

No. 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.

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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

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ARGUMENT IN REPLY

Despite the fact that Petitioner clearly raised and the South Carolina Supreme Court summarily denied a federal constitutional claim, Respondent maintains that this Court lacks jurisdiction because the state court only resolved an issue of state law. Br. in Opp'n at 21–25. Respondent offers no legal or record support for this assertion, which runs counter to both this Court's precedent and the Supreme Court of South Carolina's historical treatment of petitions for a writ of habeas corpus. Furthermore, Respondent's meager response to Petitioner's jury discrimination claim is based on a misunderstanding of what this Court requires courts to do when analyzing whether *Batson v. Kentucky*, 766 U.S. 87 (1986), is violated. As discussed here and more thoroughly in Moore's pending petition for a writ of certiorari, certiorari is appropriate because the Supreme Court of South Carolina committed clear legal error in applying this Court's precedents when assessing whether *Batson* was violated at Moore's capital trial.

I. THE SOUTH CAROLINA SUPREME COURT'S DENIAL OF MOORE'S PETITION FOR A WRIT OF HABEAS CORPUS WAS AN ADJUDICATION OF THE MERITS OF MOORE'S *BATSON* CLAIMS.

Petitioner presented the legal and factual arguments in support of the *Batson* claims now before this Court in a petition for writ of habeas corpus in the original jurisdiction of the Supreme Court of South Carolina. Following a response filed by the State and a reply filed by Petitioner, the Supreme Court of South Carolina denied the petition in a summary order stating, "Petitioner seeks a writ of habeas corpus. The petition is denied." App. 1a. This Court has expressly held that this type of summary denial is an adjudication on the merits. *See Harrington v. Richter*, 562 U.S. 86 (2011). Much like in Moore's case, in *Richter*, the petitioner presented his federal claims to the state supreme court in a petition for writ of habeas corpus filed in that court's original jurisdiction. *Id.* at 96. The state supreme court in *Richter* rejected the petition in summary fashion using

virtually identical language to that of the Supreme Court of South Carolina.¹ In Richter’s subsequent federal habeas corpus proceedings, this Court reversed the Ninth Circuit’s grant of relief, finding “no merit” to Richter’s contention that 18 U.S.C. § 2254(d) was inapplicable because the California Supreme Court did not specifically state it was “adjudicating his claims ‘on the merits.’” *Id.* at 99. As this Court noted, neither did the state court say it was “denying the claims for any other reason.” *Id.* This Court concluded that “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Id.* Summary denials by state courts thus are clearly merits denials, and therefore, the Supreme Court of South Carolina’s summary denial of Moore’s state habeas petition is an adjudication of the merits of Moore’s federal claims.

Any doubt about whether the claims were denied on their federal merits is put to rest by this Court’s decision in *Johnson v. Williams*, 568 U.S. 289 (2013). In *Johnson*, the petitioner argued on direct appeal that the trial judge’s dismissal of a juror violated both federal and state law. *Id.* at 295. In the opinion affirming the convictions, the state court only addressed the state law component of the claim. *Id.* at 295–96. When the case entered federal habeas corpus, Williams argued, and the Ninth Circuit agreed, that the state court’s failure to mention federal law and to discuss the merits of petitioner’s federal claim made it clear that the state court overlooked or disregarded it. *Id.* at 297. This Court again disagreed with the Ninth Circuit, holding that “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal [] court *must* presume that the federal claim was adjudicated on the merits. . . .” *Id.* at 301 (emphasis added).

¹ See *Richter*, 562 U.S. at 96–97 (citing docket entry denying petition for a writ of habeas corpus); *In re Richter*, Case No. S082167 (Cal. Mar. 28, 2001) (“Petition for writ of habeas corpus denied”).

While this Court noted that the presumption could under “some limited circumstances be rebutted,” it cautioned that the “presumption is a strong one that may only be rebutted in unusual circumstances,” such as when a federal claim was not fairly presented to the state courts or there is other irrefutable evidence that the state court overlooked the federal claim. *Id.* at 301–02.

Richter and *Johnson* unassailably establish that Moore’s claims were adjudicated on the merits. The federal constitutional claims which Moore presented to the Supreme Court of South Carolina are identical in all material respects to the grounds for relief contained in his petition for a writ of certiorari and were unquestionably fairly presented to the state courts as the operative facts and relevant law were set forth in detail in the state habeas petition.² *Picard v. Connor*, 404 U.S. 270, 278 (1971) (claim is “fairly presented” when a habeas petitioner presented to the state courts the “substance” of his federal habeas corpus claim including the “operative facts” and “controlling legal principles.”). There is no basis to believe that the federal nature of the claims was not apparent to the Supreme Court of South Carolina or that it somehow overlooked the federal substance of the claims. In fact, such an assertion would be preposterous given the nature of Moore’s claims. Moore’s petition for a writ of habeas corpus only raised federal claims arising from *Batson v. Kentucky*, 476 U.S. 79 (1986) and this Court’s subsequent precedent interpreting and reinforcing *Batson*’s mandate. A denial of his petition for a writ of habeas corpus necessarily required considering the federal bases of his claims.

