No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD BERNARD MOORE,

Petitioner,

VS.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

LINDSEY S. VANN
Counsel of Record
ROSALIND S.D. MAJOR
ALLISON FRANZ
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME, III
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

COUNSEL FOR PETITIONER

****CAPITAL CASE****

QUESTION PRESENTED

Richard Moore is the last person on death row in South Carolina who was convicted and sentenced to death by an all-white jury. Moore is Black and the victim in his case was white. The State removed the only two otherwise qualified Black jurors through the exercise of its peremptory challenges. During individual *voir dire,* the State engaged in excessive and disparate questioning of the Black potential jurors when compared to how it approached white potential jurors. The State's proffered reasons for removing the two Black jurors were not supported by the record or were not applied to similarly situated white jurors, revealing that the reasons were pretextual and the challenges violated the Equal Protection Clause. Despite the evidence of racial animus, the Supreme Court of South Carolina rejected Moore's claim. Given the strength of the record, **the question presented is:**

1. Whether the Supreme Court of South Carolina failed to apply the factors outlined by this Court in *Flowers v. Mississippi*, 588 U.S. 284, 139 S. Ct. 2228 (2019), in determining whether the State had exercised its challenges in a racially discriminatory manner given that the totality of the circumstances demonstrates that the all-white jury that convicted Moore and sentenced him to death was empaneled in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

FEDERAL CASES

STATE CASES

STATUTES AND RULES

OTHER AUTHORITIES

Petitioner, Richard Bernard Moore, prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina.

CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina is unreported but is attached in the Appendix to this petition. App. 1a.

JURISDICTION

The decision of the Supreme Court of South Carolina at issue here was announced on August 12, 2024. *See* App. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides: "No State shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Richard Bernard Moore is the last man on South Carolina's death row sentenced to death by an all-white jury.[1] An all-white jury, especially one where all qualified Black prospective jurors were peremptorily struck by the State because of their race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), casts serious doubt on the integrity of a capital trial and undermines public confidence in the criminal justice system. This is especially true where, as in Moore's case, the defendant is Black and the victim is white. A review of how jury selection unfolded at Moore's trial demonstrates the State violated the equal protection rights of qualified Black citizens that were excluded from the jury solely because of the color of their skin. In 2023, Moore raised the *Batson* violations in state habeas petition for the Supreme Court of South Carolina to consider in its original jurisdiction which it rejected in a

[1] Citations to the record throughout this petition refer to the Joint Appendix filed in *Moore v. Stirling*, No. 18-4 (4th Cir. Oct. 22, 2022) (Docket Nos. 18-1 through 18-10), by reference to "Doc.".

summary per curiam order. The Supreme Court of South Carolina's reluctance to enforce *Batson*'s mandate is well-established. Despite numerous appeals raising claims of *Batson* error, the Supreme Court has not found that a prosecutor exercised his peremptory challenges in a racially discriminatory manner in 32 years. *See State v. Grate*, 423 S.E.2d 119 (S.C. 1992); *State v. Marble*, 426 S.E.2d 608 (S.C.1992).

Moore was charged with murder, armed robbery, and other related offenses, in connection with the September 16, 1999 death of James Mahoney, a convenience store clerk. From the start, this case was an improbable one for a capital prosecution: Moore entered the convenience store unarmed; both firearms, which discharged moments later in the convenience store, originated in the possession of the victim; and there was no surveillance video footage or other reliable evidence from the crime scene. *See Moore v. Stirling*, 871 S.E.2d 423 (S.C. 2022). Yet, the State opted to seek death penalty. Moore's case went to trial in October of 2001 with no Blacks on the jury—a fact that caused one former member of the Supreme Court of South Carolina to remark that Moore's case is a "relic of a bygone era." 871 S.E.2d at 442. (Hearn, J. dissenting).

For Moore's capital trial, ninety-six citizens were questioned in individual *voir dire*, out of which nineteen (19.7%) of the prospective jurors were Black.[2] Each prospective juror was individually questioned by the judge followed by counsel for the defense and the State. As explained in detail later in this petition, during individual *voir dire*, the State engaged in disparate questioning of Black jurors, asking significantly more questions of Black jurors than white. *See infra II*. Those not disqualified for cause were added to a list of qualified jurors. As is common practice in capital trials, after thirty-eight

[2] The complete jury pool list, which pulls from Department of Public Safety records, S.C. Code § 14-7-30, listed all the seated jurors as white. The clerk's strike sheet prepared at trial listed juror Benjie Martinez's race as Hispanic. *See* App. 3a and Doc. 18-7, p. 213.

prospective jurors were qualified, the Court suspended individual *voir dire* and moved on to seating the jury from this pool. Doc. 18-6, pp. 53–65, 75.

