STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

HENRY L. GRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001127

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

ISSUES PRESENTED

1.

Whether the PCR court erred where it found counsel provided effective assistance where counsel failed to object to petitioner being visibly shackled during trial, where the routine use of physical restraints visible to the jury is forbidden by the Due Process Clause, since visible shackling is "inherently prejudicial"?

2.

Whether the PCR court erred where it found counsel provided effective assistance where counsel did not object to testimony that petitioner was a member of the "Gangster Killer Bloods" and that people were afraid of him, since counsel's strategic decision to question witnesses about the gang involvement of others did not open the door to evidence about petitioner's gang involvement, and where evidence of guilt was not overwhelming?

3.

Whether the PCR court erred where it found counsel provided effective assistance where counsel failed to object to the solicitor's improper comment in closing argument that "there is absolutely no evidence that supports [petitioner] being innocent," since the comment misstated the burden of proof and thereby infected petitioner's trial with a degree of unfairness that made his convictions a denial of due process, and since the evidence of guilt was not overwhelming?

STATEMENT

Trial

Petitioner was indicted by a Richland County Grand Jury for murder and for lynching in the first degree. App. 1419 – 1422. He was tried before the Honorable Thomas G. Cooper, Jr., and a jury from February 28 – March 2, 2012. App. 1. Petitioner was tried with his codefendant, Robin Reese (Reese), who was his sister. App. 1; App, 281, ll. 5-10.

Mathias Chaplin represented petitioner. App. 1. Luck Campbell, April Sampson, and Nicole Simpson represented the state. App. 1. Andrew Farley represented Reese. App. 1.

Petitioner was shackled throughout the trial, and the jury was aware that he was shackled. In his opening statement, petitioner's trial counsel told the jury that petitioner was shackled. "[T]he end of the world sounds like . . . being forced to sit in a courtroom, shackled." App. 162, l. 17 – 163, l. 6. Trial counsel had not made, and never did make, any objection to the shackling on the record.

Petitioner and Reese were tried jointly for the killing of the decedent, Kevin Mack. App. 1; App. 392, ll. 20-22. Shortly before his death, the decedent approached a thirteen-year-old girl (the minor) on Valentine's Day and asked her to come home with him.[1] App. 923, ll. 19-20; App. 922, ll. 16-17. A few minutes later, the decedent unwantedly grabbed the minor and when she rebuffed him, he knocked her to the ground and landed on top of her. App. 245, l. 10 – 246, l. 21; App. 923, l. 19 – 925, l. 16.

The state alleged that a group of men including Marcellius Brooks (Brooks), who witnessed the decedent assault the minor, "bum rushed" the decedent to get him off of the minor and then the men beat and kicked the decedent. App. 582, l. 22 – 583, l. 11; App. 245, l. 10 –

[1] The decedent was apparently in his thirties. App. 582, ll. 10-13; App. 662, ll. 20-23.

248, l. 13. Of note, at least one booted man kicked the decedent in the head. App. 260, l. 21 – 261, l. 5. Brooks said he attacked the decedent after he saw the decedent "messing with" and "taking advantage of" the minor. App. 582, ll. 10-18. Another witness to this first attack said, "She was asking him to leave her alon[e], over and over and over, and [the decedent] wouldn't." App. 661, ll. 20-21.

A manager at the nearby CVS pharmacy who witnessed this first attack said the beating was "brutal" and seemed to go on "forever." App. 475, l. 8 – 477, l. 15. Nevertheless, the decedent eventually got up and walked off, before, the state claimed, he encountered petitioner, who was the minor's uncle. App. 279, ll. 1-15; App. 283, ll. 5-18. The state claimed this encounter precipitated a second confrontation, and it alleged that petitioner "clipped" the decedent's feet out from under him causing him to fall and hit his head. App. 279, l. 24 – 281, l. 6. The state further claimed that petitioner and Reese, who was the minor's mother, then hit the decedent with a metal chair. App. 284, l. 15 – 287, l. 3.

The decedent died from blunt force trauma to the head, and the state alleged the injury was consistent with a person "having their feet swept out from under them and landing on their head." App. 698, l. 1 – 699, l. 20.

