The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

Bryan P. Stirling, Commissioner, South Carolina Department of Corrections, Respondent.

Appellate Case No. 2023-001345

ORDER

Petitioner seeks a writ of habeas corpus. The petition is denied.

C.J.

J.

J.

J.

J.

Columbia, South Carolina
August 12, 2024

cc:
Whitney Boykin Harrison
Gerald Donovan Malloy

Gerald Malloy
Lindsey Sterling Vann
Rosalind Sarah Duval Major
John H. Blume, III
Donald J. Zelenka
Melody Jane Brown
J. Anthony Mabry
Alan McCrory Wilson

JUR # NAME
TRM DT ADDRESS
TRM TM CITY/STATE/ZIP
STATUS SPOUSE
SOC. SEC. #

CERT #
BAR ST
CHLDRN
EMPLOYER

BIRTHPLACE
BIRTH DT AGE SEX
EDUCATION
YRS OCCUPATION

SERVED CIVIL
SERVED CRIM
LAWST RACE

0168 ALICE J MARTIN
101501
9:30
5
[redacted] F W

3169 LISA MARTIN
101501
3:30
[redacted] F W
[redacted] (96) Tresp. -> NDS AKA Lisa Renay Bales & other aliases : (GA) : (84) S. Battery -> NDS
(85) Dang Drugs -> NDS (90) DUI -> NDS (92) Interf. w/ Custody -> conv. (92) DUI -> conv; DUS -> conv.
(93) DUI -> conv; DUS -> conv (93) DUI -> conv; DUS -> NP; Poss Meth. -> conv. (conf 2m, Prob 10m)
(01) DUS -> NDS; False Info -> NDS; Theft by Taking -> NDS

170 BENJIE L MARTINEZ
01501
:30
[redacted] M W

171 ELIZABETH A MAY
01501
:30
[redacted] F W

172 MICHAEL E MAYBIN
01501
:30
[redacted] M W
[redacted] (96) DUI -> NDS

173 LEON MCABEE
01501
:30
[redacted] M W
[redacted] *Has fingerprints stored in Afis but no record appears on printout.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 39/2023

Precautionary Measures No. 303-23
Richard Moore regarding the United States of America
July 4, 2023
Original: English

I. INTRODUCTION

1. On April 21, 2023, the Inter-American Commission on Human Rights ("the Inter-American Commission", "the Commission" or "the IACHR") received a request for precautionary measures filed by Lindsey Vann and Rosalind Major ("the applicants" or "the requesting party"). The request urged the Commission to require that the United States of America ("the State" or "United States") adopt the necessary measures to protect the rights of Richard Moore ("the proposed beneficiary"), who is currently facing the risk of imminent execution in the state of South Carolina. The request for precautionary measures is linked to petition P-778-23, in which the applicants allege violations of Article I (Right to life, liberty and personal security), Article II (Right to equality before law), Article XVIII (Right to a fair trial), and Article XXVI (Right to due process of law and right not to receive cruel, infamous or unusual punishment)of the American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration").

2. Pursuant to Article 25(5) of its Rules of Procedure, the IACHR requested additional information to the applicants on May 5, 2023, and the applicants provided updated information on May 12, 2023. Subsequently, the IACHR requested information to the State on May 25, 2023, and reiterated the request on June 6, 2023. The State submitted its observations on June 7, 2023.

3. Having analyzed the submissions of fact and law presented by the parties, the Commission considers that the information submitted demonstrates *prima facie* that there is a serious and urgent risk of irreparable harm to Mr. Moore's rights to life and personal integrity in accordance with Article 25 of its Rules of Procedure. Moreover, in the event that Mr. Moore is executed before the Commission has the opportunity to examine the merits of his petition, any eventual decision would be rendered moot, leading to irreparable harm. Consequently, the Commission requests that the United States of America: a) adopt the necessary measures to protect the life and personal integrity of Richard Moore; and b) refrain from carrying out the death penalty on Richard Moore, until the IACHR has had the opportunity to reach a decision on his petition.

II. SUMMARY OF FACTS AND ARGUMENTS

A. Information provided by the applicants

4. The proposed beneficiary is currently facing the risk of imminent execution in the state of South Carolina, United States. He has been detained on death row since 2001. According to the applicants, Mr. Moore has exhausted all domestic remedies available to him; the execution date was suspended due to legal issues regarding changes in the law governing methods of execution; and Mr. Moore is the first individual up for execution.

a. Proposed beneficiary's conviction and death sentence

5. According to the request, Mr. Moore is an African American man who was convicted of armed robbery, murder, and assault with intent to kill a convenience store clerk, Mr. Mahoney, in Spartanburg County. The applicants also mention this area is traditionally known for racial discriminatory death sentences and lynching. In this regard, it was stated that Mr. Moore entered the convenience store without possessing a gun. At the checkout, a confrontation arose, and Mr. Mahoney allegedly racially insulted Mr. Moore and pulled a gun on him. Mr. Moore was able to wrestle that gun away. Nevertheless, Mr. Mahoney reportedly brandished a second gun. Mr. Moore managed to hide and grab the first gun. Both individuals reportedly shot at each other. Medical examinations revealed that both men had gunshot wounds and that Mahoney's injuries were fatal. The request also claims no evidence for Mr. Moore prior intent to kill, and there is no surveillance video footage that could provide clear evidence of the chain of events that led to this fatal shooting. The request alleged that race, above all else, played a role at each juncture of Mr. Moore's trial and ultimately his sentence to death.

b. Allegation of the proposed beneficiary's failed defense and failure of fair trial

6. The applicants stated that the request claimed that defense counsel's complete failure to exploit the gaps in the prosecution's evidence using the collected physical evidence. Additionally, the request highlighted that Mr. Moore's case was selected for capital prosecution in the context of a heated electoral race for the Circuit Solicitor position. In this regard, the request informed that the elected prosecutor reportedly won the race amidst debates about capital punishment and having a firm stance against crime. After facing months of political scrutiny for his prior positions on capital punishments, the elected prosecutor continued with the capital prosecution of Mr. Moore.

7. Furthermore, they alleged that the State struck jurors from Mr. Moore's capital trial in a racially discriminatory manner. The request addressed that Mr. Moore's jury consisted of 12 white jurors. The black jurors were considered for peremptory strikes by the prosecutor. Additionally, the applicants highlighted that the prosecutor for the Seventh Judicial Circuit of South Carolina at the time of the offense sought death mostly in cases involving white victims in his fifteen-year tenure (1985–2001).

8. The applicants also stated that Mr. Moore's sentence was excessive and disproportionate as the facts do not show an "exceptional gravity" that can justify imposition of the death penalty, as the proposed beneficiary was unarmed and had no prior intention to kill. The paucity of reliable evidence was also highlighted by the applicants, who stated that there was no video surveillance in the convenience store and the sole eyewitness account lacks accuracy. Additionally, that case does not rise to the level of "exceptional gravity" that can justify imposition of the death penalty, and that the influence of race as the best explanation for Mr. Moore´s death penalty.

c. The proposed beneficiary's current detention conditions

9. The applicants updated information on May 12, 2023. The applicants stated that the proposed beneficiary has been incarcerated on South Carolina death row since 2001. From 2001 to 2017, the proposed beneficiary was housed at Lieber and Kirkland facilities. During this period, it

was mentioned that the proposed beneficiary had been in 23 hour per day solitary confinement. In 2017, the death row population was moved to Kirkland Correctional Institution, in a cell that had no windows for natural light. In 2019, the proposed beneficiary was relocated to Broad River Correctional Institution, where he is currently held.

10. According to the request, at Broad River Mr. Moore can leave his cell for 8 to 10 hours a day. The men held on death row are able to interact with one another in recreation spaces in the secure facility. Additionally, Mr. Moore has been twice on "execution status", following the Supreme Court of South Carolina's issuance of an execution notice setting execution dates in December 2020 and April 2021, which were eventually stayed. According to the request, when individuals are on execution status, they are moved to an isolation cell where they are locked down and watched for 24 hours a day, and the lights are constantly on. When leaving the isolation cell, restrictive restraints are imposed, including wrist and ankle shackles, a belly chain, and another chain connecting it to the ankles. The request alleged that individuals under this regime are also subjected to a dog leash attached to the back of the belly chains to allow further restriction of movement by corrections officers. The isolation and restraints are imposed simply because of the issuance of an execution warrant and do not correspond to any security problems caused by the proposed beneficiary. In this regard, the request stated that Mr. Moore has had no disciplinary sanctions in over a decade. Nevertheless, he has spent two months in this most restrictive confinement since November 2020.

11. The applicants addressed that Mr. Moore's execution date is expected to be set soon, which will again result in Mr. Moore being placed on execution status. The request finally alleged that Mr. Moore has lived under constant fear of imminent execution for the past two and a half years.

d. Internal remedies and execution date

12. The request stated that Mr. Moore's death sentence has been completed, reviewed, and all available remedies related to right's violations have been exhausted in domestic proceedings. In this regard, it was stated that the proposed beneficiary sought post-conviction relief (PCR) with the help of new counsel on several grounds including his trial counsel's failure to challenge the prosecution's theory of the case. According to the request, direct appeal process concluded in 2004, post-conviction process concluded in 2015, and federal Habeas Corpus was concluded in 2020 (certiorari). Mr. Moore also brought an additional challenge to his sentence under South Carolina's original habeas authority in 2021, which was denied by the South Carolina Supreme Court in 2022.

13. Since the State of South Carolina failed to obtain lethal injections drugs, the legislature amended the law to permit two methods of execution besides lethal injection – execution by electric chair and execution by firing squad. Mr. Moore is one of four plaintiffs in a civil suit in the South Carolina state courts regarding the constitutionality of electrocution and firing squad as methods of execution. On September 6, 2022, the trial court ruled that the amended execution methods statute is unconstitutional under the South Carolina Constitution. The Defendants appealed and an oral argument was heard by the Supreme Court of South Carolina on January 5, 2023. The Supreme Court of South Carolina stayed its decision about the constitutionality of the methods of execution pending discovery on lethal injection on January 26, 2023.

14. The request stated that on May 4, 2023, the state legislature passed a shield law barring the disclosure of any information about the source and process of obtaining lethal injection

drugs from public disclosure. When the bill is signed into law, the State may be able to procure lethal injection drugs and move the Supreme Court of South Carolina to set a new execution date for Mr. Moore. Once a case is cleared to proceed for execution the Supreme Court of South Carolina issues an execution notice, which sets the execution date for the fourth Friday after issuance of the notice. This provides an individual with only 22 to 28 days between the issuance of an execution notice and the execution date. Lastly, the request highlighted that Mr. Moore is first in line to be executed in South Carolina.

B. Observations from the State

15. The United States informed on June 7, 2023, that it had forwarded the request for information to the Governor and Attorney General of the State of South Carolina on May 30, 2023. Additionally, the State reaffirmed its position that the Commission lacks the authority to require that States adopt precautionary measures. Consequently, should the Commission adopt a precautionary measures resolution in this matter, the State would take it under advisement and construe it as recommendatory.

III. ANALYSIS OF THE ELEMENTS OF SERIOUSNESS, URGENCY AND IRREPARABLE HARM

16. The precautionary measures mechanism is part of the Commission's functions of overseeing Member States' compliance with the human rights obligations established in Article 106 of the Charter of the Organization of American States ("OAS"). These general functions are set forth in Article 41(b) of the American Convention on Human Rights, as well as in Article 18(b) of the Statute of the IACHR. Moreover, the precautionary measures mechanism is enshrined in Article 25 of the Rules of Procedure, by which the Commission grants precautionary measures in serious and urgent situations, where such measures are necessary to prevent irreparable harm.

17. The Inter-American Commission and the Inter-American Court of Human Rights ("the Inter- American Court" or "I/A Court H.R.") have repeatedly established that precautionary and provisional measures have a dual nature, both protective and precautionary.[1] Regarding the protective nature, these measures seek to avoid irreparable harm and protect the exercise of human rights.[2] To do this, the IACHR shall assess the problem raised, the effectiveness of state actions to address the situation described, and how vulnerable the persons proposed as beneficiaries would be left in case the measures are not adopted.[3] Regarding their precautionary nature, these measures

[1] See in this regard: I/A Court H.R. Matter of the Yare I and Yare II Capital Region Penitentiary Center. Request for Provisional Measures submitted by the IACHR regarding the Bolivarian Republic of Venezuela. Order of the Inter-American Court of Human Rights of March 30, 2006, considerandum 5; I/A Court H.R. Case of Carpio Nicolle et al. v. Guatemala. Provisional Measures. Order of July 6, 2009, considerandum 16

[2] See in this regard: I/A Court H.R. Matter of Capital El Rodeo I and El Rodeo II Judicial Confinement Center. Provisional Measures regarding Venezuela. Order of the Court of February 8, 2008, considerandum 8; I/A Court H.R. Case of Bámaca Velásquez. Provisional measures regarding Guatemala. Order of the Court of January 27, 2009, considerandum 45; I/A Court H.R. Matter of Fernández Ortega et al. Provisional measures regarding Mexico. Order of the Court of April 30, 2009, considerandum 5; I/A Court H.R. Matter of Milagro Sala. Request for Provisional Measures regarding Argentina. Order of the Inter-American Court of Human Rights of November 23, 2017, considerandum 5 [only in Spanish]

[3] See in this regard: I/A Court H.R. Matter of Milagro Sala. Request for Provisional Measures regarding Argentina. Order of the Inter-American Court of Human Rights of November 23, 2017, considerandum 5 [only in Spanish]; I/A Court H.R. Matter of Capital El Rodeo I and El Rodeo II Judicial Confinement Center. Provisional Measures regarding Venezuela. Order of the Court of February 8,

have the purpose of preserving legal situations while under the consideration of the IACHR. Their precautionary nature aims at safeguarding the rights at risk until the request pending before the Inter-American system is resolved. Their object and purpose are to ensure the integrity and effectiveness of an eventual decision on the merits and, thus, avoid any further infringement of the rights at issue, a situation that may adversely affect the useful effect (*effet utile*) of the final decision. In this regard, precautionary or provisional measures enable the State concerned to comply with the final decision and, if necessary, to implement the ordered reparations. In the process of reaching a decision, and according to Article 25(2) of the Rules of Procedure, the Commission considers that:

a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;
b. "urgent situation" is determined by means of the information provided and refers to risk of threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and,
c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

18. In analyzing these requirements, the Commission reiterates that the facts supporting a request for precautionary measures do not need to be proven beyond doubt. Rather, the purpose of the assessment of the information provided should be to determine *prima facie* if a serious and urgent situation exists.[4]

19. As a preliminary observation, the Commission considers it necessary to highlight that, according to its mandate, it is not called upon to determine the criminal responsibility of individuals in relation to their alleged commission of crimes or infractions. Additionally, the IACHR does not havethe mandate, through the precautionary measures mechanism, to determine whether the State has incurred in violations of the American Declaration as a result of the alleged events. In this sense, the Commission reiterates that, with respect to the precautionary measures' procedure, it is only called upon to analyze whether the proposed beneficiary is in a situation of seriousness and urgency facing harm of an irreparable nature, as established in Article 25 of its Rules of Procedure. With regard to P-778-23, which alleges violations of the rights of the proposed beneficiary, the Commission recalls that the analysis of these claims will be carried out in compliance with the specific procedures of its Petition and Case System, in accordance with the relevant provisions of its Statute and Rules of Procedure.

20. The Commission also finds it pertinent to underscore that, while the exhaustion of domestic remedies is indeed a requirement for the admissibility of petitions in accordance with Article 31 of its Rules of Procedure, this same requirement does not apply to the granting of precautionary measures. In this sense, Article 25.6.a of the Rules of Procedure establishes that whether the situation has been brought to the attention of the pertinent authorities should be

2008, considerandum 9; I/A Court H.R. Matter of the Criminal Institute of Plácido de Sá Carvalho. Provisional Measures regarding Brazil. Order of the Inter-American Court of Human Rights of February 13, 2017, considerandum 6 (available only in Spanish)

[4] See in this regard: I/A Court H.R. Matter of Residents of the Communities of the Miskitu Indigenous People of the North Caribbean Coast Region regarding Nicaragua. Extension of Provisional Measures. Order of the Inter-American Court of Human Rights of August 23, 2018, considerandum 13; I/A Court H.R. Matter of the children and adolescents deprived of their liberty in the "Complexo do Tatuapé" of the Fundação CASA. Request for extension of provisional measures. Provisional Measures regarding Brazil. Order of the Inter-American Court of Human Rights of July 4, 2006, considerandum 23

considered when reviewing a request for precautionary measures. However, such actions do not bar the Commission from granting precautionary measures under the consideration of the requirements of seriousness, urgency and irreparable harm. Additionally, as indicated above, the Commission's competence to grant precautionary measures extends to all Member States of the OAS and does not derive solely from the American Convention on Human Rights.

21. Additionally, the Inter-American Commission recalls that the death penalty has been subject to strict scrutiny within the inter-American human rights system.[5] While most OAS Member States have abolished the death penalty, a significant minority still hold on to this form of punishment.[6] With regard to the States that maintain the death penalty, there are a series of restrictions and limitations established in regional human rights instruments that States are bound to comply with in accordance with international law.[7] These restrictions and limitations are based on the broad recognition of the right to life as the supreme human right and as the *sine qua non* of the enjoyment of all other rights, thus requiring greater scrutiny to ensure that any deprivation of life resulting from the request of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration.[8] In this sense, the Commission has underlined that the right to due process plays an essential role in guaranteeing the protection of the rights of persons who have been sentenced to death. In order to protect due process guarantees, States have the obligation to ensure the exercise of the right to a fair trial, the strictest compliance with the right to defense, and the right to equality and non-discrimination[9]. In this sense, the Commission highlights that it has granted a number of precautionary measures to individuals on death row, considering both the precautionary and protective dimensions of the precautionary measures' mechanism.[10]

22. In this sense, the Commission has underlined that the right to due process plays an essential role in guaranteeing the protection of the rights of persons who have been sentenced to death. In order to protect due process guarantees, States have the obligation to ensure the exercise of the right to a fair trial, the strictest compliance with the right to defense, and the right to equality

5 IACHR. Press Release No. 248/20. The IACHR stresses its call for the abolition of the death penalty in the Americas on the World Day Against the Death Penalty. October 9, 2020.

6 IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, paras. 12 & 138; IACHR. Press Release No. 248/20. The IACHR stresses its call for the abolition of the death penalty in the Americas on the World Day Against the Death Penalty. October 9, 2020.

7 IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, paras. 138-39.

8 IACHR. Report No. 210/20. Case 13.361. Admissibility and Merits (Publication). Julius Omar Robinson (United States of America), August 12, 2020, para. 55; IACHR. Report No. 200/20. Case 13.356. Admissibility and Merits (Publication). Nelson Ivan Serrano Saenz (United States of America), August 3, 2020, paras. 44-45; IACHR. Report No. 211/20. Case 13.570. Admissibility and Merits (Publication). Lezmond C. Mitchell (United States of America), August 24, 2020, paras. 72-73.

9 IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, para. 141.

10 See, in this regard: IACHR. Resolution 95/2020. Precautionary Measure No. 1080-20. Christa Pike regarding the United States of America. December 11, 2020; IACHR. Resolution 91/2020. Precautionary Measure No. 1048-20. Lisa Montgomery regarding the United States of America. December 1, 2020; IACHR. Resolution 77/2018. Precautionary Measure No. 82-18. Ramiro Ibarra Rubí regarding the United States of America. October 1, 2018; IACHR. Resolution 32/2018. Precautionary Measure No. 334-18. Charles Don Flores regarding the United States of America. May 5, 2018 (available only in Spanish); IACHR. Resolution 41/2017. Precautionary Measure No. 736-17. Rubén Ramírez Cárdenas regarding the United States of America. October 18, 2017; IACHR. Resolution 21/2017. Precautionary Measure No. 250-17. Lezmond Mitchell regarding the United States of America. July 2, 2017; IACHR. Resolution 14/2017. Precautionary Measure No. 241-17. Matter of Víctor Hugo Saldaño regarding the United States of America. May 26, 2017; IACHR. Resolution 9/2017. Precautionary Measure No. 156-17. William Charles Morva regarding the United States of America. March 16, 2017.

and non-discrimination.[11] The Commission highlights that it has granted several precautionary measures to individuals on death row, considering both the precautionary and protective dimensions of the precautionary measures' mechanism.[12]

23. Taking this into account, the IACHR will proceed to analyze the procedural requirements with regard to Mr. Moore.

24. In the matter at hand, the Commission considers that the requirement of seriousness has been fulfilled. With regard to the precautionary dimension, the Commission observes that, according to the petition 778-23 presented by the applicants, the legal proceedings which led to Mr. Moore's death sentence allegedly did not comply with his rights to fair trial, right to equality, no discrimination and due process of law. In particular, the applicants claimed that, during the criminal proceedings the State-appointed counsel for Mr. Moore was ineffective. In particular, the applicants indicated the following: a. the defense counsel's complete failure to exploit the gaps in the prosecution's proof using the collected physical evidence; b. the sentence was disproportionate as the facts does not correspond an "exceptional gravity" that can justify imposition of the death penalty; c. the State struck jurors from Mr. Moore's capital trial in a racially discriminatory manner.

25. Given the aforementioned, the applicants indicated violations of Article I (Right to life, liberty and personal security), Article II (Right to equality before law), Article XVIII (Right to a fair trial), Article XXVI (Right to due process of law and right not to receive cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration").

26. In this regard, while the imposition of the death penalty is not prohibited *per se* under the American Declaration,[13] the Commission has recognized systematically that the possibility of an execution in such circumstances is sufficiently serious to permit the granting of precautionary measures to the effect of safeguarding a decision on the merits of the petition filed.[14]

[11] IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, para. 141.

[12] See, in this regard: IACHR. Resolution 22/2023. Precautionary Measures No.176-23. Michael Tisius regarding the United States of America. IACHR. Resolution 95/2020. Precautionary Measures No. 1080-20. Christa Pike regarding the United States of America. December 11, 2020; IACHR. Resolution 91/2020. Precautionary Measures No. 1048-20. Lisa Montgomery regarding the United States of America. December 1, 2020; IACHR. Resolution 77/2018. Precautionary Measures No. 82-18. Ramiro Ibarra Rubí regarding the United States of America. October 1, 2018; IACHR. Resolution 32/2018. Precautionary Measures No. 334-18. Charles Don Flores regarding the United States of America. May 5, 2018 (available only in Spanish); IACHR. Resolution 41/2017. Precautionary Measures No. 736-17. Rubén Ramírez Cárdenas regarding the United States of America. October 18, 2017; IACHR. Resolution 21/2017. Precautionary Measures No. 250-17. Lezmond Mitchell regarding the United States of America. July 2, 2017; IACHR. Resolution 14/2017. Precautionary Measures No. 241-17. Matter of Víctor Hugo Saldaño regarding the United States of America. May 26, 2017; IACHR. Resolution 9/2017. Precautionary Measures No. 156-17. William Charles Morva regarding the United States of America. March 16, 2017.

[13] IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, para. 2

[14] See, in this regard: IACHR. Resolution 22/2023. Precautionary Measures No.176-23. Michael Tisius regarding the United States of America. IACHR. Resolution 95/2020. Precautionary Measure No. 1080-20. Christa Pike regarding the United States of America. December 11, 2020, para. 34; IACHR. Resolution 91/2020. Precautionary Measure No. 1048-20. Lisa Montgomery regarding the United States of America. December 1, 2020, para. 40; IACHR. Resolution 77/2018. Precautionary Measure No. 82- 18. Ramiro Ibarra Rubí regarding the United States of America. October 1, 2018; IACHR. Resolution 32/2018. Precautionary Measure No. 334-18. Charles Don Flores regarding the United States of America. May 5, 2018 (available only in Spanish); IACHR. Resolution 41/2017. Precautionary Measure No. 736-17. Rubén Ramírez Cárdenas regarding the United States of America. October 18, 2017;

27. In view of the aspects stated above, and notwithstanding the petition presented, the Commission concludes that the rights of Mr. Moore are *prima facie* at risk due to the possible execution of the death penalty, and its subsequent effects on his petition which is currently under the Commission's analysis.

28. The IACHR considers that the requirement of urgency has been fulfilled. Regarding the precautionary dimension, according to the information presented by the applicant, in 2020 the U.S. Supreme Court denied the proposed beneficiary's writ of certiorari, leading to the exhaustion of internal remedies, as stated by the applicants. Even though the Supreme Court of South Carolina suspended the execution date due to legal issues regarding changes in the law governing methods of execution, according to the applicant, the litigation is expected to be resolved soon and Mr. Moore is the first individual up for execution. Therefore, considering the imminent possibility of the death penalty being applied, the Commission considers it is necessary to adopt precautionary measures in order to protect Mr. Moore's life and physical integrity and to examine the petition presented by the applicants according to the Rules of Procedure.

