

No. 23-7509

**In The
Supreme Court of the United States**

THOMAS J. MOORE,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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Capital Case

QUESTION PRESENTED

Whether Petitioner is entitled to habeas relief from a procedurally defaulted claim raised in a time-barred federal petition for writ of habeas corpus after the state court denied review of the claim due to a state procedural rule?

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STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1254(1). Respondent agrees that that statutory provision sets out the scope of this Court's certiorari jurisdiction to review cases from the court of appeals. However, as will be explained below, Respondent submits that this case is altogether inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel." U.S. Const. amend VI, § 1.

STATEMENT OF THE CASE

In 1993, Petitioner, Thomas James Moore, was convicted of first-degree murder, attempted armed robbery, conspiracy to commit armed robbery, armed burglary, and arson after he killed his neighbor and set his house on fire. Moore was sentenced to death, and the Florida Supreme Court affirmed Moore's convictions and death sentence. *Moore v. State*, 701 So. 2d 545 (Fla. 1997). This Court denied Moore's petition for writ of certiorari.

Moore subsequently filed a motion for postconviction relief in state court containing numerous claims, including that he was improperly prejudiced by the prosecutor's closing argument and that his trial counsel was ineffective for failing to

object to the prosecutor's closing arguments. The prosecutor's remarks at issue were made during the guilt and penalty phases as follows: "Crime conceived in hell will not have any angels as witnesses. And, ladies and gentlemen, as true as that statement is, Grand Park is hell, And that man right there is the devil" and "...sometimes you have to deal with sinners to get the devil. And I would submit to you what the State did was we dealt with this sinner and we dealt with this sinner to get this devil." *Moore v. State*, 820 So. 2d 199, 207 (Fla. 2002).

The postconviction court determined that Moore's challenge to the prosecutor's closing argument was procedurally barred and it denied Moore's ineffective assistance of counsel claim. *Moore*, 820 So. 2d at 208 n. 10. The Florida Supreme Court affirmed, noting that "Moore's claim that he was improperly prejudiced by the prosecutor's remarks could have been raised on direct appeal and, therefore, the trial court correctly found this claim to be procedurally barred." *Id.* The Florida Supreme Court affirmed the denial of relief on the ineffective assistance of counsel claim and determined that Moore had specifically failed to establish prejudice under *Strickland*¹ by counsel not objecting to the closing argument. *Id.* At 208.

Moore then filed a petition for writ of habeas corpus in the district court under 28 U.S.C. § 2254 (d). He included among his grounds for relief the ineffective assistance of trial counsel claim for failing to object to the prosecutor's closing argument as well as the prosecutorial misconduct argument. The court first determined that Moore's habeas petition had been untimely filed beyond the one-year

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

statute of limitations period. A-36. Despite finding the petition time-barred, the court addressed the merits of the habeas petition. A-36-37.

In reaching Moore’s closing argument claim based on ineffective assistance of counsel as well as prosecutorial misconduct, the district court determined that the ineffective assistance of counsel portion of the claim had been exhausted. The court applied the deferential standard of review and rejected Moore’s ineffective assistance of counsel claim, finding that the state court’s adjudication of the claim was not contrary to clearly established federal law, did not involve an unreasonable application of federal law, and was not based on an unreasonable determination of the facts. A-111. The court rejected the remaining claims and ultimately denied habeas relief. It also determined that a certificate of appealability (“COA”) was not warranted. A -185.

In the Eleventh Circuit, Moore sought a COA on the ineffective assistance of counsel claim for the failure to object to the prosecutor’s closing argument; a *Giglio*² claim relating to two witnesses, and an ineffective assistance of appellate counsel claim. The Eleventh Circuit granted a COA on a *Giglio* issue related to one witness, and the court denied a COA on the remaining issues. A-5. The Eleventh Circuit held that the district court properly determined that the state court’s adjudication of Moore’s *Giglio* claim was not based on an unreasonable determination of the facts, and it affirmed the district court’s denial of Moore’s habeas petition. A-12-14.

