No. 21A479

IN THE SUPREME COURT OF THE UNITED STATES

Paul A. Moore
Petitioner,

v.

Ron Neal
Superintendent, Indiana State Prison

MOTION TO DIRECT THE CLERK TO FILE A PETITION FOR WRIT OF *CERTIORARI* OUT OF TIME

Richard Dvorak,
DVORAK LAW OFFICES, LLC
6262 Kingery Highway, Suite 305
Willowbrook, IL 60527
Telephone: (312) 593-7146
Fax: (312) 873-3869
Email: richard.dvorak@civilrightsdefenders.com
Member of the United States Supreme Court Bar

Counsel Of Record For Petitioner

MOTION TO DIRECT THE CLERK TO FILE A PETITION FOR WRIT OF CERTIORARI OUT OF TIME

Petitioner Paul Moore, the in the above-referenced matter, by his attorney, Richard Dvorak, of DVORAK LAW OFFICES, LLC, submits this Motion to Allow Petition for Writ of *Certiorari* Out of Time, *Instanter*, pursuant to United States Supreme Court Rule 13, as well as the inherent equitable authority of this Court. In this case, extraordinary circumstances caused by former counsel's misconduct and apparent mental health issues justify the granting of this motion. In support, Petitioner states as follows:

1. On March 24, 2021, the United States District Court for the Northern District of Indiana issued an Order and Opinion denying Petitioner's habeas corpus petition under 28 U.S.C. § 2254(d).
2. On April 22, 2021, Petitioner, by way of prior counsel, filed a Notice of Appeal to the Seventh Circuit Court of Appeals.
3. Subsequently, the Seventh Circuit construed Petitioner's notice of appeal as a Request for Certificate of Appealiability and on October 22, 2021, the Court denied the COA. In response to the court's denial of the COA, on November 5, 2021, Petitioner's counsel filed a Petition for Rehearing. On December 3, 2021, the petition for rehearing was denied.
4. After the Seventh Circuit panel denied the petition for rehearing, Petitioner immediately sought to retain new counsel to file a petition for writ of *certiorari* in this Court. The filing deadline for Petitioner's petition for writ of *certiorari* was March 3, 2022.
5. On December 14, 2021, Petitioner met with Attorney Mark Small at Indiana State Prison to discuss hiring him as counsel to file a petition for writ of *certiorari*.

Affidavit of Paul Moore ¶ 1 ("Aff. P. Moore") (**Exhibit A – Affidavit of Paul Moore**). This meeting with Attorney Small would be the first and last time that Petitioner had direct communication with him; all subsequent communicate with Attorney Small was made through a third party, Petitioner's mother, Grace Moore. *Id.* ¶ 1, 5; See also Affidavit of Grace Moore ¶ 3 ("Aff. G. Moore") (**Exhibit B – Affidavit of Grace Moore, Attorney-Client Contract, Text Messages and Emails, and Attorney Disciplinary Documents**). On December 20, 2021, Petitioner, by way of Grace Moore, hired Attorney Small to draft and file his petition for writ of certiorari in this Court.

6. Despite employing Attorney Small to represent him in his writ of *certiorari* proceedings, Petitioner also diligently assisted Attorney Small in attempting to file the petition within the allotted 90-day time period. Aff. P. Moore, ¶ 4. Petitioner did so by compiling documents, researching case law and even constructing potential arguments in an effort to assist Attorney Small with drafting the petition. *Id.* On January 17, 2022, Grace Moore emailed Attorney Small the documents that Petitioner had produced to assist Attorney Small with drafting the petition. Aff. G. Moore, ¶ 4-6; See Email Jan. 17, 2022. Attorney Small responded the same day by email informing Grace Moore that he would visit Petitioner in "two weeks." *Id.* However, Attorney Small never went to visit to Petitioner, and he gave no reason as to why. Aff. P. Moore, ¶ 6. On February 1, 2022, Grace Moore again emailed additional documents to Attorney Small to further aid him with drafting the petition. Email Feb. 1, 2022; Aff. G. Moore, ¶ 6. The next day, on February 2, 2022, Grace Moore texted Attorney Small to confirm his receipt of the documents. *Id.*; see Message: Feb. 2,

2022. Attorney Small confirmed that he received the documents and said that he would call her later that day. *Id.* However, Attorney Small failed to call Grace Moore. Aff. G. Moore, ¶ 6.

7. On February 15, 2022, Grace Moore sent Attorney Small a message inquiring about his failure to call her and his failure to visit Petitioner. *Id.* ¶ 8; Text Message: Feb. 15, 2022. She also informed Attorney Small that Petitioner wanted him to file an application for a 60-day extension of time because Attorney Small had not produced any work product. *Id.* In another message, Grace Moore explained to Attorney Small that only "16 days" remained in which to file the petition for certiorari and that the deadline for filing a timely application for extension of time was February 22, 2022. *Id.* Attorney Smalls responded by text message stating that he "had always planned to seek an extension" of time, and that he would be diligent in drafting Petitioner's petition. *Id.* On February 17, 2022, Attorney Small messaged Grace Moore informing her that he was filing the application for extension of time on February 18, 2022—four days ahead of the ten day deadline. *Id.* On February 18, 20d22, Grace Moore sent Attorney Small a message requesting that he him email her a copy of the application he was filing that day. *Id.* Attorney Smalls never responded to her request. Aff. G. Moore, ¶ 9-10.

8. By February 24, 2022, Attorney Small still had not responded to Grace Moore's request for a copy of the application for extension time, so she sent him another message requesting that he call her. Text Message: February 24, 2022. Again, Attorney Small failed to respond to her inquiries. Aff. G. Moore, ¶ 11. Grace Moore emailed Attorney Small again on March 5, 2022, requesting a copy of the application

for extension of time—he still did not respond. Email: March 5, 2022. On March 8, 2022, Grace Moore messaged Attorney Small expressing her concerns regarding his failure to communicate with her during this critical time period in Petitioner's certiorari process, she implored him to respond to her inquiries. Text Message: March 8, 2022. It was not until March 10, 2022—a week after the petition for certiorari was due—that Attorney Small finally communicated by email saying "the motion for extension of time to file cert was denied." Email: March 10, 2022. Justice Amy Coney Barrett denied the application the same day. To exacerbate the matter, Attorney Small never sent a copy of the application for extension of time to Petitioner or Grace Moore, despite their repeated requests for a copy. Aff. P. Moore, ¶ 11; Aff. G. Moore, ¶ 14. As a result, Grace Moore was forced to obtain a copy of the document from this Court's website. *Id.* ¶ 15. Upon reviewing the application for extension of time that Attorney Small filed, Petitioner and Grace Moore were troubled by the contents of the document.

9. First, the application revealed that Attorney Small engaged is professional misconduct by intentionally misleading Petitioner and Grace Moore to believe that he had filed a timely application for extension of time on February 18, 2022. Aff. P. Moore, ¶ 13; Aff. G. Moore, ¶ 16. The document itself showed that it was not filed until March 3, 2022, the very day the petition for writ of certiorari was due and past the ten-day deadline prescribed by Rule 13.5. Motion For Extension Of Time To File Petition For Writ Of *Certiorari* ("Mot. for Cert."), at 3. Attorney Small had an obligation to inform Petitioner and Grace Moore of his failure to file a timely application for extension of time. And he could have done so on February 24, 2022,

when Grace Moore attempted to obtain a copy of the application. But instead Attorney Small chose not to respond thus leaving Petitioner and Grace Moore under the false representation that the application was filed on February 18, 2022. Aff. P. Moore, ¶ 13; Aff. G. Moore, ¶ 16.

10. Secondly, the motion also revealed a disturbing issue not known to the Petitioner and his mother at the time Attorney Small was representing Petitioner: his apparently mental-health issues. In the application he filed, Attorney Small wrote the following: "WHEREFORE, Petitioners respectfully move the Supreme Court to appoint a Special Master to investigate the invasion of the United States as described in this Motion, and for all other proper relief." Mot. for Cert., at 2 (**Exhibit C – Motion for Extension of Time to file a Writ of *Certiorari***). The incoherent request for relief made by Attorney Small in the application caused Petitioner and Grace Moore consternation regarding his mental well-being. Consequently, Grace Moore began to investigate Attorney Mark Small's background. Aff. G. Moore, ¶ 17. The information she discovered was deeply troubling.

11. Through her investigation, Grace Moore discovered that the Indiana Supreme Court suspended Attorney Small's law license on May 5, 2021, for engaging in a pattern of misconduct caused by underlying mental health issues. *Id.* ¶ 18. The Indiana Supreme Court found that Attorney Small "engaged in a pattern of neglect in numerous appeals involving criminal matters and termination of parental rights." Published Order Finding Misconduct and Imposing Discipline ("Order for Misconduct.") at 1. Attorney Small admitted and the court found that he violated the following Indiana Professional Conduct Rules: 1) "Failing to act with reasonable diligence and

promptness"; 2) "Failing to withdraw from representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"; and 3) "Engaging in conduct prejudicial to the administration of justice." *Id.* The suspension of Attorney Small's law license was stayed pending successful completion of a three year probationary period. *Id.* at 2.

12. Since Attorney Small's pattern of misconduct was attributable to underlying mental health issues, the Indiana Supreme Court mandated that he strictly adhere to the following terms and conditions: 1) "remain under a long-term JLAP[1] monitoring agreement for the duration of his probation"; 2) "continue with mental health and supportive programming through JLAP"; and 3) "follow all recommendations from medical professionals with respect to medication and/or mental health treatment." *Id.* at 1-2. Attorney Smalls never disclosed any of this information to Petitioner or Grace Moore. Aff. P. Moore, ¶ 15; Aff. G. Moore, ¶ 18.

13. In Petitioner's case, the continued pattern of misconduct exhibited by Attorney Small has created extraordinary circumstances beyond Petitioner's control that has prevented the timely filing of his petition for certiorari in this Court. For this reason, Petitioner's petition for writ of certiorari should be permitted to be filed out of time under equitable principles.

14. This Court has "previously made clear that a petitioner is entitled to equitable tolling' if he shows: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v.*

[1] Judges and Lawyers Assistance Program

Florida, 560 U.S. 361, at 649 (2010) (quoting *Pace v. Diguglielmo*, 544 U.S., at 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)).

15. In this case, Petitioner diligently pursued his right to file a timely petition for certiorari on his habeas corpus claims. Even after hiring Attorney Small to draft and file the petition for writ of certiorari, Petitioner himself assisted counsel by compiling documents, drafting arguments, researching law, and routinely notifying Attorney Small, by way of Grace Moore, as to the applicable filing deadlines in his case. Aff. P. Moore, ¶ 4-8. Moreover, after learning that Attorney Small had failed to file the petition for writ of certiorari, Petitioner took immediate action by hiring new legal counsel while simultaneously investigating and obtaining documentation of Attorney Small's misconduct. Aff. G. Moore, ¶ 14-19.
16. The fact that Attorney Small's misconduct in this case is identical to a larger documented pattern of misconduct caused by underlying mental health issues, certainly constitutes an "extraordinary circumstance" under the equitable tolling doctrine. Attorney Small put Petitioner and Grace Moore under the false impression that he had filed a timely application for extension of time on February 18, 2022, when in fact the application was filed untimely on March 3, 2022—the same day the petition for certiorari was due. Rule 30.2 explicitly states that if the application for extension of time is "filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances."
17. By waiting to file the application for extension of time on the same day that the petition for writ of certiorari itself was due, Attorney Small made it virtually impossible for Petitioner himself, even with the exercise of reasonable diligence, to

have filed a timely petition for certiorari because the time to do so had expired. Even more so, because Justice Barrett denied the application for extension of time a week after the filing deadline for the petition for certiorari—absent her granting the extension of time, Petitioner had no time left to file anything. When Grace Moore messaged Attorney Small on February 24, 2022, requesting a copy of the application for extension of time, he could have then communicated to her that he did not file the application and that had not he drafted the petition for certiorari. This would've at least given Petitioner the opportunity to have filed an application for extension of time himself under the "extraordinary circumstances" clause in Rule 13.5 and 30.2 to justify the tardy filing. Aff. P. Moore, ¶ 16.

18. Attorney Small's misconduct in this case is not the "'garden variety claim of excusable neglect,' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline," that typically would "not warrant equitable tolling." *Holland*, 506 U.S. 63, at 651-652. Rather, the facts of Petitioner's case presents instances of attorney misconduct of the "far more serious kind," *Id.* 652: 1) engaging in professional dishonesty with Petitioner, 2) failure to "perform reasonably competent legal work," 3) failure "to communicate with" Petitioner, 4) failure "to implement [Petitioner's] reasonable requests," and 5) failure "to keep [Petitioner] informed of key developments in [his] case[]." *Id.* 653. Additionally, a lawyer's "mental impairment" is another specific reason for a finding of extraordinary circumstances. *Holland*, 560 U.S. at 649.

19. This is doubly so, because less than a year ago the Indiana Supreme Court suspended Attorney Small's law license for engaging in the same pattern of misconduct as in this

case—misconduct that the court found was caused by mental health issues. Petitioner's case certainly presents "extraordinary circumstances" where his lawyer's misconduct is caused by mental health issues that are beyond Petitioner's control, that has in turn prevented the timely filing of petition for certiorari.