29. The Commission considers that the requirement of *irreparable harm* has been fulfilled, insofar as the potential impact on the rights to life and personal integrity of proposed beneficiary constitutes the maximum situation of irreparability. Furthermore, the IACHR deems that if Mr. Moore is executed before the Commission has had the opportunity to evaluate P-778-23, any eventual decision on the merits of the case would be rendered futile, given that the situation of irreparable harm would have already materialized.

30. In the matter at hand, regarding the current detention conditions of Mr. Moore's, the Commission noted that the proposed beneficiary has been imprisoned since 2001 and, during this period, he had been placed in isolation cells and restrictive conditions. Nevertheless, the applicants have informed that, since 2019, the proposed beneficiary has been held in Broad River Correctional Institution, in which solitary confinement is no longer applied.

IV. BENEFICIARY

31. The Commission declares that the beneficiary of this precautionary measure is Richard Moore, who is duly identified in this proceeding.

V. DECISION

32. The Inter-American Commission on Human Rights concludes that this matter meets *prima facie* the requirements of seriousness, urgency and irreparable harm contained in Article 25 of its Rules of Procedure. Consequently, the IACHR requests that the United States of America:

a. adopt the necessary measures to protect the life and personal integrity of Richard Moore; and
b. refrain from carrying out the death penalty on Richard Moore, until the IACHR has had

IACHR. Resolution 21/2017. Precautionary Measure No. 250-17. Lezmond Mitchell regarding the United States of America. July 2, 2017; IACHR. Resolution 14/2017. Precautionary Measure No. 241-17. Matter of Víctor Hugo Saldaño regarding the United States of America. May 26, 2017; IACHR. Resolution 9/2017. Precautionary Measure No. 156-17. William Charles Morva regarding the United States of America. March 16, 2017

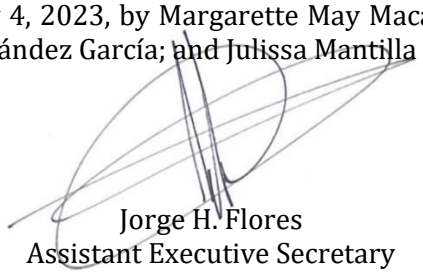
the opportunity to reach a decision on his petition.

33. The Commission requests the United States of America to inform, within a period of 15 days, as from the date of notification of this resolution, on the adoption of the precautionary measures requested and to update such information periodically.

34. The Commission emphasizes that, in accordance with Article 25(8) of its Rules of Procedure, the granting of this precautionary measure and its adoption by the State do not constitute a prejudgment of any violation of the rights protected in the applicable instruments.

35. The Commission instructs its Executive Secretariat to notify this resolution to the United States of America and the applicants of this resolution.

36. Approved on July 4, 2023, by Margarette May Macaulay, President; Roberta Clarke, Second Vice-President; Joel Hernández García; and Julissa Mantilla Falcón, members of the IACHR.



Jorge H. Flores
Assistant Executive Secretary

Appendix D: *Voir Dire* Comparison Chart

Juror Morrow	*Juror Gantt*
Q: Ms. Morrow, is your maiden name or prior name Atchison? A: Yes, sir. Q: Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana? A: In 82? Yes, sir. Q: And what happened to that charge? A: It was expunged. Q: But before – you say it was expunged. What happened? A: It was a fine. Q: And you didn't have a jury trial or anything? A: No, sir. Q: You just again forfeited the bail bond? A: Yes. Q: And then at the same time you had the ball tickets did you have another possession of marijuana tickets? A: No, sir. Q: You didn't have that? A: I did not.	Q: Ms. Gantt, I have got a record here that a Stacy Marie Gantt – is that your middle name? A: Yes, sir. Q: Was arrested back in April of this year for receiving stolen goods. A: Yeah. But I was not found guilty. Q: And that's fine. That's fine. I just asked you whether or not you had been arrested for it. A: Oh, I've been arrested, yeah, for receiving stolen goods. Q: Okay.

**See* Doc. 18-4, pp. 254–255; Doc. 18-5, pp. 340–341.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. _____

RICHARD BERNARD MOORE,

Petitioner,

v.

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

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

Richard Bernard Moore, a Black man, was sentenced to death for killing a White victim by an all-White jury—a product of the State peremptorily striking *all* qualified Black prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Despite there being ample evidence that the State's peremptory challenges were racially motivated, the merits of Moore's *Batson* claim have never been heard by this Court or the federal courts. Moore respectfully requests this Court issue a writ of habeas corpus vacating his conviction and remanding his case for a new trial.

The right to a fair trial and to be free from discrimination based on race in the application of the law is a fundamental human right.[1] In April of 2023, Moore petitioned the Inter-American Commission on Human Rights ("the Commission") to examine his case, alleging that—as the last inmate on South Carolina's death row to be tried and sentenced by an all-White jury—his human rights related, *inter alia*, to the jury selection procedures at his trial have been violated. 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 any 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 and issued a Precautionary Measures Resolution urging the United States to adopt all "necessary measures to protect the life and personal integrity of Richard Moore." App. 8, ¶32. The Commission also mandated the State not execute Moore until the Commission

[1] 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*, 139 S. Ct. 2228, 2242 (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).

reaches its final decision on the merits of Moore's petition. While the Commission's findings are powerful, it is unable to ensure the protection of Moore's rights on its own because it does not have domestic enforcement capabilities.[2] Without intervention from this Court, Moore is at substantial risk of inhumane execution.

While for more than fifteen years, Moore has consistently attempted to present his *Batson* claim to the courts, this Court has never reviewed the State's racially discriminatory peremptory challenges because (a) Moore's counsel failed to properly preserve his *Batson* claim at trial (October 2001), (b) Moore's appellate post-conviction review ("PCR") counsel did not follow his explicit request to present his *Batson* claim to this Court (December 2012), and (c) this Court denied Moore's request to supplement the PCR appeal petition filed by his counsel (February 2013). Moore raised the *Batson* claim in the federal courts (beginning in August 2015), which found the claim procedurally defaulted because it was not reviewed by this Court. The federal courts, therefore, refused to consider the merits of his claim. Having exhausted all other avenues of direct and collateral review, Moore respectfully urges this Court to review his *Batson* claim notwithstanding the delay in the presentation of this claim.

An all-White jury, especially one where all qualified Black prospective jurors were peremptorily struck by the State, casts serious doubt on the integrity of a capital trial and undermines the 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 close review of the jury selection at Moore's trial demonstrates the State repeatedly violated the equal protection rights of Moore and those qualified Black citizens that were excluded from the jury solely because of the color of their skin. This violation "*in the setting*, constitutes a denial of fundamental fairness

[2] Organization of American States, *Inter-American Commission on Human Rights: Mandate and Function*, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/functions.asp.

shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (emphasis in original).

I. RELEVANT FACTS AND PROCEDURAL HISTORY.

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*, 436 S.C. 207, 871 S.E.2d 423 (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 this Court to remark that Moore's case is a "relic of a bygone era." 436 S.C. at 243, 871 S.E.2d at 442. (Hearn, J. dissenting).

1. Jury Selection.

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.[3] Each prospective juror was

[3] One juror, Benjie Martinez, was listed on the jury pool list as White (App. 1049) but was listed on the clerk's strike sheet as Hispanic (App. 1072). The jury pool list was created by the State Election Commission based on a list of eligible voters provided by the Department of Public Safety. S.C. Code § 14-7-130 (2000). The Department of Public Safety provided the Commission with a list of "the name, address, date of birth, social security number, sex, and race of persons who are over the age of eighteen years and citizens of the United States residing in the county who hold a valid South Carolina driver's license or an identification card issued pursuant to Section 57-3-910." *Id.* This list was then merged with a list of registered voters by the State Election Commission to furnish each county with a list of jurors whose names are eligible for jury pools. *Id.* It is unclear to counsel where the race information on the clerk's strike sheet came from, as there is no race information contained in the juror questionnaires. The race information contained in the jury pool list is derived from sources where individuals self-report their racial identities. Counsel bases their representation of the jury's racial make-up from the information contained in the jury pool list. Moreover, it is not uncommon for Hispanic individuals to identify as White. 20.3% of the current Hispanic population identifies as solely White according to the 2020 census, a number that has dropped significantly from

individually questioned by the judge followed by counsel for the defense and the State. Those not disqualified for cause were added to a list of qualified jurors. As is common practice in capital trials, after thirty-eight prospective jurors were death qualified, the Court suspended individual *voir dire* and moved on to seating the jury from this pool. App. 992–94, 1014.

Only three of these thirty-eight jurors were Black (7.8%).[4] 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.[5] The State took that opportunity, striking Juror Morrow first and then Juror Alexander, and ensured no Black jurors would sit on Moore's jury. App. 1072. After both parties had exhausted their peremptory strikes, an all-White jury, with two White alternate jurors, was empaneled for Moore's capital trial.

2. <u>Trial counsel's abandonment of Moore's *Batson* claim</u>.

Trial counsel initially challenged the State's peremptory strikes of Jurors Morrow and Alexander under *Batson.* App. 1015–16. After the State proffered reasons for striking the two qualified Black prospective jurors, trial counsel abandoned its *Batson* challenges, failing to

53% since 2010. *See* Table 4. Hispanic or Latino Origin by Race: 2010 and 2020, available online at: https://www2.census.gov/programs-surveys/decennial/2020/data/redistricting-supplementary-tables/redistricting-supplementary-table-04.pdf. Regardless, Moore was tried by a jury with no members of his race.

[4] It is estimated that approximately 20.9% of the population of the County of Spartanburg was Black in 2001. *See* https://www.indexmundi.com/facts/united-states/quick-facts/south-carolina/county/spartanburg/black-population-percentage#chart.

[5] 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 Judge Clary 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 Ms. Smith.

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 in an apparent effort to find pretextual reasons to strike Black prospective jurors, the State engaged in dramatically disparate questioning of Black and White prospective jurors. App. 1018–19. After trial counsel withdrew the *Batson* challenges, the trial judge denied the *Batson* challenges. *Id.* Accordingly, Moore was tried in front of an all-White jury.

Ultimately, the jury convicted Moore and sentenced him to death. This Court affirmed his convictions and sentence on direct appeal, *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Moore's unpreserved *Batson* claim was not presented to this Court on direct appeal.

3. Moore's repeated attempts to present the *Batson* claim to this Court.

Moore filed a timely application for post-conviction relief alleging, *inter alia*, that trial counsel were ineffective for failing to pursue a *Batson* claim, which was ultimately denied by the circuit court. App. 1073–80, 1081–92. Although Moore's PCR counsel pursued the *Batson* claim, the PCR application failed to include the necessary merit arguments. App. 1073–80. New counsel was appointed to represent Moore on appeal of the denial of PCR. Counsel sought this Court's review but presented only three claims that did not include Moore's *Batson* claim. *See* App. 1093.

After reviewing the petition filed by counsel, and realizing the *Batson* claim had not been raised, Moore called his counsel and asked him to amend the petition to present the *Batson* claim, fearing that if the *Batson* claim was not included in the certiorari petition, the *Batson* claim would be defaulted for federal review. *See* App. 1093–95. Despite Moore's explicit request, no subsequent pleadings were filed. Moore contacted his attorneys again by letter imploring appellate counsel to present the *Batson* claim. In the letter, Moore noted the petition

filed on his behalf contained "no issues at all with regard to the jury (and the *Batson* issue) even though that argument was clearly raised" in the PCR application. App. 1093. Moore continued, "[a]s we have discussed in previous phone conversations, if we do not raise it in the lower/state courts and allow exhaustion of the issue, I will not be allowed to raise it in the Habeas Corpus venues. It will be procedurally barred." *Id.* Nearly two months later, Moore's attorneys finally responded to his letter and reiterated that they did not intend to raise Moore's *Batson* claim. Counsel's letter sought to comfort Moore by citing *Martinez v. Ryan*, 566 U.S. 1 (2012), for the proposition that "federal habeas corpus petitioner may overcome procedural default of an issue by showing ineffective assistance of PCR counsel." App. 1102–03. The comfort was cold, however, as *Martinez* did not address ineffective assistance of post-conviction appellate counsel, and the federal courts deemed the claim procedurally defaulted and refused to reach its merits. App. 1130–34.

In a third attempt to present the *Batson* claim to this Court, Moore requested permission to supplement his counsel's certiorari petition in a *pro se* motion to file a supplemental certiorari petition. Moore emphasized that, if the Court denied his motion, his *Batson* claim, would be procedurally barred from federal review. App. 1096–99. This Court rejected Moore's filing, stating that "[s]ince you are represented by counsel in this matter, no action will be taken on this *pro se* filing." App. 1000–01. Moore then made a final attempt to present his *Batson* claim to this Court by mailing a supplemental petition for writ of certiorari, which included the *Batson* claim. This Court again rejected Moore's filing because Moore was represented by counsel. App.1104–28.

Ultimately, this Court denied Moore's petition for certiorari as filed by counsel. App. 1129. Moore filed a timely petition for federal habeas corpus relief. The district court found Moore's *Batson* claim was procedurally defaulted and he could not overcome the default because the claim was defaulted by appellate PCR counsel (and not initial PCR counsel), and

he could not show prejudice. As Moore had feared, and contrary to the advice of his appellate PCR counsel, *Martinez* did not save the day and Moore was not able to litigate his *Batson* claim in federal courts. App. 1130–34. After denial of his federal habeas petition, Moore filed a state habeas petition that alleged, *inter alia*, that his death sentence is disproportionate, which was denied by this Court following oral argument. *See Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022).

4. <u>Inter-American Commission's Precautionary Measures Resolution</u>.

The Organization of American States ("OAS") is a multilateral regional body, which is headquartered in Washington, D.C., focused on promotion of human rights, democracy, social and economic development, and security in the Americas. The Inter-American Commission of Human Rights ("the Commission") is a regional human rights tribunal that is an arm of the OAS. *See* OAS Charter (Amended) Article 112, 21 U.S.T. 607. The Charter of the OAS, which was ratified by the United States in 1968, provides that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights []." *Id.*

In April of 2023, Moore petitioned the Commission to protect his fundamental rights under the American Declaration of the Rights and Duties of Man ("the American Declaration"). In this petition, Moore extensively discussed, *inter alia*, the jury selection in his capital trial. In particular, Moore presented evidence that the qualified Black prospective jurors were struck by the State in a racially discriminatory manner. On June 7, 2023, the United States filed its response to Moore's petition. *See* App. 1, ¶ 2.

On July 4, 2023, after reviewing the submissions by both parties, the Commission issued a Precautionary Measures Resolution, invoking its precautionary measures mechanism, which the Commission utilizes only in those situations where there is imminent risk of irreparable harm. App 1–9. The Commission held that the submissions of the parties demonstrate the

rights of Moore under Articles I (Right to life, liberty, and personal security), Article II (Right to equality before law), Article XVIII (Right to a fair trial), and Article XXVI (Right to due process of law and right not to receive cruel, infamous or unusual punishment) of the American Declaration are at risk of irreparable harm. App. 1, ¶3 ("[T]he Commission considers that the information submitted demonstrates *prima facie* that there is a serious and urgent risk of irreparable harm to Mr. Moore's rights to life and personal integrity."). *See* App. 8–9, ¶31-32.

Acknowledging the imminent risk to Moore's human rights under the American Declaration, the Precautionary Measures Resolution urged the United States to adopt all "necessary measures to protect the life and personal integrity of Richard Moore" and to not execute Moore until the Commission has reached its final decision on Moore's petition. App. 8, ¶32.

Considering that the merits of Moore's *Batson* claim have never been heard by this Court and the Commission's grave concerns for Moore's human rights, especially in connection with the jury selection in Moore's capital trial, Moore now asks this Court to consider the bona fides this issue as set forth in detail below.

II. THIS CASE IS APPROPRIATE FOR HABEAS CORPUS RELIEF IN THIS COURT'S ORIGINAL JURISDICTION.

This Court has specifically reserved the writ of habeas corpus as a remedy that remains available even after a prisoner has exhausted all other avenues of direct and collateral review. *See, e.g., Tucker v. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001) (*per curiam*). While "not every intervening decision, nor every constitutional error at trial will justify issuance of the writ," relief is required "where there has been a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (emphasis in original); *Gibson v. State*, 329 S.C. 37, 40, 495 S.E. 2d 426, 428 (1998).

This Court has made the elevation of substance over technical procedural rules a cornerstone of its habeas jurisprudence. Where fundamental fairness and equity demand a remedy, this Court has shown no hesitation to set aside procedural obstacles that may have prevented earlier review, and to proceed directly to the merits. In *Butler*, the Court noted it did "not condone" the petitioner's "delay in calling this grave constitutional error to our attention," but nevertheless granted relief because of the "unique and compelling circumstances." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88. And in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the Court concluded its landmark opinion abrogating the 200-year-old doctrine of *in favorem vitae* review in capital cases by emphasizing that, even after the establishment of a rigorous contemporaneous objection requirement, habeas relief would remain available under *Butler* for "those who have, for whatever reason, been utterly failed by our criminal justice system." *Torrence*, 305 S.C. at 69, 406 S.E.2d at 328. The Court later made good on this promise in *Tucker*, where relief was granted on a petition setting a statutory claim which had never been previously presented, and a constitutional claim which had been found procedurally defaulted on direct appeal and was later the subject of an unsuccessful claim of ineffective assistance of appellate counsel. 346 S.C. at 488–89, 552 S.E.2d at 714–15. Accordingly, it is within this Court's original jurisdiction to provide habeas corpus relief to Moore.

III. THE STATE'S PEREMPTORY STRIKES AGAINST 100% OF THE QUALIFIED BLACK PROSPECTIVE JURORS VIOLATED *BATSON V. KENTUCKY*.

A. Courts must diligently guard against racial discrimination in the criminal justice system, especially in the 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 more true 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).

Both the U.S. Supreme Court and this Court have repeatedly and consistently recognized prohibitions against racial discrimination in jury selection under *Batson* and its progeny are designed to serve multiple ends: "to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice." *State v. Haigler*, 334 S.C. 623, 628–29, 515 S.E.2d 88, 90 (1999); *see also State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (S.C. 2006).

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*, 139 S. Ct. at 2238 ("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*, 578 U.S. at 523. 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 412.

An all-White jury, especially in a trial where the defendant is Black and the victim is White, sustains cynicism about the jury's neutrality. Justice Thomas, concurring in *Georgia v. McCollum*, 505 U.S. 42 (1992), highlighted how a jury's racial composition affects perceptions of its fairness:

> The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of Whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

[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).

Id. at 60 (footnote omitted).

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 public's confidence in the criminal justice system and, therefore, weakening the foundations of our multiracial democracy.

B. *Batson* requires courts to carefully consider all evidence of racial discrimination.

The U.S. Supreme Court has established a three-step inquiry when someone challenges a peremptory strike as being exercised improperly on the basis of race. *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, "whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2241. In Moore's case, the case hinges on the ultimate step of this inquiry.

Justice Kavanaugh writing for the majority of the *Flowers* Court outlined factors generally considered in determining whether the prosecutor's stated reason 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."

139 S. Ct. at 2243. 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." *Flowers*, 139 S. Ct. at 2250; *see also State v. Patterson*, 307 S.C. 180, 182–83, 414 S.E.2d 155, 157 (1992) ("When the record does not support the solicitor's stated reason [for a peremptory strike] upon which the trial judge has based his findings, [] those findings will be overturned.").[7] 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." *Flowers*, 139 S. Ct. at 2250.

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*")); *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001).

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*"), the U.S. Supreme 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

[7] *See also State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991); *State v. Grate*, 310 S.C. 240, 423 S.E.2d 119 (1992).

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*, 139 S. Ct. at 2248–49 (same).[8]

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." 139 S. Ct. at 2249 (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.").

Importantly, 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*, 139 S. Ct. at 2235 (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)).

[8] This Court has also held that unequal treatment of similarly situated jurors is reliable evidence of purposeful discrimination. *See State v. Oglesby*, 298 S.C. 279, 379 S.E.2d 891 (1989) (holding that a *Batson* violation had occurred where State's reason for striking three Black potential jurors was also applicable to a similarly situated White juror, who was allowed to serve on the jury); *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001) ("The opponent [of a peremptory strike] must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another race or gender."); *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1999).

C. A peremptory strike cannot be "saved" by proffering a neutral reason if one or more of the alternative reasons proffered for such strike are constitutionally invalid.

It is settled law in South Carolina that "[o]nce a discriminatory reason [for a peremptory strike] has been uncovered—either inherent or pretextual—this reason taints the entire jury selection procedure," regardless of whether there are other nondiscriminatory neutral reasons for the relevant peremptory strike. *Payton v. Kearse*, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998); *see also Haigler*, 334 S.C. at 631, 515 S.E.2d at 92; *State v. Shuler*, 344 S.C. 604, 616, 545 S.E.2d 805, 811 (2001). In *Payton*, this Court held that the prosecution had violated *Batson* because the prosecution had described the prospective juror as a person of "*redneck variety*," when justifying a peremptory strike. 329 S.C. at 55, 495 S.E.2d at 208 (emphasis in original). This description, based on a derogatory racial stereotype, was sufficient grounds for this Court to hold that a *Batson* violation had occurred. The argument that the proponent of the peremptory strike had also proffered other neutral valid justifications for the challenge did not persuade this Court to hold otherwise: "[t]o excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection." *Id.*

D. 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 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.

1. <u>The State's Reasons for Striking Juror Joyce Morrow are 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. App. 1016–17. 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* App. 204–06, 366–72, 471–72, 475–76, 583–91, 760–62, 785–86. Judge Clary commented about the confusing wording of the question about criminal history, noting that he would be changing his juror questionnaire for future juries to avoid the same confusion. App. 789–90. Two White prospective jurors, Stacy Gantt and Malcolm White, were qualified despite failing to disclose information about their criminal record on their juror questionnaires, App. 760–62, 785–86, but the State did not challenge the seating of either. 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. App. 1016–17. During her individual *voir dire*, Juror Morrow stated, in response to the State's question about her stepson's killing, that

"everyone shouldn't be allowed to carry a gun."[9] App. 207. 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.

App. 1016–17.

A close 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.[10] App. 252–53, 488, 494. 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," App. 1016, 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

[9] 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. App. 85.

[10] 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. App. 488, 494.

defense counsel and two by the State. App. 488, 694–95, 743–44, 759. 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. This reason is not credible 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*, 139 S. Ct. at 2249 (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 who wanted to switch to another term until learning it would interfere with a planned vacation, App. 37–38, this proffered reason for striking her was also pretextual.[11] 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.*, 38–41, 67–68. 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 under the supervision of jury custodians while serving as a juror. App. 880–82. 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 was not struck by either side and

[11] 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 seated on the jury. App. 727. 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. App. 999–1003. 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.

2. <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 proffered 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. App. 1017. 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. App. 1017–18.

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. App. 636–37. Juror Nave's brother was prosecuted for drug possession. App. 383–84. Juror Hardison's relative had pled guilty to an unspecified crime. App. 239–240. 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.* Juror Allen's brother had a driving-under-influence conviction in Tennessee. App. 443. Juror Willingham's brother was convicted of grand larceny and driving under influence. App. 698. 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." App. 255–56; *see also* App. 72–73.

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?" App. 245. 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. App. 377. 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. App. 422. In Juror Ridings's case, the judge had to re-phrase the question before Ridings was able to answer the question. App. 449. Juror Willingham told the judge he did not understand the question twice. App. 687–88. Juror Fortner asked the judge to repeat the same question during his *voir dire*. App. 704. The State had an opportunity to strike all of these White jurors who did not initially express understanding of this particular question but did not. Jurors Nave, Ballard, and Ridings sat on Moore's jury.[12]

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 also 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." Judge Clary 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." App. 844–45. Concerned about these responses, defense counsel again questioned Juror Lindsay on this issue.

[12] Jurors Fortner and Willingham were struck by defense counsel. App. 1072.

After considerable back and forth, with Judge Clary 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." App. 849–52. Notwithstanding the earlier lengthy exchanges, the State also raised this issue, and this time she again confirmed that she could follow the judge's instructions with regards to the law. App. 856.

Similar to 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.

3. <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 underlining 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*, 139 S. Ct. at 2248.

In Moore's case, there is substantial evidence the State subjected Jurors Morrow and Alexander to excessive and disparate questioning. With regard to the statistics, the findings of the *Flowers* Court 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*, 139 S. Ct. at 2247. 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. App. 239–40.

- 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.[13] 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. App. 205–06; 785–86.

[13] A total of six jurors failed to disclose their prior criminal record accurately on their juror questionnaires: Jurors Morrow (App. 204–06), Rookard (App. 366–72), Browning (App. 471–72, 475–76), Kent (App. 583–91), White (App. 760–62) and Gantt (App. 785–86). 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. App. 762–63.

