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ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Spartanburg County  
Gary E. Clary, Circuit Court Judge  
\_\_\_\_\_

RECEIVED  
SOUTH CAROLINA  
MAY 12 1994

THE STATE,

RESPONDENT,

V.

RICHARD BERNARD MOORE,

APPELLANT

\_\_\_\_\_  
FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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## STATEMENT OF ISSUES ON APPEAL

1. The judge erred during the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing, “The State is seeking the death penalty on me, which means my very life is at stake.” The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of “the testimony and evidence that has been presented.”

2. The judge erred during the sentencing phase by once again limiting Moore’s closing argument “to the evidence that has been presented and to the issues concerning the sentence imposed.” Since S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore’s purported waiver of closing argument involuntary.

## STATEMENT OF FACTS

On January 13, 2000, a Spartanburg County grand jury indicted Richard Bernard Moore for murder, assault with intent to kill, armed robbery and possession of a firearm during the commission of a violent crime. The State sought the death penalty, relying on three aggravating circumstances: that the murder had occurred during the commission of robbery while armed with a deadly weapon; that Moore had, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value. S.C. Code Section 16-3-20(C)(a)(1)(d), (C)(a)(3) and (C)(a)(4).

Judge Gary E. Clary presided at Moore's jury's trial October 15 through 22, 2001. Moore is black. The homicide victim, James Mahoney, was white. The jury comprised eleven whites and one Hispanic.

The charges against Moore arose from the (initially unarmed) robbery and shooting of Mahoney, a convenience store clerk working third shift. The State believed that the motive for the robbery was that Moore was broke and needed money to buy crack cocaine. ROA p. 1247, line 6 – p. 1248, line 4; ROA p. 1371, lines 4-24; ROA p. 1374, line 2 – p. 1375, line 7. The killing itself was clearly unpremeditated, since Moore was unarmed when he entered the store and tried to grab the money and run.

An eyewitness (literally, as he had only one good eye), Terry Hadden, was in the store playing video poker at the time of the incident and saw almost everything. ROA p. 1194, lines 13-21. He gave the following account:

There was a black man come in the store. And as he come in the store and got in the store, he looked over at me, glanced at me. I glanced at him. He walked toward the cooler. I turned back around and played the poker machine.

ROA p. 1204, lines 10-18. He identified this man as Moore and continued:

Right as he walked in the cooler, I turned around and was shooting (sic) the poker machine. The next think I know of anything going on in the store is when I heard Jamie [Mahoney] say, "What the hell do you think you are doing?"... I made a turning motion around to see what was going on. And as I did, that man right there, Mr. Moore, had Jamie by both of his hands with one of his hands. As I turned around, he come around and come up with a gun and told me not to move.

ROA p. 1204, line 19 – p. 1206, line 6. Moore had taken the gun, a forty-five automatic, away from Mahoney. ROA p. 1347, lines 12-22. The gun was in his right hand. ROA p. 1208, lines 18-23. He pointed it toward Hadden and fired a round into the wall above the poker machine Hadden was playing. ROA p. 1207, lines 14-21; ROA p. 1210, lines 9-14; ROA p. 1319, lines 5-15.

At this point, Mahoney pulled and fired a forty-four revolver he always kept tucked in his jeans and blew a hole through Moore's left arm. ROA p. 1212, lines 7-12; ROA p. 1277, lines 4-15; ROA p. 1348, lines 9-20; ROA p. 1377, line 19 – p. 1378, line 2; ROA p. 1382, lines 3-16. Moore spun around and opened fire, shooting Mahoney through the heart. ROA p. 1208, line 24 – p. 1209, line 5; ROA p. 1429, line 22 – p. 1430, line 17; ROA p. 1491, line 7 – p. 1495, line 2. Mahoney fell to the floor unconscious and bled to death in minutes. ROA p. 1500, line 10 – p. 1503, line 16.