20. In *Holland* this Court held "that § 2244(d) is subject to equitable tolling." *Id.* 649. For the following reasons, Petitioner contends that this Court's application of equity principles in *Holland* should extend to the circumstances presented in his case. To begin with, this Court has said that "'equitable principles' have traditionally 'governed' the substantive law of habeas corpus, for we will 'not construe a statute to displace courts' traditional equitable authority absent the 'clearest command'". *Id.*, 560 U.S. at 646 (citations omitted). Although Petitioner's petition for writ of certiorari is governed by § 2101(c), the "subject matter" of his petition is controlled by § 2254(d), "habeas corpus, . . . an area of the law where equity finds a comfortable home." *Id.* 647. Given the extraordinary circumstances that prevented Petitioner from filing a timely petition for writ of *certiorari*, coupled with the fact that the substance of his petition is rooted in habeas corpus, an area of law that has traditionally been "governed" by equitable principles, *Holland's* reasoning should extend to his case. See *Holland*, 560 U.S. 631, at 650 ("courts of equity can and do draw upon decisions made in other similar cases for guidance")

21. Secondly, § 2101(c) states that the ninety-day period for applying for a petition for writ of certiorari may be extended by a justice "for good cause shown . . . for a period not exceeding sixty days." However, Rules 13.5 and 30.2 state that an application for extension of time filed less than "10 days before the date the petition is due," will not

be "granted except in the most extraordinary circumstances." Both the "10 day" and the "extraordinary circumstances" clause in Rule 13.5 and 30.2 are not a part of the statutory text in section § 2101(c). Thus, these "procedural rules adopted by the Court for the orderly transaction of its business . . . can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, at 64 (1970).

22. Thirdly, § 2101(c) gives a "justice of the Supreme Court, for good cause shown," the power to "extend the time for applying for a writ of *certiorari* for a period not exceeding sixty days." This statutory language strongly implies that Congress intended for the ninety day period to file a petition to be subject to extension under the principles of equity if extraordinary circumstances justify doing so. Section § 2101(c) effectively gives this Court the power to extend the ninety-day deadline to total 150 days for "good cause," which is a standard considerably less stringent than is extraordinary circumstances. This Court recently exercised this power, when on March 19, 2020, this Court issued a blanket Order extending the deadline for filing a petition to "150 days from the date of the lower court judgment" due to "ongoing public health concerns relating to COVID-19." It should follow then, that since extraordinary circumstances beyond Petitioner's control led to the denial of his application for extension of time and prevented the timely filing of his petition for writ of certiorari, then the motion to file the petition for certiorari out of time should be granted where the petition is being filed before the expiration of the 150 day period that the sixty day extension would've given him. This Court has "followed a tradition in which courts of equity have sought to 'relieve hardships which, from time

to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity' ". *Holland*, 560 U.S. at 650 (quoting *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, at 248 (1944).

23. Additionally, even though Rule 13 indicates the Clerk shall not file any petition for writ of certiorari that is jurisdictionally out of time, this Rule simply indicates such petitions may only be filed out of time with the permission of this Court, which is what Petitioner seeks in this motion.

24. Petitioner is not seeking an extension of time to file a Petition, but is instead asking that this Court allow him to file an out-of-time Petition. Thus, the 10-day deadline for an extension of time found in Rule 13 is not applicable. Instead, this is a request to file a Petition, instanter, and is within the 60-day period contemplated by the Rule and the equitable principles set forth in *Holland*.

WHEREFORE, for the foregoing reasons Petitioner respectfully requests that this Honorable Court grant this motion and directs the Clerk to file the Petition for Writ of *Certiorari* Out of Time, *Instanter* (attached as **Exhibit D**[2]).

Respectfully submitted,

/s/ Richard Dvorak

Richard Dvorak,

DVORAK LAW OFFICES, LLC
6262 Kingery Highway, Suite 305
Willowbrook, IL 60527
Telephone: (312) 593-7146
Fax: (312) 873-3869
richard.dvorak@civilrightsdefenders.com

[2] In the event that this Motion is granted, the Petitioner will furnish the Court and counsel for the Respondent with printed and bound courtesy copies of the Petition, in conformity with the rules of this Court.

Member of the Bar of the United States
Supreme Court

Counsel Of Record For Petitioner

EXHIBIT A

Affidavit of Paul Moore

GENERAL AFFIDAVIT OF PAUL MOORE

The within named person (Affiant), Paul Moore, who is currently incarcerated at Indiana State Prison, is a resident of LaPorte County, State of Indiana, personally came and appeared before me, the undersigned Notary Public, and makes this his statement, testimony and General Affidavit under oath or affirmation, in good faith, and under penalty of perjury, of sincere belief and personal knowledge that the following matters, facts, and things set forth are true and correct to the best of his knowledge:

1) On December 14, 2021, I received a visit from Attorney Mark Small. The purpose of the visit was to conduct a consultation regarding him representing me in my writ of certiorari proceedings to the United States Supreme Court. This would be the first and last time that I had any direct contact with Attorney Small.

2) On December 16, 2021, I contacted my mother, Grace Moore, to inform her that I had made the decision to hire Attorney Small to represent me in my writ of certiorari proceedings. My decision to hire Attorney Small was based on his assurances that he would put forth his best skills and abilities in drafting and perfecting my petition for writ of certiorari while also preserving my rights to review by the United States Supreme Court.

3) On December 20, 2021, I received noticed from Grace Moore that she had officially retained Attorney Small as legal counsel to represent me in my writ of certiorari proceedings.

4) After being informed that Attorney Small was now my legal counsel, I immediately set about the business of compiling habeas corpus documents, drafting legal arguments, and researching case law all in an effort to assist Attorney Small with drafting my petition for writ of certiorari.

5) On January 10, 2022, I mailed legal documents to Grace Moore along with a letter instructing her to forward those documents to Attorney Small. Being that I had no means to directly communicate with Attorney Small, I utilized Grace Moore as a third party intermediary through which I could send and receive information from him.

6) On January 18, 2022, Grace Moore informed me that she received the documents I sent and had already emailed them to Attorney Small. She also notified me that Attorney Small said he would be to visit me in couple of weeks. However, I never did receive the visit from Attorney Small.

7) Sometime around January 25, 2022, I mailed out additional legal documents to Grace Moore with instructions attached to forward them to Attorney Small. On February 2, 2022. Grace Moore informed me that she had emailed the additional documents to Attorney Small.

8) On February 14, 2022, after not receiving any updates or work product from Attorney Small, and with the filing deadline for the petition for certiorari roughly two weeks away, I

instructed Grace Moore to ask Attorney Small to file an application for extension of time. I also provided Grace Moore with the exact dates on which the application for extension of time and the petition for certiorari were due to be filed. I told her to make sure that Attorney Small was aware of those filing deadlines.

9) On February 17, 2022, I received a message—via the prison email system—from Grace Moore. In the message she explained that she had communicated with Attorney Small, and that he said the application for extension of time would be filed on February 18, 2022. I instructed Grace Moore to obtain a copy of the application for extension of time from Attorney Small, and to then forward me a copy once she received it.

10) On March 1, 2022, I contacted Grace Moore seeking an update. She informed me that Attorney Small had not responded to any of her attempts to contact him since February 18, 2022, and he also never emailed her a copy of the application for extension of time that she requested. Nonetheless, she said that she would continue to try to establish contact with him.

11) On March 10, 2022. I received an email from Grace Moore informing me that Attorney Small had finally communicated with her. She said that he had emailed her stating that the motion for extension of time had been denied by the Supreme Court. In addition, she also informed me that Attorney Small still had not provided her with a copy of the application for extension of time. I then asked her to see if she could possibly obtain a copy of the application from another source.

12) The following day on March 11, 2022, I spoke with Grace Moore again. She informed me that she was able to obtain a copy of the application for extension of time online from the United State Supreme Court's website. She also said that she had mailed a copy to me. She then conveyed to me that she was deeply disturbed by the contents contained within the application.

13) On March 14, 2022, I received a copy of the application for extension of time. After reading the application for myself, I was extremely disconcerted by what it revealed. First, the document showed that Attorney Small had engaged in dishonesty. He misled me and my mother to believe that he had filed a timely application for extension of time on February 18, 2022, when in fact the application was filed late on March 3, 2022—the same day the petition for certiorari was due. Second, and perhaps most disturbing, were the completely irrational allegations and requests that Attorney Small lodged within the application. Attorney Small alleged in the application that the United States of America was being invaded and then made the request that a Special Master be appointed to investigate it.

14) On March 15, 2022, Grace Moore informed me that she had discovered information—by way of her own investigation—revealing that Attorney Small's law license had recently been suspended by the Indiana Supreme Court for engaging in a pattern of misconduct that was precipitated by mental health issues. After receiving this information, I instructed Grace Moore to seek out substitute legal counsel to assist us with the situation that Attorney Small had created.

15) To be sure, at no point in time did Attorney Small ever disclosed to me that he was on disciplinary probation for engaging in misconduct caused by underlying mental health issues.

16) It is because of Attorney Small's dishonesty and his failure to communicate with me during critical stages of my writ of certiorari proceedings, that my petition for certiorari was never filed in the United States Supreme Court. Had I known that Attorney Small did not file the application for extension of time on February 18, 2022, as he had misled me to believe he did, I would have filed the application myself before the February 22, 2022 deadline.. Or, in the alternative, I would have given my best effort, within the short period that remained, to have drafted and timely filed the petition for certiorari.

17) Throughout my entire appeals processes—in both the state courts and federal courts—I have scrupulously made sure that all filing deadlines were satisfied pursuant to the applicable rules and law. I've done so in order to preserve my rights at all stages of appellate review. And although I am but a layman, I have never let that serve as an excuse. However, it is now because of Attorney Small's misconduct in my case that I may have possibly lost the last chance to have the constitutionality of my 120-year prison sentence reviewed by a higher court.

Dated this 8th day of April, 20 22,

Paul A. Moore

Signature of Affiant

State of Indiana

County of LaPorte

Subscribed and sworn to, or affirmed, before me on this 6th day of April, 20 22 by Affiant Paul Moore.

Signature of Notary Public

Tina W. Williamson My Commission Expires: 7-6-23

TINA WILLIAMSON
Notary Public, State of Indiana
Marion County
Commission Number 670169
My Commission Expires
July 06, 2023

EXHIBIT B

Affidavit of Grace Moore, Attorney-Client Contract, Text Messages, Emails, and Attorney Disciplinary Documents

AFFIDAVIT OF GRACE I. MOORE

The within named person (Affiant), Grace I. Moore, who is a resident of Marion County, State of Indiana, personally came and appeared before me, the undersigned Notary Public, and makes this her statement, testimony and General Affidavit under oath or affirmation, in good faith, and under penalty of perjury, of sincere belief and personal knowledge that the following matters, facts, and things set forth are true and correct to the best of her knowledge:

1) On December 20, 2021, I hired Attorney Mark Small to represent my son, Paul Moore, in his writ of certiorari proceedings to the United States Supreme Court. Attorney Small's legal services was referred to me by Attorney Michael Ausbrook, who represented Paul in his habeas corpus proceedings through the lower courts.

2) Attorney Small's legal fee per the contract was $15,000 not including filing fees and printing cost. Based on the agreement I paid him half the cost ($7,500) up front, with the other half to be paid upon completion of the petition for writ of certiorari.

3) Attorney Small did not provide Paul with any means to directly contact him. Due to the fact that Paul is incarcerated I acted as a third party intermediary through which he could deliver information to Attorney Small.

4) On January 13, 2022, I received documents from Paul along with a letter instructing me to give them to Attorney Small. In the letter Paul said the documents were intended to assist Attorney Small with drafting his petition for writ of certiorari.

5) On January 17, 2022, I scanned Paul's documents into my computer and emailed them to Attorney Small. He responded the same day by email stating that he would visit Paul in two weeks. I informed Paul that Attorney Small said he would be to visit him in a couple of weeks.

6) Sometime in late January 2022, I received additional documents from Paul with instructions to give them to Attorney Small. On February 1, 2022, I emailed the documents to Attorney Small. The following day I messaged Attorney Small to confirm that he received the documents, he messaged back confirming that he received the documents. Attorney Small said he would call me later that day, but he never did.

7) On February 14, 2022, I received an email from Paul via the prison email system. In the email Paul explained to me that he wanted Attorney Small to file an application for extension of time because he hadn't visited him and he hadn't produced any work product regarding the petition. Paul also said the filing deadline for the petition was extremely close. Paul gave me all of the dates that everything was due to be filed, and told me to be sure that Attorney Small was aware of them.

8) On February 15, 2022, I messaged Attorney Small. In the message I inquired as to why he hadn't called me or gone to visit Paul like he said he would do. I also requested that he file for an extension of time due to the fact that he had not produced any work on the petition. In the message I iterated that the petition for certiorari was due in 16 days, and I also informed him that February 22, 2022, was the deadline for filing the application for extension of time. Attorney Small responded back the same and informed me that he had always planned to file a motion for extension of time.

9) On February 17, 2022, Attorney Small sent me a message informing me that he was filing the application for extension of time the next day on February 18, 2022.

10) On February 18, 2022, I sent Attorney Small a message requesting that he email me a copy the application for extension of time that said he was filing that day. He never responded back to me.