Moore then filed his instant petition for writ of certiorari in this Court based

² *Giglio v. United States*, 405 U.S. 150 (1972).

on the closing argument claim that was deemed procedurally barred by the state courts and not addressed by the court below.

REASONS FOR DENYING THE WRIT

I. This Case Is An Exceptionally Poor Vehicle For This Court's Review

a. This Court Lacks Jurisdiction

Moore couches his question presented in terms of ineffective assistance of counsel for failing to object to the prosecutor's closing argument referring to Petitioner as the devil; however, the focus of his petition is on the propriety of the prosecutor's closing argument and whether the comments amounted to a violation of due process. Moore altogether fails to address ineffective assistance of counsel under *Strickland*, and instead, he presents a substantive prosecutorial misconduct claim.

Moore's prosecutorial misconduct claim was first raised in his state motion for postconviction relief alongside his ineffective assistance of counsel claim for failing to object to the prosecutor's closing argument. While the Florida Supreme Court reached the merits of the ineffective assistance of counsel claim, the court did not address the assertion that Moore was improperly prejudiced by the prosecutor's closing argument. *Moore v. State*, 820 So. 2d 199, 208 (Fla. 2002). Indeed, the state court found that the substantive challenge involving prosecutorial misconduct was procedurally barred for not having been raised on direct appeal. *Moore*, 820 So. 2d at n. 10.

The district court acknowledged that the Florida Supreme Court found Moore's claim that the prosecutor's comments prejudiced him to be procedurally barred, but the court found that Moore exhausted his claim as it related to ineffective assistance of counsel for failing to object to the prosecutor's closing argument. A-110-111. The

court ultimately concluded that Moore was not entitled to habeas relief on his ineffective assistance of counsel claim. A-111-112. The Eleventh Circuit denied a COA on the ineffective assistance closing argument claim.

Nevertheless, the petition is based on the argument that was deemed procedurally barred by the Florida Supreme Court. The petition is based entirely on alleged prosecutorial misconduct, rather than ineffective assistance of counsel. Under Florida law, a defendant is procedurally barred from raising a substantive claim in postconviction proceedings that could have been raised on direct appeal. *See Ferrell v. State*, 29 So. 3d 959, 977 (Fla. 2010) (finding a substantive claim of improper closing argument should have been raised on direct appeal, and, thus, procedurally barred); *see also Dufour v. State*, 905 So. 2d 42, 67 (Fla. 2005) (a claim of error during trial is procedurally barred when it should have been presented on direct appeal); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1016 (Fla. 1999) (holding substantive postconviction claims procedurally barred when they could have been raised on direct appeal). Likewise, postconviction proceedings cannot be used as a second appeal on the merits by raising an issue under the guise of ineffective assistance of counsel. *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000); *see also Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011) (“A defendant may not attempt to circumvent the procedural bar to his claims by raising conclusory allegations of ineffective assistance of counsel.”).

Here, the state court’s bar to Moore’s substantive closing argument claim was based on state procedural law that is independent of any federal grounds. This Court has repeatedly recognized that where a state court judgment rests on non-federal

grounds, and where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, “our jurisdiction fails.” *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Michigan v. Long*, 463 U.S. 1032, 1038, 1041-42 (1983); *see also Illinois v. Gates*, 462 U.S. 213 (1983) (explaining that the Supreme Court’s jurisdiction fails where the federal question has not been raised and decided below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below). The independent and adequate state ground doctrine applies with equal force to bar federal habeas relief when a state court declined to address a defendant’s federal claims because he failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. at 729–30. Given that the Florida Supreme Court’s denial of this claim rests on adequate and independent state law grounds, this Court lacks jurisdiction, and the petition for certiorari should be denied.

b. The District Court Ruled On Alternative Grounds, And The Alternative Ruling Precludes Moore From Obtaining Relief

The instant petition for writ of certiorari is from the denial of Moore’s federal habeas petition. Notably, the district court held that Moore’s entire habeas petition was untimely filed. A-36-37. The court determined that the successive state postconviction motion was not timely filed and, thus, did not serve to toll the one year-statute of limitations period. A-36. Therefore, when Moore filed his federal habeas petition, the statute of limitations period had already run. A-36. Despite finding that Moore “did not timely file his Petition,” the district court considered the merits of his

claims and ultimately denied habeas relief. A-37.