Respondent relies exclusively on one Fourth Circuit case, *Wilson v. Moore*, 178 F.3d. 266 (4th Cir. 1999), for the argument that the Supreme Court of South Carolina denied Moore’s petition on state law grounds. Br. in Opp’n at 23. *Wilson*, however, was wrongly decided at the time, which

² The state habeas petition is contained in the appendix to Moore’s pending petition for a writ of certiorari. See App. 14a–43a.

has been revealed both by subsequent decisions, especially this Court’s decisions in *Richter* and *Johnson*, and the Supreme Court of South Carolina’s subsequent treatment of habeas petitions.

Further, it is disingenuous of Respondent to represent that the Supreme Court of South Carolina “did not pass on the merits” of the issue raised in Moore’s petition for a writ of habeas corpus. Br. in Opp’n at 25. The standard applicable to state habeas petitions requires a consideration of whether “there has been a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.” *Butler v. State*, 397 S.E.2d 87, 88 (S.C. 1990) (emphasis in original) (citations and internal quotation marks omitted); *see also Tucker v. Catoe*, 552 S.E.2d 712, 713 (S.C. 2001) (applying the same standard); *Moore v. Stirling*, 871 S.E.2d 207, 218–19 (S.C. 2022) (recognizing two components that must be met under the *Butler* standard: “(1) the existence of a constitutional violation; and (2) the denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice”). This standard necessarily requires the court to consider the totality of the issues and circumstances before it, including the merits of any raised claim, when deciding whether to grant a petition, as the court must determine both whether a constitutional violation occurred and whether the totality of the circumstances requires the court to provide relief in the interests of justice. 522 S.E.2d. at 713, 718. Without a firm articulation in the court’s order, there is no way to know (and no support for a presumption) that the Supreme Court of South Carolina “did not pass on the merits,” or for what reason it denied the petition. Rather, as in *Richter* and *Johnson*, “it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” 562 U.S. at 92; 568 U.S. at 301–02.

Moreover, the Supreme Court of South Carolina’s treatment of other habeas corpus petitions brought in its original jurisdiction counsels against presuming the court’s treatment of

Moore's petition was anything other than an adjudication on the merits. In other cases, it has clearly indicated when a denial of a petition is based on something other than the underlying merits. In other cases, the court has explained when (and why) it denied relief on procedural grounds, such as filing a petition raising claims for relief that were not first exhausted through direct appeal or other available post-conviction relief proceedings. *E.g.*, *Simpson v. State*, 495 S.E.2d 429 (S.C. 1998); *Pennington v. State*, 441 S.E.2d 315 (S.C. 1994); *Tyler v. State*, 145 S.E.2d 434 (S.C. 1965).³ The fact that the court did not articulate another reason for denying Moore's petition for a writ of habeas corpus strongly supports the required presumption that it was an adjudication on the merits. *Johnson*, 568 U.S. at 301–02.

Thus, given the circumstances surrounding the Supreme Court of South Carolina's treatment of Moore's petition for a writ of habeas corpus, the only conclusion that can be reached in light of *Richter* and *Johnson* is that the claims were adjudicated on the merits. Accordingly, this Court can and should consider the appellate issues set forth in Moore's petition for a writ of certiorari.

³ In *Simpson*, the habeas petitioner filed a petition for a writ of habeas corpus in the trial court for claims that he could have first raised in an application for post-conviction relief pursuant to S.C. Code § 17-27-10 *et seq.* 495 S.E.2d at 430. In denying Simpson's claim, the Supreme Court of South Carolina denied Simpson's petition because "a matter which is cognizable under the [Uniform Post-Conviction Procedure] Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts," and "the allegations raised in appellant's habeas corpus petition clearly are cognizable under the Uniform Act." *Id.* at 431. Similarly, in *Pennington*, the Supreme Court of South Carolina denied the petition because Pennington had not fulfilled "the requirement to exhaust the avenues available under post-conviction relief prior to the filing of a petition for habeas corpus." 441 S.E.2d at 316. Likewise, in *Tyler*, the Supreme Court of South Carolina denied the petition because "[e]very ground now asserted by the petitioner could have been raised in the trial of this case. Questions which may or should be decided at the trial or reviewed upon appeal or error have no place in a habeas corpus proceeding, at least within the period of possibility of an appeal, or where an appeal is pending." 145 S.E.2d at 437 (citation omitted).

