STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

G. Thomas Cooper, Jr., Trial Judge
Paul M. Burch, PCR Judge

HENRY GRAY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

App. Case No. 2019-001127

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner's Statement of Issues Presented on Certiorari

I. 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"?

II. 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?

III. Whether the PCR court erred where it found counsel provided effective assistance where counsel failed to object to the solicitor's improper 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?

Respondent's Counter-Statement of Issues Presented on Certiorari

I. The PCR court correctly found Counsel deficient for failing to preserve Petitioner being shackled at trial; however, the PCR court also correctly found Petitioner failed to establish prejudice because the record shows: Counsel raised the objection in chambers; the trial court stated shackling "was required in this particular matter;" the trial court would have made the same ruling had the objection been placed on the record; and the trial court's ruling would have been upheld on appeal.

II. The PCR court correctly found Counsel not constitutionally ineffective for failing to object to testimony that Petitioner was associated with a gang and people were afraid of him because Counsel made a reasonable strategic decision to open the door to such questioning in order to establish Petitioner's defense where the evidence overwhelmingly showed Petitioner beat Mack after the first beating, and the crux of the case was which beating caused Mack's death, and Counsel's trial strategy was to present evidence that Mack died from the first beating by a group of gang members; Petitioner was not involved in the first beating; and Petitioner was not a gang member.

III. The PCR court correctly found Counsel not constitutionally ineffective for failing to object to the State's closing argument comment, "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," because the comment was an invited response to Reese and Petitioner's closing arguments; the comment was the State's interpretation of the evidence presented; and the State and the trial court instructed the jury several times the State always had the burden of proof, and the evidence overwhelmingly showed Petitioner beat Mack, and the crux of the case was which beating caused Mack's death.

STATEMENT OF THE CASE

Petitioner Henry Gray and his sister, Robin Reese, were indicted for first-degree lynching and murder. App. 1419–22. Petitioner and Reese's charges stemmed from the beating and resulting death of Kenneth Mack. Petitioner was represented by Mathias Chaplin, Esquire (Counsel). Assistant Solicitors Kathryn Luck Campbell, April Sampson, and Nicole Simpson prosecuted the case. App. 1

On February 28–March 2, 2012, Petitioner and Reese received a joint jury trial before Judge G. Thomas Cooper.[1] App. 1. The jury convicted Petitioner and Reese as indicted. Judge Cooper sentenced Petitioner to serve concurrent terms of thirty years imprisonment. App. 1423–24. Petitioner appealed.

Petitioner was represented by Appellate Defender David Alexander on appeal. App. 1186. Petitioner, through appellate counsel, briefed the following issues to the 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?

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

App. 1186–1210. After briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014); App. 1257. The case was remitted back to the circuit court on June 27, 2014. App. 1272.

Petitioner commenced the underlying PCR action on July 1, 2014. App. 1273. The State made its return on November 19, 2014. App. 1287. Petitioner amended his allegations on July 10, 2017. App. 1292. Petitioner presented the following allegations at the PCR hearing:

1. Ineffective assistance of counsel:
    a. Failure to investigate and prepare for trial;
    b. Failure to object to Petitioner being shackled during trial;
    c. Failure to object to the same jury pool being used after a *Batson* motion was granted;
    d. Failure to object to witnesses testifying they were scared to testify;
    e. Failure to object to information regarding gangs being introduced and/or opening the door to such testimony;
    f. Failure to object to burden shifting in the State's closing argument;
    g. Counsel forced Petitioner to not testify regarding his defense; and
    h. Failure to obtain a ruling on the record regarding a lesser-included charge on lynching.

App. 1292–93; 1357. This appeal deals with allegations b, e, and f.

An evidentiary hearing into the matter convened on August 30, 2017, before Judge Paul M. Burch. Petitioner was present and represented by Anna Rawl Browder, Esquire. Assistant Attorney General Jessica Kinard represented the State. App. 1295.After a full evidentiary hearing and review of the record, the PCR court denied relief on July 1, 2019. App. 1355. Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner and Robin Reese, his sister, were jointly tried for murdering and lynching Kenneth Mack. On February 13, 2010, Mack suffered two beatings at Gonzales Gardens[2] (the

[2] Gonzales Gardens was Columbia's oldest public housing complex, and has since been razed. The complex was bordered by Forest Drive to the North, Washington Street to the South, McDuffie Avenue to the East, and Lyon Street to the West. http://www.chasc.org/gonzales-gardens.html.