In contrast, the defense argued that the first beating by Brooks and the other men was the cause of the decedent's death. To that end, the defense presented the testimony of Dr. Adel Shaker, an expert in forensic pathology, who testified that the decedent's death could have been the result of the first beating, by Brooks and his group. App. 848, ll. 8-15; App. 856, l. 15 – 863, l. 20. According to Dr. Shaker, the decedent could have walked away after the first beating during a "lucid interval" and subsequently succumbed to the fatal injuries. App. 858, ll. 6-16. Dr.

Shaker opined that the decedent's injures were *not* consistent with falling due to having his feet swept out from under him, as the state's expert claimed. App. 889, ll. 2-8.

It appears the parties agreed pretrial that there would be no mention of gangs. App. 1313, l. 14 – 1314, l. 6. Nevertheless, when counsel questioned state's witness Donnetti Perry (Perry), a woman who claimed she saw petitioner and his sister attack the decedent, counsel asked Perry questions about whether she had heard that it "was the Bloods of McDuffie that beat [the decedent] up on McDuffie Street." App. 279, l. 15 – 287, l. 3; App. 321, l. 24 – 322, l. 4. Perry replied in camera that she had no personal knowledge but had only repeated what she was told by others. App. 322, ll. 2-20.

Counsel asked Perry, in camera, whether she had identified Marcellius Brooks "as a Blood?" and Perry replied, "No." App. 322, l. 25 – 323, l. 2. Counsel also asked Perry if she was only "testifying today because you're afraid of what gang members might do to you?" and Perry replied, "No." App. 323, ll. 6-9. The solicitor interjected, "He wants to go into gang affiliation in this case. I'm just saying if he opens the door, we're going into his client's gang affiliations." The court stated, "Fine." App. 323, ll. 21 – 25.

Counsel said that he wanted to question Perry to show that she was "testifying the way she is" because she might be fearful of Brooks, a gang member. App. 324, l. 11-21. The court stated it would allow that questioning but reminded defense counsel that he could not "impeach her with that statement;" i.e., a statement in which Perry wrote about what she had heard from others. App. 325, ll. 22-25.

The solicitor offered that "if [defense counsel] goes there" the state believed that would open the door to "prior bad acts of [his] client and why [Perry] would be scared of him. App. 326, ll. 16-22. The court replied, "That's fine. Ready for the jury?" App. 326, ll. 23-24.

Counsel proceeded to ask Perry whether she was a gang member and whether Brooks was a gang member, and she said no. App. 328, l. 18 – 330, l. 2. Counsel also asked Perry if she was "testifying today out of fear of reprisal when you get back to Gonzales Gardens?" and Perry replied, "No." App. 330, ll. 3-6.

Thereafter, the state called Sergeant Pegram of the Columbia Police Department, the lead investigator on the case who testified that he had previously been "assigned to the FBI. My job with the FBI was to investigate the Gangster Killer Bloods." App. 757, ll. 1-4; App. 763, ll. 5-7. "Gonzales Gardens [the neighborhood where the decedent was assaulted] was actually identified by the FBI as a hot spot for the Bloods street gang." App. 763, ll. 10-12. Pegram continued that if you "talk to the police in Gonzales Gardens, there is a very good likelihood you will be killed. That's fact." App. 763, ll. 15-18.

Pegram went on to say that Reese, petitioner's codefendant, was seen with a person who was doing a dance called the "Bloods bounce," and he said that the thirteen-year-old minor involved in the underlying incident with the decedent was also "affiliated with" the "Gangster Killer Bloods." App. 797, ll. 2-21. On cross-examination, counsel asked Pegram if he had "ever been aware of the Bloods forcing people to make statements," and Pegram replied, "Absolutely." App. 825, ll. 6-8.

On redirect, the solicitor asked, "[A]s far as people being afraid of the Bloods and everything. Who is affiliated with Marcellius Brooks, the Blood in this case?" and Pegram replied, "Robin Reese and [petitioner]." App. 825, ll. 17-21. The solicitor continued, "If anyone was going to be afraid of anyone in this case, who would they be afraid of?" and Pegram replied, "Robin Reese and [petitioner]." App. 825, ll. 19-24. Counsel did not object.