Moore then grabbed a money bag containing \$1,408 and fled in his pickup. ROA p. 1240, lines 3-7. ROA p. 311, lines 9-24; ROA p. 1313, lines 19 and 20. He threw the forty-

five out the window. ROA p. 1263, lines 2-5. Moore drove to his dealer's house and unsuccessfully tried to buy crack cocaine, then backed his truck into a telephone pole as he was leaving. ROA p. 1237, line 13 – p. 1238, line 11; ROA p. 1248, line 7 – p. 1249, line 17. A deputy sheriff cruising the area on the lookout for the perpetrator of the robbery and homicide witnessed the accident and arrested Moore without incident. ROA p. 1238, line 23 – p. 1239, line 5. He said Moore repeatedly shouted, "I did it, I did it, I give up, I give up." ROA p. 1239, lines 6-17.

Moore did not testify at either phase of his trial. He attempted to make a closing argument during the guilt phase, but the judge precluded him from arguing, "The state is seeking the death penalty on me, which means my very life is at stake." ROA p. 1572, line 22 – p. 1573. He held that Moore could not go beyond "the testimony and evidence that has been presented... Insofar as mentioning punishment, you are not to mention that, because we are not about that right now." ROA p. 1573, line 23 – p. 1575, line 8. [This abuse of discretion is addressed in the first argument of this brief.] The jury found Moore guilty of all four offenses as charged.

In addition to the three statutory aggravators previously mentioned, at sentencing the judge instructed the jury on the following three statutory mitigators: that the murder was committed while Moore was under the influence of mental or emotional disturbance; that Moore's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired; and Moore's age or mentality at the time of the crimes. Section 16-3-20(C)(b)(2), (6) and (7). ROA p. 1744, lines 15-24. These mitigators were based on evidence that Moore had been drinking and possibly smoking crack cocaine shortly before the incident. ROA p. 1377, line 22 – p. 1378, line 5; ROA p.

1705, lines 13-23. The judge also explained, “If a recommendation of death is not made, the defendant shall be sentenced to life imprisonment without the possibility of parole.” ROA p. 1734, lines 20-22. Moore decided not to make a closing argument to the jury in the sentencing phase after the judge told him that, “Once again, the statement that you would make to the jury would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed.” ROA p. 1713, lines 8-22. [This abuse of discretion is addressed in the second argument of this brief.]

The jury recommended death, and the judge sentenced Moore accordingly.

## ARGUMENT

### I.

The judge erred during the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing, “The State is seeking the death penalty on me, which means my very life is at stake.” The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of “the testimony and evidence that has been presented.”

As noted previously, Moore did not testify at either phase of his trial. He did elect to make a closing argument at the guilt phase. “I am very nervous,” he began. ROA p. 1571, line 13. “All I can do is tell you that I am not guilty of murder.” ROA p. 1571, lines 13 and 14. The solicitor objected that Moore was testifying. ROA p. 1571, lines 15 and 16. The judge sustained the objection and told Moore, “You need to limit yourself to the evidence that has been produced. You cannot testify.” ROA p. 1571, lines 17-20. Moore responded, “I hear what you are saying, but I don’t know if I am going to be able, but I’m going to try.” ROA p. 1571, lines 21 and 22. The judge warned, “Well, sir, if you are not able to, then I will have to stop you.” ROA p. 1571, lines 23 and 24.

Moore then contested the state’s evidence that he was broke and needed money to buy crack cocaine. ROA p. 1572, lines 2-11. Next, he attempted to impress upon the jury the gravity of their task: “I am nervous. I am shaking up here because I don’t know what to say. All I know is my life is in jeopardy here a second time.” ROA p. 1572, lines 13-15. The solicitor objected that Moore’s argument was “improper... at this stage.” ROA p. 1572, lines 16 and 17. The judge sustained the objection and told Moore, “You’re to limit yourself to the testimony and evidence, and they are to determine the guilt or innocence, sir.” ROA

p. 1572, lines 18-21. Moore continued, “The State is seeking the death penalty on me, which means my very life is at stake.” ROA p. 1572, lines 22 and 23. The judge again held, “We are in the guilt phase. They are simply determining the guilt or innocence of the crimes charged at this point in time. That’s all they are doing in this stage of the trial. So, please limit it to that.” ROA p. 1572, line 24 – p. 1573, line 4. The judge then sent the jury from the courtroom and amplified his ruling:

Now, Mr. Moore, I want you to understand that you certainly have the right to make the closing argument to the jury. That’s provided for by law. But, once again, you have to do it within the confines of the testimony and evidence that has been presented. You cannot go beyond that... [S]ince you elected not to take the stand, you cannot testify...