Gardens). Mack was twice beaten because he allegedly assaulted Reese's thirteen-year-old daughter, M.S. a/k/a "Lucy." Petitioner and Reese were charged in connection to the second beating where they both beat Mack with a metal chair and kicked him until he was unconscious. Several witnesses saw both beatings. Mack died.

First beating

On February 13, 2010, Marcellius "Bloom" Brooks and Angelo "Ricky" Boyd walked up McDuffie Avenue to Cousins Mini Mart on Forest Drive. App. 242–45; 254; 523–25. Brooks and Boyd both testified at trial. As they walked, they saw Mack grabbing Lucy's arm. Lucy was yelling at Mack to "stop." Mack persisted and threw Lucy to the ground. Brooks and Boyd intervened. Brooks tackled Mack, punched him twice in the face, and held him down while Boyd kicked him. Brooks and Boyd also encouraged Lucy to "get her licks in." A crowd watched the beating. Eventually, Boyd pulled Brooks off Mack, and Mack fled "towards the bottom of [the Gardens]." 245–48; 254–55; 260–63.

Issac Weathers lived in the Gardens in 2010 and witnessed the first fight on February 13. Weathers saw Lucy and Mack arguing, but thought they were playing. Lucy and Mack got tangled up and fell. Then, "a bunch of guys just went and jumped on him." According to Weathers, Brooks hit Mack first, then encouraged Lucy to "get [her] licks in." App. 656–58; 662; 664. Mack tried to convince his attackers that he and Lucy were just playing and tried to defend himself. After the beating, Mack "jumped up and ran." The attackers went to the store. Weathers heard Brooks say that he did not get the man good enough. App. 655–59; 665; 669–70.

Amber Hardy managed the nearby CVS on Forest Drive and also witnessed the first fight. On February 13, Hardy followed a shoplifter in her car while on the phone with the police. While following the shoplifter, Hardy described seeing four black men and a black woman beating a

black man (Mack) on McDuffie Avenue. Hardy testified Mack was trying to defend himself, and the beating lasted about five minutes. App. 474–78; 480–83; 490. After the attack, Mack could stand, but he was very unsteady on his feet. App. 477–78; 489–90.

When the first fight ended, Brooks and Boyd then took Lucy to Cousins Mini Mart where Reese played video poker. The crowd followed. Brooks and Boyd told Reese about the incident and assured her "it was already good." App. 256. Brooks and Boyd then left the store. Reese and Lucy left a short time later. As she was leaving, Reese made a phone call. Reese left and walked down Forrest Drive. Brooks took McDuffie Avenue to the apartment of a woman named Valerie Goodwin. App. 565–70.

Second beating

Petitioner's father lived in the Gardens across the hall from Donetti Perry and near Sanovia Thompson. App. 277; 640. Thompson, Perry, Kara Chase, and Mary Anderson all witnessed the second beating.

Thompson saw Mack walking down Forest Drive "with his hand over his head," and, "He appeared to be intoxicated . . . ." App. 636–37. Mack had a bleeding knot on his head and was staggering. App. 638. Thompson heard Petitioner ask Mack what happened, and Mack "said something about some young b-i-t-c-h up the street." App. 638–40. Then, Petitioner's phone rang, and he entered his father's apartment to answer it. App. 640. Shortly thereafter, Petitioner exited his father's apartment and said "you put your hands on my niece," grabbed Mack by the collar, and said "we're going to talk to my sister." App. 640; 642. Thompson followed from a distance and stopped in front of Perry's apartment where Perry and Kara Chase were standing. App. 643–44. When Thompson saw Petitioner and Mack again, Mack was on the ground. At this time, Reese arrived and "looked like she was upset, maybe crying." App. 643–44. Thompson briefly walked

away from the confrontation. App. 644. When she returned, Thompson heard Reese ask Mack, "Why did you put your hand on my baby[?]" and then saw Reese kick Mack in the leg. Thompson called 911. App. 644–46; 649.