II. RESPONDENT MISREPRESENTS MOORE'S *BATSON* CLAIM RAISED IN THIS COURT.

Respondent argues that Moore's claim fails because he is simply attempting to litigate an issue that courts have addressed before and Moore is simply attempting to challenge prior determinations of rulings that "in no way could be properly presented to the state appellate court or timely presented for this Court's review." Br. in Opp'n at 21 n.16. First, this is premised on a misrepresentation of the available state remedy in the proceedings below. Second, this misrepresents the procedural history of how the *Batson* violation set forth in Moore's pending petition for a writ of certiorari has been considered throughout his case.

South Carolina's writ of habeas corpus is a post-conviction remedy arising from the South Carolina constitution. S.C. Const. art. 1, § 18; *Butler v. State*, 397 S.E.2d 87, 88 (S.C. 1990). The Supreme Court of South Carolina has repeatedly recognized that "[n]otwithstanding the exhaustion of appellate review, including all direct appeals and PCR, habeas corpus relief remains available to prisoners in South Carolina." *Williams v. Ozmint*, 671 S.E.2d 600, 602 (S. C. 2008). The purpose of this remedy is to provide a place for review in circumstances where, whether because of procedural default preventing prior adjudication of the merits, a prior misinterpretation of what the law demands, a change in the law, or any other circumstance, it would be an injustice not to consider the claim. This central intention to remedy constitutional violations is clear from the *Butler* standard, which evaluates not only the alleged constitutional violation but also the attendant facts and circumstances to determine whether relief is warranted to ensure the interests of justice are being met following other post-conviction review. *Butler*, 397 S.E.2d at 88.

The only procedural requirement the Court has imposed over its years of jurisprudence is that a petition for a writ of habeas corpus can only be properly filed after the exhaustion of the other readily available avenues of post-conviction relief. *E.g.*, *Simpson*, 495 S.E.2d at 431;

Pennington, 441 S.E.2d at 316; *Tyler*, 145 S.E.2d at 437.⁴ Additionally, the court does not bar its own consideration of the merits of an issue simply because the issue has been previously presented to a court. For example, in another habeas corpus proceeding, the Supreme Court of South Carolina conducted a comparative proportionality analysis in Moore’s case despite the issue being addressed during his direct appeal. *See Moore*, 871 S.E.2d at 427–35. Simply put, it is improper for Respondent to assert that the *Batson* issues in Moore’s case could in no way be properly presented for consideration in a state habeas corpus proceeding. Moore’s pending petition for a writ of certiorari before this Court was timely filed well within the applicable time periods set forth by this Court in Supreme Court Rule 13.1. Therefore, the issues contained therein are properly presented to this Court for consideration.

Second, while Moore had diligently attempted to raise *Batson* as an issue throughout his prior post-conviction proceedings for over fifteen years, no court addressed the *bona fides* of the claim until the below petition for a writ of habeas corpus. This included *pro se* attempts by Moore himself, in an attempt to ensure the issue would be adequately considered in the course of his regular post-conviction proceedings. Despite this, the claim was never fully assessed on its merits by either this Court or the Supreme Court of South Carolina before these proceedings. A brief discussion of how this claim was previously presented is warranted.

Moore’s original trial team initially challenged and then withdrew their *Batson* objections to the two juror strikes at the heart of Moore’s pending petition before this Court. Doc. 18-6, pp.

⁴ Likewise, the Supreme Court of South Carolina imposes no firm time limits on when a petition for a writ of habeas corpus may be filed for its consideration when it is procedurally proper to do so. In *Butler*, the court allowed for review and ultimately granted relief despite the petition being filed five years after it authored the opinion Butler’s habeas claim arose under and several years after Butler had completed his post-conviction relief actions. 397 S.E.2d at 87–88.

76–77, 79–80.⁵ Because these objections were withdrawn, they were unpreserved for review and were not presented for consideration in his direct appeal proceedings. *State v. Moore*, 593 S.E.2d 608 (S.C. 2004). Moore’s post-conviction relief counsel initially alleged trial counsel was ineffective in their failure to pursue the *Batson* claim but post-conviction relief counsel failed to include many of the merits arguments now before this Court. Doc. 18-7, pp. 236–245. On appeal of the denial of post-conviction relief, Moore’s counsel failed to raise the *Batson* ineffectiveness claim in the Supreme Court of South Carolina. Doc. 18-9, pp. 453–513.