On recross, counsel asked Pegram if he had any evidence that petitioner was in the Bloods gang, and when Pegram said that he did, counsel moved to strike, but his motion was too, little too late. App. 828, ll. 2-11. The judge overruled the objection and stated, "Well, you raised the issue. You brought it up yesterday." App. 828, ll. 12-13.

In closing argument, the solicitor misstated the burden of proof in the case. "So I want to give you instructions . . . Go back there and discuss it because at the end of the day, there is absolutely no evidence that supports Robin Reese and [petitioner] of being innocent." App. 1130, ll. 13-18.

Petitioner was found guilty as indicted and he was sentenced to serve concurrent terms of imprisonment of thirty years on each charge. App. 1158, ll. 19-25; App. 1183, ll. 11-15.

PCR hearing

After his conviction was affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR) on July 1, 2014. App. 1273 – 1286. The state made its return on November 19, 2014. App. 1287 - 1291. On July 10, 2017, petitioner filed an amended PCR application. App. 1292 – 1294. A hearing was held before the Honorable Paul M. Burch on August 30, 2017. App. 1295. Anna Rawl Browder represented petitioner. App. 1. Jessica Kinard represented the state. App. 1295.

Petitioner claimed ineffective assistance of counsel based on, inter alia, his counsel's failure to object that he was visibly restrained in shackles during the trial; to counsel allowing testimony that petitioner was involved with the "Gangster Killer Bloods" street gang; and counsel's failure to object to a comment by the solicitor in closing argument that misallocated the burden of proof.

As to the shackling claim, petitioner testified that he was shackled throughout the trial and that his shackles were visibly and audibly apparent to the jury. App. 1320, l. 4 – 1321, l. 3. Trial counsel agreed "that it was very obvious [petitioner] was shackled." App. 1341, ll. 13-15. Trial counsel said that he "challenge[d] the issue" of shackling in chambers but was "told that that was – that was required in this particular matter." App. 1337, ll. 15-25. Counsel did not say who told him that the shackles were required; he did not say whether it was the judge, the prosecutor, or a courtroom deputy.

Counsel said he believed the shackling was prejudicial to petitioner. App. 1337, ll. 20-21. Counsel said he referred to the restraints in his opening statement to "try to soften the blow a little bit." App. 1338, ll. 1-4. Counsel agreed he "probably should've" made an objection on the record regarding the shackles. App. 1341, ll. 1-6. Counsel said that he was *unaware* of the United States Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622 (2005), "indicating that if a defendant is shackled during trial, it must be put on the record why he is to be shackled because it is so prejudicial [] to be shackled during trial." App. 1341, ll. 7-12. Counsel said, "I'm not aware [of that case]." App. 1341, ll. 7-12.

Turning to the gang claim, petitioner testified that it was agreed pretrial that gangs would not be mentioned, and that counsel was ineffective for allowing gang information to be admitted. App. 1314, ll. 3-23.

Counsel testified that, "the theory of our case was that the beating that [the decedent] received at the top of the hill was delivered by . . . gang members." App. 1335, ll. 20-22. Counsel claimed that he did not believe testimony about gang involvement was harmful to petitioner in this case. App. 1336, ll. 3-5. Counsel said he thought the gang testimony was "beneficial." App.

1336, l. 15. Tellingly, however, counsel did not recall that petitioner himself was actually linked with the gang at trial. App. 1336, ll. 1-2.

Turning to the closing argument claim, petitioner testified that he believed counsel was ineffective for failing to object during the state's closing argument. App. 1314, l. 24 – 1315, l. 9. Likewise, counsel said did not remember why he failed to object to the solicitor's improper characterization of the burden of proof, and he agreed that if "I didn't object, I probably should have." App. 1347, l. 10 – 1348, l. 6.