You may not testify. You gave that right up. You can comment on the facts, what the evidence has revealed in this case. Insofar as mentioning punishment, you are not to mention that, because we are not about that right now. And, if there are any violations of what I am laying out at this time, you are going to stand over here. Then I’m going to stop your argument. And then we will proceed into the charge on the law.

ROA p. 1573, line 5 – p. 1575, line 8. The jury returned to the courtroom. ROA p. 1575, lines 10 and 11. In consequence of the judge’s rulings, the balance of Moore’s closing argument was perfunctory and truncated:

Ladies and gentlemen of the jury, please forgive me for the mistakes I made in this presentation... I don’t want to offend Your Honor any longer, so I am not going to say any more. I think I have said enough. I just ask that you be fair and don’t guess, because that’s what you are being asked to do, guess. Thank you.

ROA p. 1575, lines 15-24.

The judge erred during the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury. The judge abused his discretion by ruling that Moore could not mention punishment, but was limited commenting upon “the testimony and evidence that has been presented.”

S.C. Code Section 16-3-28 provides, “[I]n any criminal trial where the maximum penalty is death... the defendant and his counsel shall have the right to make the last argument.” The Court has held that this statute “clearly indicates that the legislature intended for capital defendants to have a personal right to make the last argument in both phases of their trials.” State v. Charping, 313 S.C. 147, 437 S.E.2d 88, 89 (1993); see, also, Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002).

The judge’s ruling that Moore could not comment upon the possibility of a death sentence during the guilt phase is apparently based upon the Court’s opinion in State v. Huiett, 271 S.C. 205, 246 S.E.2d 862 (1978). In that case the Court observed that “ordinarily what becomes of an accused upon either conviction or acquittal is of no concern to the jury.” 246 S.E.2d at 864. Huiett relied upon an earlier case, State v. McGee, 268 S.C. 618, 235 S.E.2d 715, 716 (1977), wherein the Court stated:

As a general rule, where the right to fix the punishment is exclusively within the province of the court, it is not error to refuse an instruction with regard to punishment, since information as to the penalty is of no aid to the jury in determining whether the defendant committed the crime charged. However, where the right to fix the punishment or make a recommendation with regard to punishment rest with the jury, it is error for the court to refuse to instruct the jury in that respect. [Citations omitted.]

In Moore’s case, of course, the jury would determine the appropriate punishment if they found him guilty of murder.

The determination of guilt in a capital case must be especially reliable. See, for example, Beck v. Alabama, 447 U.S. 625 (1980). It is true that a trial judge may prohibit the defendant from offering unsworn testimony in his statement to the jury. State v. Davis, 306 S.C. 246, 411 S.E.2d 220 (1991). Yet the judge may not preclude such a defendant from making a legitimate argument stressing the importance of the jury's decision at the guilt phase by pointing out that a determination of guilt carries with it the distinct possibility of a death sentence. Contrary to the judge's ruling, there is absolutely no rule of law which prohibits a capital defendant from mentioning that possibility during his closing argument in the guilt phase.

Moore's argument that "my very life is at stake" was perfectly legitimate. The judge's limitation of Moore's closing argument to "the testimony and evidence that has presented" was arbitrary and unduly restrictive. This abuse of discretion means that Moore's convictions must be reversed and his case remanded for a new trial. However, the prejudicial effect of the judge's ruling did not end with the guilt phase, but carried over to Moore's purported waiver of the right to make a closing argument at sentencing, as will now be shown.