Only three of these thirty-eight qualified jurors were Black (7.8%).[3] The clerk presented the jurors for seating or the parties' peremptory strikes in the order they were qualified. There were only two Black jurors that either side had an opportunity to strike: Jurors Joyce Morrow and Douglas Alexander.[4] The State took that opportunity, striking Juror Morrow first and then Juror Alexander, and ensured no Black jurors would sit on Moore's jury. Doc. 18-7, p. 213. After both parties exhausted their peremptory strikes, an all-white jury, with two white alternate jurors, was empaneled for Moore's capital trial.

Trial counsel initially challenged the State's peremptory strikes of Jurors Morrow and Alexander under *Batson*. Doc. 18-6, pp. 76–77. After the State proffered reasons for striking the two qualified Black prospective jurors, trial counsel abandoned its *Batson* challenge, failing to raise arguments that many of the State's proffered reasons were contradicted by the record (several also applied to white prospective jurors the State did not strike; some of the reasons were patently implausible) and, if the trial counsel had kept track of simple metrics, like the number of questions asked of each prospective juror, it would have been obvious that the State engaged in dramatically disparate questioning of Black

[3] Approximately 20.9% of the population of the County of Spartanburg was Black in 2001. *See* Index Mundi, *Spartanburg County Black Population Percentage – South Carolina*, https://www.indexmundi.com/facts/united-states/quick-facts/south-carolina/county/spartanburg/black-population-percentage#chart (last accessed Sept. 25, 2024).

[4] Under South Carolina law, the defense and the prosecution are allowed ten and five peremptory strikes, respectively, for the petit jury. S.C. Code § 14-7-1110. If the judge decides to seat alternate jurors, the defense and the prosecution are allowed two and one additional peremptory strikes respectively for each alternate juror. S. C. Code § 14-7-1120. Because the trial judge decided to seat two alternate jurors in Moore's capital trial, there only needed to be thirty-five qualified jurors for jury selection. Juror Smith, the third qualified Black juror, was the thirty eighth juror qualified in individual *voir dire*. The petit jury and both alternate jurors were selected before either side had an opportunity to consider striking the final qualified juror.

and white prospective jurors. Doc. 18-6, pp. 79–80. After trial counsel withdrew the *Batson* challenge, the trial judge went on to deny it. *Id.*

Ultimately, the jury convicted Moore and sentenced him to death, and his convictions and sentence were affirmed on direct appeal. *State v. Moore*, 593 S.E.2d 608 (S.C. 2004). Moore's unpreserved *Batson* claim was not presented on direct appeal. Moore raised claims related to *Batson* in both his state post-conviction proceedings and federal habeas proceedings. At both junctures, relief was denied. *Moore v. Stirling*, 952 F.3d 174,180, 186 (4th Cir. 2020).

In April 2023, Moore filed a petition in the Inter-American Commission on Human Rights asking them to review human rights violations in his case including, *inter alia*, that his rights to a fair trial and to be free from discrimination based on race had been violated by the jury selection procedures during his capital trial.[5] On July 4, 2023, having analyzed the submissions by Moore and the United States of America, the Commission expressed grave concern for the protection of Moore's human rights, including the right to a fair trial devoid of racial discrimination. Due to its concerns in Moore's case, the Commission invoked its precautionary measures mechanism, which the Commission deploys only in serious and urgent situations to protect against irreparable harm after determining a prima facie human rights violation occurred. The Commission issued a Precautionary Measures Resolution urging the United States to adopt all "necessary measures to protect the life and personal integrity of Richard Moore," while the Commission fully considered the merits of Moore's petition. App. 11a.

[5] International human rights law and the requirements of the United States Constitution are in agreement that there is no place for racial bias in jury selection procedures. *See Flowers v. Mississippi*, 588 U.S. 284, 301 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process"); *William Andrews v. United States*, Case 11.139, Inter-Am. Comm'n H.R., Report No. 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 170–174 (recognizing that the presence of racial bias in a capital case violates the human right of equal treatment under the law and the right to a fair and impartial trial).