Order of dismissal

On July 1, 2019, the PCR court issued a sixty-four page order of dismissal.[2] App. 1355 – 1418. The PCR court's order of dismissal addressed petitioner's claim that counsel was ineffective for failing to object to petitioner being visibly shackled during his trial at pages 1384 – 1390 of the Appendix. The order stated that it was "unnecessary to address *Strickland*'s[3] deficiency prong on [this claim] because [petitioner] was not prejudiced by counsel's deficient performance." App. 1384. The order noted that "trial counsel testified it was obvious to jurors that his client was in shackles." App. 1385.

The order also noted counsel's failure to place an objection on the record and recited counsel's testimony that he had objected in chambers but that someone[4] simply responded that

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2 Page one of the order of dismissal stated that the PCR court had before it, inter alia, a transcript of petitioner's trial. App. 1355. Three pages of the transcript of petitioner's trial are missing from the trial transcript possessed by undersigned counsel: pages 629, 725, and 1090. Undersigned counsel believes these three pages were not before the PCR court, since they were not part of the trial transcript received by petitioner's appellate counsel on direct appeal and received by the state on direct appeal.

3 *Strickland v. Washington*, 466 U.S. 668 (1984).

4 The PCR order stated the person was the judge but this finding was not supported by the record.

shackling "was required." App. 1385. The PCR court therefore found that "an objection would have simply required the trial judge to place his previously-found reasons for requiring shackling in this case on the record . . ." App. 1387.

The order of dismissal cited *Deck v. Missouri*, 544 U.S. 622 (2005), for the proposition that "[e]ven 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." App. 1386. The order continued that "this [c]ourt finds that the record contains sufficient facts that support the trial judge's decision requiring [petitioner] to be shackled during his trial," and cited petitioner's prior convictions for armed robbery, drug offenses, and domestic violence, as well as his "possible gang affiliation." App. 1387.

The PCR court's order also stated that while *Deck v. Missouri* "may not require a defendant to demonstrate actual prejudice" on direct appeal, petitioner failed to establish *Strickland* prejudice here due to "overwhelming evidence of guilt" since the crime "occurred in broad daylight and in complete disregard of the presence of numerous [sic]." App. 1386; App. 1388. The order stated that the PCR court "finds that any error by counsel in failing to object did not contribute to the jury's verdict and thus was not prejudicial under *Strickland* in light of the overwhelming evidence of [petitioner's] and Reese's guilt . . ." App. 1390.

The order addressed petitioner's claim that counsel was ineffective for failing to "object to testimony about gangs being introduced and/or opening the door to such testimony" at pages 1399 – 1409 of the Appendix. The order of dismissal stated, "The [c]ourt finds that [petitioner] 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." App. 1399.

The order continued that the PCR 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].'" (alterations in original.) App. 1403 – 1404. "The [c]ourt 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 and others, actually caused the victim's death." App. 1404.

The order also stated that petitioner failed to prove prejudice, and cited *State v. Young*, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2005), for the proposition that rebuttal testimony must be "proportional and confined to the topics to which counsels had opened the door," and found that the testimony here was so proportional and confined. App. 1405. The order stated that "the absence of prejudice is underscored by the presence of overwhelming evidence of [petitioner's] guilt, as discussed." App. 1408.

Finally, the PCR court addressed petitioner's claim that counsel was ineffective for failing to object to the solicitor's comment in closing argument as burden-shifting at pages 1409 – 1414 of the Appendix. The order of dismissal stated that the PCR court "finds that [petitioner] 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." App. 1409. The order cited to *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), for the principle that "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." App. 1409.

The PCR court wrote that it "reject[ed] [petitioner's] contention that the challenged portion of the State's closing argument improperly shifted the burden of proof to him," concluding that petitioner "has not proven that the challenged remarks were so prejudicial that they deprived him of a fair trial." App. 1410. The order of dismissal continued that the solicitor's comment "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." App. 1411.

The PCR court found counsel's performance "objectively reasonable" despite "counsel's inability to recall why he did not object . . ." App. 1411. The order of dismissal also stated that petitioner was not prejudiced due to "overwhelming evidence of guilt" and the trial court's jury instructions. App. 1413.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court erred where it found counsel provided effective assistance where counsel failed to object to petitioner being visibly shackled during trial, where the routine use of physical restraints visible to the jury is forbidden by the Due Process Clause, since visible shackling is "inherently prejudicial".

