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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Eugene C. Griffith, Circuit Court Judge

WILLIAM BRUCE JUSTICE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Opinion No. 2022-UP-186 (S.C. Ct. App. filed May 4, 2022)

APPELLATE CASE NO. 2017-001718

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was filed on May 19, 2022 and ruled on by the Court of Appeals, on November 3, 2022. App. 5, 21.

QUESTION PRESENTED

Whether the Court of Appeals failed to apply an exception to the mootness doctrine, where, as a result of an unconstitutional parole revocation hearing, Justice has a parole violation on his criminal record, where the blatantly illegal procedures employed by the South Carolina Department of Probation, Parole and Pardon Services are the standards by which they treat every unrepresented, indigent individual in South Carolina, where the remedy for future violations proposed by the Court of Appeals—filing a PCR application—was followed in this case yet failed to yield appellate review due to perceived mootness, and where a current South Carolina statute is unconstitutional based on longstanding United States Supreme Court precedent?

STATEMENT OF THE CASE

William Justice was indicted in February 1989 for four counts of burglary second, two counts of grand larceny, and two counts of petit larceny. He was found guilty as indicted and sentenced to fifteen years' imprisonment on each of the burglary charges, twenty years on the grand larceny charges, and one month on each of the petit larceny charges. In total, Mr. Justice received a sixty year aggregate sentence. His convictions were affirmed. State v. Justice, 91-MO-200 (S.C. Sup. Ct, filed July 16, 1991).

On or about May 2, 2012, Justice was granted parole. Parole was to take effect from May 3, 2012 until March 6, 2032. A warrant was issued for Justice's arrest on August 7, 2013 following allegations that Justice violated four conditions of his parole. He attended two hearings related to his parole revocation: a preliminary hearing and a revocation hearing. The

former took place on August 27, 2013 at the Kershaw County Detention Center. Mr. Justice represented himself. Also present at the hearing were the Administrative Officer, Justice's parole agent, and two witnesses. The revocation hearing occurred on or about October 16, 2013. He was found to have violated four conditions of his parole, and his parole was revoked. He was ordered to serve the remainder of his sentence.

Justice filed a timely application for post-conviction relief on February 26, 2014. App. 251 – 265. It contained allegations that his parole was revoked unlawfully. App. 258. The state made its Return on or about May 27, 2015—over a year after Mr. Justice's application was filed. App. 266 – 274. A hearing on the state's motion to dismiss was held before the Honorable Perry H. Gravely on April 21, 2016. App. 275. The PCR court denied the state's motion. App. 291 ll. 4 – 18. An evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr. on February 1, 2017. App. 298. The court heard testimony from Justice and Nikita Cook, Justice's The PCR judge took the matter under advisement. App. 343 ll. 4 – 21.

An Order of Dismissal was filed on August 2, 2017. App. 350. The PCR court found that Justice's due process rights were not violated. App. 360 – 361. A notice of appeal was filed with this Court. The case was transferred to the Court of Appeals pursuant to Rule 243(l), SCACR, on January 8, 2019. The Court of Appeals granted certiorari on June 30, 2020 and issued an amended order granting certiorari on July 9, 2020. Almost one year later, on May 4, 2022, the Court of Appeals issued its opinion, stated the allegations are "profoundly troubling," yet concluded the case was moot because Mr. Justice was no longer incarcerated.[1] The undersigned filed a Petition for Rehearing on May 19, 2022. Over five months later, on November 3, 2022, rehearing was denied. This Petition follows.

[1] No oral argument was held at the South Carolina Court of Appeals in this case.

ARGUMENT

The Court of Appeals failed to apply an exception to the mootness doctrine, where, as a result of an unconstitutional parole revocation hearing, Justice has a parole violation on his criminal record, where the blatantly illegal procedures employed by the South Carolina Department of Probation, Parole and Pardon Services are the standards by which they treat every unrepresented, indigent individual in South Carolina, where the remedy for future violations proposed by the Court of Appeals—filing a PCR application—was followed in this case yet failed to yield appellate review due to perceived mootness, and where a current South Carolina statute is unconstitutional based on longstanding United States Supreme Court precedent.

William Justice was deprived of numerous due process rights at the preliminary hearing and the revocation hearing in his parole revocation case. Both his parole agent and the parole board were complicit in the blatantly improper proceedings; they showed no regard for his well-established and unequivocal constitutional rights and seemed intent on only revoking his parole without any consideration given to fairness, justice or the law. Compelling evidence was presented to the PCR court, and the Court of Appeals erred in its determination that the case is moot.

Based on the audio from the revocation hearing and the unequivocal PCR testimony from Mr. Justice and the parole agent, this miscarriage of justice is going to continue to occur in South Carolina until a Court puts an end to it. Given that opportunity, the Court of Appeals instead adopted a flawed approach offered by the state and held that the case was moot. Because Mr. Justice has a parole violation on his record, and because this travesty is going to continue to dodge appellate review, the undersigned respectfully requests that this Court grant certiorari.

