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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.

APPELLATE CASE NO. 2022-001680

BRIEF OF PETITIONER

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ISSUE 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

Petitioner William Justice was indicted in February 1989 for four counts of second degree burglary, two counts of grand larceny, and two counts of petit larceny. He was found guilty as indicted and sentenced to fifteen years' imprisonment for each count of burglary, twenty years for each count of grand larceny, and one month for each count of petit larceny by the Honorable Marion Kinon. The burglary sentences were ordered to run consecutive to one another but the remaining sentences were all ran concurrently. 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 he 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, now a client of the South Carolina Commission on Indigent Defense, did not have counsel present. 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. Justice 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 an application for post-conviction relief on February 26, 2014. App. 251-265. He alleged that his parole was revoked unlawfully:

> Petitioner was denied the right to confront and question witnesses testifying against him that is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the South Carolina Constitution and the South Carolina Department of Probation, Parole and Pardon Services (see forms stock #36, #1122, and #1124, therefore Due Process was violated[])].

App. 258. The state filed a return to this application on or about May 27, 2015. 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. Anna R. Good represented Justice, and Caitlin Hastings appeared on behalf of the state. 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. Anna Good again represented Justice, and Johanna Valenzuela appeared on behalf of the state. The court heard testimony from Justice and Nikita Cook, Justice's parole agent. At the conclusion of the hearing, the PCR court took the matter under advisement. App. 343 ll. 4-21.

By order filed August 2, 2017, the PCR court denied Justice relief. App. 350. The court found Justice's due process rights were not violated. App. 360-361. Justice filed a petition for writ of certiorari with this Court on May 14, 2018. The state filed a return to this petition on September 28, 2018, and Justice filed a reply on October 8, 2018. 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. The brief of petitioner was filed on November 10, 2020. The state filed its brief of respondent on May 13, 2021. A reply brief was filed on May 24, 2021.

On May 4, 2022, the Court of Appeals issued its opinion, finding the allegations raised by Justice were "profoundly troubling," yet concluding the case was moot because Justice was no longer incarcerated.[1]

Justice filed a petition for rehearing on May 19, 2022. On November 3, 2022, the Court of Appeals denied rehearing. Justice filed a petition for writ of certiorari to the Court of Appeals

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

with this Court on December 6, 2022. The state filed a return on January 23, 2023. By order dated May 23, 2023, this Court granted certiorari.

This brief of petitioner follows.

STANDARD OF REVIEW

South Carolina appellate courts review questions of law *de novo,* with no deference to trial courts, and "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 167-68 (2008)) (internal quotation marks omitted); see also Smalls v. State, 422 S.C. 174, 180-81 n.2, 810 S.E.2d 836, 839-40 n.2 (2018).

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.

Introduction

Through unlawful parole revocation proceedings, the State of South Carolina robbed Petitioner William Justice of over six years of his life. Justice was deprived of numerous due process rights at both 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 instead seemed intent on revoking his parole without any consideration given to fairness, justice, or the law. Coupled with South Carolina's statutory sentencing schemes, the way this appeal has progressed evinces how similar cases are capable of repetition, yet evading review.

Based on the audio recording of Justice's revocation hearing and the uncontested testimony from Justice and his parole agent during the PCR evidentiary hearing, 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 the case was moot. Because Justice has a parole violation on his record, and because this travesty

is going to continue to dodge appellate review, Petitioner Justice respectfully requests this Court hold the issue is not moot and address the underlying merits.

Despite his meritorious claims regarding the illegal parole revocation process, 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—well beyond the time prescribed by S.C. Code Ann. § 17-27-70. Over two years after 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, nearly two-and-a-half years following his release.[2]

William Justice has been unable to receive final review of his PCR application in a span of over nine years. As will be explained below, the Court of Appeals misapprehended the mootness doctrine and erred in applying it to this case. In exploring the rigged and practically unwinnable parole revocation procedures faced by indigent South Carolina citizens, an introduction to their most basic due process rights is enlightening.

Due Process Rights in Revocation Proceedings

Justice was denied multiple rights afforded to him by the United States Constitution and years of United States Supreme Court precedent.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

U.S. Const. amend. XIV.

Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review. See State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006).

An outline of the applicable due process rights in this setting can be found in Morrissey v. Brewer, 408 U.S. 471 (1972). In Morrissey, two petitioners' paroles were revoked without a hearing. 408 U.S. 471. Through *habeas corpus* proceedings, they maintained they were deprived of their due process rights under the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court granted certiorari, and in a landmark opinion, held that due process rights are afforded to parolees.

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 (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 parolee 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.

In the case at bar, Justice was therefore entitled to numerous due process protections according to Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). In Gagnon, the United States Supreme Court was faced with the question of whether "an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings." Id. at 783. The Supreme Court started its analysis by looking at Morrissey, which established the minimum requirements of due process for parole revocation. Those basic minimum requirements were not met in Justice's case.