11) By February 24, 2022, I still hadn't received a response from Attorney Small regarding my request for a copy of the application for extension of time, so I sent him another message requesting that he call me. I never received a response back from him.

12) Attorney Small was not returning any of my calls or responding to my text messages, so on March 5, 2022, I emailed him asking for a copy of the application for extension of time. Again, he failed to respond to my request.

13) On March 8, I had become concerned because Attorney Small hadn't responded to any of my calls or messages since February 17, 2022. The date to file Paul's petition for writ of certiorari has passed, and Attorney Small still hadn't sent me a copy of the application for extension of time that I requested. So again, I messaged Attorney Small imploring him to please communicate with me.

14) Attorney Small did not communicate with me until March 10, 2022. He sent me an email saying that the motion for extension of time had been denied by the Supreme Court. Even then, he did not provide me with a copy of the application.

15) Since Attorney Small wouldn't communicate with me or honor my request for a copy of the application for extension of time, I sought to obtain it from elsewhere. After a little bit of research, I was able to obtain it online from the United States Supreme Court's website.

16) After obtaining a copy of the application and reading its contents, I was flabbergasted. First, I discovered that Attorney Small been dishonest and misled me and Paul into believing that he filed a timely application for extension of time on February 18, 2022—he actually filed it late on March 3, 2022. But more troubling than Attorney Small's dishonesty was the wildly absurd accusation that he made in the application itself. In the application for extension of time Attorney Small alleged that the United States was being invaded and there needed to be investigation launched into the matter.

17) After reading the utterly preposterous claim made by Attorney Small in the application he filed, I was so concerned for his mental health that I began to do some investigation into his background. I was completely disturbed by the information I discovered.

18) Through my research I discovered that Attorney Small's license to practice law was suspended by the Indiana Supreme Court in May of 2021. As a result, Attorney Small was placed on probation for engaging in a pattern of misconduct caused by his mental health issues. The same pattern of misconduct that Attorney Small was disciplined for by the Indiana Supreme Court, is virtually identical to the conduct he engaged in Paul's case. Attorney Small did disclose any of this information to me before or after I retained his legal services.

19) After learning of this information and sharing it with Paul, I immediately began to seek alternate legal counsel to assist with the situation.

Dated this 8th day of April, 2022.

Grace Moore

Signature of Affiant

State of IN

County of Marion

Subscribed and sworn to, or affirmed, before me on this 8th day of April, 2022 by Affiant Grace Moore.

John B Bugbee

Signature of Notary Public

4/16/27 My Commission Expires:

JOHN B BUGBEE
NOTARY PUBLIC - SEAL
STATE OF INDIANA
COMMISSION NUMBER NP0719815
MY COMMISSION EXPIRES APR. 16, 2027

CONTRACT EMPLOYING ATTORNEY

Grace Moore hereby employs Mark Small, Attorney-at-Law (hereinafter "Attorney") to represent her son Paul Moore (hereinafter "Client") in seeking review, by the United States Supreme Court, of the denial of Client's petition for writ of habeas corpus and proceedings that followed that event.

Attorney agrees to use his best skills and professional abilities in this case, to research, prepare, and file any documents necessary to perfect and preserve Client's rights to review by the Supreme Court, and to draft and file any petition, brief or other supporting memoranda necessary, and any brief or memoranda in response to other matters filed. Attorney will consult with Client before any substantive procedural step. Attorney infers Client will cooperate fully with Attorney.

Client's Mother will pay Attorney for his work a flat fee of Fifteen Thousand Dollars ($15,000.00), with one-half of that amount paid upon the signing of this Contract and for which this Contract stands as a receipt. The balance will be due upon filing of the Petition for Writ of Certiorari. Client is responsible for reasonable expenses incurred, including the filing fee of Five Hundred Dollars ($500.00) and costs of printing that Attorney estimates will be Four Thousand Five Hundred Dollars ($4,500.00). Expenses are to be paid upon Attorney's sending the billing statement for such expense to Client's Mother. Should Attorney's representation be terminated at any time prior to disposition of the case, Attorney will be entitled to keep any sums earned, to be calculated by the tenth of an hour at an hourly rate of Three Hundred Fifty Dollars ($350.00).

Attorney has made no promises or guarantees regarding the outcome of this case.

DATE: December 20, 2021

Grace Moore

Grace Moore

Accepted:

Mark Small

GENERAL AFFIDAVIT OF GRACE I. MOORE

The within named person (Affiant), Grace I. Moore, who is a resident of Marion County, State of Indiana, personally came and appeared before me, the undersigned Notary Public, and makes this his/her statement, testimony and General Affidavit under oath or affirmation, in good faith, and under penalty of perjury, of sincere belief and personal knowledge that the following matters, facts, and things set forth are true and correct to the best of his/her knowledge:

The emails to and from ggic40@aol.com along with the text message conversations attached are authentic and accurate copies of my communication with Attorney Mark Small regarding his legal representation of my son, Paul Moore.

Dated this 8th day of April, 2022,

Grace I Moore

Signature of Affiant

State of IN

County of Marion

Subscribed and sworn to, or affirmed, before me on this 8th day of April, 2022 by Affiant Grace Moore.

John B Bugbee

Signature of Notary Public

4/16/27

My Commission Expires:

JOHN B BUGBEE
NOTARY PUBLIC - SEAL
STATE OF INDIANA
COMMISSION NUMBER NP0719815
MY COMMISSION EXPIRES APR. 16, 2027

GRACE I. MOORE'S TEXT MESSGAE AND EMAIL COMMUNICATIONS WITH ATTORNEY MARK SMALL

Subject Re: Paul Moore

To: [Ggic40 <ggic40@aol.com>]

From Mark Small <marksmall2001@yahoo.com>

Date Wed, Dec 15, 2021 at 5:05 AM

Good morning,
I wondered if you have made a decision in regard to hiring me.
Yesterday, at the end of our meeting, Paul said he was going to call you.
Thanks,
Mark Small.
Attorney-at-Law
O: 317.252.4800

On Sunday, December 12, 2021, 02:16:52 PM EST, Ggic40 <ggic40@aol.com> wrote:

Okay, I informed him.

On Thu, Dec 9, 2021 at 2:56 PM, Mark Small <marksmall2001@yahoo.com> wrote:

> I am scheduled to meet with him on December 14 in the morning.
> -Mark Small.
> O: 317.252.4800
>
> On Wednesday, December 8, 2021, 08:40:46 PM EST, Ggic40 <ggic40@aol.com> wrote:
>
> Hello Mark,
>
> This is Grace Moore, I just wanted to touch bases with you to let you know that Paul would like to meet with you when you visit ISP in Michigan City next week. His info is Paul Moore, DOC # 138652. This is what you will need to see him.
>
> Thank you,
> Grace
>
> 317-445-7674

Subject Re: Paul Moore

To: [Ggic40 <ggic40@aol.com>]

From Mark Small <marksmall2001@yahoo.com>

Date Fri, Dec 17, 2021 at 4:23 AM

Hi Grace,
I was in Court, or on the way to and from, near Louisville nearly
all day yesterday. I'll text you later this morning.
On Thursday, December 16, 2021, 09:15:25 PM EST, Ggic40 <ggic40@aol.com> wrote:

Hello Mark,

I left you a message earlier this evening, I am sending this email because we have decided to retain you as our attorney to file the Writ of Certiorari. I will be prepared to give you half of the payment of $15,000.on Monday 12/20/21. I should be able to meet with you at 4pm at the earliest. please let me know when and where works best for you. I don't check my email daily, so you can call or text 317-445-7674.
I will be awaiting your response.

Thank you,

Grace Moore

Subject Re: Copy of Paul's Request for Certificate of Appealiability...

To: [Ggic40 <ggic40@aol.com>]

From Mark Small <marksmall2001@yahoo.com>

Date Mon, Jan 17, 2022 at 5:26 PM

Thanks! I plan to be at ISP in two weeks.

On Monday, January 17, 2022, 05:25:19 PM EST, Ggic40 <ggic40@aol.com> wrote:

Good evening Mark! Paul told me send you a copy of the Request for Certificate of Appealiability that he drafted that Ausbrook never filed. He wasn't sure if Ausbrook gave that to you with the files.

Paul said he wanted to make sure you got Request for Certificate of Appealiability that Ausbrook never filed because there maybe some cases or arguments that you can use.

Also, Paul is drafting up some arguments for the Writ of Certiorari. He said he'll be done in a week. He said hopefully they'll assist you with in your drafting of his Writ.

Subject Arguments For Writ of Cert.

To: [Mark Small <marksmall2001@yahoo.com>]

From Ggic40 <ggic40@aol.com>

Date Tue, Feb 1, 2022 at 3:18 PM

Good afternoon Mark. Paul finished drafting up some potential arguments for you to consider when constructing his writ of certiorari. I've attached a word that contains the arguments to this email.

Paul said some of the arguments overlap, so please excuse the redundancy. He said that it's just a rough draft for you to possibly developed arguments from, and maybe some case law in support of the arguments. Thanks for your time Mark!

Subject Inquiry about Paul's Writ of Certiorari...

To: [Mark Small <marksmall2001@yahoo.com>]

From Ggic40 <ggic40@aol.com>

Date Sat, Mar 5, 2022 at 10:26 PM

Hey Mark, hope all is well. I never heard back from you last weekend. I called and texted you. I figured you'd get back with me the next business day. Nevertheless, can you please send me a copy of the request for extension of time that you filed on Paul's writ of certiorari? Thank you for your time!

Subject Motion was denied

To: [Ggic40 <ggic40@aol.com>]

From Mark Small <marksmall2001@yahoo.com>

Date Thu, Mar 10, 2022 at 4:28 PM

The motion for extension of time to file
cert was denied.
I can speak with you tomorrow afternoon.
-Mark Small.
Attorney-at-Law
O: 317.252.4800:

Conversation with Att. Mark Small

Message received from Att. Mark Small 12/17/2021 5:52:49 AM

AS

When you tried to call yesterday I was in the middle of a storm driving back from Jeffersonville where I had a postconviction case hearing. Would tomorrow be possible to meet? I have two Zoom conferences this afternoon.

12/18/2021

Message sent 12/18/2021 6:57:19 PM

Sorry Mark I'm just seeing your message. I am alitte under the weather today. You can give me a call tomorrow to see if I'm able to get out. If not it can be Monday evening.

Message received from Att. Mark Small 12/18/2021 7:00:40 PM

AS

I'm sorry you're not feeling well. I shall call you late tomorrow morning if that is okay. Also I can drive to you. We have sufficient time to file but the sooner the better

12/20/2021

Message received from Att. Mark Small 12/20/2021 3:08:51 PM

AS

430 at the same office as we met previously.

Message sent 12/20/2021 3:15:04 PM

Ok I will be there

Message received from Att. Mark Small 12/20/2021 3:15:43 PM

AS

Super

2/2/2022

Message sent 2/2/2022 6:03:32 PM

Hi Mark this is Grace I called you earlier but I didn't get an answer I was just wanting to let you know that I had sent an email of some some of the arguments that Paul had drafted and I wasn't sure if you got it or not cuz you didn't respond to the email but in any case just give me a call at your earliest convenience try to stay safe out here in this weather thank you

2/3/2022

Message received from Att. Mark Small 2/3/2022 9:20:28 AM

AS I received the email. I will call this afternoon if that is okay

Message sent 2/3/2022 10:09:10 AM

Yes

2/15/2022

Message sent 2/15/2022 7:45:26 AM

Hello Mark I haven't heard from you since February the 3rd when you responded to my text message I thought I was going to get a call from you but I think a continuance is going to have to be filed and it needs to be filed by the 22nd of February which is next Tuesday Paul hasn't been able to see you and I haven't heard from you but so I think continuance would be our best bet I know we had some bad weather there that kind of slow things up also but please give me a call sometime today so we can discuss filing for a continuance which will have to be filed by February the 22nd which is next Tuesday

Message sent 2/15/2022 5:05:35 PM

The deadline for filing Paul's writ of certiorari is March 3, 2022. With that said, Paul wants you to file for the 60 day extension of time.

With the deadline fast approaching, he doesn't want a rush job--neither do I. Additionally, as I've iterated before, Paul would like to have time to review for his approval the final draft of the writ before it is filed. Also, he'd like to provide suggestions if any are needed. He knows his case very well.

With roughly 16 days remaining until writ must be filed, Paul thinks it's prudent to request the 60 day extension. Paul said he believes a request for extension of time must be filed 10 daysi before the in deadline date to file the writ. I think that puts the date for filing the extension of time at February 22, 2022--next Tuesday.

Mark, please follow through. I hired you because Paul said he trust you. I'll be looking for a response from you. Thank you for your time!

Message received from Att. Mark Small 2/15/2022 5:36:05 PM

AS I had always planned to seek the extension. There will be no rush job. I have a brief due tomorrow. I can talk on Thursday.

