

No. _____

In the Supreme Court of the United States

WILLIAM BRUCE JUSTICE,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Taylor D. Gilliam
Counsel of Record

University of South Carolina School of Law
Pro Bono Program
1525 Senate Street
Columbia, SC 29201

GilliaTD@mailbox.sc.edu
(803) 777-3405

Attorney for Petitioner

RECEIVED

APR 11 2024

S.C. SUPREME COURT

QUESTIONS PRESENTED

1.

Does South Carolina's parole revocation scheme comply with this Court's constitutional framework, where—in every case—indigent inmates are deprived of their right to cross-examine adverse witnesses, where they are not provided with the packet the parole board receives, and where they are not given a meaningful opportunity to speak in their own defense?

2.

Due to the inherent delays in post-conviction relief proceedings, which often extend beyond a petitioner's period of incarceration, does application of the mootness doctrine constitute an inadequate state procedural bar that would prevent future petitioners from receiving relief, given the underlying due process violations in the case at bar remain unaddressed?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
APPENDIX INDEX	iii
TABLE OF AUTHORITIES	iv
CITATION TO OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	2
QUESTION ONE.....	4
REASONS THE WRIT SHOULD BE GRANTED ON QUESTION ONE	4
QUESTION TWO.....	17
REASONS THE WRIT SHOULD BE GRANTED ON QUESTION TWO	17
CONCLUSION.....	40

RECEIVED
APR 11 2024
S.C. SUPREME COURT

APPENDIX INDEX

Order of Dismissal from South Carolina Circuit Court.....	A1
Opinion of the South Carolina Court of Appeals.....	A14
Petition for Rehearing in the South Carolina Court of Appeals.....	A18
South Carolina Court of Appeals Order Denying Rehearing	A33
Opinion of the South Carolina Supreme Court	A34
U.S. Supreme Court Order Granting Extension	A37

RECEIVED
APR 11 2024
S.C. SUPREME COURT

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Armstrong v. Manzo</u> , 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)	24
<u>Baddourah v. McMaster</u> , 433 S.C. 89, 856 S.E.2d 561 (2021)	35, 36
<u>Beard v. Kindler</u> , 558 U.S. 53, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009)	18
<u>Brown v. State</u> , 423 S.C. 56, 814 S.E.2d 146 (2018)	20, 21
<u>Byrd v. Irmo High School</u> , 321 S.C. 426, 468 S.E.2d 861 (1996)	34, 35
<u>Croft as Tr. Of James A. Croft Tr. V. Town of Summerville</u> , 433 S.C. 473, 860 S.E.2d 352 (2021)	38
<u>Davis v. Wechsler</u> , 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143 (1923)	19
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)	23
<u>Gagnon v. Scarpelli</u> , 411 U.S. 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)	3, 5, 6
<u>Gasca v. Precythe</u> , 83 F.4th 705 (8th Cir. 2023)	23
<u>Hathorn v. Lovorn</u> , 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982)	19, 34, 37
<u>Hayes v. State</u> , 413 S.C. 553, 777 S.E.2d 6 (Ct. App. 2015)	38
<u>Henslee v. Union Planters Nat. Bank & Trust Co.</u> , 335 U.S. 595, 69 S.Ct. 290, 93 L.Ed. 259 (1949)	42
<u>James v. Kentucky</u> , 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984)	18, 37
<u>Jones v. Cunningham</u> , 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963)	13
<u>Justice v. State</u> , 441 S.C. 623, 896 S.E.2d 319 (2023)	1, 4
<u>Lane v. Williams</u> , 455 U.S. 624, 102 S.Ct. 1322	40

<u>Lee v. Kemna</u> , 534 U.S. 362, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002)	18, 19
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893 (1976).....	24
<u>Meese v. Keene</u> , 481 U.S. 465, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987).....	41
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).....	2, 4, 5, 6
<u>NAACP v. Alabama ex rel. Flowers</u> , 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964)	18
<u>Pimentel v. Judges of King Cnty. Superior Ct.</u> , 197 Wash. 2d 365, 482 P.3d 906 (2021)	19
<u>Prihoda v. McCaughtry</u> , 910 F.2d 1379 (7th Cir. 1990)	39
<u>Simpson v. State</u> , 329 S.C. 43, 495 S.E.2d 429 (1998).....	20
<u>Sloan v. Friends of Hunley, Inc.</u> , 369 S.C. 20, 630 S.E.2d 474 (2006)	34
<u>Spencer v. Kemna</u> , 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)	39, 41
<u>State ex rel. La Crosse Tribune v. Circuit Court</u> , 115 Wis.2d 220, 340 N.W.2d 460 (1983)	33
<u>State ex rel. Young v. Schnell</u> , 956 N.W.2d 652 (Minn. 2021)	30
<u>State ex rel Olson v. Litscher</u> , 233 Wis.2d 685, 608 N.W.2d 425 (2000).....	32, 33
<u>State v. Hicks</u> , 387 S.C. 378, 692 S.E.2d 919 (2010).....	15
<u>State v. Passmore</u> , 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005)	36, 37
<u>Staub v. City of Baxley</u> , 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)	29
<u>Tiitsman v. Black</u> , 536 F.2d 678 (6th Cir. 1976).....	6
<u>U.S. v. Dane</u> , 570 F.2d 840 (9th Cir. 1977)	6
<u>Walker v. Martin</u> , 562 U.S. 307, 131 S.Ct. 1120 (2011)	39

Statutes

28 U.S.C. § 1257(a).....	1
S.C. Code Ann. § 1-1-110	21
S.C. Code Ann. § 16-11-312(C)(2)	26
S.C. Code Ann. § 17-27-10.....	3
S.C. Code Ann. § 17-27-70.....	3
S.C. Code Ann. § 17-27-100.....	23
S.C. Code Ann. § 17-27-20(A).....	3, 20
S.C. Code Ann. § 17-27-20(B).....	20
S.C. Code Ann. § 17-27-70(a)	21
S.C. Code Ann. § 24-21-680.....	20
S.C. Code Ann. § 24-13-100.....	24, 25, 26

Rules

Rule 12(b)(1) and 12(b)(6), SCRCP	35
Rule 71.1, SCRCP.....	23
Rule 243(l), SCACR.....	3
Rule 243, SCACR	23

Constitutional Provisions

U.S. Const. amend XIV	1, 5, 24
S.C. Const. art. I, § 3	5, 24
U.S. Const. amend. XIV, § 1	5, 24

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Bruce Justice respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at Justice v. State, 441 S.C. 623, 896 S.E.2d 319 (2023). Appendix 34 (A34).