Following the Commission's grant of precautionary measures, Moore filed a state habeas petition in the Supreme Court of South Carolina's original jurisdiction asking the court to consider the *Batson* violations in his trial, raising the arguments addressed below. After considering briefing on *Batson* and the strikes of Morrow and Alexander at Moore's trial, the court denied relief. App.1a.

REASONS FOR GRANTING THE WRIT

The totality of the evidence surrounding the strikes of Juror Morrow and Juror Alexander establishes that both jurors were struck in violation of *Batson*. Despite this, the South Carolina Supreme Court ignored this Court's settled precedent and denied relief. This Court should grant certiorari to correct the legal error that occurred below and offer the state courts more guidance on what is required when undertaking *Batson* review.

I. THIS COURT'S RELEVANT PRECEDENT

a. Courts must diligently guard against racial discrimination in the criminal justice system, especially in jury selection procedures.

Racial discrimination in the administration of justice "strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979). Because "the power of the State weighs most heavily upon the individual" in criminal cases, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious" in that context, *Rose,* 443 U.S. at 555; *see also Pena-Rodriquez v. Colorado*, 580 U.S. 206, 223 (2017) (quoting *Rose*, 443 U.S. at 555); *Buck v. Davis*, 580 U.S. 100, 124 (2017) (same). Therefore, in criminal cases, courts "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin*, 379 U.S. at 192.

This is nowhere truer than in jury selection. The jury's indispensable role as "a criminal defendant's fundamental protection of life and liberty against race or color prejudice," *Pena-Rodriquez*, 580 U.S. at 223 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)) (internal quotation marks omitted), means that racial discrimination in jury selection threatens the gravest of harms to criminal

defendants. This reality, true in any criminal case, is especially pertinent in capital cases due to the "complete finality of the death sentence," and the "unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35, 45 (1986).

Prospective jurors who are excluded from serving on a jury because of their race are deprived of one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers*, 588 U.S. at 293 ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991). Jury service provides citizens with an opportunity to participate in the legal system and enhances their regard and understanding of the legal system, the judiciary, and the jury system.[6] Unlawful exclusion of citizens from jury duty, therefore, forsakes significant opportunities to strengthen and deepen our democracy.

Perhaps, most significantly, the harm from discrimination affecting the composition of the jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 556; *Buck*, 580 U.S. at 124 ("[Such discrimination] injures not just the defendant, but 'the law as an institution . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'") (quoting *Rose*, 443 U.S. at 556). Such doubt, in turn, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been "given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413; *see also Foster v. Chatman*, 578 U.S. 488, 523 (2016). In short, "[a]ctive discrimination by a prosecutor" during jury selection "invites cynicism respecting the jury's neutrality and its obligations to adhere to the law," and it "cannot be tolerated." *Powers*, 499 U.S. at 411–12.

[6] *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 285–86 (Robert E. Litan ed., 1993).

As this Court has repeatedly recognized, "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers*, 588 U.S. at 298; *Foster*, 578 U.S. at 499 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). Thus, it is imperative that courts remain diligent in ferreting out racial discrimination in jury selection procedures. Failure to do so risks inflicting grave harm on not only the defendant and the citizens that are unlawfully excluded from jury duty, but also on the community at large by undermining the public's confidence in the criminal justice system and, therefore, weakening the foundations of our multiracial democracy.

b. *Batson* and its progeny require courts to carefully consider all evidence of racial discrimination

This Court has established a three-step inquiry governing challenges to peremptory strikes alleged to be racially motivated. *See Batson*, 476 U.S. at 96–98. First, the party challenging the strike must establish a *prima facie* case of purposeful racial discrimination; second, the prosecutor "must provide race-neutral reasons for its peremptory strikes;" and, third, the court must determine "whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 588 U.S. at 298. Moore's case hinges on the final one.

The *Flowers* Court outlined factors to be considered in determining whether the prosecutor's stated reasons were pretext for discrimination:

- "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination."

588 U.S. at 302. Each reason articulated in *Flowers*, along with other reasons identified by courts, may serve on its own as a ground for finding that a proffered reason is pretextual.

For example, when a proponent of a peremptory strike "misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent." *Id.* at 314. The *Flowers* Court elaborated on the utility of misstatements in ferreting out racial discrimination in jury selection procedures: "To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations should not be confused with racial discrimination. But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling." *Id.*

In some cases, the proffered reason for a peremptory strike "may be so fundamentally implausible [that] the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment." *See Foster*, 578 U.S. at 509 ("Credibility can be measured by, among other factors. . . . how reasonable, or improbable, the [State's] explanations are.") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("*Miller-El I*")).

