NO. 24-5668

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD BERNARD MOORE,

Petitioner,

v.

BRYAN P. STIRLING, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

[EXECUTION SET FOR NOVEMBER 1, 2024]

QUESTION PRESENTED

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

COUNTERSTATMENT OF QUESTION PRESENTED

Whether this Court should dismiss Moore's petition for lack of jurisdiction when the ruling at issue involves the application of a state law test for determining whether to exercise jurisdiction over an extraordinary writ and the Supreme Court of South Carolina did not exercise jurisdiction to rule on the merits of Moore's *Batson* claim? Alternatively, whether certiorari review is warranted to conduct a redundant, ordinary application of *Batson* and its progeny to the facts of this case, which were well-developed in the state courts and supported the repeated rulings that no *Batson* violation occurred?

STATEMENT OF RELATED PROCEEDINGS

Petitioner's death sentence was imposed on October 22, 2001. Since that time, he has been in near constant litigation. The following reflect proceedings directly related to his trial and sentence:

Moore v. Stirling, 871 S.E.2d 423 (S.C. 2022) (state proportionality review issue review granted; state original jurisdiction habeas relief denied)

Moore v. Stirling, 952 F.3d 174 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 680 (2020) (affirming denial of federal habeas corpus relief)

Moore v. Stirling, No. 4:14-CV-4691-MGL-TER, 2017 WL 8294058 (D.S.C. Dec. 28, 2017), *report and recommendation adopted*, No. CV 4:14-04691- MGL, 2018 WL 1430959 (D.S.C. Mar. 21, 2018), *aff'd*, 952 F.3d 174 (4th Cir. 2020) (denying federal habeas corpus relief)

Moore v. Stirling, No. 4:14-CV-4691-MGL-TER, 2016 WL 155050 (D.S.C. Jan. 13, 2016) (granting stay of 28 U.S.C. § 2254 action to return to state court and attempt additional proceedings)

Moore v. State of South Carolina, C/A 2015-CP-42-5040, successive post-conviction relief action, State's motion to dismiss on procedural grounds granted on December 4, 2017) (available on the Public Index for Spartanburg County, SC at https://www.sccourts.org/case-records-search/)

Moore v. South Carolina, 576 U.S. 1058 (2015) (petition for writ of certiorari to Spartanburg County Court of Common Pleas denied on June 29, 2015)(PCR appeal)

Moore v. State of South Carolina, appeal from the denial of post-conviction relief, petition for writ of certiorari review denied September 11, 2014, Appellate Case No. 2011-198472 (post-conviction relief action appeal) (available https://ctrack.sccourts.org/public/caseView.do?csIID=39279))

Moore v. State of South Carolina, post-conviction relief denied on August 1, 2011, 2004-CP-42-02715 (circuit court post-conviction relief action) (available on the Public Index for Spartanburg County, SC at https://www.sccourts.org/case-records-search/)

State of South Carolina v. Moore, 593 S.E.2d 608 (S.C. 2004) (direct appeal)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Court Rules:

BRIEF IN OPPOSITION

Moore is nearing execution and makes this late attempt to revive review of a ruling made at his October 2001 trial. Defense counsel made a *Batson*[1] motion at trial and challenged two of the State's peremptory strikes. However, once having heard and considered the State's reasons, Moore's counsel expressed satisfaction with the State's non-racial reasons for the strikes. The trial judge also found the State had not violated *Batson*. Moore did not attempt to appeal the trial judge's finding. Further, Moore explored the State's reasons again in post-conviction relief and again the state court found no violation of *Batson*. Moore did not appeal the issue. In 28 U.S.C. § 2254 federal habeas corpus proceedings, he argued that trial counsel failed to pursue the *Batson* motion given the evidence in the record. However, the district court found the record would not support a meritorious issue and did not excuse the procedural default. Moore did not appeal the ruling to the Fourth Circuit.[2]

Moore, though, does not present this Court with a ruling on a federal issue made in a regular appeal from an ordinary remedy. Rather, he seeks review of the denial of a petition submitted to the Supreme Court of South Carolina after he had exhausted his ordinary state and federal remedies that requested the court exercise its original jurisdiction to consider his *Batson* claim. The state supreme court, under its own well-established state law test, declined to exercise its original jurisdiction,

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1 *Batson v. Kentucky*, 476 U.S. 79 (1986).