Perry recalled the events differently. According to her, on February 13, Thompson came to Perry's door and told her something was happening outside. Perry looked outside and saw Petitioner and Mack talking. Petitioner asked Mack what happened to him. Petitioner then entered his father's house because the phone rang. When Petitioner returned, he used his feet to "clip," or undercut Mack's feet from underneath him. Perry testified Mack immediately fell to the ground and struck his head. App. 279–81. Mack did not get up, and Petitioner repeatedly kicked Mack. Petitioner also repeatedly cussed Mack and asked what Mack had done to Petitioner's niece.

According to Perry, Reese came from her apartment and joined the beating. Mack never got off the ground or defended himself. Even so, Reese retrieved a metal chair from a nearby porch, and she and Petitioner beat Mack with the chair "two or three times."[3] App. 281–87; 301; 303–06. By then a crowd had gathered around the beating. Eventually, Petitioner and Reese ceased beating Mack and went back to their respective apartments. Perry stated Mack was injured all over and blood was coming from his mouth. App. 287–90.

Kara Chase saw Mack walking down a street through the Gardens. According to Chase, Mack and Petitioner had a disagreement over something Mack said. Petitioner grabbed Mack and said, "you're gonna talk to me." App. 393–99. Chase stated the grab was not forceful, but Mack did not want to go with Petitioner. Petitioner then hit Mack hard enough to take Mack's feet from

[3] The bottom of the chair presumptively tested positive for blood, and a partial DNA profile was developed. The partial DNA profile matched Mack, and "The probability of randomly selecting an unrelated individual having a DNA profile matching . . . [was] one in approximately twenty-five million." App. 605–12.

under him. Mack fell to the ground and never got up. App. 399–401; 403. Chase recalled Petitioner walked off after Mack hit the ground. She recalled Reese hitting Mack, and recalled Petitioner continuing to kick and stomp Mack in the face after Reese stopped. Chase recalled Petitioner hitting Mack with a chair, and Petitioner was wearing construction boots. App. 407–08. However, Chase claimed she could not remember Reese ever picking up or hitting Mack with a chair. App. 401–07; 410; 412–13; 422–24

Chase's trial testimony differed from what she initially told the police. Chase told the police:

> I saw the victim in between … [two] buildings of [the Gardens] 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 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 [she] stopped, the victim laid on the ground the whole time this was occurring.

App. 748.[4]

Anderson testified that her now-deceased sister lived in the Gardens in February 2010, and she visited her sister on the afternoon of February 13. App. 347–53. As Anderson left her sister's apartment, she saw Reese and Petitioner beating Mack while he was on the ground, stomping him, kicking him, and beating him with a metal chair; however, Mack was not moving. App. 353–53; 360. Anderson could not recall who was beating Mack with the chair at trial; however, she told the police that Reese and Petitioner both did. App. 353–55.

[4] When interviewed by the Fifth Circuit Solicitor's Office investigation the day before trial started, Chase confirmed that her February 16, 2010 statement was correct. App. 730–34; 743.

As Reese was attacking Mack, Anderson heard Reese say, "[M]otherfucker, why [did] you approach my 13-year-old?" App. 354. This attack "[l]asted for a while" and was so intense that Anderson momentarily turned away from it and eventually had to leave. App. 355. She was concerned that Reese and Petitioner were going to kill the man. App. 353. After Reese and Petitioner stopped their attack, they walked to their father's apartment. App. 368. Mack was left for dead.

Officers Matthew Buck and Harry Delage responded to a reported fight involving several people at the Gardens. There was no fight when they arrived. However, dispatch informed Buck and Delage that one person involved in the fight wore a red hoodie or hat, and another wore a black sweatshirt and carried a red bag. App. 175; 177–78; 192–96; 206. While they did not find a fight, Delage saw a man with a red backpack enter a nearby apartment. Delage spoke to Valerie Goodwin at that apartment. Goodwin informed Delage that Brooks had entered her apartment but was no longer there. App. 178–79; 182; 189–90; 196–98; 205–07.

Delage and Buck then learned there was a man (Mack) on the ground between two buildings in the Gardens. When they found Mack, he was unconscious and seemed to be having a seizure. Mack was transported to the hospital, where he died shortly after arriving. App. 179–81; 184; 198–200; 382–88; 678–80; 760.