Pretext can also be inferred when a prosecutor treats similarly situated jurors of different races differently. In *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("*Miller-El II*"), this Court explained that if "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *See also Foster*, 578 U.S. at 512 (2016) (quoting *Miller-El II*, 545 U.S. at 512–13); *Flowers*, 588 U.S. at 311 (same).

The *Flowers* Court further clarified that "[a]lthough a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." 588 U.S. at 311–312 (emphasis in original); *see also Miller-El II*, 545 U.S. at 247 n.6 ("A *per se* rule that a

defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.").

In assessing the constitutionality of a peremptory strike, it is important to consider "all of the relevant facts and circumstances *taken together* [to] establish that [the exercise of such peremptory challenge] was not motivated in substantial part by discriminatory intent." *Flowers*, 588 U.S. at 288 (emphasis added); *see also Foster*, 578 U.S. at 512 ("Considering all of the [] evidence that bears upon the issue of racial animosity, we are left with the firm conviction that the strikes of [two panelists] were motivated in substantial part by discriminatory intent."). Further, to find a constitutional violation, the Court need only find that race was a substantial motivating factor but not necessarily that the racial motivation was "determinative." *See Snyder v. Louisiana,* 552 U.S. at 485 (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).

II. THE SUPREME COURT OF SOUTH CAROLINA IGNORED THIS COURT'S PRECEDENT AS ABUNDANT EVIDENCE ESTABLISHES PURPOSEFUL DISCRIMINATION

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Foster*, 578 U.S. at 501 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). In assessing Moore's *Batson* claim, there are four principal categories of evidence: (1) the State's proffered reasons for striking the two qualified Black prospective jurors were equally applicable to other similarly situated qualified white prospective jurors the State did not strike; (2) some of the State's proffered reasons were refuted by or misrepresented the record; (3) two of the reasons proffered by the State for striking Juror Morrow are clearly implausible; and (4) the State's disparate questioning of Jurors Morrow and Alexander relative to white jurors. The evidence establishes that, pursuant to this Court's precedent, *Batson* was violated at Moore's capital trial.

a. <u>The State's Reasons for Striking Juror Joyce Morrow Were Pretextual</u>.

The State gave three reasons for striking Juror Joyce Morrow, a 51-year-old Black woman. The State claims that it struck her because: (1) she withheld information about her criminal record on her juror questionnaire, (2) she believed as a general matter that "guns were improperly used," which the State said was concerning because the victim was armed, and (3) she was a teacher who initially wanted to switch to another jury term until she learned she would have to miss her vacation if she was scheduled for another term. Doc. 18-6, pp. 77–78. Review of the record demonstrates each of these reasons are pretextual.

The State's proffered reason that Juror Morrow withheld information regarding her criminal record does not withstand scrutiny. The *voir dire* as a whole reveals the wording of the question on the juror questionnaire was confusing, and at least six jurors failed to disclose some kind of criminal record. *See* Doc. 18-4, pp. 253–255, 415–421; Doc. 18-5, pp. 26–27, 30–32, 138–146, 315–317, 340–341. The trial judge commented on the wording of the question about criminal history, noting that he would be changing his juror questionnaire for future juries to avoid the same confusion. Doc. 18-5. pp. 344–345. Two white prospective jurors, Stacy Gantt and Malcolm White, were qualified despite failing to disclose information about their criminal record on their juror questionnaires, Doc. 18-5, pp. 315–317, 340-341, but the State did not challenge either one. The State did not even ask White any questions about his criminal history. White was ultimately struck by the defense following the State's decision not to strike him, and Gantt was seated as an alternate juror.

The State's proffered reason that Juror Morrow believed as a general matter that "guns were improperly used," was also pretextual. Doc. 18-6, pp. 77–78. During her individual *voir dire*, Juror Morrow stated, in response to the State's question about her stepson's killing, that when guns are "used inappropriately . . . wrong things can happen," and "everyone shouldn't be allowed to carry a

gun."[7] Doc. 18-4, p. 256. At no point did Juror Morrow express a belief that guns would be used inappropriately in every context. In explaining its strike of Morrow, the State referred to this statement:

> She also said, Your Honor, that she thought guns were used improperly. Now, there were other jurors who expressed some reluctance about guns, but nobody used the word guns are used in properly [*sic*]. That's obviously going to be an issue in this case, if the victim was armed.

Doc. 18-6, pp. 77–78.