The Supreme Court noted that "the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess." 411 U.S. at 786. The Gagnon Court concluded that the entitlement of counsel should be determined on a case-by-case basis. The Court offered guidance on how to make this determination:

> [C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the condition upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

411 U.S. at 790-91.

Relevant Facts and Procedural History

Petitioner 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 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 recording of the October 2013 revocation hearing validated Justice's written PCR allegations as well as his testimony at the PCR hearing. See CD Containing Audio of Justice's Parole Revocation Hearing. Facing unsatisfied time of over eighteen years, Justice listened to his parole agent list largely uncorroborated allegations. Following her presentation, Justice, who was unrepresented, was asked if there was anything he wanted to "add in this case" following the allegations by the parole agent. Audio 2:37.

Justice asserted 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. Audio 2:39 – 3:06. He was met with an immediate "no" from the parole board member who was speaking. Audio 2:39 – 3:06. 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. Critically, the board member was provided a revocation packet containing violation descriptions. Justice was not provided this packet.

After notifying the parole board that he was deprived of his constitutional rights, 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] Audio 2:39 – 5:11. Notably, Justice denied the allegation that he had hit anyone with a metal pipe. Audio 2:39 – 5:11. As he continued to explain what happened, 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 Justice 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.[4] After hearing from Cotton, the decision was made to revoke Justice's parole. Audio 10:06 – 10:11.

Justice knew 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:

> [On] August 27, 2013, Petitioner was denied his right to confront and question the adverse witnesses testifying against him at his preliminary hearing when the hearing officer left the room and took testimony from the adverse witnesses outside

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

[4] It is unknown whether the South Carolina Rules of Evidence apply, or are enforced, at these hearings.

> the presence of the Petitioner. (Orally taped by the hearing officer and witnessed by Ms. Cook, his parole agent. (On record)[)].
>
> [On] October 16, 2013, Petitioner was again denied his right to confront and question the adverse witness at his Revocation Hearing by the Parole Board itself, cutting the Petitioner off when he tried to question the witness ... who was sitting right next to him. (Video Taped by the Parole Board and witnessed by Ms. Cook, his parole agent). (On record).

App. 258-259.

Included in Justice's PCR application were the forms he listed, #26, #1122, and #1124. App. 260-262. Each of these forms indicates that Justice had a right to confront and question any person who appeared as a witness against him, and as was explained *supra*, the law requires that he be afforded that right as well as others.

Despite clear statutory language in the South Carolina Uniform Post-Conviction Relief Act, 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 and factual history 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. As articulated by PCR counsel in response to the motion to dismiss, Justice's matter was correctly brought under the PCR statute:

> To start off with, the stated statute, South Carolina Code Section 17-27-20(a), a person who has been convicted of or sentenced for a crime can file a PCR ... if his parole or conditional release is unlawfully revoked. It is our position ... that it was unlawfully revoked in the sense of a due process claim."

App. 281, ll. 16-23.

In particular, PCR counsel argued that testimony was taken from witnesses who Justice was neither able to hear nor cross-examine. App. 281, l. 23 – 282, l. 2. Additionally, Justice asked

for but never received copies of the incident reports related to his arrest which set in motion the revocation proceedings. App. 282, ll. 3-17.

The state then argued that Justice's claims were "inappropriate for a PCR review." App. 283, l. 5 – 284, l. 1. Citing S.C. Code Ann. § 24-21-680, the state averred that decisions by the Parole Board cannot be appealed. Id. In response, PCR counsel argued that Justice's parole was unlawfully revoked and that the claim was therefore properly brought under the PCR statute:

> The argument is that he was unlawfully revoked and that he did not have the opportunity under [the due process clause] to cross-examine or see any of the evidence against him or to hear the evidence that was - - the opportunity to counter that against the Parole Board and in the initial preliminary hearing at the Kershaw jail, because I believe that they were also present there, Your Honor.

App. 285, ll. 12-23.

The state then provided the due process requirements under Morrisey v. Brewer 408 U.S. 471 (1972):

> [I]n regards to the Applicant's argument of not being able to confront the witnesses, the United States Supreme Court case of Morrisey v. Brewer lays out the minimal requirements of due process for a parole revocation hearing and talks about how parole revocation hearings and administrative hearings are criminal hearings. Therefore the applicant is entitled to less procedural protections, in that the hearings are not meant to be flexible and lays out specifically what the minimal requirements are.
>
> Those requirements are written notes of the claimed violations of parole; disclosure to the parolee of evidence against him; an opportunity to be heard in person, and to present witnesses and documentary evidence; the right to confront and examine witnesses unless the hearing officer **specifically** finds good cause for not allowing confrontation; a mutual and detached hearing body, such as a traditional parole board; and a written statement by the fact finders as to the evidence relied and the reasons for revoking parole.
>
> In this case, the State finds that the hearing officer had more than good cause to disallow the confrontation of the two adverse witnesses.