JURISDICTION

The Supreme Court of South Carolina issued its opinion on December 13, 2023. A34. On March 7, 2024, the Chief Justice extended the time to file a petition for a writ of certiorari to April 11, 2024. A37. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not 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.” Amendment XIV, United States Constitution.

INTRODUCTION

When Mr. Justice received notice of his parole revocation in 2013, he could not have predicted that an opaque system, riddled with inordinate and systemic delays, would creak into motion, just to deny him relief over ten years later. This system—the statutory post-conviction relief scheme and accompanying appellate review process—has been forsaken by the judicial branch in South Carolina. Making matters worse, this is the only avenue by which an inmate can challenge the unlawfulness of parole revocation proceedings. Given the opportunity to right a glaring injustice, the South Carolina Supreme Court improperly affirmed. Mr. Justice’s case is a standalone illustration of why the court’s rationale regarding mootness is illogical and futile.

STATEMENT OF THE CASE

When this matter began in 1989, William Justice received four consecutive fifteen-year sentences on various non-violent property offenses; his total period of incarceration was sixty years in the aggregate. Twenty-three years later, he was granted parole; it was scheduled to take effect from May 3, 2012 until March 6, 2032.

In August 2013, a warrant was issued for Mr. Justice’s arrest, following allegations that he violated four conditions of his parole. He attended two hearings as part of the parole revocation procedures: a preliminary hearing and a revocation hearing. The latter is largely the subject of this appeal; Mr. Justice was not afforded the rights given to him by the United States Constitution as interpreted by this Court in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 779, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

Following the parole revocation, Mr. Justice filed a timely application for post-conviction relief under South Carolina's Uniform Post-Conviction Relief Act: S.C. Code Ann. § 17-27-10 et seq. Under S.C. Code Ann. § 17-27-20(A), "[a]ny person who has been convicted of, or sentenced for, a crime and who claims ... [t]at his sentence has expired, his probation, parole or conditional release **unlawfully revoked** ... may institute, without paying a filing fee, a proceeding under this chapter to secure relief."

The State of South Carolina, represented by the South Carolina Attorney General's Office, filed its Return over a year after Mr. Justice's application was filed.¹ The State's subsequent motion to dismiss was denied, and an evidentiary hearing was held on February 1, 2017. The circuit court heard testimony from Justice and his parole agent, Nikita Cook. An Order of Dismissal was filed on August 2, 2017.

A notice of appeal was filed with the South Carolina Supreme Court, which transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. The court of appeals granted certiorari on June 30, 2020. Following briefing, the court issued its opinion, stated the allegations are "profoundly troubling," yet concluded the case was moot because Mr. Justice was no longer incarcerated.

The case was appealed to the South Carolina Supreme Court, which granted certiorari on May 23, 2023. The opinion was issued on December 13, 2023. Justice v. State, 441 S.C. 623, 896 S.E.2d 319 (2023). The court was "gravely concerned" by the allegations but affirmed the court of appeals based on perceived mootness. No oral argument occurred at either court. This petition follows.

¹ State law requires a response within thirty days. S.C. Code Ann. § 17-27-70.

QUESTION ONE

Does South Carolina's parole revocation scheme comply with this Court's constitutional framework, where—in every case—indigent inmates are deprived of their right to cross-examine adverse witnesses, where they are not provided with the packet the parole board receives, and where they are not given a meaningful opportunity to speak in their own defense?

REASONS FOR GRANTING THE PETITION ON QUESTION ONE

The State of South Carolina is actively defying federal law. Our parole revocation process does not comply with well-established federal jurisprudence and especially hinders indigent inmates who cannot afford to hire an attorney. This Court should act to bring South Carolina into compliance with this Court's well-settled precedent.

I. For Reasons Unknown, the South Carolina Department of Probation, Parole and Pardon Services is Refusing to Recognize Well-Settled Law

"[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 2601, 33 L. Ed. 2d 484 (1972). Justice was denied multiple rights afforded to him by the United States Constitution and unambiguous precedent from this Court. The Fourteenth Amendment is implicated in instances like this; 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.

An outline of the applicable due process rights in this setting can be found in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In Morrissey, two petitioners' paroles were revoked without a hearing. 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Through *habeas corpus* proceedings, they maintained that they were thereby deprived of their due process rights under the Due Process Clause of the Fourteenth Amendment. This Court granted certiorari, and in a landmark opinion, held that due process rights are afforded to parolees.

Prior to revocation, a parolee is entitled to two hearings: a preliminary hearing following arrest and a final revocation hearing. At the preliminary hearing, the parolee is entitled to: (1) notice of the alleged violations of parole; (2) an opportunity to appear and to present evidence; (3) a conditional right to confront adverse witnesses; (4) an independent decisionmaker; and (5) a written report supporting whether or not there is probable cause to hold a final revocation hearing. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (citing Morrissey, 408 U.S. at 487).

At a final revocation hearing, the "minimum requirements of due process" require (1) written notice of the claimed violations; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and the right to confront witnesses; (4) the right to cross examine adverse witnesses; (5) a neutral and detached adjudicator; and (6) a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole. Morrissey, 408 U.S. at 489; see Gagnon, 411 U.S. at 786. Parole revocations implicate liberty interests as well:

It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation... [W]here the prescribed acts are not criminal, due process mandates that [a probationer or parolee] cannot be subjected to forfeiture of his liberty for those acts unless he is given prior fair warning.