Despite his meritorious claims regarding the illegal parole revocation process, Mr. Justice sat in prison for six years while his PCR action languished. He filed his PCR application on February 26, 2014. The state's Return was filed late under S.C. Code Ann. § 17-27-70. Over two years after Mr. Justice's PCR application was filed, a hearing on the state's motion to dismiss occurred (April 21, 2016). The eventual PCR evidentiary hearing occurred almost three years after his PCR application was filed (February 1, 2017). The PCR appeal process is ongoing, having begun on August 16, 2017. The Court of Appeals issued its opinion in May 2022, and rehearing was denied in November 2022. Even now, over two years following Mr. Justice's release, this appeal has largely sat dormant.[2] William Justice has been unable to receive final review of his PCR application in a span of over eight years. As will be explained below, the Court of Appeals misapprehended the mootness doctrine and erred in applying it to this case.

Relevant facts

William Justice was sentenced to four consecutive fifteen-year sentences in 1989. In May 2012, after receiving various good time credits through the South Carolina Department of Corrections, Justice was granted parole. Parole was crafted to take effect from May 3, 2012 to March 6, 2032. On August 7, 2013, a warrant was issued for Mr. Justice's arrest based on allegations that he violated conditions of his parole. Thus began the parole revocation proceedings, which include a preliminary hearing and a revocation hearing.

The audio from the revocation hearing validated Mr. Justice's written PCR allegations as well as his testimony at the PCR hearing. See CD Containing Audio of Petitioner's Parole Revocation Hearing. At the 2:37 mark, Justice, who was unrepresented, was asked if there was

[2] Although the appendices in this case do not reflect Mr. Justice's release date, the undersigned represents that Mr. Justice was released from the South Carolina Department of Corrections around July 2020.

anything he wanted to "add in this case" following the allegations by the parole agent. Justice noted that he was deprived of his right to confront witnesses at the preliminary hearing. Audio 2:39 – 3:06. He then told the parole board that he wished to explain what happened. Id. He was met with an immediate "no" from the parole board member who was speaking. Id. The board member seemed to suggest that Justice was deemed to have violated his parole and nothing could change his mind. Audio 3:06 – 3:22.

After notifying the parole board that he was deprived of his constitutional rights, Mr. Justice was given approximately two minutes to provide his account of the circumstances giving rise to the parole revocation action. Audio 2:39 – 5:11. During questioning by the parole board member, Justice was repeatedly interrupted as he attempted to explain the situation. He answered in a straightforward fashion when asked about a scuffle; Justice defended himself on his own property, and a neighbor called the police.[3] Id. Notably, Justice denied the allegation that he had hit anyone with a metal pipe. Id. As he continued to explain the facts, he was interrupted yet again, and the parole board member stated: "We have enough information. We have reviewed the facts here so please step outside. We'll make a decision." Audio 4:50 – 5:10.

Outside of Mr. Justice's presence, two witnesses were introduced to the parole board. Audio 5:29 – 10:01. These two witnesses, Ms. Cotton and Ms. Wessinger, were afforded much more deference and respect than Justice. The parole board member did not repeatedly interrupt Cotton; he repeatedly said "okay" and "right" as she spoke, signifying interest and willingness to listen. Cotton was afforded more time to speak than Justice, and her remarks were rife with objectionable statements. After hearing from Cotton, the decision was made to revoke Mr. Justice's parole. Audio 10:06 – 10:11.

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[3] Petitioner testified similarly at his PCR evidentiary hearing, over two years later. App. 312 ll. 3 – 16.

Justice knew that his rights were trampled on, and so at the outset of his PCR action, He concisely pled in his application the following facts which on their face support the contention that his parole was unlawfully revoked. App. 258 – 259. Despite clear statutory language, the uniqueness of this claim resulted in a motion to dismiss being brought by the state. At a hearing before the Honorable Perry H. Gravely on April 19, 2016, the state requested dismissal of Justice's claims. App. 277 l. 12 – 281 l. 7. During its recitation of the procedural history and facts of the case, the state admitted that the hearing officer at the preliminary hearing took the testimony of two adverse witnesses outside of Justice's presence. App. 280 ll. 8 – 20.

The PCR court denied the state's motion to dismiss. App. 291 ll. 4 – 18. Following the denial, an evidentiary hearing was held. App. 298. Two exhibits were entered into evidence, a violation report and a script utilized by Cook. App. 347 – 349. At the hearing, Mr. Justice testified that he was granted parole on May 3, 2012. App. 301 ll. 14 – 15. He was arrested for alleged parole violations in August 2013. App. 301 ll. 11 – 13. He indicated that one of the alleged parole violations involved contact with his prior employer. App. 301 l. 19 – App. 302 l. 21. The other two parole conditions which he recalled the state claiming that he violated were a payment arrearage and drinking to excess. Id.