App. 286, l. 11 – App. 287, l. 19. (emphasis added).

The PCR court asked counsel for the state whether such a specific finding of good cause was made:

Court:	Did the judge make that finding?
Counsel:	(No verbal response).
Court:	Doesn't it require the judge, the actual parole officer, to make that finding?
Counsel:	(No verbal response).
Court:	What does it say?
Counsel:	Uh, - - -
...	
Court:	And I don't think that there is an Order- - is there an Order in my packet that makes - - is there an Order from the Parole Board?

App. 287, l. 20 – 289, l. 19.

The state admitted that such a finding could not be located in the parole hearing Order or the administrative hearing summary. App. 289, l. 20 – 290, l. 7.[5] Following additional discussion, the PCR court denied the state's motion to dismiss:

> I think on the second ground - - I mean ... it sounds like they have a right to confront witnesses unless - - according to what you read to me - - there are specific findings saying that would not be appropriate.
>
> In my review of that Order, the judge addresses that there are issues back and forth between the people but there's not a specific finding that that wouldn't be appropriate. So - - unless you have something else, I think this needs to proceed forward and actually have - - I believe it is the Court's position that your Motion should be denied.

[5] This discussion notwithstanding, the order of dismissal still contained language that seems to suggest a lack of such a finding could be held against Justice: "This Court finds that while it is unclear of whether there was a finding on the record of danger to the witnesses, there is testimony that the parole agent knew the witnesses had been allegedly subject to a physical attack by Applicant." App. 361. It is unclear who drafted the order of dismissal.

App. 291, ll. 4-18.

Following the denial of the state's motion to dismiss, an evidentiary hearing was held before Judge Griffith on February 1, 2017. App. 298. Two exhibits were entered into evidence, a violation report and a script utilized by Cook. App. 347-349.

At the evidentiary hearing, 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. Once of the alleged parole violations involved contact with his prior employer. App. 301, l. 19 – 302, l. 21. The other two parole conditions the state claimed he violated were a payment arrearage and drinking to excess. App. 301, l. 19 – 302, l. 21.

Justice told the PCR court that his parole revocation preliminary hearing was initially attempted but then rescheduled due to technical difficulties with the telephones. App. 302, l. 23 – 303, l. 12. The preliminary hearing was ultimately 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 – 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 she claimed. App. 304, ll. 7-14. As a result, Justice was unable to respond to any allegations made by either witness or cross-examine them. App. 304, ll. 7-14.

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. App. 305, ll. 2-18. 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 – 305, l. 1. All in all, 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 Institution in October 2013. App. 305, ll. 19-25. His recollections of this hearing over two years later, when compared to the audio recording, were 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. App. 306, ll. 1-12. Once more, Justice was denied his right to confront either Cook or Cotton regarding the allegations leveled against him. App. 306, ll. 9- 25. He was unaware whether Cotton or her daughter-in-law, both whom attended the hearing, spoke to the parole board. App. 306, ll. 9- 25. He was denied the opportunity to confront either at the hearing in October. App. 306, l. 21 – 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:

> I asked a gentleman that was sitting out there with us that rode down with us, I don't know his name, he was sitting with me and Ms. Cook. I said, "How do I go about getting a lawyer so I can prove some of this stuff is false?" He said it's too late for that.

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: "I left my truck at her house and she text[ed] me and said your truck's on the way and I text[ed] her back. I said okay." App. 310, ll. 13-23. Justice also disputed the late payment allegations. App. 311, ll. 3-13. He testified that his parole agent always allowed him make his payments at the end of the month when he came in to report. App. 311, ll. 3-13.

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. App. 312, l. 3 – 313, l. 22. Perhaps the most noteworthy line from the entire PCR hearing came during this exchange between Justice and PCR counsel:

> Q: And everything that you just explained about this fight and them coming to your home that you just testified to, at your parole revocation hearing were you able to tell the parole board about that?
>
> A: **This is the first time three and a half years later that I have had an opportunity to tell my side of the story.**

App. 317, ll. 5-12. (emphasis added).

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." App. 320, ll. 18-24. 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 – 323, l. 4.

When asked whether Justice was provided that evidence, Cook testified that *he was shown none of it*: "probably not because usually they go out and hire an attorney and you give all that information to the attorney." App. 323, ll. 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 – 333, l. 1. However, even the attorneys at parole hearings are traditionally limited in their advocacy, according to Cook: "In 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, ll. 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.[6] 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. App. 333, ll. 2-25. 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." App. 334, ll. 1-11.

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. App. 336, ll. 3-24. However, in the matter *sub judice*, it was just the hearing officer who went and spoke with the witnesses. App. 336, ll. 3-24. **Justice was not allowed to go and confront or cross-examine either witness.** App. 336, ll. 3-24.