A review of the record refutes this explanation as race neutral. In fact, very few jurors were questioned about guns at all during individual *voir dire*, demonstrating the State was not actually concerned about this issue. If jurors' views on gun ownership were important to the State, then it would have asked more questions to the venire to elicit views about guns. Other than Juror Morrow, the State broached the issue of guns with only two prospective jurors, Douglas Alexander and Gary New. First, the State discussed guns with Juror Alexander, the other Black juror it struck, which elicited a response that Alexander owned a number of firearms and had no issues with private gun ownership. Second, the State had a brief exchange with Juror Gary New after he had already shared with defense counsel that he owned twelve or thirteen firearms.[8] Doc. 18-4, pp. 301–302; Doc. 18-5, pp. 43. Other than these three exchanges, the State did not pose any questions about guns to other jurors.

Moreover, the State's representation that "there were other jurors who expressed some reluctance about guns," Doc. 18-6, p. 77, is belied by the record. Guns were notably a non-issue throughout the entirety of *voir dire*. Only six jurors were questioned about guns—four by defense

[7] Morrow provided additional information about her stepson's death, explaining that the death happened before she was married to her husband and that it would not interfere with her ability to be impartial in Moore's case. Doc. 18-4, p. 134.

[8] The State asked only one question about guns to potential juror Gary New: "You said you had 12 guns, or thereabouts. Are most of them long guns or any of them handguns?" This question was not designed to elicit Juror New's views about guns, as those were already clear from his earlier testimony to defense counsel that he owned several guns. Doc. 18-5, pp. 43, 49.

counsel and two by the State. Doc. 18-5, pp. 43, 249–250, 298–299, 314. Each of these jurors testified that they owned several guns and did not express reluctance about guns. *See id.* While this explanation for striking Juror Morrow sounds plausible, it is simply not true and "[a] State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *See Flowers*, 588 U.S. at 312 (quoting *Miller-El II*, 545 U.S. at 246).

Lastly, while it is true that Juror Morrow expressed some concern about serving on the jury because she was a teacher, and wanted to switch her service to another term until learning it would interfere with a planned vacation, Doc. 18-4, pp. 86–87, this proffered reason for striking her was also pretextual.[9] Concerns about work disruptions and planned vacations are common reasons that people do not want to serve on juries and these came up with a number of the members of the venire. *E.g.*, Doc. 18-4, pp. 87–90, 116–117. This reason is so broadly applicable that it strongly suggests on its own that it is mere pretext.

Moreover, several white jurors who were ultimately seated on the jury had similar, if not more complicated to accommodate, concerns and the State did not strike any of them, despite having the ability to do so. Juror Jeffrey Blanchard, a white man who was ultimately seated on the jury, wrote a letter to the judge outlining his logistical concerns about not being able to make telephone calls if selected to serve on the jury. He was not struck by the State, and special concessions were made for him to be able to receive and make telephone calls while serving as a juror. Doc. 18-5, pp. 435–436. Similarly, Juror Sandra Taylor, a white female, also expressed concern about serving on the jury because she was the primary caregiver for her elderly mother who was not in the best of health. She

[9] This reason has been explicitly recognized by the United States Supreme Court as a pretextual reason for striking a juror. *See Synder,* 552 U.S. at 479-80 (finding pretext where a juror was struck due to his hesitance to serve on the jury because of his teaching obligations).

was not struck by either side and was seated on the jury. Doc. 18-5, p. 282. Finally, Juror Jennifer Caston, another white female, had significant scheduling concerns because of paralegal training courses she had paid for and did not want to miss, as they would not be refunded, resulting in a lengthy back and forth with the Court. Doc. 18-6, pp. 60–64. Despite these concerns and external pressures, the State did not strike her, and she was seated on the jury. It is implausible that such a generic reason could serve as a legitimate basis for a peremptory strike. *See Snyder*, 552 U.S. at 479–80.

b. <u>The State's Reasons for Striking Juror Douglas Alexander Were Pretextual</u>.

The State also struck Juror Douglas Alexander, a 53-year-old Black man. When trial counsel objected to this peremptory strike as violating *Batson*, the State proffered two alleged "race-neutral" reasons for striking Juror Alexander. First, the State maintained that Alexander's son was prosecuted for murder by the same office that was prosecuting Moore and said it also struck similarly situated potential juror Edward Huffman, a white male, who also had a close relative that was prosecuted for murder. Doc. 18-6, p. 78. The State claimed it did not want a jury member who had a son incarcerated for murder because Moore "is also somebody's son." *Id.* Second, the State proffered that Alexander misunderstood one of the judge's questions and was the only juror who misunderstood that question. Doc. 18-6, pp. 78–79.