U.S. v. Dane, 570 F.2d 840, 843-44 (9th Cir. 1977) (citing Tiitsman v. Black, 536 F.2d 678 (6th Cir. 1976)).

Parole Revocation Hearing

Mr. Justice did not receive any semblance of his right to cross-examine adverse witnesses; he similarly was not provided the packet that the parole board was given, and he was not allowed the opportunity to fully be heard in person. Evidence to support these allegations can be gleaned from both the parole revocation hearing and the resulting PCR hearing.

An audio recording from the October 2013 revocation hearing validates Mr. Justice's written PCR allegations. At the revocation hearing, after notifying the board that he was deprived of his constitutional rights, Mr. Justice provided his account of the circumstances giving rise to the revocation action. 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.

Given approximately two minutes to convince the board not to revoke his parole and send him back to prison, Justice noted at the outset that he was deprived of his right to confront witnesses at the preliminary hearing. He then told the parole board he wished to explain what happened but was met with an immediate "no."

During questioning by the parole board, 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.² Critically, Justice denied the allegation that he had hit anyone with a metal pipe. As he continued to explain the facts, he was interrupted yet again and the parole board put an end to his testimony. Justice was told to step outside the room, and he complied.

Outside of Mr. Justice's presence, two witnesses were introduced to the parole board. These two witnesses, Ms. Cotton and Ms. Wessinger, were afforded much more deference and respect than Mr. Justice. The parole board member did not repeatedly interrupt Cotton; rather, he repeatedly said "okay" and "right as she spoke, signifying interest, openness, and active listening. Cotton was afforded more time to speak than Mr. Justice, and her remarks were rife with objectionable statements.³ After hearing from Cotton, the decision was made to revoke Justice's parole.

² Mr. Justice testified similarly at his PCR evidentiary hearing years later.

³ It is unknown whether the South Carolina Rules of Evidence apply, or are enforced, at these hearings. Regardless, neither Justice nor an attorney was present to object.

Post-Conviction Relief Proceedings

Justice knew that his rights were trampled on, and so at the outset of his PCR action, he concisely pled in his application the following facts which on their face support the contention that his parole was unlawfully revoked:

[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 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).

His PCR application was prepared and filed without the assistance of an attorney. Included in his application were forms promulgated by the South Carolina Department of Probation, Parole and Pardon Services. Each of these forms indicates that Mr. Justice had a right to confront and question any person who appeared as a witness against him, and as was explained herein, the law requires that he be afforded that right as well as others.

Despite clear statutory language in South Carolina's PCR Act, and following an untimely return filed by the state, the uniqueness of this claim resulted in a motion to dismiss being filed by the state. The PCR judge denied this motion.

Following the denial, an evidentiary hearing was held on February 1, 2017. Two exhibits were entered into evidence, 1) a violation report and 2) a script utilized

by the parole agent, Nikita Cook. During his testimony, Mr. Justice detailed the timelines surrounding his revocation as well as the procedures employed.

At the PCR evidentiary hearing, Mr. Justice testified that he was granted parole on May 3, 2012. He was arrested for alleged parole violations in August 2013. App. 301 ll. 11 – 13. He indicated that one of the alleged parole violations involved contact with his prior employer. The other two parole conditions which he recalled the state claiming that he violated were a payment arrearage and drinking to excess.

Justice advised the PCR court that his first parole revocation preliminary hearing was attempted but then rescheduled due to technical difficulties. The second preliminary hearing was held in a conference room at the Kershaw County Jail. In the room with Justice were the parole examiner and Justice's parole officer, Cook. Two witnesses against Justice, his former employer Ms. Cotton and her husband, were present at the facility but not in the conference room.

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

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

the parole board was also provided a revocation packet containing violation descriptions; Mr. Justice was not provided this packet.

Moreover, Justice also requested an attorney on more than one occasion. He was never provided one, because "[t]he parole office doesn't ... appoint lawyers." All in all, Mr. Justice was deprived of his right of confrontation and his right to view the evidence against him. Although he was given time to speak in his own defense, he was unable to respond to each of the allegations; instead, his time to be heard was arbitrarily ended. Further, the current procedures for requesting an attorney appear illusory, such that no indigent individual who is facing parole revocation would ever receive counsel.

Following the hearing in August 2013 at the Kershaw County Jail, Justice attended a second hearing before two members of the parole board at Lee Correctional in October 2013. His recollections of this hearing over two years later, when compared to the audio CD, were remarkably accurate.

At this hearing, Cook made a presentation via a video camera to the partial board which appeared on a screen. As outlined above, 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. Once more, Justice was denied his right to confront either Cook or Cotton regarding the allegations leveled against him. He was unaware whether Cotton or her daughter-in-law, both who attended the hearing, spoke to the parole board. He was denied the opportunity to confront either of them or parole agent Cook at the hearing in October. When asked if he would have wanted to be

able to hear their remarks and ask them questions, Justice answered "[a]bsolutely."

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.

Regarding the alleged drinking violation, Justice presented a medical defense at the PCR hearing. With respect to the claim that he contacted his former employer, he explained that a responsive text message was the basis 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." Justice also disputed the late payment allegations. He indicated that his parole agent always let him make his payments at the end of the month when he came in to report.

On cross-examination, Justice testified that he was defending himself on his own property and never sought violence. He was unsure where the metal pipe allegations came from. 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.

(emphasis added).

After Justice's testimony concluded, Cook took the stand. She described Justice as a "model citizen" during the beginning of his parole. "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." However, Cook testified that she soon thereafter imposed a condition that Justice was not supposed to contact Cotton or her family.

Regarding the parole revocation hearings, Cook was unable to recall whether more than one hearing took place. She averred that she presented a statement and a cell phone printout at one of the hearings.