Respondent's Exhibit No. 1, Cook's script, was made an exhibit during the evidentiary hearing. App. 324, l. 2 – 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. The following exchange then took place between PCR counsel and Cook regarding Justice's due process rights:

Counsel: Did Mr. Justice get a copy of that packet?

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[6] Justice Hugo Black noted the distinction between a paroled prisoner and one presumptively innocent of crime: "He can be rearrested at any time the board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime." Jones v. Cunningham, 371 U.S. 236, 242 (1963).

Cook: No.

Counsel: Why not?

Cook: Because he's not an attorney.

App. 334, ll. 22-25.

Cook admitted 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, Justice did not "get to say anything to the parole board to defend himself." App. 335, ll. 17-23. PCR counsel succinctly summarized in closing remarks the unconstitutional nature of the two parole revocation hearings in this case:

> Mr. Justice was not allowed to have due process in his parole violation hearing. There were two separate hearings. The original preliminary hearing as well as the second parole hearing. You heard Ms. Cook testify that she did not give - - Mr. Justice did not even have the opportunity to have a copy of any of the paperwork or packet because he did not have an attorney. He was representing himself, Your Honor. We believe he should have been allowed to have a copy of the packet. In addition, there was no finding in any of these records. ... There was no finding anywhere that was determined whether there was any extraordinary circumstances or not and he testified that he did ask for an attorney ...
>
> He was not allowed to address the parole board. [Cook] indicated he's not allowed to have open dialogue. They may have asked him a couple of questions, however, she remembers them cutting him off and not letting him necessarily speak. So we would say, Your Honor, that he was not given due process in this hearing. He was not allowed to confront the witnesses. They were at the original preliminary hearing and we believe they were at the second hearing also, Your Honor. They spoke to the parole board. So we would ask that you grant the PCR and allow him to have a full parole revocation hearing.

App. 340, l. 3 – 341, l. 25.

During each of the hearings in Justice's PCR matter, the PCR court admitted it was not familiar with various portions of the parole process. App. 289, ll. 20-23; App. 343, ll. 4-14. At the end of the evidentiary hearing, the court took the matter under advisement. App. 343, ll. 4-22.

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 of harm 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.[7] 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. 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 with this Court on August 16, 2017. The petition for writ of certiorari was filed on May 14, 2018. The state's return was filed on September 28, 2018. A reply to the return was filed on October 8, 2018. This Court transferred the case to the Court of Appeals

[7] 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 the Petition was 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.

on January 8, 2019. Certiorari was granted on June 30, 2020. An amended order granting certiorari was filed on July 9, 2020 for the following issues:[8]

I. Did the PCR court err by denying Petitioner relief, where Petitioner was denied the minimum level of due process, including his right of confrontation and cross-examination of witnesses at two parole revocation hearings in contravention of the longstanding United States Supreme Court decision Morrissey v. Brewer which guarantees parolees such a right, and where there was no testimony presented from the State's only witness, Petitioner's parole agent, that either the administrative hearing officer or the parole board made a specific finding that any of the witnesses would be subjected to harm or that good cause existed for not allowing confrontation?

II. Did the PCR court err by denying Petitioner relief, where Petitioner was likewise denied his right of disclosure of evidence against him, his right of an opportunity to be heard in person and to present witnesses and documentary evidence, and his right of a written statement by the factfinders as to the evidence relied on and reasons for revoking parole which are likewise constitutionally protected, and where Petitioner also received disparate treatment based upon his *pro se* nature?

III. Whether South Carolina's statute outlawing the right to confront witnesses at a parole revocation hearing fails to meet the minimum requirements of the Due Process Clause of the Fourteenth Amendment and as a result is flagrantly unconstitutional?

Mootness was briefed as a fourth issue. The brief of petitioner was filed on November 10, 2020. After initially missing the deadline, the state's brief of respondent was filed on May 13, 2021. A reply brief was filed on May 24, 2021. 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 of Appeals concluded the case is moot.

Discussion

Petitioner William Justice was sentenced to four consecutive fifteen year sentences in 1989. Despite a sixty-year aggregate sentence, the unconstitutional parole revocation procedures

[8] The Court of Appeals initially asked the parties to address whether the Court had jurisdiction and then modified the instructions to reference mootness, instead.

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 procedure have a meaningful remedy, namely the same one that failed to secure relief for Justice.[9]

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

The Court of Appeals' Opinion

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, 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

[9] Even by the Court of Appeals' incorrect interpretation of mootness, Justice's case was not moot for the 1,049 days between the filing of the Notice of Appeal and the grant of certiorari.

constitutional deprivations, complete with sworn testimony[10] that this exact situation will continue to occur, Justice's case was dismissed.

The Court of Appeals held, "While 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 reincarcerated. 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 hypothetical inmate was released within three years, his case would be moot under the Court of Appeals' reasoning and the timelines experienced by Justice. App. 317, ll. 5-12.