A criminal defendant may not be physically restrained during his trial unless the trial court provides adequate justification for the shackles, and the trial court did not do so here. Counsel provided ineffective assistance when he did not object to physical restraints being used on petitioner and he even went so far as to call the jury's attention to the restraints. Petitioner had no history of escape and there is nothing in the record to indicate that he was a threat to courtroom security.

The practice of shackling is "inherently prejudicial." *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). "[G]iven 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." *Deck v. Missouri*, 544 U.S. 622, 632 (2005). The Due Process Clause "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* at 628. That is because, "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id.* at 630.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate

allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

The failure to object to petitioner's shackling was not a strategy decision. Counsel admitted that he was unaware of the United States Supreme Court case of *Deck v. Missouri* that held shackling was forbidden absent an on-the-record explanation of its necessity in a particular case. App. 1341, ll. 7-12. Counsel's performance was deficient, since he did not know the relevant law and did not make an objection on the record to the shackling of petitioner, which was visibly and audibly apparent to the jury.

Although counsel said he opposed the use of restraints in chambers, he admitted he should have lodged an objection on the record. An "objection" that only occurred in chambers is not a valid objection. "Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review." *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (quoting *State v. Morris,* 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991).

Moreover, there is nothing in the record to support the position that any exceptional circumstances existed such to justify shackles. Petitioner had no prior record of escape, and there were no signs that he had ever assaulted officers or misbehaved in court. *See State v. Tucker*, 320 S.C. 206, 209–10, 464 S.E.2d 105, 107 (1995) (judge did not err in restraining defendant who had prior convictions for escape and attempted escape, had fled the state and assaulted officers, and judge ensured shackles were not visible to the jury).

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349

S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Here, the prejudice to petitioner is apparent, since it was undisputed the shackles were visible to the jury throughout the trial, no reason supporting the use of shackles was given by the trial court, and no reason to justify shackling existed. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck*, 544 U.S. at 630. "[S]hackling is 'inherently prejudicial.'" *Id.* at 635, quoting *Holbrook*, 475 at 568.

2.

The PCR court erred where it found counsel provided effective assistance where counsel did not object to testimony that petitioner was a member of the "Gangster Killer Bloods" and that people were afraid of him, since counsel's strategic decision to question witnesses about the gang involvement of others did not open the door to evidence about petitioner's gang involvement, and where evidence of guilt was not overwhelming.

The PCR court erred where it found counsel made a strategic decision to "open the door" to evidence of gang membership, since counsel's cross-examination of state's witnesses regarding gang activity by Marcellius Brooks and others was not a line of questioning about *petitioner* that opened the door to *petitioner's* gang involvement. Counsel's failure to object to evidence petitioner was a member of the Gangster Killer Bloods and that people were fearful of him allowed explosively prejudicial evidence into the case.

The solicitor asked Sergeant Pegram, "[A]s far as people being afraid of the Bloods and everything. Who is affiliated with Marcellius Brooks, the Blood in this case?" and Pegram replied, "Robin Reese and [petitioner]." App. 825, ll. 17-21. The solicitor continued, "If anyone was going to be afraid of anyone in this case, who would they be afraid of?" and Pegram replied, "Robin Reese and [petitioner]." App. 825, ll. 19-24. Counsel did not object.

On recross, counsel asked Pegram if he had any evidence that petitioner was in the Bloods gang, and when Pegram said that he did, counsel moved to strike, but the judge overruled the objection and stated, "Well, you raised the issue. You brought it up yesterday." App. 828, ll. 2-13.

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *Bowman v. State*, 422 S.C. 19, 40, 809

S.E.2d 232, 243 (2018) (internal quotations and citations omitted). "Once the defendant opens the door, the solicitor's invited response is appropriate so long as it is does not unfairly prejudice the defendant." *Id.* at 422 S.C. at 40, 809 S.E.2d at 243-44 (quoting *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006)). "Unless the State's response is inappropriate or unfairly prejudicial, counsel is not deficient for failing to object." *Id.*

Here, counsel's performance was deficient because the state's response was improper and unfairly prejudicial since defense counsel's questioning about the gang activity of others did not open the door to testimony about gang involvement by petitioner.

