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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 8, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Richard Bernard Moore v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a copy of petitioner's reply brief. Please contact me if you have any questions.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Attorney at Law

SBH/

Enclosure

cc: William Edgar Salter, III, Esquire

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June 8, 2015

Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Richard Bernard Moore v. South Carolina

Dear Mr. Harris:

Enclosed is Petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Attorney at Law

SBH/

Enclosure

cc: William Edgar Salter, III, Esquire
Honorable Daniel E. Shearouse, Clerk

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June 8, 2015

Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Richard Bernard Moore v. State of South Carolina

Dear Mr. Harris:

Enclosed is petitioner's reply brief in the above-referenced case. The certificate of service is attached to the reply brief. Representing the State of South Carolina is William Edgar Salter, III, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3970. If additional information is desired, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Attorney at Law

SBH/

Enclosure

cc: Honorable Daniel E. Shearouse
William Edgar Salter, III, Esquire

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 14-9056

RICHARD BERNARD MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITIONER'S BRIEF IN REPLY

*ROBERT M. DUDEK

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INTRODUCTION

Petitioner has presented this Court with three issues where the holdings of the South Carolina Supreme Court conflict with this Court's precedent. Yet, in the brief in opposition, respondent portrays petitioner's claims as "fact-intensive" and involving the state court properly applying this Court's precedent. It is respondent's hope that this Court will categorize the errors in petitioner's case as consisting of "erroneous factual findings" or "the misapplication of a properly stated rule of law." See Sup. Ct. R. 10. However, a review of the certiorari petition easily demonstrates that the issues are *not* "fact-intensive." Further, it is readily apparent that the South Carolina court has not merely misapplied a properly stated rule of law. On the contrary, the facts underlying petitioner's three claims are *undisputed*, and the state court's resolution of petitioner's claims *conflict* with this Court's precedent.

Petitioner was sentenced to death for what the prosecution claimed began as an attempted strong armed robbery. It was undisputed that petitioner was *unarmed* when he entered the country store. The only weapons in the store were the two guns under the counter and the one worn by the decedent behind the counter. It was undisputed that petitioner was shot by the decedent. This was the rare death penalty case in which there is a strong case to be made that the defendant was acting in self-defense. This was also a highly unusual death penalty case because the lesser-included offense of voluntary manslaughter Again, this was not just a possibility, but was significantly probable.

ARGUMENT

1.

The Sixth Amendment's guarantee of effective assistance of counsel was violated where trial counsel failed to investigate and present critical available evidence to rebut the state's primary evidence of malice - that petitioner was behind the store counter - because there was evidence assessable to competent counsel that petitioner shot only after the clerk fired at him, which was crucial evidence regarding petitioner's legal culpability.

Respondent began its campaign to convince this Court of the alleged "fact-intensive" nature of petitioner's claims in the very first sentence of its brief in opposition concerning the first issue presented. BIO at p. 3. Respondent went to great lengths to make its case for classifying petitioner's claims as "fact-intensive," including make false allegations against petitioner's factual recitation.

Tucked in a footnote, respondent claimed petitioner "misrepresent[ed]" the record in his petition. BIO at p. 4, n. 4. In his petition, petitioner noted that "[e]veryone knew the third shift clerk at Nikki's convenience store, James Mahoney, carried a .44 Magnum bulldog revolver in his waistband." Pet. at p. 3. Additionally, petitioner explained that two other guns were kept in the store. Pet. at p. 3. To support these propositions, petitioner cited to the testimony of the store's owner, Keith Fowler. Pet. at p. 3. Respondent asserted that petitioner misrepresented the record by saying that "Everyone knew" about Mahoney carrying a gun. Respondent claimed the record revealed only that the store's owner knew Mahoney was carrying a gun. BIO at p. 4, n. 4. This is simply false as will be revealed by two short, direct quotations from the record.