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." Cook also testified that "[a]n attorney will not be appointed except in the most extraordinary circumstances." 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. Furthermore, there was not a determination, one way or the other, at the initial hearing regarding extraordinary circumstances. App. However, even the attorneys at parole hearings are traditionally limited in their advocacy, according to Cook: "[i]n my most recent experience ... where the offender actually had an attorney, the attorney was not allowed to say a whole lot." Cook

admitted that Justice was not allowed "to say a whole lot" to the members of the parole board. Justice was only allowed to respond to questions, according to Cook. The hearing was "not open dialogue." The state concluded that Justice was therefore treated "similarly to any other person whether represented or not by the parole board." 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.⁴

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. Cook admitted that neither witness was in the same room as Justice. She testified that "if [the witnesses] were present, they may have" spoken to the administrative hearing officer, Mr. Rivers. However, Justice would not have been present for that, according to "the jail's rules."

According to the jail's rules, the hearing officer would have left the conference room and gone to where the witnesses were located. Had Justice been represented, the attorney would have been allowed to go with the hearing officer. However, in the matter *sub judice*, it was just the hearing officer who went and spoke with the

⁴ 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 or 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, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963).

witnesses. Justice was not allowed to go and confront or cross-examine either witness.

Respondent's Exhibit #1, Cook's script, was made an exhibit at the evidentiary hearing. The script was read to the members of the parole board present for Justice's hearing. Cook indicated that the parole board received a packet of information prior to the hearing. 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?

Cook: No.

Counsel: Why not?

Cook: Because he's not an attorney.

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

During each of the hearings in Justice's PCR matter, the PCR court admitted that it was not familiar with various portions of the parole process. At the end of the PCR evidentiary hearing, the court took the matter under advisement.

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. 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.⁵ 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.

Following a notice of appeal, the undersigned began representing Mr. Justice and the case made its way through South Carolina's state appellate courts. The Court of Appeals—our intermediary appellate court—concluded Justice's case was 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. Additionally, and as will be explained in Issue II, Mr. Justice is saddled with the collateral consequence of a parole violation on his record.

The opinion issued by the state 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

⁵ The subject audio was provided to the PCR court at the evidentiary hearing. On December 13, 2018, the South Carolina Supreme Court granted a motion allowing the parties to substitute copies of this recording for the original CD on appeal.

Carolina. The Court of Appeals granted certiorari in the matter *sub judice*, yet instead of receiving appellate review of credible allegations of constitutional deprivations, complete with sworn testimony⁶ that this exact situation will continue to occur, Justice's appeal was dismissed. Although the state supreme court was "gravely concerned" by Justice's allegations, it nonetheless affirmed. A35.

Each court that has reviewed Justice's case has passed on real-world constitutional violations. Under Morrissey, supra, Justice was entitled to disclosure of the evidence against him, an opportunity to be heard in person, the right to confront witnesses, and the right to cross-examine adverse witnesses. These are significant constitutional violations worthy of this Court's intervention.

In the case at bar, Justice was entitled to numerous due process protections according to Morrissey v. Brewer and Gagnon v. Scarpelli, supra. Because the unconstitutional practices of the South Carolina Department of Probation, Pardon and Parole Services did not magically end at the time of Mr. Justice's release, this Court should act to bring South Carolina in compliance with federal law.

⁶ 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." Her testimony admitted the occurrences in Justice's case are standard operating practices.

QUESTION TWO

Due to the inherent delays in post-conviction relief proceedings, which often extend beyond a petitioner's period of incarceration, does application of the mootness doctrine constitute an inadequate state procedural bar that would prevent future petitioners from receiving relief, given the underlying due process violations in the case at bar remain unaddressed?

REASONS FOR GRANTING THE PETITION ON QUESTION TWO

South Carolina has failed to guarantee the bare minimum due process protections in parole revocation proceedings. These constitutional deprivations cannot be excused simply because the individual who properly raised a challenge is no longer incarcerated.

From the date of filing, it took nearly ten years for Justice's post-conviction relief case to be adjudicated by the South Carolina Supreme Court. As will be explained below, this timeline is typical for post-conviction relief petitioners in South Carolina. Mootness, therefore, will always arise since parole-eligible offenses in South Carolina contain a maximum sentence of fifteen years; no constitutional challenge will be completed before an inmate is released. The application of the mootness doctrine cannot be adequate, or petitioners like Mr. Justice will forever be barred from appellate review.

The question of whether a state procedural ruling is adequate is itself a question of federal law. Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). This Court has framed the adequacy inquiry by asking whether the state rule in question was "firmly established and regularly followed." Lee v. Kemna, 534 U.S. 362,

376, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) (quoting James v. Kentucky, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984)); see also Beard v. Kindler, 558 U.S. 53, 60, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297, 84 S.Ct. 1302, 1308, 12 L.Ed.2d 325 (1964) (application of procedural rule was pointless, severe, and consequently inadequate as jurisdictional bar to review).

Mootness creates a procedural bar. See Pimentel v. Judges of King Cnty. Superior Ct., 197 Wash. 2d 365, 373, 482 P.3d 906, 910 (2021). “State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.” Hathorn v. Lovorn, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982).

This Court has also recognized a “limited category” of “exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.” Lee v. Kemna at 376, 122 S.Ct. 877; see also Davis v. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923) (“Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”).

I. Post-Conviction Relief Applicants Face Unreasonable and Exorbitant Delays Caused by Two Different Branches of Government

The circumstances surrounding Justice's case, in concert with the significant delays in PCR cases in South Carolina, paint a plaintive picture in desperate need of correction. To that end, a brief overview of how parole revocation challenges arise is elucidatory.

South Carolina's Uniform Post-Conviction Procedure Act allows for a post-conviction relief ("PCR") application to be filed if an individual claims 1) "[t]hat the conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this State" or 2) "his probation, parole or conditional release [was] unlawfully revoked." S.C. Code Ann. § 17-27-20(A)(1) and § 17-27-20(A)(5). This is the avenue by which Mr. Justice sought to challenge the constitutionality of the parole revocation procedures discussed in Issue 1. Notably, this Act is the exclusive remedy for claims such as Mr. Justice's:

Except as otherwise provided in this chapter, [this remedy] comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

S.C. Code Ann. § 17-27-20(B).