Message sent 2/15/2022 7:31:01 PM

Ok that will be great plan to get hear from you on Thursday

2/16/2022

Message received from Att. Mark Small 2/16/2022 7:39:44 AM

AS Super

2/17/2022

Message received from Att. Mark Small 2/17/2022 3:19:49 PM

AS I had a hearing on a postconviction relief case in Elkhart County. I am back now. I shall file for the extension tomorrow. I shall go to ISP next Friday to meet with Paul

2/18/2022

Message sent 2/18/2022 6:08:09 PM

Thank you, Mark can you email me a copy of the filing please thank you my email is ggic40@AOL.COM

2/24/2022

Message sent 2/24/2022 7:23:57 PM

Hello Mark I never got the email with the copy of the continuance that you filed if you would give me a call at your earliest convenience I'd appreciate it

3/8/2022

Message sent 3/8/2022 11:41:22 AM

Good afternoon mark this is Grace can you please give me a call to let me know where we're at with this darling and when you might get a chance to go and see Paul again I know the weather got bad so I know you didn't make it that Friday but just call me and let me know please I really would appreciate the response

Message sent 3/8/2022 10:29:17 PM

Hey Mark, at this point I'm becoming concerned. I've tried to reach you several times but haven't received a response from you.

Last time I heard from you was February 17, 2022. You informed me via FB text that you'd be filing for the extension of time on Paul's writ of certiorari the following day--Feburary 18, 2022.

While I trust that you followed through on your word and obligation, I'm merely seeking confirmation from you. I know you're a busy man Mark. But surely what I'm requesting isn't unreasonable as a client of yours. Communication is key. A brief text or email answering responding to my inquiry is all I'm asking.

Please respond!h As always, thank you for your time.

3/12/2022

Message sent 3/12/2022 12:04:03 PM

Hello Mark I did have a question I wanted to ask you if you can give me a call back I'd appreciate it thank you

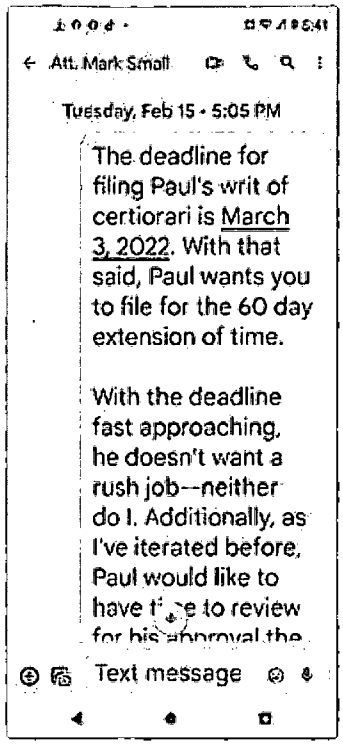
3/16/2022

Message sent 3/16/2022 10:36:37 AM

Good morning Mark I was just calling to see when you thought you may be able to refund my money for the writ of certiorari that you were unable to do. Please give me a call and let me know what your intentions are I know you said that you wanted to talk to Paul but I'll talk to Paul and he feels the same way I do we would like a refund there's nothing more that you could do for us thank you.

3/17/2022

Message sent 3/17/2022 5:41:30 PM



3/25/2022

Message sent 3/25/2022 10:30:44 AM

Good morning Mark, this is Grace Moore I've been trying to reach you since Tuesday as you said you would be available to discuss giving me a refund. I am not planning on chasing you down, please give me a call soon so we can take care of this matter.

3/31/2022

Message sent 3/31/2022 4:26:35 PM

Good evening mark according to your email you said that today would be a good day to get with you for me to pick up my refund please give me a call my number is 317-445-7674 this is Grace Moore and I'll reach it out to you about my refund thank you .

In the
Indiana Supreme Court

In the Matter of: Mark Small,
Respondent

Supreme Court Case No.
19S-DI-647

Published Order Finding Misconduct and Imposing Discipline

Upon review of the report of the hearing officer, the Honorable Helen Marchal, who was appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's "Verified Disciplinary Complaint," the Court finds that Respondent engaged in professional misconduct and imposes discipline on Respondent.

Facts: Respondent engaged in a pattern of neglect in numerous appeals involving criminal matters and termination of parental rights. At least six appeals were dismissed due to Respondent's neglect. In most other appeals successor counsel was appointed or the Court of Appeals took other action to protect the clients' appeals.

Facts in aggravation include Respondent's prior discipline and his pattern of misconduct here. Facts in mitigation include Respondent's cooperation, remorse, and engagement with the Judges and Lawyers Assistance Program (JLAP) to address factors contributing to his misconduct.

Violations: Respondent has admitted, the hearing officer found, and the Court likewise finds that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

1.3: Failing to act with reasonable diligence and promptness.

1.16(a): Failing to withdraw from representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

8.4(d): Engaging in conduct prejudicial to the administration of justice.

Discipline: For Respondent's professional misconduct, the Court **suspends Respondent from the practice of law for a period of one year, beginning on the date of this order, all stayed subject to completion of at least three years of probation** on the following terms and conditions:

(1) Respondent shall remain under a long-term JLAP monitoring agreement for the duration of his probation, shall continue with mental health and supportive programming through JLAP, and shall follow all recommendations from medical professionals with respect to medication and/or mental health treatment.

(2) Respondent shall have no violations of the Rules of Professional Conduct or any other law during his probation.

(3) Respondent shall promptly report to the Commission any violation of the terms of Respondent's probation.

(4) If Respondent violates the terms of his probation, the stay of his suspension shall be vacated and the balance of the stayed suspension shall be actively served without automatic reinstatement.

Notwithstanding the expiration of the minimum term of probation set forth above, Respondent's probation shall remain in effect until it is terminated pursuant to a petition to terminate probation filed under Admission and Discipline Rule 23(16).

The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged with the Court's appreciation.

Done at Indianapolis, Indiana, on 5/20/2021.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

EXHIBIT C

Motion for Extension of Time

In The
SUPREME COURT OF THE UNITED STATES
Case No.

PAUL MOORE
Petitioner,

v.

RON NEAL,
Superintendent, Indiana State Prison

MOTION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF *CERTIORARI*

Now comes the Petitioner in the above-entitled matter and respectfully moves this Honorable Court for an extension of time of Sixty (60) days in which to file his Petition for Writ of *Certiorari*, and would show the Court as follows:

1.) The Court has jurisdiction to consider Moore's Petition, 28 U.S.C. §2101(c).

2.) Moore's Petition for Writ of *Habeas Corpus,* and a Certificate of Appealability, were denied by the United States District Court for the Northern District of Indiana, on March 24, 2021, under cause number 3:15-cv-577-TLS-MGG. (Exh. A herewith.)

3.) Moore's Notice of Appeal, docketed by the United States Court of Appeals for the Seventh Judicial District under case number 21-1717, was construed by the Seventh Circuit as an application for a certificate of appealability and denied on October 14, 2021. (Exh. B herewith.)

4.) Moore's timely Petition for Rehearing on the October 14, 2021, Order was denied on December 3, 2021. (Exh. C herewith.)

5.) The 90th day from denial of that Petition for Rehearing is March 3, 2022.

6.) Paul Moore is the specific party for whom this extension is sought.

7.) The extension sought is sought for the following reasons:

a.) Counsel was retained after the December 3, 2021, Order was issued by the Seventh Circuit and time for filing a petition for writ of *certiorari* already had begun to run;

b.) The record and other materials to review are of significant length;

c.) The legal issues, specifically failure of the State to disclose a plea agreement with the State's principal witness in Moore's trial for murder, the State's knowing presentation of false testimony at that trial, and Moore's trial counsel's ineffective assistance, are of such complexity as to require more time; and,

d.) Moore's family is of modest means and counsel is a sole practitioner.

8.) This Motion is filed less than ten (10) days before the filing deadline sought to be extended and the extraordinary circumstances consist of counsel's physical condition in that he was scheduled for knee replacement surgery on November 30, 2021, and February 8, 2022, but both surgeries were postponed due to COVID surges, counsel's pain had been significant, and because of the latter postponement, counsel was able to obtain a hydrocortisone shot to his left knee to abate that pain.

WHEREFORE, Petitioners respectfully move the Supreme Court to appoint a Special Master to investigate the invasion of the United States as described in this Motion, and for all other proper relief.

Respectfully submitted,

/s Mark Small.
Mark Small

Indiana Attorney Number 14656-49
Counsel for Petitioner
PO Box 20612
Indianapolis, Indiana 46220
Telephone: 317.252.4800
E-mail: marksmall2001@yahoo.com

Certificate of Service

I hereby certify that on March 3, 2022, I electronically filed the foregoing, and all attachments, with the Clerk of the United States Supreme Court by using the Supreme Court Electronic Filing System system and I also filed it by deposit in the United States mail, first-class postage pre-paid. I also certify that all participants in the case are registered users of the United States Supreme Court Electronic Filing System, that they will be served by that means, and I certify that service on Theodore Rokita, Office of the Indiana Attorney General, 219 Statehouse, 200 West Washington Street, Indianapolis, Indiana 46204, has been performed both electronically to that office and by deposit in the United States mail, first-class posdtage pre–paid, this 3rd day of March, 2022.

/s Mark Small.
Mark Small.

EXHIBIT D

Petition for a Writ of
Certiorari and
Appendices

No. 21A479

In THE Supreme Court of the United States

PAUL MOORE, PETITIONER,

v.

RON NEAL, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Richard Dvorak
Counsel of Record
DVORAK LAW OFFICES, LLC
6262 Kingery
Highway Suite 305
Willowbrook, IL 60527
Telephone: (312) 593-7146

QUESTIONS PRESENTED

This case presents two related questions.

First, whether the Seventh Circuit Court of Appeals erred in denying Petitioner's request for a certificate of appealability where the district court narrowly construed the Brady rule to require the disclosure of only formalized agreements between the prosecution and a cooperating witness, even though the clearly established precedence of this Court requires the disclosure of all deals or understandings, whether explicit or implicit, and whether they are in writing or merely verbal.

Second, whether this Court should apply in Brady cases the so-called Defense Due Diligence Rule, which this Court implicitly – or perhaps explicitly – rejected in *Banks v. Dretke*, 540 U.S. 668 (2004), when this Court opinioned that Brady obligations are "external to the defense," and that "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

RELATED CASES:

- *Moore v. Neal*, No. 3:15-cv-577-TLS-MGG, U.S. District Court for the Northern District of Indiana. Judgment entered March 24, 2021.
- *Moore v. Neal*, No. 21-1717, U.S. Court of Appeals for the Seventh Circuit. Application for Certificate of Appealability denied October 22, 2021. Petition for rehearing denied December 3, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other sources

Erosion of Brady Through the Defendant Due Diligence Rule, 60 UCLA L. Rev. 138 (2012).

INTRODUCTION

Paul Moore respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Seventh Circuit Court of Appeals, which denied Moore a certificate of appealability.

OPINIONS BELOW

The Seventh Circuit Court of Appeals denied a certificate of appealability (App. ___), which was not reported. The opinion of the United States District Court for the Northern District of Indiana (App. _____) is reported in an unofficial reporter at 2021 WL 1123813 (N.D. Ind. March 24, 2021).

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2021. A timely petition for rehearing was filed on October 14, 2021, and the court of appeals denied rehearing on December 3, 2021 (App. ____). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourteenth Amendment provides:

No State shall . . . deprive any person of . . . liberty . . . without due process of law.

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

1. *The Trial*

Prior to Petitioner's trial, his lawyer learned that the State's sole eyewitness, Curtis Ward, received an extraordinarily low bond reduction—his bond was reduced from $500,000 to $25,000. This information led Petitioner's lawyer to believe that the State had given Ward

consideration for his testimony. As a result, Petitioner's lawyer filed a motion to reveal agreements stating that "[t]hrough the discovery process, the Defendant has reason to believe that the State's witness, Curtis Ward, has been provided consideration for his cooperation . . ." Post-Conviction Ex. G. The trial court granted the motion, but the State never disclosed any information in response to the motion.

By the start of Petitioner's trial, his lawyer still harbored suspicions that the State had a deal with Ward for his testimony, and he conveyed this to the jury in his opening statements:

> after negotiations with the State of Indiana and striking what they call a 'gentleman's handshake,' which I call 'you scratch my back, I'll scratch your back,' Curtis Ward starts telling a story implicating Paul Moore . . . This is after the deal with the State and you'll hear about the benefit that he has received and possibly could still receive for this cooperation. Trial Tr. 103-04.

During cross-examination, Petitioner's lawyer questioned Ward about his pending probation violation charge and the bond reduction he received. *Id.* at 496-99. On redirect examination, the prosecution solicited testimony from Ward stating that there were no deals or promises made in exchange for his testimony:

> **Prosecuting Attorney:** Have you been promised anything in exchange for your testimony here today?
>
> **Ward:** No, I haven't. *Id.* 538-39

In closing statements, the prosecution concretely told the jury there were "no deals" of any kind for Ward's

testimony and that his bond reduction was not part of any deal either: "Curtis Ward hadn't made any deals with the State, let me make that clear. He may have received a benefit in getting a bond reduction that he shouldn't have gotten, but he has received no deals for his testimony in this case." *Id.* 972. The prosecution emphasized that Ward was "facing" full criminal liability on his pending charges, and that he was subjecting himself to that potential punishment in the interest of doing the "right thing." *Id.* at 971.

