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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2026-002059

The State, ...Petitioner-Respondent,

v.

Kendrick Montrez Lee, ...Respondent-Petitioner.

RESPONSE IN OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI

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STATE'S STATEMENT OF QUESTIONS PRESENTED

Whether the trial court abused its discretion in excusing an alternate juror before trial upon learning that the alternate juror had hearing problems and informed the trial court that he had only heard some of the questions posed to the jury panel in voir dire.

KENDRICK LEE'S STATEMENT OF QUESTIONS PRESENTED

Is there a special and important reason for this Court to grant a writ of certiorari when the Court of Appeals held the trial court abused its discretion when it failed to determine whether the sole black juror's hearing issues could be accommodated and the Court of Appeals ruling is legally sound?

STATEMENT OF CASE[1]

This appeal arises out of the trial of Kendrick ("Ken") Lee, a black man, before an all-white jury, in Abbeville, South Carolina, the self-proclaimed "Birthplace and Deathbed of the Confederacy."[2] The sole charge was assault and battery of a high and aggravated nature ("ABHAN"), and trial occurred from September 25-28, 2023. A. 25-686.[3] On September 28, 2023, the jurors convicted Ken and his uncle Travis Lee of ABAHN, and the Honorable Frank R. Addy, Jr. deferred sentencing. A. 5-6, 669-86. On October 19, 2023, Judge Addy sentenced Ken Lee to life imprisonment without the possibility of parole and Travis Lee to seven years imprisonment. A. 778-79.

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[1] A detailed Statement of Case appears in Mr. Lee's cross-petition for writ of certiorari, at pp. 2-4.

[2] https://www.abbevillecitysc.com/209/Abbevilles-History (last viewed Oct. 29, 2026).

[3] "A." refers to the Appendix filed by Mr. Lee contemporaneously with his cross-petition for a writ of certiorari.

Ken Lee appealed to the Court of Appeals of South Carolina, raising seven questions in Brief of Appellant. A. 778-814. The Court of Appeals reversed Mr. Lee's conviction because the trial judge failed to determine whether the sole black juror's hearing difficulties could be accommodated. *State v. Lee*, 448 S.C. 350, 934 S.E.2d 195 (Ct. App. 2026); *see also* A. 868-73. The Court of Appeals "decline[d] to address Lee's remaining issues on appeal." *Lee*, 448 S.C. at 356, n. 4, 934 S.E.2d at 198, n. 4; A. 873.

On September 16, 2026, the State filed its petition for a writ of certiorari ("State's Petition"). On September 24, 2026, Mr. Lee filed his cross-petition for a writ of certiorari ("Lee's Petition"). This response in opposition to the State's petition follows.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

Pursuant to Rule 242(b), SCACR:

> A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Cf. S.C. Dep't of Soc. Servs. v. Benjamin, 430 S.C. 235, 236, 844 S.E.2d 373 (2020) ("a writ of certiorari will be granted only when there are special and important reasons").

STATEMENT OF FACTS[4]

The trial court selected twelve white jurors and two white men as alternates. A. 43-51. Pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and *State v. Stewart,* 413 SC 308, 775 S.E.2nd 416 (Ct. App. 2015), Ken Lee and Travis Lee moved for the prosecution to explain its strike of Juror 191, a black male and the sole black person presented for possible selection as a juror. The Lees noted—just as they had noted in Chambers prior to jury selection—that the number of black people appearing for jury services was fraction of number of black people summoned for jury duty. Of the 200 jurors summoned, 41 (20.5% of the number summoned)[5] were black. Twenty-nine black jurors did not respond to their summons.[6] Four jurors returned their juror summons to the Court but did not appear for jury service. Three jurors were excused. Of the 41 black people summoned, only five

[4] A more detailed Statement of Facts appears in Mr. Lee's cross-petition for a writ of certiorari, at pp. 6-10. Here, Mr. Lee recounts only the facts directly relevant to selection of jurors.