The State's proffered reason that Alexander was struck because of his son's conviction falls flat for several reasons. The State failed to strike five white jurors with relatives who were similarly situated to Juror Alexander. Jurors Garner, Nave, Hardison, Allen, and Willingham, all had relatives who were prosecuted for various crimes. Juror Garner's mother had been prosecuted for murder and his cousin was prosecuted for drug possession. Doc. 18-5, pp. 191–192. Juror Nave's brother was prosecuted for drug possession. Doc. 18-4, pp. 438–439. Juror Hardison's relative had pled guilty to an unspecified crime. Doc. 18-4, pp. 288–289. The lack of information in the record about the crime Juror Hardison's relative pled to demonstrates the State's inconsistent concern about this issue; the

State specifically told Juror Hardison "there is no need to go into detail" about her relative's charges and plea. *Id.* at 288. Juror Allen's brother had a driving-under-influence conviction in Tennessee. Doc. 18-4 at 498. Juror Willingham's brother was convicted of grand larceny and driving under influence. Doc. 18-5, p. 253. Jurors Garner, Nave, and Hardison sat on Moore's jury, with Juror Nave serving as the foreperson of the jury. Jurors Allen and Willingham were not struck by the State, despite the opportunity to do so, but neither juror ultimately served on the jury because defense counsel struck them.

Moreover, this reason for striking Juror Alexander similarly fails because Alexander repeatedly expressed approval of his son's conviction throughout his individual *voir dire*. When asked by the State whether his son's prosecution caused him to lose confidence in the solicitor's office or law enforcement, Alexander expressed strong support for his son's prosecution and conviction, saying, "I mean, he said he did it, so I felt like he had to pay the price. . . . I mean, got the laws you have to abide by." Doc. 18-4, pp. 304–305; *see also* Doc. 18-4, pp. 121–122.

The second reason the State provided for striking Juror Alexander—that he misunderstood a question from the judge that no other juror failed to understand—is a misrepresentation of the record. The only question Juror Alexander arguably misunderstood occurred when the judge asked, "Could you listen to the law, accept and apply that law or think that it should be some other way?" Doc. 18-4, p. 304. Juror Alexander did not misunderstand the judge, but instead merely asked a clarifying question, "Do you mean whether I agree or disagree with it?" *Id.* The judge clarified, "Would you be able to follow the law even though you disagreed with it?" *Id.* In response, Juror Alexander stated: "Oh, yeah." *Id.* The judge asked him again, "You would follow my instructions?" and Juror Alexander unequivocally stated, "Yes, I would." *Id.* A reading of Juror Alexander's responses demonstrates that he did not misunderstand the question but, quite reasonably, sought clarification to ensure he answered the exact question the judge asked of him. *Id.*

Additionally, the State was wrong in representing that no other juror misunderstood this question from the judge. In response to the same question, six white jurors struggled to adequately respond to the question: Jurors Nave, Ballard, Ridings, Willingham, Fortner, and Lindsay. Juror Nave repeated the question back to the judge before answering the question and the judge repeated the question, presumably because the judge felt that Juror Nave may not have fully understood the question. Doc. 18-4, p. 426. Similarly, while questioning Juror Ballard, the judge felt the need to repeat this question twice, likely because the judge felt that Ballard may not have fully understood or fully responded to the question. Doc. 18-4, p. 477. In Juror Ridings's case, the judge had to re-phrase the question before Ridings was able to answer the question. Doc. 18-4, p. 504. Juror Willingham told the judge he did not understand the question twice. Doc. 18-5, pp. 242–243. Juror Fortner asked the judge to repeat the same question during his *voir dire*. Doc. 18-5, p. 259. The State had an opportunity to strike all these white jurors who did not initially understand this question but did not. Jurors Nave, Ballard, and Ridings sat on Moore's jury.[10]

Moreover, Juror Lindsay, a white female, was seated as an alternate juror despite a lengthy back and forth with the Judge that made it clear that, unlike Juror Alexander, she was confused by the question and might not be able to follow the law as instructed. In addition to her discussion with the Judge, both defense counsel and the State discussed her response to this question in detail. During her initial questioning by the trial judge, Juror Lindsay indicated that she would not follow the judge's instructions with regards to the applicable law "if [she] didn't agree with it." The trial judge then rephrased his question: "You would not follow the law as I instructed?" and, she reiterated: "Not if I didn't agree with it, no." Doc. 18-5, pp. 399–400. Concerned about these responses, defense counsel again questioned Juror Lindsay on this issue. After considerable back and forth, with the trial judge

