

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**  
**Jun 23 2023**

S.C. SUPREME COURT

---

Certiorari to the Court of Appeals  
Appeal from Beaufort County  
Honorable R. Lawton McIntosh, Circuit Court Judge

---

Opinion No. 2023-UP-026 (S.C. Ct. App. Filed January 25, 2023)  
Lower Court Case No. 2015-CP-07-02386

---

CHARLES GREEN, JR.

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-000647

---

**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

---

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR RESPONDENT

**INDEX**

INDEX.....i

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI .....1

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES.....2

STATEMENT OF THE CASE .....3

STANDARD OF REVIEW .....6

ARGUMENT

**The Court of Appeals correctly found that the PCR judge erred in relying on Rule 11, SCRCP, to limit Green's testimony and PCR counsel's questioning at the post-conviction relief evidentiary hearing to only one of the nineteen allegations raised.**.....7

CONCLUSION.....17

**PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI**

Did the Court of Appeals err by reversing and remanding for an entirely new evidentiary hearing in Green's case when the post-conviction relief judge—who had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims—did not abuse his broad discretion or otherwise err by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green's counsel as having arguable merit?

**RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI**

Did the Court of Appeals correctly find that the PCR judge erred in relying on Rule 11, SCRPC, to limit Green's testimony and PCR counsel's questioning at the post-conviction relief evidentiary hearing to only one of the nineteen allegations raised?

## STATEMENT OF THE CASE

On May 19, 2011, the Beaufort County Grand Jury indicted Respondent for attempted murder, possession of a weapon during a violent crime, and possession of a firearm by a person convicted of a felony, indictments #2011-GS-07-00851-00853.. (App. pp. 332 – 337). On November 18, 2013, Respondent proceeded to jury trial before the Honorable J. Ernest Kinard. Trasi Campbell represented Respondent at trial. Hunter Swanson prosecuted the case. The jury found Respondent not guilty of attempted murder but found him guilty of the lesser-included charge of assault and battery of a high and aggravated nature. (App. p. 233 lines 8 – 25). The jury found Respondent guilty of both weapon charges. (App. p. 234, lines 1-3). Judge Kinard sentenced Respondent to two (2) years for the possession of a person previously convicted of a violent crime charge, five (5) years for the possession of a weapon while committing a violent crime charge, and fifteen (15) years for the assault and battery of a high and aggravated nature. (App. p. 243 lines 3 – 8).

Respondent appealed his convictions and sentences, and the Court of Appeals affirmed. State v. Green, Op. No. 2015-UP-458 (filed on September 16, 2015). (App. pp. 346 – 372). Respondent then filed a timely application for post-conviction relief [PCR] on October 1, 2015. (App. pp. 245 – 254). Through the original application and follow-up amendments, Respondent alleged that trial counsel and appellate counsel provided him with ineffective assistance of counsel for multiple reasons, including claims that trial counsel failed to object and present witnesses, and that appellate counsel failed to raise certain issues.

The State made its Return on or about May 13, 2016. (App. pp. 255 – 261). The State did not challenge the application as filed or move for a more definite statement. An evidentiary hearing was held on January 29, 2018, before the Honorable R. Lawton McIntosh. (App. pp. 262

– 311). James Falk represented Respondent at the PCR hearing. DeShawn Mitchell appeared on behalf of the State. At the conclusion of the hearing, Judge McIntosh denied relief as to certain allegations and requested follow-up briefing from the parties on an issue regarding a witness' statement. (App. p. 308 line 4 – p. 311 lines 1-2). The parties submitted memoranda. (App. pp. 338 – 345). An Order of Dismissal was issued on or about June 18, 2018. (App. pp. 317 – 331). The order of dismissal included the PCR court's finding that Respondent "failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel." (App. p. 324). In the order of dismissal the PCR court specifically noted, "[P]rior to testimony being taken, Applicant proceeded on only the following grounds for relief as additional grounds were disallowed by this court over Applicant's objections." (App. p. 324).