Our state supreme court has also held that "a matter which is cognizable under the [PCR] Act may not be raised in a petition for a writ of habeas corpus before the circuit or other lower courts." Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998). Moreover, state law prohibits a post-revocation appeal to either of South Carolina's appellate courts: "[t]he [parole] board shall be the sole judge as to whether or

not a parole has been violated and no appeal therefrom shall be allowed.” S.C. Code Ann. § 24-21-680. Thus, post-conviction challenges constitute the narrowly drawn avenue for relief.

Although Justice was incarcerated at the time he filed his PCR application, the PCR Act does not require that the applicant be incarcerated; our state’s highest court confirmed as such. Brown v. State, 423 S.C. 56, 814 S.E.2d 146 (2018). Our supreme court extended its holding from another case to conclude “that the Act contains no ‘in custody’ requirement.” Id. at 60, 814 S.E.2d at 147.

Following the filing of a PCR application, the state—represented by the South Carolina Attorney General’s Office—is required to respond within thirty days. S.C. Code Ann. § 17-27-70(a).⁷ As can be seen in Table 1 on the next page, this deadline is frequently (if not always) overlooked. On average, the state takes **two hundred and thirty-six** days to respond. In direct violation of state law, it took fifteen months for the state to file its return at the circuit court level in Mr. Justice’s case.⁸ This delay marks the first instance by which a petitioner’s case is delayed.

⁷ The Office of the Attorney General is part of the executive branch of government in South Carolina. S.C. Code Ann. § 1-1-110.

⁸ South Carolina adopted its version of the Uniform Post-Conviction Procedure Act in 1969. In that span of over fifty years, it is unknown how long the state has been ignoring statutory authority.

Pending PCR cases on appeal (filed through 12/31/2020)							
	Case name	Appellate case #	Date PCR application filed	Date return filed	# of days in between	# of days since filing	# of years since filing
South Carolina Supreme Court	Ron O. Finklea v. State	2019-001104	11/23/2010	12/29/2010	36	4,882	13.37
	Adonis Williams v. State	2023-000168	4/19/2013	10/18/2013	182	4,004	10.96
	Mitchell Hinson v. State	2023-001862	11/4/2016	6/23/2017	231	2,709	7.42
	David J. Benjamin v. State	2023-001435	4/20/2016	1/20/2017	275	2,907	7.96
	Carnie Norris v. State	2024-000216	11/7/2012	3/4/2014	482	4,167	11.41
	Matthew C. Dwyer v. State	2023-000810	5/21/2018	7/30/2018	70	2,146	5.88
	Marion Lindsey v. State	2019-001271	8/6/2009	6/18/2010	316	5,356	14.66
	John Upson v. State	2024-000506	1/23/2017	5/19/2017	116	2,629	7.02
South Carolina Court of Appeals	Shana Robinson v. State	2018-002216	2/5/2016	6/14/2016	130	2,982	8.16
	Jerald D. Gaskins, Jr. v. State	2019-000907	9/14/2017	1/24/2018	130	2,395	6.56
	Jalen T. Badger v. State	2019-001183	10/30/2017	7/9/2018	252	2,349	6.43
	Devatee T. Clinton v. State	2019-001272	2/6/2018	6/13/2018	127	2,250	6.16
	Rodney C. Bryan v. State	2019-001887	2/17/2011	8/2/2011	166	4,796	13.13
	Victor D. Smith v. State	2019-000549	7/9/2014	7/23/2015	379	3,558	9.74
	Michael O. Brown v. State	2019-001677	8/3/2016	6/20/2017	321	2,802	7.67
	Antwon M. Baker, Jr. v. State	2018-001531	12/21/2015	7/15/2016	207	3,028	8.29
	Henry Gray v. State	2019-001127	7/1/2014	11/19/2014	141	3,566	9.76
	James L. Carrier v. State	2019-001090	12/12/2014	4/14/2015	123	3,402	9.31
	Dominic A. Leggette v. State	2018-001793	5/21/2015	2/23/2016	278	3,242	8.88
	John Upson v. State	2018-001674	1/23/2017	5/19/2017	116	2,629	7.2
	Sincere J. Owens v. State	2020-000560	6/19/2015	10/26/2018	1225	3,213	8.8
	Willie M. Williams v. State	2020-000796	12/28/2016	10/5/2017	281	2,655	7.27
	Dennis Cumbee, Jr. v. State	2020-000966	12/11/2017	2/12/2018	63	2,307	6.32
	Earnest M. Allen v. State	2019-002056	10/13/2017	2/16/2018	126	2,366	6.48
	Leonard Brockington v. State	2020-000752	4/13/2015	8/19/2016	494	3,280	8.98
	Fonnelze Delane v. State	2020-000654	2/10/2014	6/30/2014	140	3,707	10.15
	Destiny H. Mills v. State	2020-000013	5/11/2018	8/17/2018	98	2,156	5.9
	Shiquan Tyon Cwiklinski v. State	2019-002075	3/16/2017	9/15/2017	183	2,577	7.06
	Francisco R. Rodriguez v. State	2020-000882	11/21/2016	7/5/2017	226	2,692	7.37
	Julius C. Curry v. State	2019-002004	8/31/2016	6/12/2017	285	2,774	7.59
	Jacoby Fields v. State	2020-001229	8/22/2012	2/21/2013	183	4,244	11.62
	Oshaun J. Robinson v. State	2020-001361	4/25/2017	11/9/2018	563	2,537	6.95
	Levern McCrea v. State	2020-001426	7/11/2012	9/5/2013	421	4,286	11.73
	Maurio D. Rivers v. State	2020-001106	6/1/2016	4/17/2017	320	2,865	7.84
	Marcus Wright v. State	2020-001265	4/24/2017	8/8/2017	106	2,538	6.95
	Justin R. Simms v. State	2020-001432	9/19/2016	2/16/2017	150	2,755	7.54
	Michael Clayton, Jr. v. State	2020-001171	3/19/2019	7/8/2019	111	1,844	5.05
Average					236.03	3,041.38	8.33

Table 1

Following an evidentiary hearing, a final judgment is issued, typically in the form of an Order of Dismissal. From there, an applicant may appeal. S.C. Code Ann. § 17-27-100; see also Rule 243, SCACR. If the applicant is indigent, the Division of Appellate Defense can assume representation. Rule 71.1, SCRCP. This occurred in Justice.

