No. 24A409

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD BERNARD MOORE,

***Applicant*,**

VS.

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

Respondent.

CAPITAL CASE

*** EXECUTION SCHEDULED: FRIDAY, NOVEMBER 1, 2024, 6:00 P.M. ***

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

Applicant, Richard Bernard Moore, is a South Carolina death-sentenced inmate. His execution is scheduled for Friday, November 1, 2024, to begin at 6:00 p.m.

Moore currently has a pending petition for writ of certiorari which he submitted to this Court on September 26, 2024, that this Court docketed on September 30, 2024. (Docket No. 24-5668). The Brief in Opposition was filed on October 22, 2024, and a reply was submitted on October 28, 2024. With the reply,

Moore submitted an application for a stay of execution to allow for the consideration of the petition. Respondent now makes this response and submits that the petition should be denied, and, therefore, a stay based on the request to litigate, should be denied. In support of this position, Respondent would respectfully show the Court:

THE PENDING PETITION FOR WRIT OF CERTIORARI

In his September 25, 2024 petition, Moore presented the following question for consideration: 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).

In the Brief in Opposition, Respondent submitted that Moore cannot meet the jurisdictional requirement for review. (BIO at 21-25). Moore asks this Court to review the denial of a petition submitted to the Supreme Court of South Carolina requesting that it exercise its original jurisdiction and consider a *Batson* motion that Moore previously forfeited and/or failed to appeal. The state supreme court, under its own well-established state law test, declined to exercise its original jurisdiction, thus, did not rule on the merits of the offered *Batson* claim. Consequently, Moore cannot meet the jurisdictional limitation requiring a federal law-based ruling for review given the denial was based on an independent state law ground. *See* 28 U.S.C. § 1257(a). *See also Coleman v. Thompson,* 501 U.S. 722, 729 (1991) ("In the context of

direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional."). Further, even if a basis for jurisdiction could be found, Respondent submitted that this Court need not engage in a fact-intensive and redundant review. (BIO at 26-28). Respondent noted in particular, that Moore had litigated the *Batson* issue though a claim of ineffective assistance of counsel and received a detailed review. He failed to appeal that ruling, but the state PCR court's careful and detailed ruling supports that the record in this case shows no *Batson* violation occurred. He also failed to appeal the defaulted claim raised in 28 U.S.C. § 2254 proceedings, and the district court's consideration of the underlying claim through the defaulted claim analysis. Even so, the evidence throughout fully and fairly supported what the prosecutors demonstrated in the 2001 trial – the prosecution appropriately exercised the two contested strikes based on specific, non-racial, bases.

STAYS OF EXECUTION

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*, at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637,650 (2004). Equity must also consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*,

503 U.S. 653, 654 (1992). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). This Court has also highlighted the State's and the victims' interest in the timely enforcement of the death sentence. *Bucklew v. Precythe*, 587 U.S. 119, 149-151 (2019). The people of [South Carolina], as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Id,* at 149. The Court stated that courts should "police carefully" against last-minute claims being used "as tools to interpose unjustified delay" in executions. *Id,* at 150. This Court has also stated that last-minute stays of execution should be the "extreme exception, not the norm." *Id,* at 150.

To be granted a stay of execution, Moore must establish three factors: (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal if review was granted; and (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (emphasis added).

Notably, the fact that Moore failed to appeal the adverse state PCR ruling on the merits, and also failed to appeal his rejected defaulted claim in 28 U.S.C. § 2254 proceedings, (*see* BIO at 11-19), greatly undercuts any sense of urgency at this time. If the claims were not worthy of review then, it is difficult to argue they are worthy of review now. Yet, primarily, the petition should be dismissed for want of jurisdiction. Consequently, a stay is not warranted.

Probability of this Court Granting Certiorari

As to the probability factor, Moore has presented no argument to overcome the jurisdictional bar that prevents this Court from reviewing his *Batson* claim. At bottom, there is no ruling based on federal law for this Court to review and no jurisdiction over the matter presented. (*See* BIO at 21-25).

Moore alleges error in the Supreme Court of South Carolina's analysis of his *Batson* claim. However, the Supreme Court of South Carolina, applying its own state-law test in considering the petition, never exercised jurisdiction and did not rule on the merits of Moore's *Batson* claim. That state law required Moore to demonstrate exhaustion of all his other remedies and establish a constitutional claim that meets the standard delineated in *Butler v. State*, 397 S.E.2d 87, 88 (S.C. 1990). The Supreme Court of South Carolina set out in *Bulter* that "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.'" *Id*, at 468 *quoting State v. Miller*, 16 N.J.Super. 251, 84 A.2d 459 (1951)(emphasis added in *Butler*)). Moore failed to make that showing. Moreover, the record soundly supports that Moore did not avail himself of the opportunities to both present the claim and have the claim reviewed on appeal during the ordinary review process.

Moore's conviction and death sentence was affirmed on direct appeal, however, he presented no claim related to the *Batson* motion (even if counsel's acquiescence to the explanation would affect review of the trial court's ruling). *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (S.C. 2004). Moore then alleged in his state PCR action, that

trial counsel failed to pursue an argument pursuant to *Batson* despite the fact that his jury was exclusively white, and the state struck the only two African Americans qualified to serve as jurors. The PCR Court denied relief, and on appeal, the *Batson* claim was not raised. *See* BIO at 11-17. 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 by the Court as improper because South Carolina does not recognize hybrid representation. Counsel for Moore subsequently wrote him a letter depicting why he believed the *Batson* claim had no merit. The state supreme court denied the petition that addressed three unrelated claims on June 29, 2015. *See* BIO at pp. 16-17. Moore then raised the *Batson* allegation in his federal habeas corpus petition. 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. 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. Specifically, Judge Lewis noted:

> 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. …

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). On appeal to the Fourth Circuit Court of

Appeals, Moore abandoned the ineffective assistance/*Batson* defaulted claim. *See Moore v. Stirling*, 952 F.3d 174 (4th Cir. 2020). *See* BIO at 17-19.

After these steps, Moore then 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. 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). *See* BIO at 19-20.

Then, 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.

Notably, 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 before it. 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.

"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." *Coleman,* at 729 (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872)). "This rule applies whether the state law ground is substantive or procedural" and "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman,* at 729. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory" which should be avoided. *Id.* 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. As

such, the probability of this Court granting certiorari is minimal, as Moore fails to establish this Court's jurisdiction to reach the *Batson* claim.

Significant Possibility of Reversal

As to the reversal factor, the record shows an ordinary application of *Batson* to the facts and circumstances of this case, and the record supports that no *Batson* violation occurred. The trial court, 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. BIO at 26-28; *see also* BIO at 11-19.

Moore attempts to support his position by referencing an alleged failure to consider the claim in compliance with this Court's guidance in *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019). (App. Stay 5-6). Moore also notes that he filed a petition for consideration in the Inter-American Commission on Human Rights in April 2023, and the Commission found that Moore raised a prima facie case that racial discrimination played an improper role during jury selection at his capital trial. (App. Stay. 6).[1] As addressed in the Brief in Opposition, the evidence fully and fairly supported what the prosecutors set out in the 2001 trial – the prosecution

[1] Moore simply does not show any relevance for the international organization's opinion, and none is readily apparently. Such an opinion has been found insufficient by the Fourth Circuit to allow federal action to "stay or stop" an inmate's execution. *See Roach v. Aiken,* 781 F.2d 379, 381 (1986) ("We are of the opinion that the fact the matter may be considered by the Commission on Human Rights is an insufficient reason to either stay or stop Roach's execution. Most importantly, we are not advised that the United States has any treaty obligation which would require the enforcement, in the domestic courts of this nation, state and federal, of any future decision of the Commission favorable to Roach."). *See also Garza v. Lappin,* 253 F.3d 918 (7th Cir. 2001) (similarly finding such opinion insufficient to support a stay of execution).

appropriately exercised the two contested strikes based on specific, non-racial, bases. *See* BIO at 7-10 (trial) and 11-16 (PCR).

"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. The defense challenged the strikes but ultimately found the non-racial reasons for the strikes to be satisfactory. When the reasons were tested again in context of the other arguments on disparate questions or treatment, again, there was no error.

After a thorough review of the record and reasons for the strikes, the PCR Court concluded that since the State's reasons for exercising its peremptory 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). Again, if there was no need to appeal before, it appears little need for an emergency stay here. *See Bucklew*, 587 U.S. at 150. (Courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories.").

Even the federal district court reasonably concluded, in its default analysis, the record supports that no *Batson* violation occurred. 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). As such, Moore has provided no basis that further review would not be simply redundant – there is no error to correct. There is little, much less significant, possibility of reversal.

Irreparable Injury

Irreparable injury is the inherent nature of capital cases. In addition to the obvious, Moore contends that the harm of a slight delay in carrying out his execution while this Court considered the pending petition is minimal to the State. Moore argues on behalf of a citizen's right to serve on a jury, and that such an exclusion from service based on race is abhorrent to the Constitution and American values.

Moore has failed to show that the presented *Batson* issue warrants review by this Court. The issue has been appropriately considered by the state court, and subsequently denied review in whatever fashion raised due to the claim's lack of merit. While the execution means his pending litigation will be rendered moot, that consideration must be balanced by the "strong equitable presumption against granting relief where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay." *Hill v. McDonough*, 547 U.S. 573, 574 (2006).

Therefore, Moore has failed to meet the required showing entitling him a stay of execution to await litigation of his petition. Accordingly, the application for stay of execution should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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