[10] Jurors Fortner and Willingham were struck by defense counsel. Doc. 18-7, p. 213.

asking further clarifying questions, Juror Lindsay reversed her earlier position, saying that she would follow the law as instructed: "[I]f I'm told to abide by what they say at the time [is the applicable law], I have to [abide by it]. I'm a law abiding citizen." Doc. 18-5, pp. 404–407. Notwithstanding the earlier lengthy exchanges, the State also raised this issue, and Juror Lindsay again confirmed that she could follow the judge's instructions with regards to the law. Doc. 18-5, p. 411.

Like the jury selection in *Flowers*, the State's misrepresentations considered with other evidence of discrimination are "telling" and call the State's general credibility into question, which in turn casts serious doubt on all the State's proffered reasons for striking Jurors Alexander and Morrow.

c. <u>Disparate Questioning of Jurors Alexander and Morrow</u>.

Another telltale sign of discriminatory intent in jury selection is disparate questioning of prospective jurors. *See Miller-El I*, 537 U.S. at 344 ("[T]he differences in the questions posed by the prosecutors are some evidence of purposeful discrimination."). The strategy underlying disparate questioning is straightforward. For prospective jurors that the party is seeking to eliminate, ask lots of questions "to elicit plausibly neutral grounds" to strike peremptorily or grounds for a strike for cause. *Miller-El II*, 545 U.S. at 255. Meanwhile, for prospective jurors that the party wants to seat, ask as few questions as possible to "produce a record that says little about [such] jurors and is therefore resistant to characteristic-by-characteristic comparisons" of prospective jurors that were struck and those that were seated. *Flowers*, 588 U.S. at 310.

In Moore's case, there is substantial evidence that the State subjected Jurors Morrow and Alexander to excessive and disparate questioning. With regard to the statistics, the findings of the *Flowers* Court on disparate questioning are equally applicable to the quantitative evidence regarding individual *voir dire* in Moore's trial: "One can slice and dice the statistics and come up with all sorts of ways to compare the State's questioning of excluded black jurors with the State's questioning of the accepted white jurors. But any meaningful comparison yields the same basic assessment: The State

spent far more time questioning the black prospective jurors than the accepted white jurors." *Flowers*, 588 U.S. at 308. Review of the questioning in Moore's case reveals:

- Questioning of Jurors Alexander and Morrow was significantly longer than most of the white jurors' questioning. Most jurors on average were asked five to seven questions during their individual *voir dire*, but the State asked Juror Alexander seventeen questions (more than double the average number of questions asked of most other potential jurors) and Juror Morrow forty questions (more than five times the average number of questions asked of most other potential jurors).

- Limiting the analysis to only the thirty-eight death qualified jurors, it is still clear that Jurors Alexander and Morrow were asked a disproportionately high number of questions. On average, each qualified juror was asked nine questions, with almost half (47.2%) of the qualified jurors responding to five or less questions. Jurors Alexander and Morrow were asked seventeen and forty questions, respectively. Although Jurors Alexander and Morrow represented approximately 5% of the qualified jurors, they fielded about 16.5% of the total questions that the qualified jurors were asked.

- As discussed above, upon seeing that Juror Alexander's juror questionnaire indicated his son had been charged with murder, the State posed many questions about the resolution of the case against his son. In stark contrast, the State did not even ask Juror Hardison, who also had a relative who had pled guilty to a crime, to specify her relative's offense. In fact, while questioning Juror Hardison, who was ultimately seated on the jury, the State specifically instructed her that "there is no need to go into detail" about her relative's offense. Doc. 18-4, pp. 288–289.

- The tone of the State's questioning of Juror Morrow was far more combative than those of white jurors who had also failed to fully disclose their prior criminal record on their jury questionnaires.[11] For example, both Juror Morrow and Juror Gantt, a white female, were questioned by Mr. Willingham, a member of the State's trial team and a side-by-side comparison of his questioning of Jurors Morrow and Gantt on identical topics is illustrative of the disparate questioning at play in Moore's jury selection. Doc. 18-4, pp. 254–255; Doc. 18-5, pp. 340–341.[12]

[11] A total of six jurors failed to disclose their prior criminal record accurately on their juror questionnaires: Jurors Morrow (Doc. 18-4, pp. 253–255), Rookard (Doc. 18-4, pp. 415–421, Browning (Doc. 18-5, pp. 26–27, 30–31), Kent (Doc. 18-5, pp. 138–146), White (Doc. 18-5, pp.315–317) and Gantt (Doc. 18-5, pp. 340–341). The White jurors who failed to disclose their prior criminal record (Kent, White and Gantt), faced fairer and less combative questioning from the State. In fact, the State did not ask Juror White a single question about his criminal record. Doc. 18-5, pp. 317–318.