A Petition for Writ of Certiorari was filed on January 28, 2019. The State made its Return on July 15, 2019. On July 26, 2019, this Court, pursuant to Rule 243(1), transferred the appeal to the Court of Appeals. (Supp. App. p. 49). On October 7, 2021, the Court of Appeals granted certiorari on two of the three issues raised. (Supp App. p. 50). The brief of Petitioner was filed on November 8, 2021. (App. pp. 51-68). The brief of Respondent was filed on December 17, 2021. (App. pp. 69-102). On November 16, 2022, a three-judge panel of the Court of Appeal heard oral argument. On January 25, 2023, the Court of Appeals reversed the PCR judge's order and remanded for a new PCR hearing, finding that the PCR judge erred in relying on Rule 11, SCRCP to limit Respondent's PCR claims. Green v. State, Op. No. 2023-UP-026 (S.C. Ct. App. filed Jan. 25, 2023). (App. pp. 103-107). The State filed a timely petition for rehearing on February 21, 2023. (App. pp. 108-115). The return was filed on March 8, 2023. (App. pp. 116-125). The Court of Appeals denied the petition for rehearing on March 23, 2023.

(App. p. 126). The State filed a petition for writ of certiorari on May 8, 2023. This return follows.

## **STANDARD OF REVIEW**

Appellate courts defer to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

## ARGUMENT

**The Court of Appeals correctly found that the PCR judge erred in relying on Rule 11, SCRCP, to limit Green's testimony and PCR counsel's questioning at the post-conviction relief evidentiary hearing to only one of the nineteen allegations raised.**

In the PCR application and subsequent amendments Green raised approximately nineteen claims of ineffective assistance of counsel including counsel's failure to object to the judge's improper comments in the presence of the jury, failure to object contemporaneously and preserve claims for appellate review, failure to object to inflammatory and irrelevant evidence, failure to investigate and present mitigating evidence at sentencing, speedy trial violation and others. (App. pp. 245-254). The State did not move for a more definite statement. At the beginning of the PCR hearing the PCR judge, however, relying on Rule 11, SCRCP, improperly limited Green's testimony and PCR counsel's questioning to only one issue - ineffective assistance of trial counsel for failing to object to hearsay testimony. At the end of the evidentiary hearing the PCR judge amended the PCR application to include an allegation of ineffective assistance of trial counsel for failing to call witness Ashley Thomas. (App. p. 310, lines 11-15). Although the PCR judge earlier limited Green's PCR claim to the one issue for failing to object to hearsay testimony, the order of dismissal addresses the allegation of ineffective assistance of appellate counsel. The improper limitation constitutes an error of law. The Court of Appeals correctly reversed the finding of the PCR judge and remanded for a new evidentiary hearing. This Court should deny the petition for writ of certiorari.

At the start of the evidentiary hearing the PCR judge asked about Green's allegations. (App. p. 267, lines 12-16). In response, PCR counsel stated, "He is alleging that he is prejudiced by the fact - -" (App. p. 267, lines 21-22). The PCR judge interrupted and, citing Rule 11, SCRCP, stated:

No. Pursuant to Rule 11 and by other grounds, what are his grounds? And we're going to go forward with that. I'm not going to let him just throw out anything and see if it sticks. I want to hear what the grounds are that we're going to pursue, and not just throw everything out there. Okay, sir?

(App. p. 267 line 23 – p. 268 lines 1-3). The PCR judge asked if there were other allegations and PCR counsel stated that, “ -- under the limitations of Rule 11, I'd have to say no.” (App. p. 268, lines 14-24). The court noted PCR counsel's objection but ruled that Petitioner could proceed under only one claim, that counsel failed to object to prejudicial hearsay. (App. p. 268 line 25 – p. 269 lines 1- 25).

In the middle of trial counsel's testimony at the evidentiary hearing, a bench conference took place with the following remarks being offered by the PCR court afterwards:

For the record, we had a bench conference, and counsel is concerned - - counsel for applicant is concerned that the applicant has brought here to these proceedings. I, of my own volition, *sua sponte*, have excluded the grounds that I'll articulate on the record earlier as not being relevant or acknowledged, grounds that we can - - what's the term I'm looking for, I'm drawing a blank. They are - - they're not meritorious grounds, and therefore, I'm excluding them from the testimony.

And I'm going to tell you, Mr. Green, that your attorney is fighting for you, and he is concerned that you're not going to be allowed to testify as to these other grounds that you're claiming. But I'm not going to let you testify as to that. You're protected on the record that if I make a mistake in saying that they're not meritorious or recognizable grounds, then, somebody will correct me. But I'm not going to let you testify to them, and your attorney is fighting for you on that behalf. Okay?