2 Present counsel for Mr. Moore, Ms. Vann, also represented him in the federal habeas corpus proceedings both in district court and in the Fourth Circuit. C/A No. 4:14-cv-04691 and COA4: Appeal No. 18-4.

thus, did not rule on the merits of the offered *Batson* claim. Moore cannot meet the jurisdictional limitation requiring a federal law-based ruling for review given the denial was based on state law. *See* 28 U.S.C. § 1257(a). The petition should be denied.

JURISDICTION

On August 12, 2024, the Supreme Court of South Carolina denied a petition for writ of habeas corpus seeking original jurisdiction review of the *Batson* motion from Moore's October 2001 trial. Moore attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). (Pet. 1). Respondent submits that the Court lacks jurisdiction because the Supreme Court of South Carolina rejected review on state law grounds – its test for determining whether to exercise its original jurisdiction. *See Wilson v. Moore,* 178 F.3d 266, 275-76 (4th Cir. 1999) (a determination by the Supreme Court of South Carolina not to exercise its original jurisdiction is not a merits ruling on the underlying claim presented).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore contends his petition question involves the Fourteenth Amendment. (Pet. 1).

Respondent submits that 28 U.S.C. § 1257(a) is involved:

> **(a)** Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any

> commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Cognizant that misstatements in the petition should be addressed in the brief in opposition, *see* Sup.Ct. Rule 15.2, Respondent initially brings two points to the front. First, Moore attempts to minimize his crime and opines "this case was an improbable one for capital prosecution." (*See* Pet. 2). Moore fails to acknowledge this argument has been consistently rejected based on the facts of record. Moreover, his opinion to the contrary does not lessen the crime or impugn the jury's determination of his sentence.

Second, Moore complains that the composition of his trial jury lacked diversity claiming he was convicted and sentence by an "all white jury," (Pet. 1),[3] but does not make a stand alone claim concerning diversity.[4] Rather, Moore makes these assertions while he sidles toward a *Batson* motion ruling that has been part of the record since October 2001. Notably, the prosecution's two strikes were explained at trial, and again in state post-conviction relief and supported by the records made during those proceedings. There has never been any error to correct.

Respondent offers the following details which rebut the misstatements (and fills in the omissions) Moore relies upon.

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[3] Moore has consistently failed to recognize the Hispanic male juror. He does so once again in the petition to this Court.

[4] He veers into such a claim from time to time, dissecting the jury pool and asserted only 3 of 38 qualified jurors were African American. (*See* Pet. 3).

I. Facts of the Murder.

Moore went to George Gibson's residence between 8:00 and 10:00 p.m. on September 15, 1999, and asked Gibson to get him some crack cocaine. Gibson knew Moore, but declined because Moore did not have any money. He further declined to give Moore crack on credit. The unemployed Moore told Gibson he was going to work and would return the following morning. He then left. JA 2672-74.[5] The Supreme Court of South Carolina summarized the State's evidence surrounding the murder as follows:

> 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 3:00a.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 Hillside drive, where he heard a loud bang, the sound of Moore's

[5] Citation to JA refers to the Joint appendix filed in the Fourth Circuit Court of Appeals on review of the denial of federal habeas corpus relief under 28 U.S.C. § 2254. COA4 Appeal No. 18-4.

> truck backing into a telephone pole. He turned his lights 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, 593 S.E.2d 608, 609-10 (S.C. 2004).

Though bleeding profusely from a gunshot wound after the murder, Moore did not seek treatment at a nearby hospital. Instead, he drove back to Gibson's house to buy crack, discarding the .45 caliber handgun with his blood on it along the way. JA 2674-76; 2688-91.

It was undisputed at trial and during state post-conviction relief proceedings that both guns involved in the shootout were initially within victim's control, and that Moore did not bring either gun to the store. No one disputed, however, that Moore certainly chose to use the .45.

In addition to Mr. Hadden's eyewitness testimony, officers who had investigated testified they 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 Speed Shop (State's Ex. 83) was found at the victim's feet with Moore's blood on it. Also, officers found six shell casings, two lead bullet cores, two fired bullets that had been fired by the .45 semi-automatic, and

several fragments that were consistent with having been fired by the .45. JA 2697-2719; 2731-47; 2777-79; 2790-95; 2847-58; 2886-2906.

The pathologist explained that the fatal shot "passed through the lower border of the eighth rib" before going through the victim's liver, through his stomach, diaphragm, heart and left lung. It then exited the right side of his chest. Because the victim's shirt was overlaying the wound when the shot was fired, the pathologist "could not tell for sure" if it was a contact wound. Initially, he was uncertain if stippling was present but, after reviewing photographs, opined that it was "more likely" that the gun had been fired "slightly away from the body." The victim also had a gunshot wound to his lower right arm, which broke his right arm. JA 2917-26.