Although the prosecution and Ward had completely denied there were any deals, Petitioner's lawyer continued to argue in closing statements that he suspected there was a deal for Ward's cooperation. However, ultimately Petitioner's lawyer conceded that he did not "know" there was a deal because there were "no writings" to evidence such:

> [The prosecutor] referred to how [Ward] has received a benefit already about the bond, yes, he has. I don't know if you're curious but reading of the charges he's facing, oops, [Ward] is not charged with murder. And from this deal, there's no writings. It's a gentleman's handshake. After we finish here today, what's going to happen? Do you know? I don't. As far as I know, [Ward's] charge is dismissed. Who knows? I don't.
>
> *Id.* 982.

Four days after Petitioner had been convicted, the State gave Ward a favorable plea agreement for him providing testimony against Petitioner at trial. Post-

Conviction Ex. D & E. Ward received a combined sentence of nine years; six years for two Class B felonies and a concurrent three-year sentence for a probation violation. Post-Conviction Ex. A, 62-63.

2. *The State Post-Conviction Proceedings*

Nearly a decade after Petitioner's trial, the prosecuting attorney and Ward testified at Petitioner's post-conviction evidentiary hearing. At the evidentiary hearing, both the prosecuting attorney and Ward revealed critical information that was never previously disclosed – information that they actually denied existed ten years earlier at trial.

During Petitioner's trial, the prosecutor was emphatic that there were "no deals" with Ward for his cooperation. Trial Tr. 972. Yet at the post-conviction evidentiary hearing, that same prosecuting attorney admitted that he had reached an understanding with Ward that he would receive consideration on his pending charges in exchange for his testimony against Petitioner:

> **[Post-Conviction Prosecutor]:** . . . to the best of your recollection, what was -- what should have been [Mr. Ward's counsel's] understanding of his client's legal situation at the point that he testified?
>
> **The Prosecuting Attorney:** That he could either hurt himself or help himself if he told the truth about what happened and that he could utilize that in negotiating with us with regard to a sentence on his pending charges.

Post-Conviction Tr. 32-33.

The prosecuting attorney also testified that prior to Petitioner's trial, at a bond reduction hearing for Ward, he verbally told Ward and his attorney that the State intended to offer Ward a favorable plea agreement after they utilized his testimony against Petitioner:

> **[Post-Conviction Counsel]:** Mr. Staples, did you at any time during the bond reduction hearing held on September 5 expressly state before the Court . . . to Mr. Ward and his attorney your intentions to utilize . . . Mr. Ward's testimony against [Moore] and offer him an agreement of some sort in the future?
>
> * * *
>
> **The Court:** I think he just answered that. He's answered that several times that was the whole – yes, definitely.
>
> **The Witness:** Yes, that's – yes. Sorry.

Id. 20; See also Post-Conviction Ex. B, at 6-7, 12.

Furthermore, the prosecuting attorney revealed that Ward's $475,000 bond reduction was a "chit in the game" that was part of ongoing plea negotiations at the time of trial. As part of his testimony, the prosecuting attorney also admitted that he threatened Ward with murder charges if he did not "get on the team."

> **Post-Conviction Counsel:** . . . Mr. Ward received two separate bond reductions in

> this case that we discussed earlier and those were based on the understanding that he would be a State witness, he had to cooperate with the State. Under *Brady*, do you believe that that should have been disclosed to the defense?
>
> **The Witness:** . . . We didn't reduce the bond because he was a witness; we reduced bond *because we were negotiating with his attorney regarding whether or not he was going to be a witness.* So like I -- I said earlier I used the term, and I wasn't making light of the proceedings, it was a chit in the game to . . . Fine, I'll agree to a reduced bond, that'll let you know I'm talking to you in good faith. *You know, tell your guy he needs to get on the team or he can be sitting over there with Moore and McGee.* You know, what's it going to be? It was that kind of back and forth. So that wasn't something I had to reveal, I suppose . . .

Post-Conviction Tr. 17, 23-24 (emphasis added).

Ward also provided additional information that was not previously disclosed. Ward testified that there was, in fact, a deal between him and the State for his co-operation, it was just never memorialized in writing:

> **Post-Conviction Counsel:** And is your testimony today that you had a wink and a nod, an unsaid agreement with the State?
>
> **Ward:** I'm saying yes but no specifics, no details. I knew nothing. Totally blind.

> That's what I'm telling you. . .
>
> **Post-Conviction Counsel:** So do you remember telling Ms. Rogers that there was a deal worked out, it was just never in writing?
>
> **Ward:** Exactly.

Post-Conviction Tr. 113, 114.

3. *The State Appellate Court*

Petitioner advanced two issues on post-conviction appeal in the state courts: 1) the State violated *Brady v. Maryland,* 373 U.S. 83 (1963) and *Napue v. Illinois,* 360 U.S. 264 (1959) when it withheld information regarding an understanding (informal agreement) with its principal witness and then allowed the witness to testify falsely about the deal; and 2) that trial counsel was ineffective for failing to call the only independent witness to corroborate Petitioner's testimony. *Moore v. State*, 32 N.E.3d 844, 2015 Ind. Unpub. LEXIS 535 (Ind. Ct. App. 2015).

The Indiana Court of Appeals was the highest state court to issue an opinion on Petitioner's claims. In denying the *Brady* prong of Petitioner's petition, the Indiana Court of Appeals concluded that:

> The jury was repeatedly advised of the dealings between the State and Ward. . . . we . . . conclude that any 'deal' was known to Moore and the jury. Moore has shown no *Brady* violation.

Id. at *15. The state appellate court based this determination primarily on the opening and closing statements of Petitioner's lawyer, which were mere arguments based on inferences, and which were directly contradicted by Ward's testimony and the prosecution's closing statements, not to mention jury instructions telling jurors that attorney arguments should not be considered evidence.

Nonetheless, the Indiana Court of Appeals concluded that since the jury heard argument from Petitioner's lawyer postulating there was deal, then any deal was supposedly known to the defense, even though Ward and the prosecution told the jury there were "no deals" for Ward's testimony. The court also denied Petitioner's *Napue* claim, holding since there was no written plea deal, the prosecutor did not allow perjured testimony, even though it was later learned that there was, in fact, an unwritten agreement between the prosecutor and Ward. *Id.* at *15-16.

4. The Federal Habeas Corpus Proceedings

After exhausting all of his state appellate remedies, Petitioner filed a habeas corpus petition alleging that the state court's decision was unreasonable under section 28 U.S.C. § 2254(d)(1) and (2).

When addressing the *Brady* prong of Petitioner's claim, the district court gave deference to the reasonableness of Indiana Court of Appeals' decision. The district court ruled the State court's *Brady* decision was not unreasonable because the testimony of the trial prosecutor and Ward at the post-conviction hearing, ten years after trial, "mirror[ed]" the "description" of Petitioner's lawyer argument to the jury about a deal that he believed

existed between the prosecutor and Ward:

> Significantly, trial counsel's description of the relationship between the prosecution and Ward presented to the jury at trial mirrors the description provided the prosecution and Ward at the post-conviction evidentiary hearing. Stated otherwise, trial counsel's reference to a 'you scratch my back, I'll scratch your back' arrangement, the prosecution's reference to 'a chit in the game,' and Ward's confirmation of 'an unsaid agreement' consisting of "a wink and a nod" are one and the same. These terms all cover an understanding between the prosecution and Ward that, if Ward testified against Moore at trial, he would likely receive a more favorable plea agreement. This mutual understanding, which did not include specific terms and was not itself an agreement, was known by trial counsel, who capably relayed it to the jury during opening statements, through cross-examination, and during closing arguments.

Moore v. Warden, 2021 WL 1123813, 2021 U.S. Dist. LEXIS 55211, at * 21 (N.D. Ind. 2021).

The district court admitted that there was, in fact, an "understanding between the prosecution and Ward that, if Ward testified against Moore at trial, he would likely receive a more favorable plea agreement." *Id.* However, the district court determined that the "mutual understanding . . . was not itself an agreement" and it was known to Petitioner and the jury *Id.* As to the related

prosecutorial misconduct claim alleging that the prosecution allowed Ward to falsely testify that he had no deals for his testimony, the district court gave the state court's *Napue* decision deference under 28 U.S.C. § 2254(d). *Id.* at 22.

After denying Petitioner's habeas petition, the district court simultaneously denied his certificate of appealability (COA). Petitioner appealed the denial of the COA to the Seventh Circuit. The Seventh Circuit summarily denied Petitioner's request for a COA by stating that he had made "no substantial showing of the denial of a constitutional right." A petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. This Court should accept this Petition to clarify what should have already been clear to the courts below, *i.e.*, all agreements between the prosecution and a witness must be disclosed, regardless of whether they are in writing. Alternatively, this Court should accept this Petition to direct the Seventh Circuit Court of Appeals to grant Petitioner's Certificate of Appealability.

This Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972) was crystal clear: The *Brady* rule applies to "any understanding[s] or agreement[s]" between a witness and the Government. *Giglio*, 405 U.S. at 155. See also *United States v. Bagley*, 473 U.S. 667, 683 (1985) ("The fact that the [witnesses'] stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.") This tacit-agreement rule is also well established in the Circuits, including in the Seventh Circuit, which

denied Petitioner's request for a certificate of appealability. See, e.g., *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005) ("Or there might have been a tacit understanding that if [the witness's] testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge. Express or tacit, either way there would be an agreement . . ."); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) ("While it is clear that an explicit agreement would have to be disclosed because of its effect on [the witness'] credibility, it is equally clear that facts which imply an agreement would also bear on [his] credibility and would have to be disclosed."); *Tassin v. Cain*, 517 F.3d 770, 777 (5th Cir. 2008) ("absent a firm promise of leniency from the judge or prosecutor . . . there was an understanding sufficient to trigger *Giglio* and *Brady*, albeit not a 'firm promise'"); *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) ("[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady's* disclosure mandate. If [the defendant] could prove that [the witness] and [the prosecutor] had reached a mutual understanding, albeit unspoken, that [the witness] would provide testimony in exchange for the district attorney's intervention in the case against him, such an agreement would qualify as favorable impeachment material under *Brady*"); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir.1986) ("[w]hile it is clear that an explicit agreement would have to be disclosed because of its effect on [the witness's] credibility, it is equally clear that facts which imply an agreement would also bear on [the witness's] credibility and would have to be disclosed"); *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009), ("*Brady* requires the disclosure of tacit agreements between the prosecutor and a witness. A deal is a deal, explicit or tacit. There is no logic that supports distinguishing between the two.")

In fact, this Court, citing *Napue*, more recently reiterated that a witness' mere *attempt* to obtain a deal must be disclosed. *Wearry v. Cain*, 577 U.S. 385, 394 (2016) ("even though the State made no binding promises, a witness' attempt to obtain a deal before testifying was material because the jury might well have concluded [the witness] had fabricated testimony in order to curry [the prosecution's] favor.' " (quoting *Napue*, 360 U.S. at 270)).

Despite this clearly established duty for the prosecution to disclose not only any explicit agreements, but also any understandings, tacit agreements, or attempts to enter into one, both the Indiana Court of Appeals and the district court concluded there was no *Brady* violation. The Indiana Court of Appeals set forth two reasons why, in its opinion, there was no *Brady* violation. First, the appellate court held there was nothing withheld from the defense because they allegedly knew about the deal, since defense counsel mentioned the existence of the deal in his opening and closing arguments. *Moore v. State*, 32 N.E.3d 844, 2015 Ind. Unpub. LEXIS 535, at 13-15, 2015 WL 2329146 (Ind. Ct. App. 2015). However, this was an unreasonable apprehension of the facts of the case, since defense counsel only surmised about the existence of a deal, and had no actual evidence of its existence. Moreover, the post-conviction testimony made in crystal clear that there was, in fact, an understanding between the prosecutor and Ward that he would not be charged with murder so long as he stayed on the right "team" during Petitioner's trial. This certainly goes far beyond what defense counsel knew at the time, including an explicit threat made by the prosecutor to Ward that he would be charged with murder if he did not cooperate.

Second, the Indiana Appellate Court relied on the

so-called defense-due diligence rule. The appellate court held, "the State will not be found to have suppressed evidence if it was available to the defendant through the exercise of reasonable diligence." *Id.* at 11-12 (citing Indiana law). The reliance on this rule was also a clear misapplication of clearly established Supreme Court precedence, but one that, unfortunately, continues to exist in some Circuits, including the Seventh Circuit. This is the subject of Section II of this Petition.

The District Court engaged in a similar analysis, accepting the reasoning of the Indiana Appellate Court. In deciding Petitioner's *Brady* claim, the district found the Indiana Court of Appeals' decision not to be "unreasonable" because of the following:

> After reviewing the record, the Court cannot conclude that the State court made an unreasonable determination on the prosecutorial misconduct claims. Significantly, trial counsel's description of the relationship between the prosecution and Ward presented to the jury at trial mirrors the description provided the prosecution and Ward at the post-conviction evidentiary hearing. Stated otherwise, trial counsel's reference to a "you scratch my back, I'll scratch your back" arrangement, the prosecution's reference to "a chit in the game," and Ward's confirmation of "an unsaid agreement" consisting of "a wink and a nod" are one and the same.

Moore v. Warden, 2021 WL 1123813, 2021 U.S. Dist. LEXIS 55211, at * 21 (N.D. Ind. 2021).