## II.

The judge erred during the sentencing phase by once again limiting Moore's closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed." Since S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore's purported waiver of closing argument involuntary.

At the conclusion of the sentencing phase, the judge advised Moore that he had the right to make a closing argument to the jury, but reminded him that, "once again, the statement that you would make to the jury would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed." ROA p. 1713, lines 8-16. This was the same arbitrary limitation of closing argument that the judge had rigidly applied at the guilt phase. In consequence, Moore purportedly waived his right to address the jury at sentencing. ROA p. 1713, lines 17-24.

S.C. Code Section 16-3-20(B) provides, "[T]he defendant and his counsel are permitted to present arguments for or against the sentence to be imposed." See, also, State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985). Section 16-3-28 states, "[I]n any criminal trial where the maximum penalty is death... the defendant and his counsel shall have the right to make the last argument."

A capital defendant's sentencing phase argument must be distinguished from the more circumscribed common law right of allocution. "Defendant's closing argument is not allocution, but is his opportunity to present arguments in mitigation before the factfinder deliberates." State v. Stokes, 345 S.C. 368, 548 S.E.2d 202, 207 n. 11 (2001). "Although, of course, the trial judge may prohibit a defendant from offering unsworn testimony in his

statement to the jury, a defendant may present argument regarding the facts that are in evidence to direct the jury's attention to the circumstances of the crime or the defendant's own characteristics, since these are proper sentencing considerations." State v. Davis, 411 S.E.2d at 222. A principal purpose of closing argument at sentencing is to afford the defendant an opportunity to express remorse and plead for mercy. See, for example, State v. Stokes, State v. Davis and State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982). This is especially true in South Carolina, since capital juries are instructed (as here) that "the defendant [may] be sentenced to life imprisonment for any reason or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy." ROA p. 1745, line 22 – p. 1746, line 3. The defendant may not rebut any facts in evidence, deny his guilt or express remorse that contradicts the evidentiary facts. A trial judge may preclude a defendant from arguing about God or religion. State v. Stokes and State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000).

Waiver of closing argument must be intelligent and voluntary. State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991); see, also, Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). A purported waiver of a constitutional or statutory right prompted by a judge's erroneous explanation of the law is invalid. See, for example, State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985).

Here, in both the guilt and sentencing phases, the judge erroneously and arbitrarily limited Moore's closing argument "to the evidence that has been presented," which necessarily excludes an expression of remorse on plea for mercy. The error was not obviated by defense counsel's "general plea" for mercy in his closing argument. ROA p. 1730, lines 13-19. As the oft-quoted passage from Green v. United States, 365 U.S. 301,

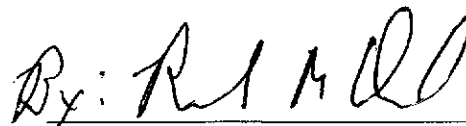
304 (1961) observes, “The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”

In short, the judge abused his discretion by summarily precluding the most important function of closing argument. In consequence, Moore’s purported waiver of closing argument was neither intelligent nor voluntary. The Court should reverse Moore’s death sentence and remand for resentencing.

CONCLUSION

To summarize: the judge's arbitrary limitation of Richard Bernard Moore's right to closing argument at the guilt and sentencing phases constituted an abuse of discretion and requires the reversal of Moore's convictions and death sentence.

Respectfully submitted,

By: 

Joseph L. Savitz, III  
Deputy Chief Attorney

ATTORNEY FOR APPELLANT.

This 16th day of October, 2003.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 16, 2003

A handwritten signature in black ink, appearing to read "By: JLS III". The signature is written in a cursive style and is positioned above the printed name and address.

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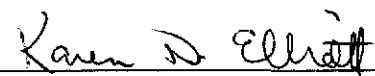
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 16th day of October, 2003.

  
\_\_\_\_\_  
Joseph L. Savitz, III  
Deputy Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 16th day of October, 2003.

  
\_\_\_\_\_  
Notary Public for South Carolina (L.S.)

My Commission Expires: March 13, 2007.