Juror Morrow	*Juror Gantt*
Q: Ms. Morrow, is your maiden name or prior name Atchison? A: Yes, sir. Q: Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana? A: In 82? Yes, sir. Q: And what happened to that charge? A: It was expunged. Q: But before – you say it was expunged. What happened? A: It was a fine. Q: And you didn't have a jury trial or anything? A: No, sir. Q: You just again forfeited the bail bond? A: Yes. Q: And then at the same time you had the ball tickets did you have another possession of marijuana tickets? A: No, sir. Q: You didn't have that? A: I did not.	Q: Ms. Gantt, I have got a record here that a Stacy Marie Gantt – is that your middle name? A: Yes, sir. Q: Was arrested back in April of this year for receiving stolen goods. A: Yeah. But I was not found guilty. Q: And that's fine. That's fine. I just asked you whether or not you had been arrested for it. A: Oh, I've been arrested, yeah, for receiving stolen goods. Q: Okay.

The State's questioning in the excerpt above of the Juror Gantt is transparent, supportive, and succinct, even though Gantt had not disclosed an arrest that happened within the twelve months preceding Moore's trial. In comparison, Juror Morrow's questioning is inquisitorial in tone even though she is being questioned about an offense that occurred and was expunged almost two decades before. Juror Morrow's *voir dire* in the excerpt above is opaque, combative,

and lengthy. The excerpts above also demonstrate the State's disparate willingness to accept Juror Gantt's explanations in comparison to Juror Morrow's similar explanations.

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.

4. <u>Discriminatory Impact</u>.

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*, 139 S. Ct. at 2245. 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.

5. 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*, 139 S. Ct. at 2250 ("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.

IV. MOORE'S *BATSON* CLAIM MEETS THE *BUTLER* STANDARD.

In *Butler*, this Court cautioned that not "every constitutional error at trial will justify issuance of the [habeas corpus] writ." 302 S.C. at 468, 397 S.E.2d at 88. Rather, the writ should be issued "only under circumstances where there has been a violation, which, *in the setting*,

constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Id.* (emphasis in original).

In applying *Butler*'s "fundamental fairness" test, it is important to consider all relevant circumstances and not merely the constitutional violation alleged by the defendant. *See McWee v. State*, 357 S.C. 403, 407, 593 S.E.2d 456, 458 (2004) (discussing *Tucker*, 346 S.C. 483, 552 S.E.2d 712), where "[this] Court found it was the combination of the constitutional violation *and* other circumstances which compelled it to conclude the applicant had been denied fundamental fairness shocking to the universal sense of justice.") (emphasis in original).

In considering whether habeas relief should be granted in this case, this Court should bear in mind that racial discrimination in jury selection has been condemned for almost 150 years. *See Strauder v. West Virginia*, 100 U.S. 303 (1880). Since then the federal and the state courts, including the Supreme Court of the United States and this Court, have assiduously labored to root out race discrimination in jury selection procedures.[14] In applying the *Butler* test, therefore, it is important to acknowledge that efforts to ensure that racial bias does not taint jury selection in criminal cases have not been entirely successful.

Equally important consideration in applying the *Butler* test is the pernicious effect of jury selection procedures that are discriminatory on the community at large. Race-based discrimination in jury selection procedures compromises the vitality of our diverse plural democracy by undermining public's confidence in the criminal justice system. *See* Section

[14] *See Flowers*, 139 S. Ct. at 2239 (discussing the Court's efforts to combat racial discrimination in jury selection procedures over the last 140 years or so and the evolution of Court's jurisprudence in the face of "widespread" and "deeply entrenched" practice of "racial exclusion from jury service"). This battle to root out racial discrimination from jury selection procedures continues to this day. *See* Jeffrey Bellin and Junichi P. Semitsu, *Widening Batson's Net To Ensnare More Than The Unapologetically Bigoted Or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) ("While the [U.S. Supreme] Court has consistently reaffirmed its 1986 holding in *Batson v. Kentucky* that race-based peremptory strikes are unconstitutional, virtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.") (internal citations omitted).

III(A), *infra*. Considering the difficulty of rooting out racial prejudice from jury selection procedures and its deleterious impact on our multiracial democracy, this Court must reaffirm its opposition to race-based discrimination in jury selection processes and to guard against any backsliding send a clear message to all actors in the criminal justice system—both private and state actors—that race-based discrimination will not be tolerated in South Carolina's criminal justice system.

Finally, in applying the *Butler*'s "fundamental fairness" test to Moore's habeas petition, it is of utmost importance to acknowledge that the finality of capital punishment demands that a death sentence is carried out only if such sentence is an outcome of a trial that is free of racial prejudice. *See Turner*, 476 U.S. at 35 ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."). Failure to abide by this principle "constitutes a denial of fundamental fairness shocking to the universal sense of justice" in any setting, *Butler*, 302 S.C. at 468, 397 S.E.2d at 88, as Moore is the only Black man on South Carolina's death row convicted and sentenced to death by an all-White jury.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should issue the writ of habeas corpus as to Richard Bernard Moore's death sentence and remand his case to the Spartanburg County Court of General Sessions for a new trial.

[*Signature block appears on the following page.*]

Respectfully submitted,

s/ Lindsey S. Vann

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2023-001345

RICHARD BERNARD MOORE,

Petitioner,
vs.

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

Respondent.

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RESPONDENTS STATEMENT OF THE CASE

This is a state habeas corpus action in the original jurisdiction of this Court in which the petitioner, Richard Benard Moore, a death row inmate, is raising a *Batson* claim from his trial in 2001, thus the claim is 22 years old. The claim, in one fashion or another, has been raised several times including: (1) at trial where it was denied by the trial judge and abandoned by trial counsel on the record; (2) abandoned on direct appeal because it was without merit; (3) raised at post-conviction relief (PCR) where it was raised as an ineffective assistance of trial counsel (IAC) claim and the underlying *Batson* claim was found to be without merit by the PCR Court; (4) abandoned on appeal from PCR by 2 qualified and experienced PCR appellate attorneys who determined the claim was without merit and told petitioner so; (5) raised to this Court in a *pro se* brief which was dismissed as barred by the prohibition against hybrid representation; (6) raised on federal habeas review as an IAC claim and denied by both the United States Magistrate and the United States District Judge because the claim was procedurally barred and cause and prejudice could not be shown to overcome the procedural bar because it was abandoned on appeal from PCR and the IAC claim was not *substantial* because the underlying *Batson* claim was without merit; (7) abandoned on appeal from the denial of federal habeas review because the claim had no merit; and (8) not raised to this Court in Moore's first state habeas petition, which raised numerous grounds, where it could have been raised. As will be shown herein, the claim has been denied in whatever fashion it has been raised or abandoned on appeal because the underlying *Batson* claim has no merit. Further, Moore cannot meet the exacting standard for a grant of relief under state habeas review.

First, because peremptory challenges can be exercised for many reasons, including those related to the case about to be tried, it is necessary to first review the basic facts of Moore's case as set forth by this Court and some additional facts from the record.

FACTS AS RECITED BY THIS COURT

> The charges in this case stem from the September 16, 1999, armed robbery of Nikki's, a convenience store on Highway 221 in Spartanburg. According to Terry Hadden, an eyewitness, Moore walked into Nikki's at approximately 3:00 a.m. and walked toward the cooler. Hadden was playing a video poker machine, which he did routinely after working his second shift job. Hadden heard Jamie Mahoney, the store clerk, yell, "What the hell do you think you're doing?" Hadden turned from the poker machine to see Moore holding both of Mahoney's hands with one of his hands. Moore turned towards Hadden, pointed a gun at him, and told him not to move. Moore shot at Hadden, and Hadden fell to the floor and pretended to be dead. After several more shots were fired, Hadden heard the doorbell to the store ring. He heard Moore's pickup truck and saw him drive off on Highway 221. Hadden got up and saw Mahoney lying face down, with a gun about two inches from his hand; he then called 911. Mahoney died within minutes from a gunshot wound through his heart. A money bag with $1408.00 was stolen from the store.
>
> Shortly after the incident, Deputy Bobby Rollins patrolled the vicinity looking for the perpetrator of the crime. Approximately one and one-half miles from the convenience store, Deputy Rollins took a right onto [redacted] drive, where he heard a loud bang, the sound of Moore's truck backing into a telephone pole. He turned his lights [on] and saw Moore sitting in the back of a pickup truck bleeding profusely from his left arm. As Deputy Rollins ordered him to the ground, Moore advised him, "I did it. I did it. I give up. I give up." A blood covered money bag was recovered from the front seat of Moore's pick-up truck. The murder weapon, a .45 caliber automatic pistol, was found on a nearby highway shortly before daylight.

State v. Moore, 357 S.C. 458, 460-61, 593 S.E.2d 608, 609-10 (2006).

ADDITIONAL RELEVANT FACTS

On September 15, 1999, before Moore murdered Jamie Mahoney, Moore went to the residence of George Gibson, in Whitney, S.C., sometime between 8:00 and 10:00 p.m., and Moore asked Gibson to get him some crack cocaine. This is the same residence that Moore ended up at after the crimes at Nikki's. Gibson, who knew Moore as "Mo," refused provide Moore with any crack cocaine because Moore did not have any money. Gibson also refused to give Moore the crack on credit. Even though Moore was unemployed at the time, he told Gibson that he was going

to work and would return the following morning. He then left. **(App. 1245-48; 1253; 1255; 1371-72).**[1]

Moore then went to Nikki's where Jamie Mahoney (the murder victim) was working the third shift at Nikki's, where he had worked for over 3 years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol in the store for protection, and Jamie carried a .44 caliber handgun behind his back and in his waistband for protection. However, he was slightly built, he was between 5'7" and 5'9" tall and weighed approximately 145 pounds. and his hands were ravaged by arthritis. None of his co-workers or friends had ever seen Mahoney be physically aggressive towards anyone in Nikki's. **(App. 1195-96; 1346-57; 1361-63; 1366-70; 1489).** Terry Hadden (the AWIK victim) was a regular customer and arrived around 12:15 a.m. on September 16, 1999. Hadden ate and briefly talked to Jamie. Hadden then began playing the video poker machine. The store was busy for a short period, and Jamie had a brief rush of customers around 1:15 a.m. Later, Jamie loaned his lug wrench to an African-American customer who had trouble with his tire in the parking lot. Otherwise, the early morning hours remained relatively uneventful, until Moore walked in shortly after 3:00 a.m. Hadden and Moore glanced at each other briefly when Moore first entered. Then, Hadden turned around and continued playing video poker. Moore went to a cooler and, apparently, retrieved two cans of beer. **(See App. 1193-1205; 1309).** "The next thing" Hadden knew, he "heard Jamie say, 'What the hell do you think you are doing?' ... in a loud tone of voice." **(App. 1205).** After this exclamation, Hadden swiveled around in his chair and saw Moore holding both of Jamie's hands in one of Moore's hands. Moore quickly pulled a gun on Hadden and told him "not to move." Without giving Hadden a chance to

[1] Appendix citations are to the Appendix in Moore's federal habeas action, not Moore's Appendix filed with his state habeas petition. Respondent has also filed with this Return a Supplemental Appendix containing additional records relevant to this action.

comply with this order, Moore fired a shot *at Hadden* with the .45 caliber semi-automatic that he had taken from Jamie. Hadden then played dead. He thereafter heard a number of gunshots but did not count how many. **(App. 1204-09; 1215-17; 1288-89; 1424).** Hadden continued playing dead until he heard Moore say, "Let's get the hell out of here" and exit the store. Before Moore left the store, he took a money bag containing $1,408.00. Although bleeding profusely from a gunshot wound, Moore did not go to the hospital. Instead, he immediately drove his pickup truck to Gibson's house, to buy crack. Along the way, he discarded the .45 caliber handgun, which had his blood on it. **(App. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478).** It was undisputed at trial and PCR that both of the guns involved in the shootout were initially within victim's control, and that Moore did not bring either gun to the store. When Moore reached Gibson's residence, he asked Gibson to get him some crack. Gibson refused to get him crack because of the late hour. Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." **(App. 1248- 49).** Moore was obviously bleeding, and Gibson asked him what had occurred. Moore said that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to get involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. **(App. 1249-50; 1256-57).** Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle," which was the description of the suspect. He passed by as Moore backed into the telephone pole. He quickly turned his car around, "threw all of [his] light in that general area" and exited his vehicle with his weapon drawn. **(App. 1234-38).** Moore approached Deputy Rollins with his hands in the air. He was "bleeding profusely" from his left arm. As Moore was complying with Deputy Rollins' instructions to get on the ground, he repeatedly said, "I did it, I did it, I give up, I give up." A search of Moore's truck resulted in the seizure of the stolen money and an open pocketknife.

Officers found Moore's wallet in the roadway and the bloody shirt Moore had been wearing near Gibson's residence. **(App. 1238-40; 1311-18).** Moore later told the emergency room nurse that he was using alcohol and cocaine that night. **(App. 1377-78).** During the exchange of gunfire, at least one shot had mortally wounded Jamie Mahoney. The pathologist explained that gunshot had "passed through the lower border of the eighth rib" before going through the victim's liver, through and through his stomach, through and through his diaphragm, through and through his heart and his left lung. It exited the right side of his chest. Because Jamie's shirt was overlaying the wound when the shot was fired, the pathologist "could not tell for sure" if it was a contact wound. He concluded that it was "more likely" that the gun had been fired "slightly away from the body." Jamie also had a gunshot wound to his lower right arm, which broke his right arm. **(App. 1491-1502).** The pathologist opined it is possible either there were two gunshot wounds or all of Jamie's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and death would have occurred within six to ten minutes after receiving this wound. **(App. 1491-1502).** A bullet fired by Jamie's .44 caliber weapon went through Moore's left arm. **(App. 1380-84).**

At the crime scene at Nikki's, after the crime, officers found the victim lying in the kitchen floor. He was deceased, and his right arm was bent at such a peculiar angle that it was clearly broken. In addition to finding evidence of the victim's blood, Moore's blood was found across the back of the victim's clothing and a trail of his blood led out the front door. A meat cleaver that did not belong to Nikki's was found at the victim's feet with Moore's blood on it. Also, officers found six shell casings, two lead bullet cores, and two fired bullets that had been fired by the .45

automatic, as well as several fragments that were consistent with having been fired by it. **(App. 1271-93; 1305-18; 1352-53; 1364-65; 1368; 1421-32; 1460-80).**

RELEVANT PROCEDURAL HISTORY

Trial and direct appeal.

Moore is currently under a death sentence as the result of his Spartanburg County murder conviction and death sentence for murdering Jamie Mahoney during the commission of the armed robbery described above. The Spartanburg County Grand Jury indicted Moore in January 2000 for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617- 619). **(App. 2980-81; 2984-850).** The Grand Jury handed down another armed robbery indictment at the October 2001 term of court. **(App. 2987-88).** Keith Kelly, Michael Morin and Jennifer Johnson, Esquires, represented Moore at his October 16-22, 2001, trial.

The case proceeded to trial and the jury convicted Moore of each of the indicted offenses. **(App. 73-1607; 1765).** Following the 24 hour waiting period in S.C. Code Ann. § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury, which found 3 aggravating circumstances beyond a reasonable doubt.[2] The jury also was directed to consider the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7). The jury recommended a death sentence for murder, which was imposed. **(App. 1609-1763; 2982-83; 2986; 2989).**

Moore filed a direct appeal. As will be discussed herein, the *Batson* issue now before this Court was not raised on direct appeal for good reason; it had no merit. This Court affirmed the

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[2] The murder was committed while in the commission of robbery while armed with a deadly weapon; Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and Moore had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1)(e) & (3)-(4).

convictions and death sentence on March 1, 2004. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004).

Original state Post-Conviction Relief proceedings.

Collateral attorneys, Melissa R. Armstrong and James M. Morton, Esquires, filed a PCR application (2004-CP-42-2713), dated August 8, 2004. **(App. 1766-69)**. Moore filed an amended application on December 31, 2010 **(App. 1788-95)** alleging numerous grounds including the following ground relevant to this petition:

> 9 & 10.e. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to pursue their *Batson v. Kentucky*, 476 U.S. 79 (1986) claim, despite the fact that Applicant's jury was exclusively white in the state struck the only two African-Americans qualified to serve as jurors. Applicant is African-American and the alleged victim, James Mahoney, was Caucasian. The State's decision to strike the only two qualified African-American jurors on the jury panel established a prima facie case of racial discrimination. Trial Counsel raised a *Batson* challenge, but later abandoned it. (Tr. P. 1137). Trial Counsel's failure to pursue and/or preserved for direct appeal a *Batson* challenge was unreasonable, as the State's alleged race-neutral reasons for striking jurors Morrow and Huffman were pre-textual, as white jurors who gave almost mirror like responses and/or were similarly— if not exactly— situated insofar as having relatives who were prosecuted, were not challenged by the State and were seated on Applicant's jury. Counsel's failure to preserve this meritorious issue was deficient and unreasonable, as well as prejudicial. *Strickland v. Washington, supra.*

(App. 1789-90; 1792-93). The Honorable Roger L. Couch ("the PCR Court") held a hearing into the matter on January 30, February 1, and February 3-4, 2011. Moore was present at the hearing; and Ms. Armstrong and Mr. Morton represented him. Assistant Attorney Generals William Edgar Salter, III, and Anthony Mabry represented Respondent. **(App. 1962-2740)**. Judge Couch filed an Order of Dismissal on August 1, 2011. **(App. 2879-2979)**.

Relevant to this state habeas action, the PCR Court denied the claim of IAC for failing to pursue the *Batson v. Kentucky*, 476 U.S. 79 (1986) claim raised here finding the underlying *Batson*

claim was without merit. **(App. 2879-2936).** In the detailed and well-reasoned Order, the PCR Court found the State's reasons for exercising its peremptory challenges were race neutral and the record showed they were not pretextual. **(App. 2879-2936).**

The PCR Appeal

Moore appealed from the denial of PCR. Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Barber Hackett represented him in collateral appellate proceedings. Moore filed his Petition for Writ of Certiorari on July 18, 2012. On appeal from the denial of PCR, Moore **did not raise** the *Batson* claim, whether as a direct appeal claim *or* as an IAC claim, because PCR appellate counsel did not believe the claim had any merit. Appellate counsel wrote a letter to Moore explaining why they did not raise the claim, i.e. it did not have any merit. Moore sought to file a *pro se* Petition for Certiorari raising the *Batson* direct appeal claim or the related IAC claim, which this Court dismissed as improper because South Carolina does not recognize hybrid representation. Respondent made its Return to Certiorari on November 16, 2012. This Court filed an Order denying certiorari on September 11, 2014. Through his collateral appellate attorneys, Moore filed a Petition for Rehearing on September 26, 2014, which this Court denied on October 24, 2014.

On December 22, 2014, the Honorable Mary G. Lewis, United States District Judge, filed an Order granting Moore a stay of execution so that he could file a Petition for Writ of Habeas Corpus from this Court's denial of certiorari. Christopher W. Adams, Esquire, was appointed to act as lead counsel on January 13, 2015. Lindsey Sterling Vann, Esquire, was also appointed, as second chair, on January 13, 2015. At the time the stay was entered, Moore had the right to file a Petition for Writ of Certiorari in the United States Supreme Court, which he subsequently filed on

March 23, 2015.[3] His Petition contained 3 Questions Presented which are not relevant to this state habeas action. Respondent filed a Brief in Opposition dated May 27, 2015, and Moore filed a Brief in Reply dated June 8, 2015. The United States Supreme Court filed an Order denying certiorari on June 29, 2015. *Moore v. South Carolina*, 135 S.Ct. 2892 (2015).

FEDERAL HABEAS CORPUS

Moore filed his federal Petition for Writ of Habeas Corpus, through counsel, on August 14, 2015. *Richard Bernard Moore v. Bryan P. Stirling, Commissioner, South Carolina Department of Corrections, et al.*, C/A No. 4:14-cv-4691-MGL-TER [ECF #43]. Among other issues, Moore raised the following allegation in his *pro se* Petition for Writ of Habeas Corpus:

> III: Moore's Rights to Due Process and the Effective Assistance of Counsel as Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were Violated Due to Trial Counsel's Failure to Pursue a *Batson v. Kentucky*, 476 U.S. 79 (1986), Claim After the State Struck the Only Two African-American Jurors Qualified to Serve on the Jury.

On November 16, 2015, Respondents filed a Return and Memorandum of Law in Support of Motion for Summary Judgment and a Motion for Summary Judgment.[4] After returning to federal court, Petitioner filed a Response to the Motion for Summary Judgment, and Respondent filed a Reply. On November 16, 2015, the Honorable Thomas E. Rogers, United States Magistrate Judge, issued a 145-page Report and Recommendation recommending that Respondent's motion

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[3] On December 10, 2014, this Court had denied Petitioner's motion for a stay to pursue relief in the United States Supreme Court, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. at 547, 471 S.E.2d at 142.

[4] Rather than respond to Respondents' motion for summary judgment, Moore moved for a stay and abeyance under *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust previously unexhausted claims in a successive state PCR action. Over Respondents' objection he had no right to return to state PCR court, the U.S. Magistrate Judge stayed proceedings on January 13, 2016. Moore returned briefly to state court where he filed a 2nd PCR application. The State moved to dismiss on multiple grounds including that this application was time barred and improperly successive under state law. The application was dismissed as improperly successive and time barred by the 2nd PCR Court, and the case returned to federal habeas corpus.

for summary judgment be granted and the petition for federal habeas corpus relief be dismissed. *Moore v. Stirling*, 2017 WL 8294058 (D.S.C. December 28, 2017 (Not Reported in F.Supp.) 4:14-cv-0469-MGL-TER, Report and Recommendation.[5] Within the Report and Recommendation, Judge Rogers addressed the IAC *Batson* claim finding the claim was procedurally defaulted by not being raised on appeal in state court, **but more importantly** Moore had not shown cause **or prejudice** to excuse the procedural bar. Specifically, Moore had not shown **prejudice** because the IAC *Batson* claim was not *substantial* pursuant to *Martinez v. Ryan,* 566 U.S. 1 (2012),[6] because considering the trial record and the PCR testimony on the *Batson* hearing, the underlying *Batson* claim had no merit. *Id.*[7] Petitioner filed objections to the Report and Recommendation which were denied. On March 21, 2018, the Honorable Mary G. Lewis, United States District Judge, adopted the Report and Recommendation and granted Respondent's motion for summary judgment agreeing with the Magistrate, that the claim was procedurally barred, but also Petitioner had not shown prejudice for the reasons stated in the Report and Recommendation including the Magistrate's detailed analysis of the underlying *Batson* claim which was addressed by the PCR Court, i.e. the IAC *Batson* claim was not substantial because underlying *Batson* claim had no merit.

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[5]Even though the District Court specifically references the Magistrate's Report and Recommendation and its analysis of the IAC claim and the underlying *Batson* issue, Moore has not included the Report and Recommendation in his Appendix. Respondent is providing the same to this Court and it can also be obtained on Westlaw.

[6] "To demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one," a federal habeas petitioner must show "that the claim has some merit." *Martinez*, 566 U.S. at 14; *Sigmon v. Stirling*, 956 F.3d 183, 198 (4th Cir. 2020), *as amended* (Apr. 15, 2020). This is done with reference to *Strickland v. Washington*, 466 U.S. 668 (1984) two familiar prongs. *Sigmon*, supra.

[7] Again, to be clear, the United States Magistrate Judge did not make a traditional determination on the merits of the IAC claim but did determine Moore could not show prejudice to excuse the procedural default because the IAC *Batson* claim was not "substantial", i.e. it did not have "some merit" after reviewing the PCR Court's determination and the underlying *Batson* claim itself. *Martinez; Sigmon.*

Moore v. Stirling, 2018 W.L. 14309594:14-cv-0469-MGL (D.S.C. March 21, 2018) adopting Report and Recommendation. Stanko filed a Rule 59 Motion to Alter or Amend, which was denied by Judge Lewis. The District Court also denied a Certificate of Appealability as to this issue.

The appeal from the denial of federal habeas corpus

Moore, represented by the same attorneys including Ms. Vann, appealed the denial of federal habeas corpus relief to the Fourth Circuit Court of Appeals; however, they did not raise the *Batson* claim in any form whether as a due process claim or as an IAC claim, abandoning the issue raised below. *Moore v. Stirling*, 952 F.3d 174 (4th Cir. 2020).

The First State Habeas Petition

Moore, represented by counsel, filed a state habeas petition in this Court's original jurisdiction alleging several grounds including grounds of IAC and a proportionality challenge. Moore did not attempt to raise the present claim in that action even though he could have done so. This Court denied that state habeas petition. *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022).