Gang Involvement

The joint defense, Reese and Petitioner, moved pretrial to bar the introduction of evidence of gang affiliation, and the prosecution agreed to do so unless the defense opened the door to its admission. App. 108. 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. App. 163–64. Counsel suggested that "Brooks and his thugs beat the life out of the deceased" and

then did "a celebratory dance acknowledging that." App. 164. Counsel therefore agreed with the State that others were involved in Mack's murder but not Petitioner, who was innocent. App. 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 Mack. Likewise, there was no mention of gangs in the State's direct examination or Reese's cross-examination of Perry. App. 274–303. However, Reese did elicit that Perry was friends with Marcellius Brooks' brother. App. 305–06. Counsel elicited that 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 Mack. App. 313. When Counsel thereafter questioned 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 Petitioner on the front and the word "Innocent" on the back of it, the trial judge excused the jury and heard further testimony in camera. App. 318.

Outside the jury's presence, she claimed that she could not recall anyone wearing a shirt like the one described. App. 320–21. On further in camera examination, she admitted she told police that she had heard the Bloods of McDuffie Avenue had beaten up Mack. 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 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 Brooks a/k/a "Bloom" as a Blood, or that members of the Bloods had been to her residence. App. 321–23.

When she denied 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 Counsel could not present hearsay, but he could question Perry 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 Petitioner's gang affiliation. App. 323–24. In response to the State's questioning the relevancy of asking about the t-shirt with pictures of Reese and Petitioner on it and the word "innocent" on the back, Counsel stated that contrary to 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." App. 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 that the Gang Task Force has been to her house." Also, Counsel stated the Bloods occupy the apartment complex where the murder occurred, and he believed that was the reason she had testified as she did. App. 325. Perry then responded, "No" to Counsel's question as 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 Petitioner and why Perry "would be scared of him." App. 326.

After the jury returned to the courtroom, Counsel elicited that Perry had been questioned by the City of Columbia Police Department's Gang Task Force, but she denied being affiliated with or a member of a gang. Although she admitted that she knew Brooks' brother and that she had later learned Brooks was involved in the initial attack, she denied knowing whether he was a

Blood, and she denied she was testifying "out of fear of reprisal when [she] get[s] back to [the apartment complex]." App. 327–30.

The State thereafter presented testimony from Sgt. William Pegram, the supervisor for the City of Columbia Police Department's Violent Crimes Unit and the chief investigating officer in this the case. App. 756–62; 768–97. He testified 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 he had been assigned to the FBI in 2006, and he was responsible for investigating the Gangster Killer Bloods (GKB). According to Pegram, 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 [they] will be killed." So, residents there "are not going to be seen talking to the police." App. 762–64. He later testified that Lucy was affiliated with the GKB. Counsel did not object to this testimony. App. 797–98.

Following 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, the State asked, "Who is affiliated with Marcellius Brooks, the Blood in this case?" App. 824–25.[5] Pegram responded, Petitioner and Robin Reese. The State also elicited that if a witness was afraid of anyone in the case, it would be Petitioner and Reese the witness feared. App. 825.

PCR testimony

[5] Earlier, Counsel had elicited that Brooks was the first person charged with Mack'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. App. 816-17; 824-25. Counsel also established that Pegram's investigation "assaulted the victim. I don't know how many [times] he struck [the victim]." App. 826.

Petitioner does not dispute that he and Reese beat Mack. Indeed, at the PCR hearing, Petitioner testified he wanted to take the stand at trial to tell his side of the story. Petitioner wanted to tell the jury, "That it was a freak accident." App. 1316. Petitioner testified he exited his father's home and saw Mack talking to a man. Petitioner noticed Mack was bleeding, explaining, "He all bust up (sic), head knot and stuff on his head, bleeding." Petitioner asked Mack what happened, and Mack replied, "Just beat." App. 1317. Petitioner walked back into his father's home and answered the phone. His sister, Reese, told Petitioner Lucy had been attacked, saying, "Dude slam (sic) her [and] was on top of her." App. 1317. Reese described the man to Petitioner, and Petitioner responded, "Well, he around here," and hung up the phone. App. 1317. Petitioner exited his father's home and asked Mack, "Yo, what you did (sic) to my niece?" App. 1317. Then, Petitioner:

> [G]rabbed [Mack] from the - - by like, back of the shirt on around the collar. And we was - - proceeded to walk down the sidewalk. We were going to meet my sister and my niece. [Mack] snatch away; startle me (sic). I clipped him up. . . .
>
> [Mack] hit the ground. He was laying on the ground with his hand over his face. I walked to the edge of the building to see - - if I could see my sister and my niece coming.
>
> So they came around and . . . we roughed him up a little bit and then we went on about our way.