Justice advised the PCR court that his first parole revocation preliminary hearing was attempted but then rescheduled due to technical difficulties with the telephones. App. 302 l. 23 – App. 303 l. 12. The second preliminary hearing was held in a conference room at the Kershaw County Jail. App. 303 ll. 13 – 14. In the room with Justice were the parole examiner and Justice's parole officer, Cook. App. 303 ll. 16 – 20. Two witnesses against Justice, his former employer Ms. Cotton and her husband, were present at the facility but not in the conference room. App. 304 ll. 2 – 6.

Justice recalled Cook read allegations against him from a piece of paper without much specificity. App. 303 l. 21 – App. 304 l. 1. Because Cotton neither spoke nor testified under oath in Justice's presence, he was unaware at the time of the evidentiary hearing what was said. App. 304 ll. 7 – 14. As a result, Justice was unable to respond to any allegations made by either witness or cross-examine them. Id.

Justice wanted to utilize his right of confrontation regarding Cotton, because she "made a bunch of false accusations" against him. App. 305 ll. 2 – 18. Justice notified the PCR court that Cotton had applications on her phone which could spoof caller ID's and text messages. Id. However, he was never allowed to cross-examine or even confront Cotton.

Justice also requested an attorney on more than one occasion. App. 304 ll. 15 – 19. He was never provided one, because "[t]he parole office doesn't ... appoint lawyers." App. 304 l. 20 – App. 305 l. 1. All in all, Mr. Justice was deprived of his right of confrontation and his right to view the evidence against him. App. 304 l. 2 – 305 l. 18. Further, the current procedures for requesting an attorney appear illusory, such that no individual who is facing parole revocation could or would ever receive counsel.

Following the hearing in August 2013 at the Kershaw County Jail, Justice attended a second hearing before two members of the Parole Board at Lee Correctional in October 2013. App. 305 ll. 19 – 25. His recollections of this hearing over two years later, as compared to the audio CD, was remarkably accurate. At this hearing, Cook made a presentation via a video camera to the partial board which appeared on a screen. App. 306 ll. 1 – 12. Justice was asked whether he had hit someone with a pipe; when he answered in the negative, the board cut him off and turned off the camera. Id. Once more, Justice was denied his right to confront either Cook or Cotton regarding the allegations leveled against him. App. 306 l. 9 – 25. He was unaware

whether Cotton or her daughter-in-law, both who attended the hearing, spoke to the parole board. Id. He was denied the opportunity to confront either at the hearing in October. App. 306 l. 21 – App. 307 l. 3. When asked if he would have wanted to be able to hear their remarks and ask them questions, Justice answered "[a]bsolutely." App. 306 ll. 1 – 25. He requested counsel at this hearing as well. App. 307 ll. 4 – 11.

Regarding the alleged drinking violation, Justice presented a medical defense at the PCR hearing. App. 308 ll. 10 – 22. With respect to the claim that he contacted his former employer, he explained that a responsive text message was the ground upon which the state attempted to revoke his parole. App. 310 ll. 13 – 23. Justice also disputed the late payment allegations. App. 311 ll. 3 – 13. He indicated that his parole agent always let him make his payments at the end of the month when he came in to report. Id.

On cross-examination, Justice testified that he was defending himself on his own property and never sought violence. App. 312 l. 3 – 313 l. 22. He was unsure where the metal pipe allegations came from. Id. After Justice's testimony concluded, Cook took the stand. App. 318. She described Justice as a "model citizen" during the beginning of his parole. App. 320 ll. 18 – 24. "He was clean cut. Just how he is today. He was very polite and he was on the right path. He was working. And like he said, he came in every month. He paid his fees." Id. However, Cook testified that she soon thereafter imposed a condition that Justice was not supposed to contact Cotton or her family. App. 321 ll. 13 – 16.

Regarding the parole revocation hearings, Cook was unable to recall whether more than one hearing took place. App. 322 ll. 5 – 18. She averred that she presented a statement and a cell phone printout at one of the hearings. App. 322 l. 24 – App. 323 l. 4; App. 323 l. 23 – App. 1.

Cook testified that **he was shown none of that evidence**: "probably not because usually they go out and hire an attorney and you give all that information to the attorney." App. 323 l. 5 – 9. Cook also testified that "[a]n attorney will not be appointed except in the most extraordinary circumstances." App. 323 ll. 5 – 15. Therefore, because Cook did not deem Justice's matter to be one of "extraordinary circumstances" and because he could not afford to hire an attorney, he represented himself. Because he represented himself, he was not provided any of the information that the parole board received.

Cook admitted on cross-examination that she has **never** seen a parole examiner make a determination that extraordinary circumstances exist such that an individual would be appointed an attorney. App. 332 ll. 20 – 23. Furthermore, there was not a determination, one way or the other, at the initial hearing regarding extraordinary circumstances. App. 332 l. 24 – App. 333 l. 1. However, even the attorneys at parole hearings are traditionally limited in their advocacy, according to Cook: "[i]n my most recent experience … where the offender actually had an attorney, the attorney was not allowed to say a whole lot." App. 327 ll. 7 – 14. Cook admitted that Justice was not allowed "to say a whole lot" to the members of the parole board. App. 326 l. 13 – 23. Justice was only allowed to respond to questions, according to Cook. The hearing was "not open dialogue." App. 326 l. 20 – App. 327 l. 6. The state concluded that Justice was therefore treated "similarly to any other person whether represented or not by the parole board." App. 327 ll. 15 – 18. Seemingly suggesting that Justice was afforded the presumption of innocence, Cook testified that he had "the opportunity to remain silent if he wished to" at the preliminary hearing. App. 327 l. 19 – 328 l. 3.