THE LACK OF MERIT OF THE ISSUE RAISED

Overall claims in the petition

First, Moore complains extensively in his petition that he was tried by an all-white jury. He argues this is a violation of due process or equal protection and calls into question the fairness of his proceeding. However, as this Court is well-aware, Moore, like any other criminal defendant whatever their race or sex, is not entitled to a jury of a particular composition, but a jury drawn from a fair cross-section of the community and one in which the State does not exercise its peremptory challenges in a discriminatory fashion based on race or sex. *See Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny. Moore's arguments to the contrary, including those of a

human rights committee he has included in his petition, are simply not the law, have no merit, and need no further discussion. *Id.*

In the present case, Moore does not even allege that his jury was not drawn from a fair cross-section of the community. In fact, his jury was drawn from a fair cross-section of the community, and the panels drawn for individual voir dire were drawn randomly from that pool of jurors drawn from that fair cross-section of the community. After general voir dire and individual voir dire of each panel of jurors, only 2 African-American jurors were death penalty qualified under *Witherspoon v. Illinois,* 391 U.S. 510 (1969), out of a total of 38 death penalty qualified jurors. The jurors who were not death penalty qualified were removed for non-discriminatory reasons including that they could not impose either verdict, life or death, based on the evidence in the case. The 2 African-American jurors who were death penalty qualified were some of the first jurors qualified. The jury was then selected in the order of qualification. (App. 1765). As a result, the 2 African-American jurors were some of the first jurors presented for jury selection. The State exercised 2 of its 5 peremptory challenges for race neutral and sex neutral reasons against the 2 African-American jurors and also used its 3 other strikes and 1 alternate strike against white jurors. This resulted in a jury of all white jurors. This is simply not a constitutional violation entitling Moore to any relief under United States Supreme Court precedent or this Court's precedent.

Instead, Moore alleges that the State exercised those 2 peremptory challenges in a racially discriminatory fashion and because those 2 jurors were the only African-American juror's death penalty qualified, this resulted in an improper all-white jury deciding his case and he is entitled to a new trial. Moore is simply wrong. As will be discussed in detail herein, the State did not exercise those 2 peremptory challenges in a racially discriminatory fashion. Therefore, Moore is not entitled to state habeas relief.

The *Batson* claim

What Occurred in the Trial Court relevant to this issue

After roll call of the jurors, and general qualification, jurors were individually voir dired. The jury was then selected [peremptory challenges were exercised] by both sides in the order of juror qualification. (App. 1765 [juror strike sheet]). The State exercised 4 peremptory challenges against white jurors Joyce-Smythe (#251); Debra Perkins (#213), Charles Kent (#145) and alternate Edward Huffman (#132) and 2 peremptory challenges against African-American jurors Joyce Morrow (#191)[8] and Douglas Alexander (#2). **(App. 1133-34; 1765).** Moore used his all 10 peremptory challenges to remove white jurors: Jason Lyda (#166), Don Blair #28), Lanie Allen (#4); Gary New (#197), Rhonda Parkes (# 205), Kelly West (#288), Tammy Hays (#220), David Mosley (#192), Michael Willingham (#295), and Jeff Fortner (# 85). Moore used both of his alternate strikes to remove white jurors Malcom White (#290) and Patricia Gallman (#92). (App. 1765). After jury selection, Moore's trial counsel made a *Batson* motion as to the 2 African-American jurors who were excused. Solicitor Gowdy gave his race neutral reasons for striking the 2 African-American jurors as follows:

> MR. GOWDY: Your Honor, if it please the Court, I would just initially want to say for the record that the fact that two African-Americans were struck, I don't believe, makes out a prima facie case. I would like to go on and give the race neutral reasons.
>
> MR. GOWDY: On Ms. Morrow, Your Honor, as the Court I am sure will remember, she was one of the first jurors. Deputy Willingham questioned her at some length about her criminal record.
>
> There was some withholding on her behalf, and but for the fact that I think I dropped the ball in terms of understanding how the Court qualified jurors early on, on Tuesday morning, we would, of course move to have her disqualified, because her answers were, quite frankly, closer, I thought, to Mr. Rookard's who was disqualified than they were any of the other people who had an innocent misrecollection.

[8] According to this Juror's own testimony, she is a 3rd cousin of Chief Justice Beatty. The Juror's grand-mother and Chief Justice Beatty's grandmother are sisters.

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.

And, in addition, Your Honor, she wanted to switch to another term. She is a school teacher, as I recall, and, obviously, we only want jurors who want to be here. And, only when she was confronted with the fact that she would miss her vacation did she opt to stay.

But the primary reason, Your Honor, is the withholding of the convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses.

THE COURT: All right. Let's go on to the other.

MR GOWDY: Your Honor. Mr. Alexander, the same rationale for him would exist for him, for Mr. Huffman [the alternate struck]. Of course he was a white juror that we struck [Huffman]. Mr. Alexander has a son who was prosecuted for murder.

Mr. Huffman, although it wasn't his son, had a close family member that was also prosecuted for murder. This is a murder case.

And, Mr. Moore is also somebody's son. And we did not want a juror who had recently had a son sent to prison, although I cannot tell you for how long, for the charge of murder. That is the primary reason we struck him, because he is the only juror from my recollection that actually had a child that is in prison for murder.

I also had a notation from Monday, Your Honor, that he misunderstood one of the Court's questions, and he was the only juror that I had a notation that misunderstood that question.

But the primary reason is the fact that he has a son that has been convicted of murder by the Seventh Circuit Solicitor's Office.

(App. 1135, ln. 10 – 1137, ln. 11).

After the State gave its race neutral reasons for all of its strikes, including the 2 African-American jurors, Moore's trial counsel admitted the reasons given were race neutral and not pretextual and withdrew the motion or conceded it was without merit. **(App. 1137, lines 8-14).** In fact, the following occurred:

THE COURT: I will be glad to hear from you in regards to the opposition to the

Strikes showing that it's mere pretext.

MR. KELLY: Could we have just one second, Your Honor?

THE COURT: All right.

(Pause)

MR. MORIN: Your Honor, we can't argue with the state.

(App. 1137). The trial judge then denied counsel's *Batson* motion, as follows:

> Given the fact that the state has presented the reasons that they have, and that in accordance with our case law of the *State vs. Adams*, 322 South Carolina 114, 470 S. E. 2d., 366, a 1996 case, wherein a motion is made to hold a *Batson* hearing where members of a cognizable racial group or gender is struck and the opposing party requests a hearing, that was done by the defendant. The second step of the analysis requires only a race neutral explanation by the proponent of the strike.
>
> Mr. Morin and Mr. Kelly, it's my understanding that you have accepted those reasons. I do find, by the way, that they are race neutral reasons, and, as such, ... these strikes were not just pretext. And, as such, the motion is denied.

(App. 1137, line 15 – 1138, line 3).

The findings of the trial judge are supported by the record. Relevant to the claim before the Court the following occurred during individual voir dire of Juror 191, Ms. Morrow:

> Q. Ms. Morrow, I don't mean to pry too much, but I do need to know a few more things about your past.
>
> I noticed on your juror information card there was a question have you ever been convicted of a crime other than a minor traffic violation. And you indicated that you had. And then you followed up on your questionnaire that it was - -

THE COURT: Solicitor, I think that's you or any family member, now.

MR. WILLINGHAM: Yes, sir.

THE COURT: I think you left the family-member part out. I want you to make sure.

MR. WILLINGHAM: I apologize, Your Honor.

Q: And then on the questionnaire it does say have you or any other family member been arrested, charged with a crime other than minor traffic offenses, and you indicated yes. And in parenthesis you put gambling and drugs. Who was that convicted of those?

A: Can I put what?

Q: Let me show you what I believe is your questionnaire. Question number 23, "Have you or any family member been arrested or charged with a crime other than a minor traffic offense?" You put yes. "If so, please explain." Who was charged with what crime, gambling and drugs? Is that your questionnaire?

A: Yes, sir.

Q: Okay. I am just trying to find out who was charged.

A. Oh, my brother.

Q: Your brother. Okay. So you have never been charged with anything.

A. Yes, sir.

Q. What have you been charged with?

A: With gambling.

Q: Okay. When was that?

A: It was in 85.

Q: And - -

A: It was expunged.

Q: Expunged?

A: Yeah.

Q: Okay. No other prior convictions that you are aware of?

A: No, sir.

Q. What happened? I know you said it's already been expunged. But before it was expunged, what happened to the trial? Was it a trial or did you plead guilty?

A. No, sir.

Q: What happened?

A. It was tickets, ball tickets.

Q. Okay. Forfeited, is that what happened?

A. Yes.

Q. Do you think because you have had this prior dealing with the criminal justice system that would in any way effect your ability to be fair and impartial to the state or the defense?

A. No, sir.

Q. Ms. Morrow, is your maiden name or prior name Atchison?

A. Yes, sir.

Q. Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana?

A. In 82, Yes, sir.

Q. And what happened to that charge?

A. It was expunged.

Q. But before - - you say it was expunged. What happened?

A. It was a fine.

Q. And you didn't have a jury trial or anything?

A. No, sir.

Q. You just again forfeited bail bond?

A. Yes.

Q. And then at the same time you had the ball tickets did you have another possession of marijuana charge?

A. No sir

Q You didn't have that?

A. I did not.

(App. 322, ln. 8-325, ln. 6). The questioning of this Juror continued but on another topic:

Q. One last set of questions, Mr. Morrow. Yesterday during qualification it was my understanding that you had a stepson who was killed by fire.

A. Killed by fire? He was killed.

Q. Tell me about that if you would. We didn't have any knowledge of that.

A. he was in the State of Ohio.

Q. And what happened in that particular case? How was he killed?

A. He was with a group of guys, and someone shot in the group, and he was killed.

Q. Was it an accidental type of shooting or was it criminal? Was any charges brought?

A. There was no charges brought.

Q. Was there a criminal investigation? Did the police come out and investigate?

A. Yes, sir.

Q. How did that make you feel, the fact that you had a stepson being killed?

A. Well, I mean, guns, you know, used inappropriately can - - wrong things can happen. And that's my feeling that, you know, everyone shouldn't be allowed to carry a gun.

Q. Okay. That's fair enough. Thank you, ma'am. I have no other questions.

THE COURT: Anything further from the defense?

MR. MORIN: Nothing.

COURT: The state?

MR. WIILILNGHAM: No other questions, Your Honor.

(App. 326, ln. 3 – 327, ln. 5). The judge then found the Juror qualified but did not first send her out of the courtroom briefly so either side could state their position on qualification or make any motion to disqualify the Juror. (App. 327-29). The State then moved to disqualify the juror for

withholding information. (App. 329). The following exchange took place between the trial judge and Deputy Solicitor Willingham:

> MR. WILLINGHAM: If it please the Court, Your Honor, I understand the Court has instructed the witness [sic] to report back, however, the state would ask - -
>
> THE COURT: I asked you if you have anything further. If you have something further, you ask her to step out.
>
> MR. WILLINGHAM: Yes, sir. And, I understand that, and I indicated I had no further questions. But I did have the point of law about her - - the answers she gave to my questions.
>
> THE COURT: Well, you can do it. But, once again, Mr. Willingham, you know as well as anybody how I conduct these things. If I ask you if you have anything else, if you have a matter to raise about her qualifications, you ask for her to be sent out.
>
> MR. WILLINGHAM: Yes, sir. And I apologize.
>
> THE COURT: What's your position?
>
> MR. WILLINGHAM: That she did not answer my questions truthfully, Your Honor.
>
> She has prior convictions, 1982, simple possession of marijuana, which initially she did not acknowledge. Whenever I asked about her maiden name, she did acknowledge but indicated it had been expunged, which it has not. She also - - I followed - -
>
> THE COURT: Well, sir, you would present those things to me, then I could consider it. I have qualified her.
>
> MR. WILLINGHAM: Yes, sir.
>
> THE COURT: So noted. But please, if you have got something back there, I've got this list that you-all gave me, but I can't make heads or tails from half of this stuff, and I am not getting a full deck. So understand that.
>
> If you have got something, let me have it. And let them have it if they don't have it. I have got nothing And then your are wanting to come in here after the barn has been locked up and the horse is gone. Mark it.
>
> (Rap sheet of Juror 191 marked Court's Exhibit Number one).
>
> THE COURT: Ms. Morrow. Number 191, is qualified pursuant to Section 16-3-20 of the code.

(App. 329-330).

Furthermore, important as to this Juror, during General Qualification, she stated as follows:

(The following takes place at the bench with Juror Number 191).

THE COURT: I think you are Ms. Morrow. Is that correct?

JUROR 191: Yes, sir.

THE COURT: Yes, ma'am.

JUROR 191: I am a school teacher.

THE COURT: Where do you teach, Ms. Morrow?

JUROR 191: I travel between two schools, Cleveland Elementary and Madden Elementary.

THE COURT: And what do you teach?

JUROR 191: Physical education.

THE COURT: And if our are not there do they - - s there something going on that would interfere with your duties this week?

JUROR 191: Well, I would have to get a substitute, and they would have to travel.

THE COURT: I will transfer you to one of your vacation times, whether it be spring vacation, Christmas vacation, Thanksgiving vacation, summer vacation. I will let you pick a time, you can stay with us.

JUROR 191: Vacation time?

THE COURT: That's not a very good deal, is it?

JUROR 191: No sir.

THE COURT: I will give you the option. You can transfer to a time that will not conflict with your school responsibility or stay with us.

JUROR NUMBER 191: I might get dismissed.

THE COURT: Quite possible. You never know.

JUROR 191: Okay.

(End of proceedings at the bench.)

THE COURT: Ms. Morrow is going to remain with us - - Number 91 [six]. She didn't like me offering her some time in her vacation time, and I don't blame her.

(App. 154, ln. 12 155, ln. 20).

Juror Alexander (Juror #2), also an African-American juror, had informed the trial judge that his son, John Alexander, was incarcerated for a Spartanburg County murder that the Seventh Circuit Solicitor's Office had prosecuted. (App. 191-92). The following is what took place with the trial judge:

(The following takes place at the bench with Juror Number Two)

THE COURT: You are Mr. Douglas Alexander?

JUROR NUMBER TWO: Yes, sir.

THE COURT: Yes, sir.

JUROR NUMBER TWO: My son is incarcerated. He's been in jail now for about four years. His name is John Alexander.

THE COURT: What's he incarnated for?

JUROR NUMBER TWO: Murder.

THE COURT: Was that here in Spartanburg?

JUROR NUMBER 20 [Sic]: Yes, Spartanburg.

THE COURT: And was he tried by the solicitor's office in this circuit?

JUROR NUMBER TWO: uh-huh. [Affirmative].

(App. 191, 15-192, ln 4). Juror Alexander also confirmed his son's murder conviction during individual voir dire. (App. 374).

In addition to striking Juror Alexander for that reason, the State also struck Juror Huffman, who was white, based upon its' knowledge that he had a brother-in-law who was convicted of murder. (R. 1131-33 & Deputy Solicitor Willingham's PCR testimony).

As previously stated, the trial court's ruling on this issue is fully supported by the record. The State's reasons for excusing each juror, including the 2 African-American jurors were race neutral and not pretextual. The issue was not raised on direct appeal.

THE PCR COURT'S DETERMINATION OF THE *BATSON* ISSUE GROUND 10(e) OF THE PCR ACTION

In Ground 10(e) of his PCR action, Moore alleged counsel were ineffective for failing to pursue their *Batson* claim, where Moore's jury was exclusively white; the State struck the only 2 African-Americans qualified to serve as jurors; and the State's facially race-neutral reasons for striking the 2 African-American jurors were *allegedly* pretext. The PCR Court addressed this claim on the merits, including the underlying *Batson* claim, and found the claim had no merit. **(St. Hab. App. 2926-36; 1082-92).**

The PCR Court noted that in the course of jury selection, the State struck white jurors Joyce- Smythe (#251); Debra Perkins (#213), Charles Kent (#145) and alternate Edward Huffman (#132). It struck African-American jurors Joyce Morrow (#191) and Douglas Alexander (#2). **(App. 1134; 1765).** The PCR Court noted in a footnote, that the jury selection sheet reflected that the State first struck juror Smythe. It then struck jurors Morrow, Alexander, Perkins, Kent and alternate juror Huffman, in that order. **(App. 1765).**

The PCR Court also noted that following jury selection, trial counsel Morin made a *Batson* motion, noting the State had struck the only 2 qualified African-American jurors. **(App. 1134-35).** Solicitor Trey Gowdy explained the State struck Ms. Morrow because she had withheld

information about her criminal record. The Solicitor observed that but for his initial misunderstanding about how the trial judge qualified jurors, he would have moved to have her disqualified for cause "because her answers were, frankly, closer, I thought to Mr. Rookard's who was disqualified than they were [to] any other people who had an innocent mis-recollection." **(App. 1135, ll. 10-21).**[9] Solicitor Gowdy further noted Morrow had also indicated "she thought guns were used improperly." While some other jurors may have had "reluctance about guns," no other juror stated that they believed guns are "improperly" used. The Solicitor stated: "That's obviously going to be an issue in this case, if the victim was armed." Moreover, she was a schoolteacher who initially wanted to be switched to another term, and "only when she was confronted with the fact that she would miss vacation did she opt to stay." He indicated that the State only wanted petit jurors who wanted to serve. The principal reason for striking this juror, however was "the withholding of [information about her prior] convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses." **(App. 1135, ln. 22-1136, ln. 10).**

The PCR Court noted the State struck juror Alexander because the Seventh Circuit Solicitor's Office prosecuted Alexander's son for murder. In fact, Solicitor Gowdy's recollection was Alexander was the only juror who had a child incarcerated for murder. The PCR Court found this was the same reason the State struck juror Huffman, a white alternate juror, who likewise, had a close family member prosecuted for murder. Solicitor Gowdy explained that "Mr. Moore [the defendant on trial] is also somebody's son. And we did not want a juror who had recently had a

[9] This is obviously a reference to Judge Clary's denial of the State's motion to disqualify this juror for cause after individual voir dire [discussed above], where Judge Clary did not send the juror out in the hall after questioning but qualified her, and the State then made its motion and Judge Clary ruled the motion came to late.

son sent to prison . . . for the charge of murder." Although this was the primary reason for striking him, Solicitor Gowdy stated his notes reflected Alexander had misunderstood a question from the trial judge and he was the only juror who his notes reflected misunderstood that question. **(App. 1136, ln. 11 -1137, ln. 7).**

The PCR Court noted in its Order that the trial judge gave trial counsel an opportunity to show that the prosecution's stated reasons for striking the jurors were pretextual, but Mr. Morin stated: "we can't argue with the State." (R. 1137, ll. 8-14). The PCR Court pointed out the trial judge then denied counsel's motion as follows:

> Given the fact that the state has presented the reasons that they have, and that in accordance with our case law of *State v. Adams*, 322 South Carolina, 114, 470 S.E.2d 366, a 1996 case, wherein a motion is made to hold a *Batson* hearing where members of a cognizable racial group or gender is struck and the opposing party requests a hearing, that was done by the defendant. The second step in the analysis requires only a race neutral explanation by the proponent of the strike.
>
> Mr. Morin and Mr. Kelly, it's my understanding that you have accepted those reasons. I do find, by the way, that they are race neutral reasons, and , as such, . . . these strikes were not just pretext. And, as such, the motion is denied.

(Citing App. 1137, ln. 15 – 1138, ln. 3).

The PCR Court pointed out that at the PCR hearing, trial counsel testified in connection with this issue, as did Deputy Solicitor Willingham, who was the Deputy Solicitor at the time of trial and part of the prosecution team. The PCR Court rejected Moore's claim that Willingham's testimony was irrelevant to the question of whether the State properly exercised its strikes and that "[o]nly Solicitor Gowdy knows why he exercised strikes against African-Americans in a certain way, and his reasons are set forth in the trial record." The PCR Court found Willingham had input into and actively participated in the State's decision of which jurors to strike and, as a result, was permitted to testify about the reason for the State's use of its strikes, even though the Solicitor

stated those reasons in the *Batson* hearing. The PCR Court found Willingham's testimony and Respondent's Ex. 26 (his folder for juror Morrow) corroborated the State's use of its' challenges at trial. The PCR Court found trial counsel's testimony and Willingham's testimony was credible, and trial counsel's testimony was credible as to all of the issues addressed in its Order. In light of the credible testimony and the trial transcript, the PCR Court found Moore had not proved either deficient performance or prejudice under *Strickland* as to the *Batson* issue.

The PCR Court noted that under *Batson* and its progeny, "parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex." Quoting *Rivera v. Illinois*, 129 S.Ct. 1446, 1451 (2009). The PCR Court found, as this Court explained in *State v. Rayfield*, 369 S.C. 1-6, 112, 631 S.E.2d 244, 247 (2006):

> "The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender" *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-629, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).
>
> We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996)(citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 479 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

(PCR Order, pp. 50- 51; App. 2928-2929).

Further, the PCR Court noted: "in *Batson* inquiries, 'the decisive question will be whether counsel's race neutral explanation for a peremptory challenge should be believed.' Because there is rarely any direct evidence of the attorney's state of mind when he made the challenge, 'the best evidence often will be the demeanor of the attorney who exercised the challenge.' This type of credibility assessment lies 'peculiarly within a trial judge's province.'" Quoting *Byram v. Ozmint*, 339 F.3d 203, 208 (4th Cir. 2003(citing *Miller-El v. Cockrell*,, 537 U.S. 322, 340 (2003)). See also *Batson*, 476 U.S. at 98 n. 21 ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because the finding 'largely will turn on evaluation of credibility.'").

Initially, the PCR Court found Moore had failed to prove deficient performance based on counsel's failure to argue the reasons proffered by the State for striking jurors Morrow and Alexander were, in fact, pretextual. The Court found counsel Morin, who was primarily responsible for handling the guilt phase, made a reasonable strategic decision not to further argue the *Batson* motion because, based upon his knowledge of the record, the reasons proffered by the State were race neutral.

The PCR Court found counsel had obviously participated in the lengthy voir dire process and he was aware of the juror's responses to the questions posed as well as the juror's demeanor. With respect to juror Morrow, counsel had witnessed the following exchange between Mr. Willingham and Ms. Morrow:

> Q: And . . . on the questionnaire it does say have you or any other family member been arrested, charged with a crime other than minor traffic offenses, and you indicated yes. And in parenthesis you put gambling and drugs. Who was that convicted of those?
>
> A: Can I put what?
>
> Q: Let me show you what I believe is your questionnaire. Question number 23,

"Have you or any family member been arrested or charged with a crime other than a minor traffic offense?" You put yes. "if so, please explain." Who was charged with what crime, gambling and drugs? Is that your questionnaire?

A: Yes, sir.

Q: Okay. I am just trying to find out who was charged.

B. Oh, my brother.

Q: Your brother. Okay. So you have never been charged with anything.

B. Yes, sir.

Q. What have you been charged with?

A: With gambling.

Q: Okay. When was that?

A: It was in 85.

Q: And - -

A: It was expunged.

Q: Expunged?

A: Yeah.

Q: Okay. No other prior convictions that you are aware of?

A: No, sir.

Q. What happened? I know you said it's already been expunged. But before it was expunged, what happened to the trial? Was it a trial or did you plead guilty?

A. No, sir.

Q: What happened?

B. It was tickets, ball tickets.

Q. Okay. Forfeited, is that what happened?

A. Yes.

Q. Do you think because you have had this prior dealing with the criminal justice system that would in any way effect your ability to be fair and impartial to the state or the defense?

A. No, sir.

Q. Ms. Morrow, is your maiden name or prior name Atchison?

A. Yes, sir.

Q. Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana?

A. In 82, Yes, sir.

Q. And what happened to that charge?

A. It was expunged.

Q. But before - - you say it was expunged. What happened?

A. It was a fine.

Q. And you didn't have a jury trial or anything?

A. No, sir.

Q. You just again forfeited bail bond?

A. Yes.

(App. 322, ln. 21 – 325, ln. 1).

The PCR Court found counsel was thus aware juror Morrow consciously withheld information about her prior criminal conviction and she only revealed a prior conviction when the State confronted her with its' knowledge she was formerly known by the name Atchison. The Court pointed out that a prior criminal conviction is a neutral reason to strike or excuse a juror. Citing *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994)(prior prosecution by that particular solicitor's office); *State v. Casey*, 325 S.C 447, 453, 481 S.E.2d 169, 172 n. 2 (Ct. App. 1997); *Sumpter v. State*, 312 S.C. 221, 223-24, 439 S.E.2d 842, 844 (1994)(prospective juror had a prior

DUI involvement). The PCR Court also found counsel Morin was also aware that, when asked how the fact that her stepson being killed made her feel, she stated that "guns, ...used inappropriately[,] ... wrong things can happen. And that's my feeling that ... everyone shouldn't be allowed to carry a gun. **(App. 326).** The PCR Court noted that this juror's stepson had been shot and no one was ever prosecuted for that crime. **(App. 326).**

The Court also found counsel was likewise aware of the following information when he made the decision to accept the prosecutions stated reasons for their strikes as race neutral. Juror Gantt (#94), a white juror who became the second alternate juror, had failed to disclose an arrest for receiving stolen goods during the same year as Moore's trial, but she had apparently misunderstood the questionnaire and did not disclose this because she was *acquitted* of the charge. **(App. 904-05).** More importantly, the PCR Court found the State had already struck white juror Edward Huffman (#132), who was presented as a possible alternate juror, **with the only peremptory challenge it had for alternate jurors before juror Gant was presented. (R. 1765).** Thus, the State could not strike juror Gantt, because it had no more strikes to use for this alternate juror. Strikes were 1 and 2 for this alternate. Again, the jurors were struck in the order of qualification. Juror Gantt came after juror Huffman. (App. 1765).