A bullet fired by the victim's .44 caliber weapon went through Moore's left arm. The pathologist opined that it is possible that either there were two gunshot wounds or all of the victim'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. JA 2917-34. JA 2807-10.[6] On this evidence, Moore was convicted and sentenced to death.

Moore later challenged the proportionality of his sentence in the Supreme Court of South Carolina through an petition for writ of habeas corpus in the original jurisdiction of the state court and emphasized he was not armed upon entry of the store. His arguments this made his crime less "egregious" were rejected:

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[6] Police also found an open pocketknife in Moore's truck when he was arrested, JA 2740-41; State's Ex. 86, which may or may not have been used in the robbery.

> We disagree with Moore's characterization, as his own offenses were similarly egregious and appropriate for comparison with the selected cases. Whether Moore entered the store with a weapon or whether he armed himself once inside is not determinative of either his intent or the egregiousness of the offenses he ultimately committed. The significant fact is that Moore became armed at some point during the commission of the offenses. *See generally State v. Keith*, 283 S.C. 597, 598–99, 325 S.E.2d 325, 326 (1985) (holding a defendant is guilty of armed robbery if he becomes armed with a deadly weapon at any point while the robbery is being perpetrated and need not be armed at all times during the offense).
>
> After hearing the evidence at trial, a jury found Moore intentionally shot and killed the store employee during an armed robbery and he endangered the life of a bystander for the obvious purpose of eliminating the only eyewitness to the murder. The robbery in this case could have resulted in two deaths but for the astute actions of the eyewitness, who "played dead" when Moore shot at him.

Moore v. Stirling, 871 S.E.2d 423, 432–33 (S.C. 2022).

In other words, every court to delve deeply into the evidence has disagreed with Moore's claim, that he again repeats to this Court, that his is not truly a capital case.

Having lost his arguments attempting to minimize his crime, and his execution nearing, Moore has now submitted the instant petition on the possibility of reviving a long-abandoned *Batson* claim.

II. Procedural History.

A. Trial.

The State of South Carolina charged Moore with murder, armed robbery, possession of a firearm during the commission of a violent crime, and assault with intent to kill (AWIK). The State served notice of capital proceedings. Attorneys

Michael Morin, R. Keith Kelly, and Jennifer Johnson, represented Moore on the charges.

A capital jury trial was held October 16-22, 2001. The Honorable Gary E. Clary presided. Moore was present with counsel. The Honorable Harold W. "Trey" Gowdy, III, Solicitor for the Seventh Judicial Circuit, represented the State with deputy solicitors Barry J. Barnette[7] and James D. Willingham. Only two African-American jurors were *Witherspoon*[8] qualified by the trial court and presented during the jury selection before the parties. The State struck those two jurors. The twelve main jurors selected included (7) White females; (4) White males; and (1) Hispanic male. BIO App. A1, Court Reporter's Jury Selection Sheet. At the conclusion of jury selection, defense counsel challenged the strikes under *Batson v. Kentucky,* 476 U.S. 79 (1986). Solicitor Gowdy responded to the motion:

> … 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.

BIO App. A2, Trial Transcript p.1135. And he did.

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[7] Mr. Gowdy was subsequently elected to Congress and Mr. Barnette became the Solicitor for the Seventh Judicial Circuit. Mr. Barnette remains the current solicitor for the judicial circuit.

[8] *Witherspoon v. State of Ill.*, 391 U.S. 510, 520-522 (1968) (jurors may not be excluded "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" but should be excluded if they "would not even consider returning a verdict of death"). *See also Wainwright v. Witt,* 469 U.S. 412, 424 (1985) (exclusion permissible where juror's "views on capital punishment are such as would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"

As to the first, Ms. Morrow, the Solicitor stated that he had "dropped the ball" as he should have timely moved to have her disqualified. *Id*, Trial Transcript p.1135.[9] She did not truthfully respond during questions about her criminal record. Further, the State noted, she had asserted that "guns are used improperly," and due to the circumstance of the case – specifically with the victim having been armed – the statement signaled a possible problem. Third she was a teacher who originally attempted to be removed and called for another term of court, then "when she was confronted with the fact that she would miss her vacation" she chose to stay. The Solicitor noted "obviously, we only want jurors who want to be here." *Id*, Trial Transcript p. 1136. The Solicitor continued:

> 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.

Id.