[5] According to the 2020 census, 25.9% of Abbeville County is black or African American. https://www.census.gov/quickfacts/fact/table/abbevillecountysouthcarolina,US/PST045222 (last viewed June 10, 2024).

[6] Abbeville County did not do anything to follow up on the jurors not returning their summonses other than check to see if the Auditor's Office had a different address for the non-responding jurors. A. 58.

appeared for service. The Lees argued the problem was not with the original list of jurors summoned, but rather the number of black people lost, as potential jurors, between the summons for jury duty and service in court. Only two black people remained in the jury pool after jury qualification and voir dire. The Lees argued, "Statistically that 20 percent [of the original list summoned] should have stayed constant throughout, but it didn't." A. 51-59.

The Solicitor explained that Juror 191 had disorderly conduct convictions in 1985 and 1989 and a criminal domestic violence conviction in 2003. The prosecution disclosed its knowledge that Jurors 186 and 188 also had criminal convictions. The Lees called the trial court's attention to *Stewart, supra,* where the Court of Appeals "reversed because the State used criminal histories to justify striking certain jurors, but also sat jurors that had criminal histories that were deemed to be similarly situated." The prosecution attempted to distinguish the criminal histories of the different jurors. The trial judge announced a preference "for juries to be racially balanced . . . if for no other reason than perception" because "it's always best to have as wide a cross section of the community if at all possible." The trial court urged the prosecution to accept Juror 191 as an alternate. The prosecution eventually relented and allowed Juror 191 to be seated. A. 59-77.

When the jury panel returned to the courtroom, the trial judge learned that Juror 191 could "only hear out of one ear" and changed the court's mind about seating Juror 191 as an alternate. At a sidebar, prior to excusing the panel of potential jurors, the Lees objected to the trial court's change of mind about Juror 191 without determining whether the juror's hearing impediment could be accommodated. A. 77-84. Although "open to such

an accommodation," the trial judge never asked Juror 191 how the court could accommodate him. A. 82.

Mr. Lee also moved "for a continuance" because "the best thing to do is – is to try this case in front of a jury when we can have a fair cross section" of the community and moved "to quash this jury." The trial court denied the motions. A. 116-19. The trial court swore the jurors subject to the Lees' objection. A. 125.

ARGUMENT

Is there a special and important reason for this Court to grant a writ of certiorari when the Court of Appeals held the trial court abused its discretion when it failed to determine whether the sole black juror's hearing issues could be accommodated and the Court of Appeals ruling is legally sound?

The Court of Appeals held, "[T]he trial court erred by excusing Juror 191 without making an inquiry into whether the court could accommodate his hearing impairment." *Lee*, 448 S.C. at 354, 934 S.E.2d at 197. In doing so, the court below acknowledged the trial court's discretion in qualifying jurors:

> The trial court may disqualify a juror for incompetence resulting from a physical infirmity. *See* S.C. Code Ann. § 14-7-1010 (2017) ("The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law."); S.C. Code Ann. § 14-7-810 (2017) ("[N]o person is qualified to serve as a juror in any court in this [s]tate if: ... [h]e is incapable by reason of ... physical infirmities to render efficient jury service .... The trial judge must make the final determination of the qualifications of a juror as set out in this section and his decision must not be disturbed on appeal."); *State v. Gaskins*, 284 S.C. 105, 113, 326 S.E.2d 132, 138 (1985) ("A juror's competence is within the trial judge's discretion and not reviewable unless wholly unsupported by the evidence." (quoting *State v. Spann*, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983))); *State v. Wise*, 359 S.C. 14, 23-24, 596 S.E.2d 475, 479 (2004) ("An appellate court will not disturb the trial court's disqualification of a prospective juror when there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under

> the law."); *see also State v. Dawkins*, 268 S.C. 110, 111, 232 S.E.2d 228, 228 (1977) (noting the trial court has wide discretion in voir dire examination).