The PCR Court found juror Alexander, an African-American juror, had informed the trial judge that his son, John Alexander, was incarcerated for a Spartanburg County murder the Seventh Circuit Solicitor's Office had prosecuted. **(App. 191-92).** In addition to striking juror Alexander for this reason, the State had struck juror Huffman, who was white, based upon its knowledge he had a close family member [a brother in law] who was convicted of murder. Huffman was the last juror who participated in voir dire. **(App. 1131-33).** The precise relationship of the "close family

member" who was prosecuted for murder was not revealed on the record until the PCR testimony of Willingham.

The PCR Court found the reasonableness of counsel's acceptance of the reasons given by the State was demonstrated by the trial judge's finding that the State's reasons for striking jurors Morrow and Alexander were race-neutral and not pretext. The trial judge, unlike the PCR Court heard the juror's responses to the questions posed and he viewed their demeanor. He also had the opportunity to view the demeanor of the Solicitor when exercising the State's strikes. The PCR Court found his finding was entitled to great deference, and on direct review would have been upheld unless clearly erroneous. Citing *Felkner v. Jackson*, 131 S.Ct. 1305, 1306 (2011), and *Batson*, 476 U.S. at 98 n. 21; *Miller-El*, 537 U.S. at 340-41("Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. ...In the context of direct review, therefore, we have noted that 'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous"). The PCR Court further found Moore had not presented the Court with any sound reason to disturb the trial judge' finding that there was no pretext.

The PCR Court found that much like other objections, a *Batson* motion can be forgone for strategic or tactical reasons, citing *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991); *Scott v. Gomez*, No. C-91-2181-SBA, 1993 WL 3033728 *2 (N.C.Cal. July 29, 1993). Here, the PCR Court found counsel made an objectively reasonable decision under *Strickland* not to contest the State's strikes after hearing the race neutral reasons offered by the prosecution because counsel, after observing voir dire, did not think those reasons were a pretext for racial discrimination. Referencing *Shabazz v. Com.*, 2006 W.L. 3755122, 4 (Ky. App. Dec. 22, 2006)(Unpublished).

The PCR Court further found Moore had not presented the Court with any credible evidence he was prejudiced by counsel's decision. The Court pointed out that to show prejudice in the context of failing to argue the reasons proffered by the State were a pretext for racial discrimination, Moore had to show a reasonable probability further argument in support of a *Batson* challenge would have resulted in a different jury. Citing *State v. Pryor*, 2011 WL 1344165, 1 – 2 (Ariz. App., Apr. 7, 2011). The PCR Court found Moore had not met that burden. *Id.* See also *United States v. Franklin*, 157 F.3d 90, 97 (2nd Cir. 1998)(finding that petitioner, alleging IAC based on his attorney's waiver of *Batson* claim, was unable to meet requirements of Strickland where the challenge was meritless); *Williams v. Duncan*, 2007 WL 2177075, 21 (N.D.N.Y., July 27, 2007)("Significantly, it is entirely possible that [trial counsel] recognized the futility of the *Batson* challenge and strategically decided to abandon the motion. An attorney's purported failure to pursue a meritless *Batson* claim cannot be the basis of an ineffective assistance of counsel claim.")(citing *Franklin*).

The PCR Court noted that in an effort to demonstrate prejudice from the strike of juror Morrow, Moore pointed out the State failed to strike juror Gantt, the second alternate. However, the Court found Moore ignored the State had exercised its only challenge for alternates to strike juror Huffman, before Gantt was called. Further, Ms. Gantt failed to disclose a charge of which she was acquitted, but Ms. Morrow was not forthcoming about a prior conviction. The PCR Court rejected Moore's contention the State indicated that Ms. Morrow's use of an alias was one of the reasons for striking her. Rather, the Court found the State challenged her because she was unwilling to admit her prior marijuana conviction until confronted with the alternate identity.[10]

[10] The PCR Court noted, as did the Solicitor at trial, that the trial judge subsequently excused juror Rookard (#235) because he had been dishonest in not disclosing a number of arrests and

Further, the Court noted the State used a peremptory challenge to strike white juror Charles Kent (#145), who had failed to reveal past offenses, after the trial judge had denied the State's request to strike Kent for cause. **(Citing App. 715-18; 1765).** The PCR Court also found Moore failed to prove the State's other reasons for striking juror Morrow were pretext.

The PCR Court noted that although the Solicitor noted other jurors expressed some concerns over use of firearms, he noted none had used the term "improperly" in doing so. The PCR Court found Moore had not pointed to any other juror the State accepted who expressed his or her reservations about gun use in this fashion or who had such strong reservations about possessing a weapon. Moreover, because this challenge was based upon an assessment of the juror's concern about gun use, the PCR Court found it should defer to the trial judge. Again, the trial judge had the opportunity to actually listen to the responses and assess the demeanor of the various jurors when they responded to questioning. Thus, the trial judge was in the best position to determine whether the State's assessment of juror Morrow's distrust of gun use was more than fellow members of the venire, whereas the PCR Court had to rely on the cold record.[11] Likewise, the Court found Moore had not pointed to any other juror the State accepted who sought to avoid

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convictions on his questionnaire. Also, the trial judge informed Mr. Rookard that he would hold a contempt hearing as to the dishonest responses following Moore's trial. (R. 485-92).

[11] The PCR Court also found that even if the Solicitor was mistaken in regard to his assessment, Moore had not shown pretext. Rather, the reason proffered was still race neutral, referencing *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1546-47 (10th Cir 1997)(finding that a proffered race-neutral explanation for peremptory strike based solely on the strike's proponent's mistaken belief satisfied the second prong of *Batson* analysis), abrogated on other grounds, *Migneault v. Peck*, 204 F.3d 1003 (10th Cir. 2000); *United Staes v. Watford*, 468 F.3d 891, 912-13 (6th Cir. 2006); and because resolution of this claim rests on credibility, "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Miller-El*, 537 U.S. at 339. The PCR Court noted to reverse the trial judge's findings "would require this Court to give greater weight to inferences and assumptions drawn from the cold appellate record concerning what the prosecutor must have known, than to specific credibility determinations made by the [trial judge] . . . with the benefit of firsthand observation." The Court declined to make those inferences and assumptions based upon this record. Cf. *Watford*, 468 F.3d at 914.

jury service in this case, only to change his or her mind when informed that such decision would result in loss of vacation time. The Court further found Moore had failed to show pretext in striking juror Alexander.

The PCR Court pointed out that to the contrary, Moore recognized juror Alexander and juror Huffman were similarly situated jurors and they were of different races. However, Moore had their races reversed asserting Alexander was white and Huffman was African-American. More importantly, the Court found Moore ignored the State stuck both men. (R. 1736) and for the same reason: a close family member of each juror was prosecuted by the Seventh Circuit Solicitor's Office for murder. (Referencing Petitioner's proposed Order, pp. 4, 17). As noted previously, this was a race neutral reason for the State's exercise of its peremptory challenges. Referencing *Casey*, 325 S.C. at 453, 481 S.E.2d at 172 n.2; *Sumpter*, 312 S.C. at 223-24, 439 S.E2d at 844. Further and as noted, the State had already exhausted its peremptory challenges by the time Ms. Gantt was presented and, therefore, it could not strike her. As a result, the PCR Court found Moore had not established a reasonable probability that further argument in support of a *Batson* challenge would have resulted in a different jury. Therefore, the PCR Court found Moore had failed to prove either deficient performance or resulting prejudice under *Strickland* based upon counsel's alleged failure to assert that the prosecution's stated reasons were pretextual.

Because this claim had no merit, both Mr. Dudek and Ms. Hackett of the Office of Appellate Defense refused to raise this issue on appeal from the denial of PCR. In fact, Ms. Hackett wrote a letter to Moore explaining why they were not raising this issue on appeal from post-conviction relief. The letter stated in pertinent part as follows:

> Your letter and your Motion indicate concern that we did not raise your Batson claim in the petition for writ of certiorari. We have talked about this by phone, but this presents a good opportunity to discuss it again. In the PCR court's order denying you relief, the court addressed your

> Batson claim. The state struck two black jurors, Morrow and Alexander. Your trial attorneys made a Batson motion, and the trial judge inquired as to the reasons for the strikes. The state provided reasons, and your trial attorney did not pursue the motion any further. Your PCR allegation is that your trial attorney should have pursued the motion. Concerning Alexander, the prosecutor struck him because his son was prosecuted for murder. Nothing in the PCR presentation indicated this information was false or that the prosecutor struck Alexander for a race-based reason. The reason was race-neutral, and no evidence as presented to indicate the stated reason was a pre-text. We see no merit to raising the exercise of a peremptory strike against Alexander as an issue in your petition.
>
> Turning to Morrow, the prosecutor stated he struck her because she failed to disclose her criminal record and she expressed a concern about the improper use of guns. The state did not strike Stacey Gantt, a white juror, who also failed to disclose a prior arrest. The PCR order stated that the state could not have struck Gantt because it had exercised its only strike against Huffman. We went through the record to be sure this was accurate because Gantt and Morrow were arguably similarly situated (one having failed to disclose an arrest and, and one having failed to disclose a conviction). On page 1765 of the Appendix, the strike sheet shows the state exercised its first strike as to alternates against Edward T. Huffman. Page 1134 of the Appendix indicates that the jury was struck, but this process is not transcribed. Thus, we were left with only the strike sheet to indicate the order of the strikes. No evidence was presented in the PCR hearing that the order listed on the strike sheet was incorrect. Further undercutting this claim is the fact that the prosecutor moved to excuse Gantt for cause during the qualifications. This occurred on pages 907-90. Thus, the prosecutor would likely have struck Gantt with a peremptory if he had any available. Ultimately, the court found Gantt qualified. We hope this provides a clear understanding of our analysis of the issue presented.

(Letter of Susan Hackett to Richard More dated February 20, 2013, Resp. Supp. Appendix, Moore's Appendix, 1102-03). The letter goes on to explain that if collateral appellate counsel thought the issue was a winning issue, they would not intentionally omit it as they did in this case. (Id.).

GROUND III. OF THE FEDERAL HABEAS PETITION

Moore then filed a federal habeas petition in the United States District Court. Moore's third allegation in federal habeas corpus was trial counsel were ineffective for abandoning their previously-made *Batson* claim, where Moore's jury was exclusively white; the State struck the

only 2 African-Americans qualified to serve as jurors; and the State's facially race-neutral reasons for striking the 2 African-American jurors were *allegedly* pretext.

After full briefing by both the State and Moore's 2 federal habeas attorneys, one of whom was Ms. Vann who filed this present action before this Court, the United States Magistrate Judge issued a Report and Recommendation. The Magistrate Judge first found the IAC *Batson* claim was procedurally barred on federal habeas review because it was raised at PCR but not raised on appeal from the denial of PCR and *Martinez v. Ryan* did not excuse the default such a claim. The Magistrate Judge then analyzed whether Moore could show cause and prejudice to excuse the procedural bar. The Magistrate Judge first found Moore could not show cause. In addition, the Magistrate Judge found Moore could not show prejudice from the default of this IAC claim because the IAC claim itself was not "substantial" under *Martinez* and *Strickland*. Specifically, the Magistrate Judge analyzed the underling *Batson* claim and found it had no merit.

The Magistrate noted that during the jury selection, the State exercised its strikes as follows: first struck a white woman, Juror #251; followed by an African-American woman, Juror #191; followed by an African-American man, Juror #2; followed by a white woman, Juror #213; followed by a white man, Juror #145; and another white man, Juror #132, who was an alternate. (Citing App. 1765). After the trial judge announced the members of the jury, Moore's counsel, Mr. Morin, stated: "The state struck the only two African-Americans who qualified on the panel. We would make a motion under *Batson* at this time." (Citing App. 1134-35). Mr. Gowdy responded: On [Juror #191], Your Honor, as the Court I am sure will remember, she was one of the first jurors. Deputy Willingham questioned her at some length about her criminal record. There was some withholding on her behalf, and but for the fact that I think I dropped the ball in terms of understanding how the Court qualified jurors early on, . . . we would, of course, move to have her

disqualified, because her answers were, frankly, closer, I thought to [Juror #235's] who was disqualified than they were [to] any of the other people who had an innocent misrecollection. She also said . . . 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 [sic] properly. That's obviously going to be an issue in this case, if the victim was armed. And, . . . she wanted to switch to another term. She is a school teacher, . . . and, obviously, we only want jurors who want to be here. And only when she was confronted with the fact that she would miss her vacation did she opt to stay. But the primary reason . . . is the withholding of the convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses. (Citing App. 1135-36). The trial judge responded: "All right. Let's go on to the other." Mr. Gowdy explained: Your Honor, [Juror #2], the same rationale for him would exist for him, for [Juror #132]. Of course, he was a white juror that we struck.[12] [Juror #2] has a son who was prosecuted by the Seventh Circuit Solicitor's Office for murder. [Juror #132], although it wasn't his son, had a close family member that was also prosecuted for murder. This is a murder case. And Mr. Moore is also somebody's son. And we did not want a juror who had recently had a son sent to prison, although I cannot tell you for how long, for the charge of murder. That is the primary reason that we struck him, because he is the only juror from my recollection that actually has a child that is in prison for murder. I also had a notation . . . that he misunderstood one of the Court's questions, and he was the only juror that I had a notation that misunderstood that question. But the primary reason is the fact that he has a son that has been convicted of murder by the Seventh Circuit Solicitor's Office. (Citing App. 1136-37). The trial court then said, "I will be glad to hear from

[12] The Magistrate Judge noted in a footnote that Juror #132's wife's brother had been convicted of murder in Spartanburg County a few years prior to jury selection. (Citing App. 861).

you in regards to the opposition to the strike showing that it's mere pretext." (Citing App. 1137). Mr. Kelly asked: "Could we have just one second, Your Honor?" (Id.). After a pause, Mr. Morin stated: "Your Honor, we can't argue with the state." (Id.). The Magistrate Judge then recited the trial court's ruling set forth above. (Citing App. 1137-38).

The Magistrate Judge noted Ground Three was presented to the PCR court as Grounds 9 & 10(e). (Citing App. 1791). And, at PCR, Morin testified he made a *Batson* motion, but he did not pursue the issue after the State gave its reasons for striking Jurors #191 and #2 because he accepted those reasons as being race neutral. (Citing App. 2565-66). Counsel Kelly testified Morin had handled the *Batson* motion and the decision to abandon it was Morin's decision. (Citing App. 2681). The Magistrate Judge pointed out that Deputy Solicitor Willingham testified at PCR that Juror #2's son had been prosecuted "within five years of this case, and we felt that was a valid reason to strike him and did not want him on our jury." (Citing App. 2707). He further testified there was no similarly situated white juror. (Id.). The Magistrate noted the PCR Court specifically found trial counsel's testimony and Willingham's testimony as to this issue was credible, and in light of the trial transcript, Moore had not proved deficient performance or prejudice under *Strickland*. Moore filed Objections to the Report and Recommendation. The State filed a Response to those Objections.

In its Order, the District Court found the IAC *Batson* claim was procedurally barred under *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991), because it was not raised on appeal from PCR, but also Moore could not show cause for the procedural default because Moore could not show actual innocence under *Coleman* and the limited excuse of *Martinez v. Ryan* does not apply when a claim is raised and denied at PCR but not raised on appeal from the denial of PCR by PCR appellate counsel, for whatever reason. Citing *Martinez*, 132 S.Ct. at 1319-20.

More importantly, the District Court fully agreed with the Magistrate's Report and Recommendation and adopted it, including the Magistrate's analysis of the underlying *Batson* claim, which the District Court specifically mentioned. The District Court agreed Moore could not show any prejudice because the IAC *Batson* claim was not substantial for the reasons found by the Magistrate Judge:

> In addition to being unable to show cause for the procedural default on Ground Three, Petitioner fails to show prejudice. As analyzed in the Report, Petitioner's trial counsel made a *Batson* motion when the State struck the only two African-Americans qualified to serve on the jury. The State provided race-neutral reasons for those strikes, and Petitioner's trial counsel declined to challenge the State's reasons as pretextual. The trial judge concluded the reasons for the contested strikes were race-neutral and denied Petitioner's *Batson* motion. This issue was raised at state PCR proceedings, and the state PCR Court specifically held Petitioner had failed to prove deficient performance or prejudice under *Strickland.*
>
> Petitioner argues the Magistrate Judge ignored Petitioner's arguments showing the race-neutral reasons provided by the State were pretextual, and failed to address his claims under 28 U.S.C. § 2254(d). Both those arguments are unavailing. First, having reviewed Petitioner's claims regarding the allegedly race-neutral reasons being pretextual, the Court agrees with the Magistrate Judge's recommendation: there is no prejudice here. Second, federal habeas relief is unavailable where the claim has not been exhausted in the state's highest court. The Magistrate Judge here suggested, and the Court agrees, Petitioner's *Batson* claim was unexhausted, and thus correctly declined to review Petitioner's § 2254(d) claims. Because Petitioner fails to show cause for procedural default of Ground Three, and also neglects to show prejudice, the Court will overrule his objections to the Magistrate Judge's recommendation on Ground Three.

Moore v. Stirling, No. CV 4:14-04691-MGL, 2018 WL 1430959, at *9 (D.S.C. Mar. 21, 2018), adopting the Report and Recommendation, *aff'd,* 952 F.3d 174 (4th Cir. 2020). Moore, through his federal habeas counsel, including Ms. Vann, appealed the denial of his federal habeas petition,

but did not raise Ground III. of his petition to the Fourth Circuit Court of Appeals, abandoning the IAC *Batson* claim. *Moore v. Stirling*, 952 F.3d 174 (4th Cir. 2020), *cert. denied*, No. 20-5570, 2020 WL 6385899 (U.S.S.Ct., Nov. 2, 2020).

THE STATE HABEAS PETITION

In this state habeas corpus action in this Court's original jurisdiction, Moore is raising the same *Batson* claim from his trial in 2001, which in one fashion or another, has been raised before, including: (1) at trial where it was denied by the trial judge and abandoned by trial counsel on the record; (2) abandoned on direct appeal because it was without merit; (3) raised at PCR as an IAC claim and the underlying *Batson* claim was found to be without merit by the PCR Court; (4) abandoned on appeal from PCR by 2 excellent PCR attorneys, Robert Dudek and Susan Hackett, who determined the claim was without merit and told petitioner so; (5) raised to this Court in a *pro se* brief and dismissed because counsel would not raise it; (6) raised on federal habeas review as an IAC *Batson* claim and denied by both the United States Magistrate and the United States District Judge because prejudice could not be shown to overcome the procedural bar because the underlying *Batson* claim had no merit; and (7) abandoned on appeal from the denial of federal habeas review because the claim had no merit. As will be shown, the claim has been denied in whatever fashion raised because the underlying *Batson* claim has no merit. Further, Moore cannot meet the exacting standard for a grant of relief under state habeas review. *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002). Finally, the defenses of abandonment, res judicata, law of the case, finality of litigation, and collateral estoppel would apply barring this claim.

DISCUSSION

1. Moore cannot meet his burden for state habeas corpus relief in this Court's original jurisdiction because his claim is barred by the law of the case doctrine and principles of *res judicata*.

As shown, the present claim was rejected on the merits by the trial judge and intentionally not raised on direct appeal. The trial court's ruling on the *Batson* claim became the law of the case and *res judicata*. The underlying *Batson* claim was also rejected by the PCR Court when addressing the IAC related claim, and not raised to this Court on PCR appeal, and both this Court and the United States Supreme Court denied certiorari to review the PCR Court's ruling. The PCR Court's determination of the underlying *Batson* claim was not appealed and therefore is the law of the case and res judicata. The same IAC *Batson* claim was presented and denied in federal habeas proceedings where those Courts found no prejudice from the procedural default of the IAC *Batson* claim because it was not a substantial claim under *Martinez*, and then it was waived and abandoned on appeal by not being raised to the Fourth Circuit Court of Appeals.

In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545(1940), the Court stated that it was well settled in South Carolina that the rulings in a case become the law of the case. The doctrine of "the law of the case" prohibits issues which have been decided in a case from being re-litigated in in the same case. 5 Am.Jur.2d *Appellate Review* § 605 (1995); *Sheppard v. St*ate, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case). The law of the case applies both to those issues explicitly decided and to those issues that were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had

not erred in refusing defendant's motion for a directed verdict "for if there had been error in this respect it would have been unnecessary to consider any other questions"); *see also Warren v. Raymond,* 17 S.C. 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause);[13] *Ross v. Medical University of South Carolina,* 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State,* 68 S.E.2d 629, 633 (1952) ("[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties); *Jenkins v. Southern R. Co., 145* S.C. 161, 143 S.E. 13 (1927) (application for an injunction was refused on the ground that the initial decision in the first appeal was "not only res adjudicata as between the parties, but is the law of the case,' right or wrong," even though earlier decision was overruled).

Also, the Court explained in *Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999), that:

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Sub–Zero Freezer Co. v. R.J. Clarkson Co.,* 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina,* 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.,* 308 S.C. 467, 419 S.E.2d 217 (1992); *Sealy v. Dodge,* 289 S.C. 543, 347 S.E.2d 504 (1986).

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[13] 21 C.J.S. *Courts* § 143 (1990) ("An adjudication on any point within the issues presented by the case cannot be considered a dictum, and *this rule applies as to all pertinent questions,* although only incidentally involved, *which* are presented and decided in the regular course of the consideration of the case, and *lead up to the final conclusion,* and to any statement in the opinion as to a matter on which the decision is predicated.") (Emphasis added). *Ross v. Medical University of South Carolina,* 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997).

Therefore, Moore cannot meet his burden to demonstrate the very gravest of constitutional violations "which, in the setting, constitute[ ] a denial of fundamental fairness shocking to the universal sense of justice." *Green*, 349 S.C. at 538, 564 S.E.2d at 84, where the present claim is barred by the law of the case doctrine and principles of *res judicata*. *Id.* See also *State v. Gilbert*, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) ("Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata"); *State v. Creech*, 132 Idaho 1, 966 P.2d 1 (1998) (law of the case doctrine barred defendant from arguing on appeal that state trial court erred reversibly, on remand of capital murder case for resentencing after federal habeas corpus proceeding, in not striking certain portions of the presentence investigation report, where the state Supreme Court had previously upheld admissibility of a nearly identical presentence report); *Isley v. State*, 652 So. 2d 409, 410 (Fla. Dist. Ct. App. 1995) ("*res judicata* and the law of the case, bar Isley's repetitive arguments concerning withdrawing his pleas and ineffective assistance of trial counsel. They have been heard, considered and rejected. To raise them again is an abuse of process"); *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) ("'The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.' .... The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings"). *Cf. Foxworth v. State*, 275 S.C. 615, 618, 274 S.E.2d 415, 416 (1981). Plainly, where the same underlying issue was raised and denied in both the trial court, PCR Court, and federal habeas corpus, state habeas corpus in this Court's original jurisdiction should not lie.

2. The Defense of Abandonment Would Also Bar This Claim

As previously discussed, the *Batson* claim was withdrawn at the trial level by counsel after the State gave its neutral reasons for striking the 2 African-American jurors. The issue was also abandoned when there was no objection to the trial court's ruling denying the *Batson* motion. The issue was also abandoned when it was not raised on direct appeal by Moore. The issue was further abandoned when the IAC *Batson* claim was not even raised on appeal from PCR, and again when it was not raised on appeal from the denial of federal habeas corpus. Finally, it was abandoned **when it was not raised in Moore's previous state habeas action in this Court's original jurisdiction which raised several grounds** and could have included this ground. *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022).[14] As a result, Respondent asserts the defense of abandonment should bar this claim in the original jurisdiction of this Court where Moore has repeatedly waived and abandoned the claim at trial, in his prior state habeas action, and successively in three (3) separate appeals over 22 years.

3. The Current Petition Frustrates the Important Need for Finality of Litigation.

Allowing Moore to bring this claim in state habeas corpus would undermine the much needed finality of litigation. "[T]he principle of finality ... is essential to the operation of our criminal justice system" because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). *Teague* added, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' " *Id.* (Citation omitted). *See also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J.,

[14] Moore's original petition in the first state habeas action is on file with this Court. It raised 2 issues of IAC in addition to a proportionality challenge to his sentence. He could have raised this *Batson* claim there as well but chose not to.

concurring in judgments in part and dissenting in part). In observing the balance of equities disfavors last-minute delay, the Supreme Court continues to recognize: "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). It is evident that the balance does not tilt in favor of Moore in this latest request. Moore murdered James Mahoney early in the morning of September 16, 1999, over twenty-one years ago. He was convicted and sentenced to death in October of 2001. In the nineteen years that have followed, Moore has received review at nine different levels of appeals in the State and federal system. He also filed a successive post-conviction relief application that was summarily dismissed. He filed a previous state habeas action in this Court's original jurisdiction in which he could have raised this claim but did not. His death sentence – a sentence that a jury of his peers determined was the appropriate sentence in this case – has been upheld. Of the claim in his petition, it has been repeatedly litigated in state and federal court and as found by those Courts does not set forth a constitutional violation. As Justice Powell correctly recognized in his concurring opinion in *Schneckloth v. Bustamonte*, "There has been a halo about the 'Great Writ' that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality." *Schneckloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring).