[12] For the Court's convenience, a chart with the relevant questioning is attached to this petition. App. 13a.

Finally, one of the State's proffered reasons for striking Juror Morrow specifically demonstrates that the State engaged in disparate questioning of Black jurors. The State only meaningfully questioned the two Black jurors it later struck about their views on guns. This line of questioning was an ideal vehicle to elicit potential answers to provide the basis for a neutral strike if a juror showed any sort of concern or discomfort about guns. The State then used this precise ground as a proffered basis for striking Juror Morrow.

In sum, the quantitative and qualitative evidence from individual *voir dire* at Moore's jury selection clearly demonstrates that the State engaged in starkly different questioning for its Black and white prospective jurors.

d. Discriminatory Impact.

The statistical evidence about the State's use of peremptory strikes is patently obvious: the State struck 100% of the qualified Black jurors it had an opportunity to strike in comparison to 11.1% of qualified white jurors . In other words, the State was over nine times more likely to strike a qualified Black prospective juror than a qualified white prospective juror. Examination of the entire jury pool presents an even starker picture. Moore's jury pool contained 300 jurors, including 65 Black jurors (21.7%). Of the ninety-six jurors who were individually *voir dired,* nineteen were Black (19.7%). Because of the State's peremptory strikes, Moore's petit jury contained zero Black jurors (0.0%). The "numbers speak loudly." *Flowers*, 588 U.S. at 305. In fact, when the statistical evidence is so strong, it not only demonstrates discriminatory impact but also serves as yet another evidence of discriminatory intent: "[P]roof of discriminatory impact may for all practical purposes demonstrate unconstitutionality." *Miller-El I*, 537 U.S. at 345.

e. Totality of the Evidence.

The evidence of racial motive by the State in Moore's case is extensive, and it is imperative, as is required by *Batson* and its progeny, that all the evidence of racial intent is considered cumulatively

and in the "overall context" surrounding the strikes. *See Flowers*, 588 U.S. at 315 ("We cannot just look away [from the broader history and context]."). In other words, the following evidence should be considered in the aggregate:

- Comparator Juror Analysis. There were at least sixteen instances where the reasons proffered for striking qualified Black prospective jurors were also applicable to qualified white prospective jurors that were not struck by the State.

- State's Misrepresentations. The record shows that on at least three instances the State blatantly misrepresented the record in explaining his peremptory challenges against the qualified Black prospective jurors, which taken together undercut the State's credibility in general and cast a serious doubt over all the State's proffered reasons.

- Implausible Reasons. The State's justifications for peremptorily striking qualified Black prospective jurors in two instances were clearly implausible.

- Disparate Questioning. The record provides ample evidence—both quantitative and qualitative—that the State engaged in disparate questioning of Jurors Alexander and Morrow compared to the white prospective jurors.

- Discriminatory Impact. By striking Jurors Morrow and Alexander, the State secured an all-white jury.

In sum, although to prove a *Batson* violation Moore merely needs to establish that one of the five reasons proffered by the State to explain its peremptory challenges to strike Jurors Morrow and Alexander was pretextual, all of the relevant facts and circumstances taken together establish that all five proffered reasons were mere pretexts for racial discrimination and, therefore, constitutionally invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of South Carolina committed legal error when, considering the totality of the evidence, it denied relief pursuant to *Batson* and its progeny. This Court should grant certiorari to correct this legal error and to provide the lower courts more guidance on how to properly adhere to its *Batson* related precedent so that racial discrimination will not impermissibly permeate judicial proceedings and erode public confidence in our court system.

CONCLUSION

Wherefore, for the forgoing reasons, this Court should grant certiorari.

Respectfully submitted,

/s/Lindsey S. Vann

LINDSEY S. VANN
ROSALIND S.D. MAJOR
ALLISON ANN FRANZ
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME
CORNELL LAW SCHOOL
158 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

September 25, 2024.