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[10] As stated in the reply brief of petitioner at the Court of Appeals, "Nikita Cook's testimony at Mr. Justice's PCR hearing is an unequivocal roadmap of why this case is capable of near-certain repetition." RBOP p. 8; see generally App. 322-335 (testimony of Agent Cook admitting the occurrences in Justice's case are standard operating practices).

Justice filed his PCR application on February 26, 2014. The state's return was filed fifteen months later.[11] 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 in the brief of petitioner and reply brief of petitioner filed with the Court of Appeals.

Consider, in the alternative, this hypothetical individual's appeal. Assuming *arguendo*, that the individual remained incarcerated, as Justice did, following the denial of post-conviction relief: after a notice of appeal, petition for writ of certiorari, and return are filed with this Court, the PCR appeal can be transferred to the Court of Appeals. The Court of Appeals 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.[12]

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

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[11] 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.

[12] See Stephenson v. Campbell, No. 2:06-CV-01929-NRS, 2009 WL 426026, at *1 (E.D. Cal. Feb. 19, 2009) (dismissing as moot an inmate's appeal after parole was granted a second time); see also Robledo-Valdez v. Trani, No. 12-CV-02203-WYD, 2013 WL 3216093, at *1 (D. Colo. June 25, 2013) (same).

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:

> The Department [of Corrections] responds that the duration of the challenged activity must, "by its very nature," be too short to be fully litigated. The exception does not apply, says the Department, because the term of an offender's re-incarceration is not, "by its very nature," too short a period to litigate a habeas corpus proceeding. The Department undermines its own position. If the re-incarceration term is subject to the Department's broad discretion, then the term, "by its very nature," **could always be shortened by the Department to moot an offender's habeas corpus petition.**
>
> Based on this analysis, we hold that the issues Young raises are capable of repetition yet likely to evade review. Accordingly, we will not dismiss this appeal as moot.

State ex rel. Young v. Schnell, 956 N.W.2d 652, 663 (Minn. 2021) (emphasis added and internal citation omitted).

These problems are not unique to South Carolina or Minnesota. In 2013, a class action lawsuit was filed against the Illinois Department of Corrections and the Illinois Prisoner Review Board stating that the parole revocation process in Illinois violated due process rights of parolees who were reimprisoned for alleged parole violations without an adequate hearing and access to legal counsel. Morales v. Monreal, Case No. 13-CV-07572.[13] Parolees were unable to speak on their own behalf at these hearings, unable to present evidence in their defense, and unable to cross-examine adverse witnesses. Complaint ¶ 16. In short, they were not receiving substantive hearings before a fair and unbiased decisionmaker ("The Defendants have, in effect, created a procedural

[13] Complaint and Final Settlement Agreement available at https://www.macarthurjustice.org/case/morales-v-monreal/ (last accessed June 27, 2023) [https://web.archive.org/web/20221129142603/https://www.macarthurjustice.org/case/morales-v-monreal/].

vortex from which people on parole cannot escape."). Complaint ¶ 5. A settlement agreement was reached between the parties.

Identical deprivations are occurring in South Carolina, and 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 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.

Mootness: Capable of Repetition but Evading Judicial Review Exception

An opinion from 1895 is generally understood to be the first United States Supreme Court decision directly addressing the mootness doctrine. Mills v. Green, 159 U.S. 651 (1895). Interestingly, Mills involved the election of delegates to a convention to revise South Carolina's constitution. Id. at 652. A South Carolina citizen filed suit, claiming the state's voter registration statutes unconstitutionally "abridge[ed], imped[ed], and destroy[ed] the suffrage of citizens of the state and of the United States." Id. at 651-52. While the case was pending on appeal, the date of the delegate election for the convention passed, the delegates were selected, and the constitutional convention was assembled. Therefore, the Court held that "the whole object of the [plaintiff's

lawsuit] was to secure a right to vote at the election." Id. at 657. The matter was therefore dismissed.

Since then, however, the Supreme Court has generally *declined to deem cases moot* that present issues or disputes that are "capable of repetition, yet evading review."[14] 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)[15] (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). Once a woman gives birth, abortion is no longer an option for terminating that particular pregnancy. However, almost any litigation of significance—especially if it involves an appeal—can rarely be fully resolved in a mere nine months. If a challenge to an abortion regulation became moot as soon as the challenger gave birth, "pregnancy litigation seldom w[ould] survive much beyond the trial stage, and appellate review w[ould] be effectively denied." Id.