Id., 448 S.C. at 354-55, 934 S.E.2d at 197; A. 872. According to the Court of Appeals, the trial court erred when it "failed to even inquire about whether Juror 191's hearing impairment could be accommodated." *Id*., 448 S.C. at 355, 934 S.E.2d at 197. This holding is consistent with Mr. Lee's argument, in his Final Brief of Appellant, that "[a] failure to exercise discretion amounts to an abuse of that discretion." A. 807-08 (quoting *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (citing *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)).

After concluding "the trial court failed to even inquire about whether Juror 191's hearing impairment could be accommodated," the Court of Appeals cited cases from other jurisdictions that require trial courts to accommodate hearing impaired jurors:

> *See Trotman v. State*, 466 Md. 237, 218 A.3d 265, 280 (2019) ("[T]he Americans with Disabilities Act prohibits a trial court from reaching the blanket conclusion that a certain disability would necessarily preclude jury service at any given trial."); *id.* ("When determining whether it is permissible to excuse for cause a prospective juror on a disability-related ground, a trial court must engage in an individualized, case- and disability-specific inquiry."); *People v. Guay*, 18 N.Y.3d 16, 935 N.Y.S.2d 567, 959 N.E.2d 504, 508 (2011) (stating "a court must determine whether the [prospective juror] has the ability to 'understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court' " (quoting *People v. Guzman*, 76 N.Y.2d 1, 556 N.Y.S.2d 7, 555 N.E.2d 259, 261 (1990))); *id.* ("[A] hearing impairment does not per se preclude an individual from serving as a juror."); *State v. Speer*, 124 Ohio St.3d 564, 925 N.E.2d 584, 589 (2010) ("[A] trial court must determine whether reasonable accommodations will enable an impaired juror to perceive and evaluate all relevant and material evidence, and when no such accommodation exists, the court must excuse the juror for cause."). Further, although the trial court had valid concerns about whether Juror 191 heard all the questions asked during voir dire, it made no effort to voir dire Juror 191 individually.

Lee, 448 S.C. at 355-56, 934 S.E.2d at 197-98. This reasoning is sound, and the State's Petition does not challenge reliance of these cases.[7] Nor could it because the holdings in these cases are consistent with this Court's holding in *Safran v. Meyer*, 103 S.C. 356, 88 S.E. 3 (1916). *Safran* held a juror "defective in hearing . . . . was not disqualified under the Constitution and laws" and the trial judge must investigation the juror's qualifications "either by examining the juror himself or by affidavit." *Id*., 103 S.C. at ___, 88 S.E. at 4.

The State takes issue with the Court of Appeals opinion and argues (a) Juror 191 is at fault for "belatedly informing the trial court of his hearing difficulty was a large part of why the trial court excused him, which is supported by the record," (b) Section 14-7-1020 of the South Carolina Code is not applicable to this case, and (c) Mr. Lee "was not prejudiced by the trial court's excusal of Juror 191." The State's arguments lack merit. Mr. Lee will address each argument below. Notably, the State's petition never addresses the basis of the Court of Appeals opinion—*that the trial judge failed to exercise discretion by not determining whether Juror 191's hearing difficulty could be accommodated*.

A. Juror 191 was not at fault for belatedly informing the trial court of his hearing difficulty.[8]

In his Final Brief of Appellant, Mr. Lee acknowledged the trial judge "had the discretion to qualify or not qualify Juror 191." A. 807 (also noting, "'The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law.' *State v. Wise*, 359 S.C. 14, 22,

[7] In its petition for rehearing, the State argued the Court of Appeals' "reliance on foreign authority to impose a requirement on the trial court to further inquire if Juror 191's hearing loss could be accommodated is also without merit." A. 877. The State's petition does not include this argument. This argument is abandoned.

[8] The trial judge told Juror 191 he "didn't do anything wrong." A. 79.