App. 1318. Petitioner's version of events essentially corroborates Thompson, Perry, Chase, and Anderson's trial testimony.

Petitioner also testified he was shackled throughout the entire trial. App. 1309–11. Additionally, Petitioner testified he has never been a gang member, but the Bloods were affiliated with his father's neighborhood—the Gardens. App. 1313.

Counsel explained his trial strategy:

> [T]he theory of our case was that the beating that [Mack] received at the top of the hill was delivered by. . . gang members. And. . . that's how we presented it, is that [the first beating] was uncalled for . . . it was a very brutal beating; and [the gang] just jumped on [Mack] and beat the brakes off the guy, to be blunt.

App. 1335. Counsel explained he did not think the mention of gangs was harmful:

> I think that what we were trying to do [was] paint a picture in the jury's mind that this wasn't just a couple of random passerbys (sic) that interfered and - - and beat [Mack], but this was a brutal beating by the hand of gang members and that the cause of death was directly related to that brutal beating.

App. 1336.

Counsel recalled an in-chambers discussion of Petitioner being shackled at trial. He recalled that he and Reese's attorney challenged Reese and Petitioner being shackled at trial in chambers:

> But we were told that was - - that was required in this particular matter. And - - and it was very obvious, and it was, I believe, somewhat prejudicial to both . . . defendants. However, there was nothing that I was able to accomplish with regards to having them removed.

App. 1337. Counsel explained he referenced the shackles in his opening argument "to try to soften the blow a little bit." App. 1338. As for failing to object to the State's closing argument comment, Counsel stated, "If . . . I didn't object, I probably should have." App. 1348.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and review those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

I. The PCR court correctly found Counsel deficient for failing to preserve Petitioner being shackled at trial; however, Petitioner failed to establish prejudice because the record shows: Counsel raised the objection in chambers; the trial court stated shackling "was required in this particular matter;" the trial court would have made the same ruling had the objection been placed on the record; and the trial court's ruling would have been upheld on appeal

Petitioner argues Counsel was constitutionally ineffective for failing to object to Petitioner being physically restrained and calling the jury's attention to the restraints. Petitioner argues Counsel was deficient for failing to preserve Petitioner's being shackled for appeal. Petitioner argues he was prejudiced because the shackles were visible; the trial court did not give its reason for supporting the use of shackles; and there was no reason to justify the shackling. Further, Petitioner argues that shackling in inherently prejudicial. However, the PCR court correctly found Petitioner had not proven prejudice. Indeed, Petitioner was not prejudiced because the trial court did not abuse its discretion in requiring Petitioner to be shackled at trial, and the evidence overwhelmingly showed that Petitioner beat Mack and left him to die in the snow. Accordingly, this Court should deny certiorari as to this issue.

A PCR applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue for appellate review. *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018). In determining prejudice, "the PCR court must view the trial court's ruling through the same lens that would be applied on appeal." *Id.* at 380, 811 S.E.2d at 804.

In *Deck v. Missouri*, 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. 622, 624 (2005) (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. "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" *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").

Here, the PCR court made a factual finding, based on Counsel's testimony, that the trial court ruled in chambers that shackling "was required in this particular matter." App. 1337. The trial court's ruling implies that the shackles were justified in this case. Petitioner failed to offer any support for the proposition that if Counsel had objected to the shackling on the record, the trial

court would have changed its ruling. Further, had Counsel objected at trial, the trial court likely would have stated its reasoning for requiring shackling—a justifiable essential State interest.