As for the second, Mr. Alexander, the Solicitor initially noted that the same logic to strike Mr. Alexander was shared with Mr. Huffman, a white juror also struck by the Solicitor. *Id*, *see also* BIO App. A1. The Solicitor's Office had prosecuted Mr. Alexander's son for murder; Mr. Huffman had a close family member also prosecuted for murder. BIO App. A3, Trial Transcript p. 1136. Simply, the State "did not want a juror who had recently had a son sent to prison" for murder on the jury. *Id.* Though there was also a notation in the State's notes that Mr. Alexander had "misunderstood"

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[9] The State did move to have her disqualified, but that motion was denied by the trial judge as untimely. BIO App. A31-32, Trial Transcript pp. 329-330**.** The transcript shows that the trial judge did not ask for the State' s position before qualifying the juror. BIO App. A29, Trial Transcript p. 327.

a question earlier, the primary reason remained his son's prosecution and conviction. BIO A4, Trial Transcript p. 1137.

The trial court, as it should, asked the defense to respond with any argument to challenge the State's stated reasons, and the defense asserted they had no argument with the State's responses. *Id*. The trial court then placed its ruling on the record, understanding that the defense had "accepted" the reasons expressed by the State, found "that they are race neutral reasons, and, as such, … these strikes were not just pretext," and denied the motion. BIO A3-A4, Trial Transcript pp. 1137-1138. Ultimately, the jury convicted him of all offenses. JA 1489-3039; 3197. Following a separate sentencing proceeding, the same jury found death was the appropriate sentence.[10]

B. Direct Appeal.

The South Carolina Supreme Court affirmed his conviction and death sentence on direct appeal. *State v. Moore*, 593 S.E.2d 608 (S.C. 2004). No claim regarding the *Batson* motion was raised.[11]

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[10] The jury found three statutory aggravating circumstances: 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. S.C. Code Ann. § 16-3-20(C)(a)(1)(e) & (3)-(4). In addition to imposing the death sentence as returned by the jury, the trial judge sentenced Moore to five years for the weapons charge, ten years for AWIK and thirty years for armed robbery. JA 3041-3195.

[11] South Carolina requires an issue to be preserved for appeal. *See, e.g., State v. Torrence,* 406 S.E.2d 315, 328 (S.C. 1991) (abolishing exception for capital trials: "we hold a contemporaneous objection is necessary in all trials beginning after the date of this opinion to properly preserve errors for our direct appellate review"). Though the trial court ruled on the issue, it is likely that this issue would not be considered preserved for direct appeal review because defense counsel did not have any argument to show pretext. *See Ex parte McMillan*, 461 S.E.2d 43, 45 (1995) (finding conceded issue is

C. **Post-Conviction Relief.**

Among other claims not relevant here, Moore's post-conviction relief (PCR) counsel raised this claim:

> 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.*

J.A. 3223-3224.[12]

At the hearing, further testimony on the same strikes was offered, with former defense counsel testifying why he did not further pursue his *Batson* motion:

> A. 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.
>
> Q And you accepted those as being race neutral?

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procedurally barred from merits review on appeal). However, the record shows Moore did not attempt to appeal the ruling by the trial court.

[12] Moore's allegation confused Juror Huffman with Juror Alexander.

A I think they were.

JA 4011-4012. *See also* JA 4046-4047 ("… when I heard their reasoning," he concluded "that they met Batson's standards for striking").

Additionally, a former deputy solicitor from the trial also testified during the collateral proceedings. He again explained the State's race-neutral reasons for the strikes and relied on contemporaneous notes supporting the strikes for non-racial reasons. J.A. 4150-4179.[13]

As to Juror Morrow, he confirmed that he questioned the juror. The juror had withheld responses about her criminal history, "and only when confronted with the fact she had any aliases did she begin to give any truthful response." J.A. 4167.

As to Juror Alexander, he also explained that State struck Juror Alexander, an African-American juror (whose son was convicted of murder), and Juror Huffman, a White juror (whose brother-in-law was convicted of murder), which debunked a "similarly situated," but failed to similarly strike allegation:

> Similarly situated in that he had a family member charged,
> but I see brother-in-law versus son being a little different.
> But either way, both of them were struck by the State.

(JA 4154).

