

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate case No. 2011-198472

S.C. Supreme Court

RICHARD BERNARD MOORE,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR STAY OF EXECUTION

Respondent hereby makes its Return to the Petition for Stay of Execution filed by Petitioner, a Spartanburg County death row inmate. Respondent opposes the request for a stay for the following reasons:

This is a capital case in which this Court denied a Petition for Writ of Certiorari on September 11, 2014, following the denial of Post-Conviction Relief as to all claims. This Court has also denied rehearing.

In accordance with the Court's April 8, 1996 Order in *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996):

If the defendant desires a stay while seeking a writ of certiorari from the United States Supreme Court to review this Court's action regarding the state post-conviction relief matter, the defendant shall, within ten (10) days of the date of the execution notice, make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. To be granted a stay, the

defendant must demonstrate to this Court that there is "a reasonable probability that four Members of the [United States Supreme] Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction." *Graves v. Barnes*, 405 U.S. 1201, 1203, 92 S.Ct. 752, 753-754, 30 L.E.2d 769, 772 (1972) (J. Powell, Circuit Justice); *see also Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (standard to be applied pending appellate review in federal habeas corpus proceedings).

In re Stays, 321 S.C. at 547, 471 S.E.2d at 142.

In his Petition, Petitioner Moore asserts that he intends to seek certiorari on the following allegations:

I. Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution[,] by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation in mitigation during the sentencing proceeding?

II. Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution[,] by failing to call James Aiken to testify regarding Petitioner's adaptability to life in prison as evidence in mitigation pursuant to *Skipper v. South Carolina*, 476 U.S. 1 (1986)?

III. Whether trial counsel was ineffective, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence that Petitioner shot the decedent with premeditation while Petitioner was behind the store counter since there was available evidence Petitioner only shot after the store clerk fired at him which was critical to the extent of Petitioner's criminal culpability?

Respondent submits that this Court should deny a stay for execution for him to seek certiorari on any of these proposed allegations because he cannot meet the standard for a stay set forth by the Court in *In re Stays*. Respondent submits that there is no "reasonable probability that four Members of the [United States Supreme] Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction," *Graves*, 405 U.S. at 1203, 92 S.Ct. at 753-754, on the first issue because the record supports the PCR judge's finding that counsel

made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan refused to cooperate with counsel's efforts or those of his mitigation specialist to develop background information.

In support of this allegation, Moore quotes *Wiggins v. Smith*, 539 U.S. 510 (2003), for the proposition that "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' [539 U.S.] at 524 (citing *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1(c) (1989))." **Petition for writ of Certiorari, p. 22** (emphasis deleted). However, his argument was not properly before this Court on certiorari because it was not presented to the PCR judge. As a result, the United States Supreme Court may not consider it because it lacks jurisdiction to review independently supported judgments on direct appeal. Because the state-law determination is sufficient to sustain the decree, any opinion of the Court on the federal question would be purely advisory. *Herb v. Pitcairn*, 324 U.S. 117, 125–126, 65 S.Ct. 459, 462–464 (1945). Also, there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR, particularly where one witness - Moore's brother James - was incarcerated at the time of his trial.

Respondent submits that the second allegation likewise is not "cert. worthy, since the record supports the PCR judge's finding that counsel made an objectively reasonable strategic decision not to present Aiken's testimony, once counsel became aware that the State would present damaging rebuttal evidence of Moore's misconduct while incarcerated in Michigan. **App. pp. 2971-73**. Their decision not to present Aiken as a witness with a full understanding of the right to

offer prison adaptability evidence and with Aiken prepared and present to testify, kept the jury from hearing evidence of misconduct when he was previously incarcerated. This was objectively reasonable performance under *Strickland v. Washington*, 466 U.S.668 (1984). *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003); *Gaskin v. Secretary, Dept. of Corrections*, 494 F.3d 997, 1002-03 (11th Cir. 2007); Also, there is evidence to support the PCR judge's finding that Moore failed to prove that he was prejudiced by counsel's performance, particularly where Mr. Aiken's opinion could be impeached with a contrary history of disciplinary infractions that Moore had committed while incarcerated and that the history of Moore's behavior while incarcerated shows an unwillingness to adapt to prison, including disciplinary infractions while on death row. **App. pp. 2973-76.**

With respect to Petitioner Moore's allegation that counsel were ineffective in their efforts to investigate the physical evidence at the crime scene and rebut the State's evidence that Moore shot the victim while he was behind the counter in the store, Respondent submits that this claim is not "cert. worthy" because the record supports the PCR judge's findings that counsel's performance was not deficient and that counsel reasonably sought to challenge the physical evidence by retaining a private investigator and experts in crime scene analysis and forensic pathology. Also, one attorney, Mr. Kelly has extensive training and experience in ballistics and the use of firearms. Unfortunately for Moore, both experts rendered opinions that were unfavorable to Moore.

The record also supports the PCR judge's conclusion that Moore had not established prejudice under *Strickland*. Specifically, he did not prove any prejudice from counsel's failure to present the opinion of Dr. Sandra Conradi, whom Moore presented in PCR. her findings that there

was a single gunshot that caused both wounds found on the victim's body (**App. p. 2327**) and that the victim would have died within five or ten minutes of the shooting (**App. p. 2329**) were merely cumulative to Dr. Wrenn's trial testimony that all of Jamie's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred and that he would have died within six to ten minutes after receiving this wound. **App. pp. 1491-1502**. More importantly and as the PCR judge correctly found, Dr. Conradi's opinion "further incriminated and damned applicant Moore," **App. p. 2903**, since she opined that there was stippling around the fatal wound to the victim's left side. She further opined that Moore would had to have been within 12" to 15" of the victim when he fired the fatal shot into the victim because the victim was wearing a shirt at the time he was shot, and the stippling penetrated the outer clothing of the victim, which is visible on the autopsy photograph introduced as State's Exhibit 17 at trial. **App. pp. 2331-32**.

Thus, the record support's PCR judge's conclusion that:

Dr. Conradi's testimony would place Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store's money.

App. pp. 2903-04. Her finding corroborates "trial counsel's expert pathologist and trial counsel's forensic expert that the fatal shooting of the deceased victim in this case occurred when Moore and the victim were both in the area behind the counter and in the kitchen area. ... [I]f trial counsel had called Dr. Conradi to the stand, this damaging testimony would have been elicited on cross-examination by the State, as it was by the Attorney General at PCR." **App. p. 2904**.

Therefore, Respondent would oppose Petitioner Moore's Petition for a Stay to seek certiorari.

Respectfully submitted,

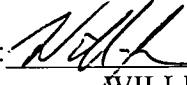
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November 6, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of November, 2014, he served Respondent's Return to Petition for Stay of Execution on counsel for Petitioner by depositing same in the United States Mail, first class, postage prepaid, and addressed as follows:

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