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[14] See, e.g., Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 170 (2016); Turner v. Rogers, 564 U.S. 431, 439-41 (2011); Davis v. FEC, 554 U.S. 724, 735-36 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007); Norman v. Reed, 502 U.S. 279, 287-88 (1992); Int'l Org. of Masters, Mates & Pilots v. Brown, 498 U.S. 466, 472 (1991); Meyer v. Grant, 486 U.S. 414, 417 n.2 (1988); Honig v. Doe, 484 U.S. 305, 317-23 (1988); Burlington N. R.R. Co. v. Bhd. Of Maint. Of Way Emps., 481 U.S. 429, 436 n.4 (1987); Brock v. Roadway Express, Inc., 481 U.S. 252, 257-78 (1987); Press-Enter. Co. v. Super. Ct. of Cal. for Cty. Of Riverside, 478 U.S. 1, 6 (1986); Globe Newspaper Co. v. Super. Ct. for Cty. of Norfolk, 457 U.S. 596, 603 (1982); Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 115 n.13 (1981); Gannett Co. v. DePasquale, 442 U.S. 368, 377 (1979); Bell v. Wolfish, 441 U.S. 520, 526 n.5 (1979); First Nat'l Bank of Bos. V. Bellotti, 435 U.S. 765, 774 (1978); United States v. N.Y. Tel. Co., 434 U.S. 159, 165 n.6 (1977); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546-47 (1976); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 125-27 (1974); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-16 (1911).

[15] While Roe v. Wade was overruled last year, mootness was not addressed by the Court in Dobbs v. Jackson Women's Health Organization,142 S.Ct. 2228 (2022).

The Supreme Court has deemed certain other controversies outside of the abortion context as capable of repetition, yet evading review as well. For example, in FEC v. Wis. Right to Life, Inc., an advocacy organization claimed that restrictions on "electioneering communications" established by the Campaign Reform Act of 2002 unconstitutionally prohibited the organization from broadcasting certain political advertisements shortly before the 2004 election. 551 U.S. 449, 457-60 (2007). Even though the case did not reach the Supreme Court until long after the 2004 election had passed, the Court nonetheless concluded that the case was not moot. Id. at 462-64. The Court reasoned that the organization "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads" in advance of future elections, and the period between elections was too short to allow the organization sufficient time to fully litigate its constitutional challenges sufficiently in advance of the election date. Id.; see also Davis v. FEC, 554 U.S. 724, 735-36 (2008) (rejecting mootness challenge in case whose facts "closely resemble[d]" those at issue in Wisconsin Right to Life).

Justice's case contains a similar admission regarding future conduct. 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:

Q: So you have the hearing officer and you're present at that meeting and did you present witnesses to support the different violations?

A: I don't recall. Uhm, I think I may have had statements from him and I do remember a printout as he said from a cell phone.

Q: **Would you have shown any of that information to the applicant?**

A: **Uhm, probably not because usually they go out and hire an attorney and you give all that information to the attorney.**

Q: Okay. In this instance he elected not to hire an attorney?

A: Correct. Uhm, when you're actually read your rights to go to a hearing, it basically states that you will have the right to hire an attorney. An attorney will not be appointed except in the most extraordinary circumstances.[16]

App. 322, l. 24 – 323, l. 15 (emphasis added).

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 noncompliance with the law:

Q: Did Mr. Justice get a copy of that packet [that was given to the parole board prior to the hearing]?

A: No.

Q: Why not?

A: Because he's not an attorney.

Q: So if he was representing himself, would you not have been able to give him the packet?

A: **It's not standard procedure to.**

App. 334, l. 22 – 335, l. 3 (emphasis added).

The admission from a parole agent employed by the State of South Carolina unambiguously defies federal jurisprudence. 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, 608 N.W.2d 425 (Wis. 2000). Olson was imprisoned for sexual assault and reached his mandatory release date

[16] Cook testified she has never, in her entire career, seen a parole examiner appoint counsel to represent an indigent parolee. App. 332, ll. 13-23.

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 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."[17] 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:

> To begin with, we note that with the recent passage of "Truth in Sentencing," ... this issue will cease to arise as mandatory release on parole for felony offenders will be a thing of the past. But a similar situation could conceivably occur under the "Truth in Sentencing" legislation because of the new requirement that felony sentences be bifurcated to include both confinement and extended supervision. Currently, offenders for whom a suitable residence has not been found are incarcerated beyond their mandatory release dates. **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 (emphasis added and internal citations omitted).

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.,

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

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 counsel who filed suit at the circuit court.[18] Id. at 429-30, 468 S.E.2d at 863. Following the circuit court's dismissal under Rule 12(b)(1) and 12(b)(6), SCRCP, the student sought an appeal, alleging three grounds of error against the circuit court. 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:

> Applying this standard, we find that even if it is assumed that the issue in the present case is moot, it is an issue that is capable of repetition, but which will evade review. Short-term student suspensions, by their very nature, **are completed long before an appellate court can review the issues they implicate.** Therefore, we conclude that the present case clearly fits into the evading review exception of the mootness

[18] The student also petitioned this Court for supersedeas, which was denied. Id. at 430, 468 S.E.2d at 863.

> doctrine, even if it were not otherwise appropriate for the Court to address this appeal.

Id. at 432, 468 S.E.2d at 864 (emphasis added).