First, Fowler testified that two guns were kept under the counters. App. 1347, l. 15 – 1348, l. 4. Further, the prosecutor asked Fowler whether Mahoney carried a gun at work. Fowler responded that Mahoney had a .44 Magnum, which he kept under the desk in a holster or on his person:

> Q. Do you know whether or not James Mahoney had a gun or carried a gun at work?
>
> A. Yes, sir. James had a .44 Magnum. I think you called it a Bulldog Revolver.
>
> Q. How do you know that he had one? Did you see it?
>
> A. Yes, sir. I had seen it before.
>
> Q. And do you know where he kept it?
>
> A. When he first came in, he kept it under the desk in a holster.
>
> Q. Later on did he keep it somewhere else?
>
> A. Whenever he was out by hisself [*sic*] stocking or something like that, he would put it on his person, yes sir.

App. 1348, ll. 9-20. This testimony makes it evident that anyone looking at Mahoney would be well aware of his possession of a firearm. Quite simply, "everyone knew" Mahoney carried a gun because everyone looking at him could see it.

Second, Terry Hadden, the state's star witness, testified that Mahoney carried a gun on his person while working. Further, Hadden made clear that Mahoney's possession of the gun was known by all. On direct examination by the state, Hadden testified as follows:

> Q. Mr. Hadden, do you know whether or not James Mahoney carried a gun on his person at work?
>
> A. Yes, sir.
>
> Q. How do you know that?

A. Because he kept his in his back, the back of his britches. Everybody could see it.

Q. Back in there?

A. Yes, sir.

App. 1212, ll. 7-14. Petitioner cited Hadden's testimony in his petition: "Hadden agreed that everyone could see that Mahoney carried a gun in his waistband." Pet. at p. 4. Quite simply, the record could not be clearer – everyone knew Mahoney carried a gun because he carried it on his person in an open and conspicuous manner. Respondent's attempt to disparage petitioner by claim petitioner misrepresented the record when the record obviously supports petitioner's contention cannot be tolerated, and must not be rewarded.

Tucked in another footnote, respondent construed petitioner's first claim of ineffective of assistance of trial counsel for failure to investigate, marshal, and present readily available evidence to rebut the state's evidence of malice as a claim of ineffective assistance due to inadequate cross-examination. BIO at p. 16, n. 14. This mischaracterization allowed respondent to argue this Court lacks jurisdiction under the independent and adequate state ground doctrine to address the claim. BIO at p. 16, n. 14. The issue presented was *not* whether trial counsel adequately cross-examined Hadden, as respondent proposed. Rather, the issue presented was whether trial counsel failed to investigate, marshal, and present readily available evidence to rebut the state's evidence of malice regarding the unarmed petitioner who entered the store.

Hadden's testimony *was* the state's evidence of malice. According to Hadden, petitioner was on the clerk's side of the counter when he shot Mahoney. This was what the prosecution claimed showed malice, an essential element of murder in South Carolina.

Petitioner has never alleged, and does not now allege, that additional cross-examination of Hadden was necessary. Instead, what was necessary was that trial counsel present evidence – in the form of expert testimony – to rebut Hadden's claims regarding the position of Mahoney and petitioner during the shooting.

The PCR judge's rejection of petitioner's claim conflicted with this Court's "ineffective-assistance-of-counsel precedents." See Hinton v. Alabama, 134 S.Ct. 1081 (2014). Although trial counsel knew there were "holes" in the state's theory, he failed even to tell his retained experts what petitioner told him happened in the store. App. 2989. Thus, trial counsel could not reasonably rely upon the advice of his retained experts, as respondent argued. During the post-conviction relief hearing, Paul Dorman, a police officer and a witness called by the prosecution at the trial, clearly stated that the shot *through the bag* came from *behind* the counter as shot by the clerk toward petitioner. This was critical evidence, yet the jury was left with the impression at trial that the shot came from the "outside in," meaning, in a normal sense of the words, that the shots came *from the customer side of the store toward the counter* and the decedent.

2.

The defense had compelling available mitigating evidence that petitioner could adapt to prison, be managed in prison, and not present a threat to others in defense expert witness, James Aiken. The failure of the defense to offer this mitigating evidence was inexcusable, and any attempt to justify the failure to offer this mitigating evidence based on an effort to prevent further state's evidence in aggravation was a fictitious constraint.