On appeal, the delays continue. As can be seen from Table 1, out of the currently pending appellate PCR actions filed before the end of 2020, it has been an average of over eight years since the initial PCR application was filed. The Eighth Circuit recently noted how the creation of an appeal process triggers due process:

There is no established right to appeal parole revocation decisions. But when a state creates an appeal process, that process must satisfy due process.

Gasca v. Precythe, 83 F.4th 705, 711 (8th Cir. 2023) (citing Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)).

It is important to note that the cases currently pending at the South Carolina Court of Appeals can be appealed to the South Carolian Supreme Court, thus contributing to further delays. An average of over eight years is insufficient, and as will be explained below, parole-eligible inmates will likely be released before their PCR appeals reach finality.

II. South Carolina's Post-Conviction Relief Process Does Not Satisfy Due Process, Particularly for Parole-Eligible Inmates.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) (citing Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). 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.

At the outset, the data contained in Table 1, *infra*, outlines how long the entire review process can take in South Carolina. Mr. Justice was serving a sixty-year sentence, yet his case was nonetheless held to be 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.⁹ S.C. Code Ann. § 24-13-100.

⁹ 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 March 18, 2024) [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].

As can be seen from the below data from the South Carolina Department of Corrections (“SCDC”), over half of the inmates who are released served between one year and five years.¹⁰ As a result, judicial review is unlikely to occur before an individual is released. Repeated constitutional violations are all but guaranteed. Further, according to the same data set, over one-third of releases from SCDC are due to the expiration of a sentence, accounting for “good time” served. *Id.* The average sentence length for fiscal years 2021-2023 is less than five-and-a-half years. *Id.*

Time Served by SCDC Inmates Released Fiscal Years 2021 – 2023

TIME SERVED	FY 2021		FY 2022		FY 2023	
	#	%	#	%	#	%
3 Months or Less	160	2.8%	242	4.2%	194	3.4%
3 Months 1 Day-6 Months	377	6.6%	487	8.5%	559	9.8%
6 Months 1 Day-9 Months	537	9.4%	585	10.2%	669	11.7%
9 Months 1 Day-1 Year	547	9.6%	507	8.8%	589	10.3%
1 Year 1 Day-5 Years	2,994	52.5%	2,182	38.1%	1,523	26.6%
5 Years 1 Day-10 Years	568	10.0%	577	10.1%	190	3.3%
10 Years 1 Day-15 Years	279	4.9%	271	4.7%	271	4.7%
15 Years 1 Day-20 Years	103	1.8%	130	2.3%	121	2.1%
20 Years 1 Day-25 Years	59	1.0%	52	0.9%	64	1.1%
25 Years 1 Day-30 Years	35	0.6%	42	0.7%	47	0.8%
Over 30 Years	47	0.8%	31	0.5%	25	0.4%
TOTAL RELEASES	5,706	100.0%	5,106	100.0%	5,731	100.0%
Average Time Served	3 Years 3 Months		3 Years 7 Months		3 Years 4 Months	

This average does not include inmates with life, death, YOA sentences and inmates released on paid fine, remanded appeal, court order, pardon, resentenced, or death.

¹⁰ Page 2, SCDC FAQ's

https://www.doc.sc.gov/sites/doc/files/Documents/research/SystemOverview/SCDC_FAQs.pdf (last accessed March 18, 2024).

[https://web.archive.org/web/20240318182317/https://www.doc.sc.gov/sites/doc/files/Documents/research/SystemOverview/SCDC_FAQs.pdf]

Inmates serving active time on a parole-eligible offense can earn up to twenty days of good time and an average of ten days of work/education credits per month. According to materials provided by SCDC's general counsel, these individuals, on average, serve between 53% and 65% of their sentences.¹¹

Nonetheless, even with a sixty-year sentence, Mr. Justice's case was deemed to be moot. A typical case would see the same result based on the South Carolina Supreme Court's flawed analysis. Take, for example, a similar burglary in the second degree case:

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).

A hypothetical 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*, the difference between the amount of prison time served before parole (five years) and the 53% average (approximately eight years) is only three years. A PCR in South Carolina cannot be finalized during that short time.

¹¹ Page 4, Bigelow, Christina Understanding Prison Sentences, 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].

Therefore, an individual who was subject to unconstitutional parole revocation procedures 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 when the individual was released. In other words, a defendant would need to be sentenced to *more than sixty years* for parole-eligible, non-violent offenses in order to receive complete judicial review. If Mr. Justice’s case evades judicial review, almost every single other case does, too.

South Carolina’s appellate courts nonetheless recommended future inmates employ an identical approach. This suggestion ensures an identical outcome. Unless something changes, this system of injustice will continue in perpetuity. The opinion issued by the state court of appeals suggests a future inmate “may file a PCR petition, and a court will have the opportunity to rule on the issues at that time.” App. 16. Cases may reach the doorsteps of our appellate courts, but they will never receive a decision on the merits.

Between the significant delays facing PCR applicants as they seek finality through the legal process, it is virtually impossible that future parolees who receive a combination of consecutive parole-eligible non-violent offenses totaling less than sixty aggregate years will receive judicial review before the brief period of re-incarceration following revocation concludes. As such, the state appellate courts’ decision to dismiss the appeal based on mootness was inadequate. The theory of mootness must give way to the realities of these delays.