The PCR court denied the ineffective assistance of counsel claim for failing to pursue the *Batson* motion. First, the PCR counsel found trial counsel's testimony credible, as was the former deputy solicitor's, and then found Moore had "failed to prove deficient performance" as counsel "made a reasonable strategic decision not to

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[13] Moore's PCR counsel objected to the witness expanding on the evidence in PCR and maintained the notes, not introduced at trial, should not come in; however, the PCR judge overruled the objection to allow the testimony based on the contemporaneous notes. JA 4162.

further argue the *Batson* motion because, based upon his knowledge of the record, the reasons proffered by the State were race-neutral." JA 4374-4375. After detailed review of the exchange between the potential juror and the State, the PCR court reasoned that Moore's "[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 formerly known by" another name; that she had made the statement about guns being "used inappropriately" ; and, knew that the record supported another juror was less than "similarly situated" as to withholding criminal background information when the other juror was *acquitted* rather than convicted; and that the State had struck both Jurors Alexander and Huffman for the reason of having family members convicted of murder, with Mr. Alexander being African American and Mr. Huffman being white. JA 4377-4379. Then, turning to the possibility of prejudice, the PCR court found:

> In an effort to demonstrate prejudice from the strike of juror Morrow, he points out that the State failed to strike juror Gantt, the second alternate. He ignores, however, that the State had exercised its only challenge for alternates to strike juror Huffman. Further, Ms. Gantt failed to disclose a charge of which she was *acquitted*, but Ms. Morrow as not forthcoming about a prior *conviction*. The Court rejects Moore's contention that the State indicated that Ms. Morrow's use of an alias was one of the reasons for striking her. Rather, it challenged her because she was unwilling to admit her prior marijuana conviction until confronted with the alternate identity. [FN 27] 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. R. pp. 715-18; 1765. Nor

has Moore proved that the State's other reasons for striking Ms. Morrow were pretext.

> [FN 27] The Court would note, as did the Solicitor at trial, that the trial judge subsequently excused juror Rookard (#235) because he had been dishonest in no disclosing a number of arrests and 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. pp. 485-92.

Although the Solicitor noted that other jurors expressed some concern over use of firearms, he noted that none had used the term "improperly" in doing so. 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. [FN 28] 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 the loss of vacation time. The Court further finds that Moore has failed to show pretext in the striking of juror A[lexander].

> [FN 28] Even if the Solicitor was mistaken in regard to his assessment, the Court finds that Moore has not shown pretext. Rather the reason offered 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. A[lexander] and Mr. Huffman were similarly situated jurors and that they were of different races. However, he has their races reversed, erroneously asserting that Mr. A[lexander] 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 [sic] the State's exercise of its peremptory challenges. [citations omitted]. 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.

J.A. 4380-4382.[14]

After this thorough review of the record and reasons for the strikes, the PCR Court concluded that since the State's reasons for exercising its peremptory

[14] While correctly referencing Mr. Alexander in other parts of the discussion, in this section, the PCR court inadvertently referenced Mr. Alexander as Mr. Anderson; however, by context, the Court is referring directly to the reasons for striking Mr. Alexander. Respondent has bracketed a corrective change for ease in review.

challenges were race neutral and the record showed they were not pretextual, Moore failed to show either deficient performance or resulting prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984). JA 4382.

D. Post-Conviction Relief Appeal.

Moore's PCR appeal counsel did not raise the denial of the claim in his petition to the Supreme Court of South Carolina. During the appeal, Moore sought to file a *pro se* Petition for Writ of Certiorari raising the *Batson* direct appeal claim or the related ineffective assistance of counsel claim. His attempt was rejected as improper because South Carolina does not recognize hybrid representation. However, PCR appellate counsel wrote a letter to Moore explaining why they did not raise the claim – because it did not have any merit:

> 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 was presented to indicate the stated reason was a pretext. 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 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 907-909. 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.

BIO App. A33-A34. *See also* JA 834-35.

The Supreme Court of South Carolina denied the petition that addressed three unrelated claims on June 29, 2015. *Moore v. South Carolina*, 576 U.S. 1058 (2015).

E. Federal Habeas Corpus, 28 U.S.C. § 2254 Action.

Among other issues, Moore raised the following allegation:

> 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.

JA 48.

Respondents moved for summary judgment. On November 16, 2015, the Magistrate Judge issued a Report and Recommendation recommending that the motion for summary judgment be granted and the petition for federal habeas corpus relief be dismissed. The Magistrate addressed the ineffective assistance/*Batson* claim finding it procedurally defaulted given the failure to raise the claim in the PCR appeal and that Moore had not shown cause or prejudice to excuse the procedural bar. In considering the trial record and the PCR testimony on the *Batson* hearing, the Magistrate found no prejudice to allow Moore to avoid the procedural default, noting that "[t]he PCR judge specifically found that trial counsel's testimony and [the deputy solicitor's] testimony as to this issue was credible, and that in light of the trial transcript, Moore had not proved [*Strickland*] deficient performance or prejudice…." *Moore v. Stirling*, No. 4:14-CV-4691-MGL-TER, 2017 WL 8294058, at *39–41 (D.S.C. Dec. 28, 2017).