596 S.E.2d 475, 479 (2004) (citing S.C. Code Ann. § 14-7-1010).”). The Court of Appeals recognized the trial judge’s discretion. The trial court’s error was not in the scope of the trial court’s discretion but rather the failure to exercise that discretion. In its Brief of Respondent, the State cited S.C. Code Ann. § 14-7-810 but never addressed section 14-7-1010, which provides, “The presiding judge shall at each term of court ascertain the qualifications of the jurors” and “shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law.” Sections 14-7-810 and 1010 place an affirmative obligation on trial courts to determine qualifications of jurors. As seen, Juror 191’s hearing impairment “does not per se disqualify him,” and trial courts have discretion about how to make the inquiry. *Safran,* 103 S.C. 356, at __, 88 S.E. at 4. By stating the court was “open to such an accommodation,” the trial judge recognized his obligation to make that determination but never asked Juror 191 how the court could accommodate him. A. 82.

When seeking to cure the *Batson* violation by seating Juror 191, the trial judge addressed the juror:

> Yeah, Mr. Wharton. Hey, can you stand up, please for me? All right. Mr. Wharton, you're going to actually be the alternate. Okay? I'm going to put you on as alternate. There was a mistake made in terms of selection. Can you hear me okay?

Undoubtably being sat as a juror, under these circumstances, came as a shock to Juror 191 who responded, “Huh?” The trial judge asked the juror if he could hear “okay,” and Juror 191 responded, “Yeah, I – I could hear with one ear.” When the trial judge asked, “Can you hear me now?” Juror 191 responded, “Yes.” The subsequent colloquy revealed the juror might not have heard some of what occurred in the courtroom. At a sidebar, the Lees requested the trial judge seek to accommodate the juror’s hearing difficulty. After the trial

judge reversed course on seating Juror 191, the court revelated its frustration with the pace of the proceedings:

> Ladies and Gentlemen of the jury panel, sorry that took so long. Lawyers can't tell time. We're not good at that. I thought it would take 15 minutes, it took an hour.

A. 80.

A careful analysis of the State's position exposes its desire for this Court to conclude the juror could not hear ***at all***—a conclusion that is not supported by the record. The State's presentation—both in its brief to the Court of Appeals and petition to this Court—emphasizes the trial court's unfortunate comment that "juror 191 was—may not be a—may not have been as deaf as a fence post, but he darn—darn close." *Compare* Brief of Respondent, A. 843, *and* State's Petition, pp. 3, 4, 7.[9] Literally, a fence post does not have ears and, therefore, is *incapable* of hearing.[10] The record does not support a finding

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[9] The trial judge also stated Juror 191 "was extremely hard of hearing" and had "difficulty hearing" prior to the "deaf as a fence post" comment. A. 82-83.

[10] A historical examination of the phrase "deaf as a post" reveals the insulting nature of this term. "Deaf as a post" is defined:

> Also, deaf as an adder. Unable to hear or to listen, as in *Speak louder, Grandpa's deaf as a post*. The first simile has its origin in John Palsgrave's *Acolastus* (1540): "How deaf an ear I intended to give him ... he were as good to tell his tale to a post." It has largely replaced *deaf as an adder*, alluding to an ancient belief that adders cannot hear; it is recorded in the Bible (Psalms 58:3–5).

https://www.dictionary.com/browse/deaf-as-a-post (last viewed Oct. 19, 2026). Psalm 58:3-5 states:

> [3]The wicked are estranged from the womb; they go astray as soon as they are born, speaking lies. [4]Their poison is like the poison of a serpent; they are like the deaf adder that stoppeth her ear, [5]which will not hearken to the voice of charmers, charm they ever so wisely.

that Juror 191 was *incapable* of hearing. A. 77-82. The Court of Appeals correctly held the trial court abused its discretion by not exercising its discretion.