Mr. Justice filed his PCR application on February 26, 2014. The state court of appeals issued its opinion on May 4, 2022, over eight years later. The state supreme court issued its opinion on December 13, 2023, nearly *ten years* after the filing of the initial application. For nearly every step of the way, Mr. Justice was incarcerated. He was incarcerated at the time he filed his PCR petition. He was incarcerated at the time the Order of Dismissal was issued by the PCR judge. He was incarcerated at the time the Notice of Appeal was filed with the South Carolina Supreme Court. He was incarcerated at the time certiorari was originally granted by the South Carolina Court of Appeals. These timeframes are standard for PCR applicants in South Carolina; mootness is an inadequate bar, where future inmates' cases will see the same result unless this Court intervenes.

In an unrelated PCR appeal where the petitioner won relief at the circuit court level, a lawyer at the South Carolina Attorney General's Office was instructed by the Honorable Mary G. Lewis, District Court Judge for the District of South Carolina, to transmit a copy of a recent Order issued in a federal *habeas corpus* case to the South Carolina Court of Appeals. In that case, the District Court thoroughly explored the delays that PCR applicants face in this state:

As the Court noted earlier, Norris filed his PCR application on November 7, 2012, almost eleven years ago. But, consideration of the state's appeal of the PCR court's granting Norris's PCR application is still pending. Approximately two years of the delay is attributable to the South Carolina Attorney General, who was responsible for scheduling the initial hearing in this matter. The remaining nine years are attributable to delays by Couch [the PCR judge] and the South Carolina Court of Appeals. These inordinate delays are deeply concerning and troubling to the Court as they tend to fray the judicial fabric on which a petitioner such as Norris should be able to rely.

Order Adopting the Report and Recommendation to the Extend Provided Herein, Entry Number 65, Civil Action No. 8.21-3353-MGL-JDA (emphasis added).

That Order was provided to the court of appeals on August 29, 2023.¹² An oral argument was held soon thereafter, and an opinion reversing the grant of post-conviction relief was issued before year's end. The case is now pending at the South Carolina Supreme Court. Notably, the initial application for post-conviction relief was filed on November 7, 2012, over ten years ago. It would seem that federal intervention is required to move PCR cases quicker in South Carolina state courts, despite PCR being a state-created process.

These examples demonstrate why the mootness doctrine is inadequate to support the state courts' decision. Simply put, the logic employed by our appellate courts is fundamentally flawed. Mr. Justice did exactly what was suggested and still never received a resolution on the merits. What will be the result the next time a revocee brings a similar action? This conclusion keeps functional the revolving door of abuse of the very same system that trampled on Justice. Application of the mootness doctrine—sans exceptions—“force[s] resort to an arid ritual of meaningless form.” Staub v. City of Baxley, 355 U.S. 313, 320, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958).

Other states have wrestled with this issue. Minnesota, for example, declined to dismiss a similar appeal based on mootness:

¹² Norris v. State, Appellate Case No. 2019-000334 <https://ctrack.sccourts.org/public/caseView.do?csIID=69375> (last accessed March 18, 2024).

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).

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 re-imprisoned 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 decision-maker (“The Defendants have, in effect, created a procedural vortex from which people on parole

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/>].

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, like in Mr. Justice’s case, could refuse to recognize longstanding and well-established precedent from this Court and thereby egregiously violate a parolee’s constitutional rights. Because PCR cases take too long to wind their way through South Carolina state courts, there exists no avenue to correct a PCR court’s erroneous findings. Such a system breeds contempt of the law.

III. Application of the Mootness Doctrine Ensures Future Constitutional Violations

The risk of leaving the opinion intact revolves around 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.¹⁴

Further, "standard procedure" mandates non-compliance 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.

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

¹⁴ Cook testified she has never, in her entire career, seen a parole examiner appoint counsel to represent an indigent recovee.

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."¹⁵ 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 requested 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).

IV. In Similar Cases, South Carolina Court have Applied Mootness Exceptions to Reach the Merits

As previously stated, "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."

¹⁵ State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis.2d 220, 229, 340 N.W.2d 460 (1983).

Hathorn v. Lovorn, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982). In similar cases, South Carolina applies mootness *exceptions* in order to reach a decision on the merits.

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

In Byrd, a student from Lexington-Richland School District 5 was suspended for ten days after coming onto campus after having consumed alcohol. Id. at 321 S.C. 426, 429 468 S.E.2d 861, 863. After exhausting his appeals through the district’s policies, the family engaged counsel who filed suit at the circuit court. 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), SCRCF, 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 the South Carolina Supreme 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 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).

Matters involving incarceration and due process are 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.

Our state supreme court applied the same exception in Baddourah v. McMaster, 433 S.C. 89, 856 S.E.2d 561 (2021), a case involving the Governor's executive order suspending a city council member. The court "decline[d] to dismiss the appeal under the circumstances present." Id. at 95, 856 S.E.2d 561, 564. "Baddourah promptly challenged the Executive Order when he was first suspended in 2017," much like Mr. Justice promptly filed his PCR action. Id. Regarding the mootness exception, this Court opined:

[T]he appeal concerns issues that are capable of repetition, yet evading review, so they are appropriate for our consideration. The suspension of Baddourah, even if appropriate, resulted in a period of approximately 1.5 years where the residents of District 3 had no representation on the Columbia City Council, so bringing clarity to the questions before the Court is highly desirable for all concerned.

Id.¹⁶

School suspensions, city council suspensions, and parole revocations involve circumstances that exist for a short, fixed time period and will likely be concluded by the time litigation reaches an appellate court. Because the issue may arise again and will almost always face timing challenges, cases like Mr. Justice's should not be dismissed for mootness.

Our court of appeals has also applied the identical mootness exception in order to reach the merits in a case involving a short, fixed time. 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

¹⁶ During the oral argument in that case, counsel for Baddourah indicated that the Respondent's brief contained a statement that "the Governor does this all the time." Oral argument at 1:13 – 1:23, dated October 14, 2020 available at <https://media.sccourts.org/videos/2017-002576.mp4>. Similarly, Mr. Justice's parole agent, Nikita Cook, admitted the occurrences in his case are standard operating procedures.