Defense counsel did not question anyone about *petitioner's* character and open the door to *petitioner's* character—it was therefore objectionable when the state claimed that counsel had opened the door to petitioner's character. "Evidence of a defendant's character is generally not admissible to show a propensity to act accordingly." *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008); Rule 404(a)(1), SCRE. "In a criminal case, the State may not attack the character of the accused unless he first places his character in issue." *State v. Taylor*, 333 S.C. 159, 174, 508 S.E.2d 870, 877–78 (1998). Here, petitioner did not testify. No evidence was presented that placed his character at issue.

The testimony was also objectionable under Rule 403, SCRE as the unfairly prejudicial nature of the testimony by Pegram that petitioner was a "Gangster Killer Blood," after he had explained that Bloods were targeted by the FBI, and that Bloods had people killed, outweighed any minimal probative value. However, counsel did not object.

This Court has explained, "[W]e are wary of a thinly-veiled attempt to show propensity by way of the open-door doctrine. Testimony in response must be proportional and confined to topics to which counsel had opened the door." *State v. Heyward*, 426 S.C. 630, 828 S.E.2d 592

(2019) (internal quotations and citations omitted). The state's attempt to enter evidence that petitioner was in a gang was a thinly-veiled attempt to introduce otherwise verboten propensity evidence. It was not proportional and confined to topics which counsel had opened the door, since counsel did not cover the topic of petitioner's character.

Even if counsel did open the door, he still should have objected—evidence of petitioner's gang involvement was so prejudicial that counsel was obligated to object. "Once the defendant opens the door, the solicitor's invited response is appropriate so long as it is does not unfairly prejudice the defendant." *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006).

Counsel testified he made a strategic choice to present evidence on gang membership by other persons—witnesses and members of the group that took part in the first attack, but that does not excuse his failure to object to testimony about petitioner's gang involvement. *See Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.") *Accord Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (notwithstanding counsel's purported strategy choice it was incumbent upon him to object: strategy could not be construed as valid one given the evident impropriety of the solicitor's remarks).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687. Here, as discussed above, counsel's

performance was deficient when he failed to object to testimony about petitioner's gang involvement.

Moreover, the PCR court erred when it determined that overwhelming evidence precluded petitioner from establishing prejudice. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As discussed in Issue 1 above and Issue 3 below, a review of the entire record shows that counsel failed to object at critical junctures which allowed the state to present petitioner as a man so dangerous he must be shackled at his own trial; a man who was a member of the Gangster Killer Bloods—a gang so frightening that Sergeant Pegram said they killed people for speaking with the police; and a man who did not prove himself innocent.

"Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). "In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Id.* at 190, 810 S.E.2d at 844. "However, for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of a reasonable probability the factfinder would have had a reasonable doubt cannot possibly be met." *Id.* at 191, 810 S.E.2d at 845 (internal quotations and alterations omitted).

Here, the evidence against petitioner was not overwhelming. Expert testimony provided reasonable doubt—that it was actually the first attack, in which petitioner was alleged to have

taken no part, that delivered the fatal blow to the decedent. Witnesses disagreed about what happened—even the solicitor said the case came down to a credibility contest. App. 1079, ll. 2-5.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Here, counsel's failure to object was not a valid strategic choice since it was not based in law and it allowed in explosively prejudicial evidence that petitioner was a member of a terrifying criminal gang. Had counsel properly objected, there is a reasonable probability that the result of the trial would have been different. The prejudicial nature of this evidence cannot be overstated.

3.

The PCR court erred where it found counsel provided effective assistance where counsel failed to object to the solicitor's improper comment in closing argument that "there is absolutely no evidence that supports [petitioner] being innocent," since the comment misstated the burden of proof and thereby infected petitioner's trial with a degree of unfairness that made his convictions a denial of due process, and since the evidence against petitioner was not overwhelming.