(App. p. 281 line 22 – p. 282 lines 1-16). The PCR judge then stated, “I feel like that covers you sufficiently and Mr. Falk.” (App. p. 282 lines 18 – 19). Although the PCR judge later addressed allegations that trial counsel was ineffective for failing to call witness Ashley Thomas and appellate counsel was ineffective for failing to raise the speedy trial violation, the PCR judge erred in limiting the other issues Green could present at the PCR hearing.

Petitioner concedes that the PCR judge erred in limiting Green's PCR claims based on Rule 11. (Petition for Writ of Certiorari p. 16). Petitioner argues that the PCR judge relied on "other grounds<sup>1</sup>" to limit Green's PCR claims. At one point the PCR judge asked, "Pursuant to Rule 11 and by other grounds, what are his grounds?" (App. p. 267, lines 23-24). While the PCR judge referred to "other grounds" the one time, he never indicated what the "other grounds" were or referenced "other grounds" again. It is clear from the PCR judge's repeated references to Rule 11 that the limitation was improperly based on Rule 11 and not "other grounds." The PCR judge stated, "So I will note, for the record, that the applicant, according to the Attorney General's Office, who paraphrases his grounds, has alleged -- and I'm -- for the record, I know you're objecting to me limiting you to Rule 11 basis, but under ineffective assistance of counsel, those allegations are perjury and prejudice." (App. p. 268, line 25- - p.269, lines 1-6). The PCR judge also stated, "Now, based on your representations to me, Mr. Falk, pursuant to my requirements that you do so, under Rule 11, the only rule ground that we're proceeding on today is counsel failed to object to prejudicial hearsay, which caused some prejudice in this case." (App. p. 269, lines 18-23). The record supports that the PCR judge improperly relied on Rule 11. The PCR judge did not rely on "other grounds" in limiting Green's PCR claims.

In Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494-95 (2009), this Court wrote:

Given the public policy considerations involved, including our recognition in Wade that PCR actions are treated differently than traditional civil cases and that sanctions of any kind could chill a petitioner's pursuit of PCR, as well as the fact that there are already limitations in place that serve to curb the potential abuse of the PCR process, we hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.

---

<sup>1</sup> In the petition for writ of certiorari Petitioner references statutes within the Uniform Post-Conviction Procedure, rules of civil procedure, rule of evidence, and rules professional conduct. As discussed below, neither the statutes nor any of the rules justify the improper limitation in the present case.

The PCR judge improperly relied on Rule 11 to limit Green's PCR claims. In Wade v. State, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002), this Court wrote:

Courts treat PCR differently than traditional civil cases. For example, PCR actions are the only type of case which this Court mandates appellate counsel must brief all arguable issues, despite counsel's belief the appeal is frivolous. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). A lawyer knowingly filing a frivolous claim in any other civil case violates Rule 11, SCRCP.<sup>7</sup> Additionally, a PCR applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. S.C.Code Ann. § 17-27-60 (1985); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992). This right does not generally exist for plaintiffs in civil cases.

The PCR judge erred in relying on Rule 11 to limit Green's PCR claims. The Court of Appeals agreed writing:

Here, the PCR court improperly required Green's counsel to evaluate and effectively discard Green's claims under the limitations of Rule 11 before presenting them to the PCR court. When asked by the PCR court if Green had any other claims besides ineffective assistance of counsel for failing to object to prejudicial hearsay testimony, PCR counsel answered "if we are speaking in terms of Rule 11, I would have to say no." PCR counsel was not allowed to fully present Green's PCR claims. While Green's "miscellaneous" claim would not withstand review on the merits, other claims did not lend themselves to summary dismissal. The PCR court erred in using Rule 11 to justify the refusal to consider the merits of and hear testimony on Green's claims. See Hiott, 381 S.C. at 629, 674 S.E.2d at 494-495 (holding Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings); Wade, 348 S.C. at 263, 559 S.E.2d at 847 (noting appellate counsel must brief all arguable issues in a PCR action, despite counsel's belief the appeal is frivolous). Therefore, the order of the PCR court is reversed and the case is remanded for a new PCR hearing.

Green v. State, No. 2018-001204, 2023 WL 395654, at \*2 (S.C. Ct. App. Jan. 25, 2023).

