

ORIGINAL

No. 20-8035

Supreme Court, U.S.

FILED

MAY 12 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES W. MOORE -PETITIONER

vs.

THE STATE OF OHIO -RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

JAMES W. MOORE

R.C.I.

P.O. BOX 7010

CHILLICOTHE, OHIO 45601

RECEIVED

MAY 14 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRSENTED

- (1) Is Ohio's Castle Doctrine unconstitutional as it does not include one's entire property as the residence while a person acting in self-defense is defending their residence?
- (2) Does the Due Process Clause of the Fourteenth Amendment allows the burden to be place on the accused whose defending his residence to prove he had no duty to retreat?
- (3) Is a defendant denied the right to effective assistance of counsel if defense counsel doesn't make sure that the proper jury instructions are submitted to the jury in accordance with the defense?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	13

INDEX OF APPENDICES

APPENDIX	A: Ohio Fourth District Appellate Court's decision
APPENDIX	B: Ohio Supreme Court's denial of jurisdiction
APPENDIX	C: Ohio Supreme Court denial of reconsideration

TABLE OF AUTHORITIES CITED

Cases:

<u>Martin v. Ohio</u> , <u>480 U.S. 228</u> , <u>107 S. Ct. 1098</u> , <u>94 L. Ed. 2d 267</u>	12
<u>Mesa v. California</u> , <u>489 U.S. 121</u> , <u>128</u> , <u>109 S. Ct. 959</u> , <u>103 L. Ed. 2d 99</u> (1989)	10
<u>Rompilla v. Beard</u> , <u>545 U.S. 374</u> , <u>380</u> , <u>125 S. Ct. 2456</u> , <u>162 L. Ed. 2d 360</u> (2005)	7
<u>Strickland v. Washington</u> , <u>466 U.S. 668</u> , <u>104 S. Ct. 2052</u> , <u>80 L. Ed. 2d 674</u> (1984)	7
<u>State v. White</u> , <u>142 Ohio St.3d 277</u> , <u>2015-Ohio-492</u> , <u>29 N.E.3d 939</u>	7
<u>State v. Rogers</u> , <u>143 Ohio St.3d 385</u> , <u>2015-Ohio-2459</u> , <u>38 N.E.3d 860</u>	7

Statutes:

<u>28 U.S.C. § 1257</u>	3
<u>R.C. 2901.05</u>	4
<u>R.C. 2901.09</u>	4

Rules:

<u>Crim.R. 52</u>	7
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

XX For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

XX reported at State v. Moore, 2021-Ohio-4321; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the Court of Appeals of Ohio, 4th App. Dist. court appears at Appendix A to the petition and is

XX reported at State v. Moore, 2021-Ohio-4321; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was Dec. 29, 2020.
A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: March 2, 2021, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES W. MOORE — PETITIONER
(Your Name)

VS.

THE STATE OF OHIO — RESPONDENT(S)

PROOF OF SERVICE

I, James W. Moore, do swear or declare that on this date,
_____, 20_____, as required by Supreme Court Rule 29 I have
served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding
or that party's counsel, and on every other person required to be served, by depositing
an envelope containing the above documents in the United States mail properly addressed
to each of them and with first-class postage prepaid, or by delivery to a third-party
commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Brigham M. Anderson, Lawrence County Prosecuting Attorney, 111 S 4th Street ,
Ironton, Ohio 45638-1426

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 20____

(Signature)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 states:

- (a)** Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
- (b)** For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

Ohio's Lawrence County grand jury indicted Petitioner James Moore (hereinafter Moore) for aggravated murder and tampering with evidence. The State alleged that Moore shot and killed the victim and rearranged evidence before contacting law enforcement. The case went to trial.

In this case, the facts established that the victim not only caused damage to Moore's jeep, which was in Moore's driveway of his residence, several different times, but also came at Moore in an aggressive manner with a "pry bar" while Moore was standing several feet from his own garage in his driveway, which caused Moore to react by shooting the victim in self-defense. During trial, without objection, the trial judge instructed on self-defense stating to the jury that Moore must prove i) he lacked fault in creating the situation, ii) had a reasonable belief the victim posed a risked of imminent death or great bodily harm, iii) had a subjective belief of the same, and iv) complied with the duty to retreat. Since Moore was at his residence when everything occurred, Moore contends that the trial court committed plain error by not instructing the jury that he had no duty to retreat before using force in self-defense under R.C. 2901.09(B) Ohio's Castle Doctrine.