B. The Court of Appeals did not err by relying on S.C. Code § 14-7-1020.

The Court of Appeals opinion relied on SC Code §§ 14-7-810, 1010, and 1020. The State does not fault the court below for relying on §§ 14-7-810 and 1010 that require trial courts to determine juror qualifications and provide trial courts with discretion about how to do it. *See Safran, supra.* As pointed out in Mr. Lee's Final Brief of Appellant, § 14-7-1010 requires, "The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law." A. 807 (citing *State v. Wise*, 359 S.C. 14, 22, 596 S.E.2d 475, 479 (2004). A juror is disqualified when "[h]e is unable to read, write, speak, or understand the English language." S.C. Code Ann. § 14-7-810(2). This section places an obligation on the trial judge to make this determination. Here, the trial court did not even inquire into whether Juror 191 could be accommodated, even though the juror stated he :could hear out of one ear." A. 78.

The State, however, argues § 14-7-1020 of the South Carolina Code is not applicable" to this case because this section "limits such additional voir dire questioning to biases, prejudices, and indifference, which notably does not include hearing abilities." State's Petition, p. 11. The State explains Mr. Lee

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https://www.biblegateway.com/passage/?search=Psalm%2058%3A3-5&version=KJ21 (last viewed Oct. 19, 2026). "The adder is a greyish snake, with a dark and very distinct zig-zag pattern down its back, and a red eye. Males tend to be more silvery-grey in colour, while females are more light or reddish-brown. Black (melanistic) forms are sometimes spotted." https://www.wildlifetrusts.org/wildlife-explorer/reptiles/adder (last viewed Oct. 19, 2026).[10]

> did not request additional voir dire questioning of Juror 191. Instead, his only request was for the trial court to inquire if Juror 191's abundantly apparent hearing impairment could be accommodated. These are not the same request.

This argument is not the same argument the State made in the Court of Appeals. The State did not cite § 14-7-1020 in its Final Brief. A. 843-44. In its petition for rehearing, the State's argument regarding § 14-7-1020 was different: "As a trial court is only required to conduct an individual voir dire at the request of either party, the trial court here had no obligation to conduct additional voir dire questioning, *which Appellant notably never requested*." A. 874-74 (emphasis added). The State thus argued Mr. Lee never requested additional questioning of Juror 191. This argument misstates the record. The trial judge addressed Juror 191's service at a sidebar (R. 79) and placed the discussion on the record (R. 82). Later, Mr. Lee elaborated on the sidebar:

> And – and at the sidebar, you had asked me about what kind of accommodations could be made and – and what I had experienced in another trial in Spartanburg.[11] And that included asking the juror what circumstances would ensure that they would be able to hear what was going on in the courtroom, allowing them to pick where they wanted to sit so that they would have that best opportunity. And where I think the abuse of discretion comes into play is that you didn't even entertain asking the juror about whether or not he could be accommodated.

A. 118-19; *see also* Lee's Return to the State's Petition for Rehearing A. 889 (summarizing this portion of the record). Having benefit of Mr. Lee's response to its petition for rehearing, the State now acknowledges Mr. Lee requested the trial judge question Juror 191 about accommodating his hearing difficulty. This Court, accordingly, must reject any

[11] *See State v. Johnathon O. Batchelor*, Appellate Case No. 2022-000160, Amended record on Appeal, Volume I, pp 246-48, 310-14 (trial court proceedings regarding accommodating juror).

suggestion that Mr. Lee did not request the trial judge question Juror 191 about how the court could accommodate him.

The State's current petition raises an argument not contained in its petition for rehearing—that § 14-7-1020 "limits such additional voir dire questioning to biases, prejudices, and indifference, which notably does not include hearing abilities." State's Petition, p. 11. Section 14-7-1020 must be read in conjunction with §§ 14-7-810 and 1010 and *Safran, supra,* that require trial courts to determine whether jurors are qualified to serve. Certainty, these statutes, in conjunction with *Safran,* allow trial courts to question potential jurors about their qualifications and for the parties to request additional questioning by the trial judge. Notably, by focusing on § 14-7-1020 in isolation, the State wants this Court to avoid the underlying basis of the Court of Appeals opinion—*that the trial judge failed to exercise discretion by not determining whether Juror 191's hearing difficulty could be accommodated*. The Court of Appeals opinion is legally sound, and there is no error for this Court to correct.