IV. There is no merit to the *Batson* claim as decided by several courts previously

Standard of Review

Habeas relief will be granted only for a constitutional claim rising to the level of "a violation, which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002), citing *Gibson v. State*, 329 S.C. 37, 39, 495 S.E.2d 426, 428 (1998) (holding that habeas relief was not available, even if precedent was overruled in petitioner's direct appeal and a new rule was created on the issue of juror qualification) and *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). *See also Tucker v. Catoe*, 346 S.C. 483, 485, 552 S.E.2d 712, 713 (2001) (writ granted finding trial judge's instructions to deadlocked jury unconstitutionally coercive). Importantly, the Court has stated that: "We caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." In *Butler*, the Court granted relief where there was determined to be a "grave constitutional error." *See also Simmons v. State*, 322 S.C. 49, 471 S.E.2d 455 (1993); *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991) (this Court will exercise its original jurisdiction where there is an extraordinary reason such as a question of significant public interest or an emergency); *McWee v. State*, 357 S.C. 403, 407, 593 S.E.2d 456, 458 (2004) (failure to charge the jury that petitioner was parole eligible is not shocking to the universal sense of justice). Petitioner has not met this exacting standard in this case.

Argument

Moore is not entitled to state habeas relief because each successive court which reviewed this claim, in whatever fashion, has correctly found the *Batson* claim has no merit because the State exercised its peremptory challenges in a race neutral fashion.

Moore seeks state habeas relief on a claim that was raised at the trial court level, conceded by counsel, and denied by the Circuit Court. No direct appeal was taken on this claim because it had absolutely no merit given this record. The claim was again raised in PCR as an IAC claim, but it was denied and dismissed by the PCR Court because the underlying *Batson* claim had no merit. The State's reasons for striking the 2 African-American jurors were race neutral and they were not pretextual given the entire record. The claim was so lacking in merit that 2 PCR appellate counsel refused to raise the claim on appeal. Moore raised the claim in a *pro se* petition which was dismissed by this Court. The claim was again raised on federal habeas corpus review as an IAC claim, and once again, the United States District Court and a United States Magistrate Judge denied the claim not only because it was procedurally defaulted, but also because Moore could not show prejudice to excuse the procedural default because the IAC *Batson* claim was not *substantial* because the underlying *Batson* claim had no merit. Two federal habeas attorneys, including one raising this current issue, refused to raise the issue to the Fourth Circuit Court of Appeals. This *Batson* issue has been reviewed and reviewed by both State and federal courts and correctly found to be without merit because there was no *Batson* violation in this case.

First, trial counsel conceded there was no *Batson* violation after hearing the State's stated reasons for striking each of the jurors it struck. Second, the trial judge, Judge Clary, correctly found on the record that the State's stated reasons for striking the 2 African-American jurors were

race neutral and were not pretextual. Third, direct appeal counsel did not raise this issue on appeal because it had no merit.

Fourth, Moore alleged at PCR and on federal habeas review IAC for abandoning their previously-made *Batson* claim, where Moore's jury was exclusively white; the State struck the only 2 African-Americans qualified to serve as jurors; and the State's facially race-neutral reasons for striking the African-American jurors were *allegedly* pretext. The underlying *Batson* claim is the same claim he raises here. As the PCR Court found, Moore could not show deficient performance or prejudice on the IAC claim because he could not show deficient performance or resulting prejudice where there was no *Batson* violation. PCR appellate counsel would not even raise the claim because it had no merit. The District Court and federal Magistrate found likewise in evaluating whether Moore could show prejudice to overcome the procedural bar of the IAC *Batson* claim finding the IAC *Batson* claim was not "substantial" because the underlying *Batson* claim had no merit. The record supports each court's determinations and state habeas relief is not appropriate. *Green*, supra.

After individual voir dire, jurors Morrow and Alexander were the only 2 African-American jurors who were *Witherspoon* [death penalty] qualified, i.e. they stated they could impose life or death based on the evidence in the case and would not automatically impose one sentence or the other regardless of the facts. That was not the State's fault. As previously noted, the jurors were struck in the order of their qualification. That was not the State's fault either.

In the course of jury selection, the State struck white jurors Joyce Smythe (# 251); Debra Perkins (# 213), Charles Kent (# 145) and alternate Edward Huffman (# 132). It also struck African-American jurors Joyce Morrow (# 191) and Douglas Alexander (# 2). **(App. 1134; 1765).** The State only had 5 peremptory challenges and 1 alternate challenge. The jury selection sheet

reflects the State first struck juror Smythe. It struck jurors Morrow, Alexander, Perkins, Kent, and alternate juror Huffman, in that order. At that point, it was out of peremptory challenges. **(App. 1765).**

Trial counsel made a *Batson* motion, noting the State had struck the only 2 qualified African-American jurors. **(App. 1134-35).** Solicitor Gowdy explained the State struck juror Morrow because she had withheld information about her criminal record. The Solicitor observed that but for his initial misunderstanding about how the trial judge qualified jurors, he would have moved to have her disqualified for cause "because her answers were, frankly, closer, I thought, to Mr. Rookard's who was disqualified than they were any of the other people who had an innocent mis-recollection." **(App. 1135, lines 10-21).** Solicitor Gowdy also noted juror Morrow had indicated "she thought guns were used improperly." While some other jurors may have had "reluctance about guns," no other juror stated that they believed guns are "improperly" used. "That's obviously going to be an issue in this case, if the victim was armed." Moreover, she was a school-teacher who initially wanted to be switched to another term, and "only when she was confronted with the fact that she would miss her vacation did she opt to stay." Gowdy stated the State only wanted those petit jurors who wanted to serve on the jury. The principal reason for striking her, however, was "the withholding of [information about her prior] convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses." **(App. 1135, line 22 – 1136, line 10).**

The State struck juror Alexander because the Seventh Circuit Solicitor's Office had prosecuted Alexander's son for murder. Solicitor Gowdy's recollection was juror Alexander was the only juror *who had a child incarcerated for murder.* Further, the State had struck juror Huffman, a white alternate juror, because he had a close family member prosecuted for murder.

Solicitor Gowdy explained that "Mr. Moore [the defendant] is also somebody's son. And we did not want a juror who had recently had a son sent to prison . . . for the charge of murder." Moore was on trial for murder. Solicitor Gowdy's *notes also reflected* Alexander had misunderstood a question from the trial judge and Gowdy believed he was the only juror who misunderstood that question, but the Solicitor reemphasized the primary reason for striking juror Alexander was his son had been prosecuted by the Seventh Circuit Solicitor's Office and convicted of murder. **(App. 1136, line 11 – 1137, line 7).**

The trial judge gave trial counsel an opportunity to show the prosecution's stated reasons for striking the jurors were pretextual. After consultation with co-counsel, Mr. Morin, who participated in the entire voir dire of the jurors, stated: "we can't argue with the State." **(App. 1137, lines 8-14).** The trial judge then denied counsel's motion, as follows:

> Given the fact that the state has presented the reasons that they have, and that in accordance with our case law of the *State vs. Adams*, 322 South Carolina 114, 470 S. E. 2d., 366, a 1996 case, wherein a motion is made to hold a *Batson* hearing where members of a cognizable racial group or gender is struck and the opposing party requests a hearing, that was done by the defendant. The second step of the analysis requires only a race neutral explanation by the proponent of the strike.
>
> Mr. Morin and Mr. Kelly, it's my understanding that you have accepted those reasons. I do find, by the way, that they are race neutral reasons, and, as such, ... these strikes were not just pretext. And, as such, the motion is denied.

(App. 1137, line 15 – 1138, line 3).

Both of Moore's trial attorneys and former Deputy Solicitor Donnie Willingham testified at the PCR hearing concerning this issue. The PCR Court found their testimony was credible. **(App. 2928).** Mr. Morin testified he recalled making a *Batson* motion. Asked why he had abandoned this motion after the State had given its' reason for striking the jurors, he testified: "If I recall, there were two African-Americans that were selected. The State struck

them both, but then the state gave race neutral reasons for striking them." Mr. Morin believed the stated reasons were, in fact, race neutral. **(App. 2565-66)**.

When asked about the prosecution's unsuccessful motion to have one of these jurors [juror Morrow] struck for cause, Mr. Morin testified: "the fact that the state wasn't successful in getting them not qualified at that time did not change the fact that the statements that they gave later ... were race neutral." He did not know whether or not he could have argued that they failed to strike similarly situated white jurors but reiterated "I felt, when I heard their reasoning, that they met *Batson's* standards for striking." **(App. 2600-01**. *See also* **App. 2601-04)**. Mr. Kelly testified Morin handled the *Batson* motion, and the decision to abandon the motion was made by Morin. **(App. 2681)**.

Former Deputy Solicitor Willingham also remembered the *Batson* motion. At the time of his PCR testimony, Willingham was serving as Magistrate for Spartanburg County. His recollection was the State had used all of its strikes **(App. 2705)**, as follows:

> The [S]tate struck Juror number 251, ... a white female. [The] State struck Juror 191, Joyce Morrow, who was a black female. [The] State struck Juror Number 2, Douglas Alexander, who was a black male. [The] State struck Juror Number 213,... who was a white female, and we struck Juror Number, 145, ... who was a White male. That was ... all five of ours for the original panel. .... And for the alternates, we struck Juror Number 132.

(App. 2705-06).

Willingham testified the State struck juror Alexander because Alexander's son "had been charged with murder within five years of this case, and we felt that was a valid reason to strike him and did not want him on our jury." Also, his son was prosecuted by the Seventh Circuit Solicitor's Office. Willingham was unaware of any similarly situated white juror. However, the State had struck juror Huffman, a white juror, because his brother-in-law had been convicted of murder. **(App. 2707-09)**. Asked about the strike of juror Morrow, Willingham testified that:

> Mrs. Morrow, I did not believe, was truthful with the court. As you know, and everybody here knows, jurors fill out the questionnaires. One of the questions On the questionnaire was have you ever been charged or arrested for any crime. Sheindicated that she had not been. ... I gave her an opportunity, in my questioning of the juror, to clear that up, and she finally acknowledged, when confronted, that she had been, in fact, charged with possession of ball tickets, gambling.
>
> Only after I then asked about the possession of marijuana did she volunteer that information. I didn't think she was candid with the Court. I made a motion to the Court to have her disqualified as not being truthful. Judge Clary denied that motion. So, that's why we had to use a strike on her.

(App. 2709-10).[15]

Willingham also noted that **Appendix page 324** reflected the juror had been convicted of possession of marijuana. **(App. 2710).** Further, juror Morrow had also stated she thought guns were improperly used, and she had initially wanted to be switched to a different term of court. **(App. 2721).** At the PCR hearing, the State introduced the prosecution's files for jurors Morrow and Alexander as Respondent's Exhibits 26 and 27, respectively. The folders contained both the jurors' responses and Willingham's notes from voir dire. **(App. 2710-12; 2715).** In pertinent part, Willingham's notes for juror Morrow reflected she had convictions for possession of marijuana in 1982 and 1983, convictions for ball tickets in 1983, and gambling in 1993. Willingham had obtained this information from running an NCIC report, or rap sheet. Also, her stepson had been killed, in a shooting, and no one had been charged. **(App. 2713; 2717).**

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[15] As previously set forth, Willingham was correct. He did make a motion to disqualify the juror, which Judge Clary denied on the basis he did not think the State made the motion timely. However, the record shows this was a misunderstanding between Judge Clary and the State. The State was actually waiting for Judge Clary to send this juror out in the hallway outside the courtroom to make its motion to disqualify her. Instead, Judge Clary qualified the juror and released her for the day. Of course, in ruling on the motion, Judge Clary did not tell the State it could not use one of its peremptory challenges to remove the juror. Further, the State attached juror Morrow's NCIC rap sheet as State's Ex. 1 after making the motion to disqualify her; therefore, it is part of the court record.

To support Willingham's assessment that juror Morrow had been less than candid with the Court, the State pointed to her responses on voir dire by the State found at **App. 322-25**, as well as the actual responses on the juror questionnaire. Morrow had also indicated she did not want to serve on this case and wanted to exercise her exemption as a teacher to be transferred to another term, but when told she would be transferred to a vacation week or a week when she was out of school, only then did she elect to serve on the jury, *hoping she would be struck.* But still, the main reason for striking her was she withheld information about her convictions and evasiveness on voir dire. Willingham's notes for jury selection concerning juror Morrow were introduced. He had assigned an "F" to her as a potential juror and explained he graded potential jurors from "A" to "F," with "F" being the lowest grade possible. (*See* **App. 2716-25**).

When questioned at PCR about the State's failure to strike alternate Juror 94, Ms. Gantt, a white female who had been acquitted of shoplifting and receiving stolen goods, Willingham explained the State did not have any strikes left when she was presented as a juror. He had worried about her potentially serving as a juror but did not have a strike to use against her. (**App. 2726; 2731-33**). Alternate strikes had in fact been exhausted. The record fully supports Willingham's testimony in this regard. The State had exhausted all its strikes by the time Gantt was presented. The State could not strike her. There was no showing of pretext here.

The PCR Court correctly rejected this allegation on the merits as the underlying *Batson* claim had no merit. The PCR Court first cited relevant *Batson* precedent from the United States Supreme Court and this Court, including *Batson*, *Purkett v. Elem*, 514 U.S. 765 (1995), *Rivera v. Illinois*, 556 U.S. 148, (2009), and *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006). (**App. 2928-29**). The PCR Court then found that counsel Morin's failure to argue the reasons proffered by the State for striking jurors Morrow and Anderson were

pretextual did not constitute deficient performance. It further found Morin had been primarily responsible for handling the *Batson* motion and Morin had "made a reasonable strategic decision not to further argue the *Batson* motion because, based on his knowledge of the record, the reasons proffered by the State were race-neutral." The PCR Court correctly found that because Morin had participated in the voir dire process, he was aware of the responses given by these 2 respective jurors, as well as their demeanor. The Court specifically found counsel had seen the exchange between Mr. Willingham and juror Morrow, in which she had been evasive and reluctant to admit her prior convictions. Based upon this exchange (**App. 322-25**), the PCR Court correctly found "[c]ounsel was thus aware that juror Morrow consciously withheld information about her prior criminal *conviction* and that she only revealed a prior conviction when the State confronted her with its knowledge that she was formally known by the name Atchison." (**App. 2929-32**).

This finding is fully supported by the record including the voir dire of juror Morrow:

> Q: And . . . on the questionnare it does say have you or any other family member been arrested, charged with a crime other than minor traffic offenses, and you indicated yes. And in parenthesis you put gambling and drugs. Who was that convicted of those?
>
> **A: Can I put what?**
>
> Q: Let me show you what I believe is your questionnaire. Question number 23, "Have you or any family member been arrested or charged with a crime other than a minor traffic offense?" You put yes. "if so, please explain." Who was charged with what crime, gambling and drugs? Is that your questionnaire?
>
> **A: Yes, sir.**
>
> Q: Okay. **I am just trying to find out who was charged.**
>
> **A. Oh, my brother.**
>
> Q: **Your brother. Okay. So you have never been charged with anything.**

C. Yes, sir.

Q. What have you been charged with?

A: With gambling.

Q: Okay. When was that?

A: It was in 85.

Q: And - -

A: It was expunged.

Q: Expunged?

A: Yeah.

Q: Okay. No other prior convictions that you are aware of?

A: No, sir.

Q. What happened? I know you said it's already been expunged. But before it was expunged, what happened to the trial? Was it a trial or did you plead guilty?

A. No, sir.

Q: What happened?

A. It was tickets, ball tickets.

Q. Okay. Forfeited, is that what happened?

A. Yes.

Q. Do you think because you have had this prior dealing with the criminal justice system that would in any way effect your ability to be fair and impartial to the state or the defense?

A. No, sir.

Q. Ms. Morrow, is your maiden name or prior name Atchison?

A. Yes, sir.

Q. Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana?

A. In 82, Yes, sir.

Q. And what happened to that charge?

A. It was expunged.

Q. But before - - you say it was expunged. What happened?

A. It was a fine.

Q. And you didn't have a jury trial or anything?

A. No, sir.

Q. You just again forfeited bail bond?

A. Yes.

Q. **And then at the same time you had the ball tickets did you have another possession of marijuana charge?**

A. No sir

Q You didn't have that?

A. I did not.

(R. 322, l. 21-325, ln. 6; App. same; App. St. hab. 203-06)(emphasis added).

Mr. Willingham subsequently explained to the Court in his motion to disqualify Juror Morrow as follows:

THE COURT: What's your position?

MR. WILLINGHAM: That she did not answer my questions truthfully, Your Honor.

She has prior convictions, 1982, simple possession of marijuana, which initially she did not acknowledge. Whenever I asked about her maiden name, she did acknowledge but indicated it had been expunged, which it has not. She also - - I followed - -

[trial court interrupted Mr. Willingham]

....

(Rap sheet of Juror 191 marked Court's Exhibit Number one).

(App. 329-330).

If one reviews the voir dire of Juror Morrow, the State had to pull information out of her about any convictions that she had, much less her family. She was asked a very simple question about whether she or someone in her family had been arrested or convicted of a crime, and she said: "Can I put what?". And, actually she was asked he question 2 times before she said: "Can I put what? Respondent submits this is evasive. Then Mr. Willingham had to show her the questionnaire, and she was asked the same question again and said: "Oh, that's my brother." She did not admit she had been convicted of a crime at that time. Then, Mr. Willingham asked her: Q: **Your brother. Okay. So you have never been charged with anything?** And, in response she said: **Yes, sir.** That response could be considered evasive as well, but Mr. Willingham, who had her NCIC rap sheet, gave her the benefit of the doubt and asked what she had been convicted of. She then named a few crimes. She then categorically stated she had not been convicted of anything else. She was asked a few more questions and then was confronted with her maiden name, which she admitted to. Only after being confronted with her former name, did she admit she had another conviction. She was then asked about another conviction appearing on her rap sheet, which she denied she had been convicted of. After this voir dire, it was clear to the prosecution she was withholding information about her own prior criminal record. They eventually moved to have her disqualified and placed her rap sheet in the record as additional proof she was being evasive in her answers.

The PCR Court correctly found that a prior criminal conviction was a race neutral reason for striking a juror, but more importantly the juror was excused for withholding information about her criminal record until the State asked about her maiden name, and the Court correctly

rejected the argument the strike of juror Morrow was pretextual because Gantt had failed to disclose a prior acquittal, whereas juror Morrow failed to disclose a prior conviction, because the State had exhausted its alternate strike by the time juror Gantt was even presented. **(App. 2932).**

The PCR Court correctly found counsel Morin was also aware that, when asked how the fact her stepson being killed made her feel, Juror Morrow stated "[if] guns, ... [are] used inappropriately[,] ... wrong things can happen. And that's my feeling that ... everyone shouldn't be allowed to carry a gun. **R. 326." (App. 2932).** This finding is also supported by the record:

Q. Tell me about that if you would. We didn't have any knowledge of that.

A. He was in the State of Ohio.

Q. And what happened in that particular case? How was he killed?

A. He was with a group of guys, and someone shot in the group, and he was killed.

Q. Was it an accidental type of shooting or was it criminal? Was any charges brought?

A. There was no charges brought.

Q. Was there a criminal investigation? Did the police come out and investigate?

A. Yes, sir.

Q. How did that make you feel, the fact that you had a stepson being killed?

A. Well, I mean, guns, you know, used inappropriately can - - wrong things can happen. And that's my feeling that, you know, everyone shouldn't be allowed to carry a gun.

Q. Okay. That's fair enough. Thank you, ma'am. I have no other questions.

THE COURT: Anything further from the defense?

MR. MORIN: Nothing.

COURT: The State?

MR. WIILLINGHAM: *No other questions*, Your Honor.

(App. 326, ln. 3 – 327, ln. 5)(emphasis added).

Obviously, the State's evidence was the victim in this case, James Mahoney, had three (3) guns in the store when Moore entered, that Moore managed to wrestle the .45 from him and ultimately murdered the victim with the .45 after the shootout with him. This was a proper race neutral reason related to the case at hand for using a peremptory challenge to excuse Juror Morrow. *Batson*, supra. Based on juror Morrow's answer about her stepson's death, and her beliefs about guns, she very well could believe after hearing the evidence in this case that the victim's death in this case and the wounding of Moore was the fault of the victim James Mahoney, not Moore, and she may not even vote for guilty, much less impose a death sentence on Moore. The State was not required to keep her on the jury. It could exercise 1 of its peremptory challenges for this race neutral reason.

Finally, the record supports the third reason Mr. Gowdy gave for exercising one of his peremptory challenges against juror Morrow. Prior to qualification, juror Morrow approached the trial court and asked to exercise her right to be excused from this case and have her service transferred to another term because she was a teacher. The following took place:

(The following takes place at the bench with Juror Number 191).

THE COURT: I think you are Ms. Morrow. Is that correct?

JUROR 191: Yes, sir.

THE COURT: Yes, ma'am.

JUROR 191: I am a school teacher.

THE COURT: Where do you teach, Ms. Morrow?

JUROR 191: I travel between two schools, Cleveland Elementary and Madden Elementary.

THE COURT: And what do you teach?

JUROR 191: Physical education.

THE COURT: And if your are not there do they - - s there something going on that would interfere with your duties this week?

JUROR 191: Well, I would have to get a substitute, and they would have to travel.

THE COURT: I will transfer you to one of your vacation times, whether it be spring vacation, Christmas vacation, Thanksgiving vacation, summer vacation. I will let you pick a time, you can stay with us.

JUROR 191: Vacation time?

THE COURT: That's not a very good deal, is it?

JUROR 191: No sir.

THE COURT: I will give you the option. You can transfer to a time that will not conflict with your school responsibility or stay with us.

JUROR NUMBER 191: I might get dismissed.

THE COURT: Quite possible. You never know.

JUROR 191: Okay.

(End of proceedings at the bench.)

THE COURT: Ms. Morrow is going to remain with us - - Number 91 [six]. She didn't like me offering her some time in her vacation time, and I don't blame her.

(App. 154, ln. 12 155, ln. 20).

The PCR Court also correctly found the proffered reasons for striking juror Alexander were race neutral because his son had been incarcerated for a Spartanburg County murder and he was prosecuted by the Seventh Circuit Solicitor's Office for that crime. The record shows the following:

(The following takes place at the bench with Juror Number Two)

THE COURT: You are Mr. Douglas Alexander?

JUROR NUMBER TWO: Yes, sir.

THE COURT: Yes, sir.

JUROR NUMBER TWO: My son is incarcerated. He's been in jail now for about four years. His name is John Alexander.

THE COURT: What's he incarnated for?

JUROR NUMBER TWO: Murder.

THE COURT: Was that here in Spartanburg?

JUROR NUMBER 20 [Sic]: Yes, Spartanburg.

THE COURT: And was he tried by the solicitor's office in this circuit?

JUROR NUMBER TWO: uh-huh. [Affirmative].

(R. 191, 15-192, ln 4). Additionally, the PCR Court noted the State had struck juror Huffman, a white juror, based upon the knowledge his brother-in- law had been convicted of murder. **(App. 2922-33)**. This is also supported by the record. (App. 1131-33 & Willingham's PCR testimony **App. 2705-09)**. The PCR Court properly found Moore had not proven any prejudice from counsel's strategic decision. **(App. 2934-36)**.

In federal habeas corpus, Moore could not meet his burden to overcome the presumption of correctness of the PCR Court's factual findings - including its' credibility determinations - by clear and convincing evidence, since those findings were supported by the record. The credible evidence was the State's proffered reasons for striking jurors Morrow and Alexander were race neutral and the stated reasons were not pretextual, as found by both the trial and PCR Courts. Further, at trial, counsel Morin made a strategic decision to withdraw the previously-made motion because he realized the State had, in fact, offered race neutral reasons that were not pretextual.

Again, the record supports the PCR Court's finding trial counsel was aware of juror Morrow's voir dire responses and demeanor (see **App. 322-25**); and juror Gantt had failed to disclose charges for which she had been arrested but was acquitted because she had misunderstood the question. On the other hand, juror Morrow failed to disclose her prior convictions until confronted with the fact they had been entered under her alias or maiden name. **More importantly**, the State was out of strikes when Ms. Gantt was presented; it could not strike her. The record further supports the finding counsel was aware juror Alexander's son had been prosecuted by the Seventh Circuit Solicitor's Office for murder and the State had also excused a white juror who was similarly situated, juror Huffman, whose brother-in-law had been convicted of murder.