On March 21, 2018, the Honorable Mary G. Lewis, United States District Judge, agreeing with the Magistrate, adopted the Report and Recommendation, and granted summary judgment in Respondents' favor. Regarding the defaulted claim, the district court found:

> 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 purportedly 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.

Moore v. Stirling, No. CV 4:14-04691-MGL, 2018 WL 1430959, at *9 (D.S.C. Mar. 21, 2018), *aff'd,* 952 F.3d 174 (4th Cir. 2020).

F. Federal Habeas Corpus, 28 U.S.C. § 2254 Action Appeal.

Moore, represented by the same attorneys, abandoned the ineffective assistance/*Batson* defaulted claim in the appeal to the Fourth Circuit Court of Appeals. *See Moore v. Stirling*, 952 F.3d 174 (4th Cir. 2020). The only reference to *Batson* within the brief is found in the Statement of the Case, Procedural History. COA Appeal: 18-4, Doc. 17 at 15 (noting trial counsel made a *Batson* motion, but "abandoned the challenge," and asserting, "As a result, Moore, an African American defendant charged with killing a white victim, was tried by an all-white jury.").

G. First State Habeas Petition

On November 19, 2020, Moore, represented by counsel, filed a state habeas petition seeking original jurisdiction review in the Supreme Court of South Carolina. He alleged ineffective assistance for failure to present certain evidence unrelated to the *Batson* motion, trial court error in the malice charge, and that his death sentence

was "disproportionate" and inappropriate for his case. Notably, Moore did not attempt to raise the present claim in that action even though he could have done so. The state court accepted the case in its original jurisdiction only on the proportionality complaint and ordered briefing. BIO App. A35. The Court ultimately considered and rejected the proportionality claim on the merits and denied relief. *Moore v. Stirling*, 871 S.E.2d 423 (S.C. 2022).

H. Second State Habeas Petition

On August 24, 2023, Moore filed another petition, this time attempting to raise the *Batson* claim. Pet. App. 14a - 43a. The Supreme Court of South Carolina, in contrast to the proportionality claim petition, denied the petition without any further proceedings.[15] Pet. App. 1a.

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[15] Moore asserts in his petition to this Court that "[t]he Supreme Court of South Carolina's reluctance to enforce *Batson's* mandate is well-established" and cites unidentified "numerous appeals raising claims of *Batson* error" with only two reversals in thirty-two years. (Pet. 2). Of course, many claims are raised in many different cases, but that does not make the claims meritorious. Even so, Moore neglects to inform this Court that the South Carolina Court of Appeals is the intermediate court in the state and would conduct the first review in most every non-capital criminal case. The State has simply not appealed some of the rulings to allow the state supreme court an opportunity to pass on the matter. *See State v. Young*, No. 2013-000149, 2017 WL 5483256, at *4 (S.C. Ct. App. Nov. 15, 2017) (reversing conviction where "the State fail[ed] to articulate a race neutral reason for its disparate treatment of the jurors"). Further, the Supreme Court of South Carolina has denied certiorari allowing the Court of Appeals' finding of *Batson* error to stand. *See State v. Stewart*, 775 S.E.2d 416, 421 (S.C. Ct. App. 2015), *cert. denied* May 19, 2016 (reversing conviction "even though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors"). Moreover, the Supreme Court of South Carolina has reversed a conviction finding the trial court erred in erroneously granting the State's *Batson* motion against the defense, *State v. Inman*, 760 S.E.2d 105, 110 (S.C. 2014), as has the Court of Appeals, *State v. Rogers*, 748 S.E.2d 247, 256 (S.C. Ct. App. 2013). Moore's statement lacks support.

REASONS WHY THE PETITION SHOULD BE DISMISSED OR, ALTERNATIVELY, DENIED

The petition should be denied as Moore cannot meet the jurisdictional requirements for review by this Court. However, even if Moore could show a basis, and if this Court would wish to engage in a fact-intensive and redundant review, the lengthy record in this case shows no *Batson* violation occurred.

I. There is no ruling based on federal law for this Court to review, and no jurisdiction over the matter presented.

Moore alleges error in the Supreme Court of South Carolina's analysis of his *Batson* claim. His problem is that the Supreme Court of South Carolina, applying its own state-law test, never exercised jurisdiction and did not rule on the merits of Moore's federal claim.[16] The only decision at issue is the one whether to exercise jurisdiction which does not present a federal question for this Court to review: "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

The Supreme Court of South Carolina has, under the state constitution, the authority to issue writs in its original jurisdiction. Article V, § 5, S.C. Constitution. However, the court primarily functions as an appellate court. *See, e.g., Key v. Currie*,

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[16] Moore is really attempting to challenge the 2001 trial court ruling which in no way could be considered properly presented to the state appellate court or timely presented for this Court's review.