Although Cook was unable to recall at first, the hearing officer's report refreshed her memory and she testified that Cotton and her husband were at the preliminary administrative

hearing. App. 333 ll. 2 – 25. Cook admitted that neither witness was in the same room as Justice. Id. Cook testified that "if [the witnesses] were present, they may have" spoken to the administrative hearing officer, Mr. Rivers. App. 334 ll. 1 – 11. However, Justice would not have been present for that, according to "the jail's rules." Id.

According to the jail's rules, the hearing officer would have left the conference room and gone to where the witnesses were located. App. 336 ll. 3 – 24. Had Justice been represented, the attorney would have been allowed to go with the hearing officer. Id. However, in the matter *sub judice*, it was just the hearing officer who went and spoke with the witnesses. Id. **Justice was not allowed to go and confront or cross-examine either witness**. Id.

Respondent's Exhibit #1, Cook's script, was made an exhibit at the evidentiary hearing. App. 324 l. 2 – App. 326 l. 5. The script was read to the members of the parole board present for Justice's hearing. App. 334 ll. 12 – 16. Cook indicated that the parole board received a packet of information prior to the hearing. App. 334 ll. 17 – 19.

Cook admitted that it was not standard practice to provide a *pro se* individual with this packet that the determining board would rely on to make a decision. App. 335 ll. 1 – 3. In a harrowing acknowledgement, Cook disclosed that Justice "**was not even allowed to see what the parole board had in front of them.**" App. 335 ll. 10 – 12 (emphasis added). Worse, Mr. Justice did not "get to say anything to the parole board to defend himself." App. 335 ll. 17 – 23.

At the end of the PCR evidentiary hearing, the court took the matter under advisement. App. 343 ll. 4 – 22. In making its decision, the PCR court inexplicably found that Justice's due process rights were not violated even though there was not an express finding that witnesses would be at risk if he was afforded his constitutional right of confrontation and cross-examination. App. 360 – 361. Contained within the Findings of Fact and Conclusions of Law

section for the allegation that petitioner was deprived his right to confront witnesses were two paragraphs containing brief reference to two cases: Morrissey, supra, and State v. Hicks, 387 S.C. 378, 692 S.E.2d 919 (2010). The Order of Dismissal also contained a false assertion that there were no tapes or transcripts of the hearings.[4] App. 360. Seemingly overlooking the underlying deprivations that affected the entire structure of the revocation proceedings, the PCR court concluded Justice would have been revoked regardless of the egregious affronts to his due process rights. App. 361. Mr. Justice was not allowed to defend himself against any of the allegations, especially considering he was not given proper notice or provided a copy of the packet the Board received.

A Notice of Appeal was filed on August 16, 2017. The Court of Appeals issued its opinion on May 4, 2022. Justice v. State, Op. No. 2022-UP-186 (S.C. Ct. App. filed May 4, 2022); App. 1. The Court concluded the case is moot. This Petition follows.

Discussion

William Justice was sentenced to four consecutive fifteen-year sentences in 1989. Despite a sixty-year aggregate sentence, the blatantly unconstitutional parole revocation procedures employed against him evaded judicial review. In concluding Justice's case is moot, the Court of Appeals in the same breath suggested future parolees avail themselves of an identical process. Without either justification or explanation, the Court held that future victims of the exact same scam have a meaningful remedy, namely the same one that failed to secure relief for Justice.

Both the PCR judge and the Court of Appeals have turned a blind eye to the obliteration of well-established, decades-old federal jurisprudence. The former, misled by the state, failed to

[4] On December 13, 2018, this Court granted a motion allowing the parties to substitute copies of this recording for the original CD on appeal. Filed concurrently with this Petition is a transportation order request for the CD to be brought to this Court. The subject audio was provided to the PCR court at the evidentiary hearing. App. 328 l. 13 – 329 l. 13.

properly apply SCOTUS jurisprudence; the latter, after a significant delay, misapprehended the mootness doctrine and failed to reach the underlying merits of the instant case.

Justice was denied multiple rights afforded to him by the United States Constitution and years of United States Supreme Court precedent. An outline of the applicable due process rights can be found in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

The Court of Appeals concluded Justice's case is moot because he is no longer incarcerated. Respectfully, this decision was erroneous. If Justice was unable to pursue his PCR appeal because he was no longer incarcerated, the indefensible, illegal parole revocation process will continue to take advantage of indigent individuals. This manifest injustice satisfies the mootness "capable of repetition, yet evading review" exception. Additionally, Mr. Justice is saddled with the collateral consequence of a parole violation on his record.