When Moore sought an application for COA in the Eleventh Circuit, he failed to challenge the district court's alternative holding that the habeas petition was untimely. The Eleventh Circuit granted COA on one issue (a *Giglio* claim), and it affirmed the denial of the habeas petition. A-5. Because the district court's ruling that the entire habeas petition was untimely was not challenged by Moore on appeal, it was not reviewed by the Eleventh Circuit. Instead, in addressing the *Giglio* claim, the Eleventh Circuit noted that "We assume without deciding that Moore's *Giglio* claim was timely raised[.]" A-10.

Given the district court's alternative ruling that Moore's habeas petition was untimely, the outcome of the case would not change even if this Court granted certiorari and reversed the question presented. That is because the alternative, unchallenged ruling on timeliness remains, and that ruling supports the overall denial of habeas relief. Accordingly, an independent alternative ground exists for denying habeas relief that Moore has not challenged, and that alternative ground would remain unaffected by any determination in this case. For these reasons, this Court should deny certiorari review.

II. The Petition Does Not Allege A Conflict Or A Profoundly Important Issue, And This Case Is Fact Intensive

In addition to this case having serious vehicle problems, Moore has failed to provide any compelling reasons to warrant this Court's review. The petition does not allege that the lower court's decision conflicts with the decision of another United States court of appeals on the same matter. Nor does it claim that the lower court

decided an important federal question in a way that conflicts with a decision by a state court of last resort. Moore does not assert that the lower court decided an important federal question that conflicts with relevant decisions of this Court.

As this Court has acknowledged, “there are strong reasons to adhere scrupulously to the customary limitations of [the Court’s] discretion.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Moore has not set forth any compelling reason for this Court to exercise its discretionary review in granting the petition for writ of certiorari. Sup. Ct. R. 10.

In addition to not alleging conflict, the petition does not involve an important question of federal law that has not been, but should be, settled by this Court. The question in this case is not one of widespread impact or importance. Instead, the question is so fact-specific that it could only impact this very case. “We do not grant a certiorari to review evidence and discuss specific facts.” *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Moore spends much of his petition focusing on the facts and evidence from his trial in an effort to rebut the district court’s determination that the improper comments “did not pervade the proceedings,” which was part of the court’s prejudice analysis. A-111. The court ultimately determined, that “given the evidence against Moore, as well as the significant aggravating factors and the minimal mitigating evidence, there is no reasonable probability that, in the absence of the improper remarks, the outcome” of the trial would have been different. A-112.

Moore does not contend that the district court’s determination contravenes

Strickland or any other case. Instead, Moore relies primarily upon the facts of his case and the evidence adduced during his trial in an effort to distinguish this case factually from *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Darden v. Wainwright*, 477 U.S. 168 (1986). Again, Moore does not argue that the district court's decision conflicts with those cases, but rather, that his facts are worse than other cases where this Court has not granted relief.

This Court rarely grants a petition for writ of certiorari “when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. Moore's arguments do not even reach that meager threshold, as he does not claim that the factual findings were erroneous or that the law was misapplied. He merely argues that the facts in his case are worse than in other cases, and therefore, warrant a different result. This is not a proper exercise of this Court's jurisdiction.

III. The Resolution Of This Claim Was Correct

The lower courts' resolution of this claim was entirely correct. As previously explained, the Florida Supreme Court properly deemed the prosecutorial misconduct claim procedurally barred for not having been raised on direct appeal. Moreover, the state court denied the ineffective assistance of counsel portion of the claim for failing to object to the closing argument, finding no prejudice under *Strickland* given the evidence in the case, the comments at issue were merely two isolated references, and the aggravating factors far outweighed the minimal mitigation. *Moore*, 820 So. 2d at 208. The district court found that the state court's adjudication of this claim was not

contrary to clearly established federal law or based on an unreasonable determination of the facts in light of the evidence presented. A-112.