Respondent's campaign to paint petitioner's claims as "fact-intensive" continued with the second issue. The main thrust of respondent's argument against certiorari on the

second issue was that "counsel made an objectively reasonable strategic decision not to present expert testimony on [petitioner]'s adaptability to prison from a retained expert who was at trial, once counsel became aware that the state would present damaging rebuttal evidence of [petitioner]'s misconduct while incarcerated in Michigan." BIO at p. 23. Respondent's argument misses the mark. Petitioner's legal issue is not "fact-intensive" or "fact-specific" as respondent maintained, but petitioner's claim does not involve any reasonable strategic decision by trial counsel.

Respondent claimed the state was prepared to present evidence of petitioner's "various problems while incarcerated in Michigan" in rebuttal to testimony regarding prison adaptability." BIO at p. 24. In other words, respondent posited the state would present this evidence *only if* petitioner presented evidence of his ability to adapt to prison. The record simply does not support respondent's claim. First, there was no evidence in the record of any problems petitioner may have had in Michigan while incarcerated that was not presented to the sentencing jury. Respondent relied upon phantom evidence to support the state court's ruling. Second, there was no evidence of any agreement by the state not to present such evidence if petitioner did not call his adaptability expert. In fact, all the evidence in the record pointed to the contrary – the prosecution presented extensive evidence of petitioner's prior criminal history, including his convictions in Michigan. See App. 1648, ll. 3-19; App. 1649, l. 12 –1650, l. 11; App. 1653, ll. 20-24; App. 1654, ll. 4-10; App. 1654, l. 22 – 1655, l.; App. 1655, l. 24 – App. 1656, l. 1; App. 1656, ll. 5-8; App. 1657, ll. 6-24.

In its brief, respondent campaigned to convince this Court that petitioner's claim regarding trial counsel's failure to present expert testimony on his adaptability merely

concerned a state court's application of Strickland v. Washington, 466 U.S. 668 (1984). On the contrary, the claim requires this Court's intervention to end almost three decades of the Attorneys General of South Carolina and the courts mischaracterizing this Court's holding in Skipper v. South Carolina, 476 U.S. 1 (1986). Respondent has continued its relentless crusade to construe Skipper to mean only that adaptability evidence could be introduced in fair response to state's evidence that the defendant would be dangerous if he were not executed in the present case. Skipper stands for the straight-forward proposition that *any* mitigating evidence the defendant proffers as a basis for a sentence of less than death, including adaptability to prison evidence, is admissible under Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) and Lockett v. Ohio, 438 U.S. 586, 604 (1978) without consideration of or reference to whatever evidence the state presents. The Attorney Generals of South Carolina have never accepted this Court's holding in Skipper for what it is, and this deliberate misinterpretation of that holding will not stop unless this Court intervenes.

Unfortunately, petitioner's trial counsel accepted the erroneous proposition that adaptability evidence would open the door to evidence of future dangerousness, which the Attorneys General and the state courts have been peddling for almost thirty years. As such, this Court should grant certiorari.

3.

The Sixth Amendment's guarantee of effective assistance of counsel was violated where trial counsel failed to perform even a most basic investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding in this capital case.

The facts underlying petitioner's third claim are undisputed, despite respondent's assertions otherwise. See BIO at p. 29-30. It is undisputed that trial counsel's case in mitigation covered only twenty-five pages of the transcript and consisted of only two witnesses: petitioner's girlfriend, Lynda Bird, and petitioner's "stepson," James Byrd. It is undisputed that trial counsel called no members of petitioner's family and presented no social history. App. 1688, l. 13 – App. 1703, l. 23. It is undisputed that during PCR proceedings, deposition testimony from petitioner's aunts, uncles, and brothers – Dorothy Hooper, Cecil J. Hooper, Harold Harrington, Arma Hadley, James A. Moore, and Maurice Moore – presented Petitioner's social history in mitigation of a death sentence and would have given the jury a reason to be merciful. It is undisputed that no one from the defense team ever traveled to Michigan, where petitioner was born and raised and where his family remained, to investigate and marshal evidence for trial.

Attempting to continue its campaign to cast petitioner's claims as involving "fact-intensive" inquiries or proper application of this Court's precedent, respondent mischaracterized trial counsel's conduct as "a decision not to *further* investigate after both counsel and their mitigation specialist had been rebuffed in their reasonable efforts to make contact with [petitioner's] family and [petitioner] had refused to assist them by providing any information that would justify further investigation." BIO at p. 35, n. 34 (emphasis in original). However, the record in this regard is not in dispute – trial counsel

never traveled to Michigan to investigate and marshal evidence to be used in mitigation of a death sentence and petitioner cooperated with the investigation.