The opinion issued by the Court of Appeals is prima facie evidence of why parolees **do not** receive meaningful judicial review. Justice's case is a perfect illustration of how indigent individuals receive disparate treatment in South Carolina. The Court of Appeals granted certiorari in the matter *sub judice*, yet instead of receiving appellate review of credible allegations of constitutional deprivations, complete with sworn testimony that this exact situation will continue to occur, Justice's case was dismissed.

The Court of Appeals opinion concluded "[w]hile we agree the issues of denial of due process rights and treatment of *pro se* individuals in a parole revocation hearing may arise again, we do not agree they will evade future judicial review." The crux of the matter, and the portion to which Justice strenuously objects, is the following: "If in the future another inmate, who is still incarcerated, believes his parole has been unlawfully revoked and the parole board has denied him similar due process rights, that inmate may file a PCR petition, and a court will have

the opportunity to rule on the issues at this time." Justice v. State, Op. No. 2022-UP-186 (S.C. Ct. App. filed May 4, 2022). This conclusion adopts the flawed and nearsighted position offered by the state: "Any inmate who claims they 'should not have been returned to prison' on the basis their parole has been unlawfully revoked may file a PCR action under section 17-27-20(a)(5)." Amended Brief of Respondent p. 9. This conclusion therefore keeps functioning the revolving door of abuse of the very same system that trampled on Justice. In a hypothetical scenario mirroring Justice's case, save for the fact that an individual is still incarcerated, the inmate could file a PCR application following the glaringly improper revocation procedures that resulted in him being re-incarcerated. If his parole was revoked and the remaining sentence was less than three years, the PCR process would not allow for judicial review, as evidenced by the procedural history in the matter at bar. If the inmate was released within three years, his case would be moot under the current reasoning and the timelines experienced by Justice. App. 317 ll. 5 – 12.

Justice filed his PCR application on February 26, 2014. The state's return was filed fifteen months later.[5] The PCR evidentiary hearing did not occur until *three years* after Justice's PCR application was filed. In the hypothetical situation described above, a parolee could have his parole revoked and be required to serve two-and-a-half years' incarceration. In that instance, the state would undoubtedly move to dismiss the PCR action as moot at the time of the evidentiary hearing. A published opinion is needed to curb the deliberate, intentional exploitation of indigent individuals in South Carolina and to align our state with longstanding federal laws as discussed briefs filed with the Court of Appeals.

[5] This significant delay far exceeded the thirty days provided by the PCR statute but is not an uncommon timeframe for the state's response in PCR actions. S.C. Code Ann. § 17-27-70(a) ("Within thirty days after the docketing of the application … the State shall respond by answer or by motion"). No motion to hold the state in default was filed.

Consider, in the alternative, this hypothetical individual's appeal. After a notice of appeal is filed with this Court, the PCR appeal can be transferred to the Court of Appeals. The Court could grant certiorari, direct further briefing, and schedule oral argument. If, however, the period of incarceration ends at *any point during the entire PCR appeal*, the individual's case could be dismissed for mootness based on the Court of Appeals' current rationale. Such a practice relegates this Court's authority to the PCR court while simultaneously preventing meaningful appellate review of a PCR court's decision. In the event the individual is still incarcerated, the parole board could *grant parole a second time the day before oral argument*, thereby requiring dismissal based upon the Court of Appeals' current rationale. This reasoning invites mischief and was the subject of a recent opinion from the Supreme Court of Minnesota. State ex rel. Young v. Schnell, 956 N.W.2d 652, 663 (Minn. 2021).

This Court should act to prevent further injustice. As it stands, a parole agent, as in Justice's case, could refuse to recognize longstanding and unambiguous precedent from the Supreme Court of the United States of America and thereby egregiously violate a parolee's constitutional rights. Without appellate review, there exists no avenue to correct the PCR court's erroneous findings. Such a system breeds contempt of the law. This Court of Appeals opinion in its current form abdicates its responsibility to the PCR court, effectively forcing PCR applicants to live with the decision of a single PCR judge. Stated differently, the Court of Appeals suggests that the determination made by the PCR judge is the only review necessary. Such a decision provides the South Carolina Department of Probation, Parole and Pardon Services ("SCDPPPS") carte blanche to invalidate well-established constitutional rights simply because most inmates who have had their parole revoked will likely "max out" their sentence before appellate review is complete.

The Supreme Court has generally *declined to deem cases moot* that present issues or disputes that are "capable of repetition, yet evading review." The classic example of a dispute that is capable of repetition, yet evading review is a pregnant woman's constitutional challenge to an abortion regulation. See Roe v. Wade, 410 U.S. 113, 125 (1973)[6] (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

In Justice's case, the admission from a parole agent employed by the State of South Carolina unambiguously defies federal jurisprudence. Nikita Cook, the parole agent who assisted the state in its deployment of unconstitutional parole revocation practices against Justice, testified at length about how Justice's case is like any other. App. 322 l. 24 – App. 323 l. 15. However, even when an attorney is present, a parolee is not afforded the minimum due process rights enshrined in decades-old United State Supreme Court precedent, according to Cook. App. 327 ll. 7 – 18. Further, "standard procedure" as described by Cook mandates non-compliance with the law. App. 334 l. 22 – App. 335 l. 3. Thus, "standard procedures" utilized by the state will continue to be illegally weaponized against indigent parolees; it has become the state's official protocol at this point.