Ohio's Legislature defines residence as follows: "Residence means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest." R.C. 2901.05(D)(3); see R.C. 2901.09(A) (as used in R.C. 2901.09, "residence" has the same meaning as in R.C. 2901.05). " 'Dwelling' means a building or

conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile." R.C. 2901.05(D)(2). "[A] building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent." *Id.*

Based on Ohio's law, the Ohio's Fourth District Appellate Court, the last court to reach the merits on Moore's claim, denied the issue stating,

'Residence' means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest." R.C. 2901.05(D)(3); *see R.C. 2901.09(A)* (as used in R.C. 2901.09, "residence" has the same meaning as in R.C. 2901.05). "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile." R.C. 2901.05(D)(2). "[A] building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent." *Id.*

R.C. 2901.09(B) does not apply because Moore was not in his residence when he used force against Crank. Moore voluntarily left his garage, went into the driveway, and was several feet from the garage entrance when he shot Crank. Moore's driveway is not a residence under R.C. 2901.05(D)(3) because it is not a dwelling under R.C. 2901.05(D)(2), i.e., a building with a roof over it that is designed to be occupied by people lodging in it at night. The contention that the driveway is curtilage that is within the definition of a residence is not well-taken. We have explained:

The curtilage is the area around a home that a resident may reasonably expect to enjoy the sanctity and privacy of the home. Generally, the extent of a home's curtilage is determined under four main factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the use to which the area is

put; and (4) the steps taken to protect the area from observation by passersby.

(Citation omitted.) *State v. Ash*, 4th Dist. Pickaway No. 15CA1, 2015-Ohio-4974, ¶ 10. Moore provides no analysis of these factors, and even if he had demonstrated that his driveway was curtilage, R.C. 2901.05(D)(2) does not state that a building includes curtilage. The statute states that a building "includes, but is not limited to, an attached porch," R.C. 2901.05(D)(2), and Moore has not demonstrated that his driveway is analogous to an attached porch.

(See Appendix (A) Ohio Fourth District Appellate Court's decision attached to petition).

The state court's finding that "*Moore voluntarily left his garage, went into the driveway, and was several feet from the garage entrance when he shot Crank,*" overlooks the fact that Moore property was being destroyed that is, his jeep, and Moore had the right to defend his property at his residence. These "several feet" from his garage alluded to by the state court should not have been the deciding factor as to whether Ohio's Castle Doctrine would apply.

To add further insult to injury, after Moore's conviction and all appeals were exhausted, Ohio's General Assembly would enact its version of the "Stand Your Ground Law" which took effect April 6, 2021, which now states, "*a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence if that person is in a place in which the person lawfully has a right to be*" Ohio Revised Code 2901.09(B). Had that law been in effect during Moore's case, there would have been no doubt that Moore would have been found to have been in a place i.e., the driveway of his residence, where he had a lawful right to be and would have had no duty to retreat.

In addition, defense counsel was ineffective for failing to object to the erroneous jury instructions and according to Ohio law " ... [a] defendant's failure to object to the challenged instruction forfeits all but plain error." State v. White, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 57. Ohio Crim.R. 52(B) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To establish plain error, a defendant must show: (1) there was an error, i.e., a deviation from a legal rule, (2) the error was an obvious defect in the proceedings, and (3) the error affected substantial rights, i.e., it impacted the outcome of the trial. State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22.

This Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) set forth the rule that governs a claim of ineffective assistance of counsel. In Strickland this Supreme Court identified two components to a claim of ineffective assistance of counsel: "deficient performance" and "prejudice." To establish "deficient performance" a petitioner must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Rompilla v. Beard, 545 U.S. 374, 380, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (citing Strickland, 466 U.S. at 687-88). To establish "prejudice" a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694).

In this case, it cannot be denied that Moore's trial counsel should have objected to the jury instructions that placed the burden on Moore to establish that he had a duty to retreat when the shooting occurred at Moore's residence. Ohio's Castle Doctrine under former R.C. 2901.09(B) removes that duty as it states: *"For purposes of any section of the revised code that sets forth a criminal offense, a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence, and a person who lawfully is an occupant of that person's vehicle or who lawfully is an occupant in a vehicle owned by an immediate family member of the person has no duty to retreat before using force in self-defense or defense of another."*

Defense counsel should have objected and argued that Moore's case fell under Ohio's Castle Doctrine relieving Moore from having to establish that he had a duty to retreat. As explained above, Ohio's Castle Doctrine eliminated the duty to retreat from one's residence and clearly Moore was at his own residence. Had it not been for counsel's ineffectiveness it's likely the proper instructions would have been given to the jury and there's a reasonable probability that the outcome of the case would have been different.

This Supreme Court is being ask to grant this petition and answer the following certified questions: **(1) Is Ohio's Castle Doctrine, unconstitutional as it does not include one's entire property as the residence when a person is acting in self-defense in defending their residence? (2) Does the Due Process Clause of the Fourteenth Amendment allows the burden to be place on the**

**accused whose defending his residence to prove he had no duty to retreat?
and (3) Is a defendant denied the right to effective assistance of counsel if
defense counsel doesn't make sure that the proper jury instructions are
submitted to the jury in accordance with the defense?**

These questions that are being submitted are one that this Supreme Court
have never addressed before and this should be the case this Court must except and
reverse the Ohio Court's decision.