The PCR judge's improper limitation on Green's PCR claims based on Rule 11 was an error of law. The improper limitation was the functional equivalent of a summary dismissal of those claims. As the Court of Appeals correctly noted:

PCR claims for ineffective assistance of counsel "raise[ ] a question of fact [that] could only be determined ... by an evidentiary hearing." Rogers v. State, 261 S.C. 288, 291, 199 S.E. 2d 761, 762 (1973). "[S]ummary dismissal of a PCR application ... without a hearing is appropriate only when it is apparent on the face of the application that (1) there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000). Moreover, rather than summarily dismiss a PCR application, the PCR court may "grant leave [for the PCR applicant] to file an amended [PCR] application or [may] direct that the proceedings otherwise continue." S.C. Code Ann. § 17-27-70(b) (2014).

Green v. State, No. 2018-001204, 2023 WL 395654, at \*2 (S.C. Ct. App. Jan. 25, 2023).

The remaining, unaddressed allegations cannot be adequately analyzed without Petitioner's testimony. In other words, although Petitioner bore the burden of proving his claims, that opportunity was taken from him. The PCR court prejudged his allegations and forced an arbitrary and irrelevant limitation on Petitioner's "one bite at the apple." Petitioner did not waive this right; the decision was made for him, without his consent, and against his will. Further, the State did not file a motion to make more definite and certain, as is seen in other cases. After filing an application for post-conviction relief and two subsequent amendments, the majority of his claims were not considered by the PCR court under the guise of Rule 11 which this Court has held to not be applicable in PCR proceedings.

As to the "other grounds" the State argues support the improper limitation, S.C. Code Ann. § 17-27-50 provides that, "The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief

desired.” While both the State and the PCR judge could have moved for or required more specificity, neither did. Instead, as stated by the Court of Appeals, “. . . the PCR court improperly required Green's counsel to evaluate and effectively discard Green's claims under the limitations of Rule 11 before presenting them to the PCR court.” The limitation was the equivalent of a summary dismissal and improper as “. . . the claims did not lend themselves to summary dismissal.” Green v. State, No. 2018-001204, 2023 WL 395654, at \*2 (S.C. Ct. App. Jan. 25, 2023).

Rule 12(e), SCRCP allows a party to move for a more definite statement and provides:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the Court is not obeyed within 15 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just.

Rule 12(e), SCRCP, does not support the improper limitation because the State never moved for a more definite statement.

The case is distinguished from Coardes v. State, 262 S.C. 493, 206 S.E.2d 264 (1974), cited by Petitioner in the petition for writ of certiorari. In Coardes this Court affirmed the decision of the trial court to dismiss the PCR application without an evidentiary hearing because the applicant failed to raise an issue of material fact. This Court wrote in Coardes:

Here, the appellant alleges only one particular in which his counsel failed to render him effective and adequate representation and that was that ‘his court appointed attorneys did not see him until the day of his plea of guilty.’ The record made at the time the appellant entered his plea of guilty, pursuant to a plea-bargaining agreement, conclusively refutes such contention. The record reflects that the attorneys for the appellant were appointed on May 23, 1972, and upon his arraignment on May 29, 1972, he entered a plea of ‘not guilty’ to the charges of

burglary and assault with intent to ravish. There can be no question but that at the time of his arraignment he was represented by his appointed counsel. This completely and conclusively refutes the claim of the appellant that he had not seen his appointed counsel until the day, May 31, 1972, he entered a plea of guilty to the lesser included charge of assault and battery of a high and aggravated nature.

262 S.C. at 497, 206 S.E.2d at 265–66. Unlike the one allegation in Coardes, refuted by the record, the numerous omitted allegations in the present case raise issues of material fact that required an evidentiary hearing.

S.C. Code Ann. § 17-27-70(a) provides:

Within thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application, the court shall take account of substance, regardless of defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

S.C. Code Ann. § 17-27-70(a) does not support the improper limitation in the present case because the judge did not order amendment. Instead, as discussed above, the PCR court improperly required Green's counsel to evaluate and effectively discard Green's claims under the limitations of Rule 11 before presenting them to the PCR court. The limitation constituted an improper summary dismissal.