Wisconsin has wrestled with a similar situation. State ex rel Olson v. Litscher, 233 Wis.2d 685, 608 N.W.2d 425 (2000). Olson was imprisoned for sexual assault and reached his mandatory release date on or about March 2, 1999. 608 N.W.2d at 426. Because the state department of corrections was unable to locate a residency for Olson, he was transferred to a minimum-security penal institution. Id. at 426-27. Olson petitioned the circuit court for a writ of habeas corpus, contending that his continued incarceration past his statutorily mandated release

[6] Roe v. Wade was overruled earlier this year; mootness is not addressed in the Dobbs v. Jackson Women's Health Organization opinion. 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).

date was an unlawful restraint of his personal liberty. Id. at 427. While the case was pending, Olson was released. Id. The state then moved to dismiss the petition as moot. Id.

Wisconsin applies a narrower mootness exception than South Carolina: the issue must be "likely of repetition and yet evades review."[7] South Carolina, by comparison, simply requires that a situation only be *capable* of repetition. Applying Wisconsin's more stringent standard, its Court of Appeals nonetheless applied the rationale Justice requests in the matter at bar: "Not only does the problem recur, it is typically resolved pending appellate review. The question is thus one that repeats itself yet evades review. Additionally, it deals with the unlawful restraint of personal liberty—a constitutional question. For these reasons, we decline to dismiss this case as moot, even though Olson has been released and our decision will have no practical effect on this case." State ex rel. Olson v. Litscher, 608 N.W.2d 425, 427.

South Carolina recognizes the "capable of repetition, yet evade review" exception. Byrd v. Irmo High School, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996). For the exception to apply, "the action must be one which will truly evade review." Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006). The exception is most applicable in situations where the prejudice suffered by the complaining party is temporary and has ended by the time of appellate review. See Byrd, 321 S.C. at 432, 468 S.E.2d at 864 (finding short-term student suspensions evade review because they are, "by their very nature, completed long before **an appellate court** can review the issues they implicate") (emphasis added).

In Byrd, a student from Lexington-Richland School District 5 was suspended for ten days after coming onto campus after having consumed alcohol. Id. at 321 S.C. 426, 429 468 S.E.2d 861, 863. After exhausting his appeals through the district's policies, the family engaged

[7] State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis.2d 220, 229, 340 N.W.2d 460 (1983).

counsel who filed suit at the circuit court. Id. at 429-30, 468 S.E.2d at 863. Following the circuit court's dismissal, the student sought an appeal. Id.

After the notice of appeal was filed, Irmo High School moved to dismiss the case as moot. Id. "It assert[ed] that Student's suspension occurred in August and September 1994, that Student has since returned to school, and that the suspension has been cleared from Student's record." Id. at 430, 468 S.E.2d at 863-64. The Byrd opinion was issued approximately eighteen months after the suspension, yet this Court declined to apply the mootness doctrine and instead found the "capable of repetition, yet evading review" exception applicable. This Court held that the student's case was not moot because future suspensions could be concluded before *appellate judicial review* could be accomplished. Id. at 432, 468 S.E.2d at 864.

Being sent to prison is far more serious than having to stay home from school. Justice's case nonetheless closely resembles the above scenario such that an identical approach should be applied. All of the situations involve circumstances that exist for a short, fixed time period and may be concluded by the time litigation reaches a court. Because the issue may arise again and will almost always face timing challenges, cases like this one should not be dismissed for mootness. The short-term nature of the re-incarceration has the potential for recurrence but will likely fail to last long enough to permit contemporaneous judicial review. See Nelson v. Ozmint, 390 S.C. 432, 434-35, 702 S.E.2d 369, 370 (2010) ("We find this issue is one that is capable of repetition, yet will usually evade review because most inmates will have served the year required by SCDC's interpretation of the statute before the lawfulness of the interpretation can be reviewed.").

Further precedent also supports Justice. In State v. Passmore, the appellant received a one-year sentence for criminal contempt. 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005). On

appeal, she alleged a constitutional violation based upon the lack of a jury trial. Id. Although she was no longer incarcerated at the time the opinion was issued, the Court of Appeals held the issue was **not moot.** Id. Much like the matter *sub judice*, the state contended in Passmore "that even if Appellant's sentence was unconstitutional, [the Court of Appeals] should affirm because she has served the sentence, rendering the case moot." Id. at 581, 611 S.E.2d at 280. The Court found the "capable of repetition yet evading review" exception and another applicable and therefore refused to dismiss Passmore's appeal as moot. Id. at 582, 611 S.E.2d at 281. This Court, in an unrelated but recent FOIA case, held a similar situation did not fall under the capable of repetition, yet evade review exception. Croft as Tr. of James. A. Croft Tr. v. Town of Summerville, 433 S.C. 473, 860 S.E.2d 352 (2021). In doing so, this Court reiterated that the scope of review includes appellate review. Id. at 480-81, 860 S.E.2d 352, 356.