Moreover, as the PCR Court correctly found (**App. 2933-34**), "the reasonableness of counsel's acceptance of the reasons given by the State is demonstrated by the trial court's finding the State's reasons for striking jurors Morrow and Alexander were race-neutral and not pretext. The trial judge, unlike [any reviewing] Court, heard the jurors' responses to the questions posed and he viewed their demeanor. He also had the opportunity to view the demeanor of the Solicitor when exercising the State's strikes." And, "much like any other objection, a *Batson* motion can be forgone for strategic or tactical reasons, *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991); *Scott v. Gomez*, No. C-91-2181-SBA, 1993 WL 303728 *2 (N.D.Cal. July 29, 1993)." **App. p. 2933**. *See also Shabazz v. Com.*, 2006 WL 3751322, 4 (Ky.App., Dec. 22, 2006) (unpublished).

In federal court, both the U.S. Magistrate and the U.S. District Court also correctly found Moore did not prove he was prejudiced from the procedural default of the IAC *Batson* claim reviewing both the trial record and the PCR testimony. Moore had not shown the IAC *Batson*

claim had *some merit* based on the record of the *Batson* hearing and the PCR testimony about the *Batson* hearing, including Mr. Willingham's notes. The *Batson* claim itself was without merit. As correctly analyzed by the PCR Court, Moore "did not show a reasonable probability that further argument in support of his motion would have resulted in a different jury." **(App. 2934).** *State v. Pryor*, 2011 WL 1344165, 1 -2 (Ariz. App., Apr. 7, 2011); *United States v. Franklin*, 157 F.3d 90, 97 (2nd Cir.1998) (finding a petitioner, alleging IAC based on his attorney's waiver of *Batson* claim, was unable to meet the requirements of *Strickland* where the challenge was meritless); *Williams v. Duncan*, 2007 WL 2177075, 21 (N.D.N.Y., July 27, 2007) ("Significantly, it is entirely possible that [trial counsel] recognized the futility of the *Batson* challenge and strategically decided to abandon the motion. An attorney's purported failure to pursue a meritless *Batson* claim cannot be the basis of an ineffective assistance of counsel claim") (citing *Franklin*). Moore mistakenly relies on the State's failure to strike juror Gantt, the second potential alternate juror presented, to show the stated reasons for striking juror Morrow were pretextual because the State had exercised its only challenge for the first alternate to strike juror Huffman. **(App. 2934).**

The U.S. District Court and the U.S. Magistrate correctly found the PCR Court reasonably found Moore's contention the State based its strike of Morrow, in part, on her use of an alias was without merit. Instead, the State "challenged her because she was unwilling to admit her prior marijuana conviction until confronted with the alternate identity.[16] Further, the State used a peremptory challenge to strike white juror Charles Kent (# 145), who had failed to reveal past offenses, after the trial judge had denied the State's request to strike Kent for cause. **(App.**

[16] As correctly found by the PCR judge **(App. 2934 n.27)**, the Solicitor observed at trial that "the trial judge subsequently excused juror Rookard (# 235) because he had been dishonest in withholding information about arrests and criminal convictions and there would be a hearing for contempt after the proceedings involving Moore.

715-18; 1765). The District Court and Magistrate also correctly found Moore had not proved that the State's other reasons for striking juror Morrow were pretext." **(App. 2934-39).**

The District Court found that while the Solicitor observed other jurors expressed some concerns over use of firearms, none had used the term "improperly" in doing so. And, the record likewise supported *the PCR Court's* factual findings, and his application of relevant United States Supreme Court precedent, when *it* concluded that:

> Moore has not pointed to any other juror that the State accepted who expressed his or her reservations about gun use in this fashion or who had such strong reservations about possessing a weapon. Moreover, because this challenge was based upon an assessment of the juror's concern about gun use, this Court finds that it should defer to the trial judge. Again, he had the opportunity to actually listen to the responses and assess the demeanor of the various jurors when they responded to questioning.
>
> Thus, he was in the best position to determine whether the State's assessment of Ms. Morrow's distrust of gun use was more than fellow members of the venire, whereas this Court must rely solely upon the cold record.[FN29] Likewise, he has not pointed to any other juror that the State accepted who sought to avoid jury service in this case, only to change his or her mind when informed that such a decision would result in loss of vacation time. The Court further finds that Moore has failed to show pretext in the striking of juror Anderson [sic][Alexander].
>
> FN29/ Even if the Solicitor was mistaken in regard to his assessment, the Court finds that Moore has not shown pretext. Rather, the reason proffered was still race-neutral, *see Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1546-47 (10th Cir.1997) (finding that a proffered race-neutral explanation for peremptory strike based solely on strike proponent's mistaken belief satisfied the second prong of *Batson* analysis), *abrogated on other grounds*, *Migneault v. Peck*, 204 F.3d 1003 (10th Cir.2000); *United States v. Watford*, 468 F.3d 891, 912-13 (6th Cir. 2006); and because resolution of this claim rests on credibility, "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Miller-El*, 537 U.S. at 339. For this Court to reverse the trial judge's findings "would require this Court to give greater weight to inferences and assumptions drawn from the cold appellate record concerning what the prosecutor must have known, than to specific credibility determinations made by the [trial judge] . . . with the benefit of firsthand observation." The Court declines to make those inferences and assumptions based upon this record. *Cf. Watford*, 468 F.3d at 914.

> To the contrary, he recognizes that Mr. Anderson and Mr. Huffman were similarly situated jurors and that they were of different races. However, he has their races reversed, erroneously asserting that Mr. Anderson was white and Mr. Huffman was African-American. More importantly, he ignores that the prosecution struck both men (**R. p. 1736**) and for the same reason: a close family member of each juror was prosecuted by the Seventh Circuit Solicitor's Office for murder. *See* **Applicant's proposed Order, pp. 4, 17**. As noted, this is a race- neutral reason for exercising for the State's exercise of its peremptory challenges. *See Casey*, 325 S.C. at 453, 481 S.E.2d at 172 n. 2; *Sumpter*, 312 S.C. at 223-24, 439 S.E.2d at 844. Further and as noted, the State had already exhausted its peremptory challenges by the time Ms. Gantt was presented and, therefore, it could not strike her.
>
> As a result, Moore has not established a reasonable probability that further argument in support of a *Batson* challenge would have resulted in a different jury.

App. 2935-36. It was for these same reasons the District Court and the federal Magistrate reviewing the same claim found Moore had not shown prejudice from the default of this claim because the IAC claim was not substantial because the underlying *Batson* claim had no merit. The PCR Court's determination that the underlying *Batson* claim was without merit is also fully supported by the record. The credible evidence is that the State's proffered reasons for striking jurors Morrow and Alexander were race neutral and that the stated reasons were not pretextual, as found by the trial judge, the PCR Court, the U.S. Magistrate, and the U.S. District Court. After being denied federal habeas corpus relief, Moore did not even attempt to appeal this issue to the Fourth Circuit Court of Appeals because it lacked any merit. He appealed several other different issues.

In his petition, Moore seeks to discredit the State's stated reasons for exercising its peremptory challenges by alleging multiple things: including disparate treatment of jurors; disparate questioning of jurors, and other matters; however, these are not supported by the record.

First, Moore alleges the State struck juror Morrow allegedly because she withheld information about her criminal record *on her juror questionnaire*. (Pet. p. 16). This is simply

incorrect. She was stricken because she withheld information about her criminal record on individual voir dire when specifically questioned about the same. Second, Moore claims the juror was confused; however, this does not change the fact that she withheld information during individual voir dire after the questionnaire was read to her, which she had answered in the affirmative. (App. 1765).

Moore also claims in his petition (Pet. p. 16) that jurors Stacy Gantt and Malcolm White were qualified despite failing to disclose information about their criminal record on their juror questionnaires, but the State did not challenge the seating of either. However, Moore ignores the State had used its only alternate peremptory challenge when juror White was seated and when juror Gantt was seated as an alternate, so the State could not strike either juror. It could not strike either Gantt or White (App. 1765). Further, juror White had admitted on voir dire *after only 1 question* that he was arrested in 1978 for PWID marijuana but *it was dismissed or dropped at the preliminary hearing*, and he had never heard anything else about the charge again. **(App. 879-80).** And, White testified he owned several handguns like the victim had in this case. So there were other reasons not to move to strike for cause. Likewise, Ms. Gantt, readily admitted her mistake on the questionnaire and that her uncle had been convicted of shoplifting and she had been arrested for receiving stolen goods but was found not guilty. (App. 903-05). Moore also ignores **the State moved to disqualify Gantt** because she did not reveal the conviction of her uncle or her arrest, **so Moore's petition is incorrect**, the State did challenge her. **(App. 907-908).** Moore **opposed the motion to disqualify Gantt** arguing **her mistake was innocent. (App. 908).** And, Moore ignores Judge Clary believed it was an innocent mistake because *her uncle* was convicted of a crime **and** *she had been cleared* of the charge, and he denied the State's motion to disqualify her. **(App. 879-881).** Moore's petition (Pet. p. 16) misrepresents the record in this case in an attempt

to show the State's strikes were pretextual. Even more important, the State could not strike either juror as it was out of strikes when each was presented. (App. 1765).

Moore next argues the State's second reason for excusing juror Morrow was pretextual because it only asked 2 other jurors about guns beside Morrow. However, Moore ignores the fact the State did not bring up anything about guns with juror Morrow until the State asked about something she had put on her questionnaire, that her stepson had been killed. She explained the circumstance of the killing, i.e. he was shot with a gun, and then she explained that she thought guns are mishandled or used inappropriately and some people should not have guns. This was not disparate treatment in questioning or excusing her because the victim Jamie Mahoney was carrying a firearm and had access to 2 more firearms, and the victim was killed, and Moore was wounded in an exchange of gunfire with those weapons. If on the jury, juror Morrow could have believed the victim Jamie Mahoney never should have been carrying a weapon, and under the circumstances of this case may have believed the entire shooting was the victim's fault. This juror may not have even found Moore guilty of murder, much less sentenced him to death. Moore also implies this juror only said her stepson was shot and killed. She said a lot more than that as previously set forth in detail. Based on her testimony about guns she could also believe this shooting was an accident.

Further Moore contradicts himself. Moore first claims the State asked 3 jurors about guns, then later he claims the State only asked 2 jurors about guns, and the defense asked 4 jurors about guns. (Pet. pp. 17 & 18). Further, in a footnote, Moore implies the State's questioning of juror Gary New had nothing to do with his view about guns; however, this too is incorrect. The State asked him if he owned any "handguns," which is part of what this present case, the case to be tried, was about. Finally, juror Alexander was asked about handguns, but he was not struck

because of his ownership of handguns, but because he had a son who this Solicitor's Office had convicted of murder. The important thing about juror Morrow in this regard was she had a close family member who was killed by a gun, and she expressed a dislike of possession of guns by the general population and believed guns are used inappropriately. This was a race neutral reason related to the case at hand and not pretextual where the victim in this case, Jamie Mahoney, was the person initially armed with a handgun and who had access to other handguns before the shooting even started and both Mahoney and Moore were shot in the exchange of gunfire. *Batson*, supra.

Next Moore contends the final reason for excusing juror Morrow was pretext because other jurors had concerns about work disruptions. However, again, Moore misreads or misrepresents the record. Morrow did not to lose a planned vacation when she chose to stay but was told that if she was transferred she would lose vacation time be it summer or holidays. The record shows Solicitor Gowdy was correct about juror Morrow wanting out of service on this case, i.e. transfer to another term, and juror Morrow only agreed to serve at the time of this case because the judge was going to transfer her to another term of court where she would lose vacation or free time [i.e. the holidays or in the summer]. The record also shows an additional reason juror Morrow agreed to stay was her hope she would be struck by either party and would not have to serve at all. (App. 153-55). In summary, she did not want to serve.

Moore incorrectly argues disparate treatment. He points to Juror Jeff Blanchard. However, Blanchard **did not want out of service** and **did not agree to stay only so he wouldn't lose vacation or free time as Morrow did.** He wanted to serve on the jury; he simply asked for accommodation, access to a phone, so he could work when the trial was not going on. That was arranged and he served. (App. 880-82). Moore next incorrectly argues disparate treatment of juror

Sandra Taylor, who needed to stay home with her elderly mother and was not struck by the State. However, the jury strike sheet shows she was the last juror seated on the petit jury and when she was presented for selection, the State had already exhausted their 5 peremptory challenges as to the petit jury. The State could not strike her. **(App. 1765).** Finally, Moore argues disparate treatment of juror Jennifer Caston, who allegedly had scheduling concerns, but she was not stricken by the State. However, Moore is wrong again. This exchange with Judge Clary occurred long after this juror was qualified and shortly before the jury strike. Juror Caston did not say she did not want to serve, and actually wanted to serve. Instead, she was concerned about losing money she had already paid for paralegal training and one class was at night and another was on Saturday. She had forgotten about this during jury qualification because one class was at night, and another was on Saturday. She remembered it before the jury strike and told Judge Clary she was concerned about missing the night class and losing her money on the Saturday class. Judge Clary assured her that he would make sure she got to her night-class, including with security, and if the case went into Saturday, Judge Clary assured her he would call the school and see about getting her a refund. After this exchange, she served. (App. 1118-1122). This was not disparate treatment at all. She did not try to get out of service during general qualification or individual voir dire but wanted to serve. She was only concerned about a fee she had paid for a class, and she did not recall it until after she was qualified for service and was in the pool of jurors about to be struck. (App. 1118-1122). Moore is straining at a gnat in an attempt to show disparate treatment.

Next, Moore argues the reasons for striking juror Alexander were pretextual. Moore points to several other jurors he claims were similarly situated to juror Alexander, and the State did not strike them. Moore claims jurors Garner, Nave, Hardison, Allen, and Willingham, all had relatives who were prosecuted for various crimes. Moore claims this proves the State's strike of juror

Alexander was pretextual. This Court can readily see the fallacy of this argument. The State struck juror Alexander because his son had been convicted of murder and had been convicted of murder by the Seventh Circuit Solicitors Office, the Office prosecuting Moore's case. And, this was a murder case in which the State was seeking the death penalty, and the Solicitor did not want someone on the jury whose son had been convicted of murder by the Solicitor's Office where Moore was on trial for murder. The State had also struck alternate juror Huffman, who was white, whose brother-in-law had been convicted of murder. Moore's argument has no merit as the jurors he has named **were not convicted of murder** or **prosecuted by the Seventh Circuit Solicitor's Office.**

Moore argues juror Garner's mother had been prosecuted for murder and his cousin had been prosecuted for drug possession; juror Nave's brother was prosecuted for drug possession; and juror Hardison's relative had pled guilty to an unspecified crime. Again, Moore is wrong that this establishes pretext in the striking of juror Alexander. As to juror Garner, Moore also ignores that when this juror was presented the State had no strikes left to excuse juror Garner with. (App. 1765). Further, Garner's mother **was acquitted of murder**, not convicted, and **she was prosecuted by a different Solicitor's Office**, the Chester County Solicitor's Office, in a different judicial circuit. (App. 755-56). As to his cousin, he was prosecuted for drug possession, not murder, and in another county not in the Seventh Judicial Circuit. (App. 755-56). The case on trial was murder. Likewise, Juror Nave's brother was prosecuted for drug possession, not murder, and in California. (App. 502-03). As to juror Allen's brother, he was prosecuted for driving under the influence, not convicted of murder, and in Tennessee (App. 562). As to juror Willingham, his brother was convicted of grand larceny and driving under the influence, and he was found not guilty of criminal domestic violence. (App. 816-17). Neither were convicted of murder or

convicted of murder by the Seventh Circuit Solicitor's Office. (App. 816-18). Juror Willingham was not even prosecuted by the Seventh Circuit Solicitor's Office. (App. 816-18). It is unknown who prosecuted his brother. (App. 816-18). Moore also argues Juror Hardison had a relative prosecuted and was not struck, but there is no evidence it was for murder or by the Seventh Circuit Solicitor's Office for murder. (App. 358-359 & Questionnaire Supplemental App.). Her husband was convicted of breach of trust and possession of cocaine. (Id.).

Moore also argues that because juror Alexander stated during voir dire that he did not hold his son's prosecution against the State, that juror Alexander was treated disparately when the State used one of its peremptory challenges to excuse him. He argues because of these answers by Alexander, the State's real reason for striking Alexander could not have been his son was previously prosecuted for murder by the Solicitor's Office and convicted of murder by the Solicitor's Office. This argument is simply wrong. The State did not have to accept any of juror Alexander's statements, about whether he agreed with his son's prosecution or not, in deciding whether to exercise a peremptory strike, nor did it have to accept juror Huffman's statements, if any, regarding the same. Moore argues the State is bound by certain answers of a juror that they could be fair. This is a fallacious argument. The fact remained both jurors had a close relative convicted by the Solicitor's Office of murder, and more specifically, juror Alexander's own son had been convicted by this Solicitor's Office of murder. Moore was on trial for the same crime as Alexander's son, murder, where Alexander's son did not get the death penalty. Alexander could simply choose not to impose the death penalty on Moore because Moore was somebody's son as well and Alexander's own son who was serving a prison sentence for the same crime and did not get the death penalty. Alexander could believe a prison sentence was a sufficient sentence given what happened to his son or what his son has told him about prison. The same applies to juror

Huffman whose brother-in-law was convicted of murder. Further, Alexander could hold secret resentment against law enforcement or the Solicitor's Office in the prosecution of his son that he was unwilling to admit under oath. The same goes for juror Huffman whose brother-in-law who was convicted of murder; who was also struck by the State. The State could strike both jurors for the reasons stated by Solicitor Gowdy. The State was asking both jurors who had relatives convicted of murder to sentence Moore to death for the crime of murder. This particular argument of Moore simply does not show disparate treatment.

Moore next argues that the State's second reason for striking juror Alexander was pretextual because it was a misrepresentation of the record; however, again Moore is incorrect. Solicitor Gowdy stated on the record after giving his reason for striking juror Alexander [i.e. because his son had been convicted of murder and convicted of murder by the Seventh Circuit Solicitor's Office], that *his notes from Monday also reflected the juror was confused by one of the court's questions* and his notes did not reflect any other juror was confused by that question. However, the Solicitor immediately stated the primary reason for striking juror Alexander was his son had been convicted of murder by his Office. Moore argues this is a misrepresentation of the record by the Solicitor as other jurors were confused by the same question; and, therefore, this is evidence of discrimination or pretext. Again, Moore is wrong. This is not a misrepresentation of the record, but Solicitor Gowdy referring to his notes when talking to the judge and stating what his notes reflected about a juror who was one of the first jurors qualified out of 38 jurors qualified and other jurors found not qualified. The most Moore has shown is the Solicitor's memory or notes may have been defective about what question the juror was confused about. The fact remains juror Alexander was somewhat confused by this question and the Solicitor's notes were accurate in that regard. (App. 364, ll. 11-20). Moore plays semantics here between confused or

misunderstood in an attempt to cast some dispersion on Solicitor Gowdy. Regardless, the Solicitor explained to the Court his reason for striking this juror was his son was convicted of murder, convicted of murder by his Office, and Moore was on trial for murder and Moore was someone's son as well. The juror could be sympathetic to Moore and the State was asking for the death penalty.

Regardless, Moore exaggerates the responses of other jurors to try to show some disparate treatment here. Juror Knave, when asked the same question, which was a compound question containing 3 questions, broke it down and answered each question, one (1) question at a time. She was not confused. (App. 496, ll. 14-23). Juror Ballard was not confused either. His first answer to the question was: "I *believe* I could." (emph. added). Judge Clary asked him again because the juror did not give a definitive answer. After the second question, the juror said he could follow the law as instructed by the court. (App. 541, 10-17)(emphasis added). Similarly, Juror Ridings was not confused by the question, he fully understood it. He just gave a non-committal response that may disqualify him. As a result, Judge Clary rephrased the question and asked him again, and he responded he could follow the law as the court instructed. (App. 568, ll. 2-13). Juror Fortner asked the judge to repeat the question. (App. 823, ll. 10-20). Further, the State had exhausted its' strikes when juror Fortner was presented for selection. (App. 1765). And, even though juror Willingham was initially confused, when he understood the question he then answered equivocally, and only answered in the affirmative when it was explained *his oath* as a juror would require him to follow the law. The State exhausted its strikes before juror Willingham was presented for jury selection. (App. 1765). Moore has not shown disparate treatment or misrepresentation of the record. At most, he may have shown a faulty memory of Solicitor Gowdy on a minor point that did not affect jury selection because any arguably comparative juror was

presented after the State exhausted its' strikes. Regardless, Moore claims in his petition: "[t]he State had the opportunity to strike all these White jurors who did not initially express understanding of this question but did not." (Pet. p. 21, ll. 11-13). As shown, this statement is simply not correct. Some of these jurors did not express a lack of understanding of the question; they answered equivocally or in the negative, and the trial judge asked a follow up question qualifying the juror. And, some of the jurors the State did not have an opportunity to strike because it had exhausted its' peremptory challenges by the time those jurors were presented. (App. 1765). Again, Moore is straining at a gnat to try to show disparate treatment.

Moore also argues Juror Lindsay, an alternate, was seated and she was confused by the question. Again, she was not confused by the question as stated. She stated several times she **would not** follow the law if she did not agree with it. (App. 863-964). It was only after it was explained to her that *her oath* would require her to follow the law as the judge instructed, did she state she would follow the law because the law would require her to. (App. 967; 968-71; 974-75). She emphasized this at least 3 times. (App. 967, 968-71; 974-75). This does not show disparate treatment. Solicitor Gowdy's notes that he mentioned to the court stated the juror was confused by one question. Again, at most, Moore has shown Gowdy's memory may be defective about what question juror Alexander was confused about after 38 jurors were qualified and others were excused for various reasons, not discriminatory motive.

Moore next argues disparate questioning of jurors shows discriminatory intent. Moore contends jurors Morrow and Alexander were submitted to excessive and disparate questioning. Again, Moore is wrong, but to the extent juror Morrow or Alexander were asked more questions it was because of the topics that had to be covered with these jurors and juror Morrow's reluctance to answer straightforward questions which required follow up questions. (App. 322-27).

First, Moore alleges that white jurors with failure to disclose criminal records were questioned less and African-American jurors like juror Morrow more harshly. This is simply not true. Juror Browning, *an African-American male* according to the petition (Pet. p. 23, fn. 13), was only questioned about his criminal record **by defense counsel Kelly** and not even questioned by the State on this topic. (App. 590-95). In fact, the Solicitor believed juror Browning when he stated an arrest on his rap sheet was from his relative not him. (App. 471-76). He was not treated harshly. Juror Rookard, who was African-American, was questioned extensively, but it was not because of his race, it was because he withheld **numerous arrests** and Judge Clary disqualified him as a juror and scheduled a contempt hearing after the trial because of the same. (App. 485-94). As to white Juror Kent, defense counsel Kelly first asked him about his criminal arrest record **extensively** (App. 702-06), so the State did not have to ask as many questions when it examined juror Kent. However, the State then also asked extensive questions about juror Kent's criminal arrest record *and* **moved to disqualify him as it did juror Morrow**. (App. 707-100; 715-17). There was no disparate treatment in regard to juror Kent, period. (App. 707-100; 715-17). Finally, as to juror White, the record shows it was unnecessary to question juror White any further about his prior record; he had **admitted everything under questioning of defense counsel Kelly** before the Solicitor got to ask any questions. (App. 879-881). The juror admitted he had been charged with PWID marijuana in 1978; it was dismissed at the preliminary hearing; the judge dismissed it; the officer did not appear for the preliminary hearing; Jack Lawrence was his attorney; and he apologized for not disclosing it on the questionnaire and stated he should have put on the questionnaire that he was arrested but it was dismissed. (App. 879-881). Juror Gantt, who was white, discussed in more detail below, was similar, she admitted immediately upon questioning that an uncle had been convicted of shoplifting and she had been arrested for receiving stolen

goods but was found not guilty (App. 785-86), but the State still questioned her anyway. (App. 905-07). The State **also moved to disqualify her as it did juror Morrow and juror Kent.** (App. 907-08).

An examination of the record shows those jurors that did not withhold information during their questioning were not questioned extensively. However, those jurors who withheld information, whether black or white, the State asked repeated questions of. The State had to ask repeated questions of juror Morrow to get her to state who in her family was convicted, and then to admit she was convicted, and of what, and then that she had been convicted under another name of convictions which she previously denied under oath that she had. (App. 322-25). She then denied another conviction showing up on her NCIC rap sheet (State's Ex. 1). (App. 322-325). Other jurors simply admitted their convictions upon the first question or an explanation of what the question was asking. Further, the State needed to ask juror Morrow about something she had disclosed on her questionnaire: the death of her stepson. This questioning took up another page of her questioning. (App. 326). There was no disparate questioning.