REASONS FOR GRANTING THE WRIT

This Supreme Court not only except those cases that have a huge impact on future litigation but also cases that provide a guiding hand when there comes a need to set forth a new legal precedent. This case before this Supreme Court is one of first impression, and present questions as it relates to citizens being able to defend themselves in their residence and whether residence includes the entire property of the home. This Supreme Court is being ask to grant this petition and answer the following certified questions: **(1) Is Ohio's Castle Doctrine, unconstitutional as it does not include one's entire property as the residence when a person is acting in self-defense in defending their residence? (2) Does the Due Process Clause of the Fourteenth Amendment allows the burden to be place on the accused whose defending his residence to prove he had no duty to retreat? and (3) Is a defendant denied the right to effective assistance of counsel if defense counsel doesn't make sure that the proper jury instructions are submitted to the jury in accordance with the defense?**

This Supreme Court has stated, "...[t]he successful legal defense of "self-defense" depends on the truth of two distinct elements: that the act committed was, in a legal sense, an act of self-defense, and that the act was justified, that is, warranted under the circumstances." Mesa v. California, 489 U.S. 121,128, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989).

First it is worth noting that States across this country have or, are at least in the process of creating some version of "Stand Your Ground Law," thereby eliminating the duty of persons to retreat before using deadly force in a claim of self-defense. Even the State of Ohio, which Petitioner Moore is bringing his case from, has recently amended its self-defense laws with its version of "Stand Your Ground Law," which unfortunately for Moore came a little too late. See Ohio Revised Code 2901.09(B).¹ Since Moore's appeals were exhausted before the new changes, Moore ask this Supreme Court answer the questions (presented above) as they relate to Ohio former law.

Based on Ohio's law, the Ohio's Fourth District Appellate Court, the last court to reach the merits on Moore's claim, denied the issue stating,

'Residence' means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest." R.C. 2901.05(D)(3); see R.C. 2901.09(A) (as used in R.C. 2901.09, "residence" has the same meaning as in R.C. 2901.05). "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile." R.C. 2901.05(D)(2). "[A] building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent." *Id.*

R.C. 2901.09(B) does not apply because Moore was not in his residence when he used force against Crank. Moore voluntarily left his garage, went into the driveway, and was several feet from the garage entrance when he shot Crank. Moore's driveway is not a residence under R.C. 2901.05(D)(3) because it is not a dwelling under R.C. 2901.05(D)(2), i.e., a building with a roof over it that is designed to be occupied by people lodging in it at night. The

¹ The Ohio General Assembly amended Revised Code 2901.09 and adopted its own version of "Stand Your Ground Law" which took effect on April 6, 2021, after Moore's conviction.

contention that the driveway is curtilage that is within the definition of a residence is not well-taken. We have explained:

(See Appendix (A) Fourth District Appellate Court's decision attached to petition).

The state court's finding that "*Moore voluntarily left his garage, went into the driveway, and was several feet from the garage entrance when he shot Crank,*" overlooks the fact that Moore property was being destroyed that is, his jeep, and Moore had the right to attempt defend his property at his residence. These "several feet" from his garage alluded to by the state court should not have been the deciding factor as to why Ohio's Castle Doctrine didn't apply.

From the beginning it was an error for the trial court to instruct on Moore's duty to retreat because Ohio's Castle Doctrine under former R.C. 2901.09(B) removes that duty as it states: "*For purposes of any section of the revised code that sets forth a criminal offense, a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence, and a person who lawfully is an occupant of that person's vehicle or who lawfully is an occupant in a vehicle owned by an immediate family member of the person has no duty to retreat before using force in self-defense or defense of another.*" This was the proper instruction.

In *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, this Supreme Court held: "Neither Ohio law nor the [] instructions violate the Due Process Clause of the Fourteenth Amendment by shifting to petitioner the State's burden of proving the

elements of the crime . . . [,] and that , “[i]t is not a violation of the Due Process Clause for Ohio to place the burden of proving self-defense on a defendant charged with committing aggravated murder.” Parts One and Two of the Syllabus.

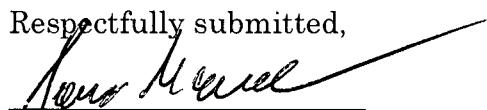
However, this Supreme Court has never determined whether residence includes a person’s entire property which one doesn’t have a duty to retreat before using deadly force, whether any state law that says otherwise is unconstitutional and does a defense counsel render ineffective assistance of counsel if counsel does not object to jury instructions that is not in accordance with defense.

CONCLUSION

This case is one of first impression before being presented to this Supreme Court. This Supreme Court is asked to accept this case and answer the certified questions being submitted.

For the reasons stated, Petitioner prays that this case notes probable jurisdiction in this case and set this matter for briefing and oral argument

Respectfully submitted,



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