After receiving a copy of the certiorari petition and realizing the *Batson* claim was not included, Moore contacted counsel and requested he amend the appeal to include the *Batson* claim, fearing that the claim would be defaulted for federal review if it was not included in the petition. Doc. 18-2, pp. 338–340. Despite Moore’s explicit request, no subsequent pleadings were filed. Concerned about the potential procedural default of the *Batson* claim for the purpose of federal habeas review, Moore filed a *pro se* motion requesting permission to file a supplemental certiorari petition, emphasizing his concerns that, if the court denied his motion, his *Batson* claim, would be procedurally barred from federal review. Doc. 18-2, pp. 342–345. The court rejected Moore’s filing, refusing to act as he was “represented by counsel in this matter.” Doc. 18-2, p. 347. Moore then made a final attempt to present his *Batson* claim to the court during his post-conviction appeal by mailing a supplemental petition for writ of certiorari, which included the *Batson* claim, which the court again rejected because Moore was represented by counsel. Doc. 18-2, pp. 353–376, 378.

Following the Supreme Court of South Carolina’s denial of his petition for certiorari during his post-conviction relief proceedings, Moore filed a timely petition for federal habeas corpus

⁵ Citations to the record throughout this reply refer to the Joint Appendix filed in *Moore v. Stirling*, No. 18-4 (4th Cir. Oct. 22, 2022) (Docket Nos. 18-1 through 18-10), by reference to “Doc.”.

relief. Doc. 18-1, pp. 42–84. As Moore had feared, the district court found Moore’s *Batson* claim was procedurally defaulted by appellate post-conviction counsel and he could not show “cause and prejudice” sufficient to excuse not presenting the claim to the Supreme Court of South Carolina during his prior post-conviction proceedings. Doc. 18-3, pp. 397–398. While the *Batson* claim was not raised on appeal to the Fourth Circuit, *Moore v. Stirling*, 952 F.3d 174, 176 (2020), this was not a result of federal habeas counsel’s determination that the claim was meritless. Rather, the issue was not raised on appeal because the post-*Martinez* jurisprudence clarified that *Martinez v. Ryan*, 566 U.S. 1 (2012), would not be extended to excuse default by appellate post-conviction counsel.

This unique procedural backdrop where, despite Moore’s diligence, no full consideration of the merits of the *Batson* claim occurred at any point during his prior post-conviction and federal habeas proceedings, was one of the circumstances set forth in the state habeas petition from which Moore now appeals. Although prior review would not foreclose the review Moore sought in the proceedings below, it is disingenuous for Respondent to represent that this claim was properly and fully considered in any of Moore’s prior proceedings.

III. RESPONDENT MISCONSTRUES WHAT THIS COURT’S *BATSON* JURISPRUDENCE REQUIRES COURTS TO CONSIDER WHEN DETERMINING IF A VIOLATION OCCURRED.

While Respondent fails to actually engage in earnest with the legal arguments and factual support set forth in Moore’s petition as to why *Batson* was violated at his capital trial, one point raised in the Brief in Opposition warrants reply. Respondent appears to argue that *Batson* can never be violated so long as the prosecutor strikes a similarly situated juror, irrespective of any of the other facts and circumstances surrounding jury selection. This Court has never limited *Batson* review to comparative juror review.

Rather, as recognized in *Batson* and reaffirmed by this Court in *Flowers v. Mississippi*, courts analyzing whether a *Batson* violation occurred must consider “all of the relevant facts and circumstances taken together.” 588 U.S. 284, 316–17 (2019); 766 U.S. 79, 97 (1986). While the *Flowers* Court did not “break [] new legal ground,” 588 U.S. at 288, it did provide guidance about the kinds of facts and circumstances courts *must* consider as relevant to assessing whether a violation occurred, including:

statistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case; evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case; side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case; a prosecutor’s misrepresentations of the record when defending the strikes during the *Batson* hearing; relevant history of the State’s peremptory strikes in past cases; or other relevant circumstances that bear upon the issue of racial discrimination.

588 U.S. at 302 (citations omitted). The *Flowers* Court went on to explain that courts must not decide a *Batson* challenge on one fact alone, but rather must consider the information presented together. *Id.* at 315–16.

Moore raised the *Batson* claim in his petition for a writ of habeas corpus after the *Flowers* Court had issued this guidance. Included in his petition were several facts and circumstances specifically identified as relevant facts and circumstances for the Court’s consideration. Based on all the facts and circumstances taken together and the legal arguments contained therein under this Court’s *Batson* jurisprudence, the Supreme Court of South Carolina erred in finding no *Batson* violation occurred at Moore’s capital trial. This Court should grant certiorari to correct this legal error in Moore’s case.

CONCLUSION

For these additional reasons, this Court should grant certiorari.

Respectfully submitted,

/s/Lindsey S. Vann

LINDSEY S. VANN

** counsel of record*

ROSALIND S.D. MAJOR

ALLISON ANN 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.