Petitioner, citing Rule 3.1, RPC, Rule 407, SCACR, and Rule 71.1(d), SCRCP, asserts that PCR counsel “. . . specifically identified the claims that could be legitimately raised as he was required to do by both our civil procedure rules and his ethical responsibilities, and the hearing proceeded forward on those claims as was proper. (Petition for Writ of Certiorari p. 14).

The statement ignores the PCR counsel's attempt to present other issues raised in the application and the judge's specific limitation based on Rule 11. (App. pp. 267-69). PCR counsel did not limit Green's PCR claims because of the rules of civil procedure or his ethical responsibility. Instead, the PCR judge improperly limited Green's PCR claims based on Rule 11. Petitioner's reliance on Rule 3.1, RPC, Rule 407, SCACR, and Rule 71.1(d), SCRCR, is misplaced.

Additionally, Petitioner, citing Rules 401, 402, SCRE, asserts, "Furthermore, our state's evidentiary rules provide some support for the PCR judge's actions in Green's case." (Petition for Writ of Certiorari p. 18). The PCR judge did not exclude evidence in the present case as irrelevant pursuant to Rules 401, 402, SCRE. Instead, the PCR judge summarily dismissed most of Green's PCR claims without a hearing and based on Rule 11. The PCR judge could not have made a decision about relevance without first hearing testimony. Petitioner's reliance on Rules, 401, 402, SCRE, is also misplaced.

The PCR judge's words — "[p]ursuant to Rule 11"—are clear and unequivocal. The limitation of Green's PCR claims based on Rule 11 is a violation of this Court's precedent in Hiott. The limitation is the equivalent of a summary dismissal and improper. Charles Green is entitled to a new PCR hearing.

In a footnote, Petitioner argues that a remand for an entirely new evidentiary hearing was not proper because, ". . . Green was *not* - despite the limitations imposed by the PCR judge - prevented from presenting all the testimony and evidence he wished to present in support of his claims regarding trial counsel's failure to object to hearsay testimony, trial counsel's failure to present the testimony of Thomas, and appellate counsel's failure to raise a speedy trial issue on appeal, and all those claims have already been ruled upon by the PCR judge in a manner entirely unimpacted by the limitations he placed at the outset of the evidentiary hearing. (App'x pp. 317-

331).” (Petition for Writ of Certiorari p. 20). Petitioner’s argument, however, overlooks the fact that the PCR judge’s ruling that limited Green’s PCR claim to one issue took place at the start of the evidentiary hearing. The PCR judge made it very clear at the start of the evidentiary hearing Green could only proceed on one issue stating, “Now, based on your representations to me, Mr. Falk, pursuant to my requirements that you do so, under Rule 11, the only rule ground that we’re proceeding on today is counsel failed to object to prejudicial hearsay, which caused some prejudice in this case.” (App. p. 269, lines 18-23).

As a result of the PCR judge’s ruling limiting Green to the one PCR claim, PCR counsel did not have the opportunity to question trial counsel on the speedy trial issue, despite Green having included that issue in his PCR application. (App. 252). The PCR judge briefly allowed Green to discuss the speedy trial issue (App. pp. 289-294). However, based on the PCR judge’s limitation, the speedy trial factors were not discussed with trial counsel and trial counsel was not asked whether she intended to move for dismissal under the 6<sup>th</sup> Amendment. While the PCR judge stated that he was limiting Green to the one PCR claim, the PCR judge allowed testimony from appellate counsel and addressed ineffective assistance of appellate counsel in the order of dismissal. (App. pp. 296-307; p. 322; pp. 329-330). As a result of the PCR judge improperly limiting Green’s PCR claims, Green was prevented from fully exploring the speedy trial issue with both trial counsel and appellate counsel. The allegation that appellate counsel was ineffective for failing to raise the speedy trial violation cannot be properly decided without the unlimited questioning of witnesses. The Court of Appeals correctly granted Green a new PCR hearing without limitations. The Court of Appeals decided not to address the ineffective assistance of appellate counsel claim based on the decision to remand.

The PCR judge's improper limitation on Green's PCR claims constitutes an error of law. Green was prevented from presenting PCR claims that that did not lend themselves to summary dismissal. The Court of Appeals correctly reversed the finding of the PCR judge and remanded for a new evidentiary hearing.

**CONCLUSION**

Based on the above argument this Court should deny the petition for writ of certiorari.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR RESPONDENT

This 23<sup>rd</sup> day of June, 2023.