Two years ago, this Court addressed mootness in a case involving a sentencing question. State v. Simpson, 429 S.C. 83, 837 S.E.2d 669 (2020). The Court found the question of Simpson's sentence moot due to his completion of the home detention portion of the sentence but found that the issue was capable of repetition and would generally evade review. Id. at 89, 837 S.E.2d at 672. To date, Mr. Justice's case has evaded appellate review. It is unclear how the Court of Appeals' suggestion—pursuit of a PCR application—would yield a different result should an applicant have his or her parole revoked for a period of less than five years. As will be explained below, many sentences in criminal cases can see the same potential result.

Justice was serving a sixty-year sentence and his case was nonetheless held moot because of South Carolina's sentencing scheme. It will be the rare defendant who receives a parole-eligible sentence that exceeds Justice's. Our structure of prison sentences is therefore ripe for abuse, where parole is generally available only in cases where the *maximum* sentence is fifteen

years. S.C. Code Ann. § 24-13-100. Therefore, an inmate who was eligible for parole, received it, and had it revoked then has a limited number of years remaining on his or her sentence. As a result, judicial review will not likely occur before an individual is released. Repeated constitutional violations are all but guaranteed.

There exist three categories of adult sentences served at the South Carolina Department of Corrections: 1) parolable sentences; 2) no parole or 85% sentences; and 3) day for day or "mandatory minimum" sentences. The first category is relevant to this matter. Individuals serving parolable sentences earn the most amount of good time and work/education credits—twenty days of good time and an average of work/education credits per month. According to materials provided by SCDC's general counsel, these offenders, on average, serve between 53% and 65% of their sentences.[8] This calculation entails consideration of good time credit and earned work and education credits under S.C. Code Ann. § 24-13-210 and -230. Parole was available to Justice after serving one-third of his sentence. S.C. Code Ann. §16-11-312(C)(2).

In Mims v. State, this Court held that for purposes of parole eligibility, consecutive sentences should be treated as one general sentence by aggregating the periods imposed in each sentence. 273 S.C. 740; 259 S.E.2d 602 (1979). Even with a sixty-year sentence, Justice's case was deemed to be moot. A typical case would see the same result based on the Court of Appeals' flawed analysis. Defendants sentenced for a single burglary in the second degree would fare no better following our State's "standard" unlawful revocation procedure. A defendant

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[8] Bigelow, Christina Understanding Prison Sentences p. 4, https://sccid.sc.gov/resource_bank/uploads/conferences-and-cles/2021-annual-public-defender-conference-092021/Bigelow_Understanding-Prison-Sentences_PDCON21.pdf (last accessed November 28, 2022) [https://web.archive.org/web/20211001194419/https://sccid.sc.gov/resource_bank/uploads/conferences-and-cles/2021-annual-public-defender-conference-092021/Bigelow_Understanding-Prison-Sentences_PDCON21.pdf].

serving the maximum fifteen-year sentence for that offense would be parole eligible after one-third, or five years. Assuming parole is granted as early as possible given the maximum sentence, the difference between the amount of prison time served before parole eligibility (five years) and the 53% described above (approximately eight years) is only three years. Therefore, an individual who was subject to tainted revocation procedures, as Justice was, would likely not even receive a PCR evidentiary hearing by the time he or she "maxed out" the sentence, because the state would move to dismiss the action as moot three years after the filing of the action. In other words, an individual would need to be sentenced to *more than sixty years* for parole eligible, non-violent offenses in order to receive complete judicial review. If Justice's case evades judicial review, almost every single every other case does too.

The opinion the Court of Appeals issued in Justice's case suggests a future inmate "may file a PCR petition, and a court will have the opportunity to rule on the issues at that time." However, between the significant delays facing PCR applicants[9] as they seek finality through the judicial process, it is unlikely that said future parolee who received a combination of consecutive parole-eligible non-violent offenses totaling less than sixty aggregate years will receive judicial review before the brief period of re-incarceration following revocation concludes. As such, this case falls squarely within the "capable of repetition, yet evading judicial review" exception to the mootness doctrine. The theory of mootness must give way to the realities of these delays. The exception to the mootness doctrine recognizes this real-world problem. The Court of Appeals erred in passing on real-world constitutional violations.

[9] Justice filed his PCR application on or about February 26, 2014. The Court of Appeals opinion was issued on May 4, 2022, over eight years later. Rehearing was not denied until November 3, 2022.

Additionally, Mr. Justice's criminal record now contains at least one additional violation. According to S.C. Code Ann. 23-3-120(A), [a]ll law enforcement agencies ... must report all criminal data and related information" to SLED. Furthermore, anyone subjected to arrest, as Mr. Justice was, must be fingerprinted. Id. That data is then sent to SLED to establish "criminal history record information." S.C. Code Ann. § 23-3-120(B).