Moore's so-called *side by side* analysis does not work either. He places *some* of juror Morrow's questioning on this topic side by side with *some* of juror Gantt's questioning. (Pet., p. 24). However, this does not show disparate questioning because juror Gantt was asked a question whether she had been arrested for receiving stolen goods and she stated she had and she was found not guilty. She answered the questions and was not evasive as juror Morrow was. (App. 905-907; 322-25). In fact, her questioning is actually the same length as Morrow's on this topic. (App. 905-07; 322-25). It took much longer to get the complete truth from juror Morrow, i.e. she hid information, so there is a reason for the length of Morrow's questioning compared to Gantt's, if there is a difference in Morrow's favor at all. In fact, a review of the record shows Moore has

creatively *left out* some of juror Morrow's questioning where she was evading answering questions which demonstrates why her questioning on this topic was longer than Gantt's. **(Compare App. 322, l. 21-325, ln. 6 to Pet., p. 24).** Further, Moore has left out significant additional questioning of juror Gantt about her uncle's criminal record and her own arrest in an attempt to show disparate questioning that did not occur, i.e. her questioning would have been longer if everything on this topic had been included in the *side by side* analysis of the petition. (App. **902-08**). Gantt's questioning on prior personal and family arrests and convictions is actually **equal to or longer than Morrow's. (App. 903-07; 322-25).** There was no disparate questioning in this regard. Moore also argues disparate questioning because juror Morrow was asked about guns, but as previously discussed, she was not initially asked about guns. She was asked about something she had disclosed on her questionnaire, that her stepson was killed. After she disclosed her stepson was killed by a gun, the State asked what she thought about guns. It was at this point she stated she thought guns should not be possessed by everyone and incorrect use can result in bad things occurring. There was no disparate questioning of juror Morrow as opposed to juror Gantt, in fact juror Gantt was questioned extensively and even asked about her tattoos, and the State moved to disqualify her as it had Morrow and Kent. **(See App. 902-08).**

Moore also argues that juror Alexander was questioned more extensively. This is simply not true. Juror Alexander was questioned **for 5 pages by defense counsel Kelly**, specifically about his gun collection and a burglary to his home. (App. 368-73). Solicitor Gowdy questioned juror Alexander a few lines short of **3 pages.** (App. 373-376). The only reason Gowdy's examination took that long was because defense counsel had asked the juror a question about something Gowdy did not even see on the questionnaire, the juror's gun collection, and Gowdy wanted to know how the defense obtained that knowledge, **and** Gowdy questioned juror Alexander about his son's

arrest and conviction for murder and where it occurred. (App. 373-76). Again, the State did not bring up guns with this African-American juror, defense counsel did. (App. 368-73). And, the remainder of the Solicitor's questioning of juror Alexander was general background and death penalty follow up questions. (App. 373-76). Alexander **was not aggressively questioned** by the Solicitor. (App. 373-76). It was anything but aggressive. (App. 368-73). As to the comparison to Juror Hardison, it appears from the record she had already disclosed in her questionnaire who in her family had been arrested, her husband, and what the offenses were, breach of trust and possession of cocaine and he had been convicted. (App. 358-59 & Supplemental App. Juror Questionnaire Juror Hardison). There is no evidence it was for murder, in fact, the opposite. Since she made full disclosure, rather than embarrass the juror, the elected Solicitor followed up with this juror like he did with juror Alexander on his son's murder conviction, if her husband's arrests and convictions would affect her ability to serve as a juror in this case. (App. 358-59). This was not disparate questioning given juror Hardison's **full disclosure** of who was arrested and who was convicted *and* of what. Morrow first stated under oath it was her brother who was arrested or convicted, upon further questioning then she admitted she was convicted, and then only after being told of her maiden name did she disclose her additional convictions. Finally, Solicitor Gowdy questioned juror Alexander, who was African-American, and juror Hardison, who was white, and they were questioned similarly. Mr. Willingham questioned juror Morrow. Therefore, their styles of questioning were different, which is not unexpected, but not disparate treatment.

Next Moore argues discriminatory impact; however, the State had no control over that when it exercised its' strikes of all jurors for race neutral reasons; the jurors were struck in order of qualification, and only 2 African-American jurors were death penalty qualified. Juror's Morrow and Alexander were the only 2 African-American jurors to be *Witherspoon* qualified; the jury was

struck in the order of qualification; and they were some of the first jurors presented for jury selection. (App. 1765). As a result, the State had to exercise its race neutral strikes of each juror in the order the jurors were presented. Here, the fact that the jury was all white does not prove unconstitutionality where the strikes exercised were race neutral.

Finally, Moore argues the totality of the evidence shows racial discrimination. However, as shown in the lengthy discussion above, Moore has not shown racial discrimination in the State's use of its peremptory challenges. Therefore, Moore has not shown a Due Process or Equal Protection violation pursuant to *Batson*. And, finally, he cannot meet the exacting standard required to obtain state habeas relief. *Garner*, supra.

CONCLUSION

As set forth above, the claim raised here was raised to the trial court and denied, abandoned by trial counsel because it had no merit, not raised on direct appeal, raised at PCR as an IAC claim and denied because the *Batson* claim had no merit, not raised on appeal from PCR because it had no merit, raised in federal habeas corpus as an IAC claim and denied because it was procedurally barred and both the federal Magistrate and the District Court Judge found no prejudice from the default because IAC claim was not substantial because the underlying *Batson* claim had no merit, not raised on appeal from the denial of federal habeas corpus, and not raised in Moore's first state habeas petition where Moore raised multiple claims. As a result, the defenses of abandonment, res judicata, law of the case, and finality of litigation would apply barring this claim. Finally, there is no merit to the underly *Batson* claim as has been found by multiple courts at the state and federal level and as shown in this Return. As a result, Moore cannot meet the exacting standard for a grant of state habeas corpus relief. *Green v. Maynard.*

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October 2, 2023.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2023-001345

RICHARD BERNARD MOORE,

Petitioner,

v.

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

Respondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF HABEAS CORPUS

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Petitioner, Richard Moore, by and through undersigned counsel, submits this Reply to Respondent's Return to Petition for a Writ of Habeas Corpus ("Return"). As set forth more fully in the Petition, the Inter-American Commission on Human Rights recognized that the State's use of peremptory strikes against all qualified Black jurors at Moore's capital trial made out a *prima facie* case that race played an impermissible role in jury selection. The merits of this claim have never been considered by this Court or the federal courts. Racial discrimination in jury selection in a case involving a Black capital defendant convicted of killing a White victim, would render Moore's execution a denial of fundamental fairness shocking to the universal sense of justice. *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). To prevent an unjust execution, this Court should grant Moore's Petition and adjudicate the underlying merits of his *Batson* claim.

I. This Court Should Give Weight to the Recent Findings of the Inter-American Commission on Human Rights.

Respondent attempts to diminish the importance of the precautionary measures resolution issued by the Inter-American Commission on Human Rights ("the Commission") by referring to it as "a human rights committee" that "need[s] no further discussion." Return at 11–12. In fact, the Commission is a tribunal that is a central component of a longstanding regional human rights body that the United States not only helped establish, but also has chosen to be an integral part of since its creation.

The Commission is a tribunal within the Organization of American States, a regional human rights body of countries throughout the Americas that began organizing around the global protection of human rights in the 1880s.[1] The United States has been a member state of the

[1] OAS, *Our History*, https://www.oas.org/en/about/our_history.asp.

Organization of American States, in its various forms, since it began in 1889.[2] In fact, the United States was an original signatory to the charter formally establishing the Organization of American States and was largely responsible for the drafting and ratification of the American Declaration on the Rights and Duties of Man ("ADRDM").[3] The Commission exists to monitor the human rights situation in the member states to ensure the rights of all are protected pursuant to the ADRDM.[4] To protect those rights, the Commission considers petitions alleging cases of specific human rights violations, like Moore's.[5]

On July 4, 2023, the Commission granted Moore's request for precautionary measures. App. 1–9. In doing so, the Commission urged the United States, by and through the state of South Carolina, to refrain from carrying out Moore's death sentence due to grave concerns about human rights violations playing a role in Moore's capital trial, particularly the impermissible effect of race on the proceedings. *Id.* at 8–9. It called on the United States to not execute Moore until the completion of a full adjudicative process on whether his human rights were violated. *Id*. In doing so, the Commission noted that, based on a preliminary examination of Moore's submissions, there were indications that human rights violations had played a role in securing Moore's capital sentence, including the race-based exclusion of Black jurors from his jury at trial. App. 5–8. The Commission's preliminary review was of the *Batson* claim as presented in Moore's Petition to this

[2] OAS, *Member State: United States*, https://www.oas.org/en/member_states/member_state.asp?sCode=USA.

[3] Inter-American Commission on Human Rights, *Charter of the Organization of American States*, https://www.cidh.oas.org/basicos/english/Basic22b.CharterOAS_ratif.htm.

[4] OAS, *What is the IACHR?*, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp.

[5] *Id.*

Court, with the totality of the evidence included in the Petition. Based on this preliminary review, it was clear to the Commission that there were, at minimum, strong indications that the two qualified Black jurors were impermissibly struck because of their race by the State in violation of both domestic law and Moore's international human rights.

This Court should honor the United States' obligations as a member state of the OAS and the Commission's recent grant of precautionary measures by providing a thorough review of Moore's *Batson* claim before allowing his execution to proceed. Moreover, reviewing this Petition would serve the important community interests at play. As the courts have stressed for decades, the harm from discrimination in jury selection "is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) ("*Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."); *Buck v. Davis*, 580 U.S. 100, 124 (2017) ("Relying on race to impose a criminal sanction poisons public confidence in the judicial process." (internal quotation marks and citation omitted)).

Allowing Moore's case to proceed to execution without actual review of his *Batson* claim, which has raised flags from a respected human rights tribunal as a potential violation of Moore's human rights, would "undermine[] our criminal justice system and poison[] public confidence in the evenhanded administration of justice." *Davis v. Ayala*, 576 U.S. 257, 285 (2015). This Court should exercise its habeas jurisdiction to provide the review Moore has been diligently seeking for years and protect the public's confidence that justice is color-blind in South Carolina.

II. The Claim Raised in Moore's Petition Is Not Barred by Res Judicata or Law of the Case Because No Court Has Fully Considered the Merits of Moore's *Batson* Claim.

Respondent repeatedly asserts this Court should not consider Moore's Petition because the claim was previously considered on the merits or intentionally abandoned for lack of merit in his prior appellate and post-conviction proceedings. *E.g.*, Return at 1. However, neither res judicata nor law of the case bar this Court's consideration because no court has, in fact, considered the merits of this claim with the totality of the evidence currently before this Court. A review of the presentation and treatment of the *Batson* claim at each juncture of Moore's case reveals no court has squarely considered the merits of Moore's *Batson* claim, and this Court has never addressed it in any manner because it has never had the opportunity to do so.

As set forth more fully in Moore's Petition, trial counsel raised a *Batson* challenge following the State's use of peremptory challenges to strike both qualified Black jurors, but then quickly abandoned their challenge when the State proffered its reasons for striking the jurors. App. 1018–19. Moore's trial attorneys failed to address how the stated reasons were pretextual and presented no other evidence of racial discrimination. The trial court's denial of the *Batson* claim was, therefore, based on counsel's abandonment of the issue. Direct appeal counsel then could not raise the *Batson* claim because it was not preserved for appellate review. Contrary to Respondent's representation that the claim was "intentionally not raised on direct appeal," Return at 40, appellate counsel's ability to raise the claim was limited given the well-established issue preservation jurisprudence in South Carolina and that counsel had inappropriately accepted the State's reasons for the strikes at trial. *See, e.g.*, *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003).

Moore's post-conviction relief ("PCR") application did include an allegation that his trial counsel was ineffective for failing to pursue a *Batson* claim, but the presentation was inadequate. App. 1076–77. Specifically, PCR counsel presented a cursory comparative juror analysis, which

did not include the vast majority of comparisons included in the pending Petition and did not present evidence of disparate questioning between Black and White jurors, of the Solicitor's misrepresentations of the record in justifying his strikes, or of the disparate impact of the State's strikes.[6] Resp. App. 131–32; *see also* App. 1076–77. The majority of the evidence contained in this Petition and in Moore's submissions to the Inter-American Commission on Human Rights was absent from Moore's PCR proceedings, with PCR counsel doing little to engage with even the readily available record-based evidence supporting relief. The PCR court denied relief on the claim based on its determination that no information was presented sufficient to disturb the trial judge's determination on the abandoned *Batson* claim. App. 1082–92.

Moore's PCR appellate counsel were once again faced with an underdeveloped *Batson* claim and did not appeal the PCR court's denial. While PCR appellate counsel indicated the claim was not meritorious, App. 1102, that reasoning should not prevent review of Moore's claim for three reasons. First, PCR appellate counsel's failure to raise the claim prevented this Court from reviewing the *Batson* claim. App. 1100 (refusing to take action on Moore's *pro se Batson* petition because he was represented by counsel). Second, PCR appellate counsel's review of the *Batson* claim was based on the cursory presentation made by PCR counsel, not the broad array of evidence Moore presents in this Petition demonstrating discrimination in the exercise of juror strikes. Finally, PCR appellate counsel's decision not to raise the *Batson* claim was based, in part, on a

[6] After the conclusion of Moore's PCR proceedings, the Supreme Court's 2019 decision in *Flowers* emphasized the importance of evaluating "a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race," including (1) "statistical evidence about the prosecutors' use of peremptory strikes," (2) "evidence of a prosecutor's disparate questioning," (3) "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck," (4) "a prosecutor's misrepresentations of the record when defending the strikes during a *Batson* hearing," (5) "relevant history of the State's peremptory strikes in past cases," and (6) "other relevant circumstances that bear upon the issue of racial discrimination." *Flowers*, 588 U.S. at 2243.

misunderstanding of *Martinez v. Ryan*, 566 U.S. 1 (2012),[7] which counsel assured Moore would excuse any procedural default through a showing that PCR counsel were ineffective. App. 1102–03. This legal error prevented PCR appellate counsel from understanding that their failure to raise the *Batson* claim permanently rendered the claim ineligible for judicial review.

Moore's federal habeas counsel attempted to raise the *Batson* claim for federal court review, but the federal courts—in line with Moore's concerns expressed to PCR appellate counsel—denied the claim as procedurally defaulted, refusing to consider it on the merits. App. 1131–34. In those proceedings, Respondent took a contrary position to its present arguments, asserting the claim was defaulted precisely because this Court had not considered the claim. App. 1132–34. In finding Moore' claim to be procedurally barred, the federal court on habeas review did not consider its underlying merits, rather it found only that Moore could not show "cause and prejudice" sufficient to excuse not presenting the issue to this Court on the then limited state court record.

While the *Batson* claim was not raised on appeal to the Fourth Circuit, *Moore v. Stirling*, 952 F.3d 174, 176 (2020), Respondent is incorrect in asserting the claim was abandoned on appeal because of a determination that the claim was meritless. Return at 1. Counsel did not raise the issue on appeal because the post-*Martinez* jurisprudence became clear that *Martinez* would not be extended to excuse default by PCR appellate counsel. While counsel thought the claim had (and still has) merit, it was obvious that the procedural bar would preclude any review in federal court and raising the claim on appeal would not result in a merits review of the claim.

[7] *Martinez* carved out an exception to procedural default barriers to review in federal court for unexhausted ineffective assistance of trial counsel claims where PCR counsel were ineffective in failing to raise the claim before the state courts and the failure to raise the claim prejudiced the petitioner. 566 U.S. at 17–18.

Based on this procedural history and the completely developed record presented in this Petition, Respondent's claim that res judicata should preclude review should be rejected. Moreover, the purpose of the writ of habeas corpus in this Court is to provide review of situations where, despite what was or was not considered in prior proceedings, a constitutional violation, "*in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (emphasis in original). Review by this Court is vital because the harm from race discrimination playing a role in Moore's execution also reaches the public. It is well established that "the harm from discriminatory jury selection extends . . . to touch the entire community." *Batson*, 476 U.S. at 87. Jury selection procedures tainted by racial discrimination undermine public confidence in the integrity of the criminal justice system, including the ability to accept that convictions are being properly and fairly handing out. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *see also Powers v. Ohio*, 499 U.S. 400, 413 (1991) ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset."). In the setting of Moore's case, including the circumstances surrounding the underlying offense, allowing his sentence to stand without review of a claim that race played an impermissible role in the proceedings would be a denial of fundamental fairness. This Court should use its habeas jurisdiction to review for the first time Moore's *Batson* claim, and in doing so protect both Moore and the public from the harm of an execution being carried out where the sentence was imposed through impermissible racial discrimination.

III. The State Makes Several Misrepresentations of the Record and Misstatements About What is Required Under the Law.

The Return contains numerous misstatements of what was submitted to this Court by Moore and erroneous assertions of what is required to make out a *Batson* violation. Several misrepresentations are apparent from a reading of the record as laid out in the Petition, but others warrant further discussion.

a. Misrepresentations about Juror Morrow.

Respondent spends a significant portion of the Return depicting Juror Morrow as being intentionally deceitful in her responses regarding prior involvement with the criminal legal system. *E.g.*, Return at 28.[8] This depiction is belied by a fair and objective examination of her voir dire responses and the trial court's comments about the juror questionnaire questions about prior criminal history. Morrow's voir dire responses make it clear that she was confused about what she was required to disclose. When asked questions about whether she had interacted with the criminal legal system, she quickly acknowledged her prior fines for gambling related charges and her possession charge. App. 204–06. She had no hesitance in providing these answers and nothing in her answers indicates a combative or intentionally concealing demeanor. *Id*. At most, her answers indicate she was unaware about whether she had to include this information in response to the question on the questionnaire and believed the twenty year old prior charges were expunged. *Id.*

[8] In doing so, Respondent repeatedly asserts that Moore is misrepresenting the record. However, Respondent does so without any weight behind the claim, either simply stating that Moore is misrepresenting the record without any support or by misstating what is actually set forth in Moore's Petition. For example, Respondent contends that Moore contradicts himself by claiming once that the state questioned three jurors about guns but in another place claiming that the state questioned only two jurors about guns. Return at 66. As set forth in the Petition, Moore's claim is that only two jurors other than Juror Morrow were questioned about guns by the State, indicating that guns were not an issue of concern to the State and diminishing the credibility of the State's proffered race neutral reason for striking Morrow because of reluctance about guns. Petition at 17–18.

Moreover, several other jurors responded improperly to the questionnaire question asking whether they had any prior arrest or conviction and had to be questioned during voir dire to elicit the information. App. 204–06, 366–72, 471–72, 475–76, 583–91, 760–62, 785–86. The wording of the questionnaire was confusing and Judge Clary even went so far as to comment on how the juror questionnaire was confusing when asking about prior interactions with the legal system, saying:

> Quite frankly, everyone is not a lawyer; quite frankly, everyone is not quite as sharp as everyone else; quite frankly, everyone doesn't pay attention to things like everyone else does; and, quite frankly, I'm going to change my form and make it a little more detailed, because, quite frankly, I believe when somebody gets a not-guilty verdict they think there is nothing to it. I know that what's going to happen is my form is going to read in the future, 'have you ever merely been arrested or merely charged for any crime, even if it resulted in a not guilty verdict, a dismissal, a nolle pros, a pretrial intervention, a whatever.' Then if somebody comes in here and they haven't put it on there, then I know what I am going to do for it, because I think, quite frankly, knowing what I do and what everyone in this courtroom does about some of the cases that come in front of us, it gives me a great deal of pause when people are even arrested sometimes.

App. 789–90. Confusion across the jury pool in response to a set of questions during individual voir dire can support a finding that a proffered race neutral reason is actually pretextual. *See Foster v. Chatman*, 578 U.S. 488, 511 (2016).

Respondent also asserts this Court should not consider the seated alternate jurors in its review of jurors similarly situated to Morrow for purposes of comparative juror analysis because the State did not have an opportunity to strike them as it had already exercised all its peremptory challenges before juror Gantt or juror White was seated as alternate jurors. Return at 52, 57, 61, 65. This is not a proper consideration under *Batson* and Respondent points to no case law or other authority to the contrary. Rather, at trial, the State understood both Gantt and White might be seated as alternate jurors, given the size of the qualified juror pool and number of strikes both sides had throughout the process of seating the jury. The State knew about the similar, not initially disclosed

prior arrests and charges for both jurors and could have saved its strike for one of them. Instead, the State strategically decided the issue did not matter for either Jurors Gantt or White. The only difference between these two jurors and juror Morrow is that Morrow is Black, and they are both White.

Finally, Respondent claims the State's reasons for striking Juror Morrow should not matter because she did not want to serve on the jury, as she had asked about getting her jury duty rescheduled to another term and "hoped to get struck by either party," which was the reason she agreed to stay. This is a misrepresentation of what happened during general voir dire. Juror Morrow was told by Judge Clary that she could either be transferred to another term or proceed to individual voir dire, and in response, Juror Morrow merely noted that she might not be selected to serve on the jury, which Judge Clary confirmed was true. App. 37–38. This is different from affirmatively expressing a desire to not be selected for a jury. Moreover, nothing in the case law suggests that the juror's personal opinions (real or fabricated) about the desirability of sitting on a jury matter when considering disparate treatment or the similarity of Juror Morrow to other jurors in the pool.

b. Misrepresentations about Juror Alexander

Respondent makes misrepresentations about both proffered race neutral reasons for striking Juror Alexander. First, Respondent speculates that Juror Alexander might have been biased against the prosecution because of his son's conviction contrary to his explicit voir dire answers showing unwavering support for his son's conviction. *Compare* Return at 70–71 and App. 255–56. Second, Respondent's continued representation that Juror Alexander "was somewhat confused" by a question as a reason proffered to support his strike being race neutral, Return at 71, is simply not true. The relevant voir dire shows that Juror Alexander merely asked a clarifying question before answering to ensure he was properly responding to Judge Clary's question, not

that he was confused by it. App. 245. Juror Alexander was quick to answer and was unequivocal in his representations that he would be able to follow the law as charged by the court. *Id.* Moreover, Respondent's assertion that the solicitor's (inaccurate) note, stating Juror Alexander was confused, should be sufficient to establish that the State's strike of Alexander could not have been racially motivated is not required by law and would set a dangerous precedent. *See* Return at 73. No authority supports this assertion and accepting such an argument would simply motivate solicitors to write down race neutral reasons in their notes to get around the constitutional mandates of *Batson*.

c. Misrepresentations about the law governing Batson *claims.*

While the law governing *Batson* claims is set out more thoroughly in the Petition, several points made by Respondent warrant response. First, Respondent asserts multiple times that Moore's claim fails because he did not allege that his overall jury pool was not a fair cross section of the community, and the State should not be at fault simply because there were only two qualified Black jurors by the end of individual voir dire. *E.g.*, Return at 11–12, 47. Nothing in *Batson* and its progeny requires a fair cross-section claim to be alleged for the challenged strike to be proper for a court's consideration. Rather, the information about the race demographics of the qualified jurors is important because, as *Batson* and its progeny distinctly express, disparate questioning and the disparate impact of exercised peremptory challenges on the number of jurors of one race are both well-established types of evidence that courts must consider when assessing the merits of a *Batson* claim. *Flowers*, 139 S. Ct. at 2243; *Miller-El v. Cockrell*, 537 U.S. 322, 344–45 (2003); *Miller-El v. Dretke*, 545 U.S. 231, 240–41 (2005); *Foster v. Chatman*, 578 U.S. 488, 509 (2016).

Second, Respondent incorrectly states that disparate impact does not matter and should not be considered in its analysis of Moore's Petition. Return at 47, 77–78. This is clearly belied by

decades of case law. *Flowers*, 139 S. Ct. at 2243, 2247 ("The State acknowledges, as it must under our precedents, that disparate questioning can be probative of discriminatory intent"); *Miller-El v. Cockrell*, 537 U.S. at 344–45 (recognizing that disparate questioning and impact as evidence of discriminatory purpose date back to *Batson*); *Miller-El v. Dretke*, 545 U.S. at 240–41; *Foster*, 578 U.S. at 509.

Finally, Respondent's Return ignores the actual analysis required when courts consider *Batson* violations. Respondent walks through each part of Moore's claim independently and says that on its own the reason or evidence is insufficient to prove a *Batson* violation, and so Moore's claim must fail. Return at 46–79. This misses the mark. The case law firmly establishes a "court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. No one factor requires reversal and the "ultimate inquiry," is whether a given strike was "motivated in substantial part by discriminatory intent." *Id.* at 2244 (quoting *Foster*, 578 U.S. at 513). Upon a thorough analysis of the totality of the evidence in Moore's petition, both strikes were "motivated in substantial part by discriminatory intent." *Id.*

CONCLUSION

For the reasons stated above and in Moore's Petition, and especially because an international tribunal has found a *prima facie* case of race discrimination, this Court should issue the writ of habeas corpus as to Richard Bernard Moore's death sentence and review the merits of Moore's *Batson* claim to ensure his execution does not take place despite a "denial of fundamental fairness" resulting from the unique circumstances of this case.

Respectfully submitted,

s/ Lindsey S. Vann

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