Counsel's performance was deficient when he failed to object to a comment by the solicitor in her closing argument that misstated the law and improperly shifted the burden of proof to petitioner.

The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt. *Holland v. United States,* 348 U.S. 121, 140 (1954); *Todd v. State*, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003). Therefore, the burden is on the state to prove a criminal defendant's guilt; the defendant does not have the burden to prove his innocence. However, the solicitor's remark that "no evidence that supports" petitioner's innocence implied just that—that he did not meet a burden to prove his innocence. This comment was a misstatement of the law, and counsel provided ineffective assistance when he failed to object.

A prosecutor should not misstate the law in her closing argument. *See Simmons v. State*, 331 S.C. 333, 338–39, 503 S.E.2d 164, 167 (1998) (finding ineffective assistance of counsel and prejudice where the solicitor "misstated the law in his closing argument by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence or an acquittal.").

Here, the solicitor's mischaracterization of the burden of proof unconstitutionally shifted the burden of proof to petitioner and counsel should have objected but he did not do so. *Cf. State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) (jury instructions that run the risk of unconstitutionally shifting the burden of proof to a defendant are disfavored); *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (jury instruction should not run the risk of unconstitutionally shifting the burden of proof); *State v. McHoney*, 344 S.C. 85, 98, 544 S.E.2d 30, 37 (2001) (reasonable doubt instruction was proper where language did not suggest the defendant bears the burden of proof).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96).

Here, the PCR court erred where it found that petitioner was precluded from establishing prejudice due to overwhelming evidence of guilt. "Ordinarily, the existence of 'overwhelming

evidence' does not automatically preclude a finding of prejudice." *Id.* at 189, 810 S.E.2d at 844. "In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Id.* at 190, 810 S.E.2d at 844. "However, for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of a reasonable probability the factfinder would have had a reasonable doubt cannot possibly be met." *Id.* at 191, 810 S.E.2d at 845 (internal quotations and alterations omitted).

The evidence against petitioner was not overwhelming. Expert testimony provided reasonable doubt as to which encounter delivered the fatal blow to the decedent. In closing argument, the solicitor admitted that the case boiled down to a credibility contest between the alleged eyewitnesses. App. 1079, ll. 2-5.

Finally, the PCR court's reasoning was in error when it found the solicitor's comment was a "fair response" to trial counsel's argument that the state had not met its burden of proof, because instead of explaining why she believed the state had, in fact, met its burden of proof, the comment made by the solicitor here misallocated the burden of proof because it suggested petitioner was required to prove his innocence.

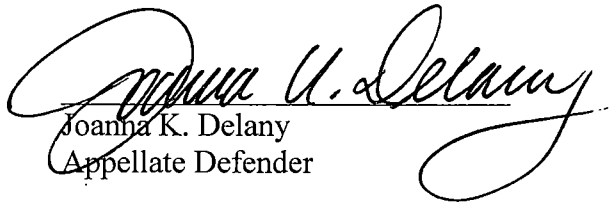
"In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (internal quotations and alterations omitted) (citing *Vaughn v. State*, 362 S.C. 163, 169–70, 607 S.E.2d 72, 75 (2004); *Donnelly*

v. DeChristoforo, 416 U.S. 637, 642 (1974); *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004).

The solicitor's misallocation of the burden of proof here must be considered in conjunction with the improper shackling of petitioner and the unfairly prejudicial testimony petitioner was a gang member. The full picture being given to the jury here was that petitioner was such a dangerous criminal he must be restrained in court; that he was a gang member people should be afraid of; and that he had not proven his innocence. This confluence of circumstances prejudiced petitioner, and his trial was infected with unfairness so as to make his conviction a denial of due process. *Holland v. United States,* 348 U.S. at 140; *Donnelly v. DeChristoforo,* 416 U.S. at 642.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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ATTORNEY FOR PETITIONER

This 2nd day of January, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

HENRY L. GRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Samuel Key, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Henry L. Gray, #162134, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of January, 2020.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2020.

Mary Allgood (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.