The justifiable essential State interests are clear from the record that security was a concern at trial. First, the underlying facts of the case were that Petitioner and Reese, who were tried together, brutally beat Mack to death to teach Mack a lesson—to warn him from ever coming near Lucy again. Second, while Petitioner refuted being a Blood gang member, he acknowledged the Bloods were affiliated with the Gardens. App. 1313. Finally, State's witnesses were afraid of cooperating with law enforcement, "Because you don't talk to the police in the hood like that." App. 414; *see also* App. 763 ("Gonzales Gardens was actually identified by the FBI as a hot spot for the Bloods street gang. People in that neighborhood generally will not talk to the police. . . . You[] talk to the police in [the Gardens], there is a very good likelihood that you will be killed."); App. 797 (stating Lucy is affiliated with the GKB); App. 825 (stating Petitioner and Reese are affiliated with Marcellius Brooks, the Blood in this case). The records shows that the trial court had a legitimate reason for requiring shackling at trial. The trial involved two associated Blood gang members; a State's witness who was a known Blood; and State's witnesses were scared to cooperate with law enforcement because, as Kara Chase stated, "You don't talk to the police in the hood like that." Therefore, had the trial court's decision to require shackling at trial been preserved, there would have been sufficient evidence in the record to support its ruling. As such, Certiorari should be denied on this issue.

Further, the PCR court did not err in finding overwhelming evidence of guilt such that Petitioner being shackled was not reasonably likely to have affected the outcome at trial. "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). Overwhelming

evidence of guilt "is one significant factor the court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice." *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.

This case presents the combination of evidence *Smalls* claims can categorically preclude prejudice. First, the evidence includes something conclusive: Petitioner admits he beat Mack; Mack's DNA was on the bottom of the chair; and several eyewitnesses claimed Petitioner and Reese brutally beat Mack with the chair, even after Mack was unconscious and motionless on the ground, then simply walked away and left him to die in the snow. The only evidence contradicting the eyewitnesses' testimony Reese and Petitioner beat Mack with the chair was Reese's self-serving statement that she swung the chair at Mack, but it did not hit him. However, Mack's DNA was found on the bottom of the chair, clearly indicating the chair hit him. This case has a combination of physical evidence—Mack's DNA on the chair—and corroborating evidence—several eyewitnesses who saw Petitioner and Reese beat Mack with the chair—"so strong that the *Strickland* of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845. Therefore, certiorari should be denied as to this issue.

II. The PCR court correctly found Counsel not constitutionally ineffective for failing to object to testimony that Petitioner was associated with a gang and people were afraid of him because Counsel's trial strategy was that Mack died from the first beating by a group of gang members; Petitioner was not involved in the first beating; Petitioner was not a gang member; the evidence overwhelmingly showed Petitioner beat Mack after the first beating, and the crux of the case was which beating caused Mack's death

Petitioner argues Counsel was constitutionally ineffective for failing to object to testimony that Petitioner was associated with a gang and people were afraid of him. Petitioner argues Counsel's decision to question witnesses about the gang involvement of other suspects in the case did not open the door to evidence about Petitioner's gang involvement. Petitioner argues the State's response was improper and unfairly prejudicial since Counsel's questioning about the gang activity of others did not open the door to testimony about Petitioner's gang involvement.

However, the PCR court found Counsel was not deficient for failing to object because his strategy was to try to convince the jury Mack died because of the first beating at the hands of gang members protecting one of their own. Counsel testified he wanted the jury to know it was gang members who attacked Mack in the first beating, not "normal" people intervening. Because Counsel employed a reasonable trial strategy in opening the door to the gang testimony, the PCR court correctly denied relief, and this Court should deny certiorari.

At trial, outside the jury's presence, Counsel elicited testimony from Donetti Perry where she admitted that she told the police she had heard the Bloods of McDuffie Avenue had beaten up Mack. She also admitted that the Gardens 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 Counsel's private investigator that the Bloods "would be at the young girl's house who stayed around the corner," that she had identified Brooks a/k/a "Bloom" as a Blood, or that members of the Bloods had been to her residence. App. 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 court that he had a signed statement that contradicted everything to which she had just testified. The trial court ruled Counsel could not present hearsay, but he could question Perry 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 Petitioner's gang affiliation. App. 323–24. In response to the State's questioning the relevancy of asking about a t-shirt with pictures of Reese and Petitioner on it and the word "innocent" on the back, Counsel stated that contrary to 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." App. 324–25.

The trial court inquired as to how Counsel could impeach her with hearsay, and Counsel noted that Perry had admitted being a "person of interest as far as affiliating with gang members and that the Gang Task Force has been to her house." Also, Counsel 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. App. 325. 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 Petitioner and why Perry "would be scared of him." App. 326.