Essentially, the district court concluded there was no *Brady* violation because the prosecution and Ward's disclosure of the deal "at the post-conviction evidentiary hearing," ten years after trial, matched trial counsel's "narrative" to the jury "at trial" postulating there was a deal, despite the fact that at trial the prosecution and Ward denied there was a deal.

At trial, the prosecution and Ward said there "no deals" of any kind for his testimony. Trial Tr. 538-39, 972. Trial counsel's argument to the jury speculating that the State and Ward had a "you scratch my back, I'll scratch your back" deal, was not based on a disclosure of evidence made by the State, it was based solely on trial counsel's intuition—he acknowledged this in closing statements. *Id.* at 982. An argument by counsel based on inference is not equivalent to trial evidence properly before a jury, especially in light of the fact that the jury was instructed that "statements made by the attorneys are not evidence." Preliminary Jury Instruction 30; Final Jury Instruction 22. The only evidence admitted during trial was Ward's testimony, wherein he flatly denied the existence of any deal. See *Bell v. Bell*, 512 F.2d 233, 245-46 (6th Cir. 2008) (Clay, J dissenting) ("If the tacit agreement is not disclosed, the defendant is left only with argument, not evidence, to attempt to counter the credibility that improperly accrues to the witness on account of his supposedly pure motive").

Relatedly, the lower courts also erred in denying Petitioner's *Napue* claim. It is undisputed that at the time of the trial, Ward and the trial prosecutor came to an unwritten understanding that Ward would benefit

from providing testimony against Petitioner. Yet, both the trial prosecutor and Ward denied the existence of any agreement, which would only be true if such agreements were only limited to formalized agreements. However, since the above authority makes it clear that *Brady* applies to all agreements and understandings, written or unwritten, then the trial prosecutor allowed false testimony to go uncorrected.

In this case, both the District Court and the Seventh Circuit Court of Appeals denied Petitioner's request for a certificate of appealability. To warrant a certificate of appealability in a Section 2254 petition, a petitioner need only demonstrate that jurists could reasonably disagree on the issue of whether the petitioner made a substantial showing of the denial of his constitutional rights. *Buck v. Davis*, __ U.S. __, 137 S.Ct. 759, 773(2017). Petitioner has easily satisfied this standard, based on the above clearly established authorities. Thus, this Court should either accept this Petition to decide the matter on the merits, or alternatively, grant this Petition and order that the Seventh Circuit Court of Appeals grant Petitioner's request for a certificate of appealability.

II. This Court should also take this case to resolve a split among the Circuits as to the so-called "defense due diligence rule" that requires defense counsel to use due diligence to discovery the withholding of *Brady* materials, which is contrary to this Court's pronouncement in *Banks v. Dretke*, 540 U.S. 668, 696 (2004) that *Brady* obligations are "external to the defense."

In 2004, in *Banks v. Dretke*, 540 U.S. 668 (2004), this Court rejected what would be later referred to as the Defense Due Diligence Rule (hereinafter referred to as "the Rule.") This Court clearly held, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. In *Banks*, this Court also clearly held that a prosecutor's *Brady* obligations are "external to the defense." *Id.* Despite this unambiguous pronouncement in 2004, a majority of the Circuits still blindly follow their respective pre-*Banks* Circuit precedents that require *Brady* litigants to prove that materials withheld by the government could not have been obtained by a criminal defendant through the exercise of "due diligence." See Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138 (2012).

In none of the seminal *Brady* cases did this Court even hint at an obligation of a criminal defendant to discover *Brady* materials on his own. However, two Supreme Court cases, one decided in 1999, and the other in 2004, conclusively settled this question, clarifying that a criminal defendant, in fact, has no such obligation.

In *Strickler v. Greene*, for the first time, this Court defined the elements of a *Brady* claim. The Court held:

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently, and prejudice must have ensued.
>
> *Strickler v. Greene*, 527 U.S. 263, 282 (1999)

Noticeably absent from these "true" *Brady* elements is any due-diligence requirement.

As if *Strickler* and the prior *Brady* cases were not clear enough, the Supreme Court's pronouncement in *Banks* should have been the nail in the coffin for all those Circuits still clinging to the Defendant Due Diligence Rule. In *Banks*, the petitioner was convicted of capital murder and sentenced to death. Before trial, despite the prosecutors advisement to the petitioner's attorney that they would fully comply with its *Brady* obligations, the prosecutors did not disclose that one of its witnesses was a paid informant, nor did it disclose a pre-trial transcript revealing that the other witness' trial testimony had been extensively coached by prosecutors and law enforcement officers. In a later federal evidentiary hearing, the withholding of the *Brady* materials came to light. The district court granted relief, but the Fifth Circuit reversed. The State argued because some of this evidence was withheld from the petitioner during his post-conviction proceedings, the petitioner did not fully exhaust his state court remedies on all of his *Brady* issues, thus having to satisfy the "cause-and-prejudice" standard for presenting claims for the first time during a federal habeas corpus proceeding.

This Court easily rejected this argument, but in an even more explicit way than in *Strickler*. This Court ruled:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.' 527 U.S. 263 at 286-287, 144 L. Ed. 2d 286, 119 S. Ct. 1936 [(1999)]. The 'cause' inquiry, we have also observed, turns

> on events or circumstances 'external to the defense.' *Amadeo* v. *Zant,* 486 U.S. 214, 222, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988) (quoting *Murray* v. *Carrier,* 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)). *Banks v. Dretke*, 540 U.S. 668, 695-96 (2004).
>
> The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden . . . to discover the evidence," Tr. of Oral Arg. 35, so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected. *Id.* A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.

One would think this would have been the death knell to the Rule. It was not. The Seventh Circuit, which denied Petitioner's request for a certificate of appealability in this case, continues to follow the Rule, even after *Banks* was decided. See, e.g., *Carval v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). The First, Fourth, Sixth, Eighth, and Eleventh Circuits join the Seventh Circuit in continuing to follow the Rule post-*Banks*. See, e.g., *United States v. Connolly*, 504 F.3d 206 (1st Cir. 2007); *United States v. Jeffers*, 570 F.3d 557, 573 (4th Cir. 2009); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007); *Liggins v. Burger*, 422 F.3d 642, 655 (8th Cir. 2005); *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005). On the other hand, the Second, Third, Fifth, Ninth, Tenth, and the Federal Circuit have explicitly rejected the Rule as having no basis in Supreme Court precedence, especially post-*Banks*. See *Lewis v. Conn. Comm'r of Corr.* 790 F.3d 109, 121 (2d Cir. 2015); *Dennis v. Sec'y, Pa. Dep't*

of Corr., 834 F.3d 263, 291 (3d Cir. 2015); *Floyd v. Vannoy*, 887 F.3d 214, 236 (5th Cir. 2018); *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 2015). The Federal Circuit has always followed this rule, even before *Banks*. See, e.g., *In Re: Sealed Case*, 185 F.3d 887, 896-97 (D.C. Cir. 1999).

The Indiana Appellate Court, applying Indiana law, held, "the State will not be found to have suppressed material evidence if it was available to the defendant through the exercise of due diligence." *Moore v. State*, 32 N.E.3d 844, 2015 Ind. Unpub. LEXIS 535, ¶ 11, 2015 WL 2329146 (Ind. Ct. App. May 13, 2015). Thus, this case presents this Court with an opportunity to resolve the split in the Circuits as to the viability of the Defense Due Diligence Rule.

CONCLUSION

WHEREFORE, Paul Moore, Petitioner, requests this Honorable Court grant this Petition to hear this matter on the merits. Alternatively, this Court should grant the Petition to remand the case to the Seventh Circuit Court of Appeals with directions to grant Petitioner's request for a certificate of appealability.

Respectfully submitted,

/s/Richard Dvorak
Richard Dvorak, *Counsel of Record*
Dvorak Law Offices, LLC
6262 Kingery Highway, Suite 305
Willowbrook, IL 60527
Tel: (312) 593-7146
richard.dvorak@civilrightsdefenders.com
Counsel for Petitioner
Date: April 25, 2022

No. 21A479

In THE Supreme Court of the United States

PAUL MOORE, PETITIONER,

v.

RON NEAL, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

The undersigned, a member of the bar of this Court, hereby certifies that the petition for writ of certiorari complies with the word limitation of Supreme Court Rule 33: the brief, including footnotes, contains 4893 words.

/s/Richard/Dvorak

Richard Dvorak
Counsel of Record for Petitioner
DVORAK LAW OFFICES, LLC 6262 Kingery Highway
Suite 305
Willowbrook, IL 60527
Telephone: (312) 593-7146

APPENDICES

APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED DECEMBER 3, 2021

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

No. 21-1717 [Seal]

December 3, 2021

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

PAUL MOORE,

Petitioner-Appellant,

WARDEN, *Indiana State Prison*,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:15-CV-577-TLS-MGG

Theresa L. Springmann, *Judge*.

ORDER

On consideration of the petition for rehearing filed by Petitioner-Appellant on November 5, 2021, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for rehearing is hereby DENIED.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED OCTOBER 22, 2021

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

No. 21-1717 [Seal]

Decided October 22, 2021

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

PAUL MOORE,

Petitioner-Appellant,

WARDEN, *Indiana State Prison*,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:15-CV-577-TLS-MGG

Theresa L. Springmann, *Judge.*

ORDER

Paul Moore has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability and motion to proceed in forma pauperis are DENIED.

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA. SOUTH BEND DIVISION, DATED MARCH 24, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

CAUSE NO. 3:15-CV-577-TLS-MGG

PAUL MOORE,
Petitioner,

WARDEN, *Indiana State Prison*,

Respondent.

OPINION AND ORDER

Paul Moore, a prisoner without a lawyer, filed a habeas corpus petition to challenge his conviction and sentence for two counts of murder, two counts of criminal confinement, and one count of arson under Case No. 49G02-308-MR-12884. Following a jury trial, on May 5, 2004, the Marion Superior Court sentenced Moore to one hundred twenty years of imprisonment.

FACTUAL BACKGROUND

In deciding this habeas petition, the Court must presume the facts set forth by the state courts are correct unless they are rebutted with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Court of Appeals of Indiana summarized the evidence presented at trial:

> The facts most favorable to the convictions indicate that Moore's mother purchased a .45–caliber Ruger handgun in 2001 and kept it at

Moore's home in the 4300 block of East 39th Street in Indianapolis. On the afternoon of January 25, 2002, Indianapolis Police Department Sergeant David Wisneski responded to a report of a burglary in progress at the home of Linda Jordan. Sergeant Wisneski heard the yelling of gang names and saw an unidentified person push Linda aside and forcibly enter her home. Yonic Jordan then forcibly removed someone from the home. After the situation calmed down, Sergeant Wisneski learned that Derrick Dempsey had lost a fight with Yonic and had driven to the Jordan residence with Moore and a third person "to seek revenge." Sergeant Wisneski asked Dempsey if he could "look inside" his car, which was parked in the driveway with the engine running. Dempsey consented.

In the trunk, Sergeant Wisneski found an assault rifle and a shotgun. A records check indicated that Moore had reported these firearms stolen. Under the front passenger seat, Sergeant Wisneski found a "chrome and black" .45–caliber Ruger handgun, which had not been reported stolen. Moore stated that he owned the handgun and produced a valid handgun permit. Sergeant Wisneski made no arrests but confiscated the firearms "because things were in a very, very dangerous state at that time." Sergeant Wisneski sent the firearms to the police property room. On January 28, 2002, as part of his duties in operating the Integrated Ballistic Identification System ("IBIS"), firearms technician John Brooks test-fired the confiscated handgun and entered the relevant ballistics information into the IBIS computer. In April 2002, Moore's mother retrieved the handgun from the property room and gave it to Moore.

Late one night in June 2003, Moore telephoned Eric Bettis, the uncle of his friend Curtis Ward, and asked for a ride. Eric complied, and Moore gave him $30. The next morning, Moore informed Eric that he had left his gun in the car. Eric's wife, Theresa, stopped by Moore's residence to give him the gun, but he was not at home. Theresa gave the gun to Eric's brother, Herman Bettis, because she did not want to keep it in her car. Herman informed Moore that he had the "black and silver" .45–caliber handgun, and Moore told him to "hang on to it." Herman kept the handgun in his restaurant.

On the evening of Friday, July 18, 2003, Adrian Beverly was riding around with Brandie Coleman and Gregory Johnson, who was dressed as a female and went by the name of Nireah. The trio saw Moore and Ward riding in Moore's car and asked them to pull into a gas station parking lot. Johnson and Moore exited their vehicles, talked briefly, and exchanged phone numbers. Johnson hugged Moore and kissed him on the cheek. Moore was attracted to Johnson. Coleman and Ward also exchanged phone numbers.

On July 21, 2003, Herman Bettis delivered the handgun to Moore at his home. At 12:51 a.m. on July 23, 2003, Coleman called Moore's home phone to speak with Ward. Coleman and Johnson then drove to Moore's home in Coleman's mother's Jeep Grand Cherokee. Coleman, Johnson, Ward, and Moore chatted briefly outside and entered Moore's home. Ward and Coleman went into Ward's room, and Moore and Johnson went into Moore's room.