This Court is empowered to conclude that the revocation proceedings were tainted with due process violations, reverse the Court of Appeals, and clear the parole violation from Mr. Justice's record. If a decision by the lower court may affect future events, or have collateral consequences, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). In State v. Passmore, the appellant made similar contentions regarding collateral consequences. 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005).

As discussed *supra*, the United States Supreme Court set forth the due process requirements afforded to parolees at both the preliminary hearing and revocation hearing in 1972. At the preliminary hearing, the parolee is entitled to: (1) notice of the alleged violations of parole; (2) an opportunity to appear and to present evidence; (3) a conditional right to confront adverse witnesses; (4) an independent decisionmaker; and (5) a written report supporting whether or not there is probable cause to hold a final revocation hearing. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (citing Morrissey, 408 U.S. at 487).

At a final revocation hearing, the "minimum requirements of due process" require (1) written notice of the claimed violations; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and the right to confront witnesses; (4) the right to

cross examine adverse witnesses; (5) a neutral and detached adjudicator; and (6) a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole. Morrissey, 408 U.S. at 489; see Gagnon, 411 U.S. at 786.

The South Carolina General Assembly amended S.C. Code Ann. § 24-21-50 in 1995 to remove the right to confrontation, in direct violation of the United States Supreme Court's holding in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct 2593, 33 L.Ed.2d 484 (1972): This statute was referenced in a footnote in Turner v. State, 384 S.C. 451, 454, 682 S.E.2d 792, 794 n. 3 (2009) ("In South Carolina, a parolee has a statutory right to have counsel present at a parole revocation hearing"). A plain reading of the statutory language, as evidenced by footnote 3 in Turner, shows that this statute applies at parole revocation hearings.

This Court has the authority to interpret the parole statute. In interpreting statutes, this Court should look to the plain meaning of the statute and the intent of the Legislature. Hinton v. S.C. Dep't of Prob., Parole, & Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct.App.2004). Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the State. See Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (construing in favor of the defendant the different time frames for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary). Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

The rights afforded by the United States Constitution as interpreted by the United States Supreme Court in Morrissey are blatantly disregarded by the South Carolina statute. As written, the statute governs "any such hearing" while considering a parole case. This statute prevents individuals from receiving their due process rights and needs to be found unconstitutional. In direct contravention to a United States Supreme Court decision from nearly fifty years ago, the

General Assembly in 1995 voted to remove a constitutional right of confrontation. The statute cannot be applied as written without violating the right of confrontation provided in Morrissey v. Brewer. 408 U.S. 471, 487, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484.

South Carolina's statute is inconsistent with longstanding United States Supreme Court jurisprudence and should be declared unconstitutional by this Court. The recrudescence of unconstitutional activity merits invalidation. As conceded below, in the Reply Brief of Petitioner, Mr. Justice never specifically claimed that S.C. Code Ann. § 24-21-50 was unconstitutional. He did, however, plainly contend that his parole was unlawfully revoked. App. 255. Citing S.C. Code Ann. § 17-27-20(A)(5), Mr. Justice advised the PCR court that his parole had been unlawfully revoked. Complete with attachments to his PCR application, he outlined in great detail how his rights had been denied.

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting). The underlying parole revocation proceedings were a farce. The safeguards established by the United States Supreme Court decades ago were ignored, Justice's due process rights seemingly nonexistent. In essence, this one-sided effort saw the full force of the state completely trample an elderly, indigent individual, in direct contravention to well-established law.

Unable to defend himself because the state failed to recognize the bare minimum panoply of rights that people in Mr. Justice's position should be afforded, these proceedings were tainted from the start. Simply put, this should not have happened. The law on this front is not ambiguous; it is not hidden. Based on Cook's testimony at the PCR hearing, however, Mr. Justice's experiences are indicative of the plight that people of this State encounter when

attempting to exercise their rights. The parole revocation proceedings in this case represent a manifest injustice that is entirely inconsistent with what the law envisions, and Mr. Justice is asking this Court to prevent further abuses of power that would evade review, as his has.

Justice was deprived of numerous due process rights under the auspices of "standard procedure" for the South Carolina Department of Probation, Pardon and Parole Services. The brutally candid testimony of Nikita Cook illustrates how future parolees will lose their freedom without being able to exercise their rights. The flagrant constitutional violations will continue to infect the parole revocation process until an appellate court holds the state responsible. Justice now requires that this Court exercise its judicial authority to prevent indigent citizens from facing identical, fundamentally unfair, and unconstitutional treatment at the hands of the government and its "standard procedure."

CONCLUSION

Based on the foregoing, the undersigned would respectfully request that this Court grant certiorari in this matter in order to reverse the Court of Appeals' decision regarding mootness and in order to issue a published opinion to curb the systemic abuse of the parole revocation proceedings in South Carolina.

Respectfully Submitted,

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This 6th day of December, 2022.