C. The *Batson* violation and denying Juror 191 the right to serve as a juror was one continuous transaction, and Kendrick Lee was prejudiced by the trial court's refusal to select the jurors de novo.

As seen, Mr. Lee's Final Brief of Respondent presented three questions regarding selection of jurors to the Court of Appeals: (a) trial court's failure to grant a continuance when the jurors appearing for jury duty did not reflect a cross-section of the community, (b) the State's *Batson* violation regarding Juror 191, and (c) the trial court's failure to exercise its discretion to determine whether Juror 191's hearing difficulty could be accommodated. The Court of Appeals declined to address the first two of these three issues. The third issue cannot be separated from the first two. The underrepresentation of black

jurors—including the court system's failure to ensure the summons were delivered—was the backdrop against which the State struck the sole black juror presented to the parties for selection. Rather than completing a comparative juror analysis, the trial judge strong-armed the State to accept Juror 191—a remedy rejected by *State v. Heyward*, 357 S.C. 577, 594 S.E.2d 168 (Ct. App. 2004) (trial court was required to strike entire jury panel and begin jury selection process de novo once it found *Batson* violation, but that error in seating juror who was stricken in violation of *Batson* rather than striking whole jury and starting jury selection process de novo was harmless). *See also State v. Shands*, 424 S.C. 106, 116–17, 817 S.E.2d 524, 529 (Ct. App. 2018) (*Batson* errors are reviewed as questions of law).

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

Prospective jurors who are excluded from serving on a jury because of their race are deprived of one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers v. Mississippi,* 888 U.S. 284, 293 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991). Jury service provides citizens with an opportunity to participate in the legal

system and enhances their regard and understanding of the legal system, the judiciary, and the jury system.[12] Unlawful exclusion of citizens from jury duty, therefore, forsakes significant opportunities to strengthen and deepen our democracy.

Perhaps, most significantly, the harm from discrimination affecting the composition of the jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 556; Buck, 580 U.S. at 124 ("[Such discrimination] injures not just the defendant, but 'the law as an institution . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'") (quoting *Rose*, 443 U.S. at 556). Such doubt, in turn, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been "given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413; *see also Foster v. Chatman*, 578 U.S. 448, 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 412.

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

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

[12] *See* Shari Seidma Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, In VERDICT: ASSESSING THE CIVIL JURY SYSTEM 285–86 (Robert E. Litaned.,1993).

Id. at 60 (footnote omitted).

Thus, it is imperative that courts remain diligent in ferreting out racial discrimination in jury selection procedures. Failure to do so not only risks inflicting grave harm on not only the defendants and the citizens that are unlawfully excluded from jury duty, but also the community at large by undermining the public's confidence in the criminal justice system and, therefore, weakening the foundations of our multiracial democracy.

As seen above, Mr. Lee relied on *State v. Stewart*, which is a case that is factually indistinguishable from the case at bar. The trial judge recognized the problem he urged the prosecution to accept the black juror it struck. The trial judge ultimately erred in denying Mr. Lee's *Batson* motion. The trial judge should have re-struck the jurors. *E.g.*, *Heyward*, *supra.* The remedy now is a new trial. This Court should deny The State's petition and allow the Court of Appeals opinion granting a new trial to stand. In the event this Court grants the State's petition, then this Court should also grant Kendrick Lee's petition for a writ of certiorari to consider the *Batson* violation and the trial court's failure to ensure that jurors appearing for service actually reflected the cross-section of the community summoned for jury duty.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for a writ of certiorari. The Court of appeals opinion granting Kendrick Lee a new trial is sound, and the State does not present a special and important reason for this Court to grant the writ.

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Respectfully Submitted,

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