Later, Moore entered Ward's room with a "black and gray" Ruger .45–caliber handgun and said, "Man, I need to holler at you." The two men went into the kitchen, and Moore asked Ward whether he knew "if Nireah is a man or a female." Ward told the "disturbed" and "upset" Moore that Nireah looked like a woman to him. Moore and Ward went into the living room, where Moore "interrogated" Johnson and Coleman regarding whether Johnson was male or female. After approximately forty minutes of questioning, Johnson had to use the restroom. Moore followed him there and exclaimed in a "stunned, startled" voice, "Man, this is a boy." Moore became "real irate" and talked about feeling "like his manhood's been violated." Moore stated that Johnson "was kissing on him." Moore stated that he should "whip their ass" or "possibly kill them ." Moore asked Johnson, "What did you think, I was a faggot?"

Moore asked Ward to get some wire, which they used to bind Coleman's and Johnson's hands behind their backs. Johnson sobbed that he "didn't mean nothing" and would "never do nothing like that again" and "turn straight." Moore put Coleman and Johnson in the backseat of the Jeep and told Ward to follow him in Ward's car. Moore drove the Jeep from East 39th Street to a small park on Fall Creek Parkway North Drive, where he drove over a curb, around a locked gate, and into a wooded cul-de-sac. Ward drove past the gate, made a U-turn, and returned to see Moore walking up the road. Moore entered Ward's car, took the handgun out of his pocket, dismantled it, and threw the pieces out the window.
Moore said, "Man, I had to do it." Moore told Ward that he had to "calm [Coleman] down" after

he shot Johnson. The pair went back to Moore's home, returned a roto-rooter to a rental store, and went their separate ways.

That afternoon, Moore called Ward and stated that "he might have to go back and burn the truck up." Ward later spoke with Moore's brother, Clarence McGee, who had seen the bodies in the Jeep. McGee asked Ward to pick him up at Moore's home so that "they could go burn the Jeep up." Ward arrived at Moore's home after dark. Moore told Ward that the Jeep had to be burned to "cover his tracks." McGee asked Ward to get a gas can, and the two men drove back to the Jeep. Ward let McGee out of the car near the Jeep, made a U-turn, and retrieved McGee, who smelled of gasoline and said that he had almost burnt himself. Ward saw that the Jeep was in flames. Upon their return, Moore described how Johnson "flopped back in the seat" when he was shot. Moore told Ward that he was like a brother and that "if anything goes down that they wouldn't have anything to worry about."

Just after 9:00 p.m., firefighters were dispatched to the burning Jeep and extinguished the flames. Inside, they discovered the charred bodies of Johnson and Coleman, both of whom had been fatally shot in the forehead before the fire started. Coleman's larynx and chest had suffered blunt force trauma. The .45– caliber bullets recovered from the victims' skulls matched the January 2002 ballistics test of Moore's handgun. Investigators determined that gasoline had been poured in the backseat of the Jeep and ignited. On July 29, 2003, Adrian Beverly identified Ward as the passenger in the car that she had seen in the gas station

> parking lot on July 18 while riding with Coleman and Johnson. Ward initially denied any involvement in the crimes but eventually implicated Moore.
>
> On August 5, 2003, the State charged Moore with two counts of murder, two counts of class B felony criminal confinement, and one count of class B felony arson. Moore and McGee were tried together in April 2004. On April 8, 2004, the jury found Moore guilty as charged. On May 5, 2004, the trial court imposed an aggregate sentence of 120 years.

Op. "Moore v. State" 4-6, ECF No. 4-6 (published as *Moore v. State*, 827 N.E.2d 631, 634–36 (Ind. App. 2005). Moore argues that he is entitled to habeas corpus relief. He asserts that the prosecution deprived him of due process by failing to disclose a plea agreement with Curtis Ward and for knowingly presenting his false testimony at trial. He further asserts that he received ineffective assistance of counsel because trial counsel did not present his grandfather as a witness and that the State court erred by finding that the introduction of ballistics evidence obtained in violation of the Fourth Amendment was harmless error.

STANDARD OF REVIEW

"Federal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (internal quotations and citations omitted).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

[This] standard is intentionally difficult to meet. We have explained that clearly established Federal law for purposes of §2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *Woods,* 135 S. Ct. at 1376 (internal quotation marks and citations omitted). Criminal defendants are entitled to a fair trial, but not a perfect one. *Rose v. Clark*, 478 U.S. 570, 579 (1986). To warrant relief, a state court's decision must be more than incorrect or erroneous; it must be objectively unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists

could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotations and citations omitted).

ANALYSIS

A. Prosecutorial Misconduct

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." *U.S. v. Bagley*, 473 U.S. 667, 676 (1985) (internal quotations and citations omitted). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (internal quotations and citations omitted).

Moore argues that he is entitled to habeas relief because the prosecution failed to disclose an agreement with Curtis Ward, a key trial witness, and that the prosecution knowingly elicited false testimony from Ward regarding the agreement. "The Supreme Court has clearly established that a prosecutor's knowing use of perjured testimony violates the Due Process Clause." *Schaff v. Snyder*, 190 F.3d 513, 530 (7th Cir. 1999). "When the defendant argues that the government allegedly used perjured testimony, to warrant setting the verdict aside and ordering a new trial, the defendant must establish that: (1) the prosecution's case included perjured testimony; (2) the prosecution knew or should have known of the perjury; and (3) there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Shasteen v. Saver*, 252 F.3d 929, 933 (7th Cir. 2001).

At the outset of the investigation, the police suspected both Moore and Ward of committing the murders. Trial Tr., 388:7–8. The prosecution decided to use Ward as a witness against Moore and Clarence McGee. *Id.* 388, 434-96. The prosecution charged Ward with criminal confinement, arson, and assisting a criminal, but did not charge him with murder. *Id.* 396:14–15. The prosecution also agreed to reduce Ward's bond from $250,000 to $25,000 and required continued contact with the prosecution as a condition of his release. Post-Conviction Relief Hr'g Tr., 14-17 (referencing the transcript for Ward's bond hearing).

On January 28, 2004, the trial court held a pretrial conference, and Moore's trial counsel represented as follows:

> **Trial Counsel:** Also, Judge, in a roundabout way, [Ward] is on probation looking at a three-year backup, picks up this case here -- Curtis Ward's charged also -- and in essence with his statement and cooperation with the State of Indiana, he has basically confessed to what his involvement, alleged involvement, is. So we're looking at a conviction on Mr. Ward which then in turn reverses or subjects him to a violation of that probation. But yet Mr. Ward is out on bond through an agreement with the State of Indiana.
>
> **The Court:** It wasn't my agreement though, I can tell you that, because you know what -- I set my bonds at $250,000 on those, so . . .
>
> **Trial Counsel:** And, Judge, basically reviewing that file, at first Mr. Ward's bond was no bond, you then set it at two hundred and fifty, and then on September the 5th, it was, by agreement, his bond miraculously dropped down to fifteen thousand.

Trial Tr. 26.

Two months later, at trial, trial counsel provided the following opening statement:

[The prosecution], the State of Indiana, intends to call thirty-six witnesses during the course of the next three days, please pay attention to each and every one of them. However, as Mr. Staples has eluded to for the length -- the majority of his opening argument, there's one individual by the name of Curtis Ward. Curtis Ward is interviewed by the State of Indiana to the detectives on July 30th, 2003. In that first interview, Curtis Ward denies any knowledge involving the deaths of Mr. Johnson and Ms. Coleman. That interview, according to Det. Gullion, takes about an hour or so. Mr. Ward, after that interview, is then let go. One important thing comes out of that interview and you'll hear from the detective that, during the course of that hour plus time, the detectives, using what they conveniently call "interview techniques," I call it "lying," plant in the mind of Curtis Ward that Paul Moore has pointed the finger at Curtis. They'll tell you Paul never said a thing like that. So they let Curtis go, and Curtis, over the course of the next thirteen days, develops a story, he also hires an attorney and he comes back to the detectives of the State of Indiana on August 6, 2003, and, after negotiations with the State of Indiana and striking what they call a "gentleman's handshake," which I call "you scratch my back, I'll scratch your back," Curtis Ward starts telling a story implicating Paul Moore. I'm not going to go into the details of it because I'm going to tell you the truth, he's now denied everything on July 30, now he comes back on August 6th with this story. This is after the deal

with the State and you'll hear about the benefit that he has received and possibly could still receive for this cooperation.

* * *

Please pay attention to all of the evidence, but you watch those TV shows -- a "star witness," in my opinion -- Curtis is their star. Remember the cookie jar when you go to deliberate. Thank you, ladies and gentleman.

Id. 103-04; 105–06.

Ward testified for the prosecution as their sole eyewitness of the events immediately preceding and following the murder of the victims. Moore's trial counsel cross-examined him as follows:

Trial Counsel: Mr. Ward, you made an interesting comment, you're trying to protect yourself, correct?

Ward: Yeah.

Trial Counsel: The statement and something about you being on probation right now, correct?

Ward: Correct.

Trial Counsel: What was that for again?

Ward: Gun charge.

Trial Counsel: Gun charge. Out of what courtroom, sir?
Ward: I'm not sure. It might be three, two. I'm not sure.

Trial Counsel: Isn't it a fact that it's out of this courtroom?
Ward: Possible, yeah.
Trial Counsel: And did you know what your bond was set in regards to your probation violation?

Ward: No.

* * *

Trial Counsel: Would you doubt or know different if I was to tell you your original bond, in regards to just the probation violation, was $250,000?

Ward: I'm not sure.

Trial Counsel: You're not sure. Your lawyer never told you anything about that?

Ward: The whole total bond was $250,000?

Trial Counsel: Right.

Ward: Initially, yeah.

Trial Counsel: Yeah. Okay, so you do know that. Do you know what bond your family posted to release you?

Ward: I don't know the exact amount.

* * *

Trial Counsel: Do you have reason to doubt me if I told you based on an agreement between you, your lawyer and the State of Indiana your bond

was reduced from $250,000 to $15,000?

Ward: You're asking me would I disagree?

Trial Counsel: Yeah. Do you know different to that or am I telling you wrong?

Ward: No, I do not.

Trial Counsel: Uh-huh. So simple mathematics, based on the agreement between you, your lawyer and the State, there's a reduction, by agreement, of $235,000, fair enough mathematics?

Ward: Yeah.

Trial Counsel: Now, you have been free on that bond since when?

Ward: October of last year.

Trial Counsel: You got out in October?

Ward: Yeah.

Trial Counsel: Okay. Do you know what your backup time, if the Court finds you in violation of your probation?

Ward: I don't know exactly.

* * *

Trial Counsel: You are looking at -- and I don't know the exact numbers -- but I know it's over one thousand days backup time. Fair enough?

Ward: Fair enough.

Trial Counsel: Roughly three years, you understand?

Ward: Yeah.

Trial Counsel: And you're out on bond facing that, correct?

Ward: Yeah.

Trial Counsel: Has anyone, your lawyer in particular, ever explained to you based on his past experiences, the policies or the actions of this Court on probation violations?

Ward: No, sir.

Trial Counsel: Okay. But you are trying to protect yourself, correct?

Ward: That was initially.

Id. 496-99. On redirect, the prosecution asked Ward whether he been promised anything in exchange for his trial testimony. He responded, "No, I haven't." *Id.* 538–39.

> Moore's trial counsel also addressed this issue during closing arguments:
>
> [Ward] is truly to protect himself. [The prosecution] referred to how he has received a benefit already about the bond, yes, he has. I don't know if you're curious but reading of the charges he's facing, oops, [Ward] is not charged with murder. And from this deal, there's no writings. It's a gentleman's handshake. After we finish here today, what's going to happen? Do you know? I

don't. As far as I know, [Ward's] charge is dismissed. Who knows? I don't. Yes, he has a lot to gain, he is doing a wonderful job protecting himself.

Id. 982.

At the post-conviction stage, the prosecuting attorney testified at an evidentiary hearing as follows:

Q: Okay. So that -- so [Ward's] bond reduction was based on an understanding that you'd reached with [Ward's counsel] that he would cooperate with the State -
- Mr. Ward would cooperate with the State.

A: It wasn't the basis but it was a -- and I hate to use a colloquialism -- a chit in the game, if you will.

Q: And that -- that request as a condition of the bond was granted by the Court, is that correct?

A: According to the transcript, yes.

* * *

Q: So if Mr. Ward didn't cooperate with that condition, his bond would be revoked. Is that your recollection after reading the transcript?

A: Yes. Judge Altice says: If either of these gentlemen come back in here and tell me that you have not stayed in touch with them then I'm going to revoke your bond. Yes.

* * *

Q: Do you recall if you had said we're working towards an agreement in this matter with Mr. Ward?

A: Do I recall saying -- yes, I probably did say -- well, let me look.

Q: Page seven, line eight.

A: Yes . . . I had been meeting with [Ward's counsel]. I'd been talking with [Ward's counsel], and that's what we were doing.

Q: Do you – do you recall stating that you were working towards an agreement but you haven't -- you haven't got it reduced to writing yet?

A: Yes.

Q: And then if – once – once you would utilize Mr. Ward's statement, you'd use him to testify against Mr. McGee and Mr. Moore, is that correct?

A: That was the plan, yes.

* * *

Q: . . . Mr. Ward received two separate bond reductions in this case that we discussed earlier and those were based on the understanding that he would be a State witness, he had to cooperate with the State. Under *Brady*, do you believe that that should have been disclosed to the defense?