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 reincarceration 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 of Appeals cited Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) for the three primary exceptions to the mootness doctrine, including the capable of repetition but evading review exception. Id. at 582, 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. Applying a similar rationale as discussed above, the Court held:

> [T]he State concedes in its brief: "the sentence was in fact too brief to be fully litigated through appeal prior to its expiration..." The issue, then, is whether the constitutional violation suffered by Appellant could be inflicted on a contemnor in the future. **That the unconstitutional sentence was imposed here is evidence enough a judge could make the same error in the future.**

Id. at 582, 611 S.E.2d at 281 (emphasis added).

In the Court of Appeals opinion in the instant case, reference was made to Passmore only to the extent that she suffered collateral consequences following a conviction. In doing so, the Court overlooked the portion of Passmore described herein, namely that unconstitutional actions are indisputable evidence that the same conduct is capable of reoccurring. Without a decision from this Court, future parolees will continue to be illegally incarcerated.

The Court of Appeals relied on two other cases in determining Justice's matter is moot: Seabrook v. City of Folly Beach, 337 S.C. 304, 523 S.E.2d 462 (1999) and Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). Each of these opinions are readily distinguishable from the current appeal.

In Seabrook, Appellant Folly Beach imposed conditions on land in the Lowcountry. 337 S.C. 304, 523 S.E.2d 462 (1999). Following the advent of litigation, Folly Beach "voluntarily removed the conditions and approved Respondents' plat and Respondents ... abandoned their taking claim." Id. at 307, 523 S.E.2d at 463. Therefore, this Court concluded a ruling on the pending issues would have no practical effect. Id. Additionally, although the factual scenario was capable of repetition, according to this Court, "it does not evade review, and would have been clearly reviewable had Folly Beach not voluntarily removed the conditions and Respondents abandoned their taking claim." Id.

Seabrook is inapplicable to the matter at bar; there is clear and unambiguous testimony that constitutional deprivations are going to reoccur. Further, no claims have been abandoned. Based on the timeline that has occurred in this case, future cases will continue to evade review.

Seven years later, this Court issued Sloan, which involved a Freedom of Information Act (FIOA) dispute. Unlike Justice's case, the organization from which documents were sought actually provided the information after litigation ensued, meaning the matter was resolved ("Because the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment."). Sloan, 369 S.C. at 26, 630 S.E.2d at 478. Sloan also admitted "his interest in this matter is purely academic." Id. This concession is not present in the current case. This Court compared Seabrook to Sloan:

> The instant case is analogous to Seabrook. Although Friends admits that the current situation is capable of repetition, it does not evade review. Should another person bring an action against Friends for a violation of FIOA and Friends fails to produce the requested documents, the Court will have the opportunity to review the issue.

Id. at 27, 630 S.E.2d at 478.[19]

Neither of these cases involved an incarcerated individual who was locked up in accordance with the state's indifference to the law. The Court of Appeals erred in relying on them.

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

[19] A South Carolina citizen may apply for a declaratory judgment and/or injunctive relief to enforce the provisions of FIOA. S.C. Code Ann. § 30-4-100. After such a filing is made, "the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties." Id. Attorney's fees and costs may be awarded under this section as well. Id.; see also S.C. Code Ann. § 30-4-220(C). The PCR statutory scheme is not as favorable to applicants.

of Summerville, 433 S.C. 473, 860 S.E.2d 352 (2021). In doing so, this Court nonetheless reiterated that the scope of review includes appellate review:

> 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. Even if the issues related to alleged FIOA and ordinance violations by the Board are capable of repetition, they do not evade review. Here, Petitioners' appeal became moot because the Developer decided to abandon the Project, not because Petitioners had insufficient time to challenge the Board's approval before the controversy ended.

Id. at 480-81, 860 S.E.2d 352, 356 (internal citation omitted).

To date, 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.

Prison Sentences and Parole in South Carolina

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.[20] S.C. Code Ann. § 24-13-100. Therefore, an inmate who was eligible for parole, received it, and then had his parole revoked only has a limited number of years remaining on his sentence. As a result,

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[20] See generally Buchanan, Matthew, S.C. Department of Probation, Parole and Pardon Services, p. 10, https://sccid.sc.gov/resource_bank/uploads/conferences-and-cles/2020-annual-public-defender-conference-092020/Buchanan_DPPP-Update_PDCon2020.pdf (last accessed June 27, 2023) [http://web.archive.org/web/20210901235152/https://sccid.sc.gov/resource_bank/uploads/conferences-and-cles/2020-annual-public-defender-conference-092020/Buchanan_DPPP-Update_PDCon2020.pdf].