After the jury returned to the courtroom, Counsel elicited that 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 she had later learned that Brooks was involved in the first beating, 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]." App. 327–30.

Counsel attempted to impeach Perry by questioning if she was affiliated with the Bloods. Counsel argued Perry was scared to testify against Brooks because Brooks was a Blood, or because Perry was testifying to help Brooks. Logically, if Perry was scared of Brooks because he was a Blood, she would also be scared of Petitioner if he was a Blood. Therefore, on reply, the State appropriately asked, "Who is affiliated with Marcellius Brooks, the Blood in this case?" Pegram responded, "Petitioner and Robin Reese." The State also elicited from Pegram that if a witness was afraid of anyone in the case, it would be Petitioner and Reese the witness feared. App. 827.

Thus, the State's reply testimony was clearly tailored to rebut Counsel's theory that Perry was testifying as she did because she was either afraid of Brooks and the Bloods, or was attempting to aid Brooks and the Bloods. The State's reply testimony merely showed that Petitioner and Reese were also affiliated with the Bloods. Lessening the blow of this testimony, however, was Pegram's own admission that everything pointing to Petitioner being a Blood was hearsay.

Counsel strategically opened the door to gang affiliations because Counsel wanted to show that Brooks and his thugs—the Bloods—caused Mack's death from the first beating. In contrast, Counsel wanted to show that Petitioner was merely protecting his niece. Counsel's decision to open the door was reasonable. He testified he wanted to show the jury the first beating was more severe than the witnesses made it to be. This was Counsel's way of introducing reasonable doubt in which beating caused Mack's death. Therefore, the PCR court correctly found Counsel was not deficient.

Moreover, Petitioner failed to establish Pegram's comment that Petitioner was affiliated with the Bloods prejudiced him. It is undisputed that Brooks beat Mack, and Petitioner beat Mack.

The question was which beating caused Mack's death. Even if the jury believed Petitioner, like Brooks, was a Blood, it would have had no effect on the jury's decision as to which of the two beatings caused Mack's death because, in that case, Mack was beaten *twice*, both times by Blood gang members. However, the State never suggested gang affiliation was Petitioner's motive for the murder. On the contrary, if the jury believed the defense evidence that Brooks and Lucy were both Bloods or Blood affiliates, then Perry's credibility as to the severity of the first fight would have been impeached. Therefore, certiorari should be denied as to this issue.

III. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to the State's closing argument comment, "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," because the comment was an invited response to Reese and Petitioner's closing arguments; the comment was the State's interpretation of the evidence presented; and the State and the trial court instructed the jury several times the State always had the burden of proof, and the evidence overwhelmingly showed Petitioner beat Mack, and the crux of the case was which beating caused Mack's death.

Petitioner argues Counsel was constitutionally ineffective for failing to object to the State's closing argument comment, "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," because the State's comment implied that Petitioner had to establish his innocence. However, the State's closing argument was not burden shifting. Instead, it was an invited response to Reese and Petitioner's closing arguments, and it was the State's interpretation of the evidence presented at trial. Even *if* Counsel was deficient for failing to object to the comment, no prejudice resulted because the State and the trial court instructed the jury several times the State always had the burden of proof. Therefore, certiorari should be denied as to this issue.

This comment may appear to be burden shifting at first glance. However, the United States Supreme Court has made clear "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). In this case, the prosecutor's statement was made in response to defense arguments and in addition was an appropriate comment on the State's view of the evidence. Here, it is important to consider both Reese and Petitioner's closing arguments because they received a joint trial.

First, Reese argued:

> The case against Ms. Reese has been elevated to a point where it just doesn't deserve. This case does not warrant the charges that have been brought against Ms. Reese. . . . It's a natural reaction when you find out or when you think your child is hurt or upset or assaulted to want to try to protect them further, to try to warn away the danger, to try to prevent it from ever occurring again and that's what Ms. Reese tried to do. She just wanted to warn away the danger and tell this man "don't ever come around my child again."

App. 1088–90. Essentially, Reese did not think what she did was wrong. Reese argued she was justified in warning Mack not to come near her daughter again by attacking him, even if Mack ended up dead from the "warning."