406 S.E.2d 356, 357 (S.C. 1991). A petition must overcome the longstanding rule that "a writ of habeas corpus is reserved for the very gravest of constitutional violations, 'which, *in the setting*, constitute[ ] a denial of fundamental fairness shocking to the universal sense of justice.' " *Moore v. Stirling*, 871 S.E.2d 423, 429 (S.C. 2022) (citing *Butler v. State*, 397 S.E.2d 87, 88 (S.C. 1990)). The "in the setting" requirement refers not just to a presence or absence of error, but consideration is made as to whether there was "a meaningful opportunity to protect" defendant's "rights." *Tucker v. Catoe*, 552 S.E.2d 712, 718 (S.C. 2001). *See also McWee v. State*, 593 S.E.2d 456, 458 (S.C. 2004) (explaining that in *Butler* then again in *Tucker*, to grant relief, the Supreme Court of South Carolina "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") (italics in original).

To be sure, initial review of the petition is necessary, but the review is not simply of the proposed claim, but also the context of the case. "While the allegations in the petition are treated as true, the petition must set forth a prima facie case showing the petitioner is entitled to relief" which is to say, "it must allege that the petitioner has exhausted all other remedies, and it must set out a constitutional claim that meets the standard delineated in *Butler*." *Moore,* at 429. Moore could not make this preliminary showing under state law to have the state court exercise review in its original jurisdiction. Thus, the petition was dismissed on the basis of the state law test, not federal law.

The Fourth Circuit has similarly found that denial of original jurisdiction petitions submitted to the Supreme Court of South Carolina do not constitute rulings on merits.[17] *Wilson v. Moore*, 178 F.3d 266, 277 (4th Cir. 1999). Wilson's case was based in federal habeas corpus reviewed under 28 U.S.C. § 2254, consequently, whether the state court considered the claim on the merits affected not only procedural default, but also whether the materials submitted in the petition for original jurisdiction review could be considered a part of the state court record for § 2254 review. *Id,* at 273. The Fourth Circuit rejected Wilson's argument that the order, which reflected the petition was "denied," indicated that Supreme Court of South Carolina considered the merits of the federal claim. The Fourth Circuit resolved "[a]fter examining the totality of the circumstances accompanying the entry of the state order, we conclude that the order fairly appears to rest on state procedural grounds, not federal law." *Id,* at 275-276. It reached that conclusion having considered that there was no mention of federal law in the order and there was no discernable difference in the state court's use of "denied" rather than "dismissed" to indicate the type of review given. *Id.* The Fourth Circuit considered other state case orders including one that had been presented to this Court previously, *Yates v. Aiken*, where this Court had reversed the denial of a petition and remanded to the Supreme Court of South Carolina for further proceedings. *Id,* at 275 n. 9 (citing *Yates v. Aiken,* 349 S.E.2d 84, 85 (S.C. 1986), *rev'd,* 484 U.S. 211 (1988)). It noted, however, that

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[17] In general, this Court may depend on the federal court of appeals to have "familiarity" with the state law at issue. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) (" Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located.").

subsequent guidance from this Court was then available to determine whether the action was based on independent and adequate state law grounds, citing *Harris v. Reed*, 489 U.S. 255 (1989), and *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), and that precedent reinforced its conclusion that the ruling was not on the merits. *Id.*[18]

Further, Moore's own petition to the Supreme Court of South Carolina acknowledged the state test for exercising original jurisdiction. Moore plainly recognized the *Butler* test and that review in *Butler* was based, in part, on the "unique and compelling circumstances" not just the proposed constitutional claim. Pet. App. 22a-23a. Relatedly, the State argued in response to Moore's state petition that 1) the claim had been denied in whatever fashioned raised because the underlying *Batson* claim has no merit; 2) Moore could not meet the standard for state habeas review; and 3) the defenses of abandonment, res judicata, law of the case, finality of litigation, and collateral estoppel would bar the claim. Pet. App. 83a. Essentially, under the two-prong state test, the claim had been considered and denied and no extraordinary circumstances to allow *Butler* review existed, rather, to the contrary, multiple principles barred further review. The Supreme Court of South Carolina denied the petition having both these arguments – Petitioner's and the State's – before it.