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.[21] This calculation entails consideration of good time credit under S.C. Code Ann. § 24-13-210 and earned work and education credits under S.C. Code Ann. § 24-13-230. Parole was available to Justice after serving one-third of his sentence:

> Burglary in the second degree pursuant to subsection (B) is a felony punishable by imprisonment for not more than fifteen years, provided, that no person convicted of burglary in the second degree pursuant to subsection (B) shall be eligible for parole except upon service of not less than one-third of the term of the 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'

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[21] 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 June 27, 2023) [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].

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 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, nonviolent offenses in order to receive complete judicial review. If Justice's case evades judicial review, almost every single other case will too.

The opinion the Court of Appeals filed 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[22] as they seek finality through the judicial process, it is unlikely that a future parolee who received a combination of consecutive parole eligible nonviolent offenses totaling less than sixty aggregate years will receive judicial review before the brief period of reincarceration 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

[22] 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.

the mootness doctrine recognizes this real world problem. The Court of Appeals erred in passing on real world constitutional violations.[23]

Our jurisprudence is replete with recent cases where courts have relied on exceptions to the mootness doctrine to reach the merits. Three 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. Additionally, in S.C. Pub. Int. Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 121-22, 804 S.E.2d 854, 860-61 (2017), this Court concluded that the issue of whether SCDOT could inspect bridges inside private, gated communities is one that is capable of repetition yet will generally evade review.

Collateral Consequences

Additionally, Justice's criminal record now contains at least one additional violation.[24] 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

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[23] In a different case where the petitioner had been released from prison, the Court of Appeals nonetheless issued an unpublished opinion earlier this month. Green v. State, 2023-UP-250 (S.C. Ct. App. filed June 21, 2023). According to a C-track entry on June 2, 2022 in that case, mail addressed to Mr. Green was returned because he had been released from Lieber Correctional Institution. Although perhaps distinguishable from a parole revocation PCR, it is worth noting the Court of Appeals nonetheless addressed the merits despite Green's release. There was no reference to mootness in the opinion. Notably, the petition for writ of certiorari in Green was filed in 2018.

[24] "[SLED] may disseminate criminal history record information, unless sealed, to private persons, governmental entities, businesses, commercial establishments, professional organizations, charitable organizations and others. The dissemination of criminal history record information will include all unsealed conviction data, non-conviction data and non-disposition data as well as findings of not guilty, nolle prosequi, dismissals, and similar dispositions which show any final disposition of an arrest." S.C. Code Ann. Regs. 73-23. These records include, among other things, parole records. S.C. Code Ann. Regs. 73-27(C).

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 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); see also 5 AM.JUR.2D Appellate Review § 649 (1995). In State v. Passmore, the appellant made similar contentions regarding collateral consequences:

> Although Appellant's time has been served, she may yet experience the repercussions of having been sentenced to a year in prison for contempt of court. For example, she might be obliged to indicate jail time served on an employment application. Thus, the sentence could affect her ability to obtain future employment. Likewise, she could be required to disclose the conviction on a credit application, thereby hindering her chances of securing credit. Further, drivers' license applications, voter registration applications, and other documents may mandate the divulgence of prior convictions. Hence, Appellant's unconstitutional conviction will continue to stigmatize and prejudice her. These significant collateral consequences are enough to surmount the mootness doctrine.

363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005).

Unconstitutionality of S.C. Code Ann. § 24-21-50

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 (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; Gagnon, 411 U.S. at 786.

The South Carolina General Assembly amended S.C. Code Ann. § 24-21-50 in 1995 to include the emphasized sentence below, in direct violation of the United States Supreme Court's holding in Morrissey v. Brewer, 408 U.S. 471 (1972):

> The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law. *No inmate has a right of confrontation at the hearing.*

S.C. Code Ann. § 24-21-50 (emphasis added).

This statute was referenced in a footnote in Turner v. State, 384 S.C. 451, 454 n.3, 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.") (emphasis added). 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. It is unknown whether this statute affected any policymaking such that the jail rules referenced at the PCR hearing were modified as a result. Regardless, this statute prevents individuals from receiving their due process rights and needs to be held 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:

> At the [preliminary] hearing, the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, person[s] who [have] given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.

408 U.S. 471, 487.

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 in briefing before the Court of Appeals, 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), 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 (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.

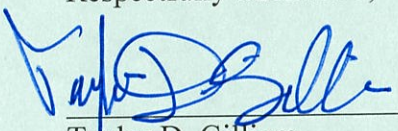
Unable to defend himself because the state failed to recognize the bare minimum panoply of rights that individuals in Justice's position should be afforded, these proceedings were tainted from the start. Simply put, this should not have happened. The law on this front is not ambiguous; it is not hidden. Based on Cook's testimony at the PCR hearing, however, 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 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 argument, Petitioner William Justice respectfully requests this Court reverse the decision of the Court of Appeals, hold the issue raised is not moot, and address the underlying merits. Justice ultimately requests this Court hold his due process rights were violated during his parole revocation proceedings and reverse his parole revocation.

Respectfully Submitted,



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This 30th day of June, 2023.