Respondent's fear of what this Court would uncover if it were to grant certiorari to review this issue is evident in its attempt to thwart jurisdiction. In its brief, respondent argued this Court lacked jurisdiction under the independent and adequate state ground doctrine to review this claim because petitioner failed to present the issue to the PCR judge or the state supreme court.[1] On this point, respondent cited a quote from Wiggins v. Smith, 539 U.S. 510 (2003) by petitioner in his certiorari petition and argued the issue had never been presented to a state court.[2] Petitioner argued that this Court stated, in Wiggins, 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.'" Pet. at p. 31. Incredulously, respondent posited this argument was not made to the state courts.

---

[1] Respondent stated "However, this Court lacks jurisdiction under the independent and adequate state ground doctrine to address this argument on direct review, since [petitioner]'s failure to present the issue to the PCR judge prevented the state supreme court from considering this argument on certiorari, as a matter of well-settled state appellate procedure, by." BIO at p. 36. This sentence is obviously incomplete and appears to contain at least one typographical error. Petitioner has construed the sentence as ending with "procedure" and the inclusion of "by" to be in error.

[2] Respondent cited page 22 of the petition when making this argument for procedural default. Page 22 of the certiorari petition referred to petitioner's claim regarding trial counsel's failure to present a prison adaptability expert, *not* petitioner's claim regarding trial counsel's failure to investigate and present mitigation evidence. Petitioner assumes respondent intended to cite page 31 of the petition where petitioner used Wiggins to argue trial counsel was ineffective for failing to investigate evidence in mitigation of death.

When quoting petitioner's claims for post-conviction relief, the order of dismissal cited Wiggins concerning this issue. App. at A13. Further, the PCR judge quoted a long passage from Wiggins when adjudicating this very claim. App. at A88. Respondent's contention that petitioner's argument that trial counsel failed to investigate, marshal, and present evidence in mitigation is procedurally barred because petitioner failed to cite to Wiggins in the PCR court, but cites to Wiggins now, is contradicted by the record. This issue is properly before this Court for review.

The state court's decision to deny petitioner relief where the undisputed evidence demonstrated a complete failure by trial counsel to investigate and present evidence in mitigation conflicts with a long line of cases from this Court regarding the duties of trial counsel to investigate and present evidence in mitigation of a death sentence. Without question, attorneys are not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Wiggins, 539 U.S. at 533. Nevertheless, courts must determine whether a decision not to investigate is reasonable in all circumstances. Id. "The ABA Guidelines provide 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.'" Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989))(emphasis added).

The undisputed evidence in the record required a finding that trial counsel's decision not to investigate was unreasonable. Trial counsel failed to conduct *any* investigation relating to petitioner's family and social history in Michigan, where he was

born and raised. The family witnesses, among other things, would have asked the jury for mercy for petitioner. A jury may recommend a life sentence as an act of mercy and it is proper to so instruct the jury. See Caldwell v. Mississippi, 472 U.S. 320, 331 (1985); Eddings v. Oklahoma, 455 U.S. 104, 110-111 (1982); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009). The complete failure to investigate petitioner's background in this case cannot withstand modern day scrutiny.

CONCLUSION

For the reasons set forth above and stated in his certiorari petition, petitioner Richard Bernard Moore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

Robert M. Dudek
Counsel of Record
Chief Appellate Defender

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S.C. 29211-1589
(803) 734-1330

By: Susan B. Hackett

ATTORNEYS FOR PETITIONER.

This 8th day of June, 2015.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 14-9056

RICHARD BERNARD MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I certify that copies of petitioner's reply brief in this case have been served upon opposing counsel, William Edgar Salter, III, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 8th day of June, 2015. Counsel is also today, June 8, 2015 sending a copy of petitioner's reply brief to opposing counsel by electronic delivery to: agesalter@scag.gov .

Susan B. Hackett

Susan B. Hackett

SUBSCRIBED AND SWORN TO before me
this 8th day of June, 2015.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022 .