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[18] Additionally, as the Supreme Court of South Carolina explained in the subsequent opinion following remand, Yates had filed *both* a petition for writ of certiorari to review his denial of post-conviction relief *and* a petition for writ of habeas corpus in the original jurisdiction. Those petitions were consolidated before the Court, logically making review of one over the other difficult. *See Yates,* 349 S.E.2d at 85.

Further still, the treatment of Moore's first petition for writ of habeas corpus in the state court's original jurisdiction is telling. In that first petition, in regard to proportionality, briefing was granted along with oral argument, but no such review was conducted for the other issues raised. *See* BIO App. A35. Further, and in contrast, no order was issued that authorized briefing for Moore's later presented *Batson* claim.

Simply, the Supreme Court of South Carolina did not pass on the merits of Moore's *Batson* claim given that Moore did not meet the requirements to exercise original jurisdiction. A passing or light review of the claim, if indeed that was done, is not enough for Moore to show proper jurisdiction in this Court where *in addition to showing a possible constitutional error,* a state petition still must establish the procedural or other failures that demonstrate the extraordinary exercise of original jurisdiction would be warranted. Either way, Moore fails to present this Court with a federal issue to review based on the Supreme Court of South Carolina's summary denial of the exercise of its original jurisdiction – it is undeniable that the state test requires more than consideration of the claim for the exercise of jurisdiction and that test is a matter solely of state law that will not support jurisdiction here. *John*, *supra. See also Coleman,* 501 U.S. at 729 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

II. Alternatively, this case does not warrant certiorari review because the record shows an ordinary application of *Batson* to the facts of this case, and the record supports that no *Batson* violation occurred.

Should the Court reject the Fourth Circuit's interpretation of South Carolina law, and find it does in fact have jurisdiction, the Court should still deny the petition because the trial court and the PCR court, and even the federal district court in considering the matter under a default analysis, were properly guided by *Batson* and its progeny and reasonably concluded the record supports that no *Batson* violation occurred. There is no need for a redundant application of *Batson* to the facts of this case.

Moore attempts to gain this Court's attention by reference to an alleged failure to consider the claim in compliance with this Court's guidance in *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019). However, this Court plainly stated in *Flowers*: "[W]e break no new legal ground. We simply enforce and reinforce *Batson* by applying" to the facts and circumstance of that particular case. *Id.* at 288. The claim has not changed in character or requirement. Further, *Flowers* does not expand or take away from the trial court's authority to consider credibility and other evidence to reveal pretext.

"As the *Batson* Court itself recognized, the job of enforcing *Batson* rests first and foremost with trial judges." *Flowers*, 588 U.S. at 302. The trial court did so in this case, and the defense did challenge the strikes but even the defense was satisfied with the non-racial reasons for the strikes. Further, when the reasons were tested again in context of the other arguments on disparate questions or treatment, again,

there was no error. Moore did not appeal these related rulings either in his PCR appeal or his federal habeas corpus appeal. This claim was not overlooked or abandoned without the benefit of careful consideration of the evidence. Rather, the evidence fully and fairly supported what the prosecutors set out in the 2001 trial – the prosecution appropriately exercised the two contested strikes based on specific, non-racial, bases.

The record supports that Juror Morrow was not forthcoming about her criminal record and confirms her responses related the shooting murder of her stepson, her statement she believes guns are used inappropriately, and that she attempted to avoid jury service. BIO App. A22-A28, Trial Transcript pp. 320-326. Further, long before the strike was made on the primary basis of her reticence on full disclosure regarding her criminal record, the prosecution had moved to strike the juror for cause, and the trial judge only denied the motion based because he considered the motion untimely. BIO App. A31-A32, Trial Transcript pp. 329-330.

The record also supports that Juror Alexander had, in fact, disclosed that his son was incarcerated after being convicted of murder by Solicitor Gowdy's office. BIO App. A10-A11, Trial Transcript pp. 191-192. Additionally, the record supports that the prosecution similarly struck a White male juror, Mr. Huffman, because he a had a brother-in-law who was convicted of murder. BIO App. A1 and A12-A13, Trial Transcript pp. 201-202.

There is no pretext; there is no discrimination; and there is no cause for yet another review of the same information that has been a matter of record for years.

Moore cannot create controversy ripe for resolution by this Court – either by a failure of the state court to exercise state court jurisdiction on an extraordinary petition, or on a record that shows no improper basis for either of those two strikes.

CONCLUSION

The Court should dismiss the petition for want of jurisdiction, or alternatively, deny the petition.

Respectfully submitted,

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