Next, Petitioner, through Counsel, attacked the State's investigation in arguing reasonable doubt. App. 1093. Counsel argued:

> [The State has] told you over [and] over again that the victim was beaten with this chair but yet none of them have been able to find blood. . . . Well why did they have to . . . resort to DNA? [Why] couldn't they just bring you a blood match? Because ther[e] is none. So [the State] had to go to the next best thing, which was DNA.

App. 1094. Counsel argued Mack's DNA may have been on the chair because he was leaning against it, and if it had been used to beat Mack, Mack's blood would have been all over it. App. 1094. Counsel argued, "The State wants you to believe . . . the first attack did not occur." App. 1095.

The State argued that based on the totality of the evidence presented at trial, its fact witnesses were credible, and Reese was not credible. App. 1115–1130. The State argued for the

jury to believe Reese, it had to disbelieve Donetti Perry (App. 1115–16); Kara Chase (App. 1116–18); Mary Anderson (App. 1118–19); Antonio Boyd (App. 1119); Marcellius Brooks (1120); and Lucy (App. 1120–1121). The State summed up its credibility argument by stating the jury had to determine witnesses credibility based on their reasons to lie, and Reese had all the reason to lie because she was on trial for murder and lynching. App. 1121. The State argued:

> I want to talk to you a little bit about being a juror. We all get instructions on how to be lawyers. . . . 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.

App. 1130.

Counsel testified he could not recall any reason for failing to object to this statement and, in hindsight, he felt he should have; however, that does not mean Counsel was deficient. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974).

Here, a reasonable interpretation of the State's comment is that the only credible evidence showed Petitioner was guilty. As noted above, Petitioner did not dispute that he attacked Mack. Petitioner "clipped" Mack's feet from underneath him, and then he and Reese "roughed [Mack] up." App. 1318. This is what the State's comment was attempting to convey—that even Reese and Petitioner acknowledged they beat Mack, *i.e.* the evidence showed Reese and Petitioner were guilty.

Further, the State's comment was an interpretation of the totality of the evidence presented. All the experts agreed Mack died from blunt force trauma. The question for the jury was which

attack was brutal enough to cause the fatal injury. The State's comment merely supported its theory that the second beating—where evidence was presented that Petitioner and Reese both stomped on Mack's head and beat him with a chair—caused Mack's death, not the first beating—which Mack walked away from. Therefore, Counsel was not deficient for failing to object because the comment was not burden shifting.

Further, the State's comment did not infect the trial with unfairness and deny Petitioner due process. 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*, 416 U.S. at 643; *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 they are not prejudicial to the defendant, and the [defendant] 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) (stating 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). Further, "[A] a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647.

Finally, the evidence at trial overwhelmingly showed that Petitioner beat Mack, with a metal chair, and left him to die in the snow. At PCR, Petitioner admitted he "clipped" Mack, and that he and Reese beat Mack, then "went on about [their] way." App. 1318. The jury clearly knew the State had the burden of proving Mack died because of the second beating as the State, the trial court, Reese's counsel, and Counsel all repeated this point in opening and closing arguments and

in the trial court's instructions. App. 134–36; 151; 161; 1051; 1061; 1065; 1090–91; 1135–36; 1151. The jury decided Mack died because of the second beating. Petitioner received a fair trial; therefore, Petitioner was not prejudiced by the State's brief comment, and certiorari should be denied on this issue.

CONCLUSION

Counsel was not constitutionally ineffective. Petitioner failed to show prejudice resulted from being shackled at trial because the trial court stated in chambers that shackling was required in this case. Had Counsel objected on the record, the trial court would have elaborated on its ruling was to protect an essential state interest—courtroom security. Counsel strategically opened the door to Petitioner's gang affiliation because he wanted the jury to know the first beating was by Blood gang members, and he did not think opening the door to Petitioner's gang affiliation would harm his defense strategy because both beatings occurred by gang members. Finally, the State's closing argument was not burden shifting, as it was an invited response, and Petitioner failed to show prejudice because the State, Counsel, Reese's counsel, and the trial court repeatedly instructed the jury the State always had the burden of proof. Therefore, certiorari should be denied and the PCR court should be affirmed.

Respectfully submitted,

s/ Samuel L. Key

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