The burden was on Moore to show deficient performance and that his attorney's failure to object to the closing arguments resulted in prejudice to his defense. *Strickland*, 466 U.S. 668, at 687. To demonstrate prejudice, a defendant must show "a reasonable probability that ... the result of the proceeding would have been different" but for attorney error. *Id.*, at 694. The prejudice showing is a necessary part of a *Strickland* claim because "a defendant has a right to effective representation, not a right to an attorney who performs his duties mistake-free." *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017). "Thus, a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). "Surmounting *Strickland*'s high bar is never an easy task." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (cleaned up). But establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) "is all the more difficult." *Id.* Moore failed to show that the state court's application of *Strickland* was unreasonable.

Moore merely cites *Donnelly v. DeChristoforo*, and *Darden v. Wainwright*, and alleges that his case was factually worse than those cases. Moore, however, does not allege that the Florida Supreme Court, in denying his ineffective assistance of counsel claim, violated those cases.

Moore paints his case as one involving a mere credibility contest between himself and the two codefendants, but he fails to mention the additional trial witnesses who

corroborated the codefendants' testimony and refuted his testimony. *Moore*, 701 So. 2d at 547. In addition to the codefendants' testimony explaining how Moore was the mastermind behind the robbery and murder, Michael Dean, the victim's neighbor, testified that he was at the victim's house with Moore shortly before the fire. (T. 502-507). According to Dean, Moore asked him to rob the victim, but Dean declined and left the victim's house. (T. 611).

Moore's defense was that he was with Christopher Shorter instead of at the victim's house when the murder occurred (T. 1097-1111); however, Shorter testified that Moore left his house and returned later when the victim's house was on fire. (T. 988-995). Moore had changed his clothes and had asked Shorter to get rid of the clothing he was wearing earlier that day. (T. 993-994). Shorter testified that Moore admitted to him that he shot the victim and set his house on fire. *Moore*, 701 So. 2d at 547.

Audrey McCray testified that she saw Moore walking home, that he went into his home and came back outside about five minutes later wearing different clothing. (T. 1038-40). Around that time, she noticed the victim's home on fire. (T. 1040). She told Moore that the victim's house was on fire, and Moore told her that it was probably caused by the pot of greens that the victim was cooking catching on fire. (T. 1041). McCary and other neighbors rushed over to help the victim, but Moore did not go to the victim's house to help him. (T. 1041).

Further, a jail inmate, Randy Jackson, testified that Moore told him that he did not mean to kill the victim, but that he had to because the victim would recognize

him. *Id.* Various other neighbors testified in a manner consistent with the codefendants' testimony. (T. 451-463, 488-490, 606-608, 532-537, 655-657). In addition to the evidence of Moore's guilt supporting his conviction, there were weighty aggravating factors (prior violent felony, avoid arrest, and pecuniary gain) in support of his death sentence that far outweighed the minimal mitigation presented. *Moore*, 701 So. 2d at 547.

Moore never established that the Florida Supreme Court's denial of his ineffective assistance of counsel claim based on a lack of prejudice was contrary to clearly established federal law. Moore failed to meet his burden of establishing prejudice under *Strickland*. *Weaver v. Massachusetts*, 582 U.S. 286, 288 (2017) (where petitioner failed to show a reasonable probability of a different outcome but for counsel's failure to object). He further failed to meet his burden under § 2254 of showing that the denial of his ineffective assistance of counsel claim involved an unreasonable application of clearly established law. The district court correctly denied habeas relief on this claim, and there was no basis for the Eleventh Circuit to grant a COA here. Moore's petition for writ of certiorari should be denied.

CONCLUSION

This case is an extremely poor vehicle to address the question presented, and Moore has not provided any compelling reason for this Court to grant certiorari review. Accordingly, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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