A: Well, your -- your question assumes something

that's not entirely true. We didn't reduce the bond because he was a witness; we reduced bond because we were negotiating with his attorney regarding whether or not he was going to be a witness. So like I -- I said earlier I used the term, and I wasn't making light of the proceedings, it was a chit in the game. .....to [Ward's counsel]: Fine, I'll agree to a reduced bond, that'll let you know I'm talking to you in good faith. You know, tell your guy he needs to get on the team or he can be sitting over there with Moore and McGee. You know, what's it going to be? It was that kind of back and forth. So that wasn't something I had to reveal, I suppose. It was just the way things were going.

Post-Conviction Relief Hr'g Tr., 17-20; 23–24.

On cross-examination, the prosecuting attorney testified:

Q: At the time that Mr. Ward testified in Mr. Moore's trial, did he have a plea agreement?

A: As I recall, he did not.

Q: At the time that he testified, would it be true to say that you had not completed negotiations with Mr. Ward regarding what his ultimate plea agreement was going to be or if he was going to plead guilty at all?

A: That -- that is true, yes.

Q: But it would be fair to say, would it not, that there had been discussions . . . leading up to that?

A: Discussions were ongoing, yes.

* * *

Q: . . . to the best of your recollection, what was -- what should have been [Mr. Ward's counsel's] understanding of his client's legal situation at the point that he testified?

A: That he could either hurt himself or help himself if he told the truth about what happened and that he could utilize that in negotiating with us with regard to a sentence on his pending charges.

Id. 31–33.

Ward also testified at the post-conviction relief hearing:

Q: Okay. But your testimony today is that there was no -- there was no understanding or agreement or promises made between you and the State prior to you testifying at trial?

A: No promises that I could grab on hold to. There was no specifics at all. None. No specifics, no details, no nothing.

* * *

Q: Now you recall meeting with Bridget Rogers, correct?

A: Yes.

Q: Okay. Prior to -- in 2010, you met with Ms. Rogers. Now did Ms. Rogers ask you at that time if you had any agreements with the State?

A: Yeah, see, right here. It says -- I mean, it says that she

asked.

Q: Okay. Did she ask you if it was an unsaid agreement, a wink and a nod?

A: Right.

Q: And what did you tell her?

A: Yes.

Q: And is your testimony today that you had a wink and a nod, an unsaid agreement with the State?

A: I'm saying yes but no specifics, no details. I knew nothing. Totally blind. That's what I'm telling you.

Id. 110–12.

The Court of Appeals of Indiana rejected the failure to disclose material evidence claim, finding that the prosecution had reached no agreement with Ward. *See* Mem. Decision on Post-Conviction Relief 8-14, ECF No. 4-13. The appellate court further found that trial counsel and the jury were aware of the understanding between the prosecution and Ward that Ward's trial testimony would likely result in a more favorable plea agreement. *Id.* 11–12 ¶ 16. The appellate court also rejected the claim that the prosecution had suborned false testimony from Ward because no evidence suggested that the prosecution had promised Ward favorable treatment for his trial testimony. *Id.* 13–14 ¶ 20.

After reviewing the record, the Court cannot conclude that the State court made an unreasonable determination on the prosecutorial misconduct claims. Significantly, trial counsel's description of the relationship between the prosecution and Ward

presented to the jury at trial mirrors the description provided the prosecution and Ward at the post-conviction evidentiary hearing. Stated otherwise, trial counsel's reference to a "you scratch my back, I'll scratch your back" arrangement, the prosecution's reference to "a chit in the game," and Ward's confirmation of "an unsaid agreement" consisting of "a wink and a nod" are one and the same. These terms all cover an understanding between the prosecution and Ward that, if Ward testified against Moore at trial, he would likely receive a more favorable plea agreement. This mutual understanding, which did not include specific terms and was not itself an agreement, was known by trial counsel, who capably relayed it to the jury during opening statements, through cross- examination, and during closing arguments. The record further demonstrates that trial counsel was fully aware of the terms of the bond reduction at the time of a pretrial conference two months before trial. While Moore may understandably believe that the prosecution's relationship with Ward was unfair, the prosecution did not conceal this relationship from him.

For similar reasons, the claim that the prosecution suborned false testimony from Ward also fails. The record contains ample evidence that the prosecution did not promise Ward favorable treatment for his testimony. Moore contends that, even if Ward's testimony to this effect was true in the literal sense, it created a false impression of a material fact, but the context of the testimony proves otherwise. Specifically, the prosecution raised Ward's lack of formal agreement on redirect examination only after trial counsel had impugned Ward's motives for testifying on cross-examination and indicated that attacking Ward's credibility was a key component of the defense strategy during opening statements. The prosecution did not deny or elicit testimony to contradict trial counsel's narrative but instead established a boundary around that narrative with Ward's testimony to show that it went no further. Therefore, the prosecutorial misconduct claims are not a basis for habeas relief.

B. Ineffective Assistance of Trial Counsel

Moore argues that he is entitled to habeas relief because he received ineffective assistance of counsel due to trial counsel's failure to present his grandfather as a witness. He contends that this testimony would have contradicted Ward's testimony that he was with Moore from the time of the murder to the time when they returned rented plumbing equipment later that morning.

To prevail on an ineffective assistance of counsel claim in the State courts, a petitioner must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel's performance was deficient, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotations and citations omitted). This presumption is an important tool to eliminate the "distorting effects of hindsight." *Id.*

The test for prejudice is whether there was a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In assessing prejudice under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). However, "[o]n habeas review, [the] inquiry is now whether the state court unreasonably applied *Strickland*." *McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013). "Given this high standard, even 'egregious' failures of counsel do not always warrant relief." *Id.*

At trial, Ward testified that, after Moore shot the victims, Ward drove back with Moore to Moore's residence and that, later that morning, they returned plumbing equipment that Moore's mother had rented.

> **Trial Counsel:** You mentioned something about a Roto-Rooter, the morning of July 23rd?

Ward: Yeah.

Trial Counsel: You helped [Moore] take it back?

Ward: Yes, I did.

Trial Counsel: What time was that?

Ward: Early morning. He had to have it back first thing in the morning, so he could get his deposit.

Trial Counsel: Would it be fair to say it was seven a.m.?

Ward: Sometime around there.

Trial Counsel: So if you had returned the Roto-Rooter back to this place around seven a.m. how long had you been back to the house from this incident on Fall Creek Parkway?

Ward: Maybe a couple of hours. Hour and a half.

Trial Tr. 513-14. Moore's mother presented a different timeline, testifying that she had spoken with Moore about the equipment at about 8:00 a.m., told the rental company that it would be a late return, and asked Moore's grandfather to assist Moore with the return. *Id.* at 663. Trial counsel later presented a receipt to show that Moore had returned plumbing equipment at 9:39 a.m. Trial Ex. A.

At the post-conviction relief stage, Moore argued that trial counsel should have presented his grandfather as a witness. At the evidentiary hearing, Moore's grandfather testified that he drove to Moore's residence and arrived there at 8:40 a.m. that morning. Post-Conviction Relief Hr'g Tr., 67:21–22. According to his testimony, Moore was the only person present when he arrived, and Ward pulled behind his car shortly thereafter. *Id.* 67–68. The Court of Appeals of Indiana rejected this claim for lack of

prejudice, noting that Ward did not testify that his time with Moore that morning was continuous and uninterrupted and that Moore's grandfather's testimony would not have contradicted Ward's testimony. *See* Mem. Decision 16-17, ¶¶ 25–26.

After reviewing the record, the court cannot find that the State court's determination regarding trial counsel was unreasonable. It might be reasonable to infer from Ward's testimony that Ward remained with Moore until the time the plumbing equipment was returned, but Ward was never squarely presented with that question nor did he make any express representations that he did so. Even if he had, it is unclear how rebutting this testimony would have meaningfully affected the outcome of the case. Moore concedes that this was not a material fact but contends his grandfather's testimony would have generally detracted from Ward's credibility and bolstered Moore's credibility. However, the rental store receipt and Moore's mother's testimony also demonstrated that Ward's account the sequence of events after leaving the scene of the murders was flawed and bolstered Moore's account. Moreover, the effect of this flawed account on Ward's credibility likely paled in comparison to the effect of trial counsel's arguments that Ward rather than Moore had committed the murders or that favorable treatment from the prosecution motivated Ward's testimony.

In sum, the record reflects that trial counsel presented the jury with a vigorous and substantial attack on Ward's credibility. It further reflects that the testimony of Moore's grandfather would have served only to contradict an immaterial fact that was not included in Ward's testimony. Because it is unclear how the absence of Moore's grandfather's testimony prejudiced Moore, the claim that trial counsel should have presented Moore's grandfather as a witness is not a basis for habeas relief.

C. Ballistics Evidence

Moore argues that he is entitled to habeas relief because the prosecution presented ballistics evidence obtained in violation

of the Fourth Amendment, which the State court incorrectly found to be harmless error. On habeas review, a constitutional error is considered harmless unless it can be shown to have "had substantial and injurious effect or influence in determining the jury's verdict." *Czech v. Melvin*, 904 F.3d 570, 577 (7th Cir. 2018) (internal quotations and citations omitted). "That is, petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Id.* "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). "In conducting this analysis, we look to a host of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011) (internal quotations and citations omitted).

At trial, the prosecution introduced evidence to show that, on January 25, 2002, a police officer confiscated a handgun from Moore because Moore was involved in a dispute and the police officer believed that it could escalate to violence. Trial Tr. 583–84, 594. The police department tested the handgun by firing it and recorded their results. *Id.* at 607, 613. These results included the unique markings on bullets fired from the handgun that were consistent with the grooves on the inside of the barrel of the handgun. *Id.* at 613, 629. The bullets recovered from the victims' bodies were consistent with the results obtained from Moore's handgun in 2002. *Id.* at 641. The trial court admitted testimony regarding this match against trial counsel's objection that it violated the Fourth Amendment. *Id.* at 595-600. The prosecution also introduced evidence through the testimony of three members of the Bettis family that Moore left the handgun in another person's vehicle but that the handgun was returned to Moore two

days before the date of the murder. *Id.* at 680, 693–95, 697, 704–05. In response, Moore testified that he had not seen the handgun since his home was burglarized in August 2002. *Id.* at 787–89.

On direct appeal, the Court of Appeals of Indiana found that the police officer seized the handgun in violation of the Fourth Amendment and that the trial court should not have admitted the ballistics evidence. Op. "Moore v. State" 8–9. However, the appellate court concluded that the admission of the ballistics evidence was harmless beyond a reasonable doubt, reasoning that it was not inconsistent with Moore's claim of innocence because Moore claimed that he had not seen the handgun since August 2002. *Id.* 10. The appellate court also reasoned that the ballistics evidence was cumulative of testimony from Ward and other witnesses. *Id.*

After reviewing the record, the Court cannot find that the State court's harmless error determination was unreasonable. To start, the prosecution's case against Moore was strong, if not overwhelming, even without the ballistics evidence. It included testimony from the victims' friend demonstrating Moore's interactions with Johnson and his attraction to Johnson, which Moore confirmed through his own testimony. Trial Tr. 720-27, 792-99. It included telephone records showing that Coleman, a close friend of Johnson, had called Moore's residence on the night of their murders. *Id.* at 746, 817; Trial Ex. 89. It also included Ward's testimony that Moore had committed the murders by shooting the victims because he felt emasculated by his romantic involvement with Johnson. *Id.* at 453–58, 464.

Considering the record as a whole, it seems unlikely that the ballistics evidence played a significant role in the jury's determination. The evidence at trial indicated that Moore and Ward, who were close friends and housemates, were the most likely culprits and forced the jury to choose between their accounts. The ballistics evidence was unnecessary to establish their connection with the victims on the night of murders in light of the telephone records. The ballistics evidence also did little to clarify whether Moore or Ward committed the murders or which of their accounts was more credible as housemates would likely

have shared access to weapons regardless of ownership. Moreover, even setting aside the inadmissible portions of the ballistics evidence, other witnesses testified that they returned a handgun to Moore days before the murder, and the expert witness would have remained able to identify that the bullets in the victims' bodies were consistent with the type of handgun owned by Moore. The record also contained evidence of Moore's motive to commit the murders but no evidence to suggest a motive for Ward. Consequently, even if the ballistics evidence caused some prejudice, any such prejudice would have been substantially outweighed by the impact of the evidence related to motive. Therefore, the Court cannot find that the admission of the ballistics evidence had a substantial and injurious effect on the jury's decision or that it is a valid basis for habeas relief.

CERTIFICATE OF APPEALABILITY

Pursuant to Section 2254 Habeas Corpus Rule 11, the Court must grant or deny a certificate of appealability. To obtain a certificate of appealability under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing "that a reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons explained in this order, there is no basis for encouraging Moore to proceed further.

For these reasons, the Court DENIES the habeas corpus petition [ECF No. 1]; DENIES a certificate of appealability pursuant to Section 2254 Habeas Corpus Rule 11; and DIRECTS the clerk to enter judgment in favor of the Respondent and against the Petitioner.

SO ORDERED on March 24, 2021.

s/ Theresa L. Springmann

JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT