

No. 24A-_____
(CONNECTED CASE 24-5668)

**IN THE
SUPREME COURT OF THE UNITED STATES**

RICHARD BERNARD MOORE,

Petitioner,

VS.

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

Respondent.

CAPITAL CASE

EXECUTION OF PETITIONER MOORE SCHEDULED FOR NOVEMBER 1, 2024

**DIRECTED TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT**

EMERGENCY APPLICATION FOR STAY OF EXECUTION

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

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

COUNSEL FOR PETITIONER

Petitioner, Richard Bernard Moore, a death-sentenced individual currently on South Carolina’s Death Row, respectfully requests a stay of his execution, which is currently scheduled for November 1, 2024. Moore asks this Court to stay his execution pending consideration and disposition of the petition for a writ of certiorari, currently filed with this Court, arising from a judgment of the Supreme Court of South Carolina pursuant to 28 U.S.C. § 1257(a). The issue raised will become moot if Moore is executed. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring); *see also Murphy v. Collier*, 139 S. Ct. 1111 (2019) (staying the execution pending the timely filing and disposition of a petition for a writ of certiorari). The requested stay may be lawfully granted pursuant to Supreme Court Rule 23 and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted. In support of this application, Petitioner submits the following:

I. STATEMENT OF THE CASE¹

Richard Bernard Moore is the last man on South Carolina’s death row who was convicted and sentenced by an all-white jury. 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, his case was an improbable one for a capital prosecution: Moore entered the convenience store unarmed; both firearms, which discharged moments later in the convenience store, originated in the possession of the victim, and there was no surveillance video footage or other reliable evidence from the crime scene. *See Moore v. Stirling*, 871 S.E.2d 423 (S.C. 2022). Yet the State opted to seek death penalty. Moore’s case went to trial in October of 2001 with an all-white jury after the State struck the only two qualified Black jurors. On August

¹ The case background is more fully set forth in the pending petition for a Writ of Certiorari. Pet. at 1–5, 9–19.

24, 2023, Moore filed a Petition for Writ of Habeas Corpus in the Supreme Court of South Carolina requesting the court consider the ample evidence that the State impermissibly struck these two Black jurors because of their race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and the United States Constitution. Moore alleged, as he sets forth in his current petition for a writ of certiorari, that the State impermissibly struck these jurors because of their race and that the proffered reasons for doing were pretextual, setting forth the totality of the circumstances surrounding the State's strikes of these two jurors, in line with this Court's precedent. *See Flowers*, 588 U.S. at 298–303. The totality of the circumstances at Moore's trial included the State's failure to strike similarly situated white jurors; the State's misrepresentations of the record in support of their strikes at trial; the State's implausible reasons offered in support of one of the peremptory strikes; and disparate questioning of both the Black jurors they ultimately struck. As a result, all qualified Black jurors were precluded from serving on Moore's jury. *See Pet.* at 9–19.

An all-white jury, especially one where all qualified Black prospective jurors were removed by the State, casts serious doubt on the integrity of a capital trial and undermines the public confidence in the criminal justice system. *See Powers v. Ohio*, 499 U.S. 400, 411–12 (1990) (“Active discrimination by a prosecutor during th[e jury selection] process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated.”).² This is especially true in cases such as Moore's where a Black man is on trial for his life in a case and the victim is white, circumstances

² *See also Buck v. Davis*, 580 U.S. 100, 124 (2017); *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979) (“Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.”).

where conscious or subconscious racial animus is most likely to put a thumb on the scale for death. *E.g.*, Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006) (analyzing prosecutorial decisions to seek the death penalty in South Carolina and finding that death is more likely to be sought for Black defendants when the victim was white); Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347 (2005) (assessing state level data for death eligible murders in several states, including South Carolina, and revealing, *inter alia*, a racial demographic effect with a higher likelihood that death will be the ultimate sentence in cases involving Black defendants and white victims).³ A review of the jury selection at Moore’s trial, as detailed in Moore’s Petition, demonstrates the State repeatedly violated the equal protection rights of Moore and the qualified Black citizens that were excluded from the jury solely because of the color of their skin.

The Supreme Court of South Carolina has a well-documented reluctance to enforce *Batson*’s mandate. Despite numerous appeals raising claims of *Batson* errors, the Supreme Court has not found that a prosecutor exercised his peremptory challenges in a racially discriminatory manner in 32 years. *See State v. Grate*, 423 S.E.2d 119 (S.C. 1992); *State v. Marble*, 426 S.E.2d 608 (S.C. 1992). The Court followed suit in Moore’s case. On August 12, 2024, the Supreme Court of South Carolina denied Moore’s Petition for Writ of Habeas Corpus. On September 25, 2024, Moore timely filed a petition for writ of certiorari in this Court on the issues of federal law decided by the Supreme Court of South Carolina. A petition for a writ of certiorari is Moore’s proper avenue

³ Race of victim-race of defendant effects have been well documented in other empirical studies of the death penalty across the country. *E.g.*, John Blume, Theodore Eisenberg, & Martin T. Wells, *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUDIES 165, 194–204 (2004).

for relief from this Court’s denial of his *Batson* claim. *See* 28 U.S.C. § 1257(a); Supreme Court Rule 13.1. Moore now respectfully requests this Court stay his execution to allow for full and timely consideration of his pending petition for a writ of certiorari. A stay of execution is necessary to address and correct the state court’s disregard for this Court’s precedents.

II. THIS COURT SHOULD STAY MOORE’S EXECUTION BECAUSE HE HAS SUBSTANTIAL CONSTITUTIONAL CLAIMS THAT CANNOT BE ADEQUATELY CONSIDERED BY THIS COURT ABSENT A STAY.

A stay of execution is warranted where there is a “presence of substantial grounds upon which relief might be granted.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, courts consider the petitioner’s likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed raising his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004). In certiorari proceedings, a petitioner must show: (1) a reasonable probability that this Court would vote to grant certiorari; (2) a significant possibility of reversal of the lower court’s decision; and (3) a likelihood that irreparable injury will occur if no stay is granted. *See Barefoot*, 463 U.S. at 895. Additionally, “in a close case it may [also] be appropriate to balance the equities,’ to assess the relative harms to the parties, ‘as well as the interests of the public at large.’” *Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). All these factors weigh in favor of staying Moore’s execution.

1. There is a reasonable probability that certiorari will be granted

Mr. Moore’s petition for a writ of certiorari raises issues similar to the issues raised in *Flowers v. Mississippi*, 588 U.S. 284 (2019). In *Flowers*, also a capital case, the State, represented by a prosecutor who had a specific history of violating *Batson* in Mr. Flowers’ prior trial proceedings, exercised five of his six peremptory strikes to exclude Black jurors. *Id.* at 289–292.

In *Flowers*, the State's behavior in jury selection included drastically disparate questioning of Black and white jurors, similarly situated white jurors that the State did not strike, and a discriminatory impact as a result of the prosecutor's strikes. This Court granted certiorari to consider whether the Mississippi courts had committed legal error when applying the Court's *Batson* precedent to the totality of the evidence about the State's peremptory strikes relevant to Flowers's claims. 588 U.S. at 287–88. Moore's case compels the same review.

Much like in *Flowers*, and for the reasons detailed more thoroughly in the petition for a writ of certiorari, the prosecutor exercised peremptory strikes to exclude the two qualified Black jurors because of their race. The State's behavior in jury selection similarly included drastically disparate questioning of Black and white jurors, similarly situated white jurors that the State did not strike, and a discriminatory impact as a result of the prosecutor's strikes. *See* Pet. at 9–19. The Supreme Court of South Carolina committed legal error when applying this Court's precedent in considering the totality of the evidence supporting Moore's claim. The Supreme Court of South Carolina's denial of Moore's petition clearly required it to adjudicate the merits of a federal claim, as the only issue before it for consideration was the *Batson* claim raised in Moore's pending petition before this Court. Therefore, this Court has jurisdiction to consider whether the judgment was in violation of federal law, pursuant to 28 U.S.C. § 1257(a).

The Inter-American Commission on Human Rights' consideration of this issue also weighs in favor of granting certiorari, and respectively recognizing that the decision below was the result of legal error. Before Moore filed the below petition for a writ of habeas corpus, he filed a petition for consideration in the Inter-American Commission on Human Rights in April 2023, alleging several violations of his international human rights including, *inter alia*, that his right to equality before the law under Article II of the American Declaration on the Rights and Duties of Man was

violated when racial discrimination impermissibly infected the jury selection procedures at his capital trial. The Commission considered the *Batson* issues in Moore’s case, taking into account the United States’ domestic and international legal obligations, and on July 4, 2023, issued precautionary measures. Pet. App., pp. 4a–12a. In issuing precautionary measures, the Commission found that Moore raised a *prima facie* case that racial discrimination played an improper role during jury selection at his capital trial. Pet. App., pp. 4a-12a.

2. There is a substantial likelihood that this Court will overturn the Supreme Court of South Carolina’s decision.

For well over a century, this Court has “reiterated that States may not discriminate on the basis of race in jury selection.” *Flowers v. Mississippi*, 588 U.S. 284, 295 (2019) (collecting cases). In accordance with this mandate, the Court has repeatedly recognized that, “[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.” *Flowers*, 588 U.S. at 298. This Court has established a three-step inquiry governing challenges to peremptory strikes alleged to be racially motivated. *See Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986). First, the party challenging the strike must establish a *prima facie* case of purposeful racial discrimination; second, the prosecutor “must provide race-neutral reasons for its peremptory strikes;” and third, the court must determine “whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination.” *Flowers*, 588 U.S. at 298.

In assessing whether the proffered reason for a peremptory strike is pretextual, courts must consider the totality of the circumstances including but not limited to several factors identified by this Court. *Id.* at 302. These factors include: (1) “statistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case,” (2) “evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case,” (3) “side-by-side comparisons of black prospective jurors who were

struck and white prospective jurors who were not struck in the case,” (4) any “misrepresentations of the record when defending the strikes,” (5) “relevant history of the State’s peremptory strikes in past cases,” and (6) any “other relevant circumstances that bear upon the issue of racial discrimination.” *Id.* Importantly, although each of these factors alone can support a court’s determination that a reason is pretextual, the list is non-exhaustive and no one factor must be established for a court to find racial discrimination occurred. *Id.* at 301–02.

As detailed more thoroughly in Moore’s petition, ample evidence establishes racial discrimination occurred during the jury selection at his capital trial, including several of the above listed factors that this Court has recognized can establish racial discrimination. Pet. at 9–19. The State used peremptory strikes on all of the Black jurors either side had a reasonable opportunity to strike. Not only did the State offer reasons for both Black jurors that applied to white jurors that they did not strike, but for both Black jurors the state also offered reasons that misrepresented what happened in the jurors’ individual *voir dire*. The State also engaged in disparate questioning of the Black jurors. While white jurors were asked five questions on average, the two Black jurors the State ultimately struck were asked forty and seventeen questions respectively. The State’s decision to strike these jurors had a discriminatory impact and allowed it to secure an all-white jury. The totality of these circumstances supports a finding that racial discrimination played a constitutionally impermissible role in jury selection at Moore’s trial under this Court’s precedents. The Supreme Court of South Carolina clearly disregarded this Court’s precedent in denying Moore’s *Batson* claims in light of this evidence.

3. There is a likelihood that irreparable harm will result if no stay is granted.

The risk of irreparable harm is clearly met in Moore’s case. “A prisoner under a death sentence remains a living person and consequently has an interest in his life.” *Ohio Adult Parole*

Authority v. Woodard, 523 U.S. 272, 288 (1998) (O’Connor, J., concurring in part and concurring in the judgment). Death is the ultimate deprivation, and no State should carry out a death sentence in violation of a prisoner’s constitutional rights.

4. The balance of equities also weighs in favor of a stay of execution.

The balance of equities weighs in favor of staying Moore’s execution. Obviously, Moore has a legitimate interest in ensuring that his trial proceedings were constitutional before South Carolina takes the irreparable step of ending his life. He filed the state court proceedings discussed in his petition for a writ of habeas corpus over a year ago and has been diligent in raising his permitted appeal to this Court. However, Moore’s interests are not the only interests that weigh in favor of granting a stay.

There are several public interests in granting a stay of execution to provide for full and proper consideration of Moore’s petition for a writ of certiorari. First, this Court has repeatedly recognized that “[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.” *Flowers*, 588 U.S. at 293; *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991). Prospective jurors who are excluded from jury service based on their race are deprived of this opportunity in a fashion that the Court has recognized is abhorrent to the Constitution and American ideals. Second, 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 v. Mitchell*, 443 U.S. 545, 556 (1979); *Buck v. Davis*, 580 U.S. 100, 124 (2017) (“[Such discrimination] injures not just the defendant, but ‘the law as an institution . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.’”) (quoting *Rose*, 443 U.S. at 556). Such doubt, in turn, undermines “public confidence” in the criminal justice system and fosters community suspicion that a verdict may not have been “given

in accordance with the law by persons who are fair.” *Powers*, 499 U.S. at 413; *see also Foster v. Chatman*, 578 U.S. 488, 523 (2016). In short, “[a]ctive discrimination by a prosecutor” during jury selection “invites cynicism respecting the jury’s neutrality and its obligations to adhere to the law,” and it “cannot be tolerated.” *Powers*, 499 U.S. at 411–12.

The harm to the State is minimal when weighed against the strong interests supporting a stay. At most, the harm to the State would be a slight delay in carrying out Moore’s execution while this Court considers the briefing on the pending petition for a writ of certiorari. Moreover, the State cannot have a legitimate interest in carrying out a sentence that was obtained as the result of an unconstitutional proceeding.

III. CONCLUSION

For the reasons set forth above, Moore respectfully requests that the Court stay his execution currently scheduled for November 1, 2024, pending the full consideration and disposition of his Petition for Writ of Certiorari.

Respectfully submitted,

/s/Lindsey S. Vann

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

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

Counsel for Petitioner

October 28, 2024.