Court found the “capable of repetition yet evading review” exception and the collateral consequence exception 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).

Justice’s revocation is an illuminating depiction of how unconstitutional practices are widespread and subject to dismissal based on mootness; the exceptions in South Carolina have not been applied in parole revocation cases. Application of the “firmly established and regularly followed” rule from James v. Kentucky, 466 U.S. 341, 348, 104 S.Ct. 1830, therefore lends itself to relief in this context, where uneven and sporadic application of mootness proves how it is not regularly followed; accord Hathorn v. Lovorn, *supra*. Critically, mootness *exceptions* are frequently applied in cases like these in order to reach the merits. Consequently, the mootness bar itself is not regularly employed. South Carolina’s mootness rule, therefore, does not meet the “regularly followed” criterion.

Reviewing—perhaps in a vacuum—a recent description of the mootness exception, a reader would think our state supreme court would have applied it here: “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.” Croft

as Tr. Of James A. Croft Tr. V. Town of Summerville, 433 S.C. 473, 480-481, 860 S.E.2d 352, 356 (2021). To date, Justice's case has evaded review. Coupled with the data in Table 1, future parole-eligible inmates are all but guaranteed to suffer the same fate.

As can be seen from the above examples, mootness exceptions are regularly applied in civil cases and even some criminal cases but not regularly followed in post-conviction relief cases. Appellate review should be accessible regardless of the party, be it a student, city councilman, or inmate. The undersigned has located zero PCR opinions from the South Carolina Supreme Court applying this exception and only one from the Court of Appeals. Hayes v. State, 413 S.C. 553, 777 S.E.2d 6 (Ct. App. 2015). That same court, however, recently dismissed as improvidently granted a case where—similar to the case at bar—the petitioner was no longer incarcerated.¹⁷ In other words, zero inmates have had this exception applied in *parole revocation cases*.

In Walker v. Martin, 562 U.S. 307, 131 S.Ct. 1120 (2011), this Court cited favorably language from Seventh Circuit Court of Appeals: “[a] basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal right asserted. Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990) (internal citations omitted.”

¹⁷ Mitchell v. State, Appellate Case No. 2019-000069 (available at <https://ctrack.sccourts.org/public/caseView.do?csIID=69093>). On January 24, 2024, the court wrote counsel, saying “[o]ur review of the SCDC public inmate search indicates your client may have been released from incarceration. Please confirm within ten days and let us know whether there are any issues remaining for this court to decide.” Following a vociferous response from counsel, the matter was nonetheless dismissed.

It is unclear why South Carolina's appellate courts have indiscriminately refused to apply an applicable mootness exception to a case with widespread Constitutional implications. Cases like this are without a doubt capable of repetition yet evading review. Application of the mootness doctrine is inherently unfair, especially where delays attributable to the executive and judicial branches prevent appellate review by state courts. The state-created remedy has proven incapable of resolving cases in a timely fashion. Civil, non-PCR cases see the mootness exception applied with regularity, while PCR appeals are not granted the same benefit.

V. Justice Faces Collateral Consequences from the Parole Revocation

The undersigned acknowledges that in Spencer v. Kemna, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), this Court ceased presuming that collateral consequences result from parole revocations. Justice's case is distinguishable from Spencer, and the collateral consequences are evident in his life and criminal record.

Unlike Spencer, Mr. Justice does not seek merely to have his reincarceration vacated while letting the fact of the underlying violations of his parole revocation stand. See also Lane v. Williams, 455 U.S. 624, 633, 102 S.Ct. 1322 (stating that Lane did not attack the finding that he had violated his parole). Mr. Justice contests the allegations that he violated his parole; in the alternative, he contends the constitutional deprivations were a structural error. If successful, relief holding that Justice's revocation was unconstitutionally imposed could also vacate any findings regarding the underlying conduct. Accordingly, because effective relief can be granted, a live case or controversy exists, and the case is not moot.

Further, Justice's "rap sheet" lists the parole revocation as a separate offense.¹⁸ In South Carolina, arrest and conviction history is listed in background checks produced by the South Carolina Law Enforcement Division ("SLED"). On Justice's report in particular, on page four, the parole revocation is listed immediately after the 1989 offenses giving rise to his initial incarceration and sixty-year sentence. The parole revocation entry shows the date (October 16, 2013), describes it as a "court charge" and parole revocation, and lists the disposition as CONVICTED.

As such, for Mr. Justice, this is shown as a new conviction and a new offense. Potential employers and landlords have treated him differently as a result. To this day, he faces collateral consequences in his daily life. He has been denied employment and housing; he remains unhoused.

Justice Stevens' dissent in Spencer v. Kemna, supra, bears repeating. Like Randy Spencer, William Justice has a personal stake in the outcome of this litigation. Further, he clings to a meaningful interest in his reputation, which this Court has held is sufficient to confer standing. Meese v. Keene, 481 U.S. 465, 472-477, 107 S.Ct. 1862, 1866-1869, 95 L.Ed.2d 415 (1987).

When a state creates an avenue to appeal unlawful parole revocation proceedings, the road must be drivable for everyone and must allow each challenger to reach their destination. Currently, that is not the case; this Court should intervene.

¹⁸ On September 12, 2023, the South Carolina Supreme Court granted the undersigned's motion to supplement the record with Justice's criminal history report. See <https://ctrack.sccourts.org/public/caseView.do?csIID=77522> (last accessed April 11, 2024).

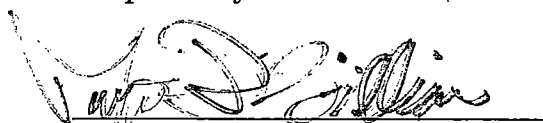
CONCLUSION

“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting). The underlying parole revocation proceedings were a farce. The safeguards established by this 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.

Concerns about this process remain unaddressed, where procedural delays render challenges to past violations practically impossible, especially given the nonexistence of appointed counsel at the revocation stage, likely causing future parole revocation challenges to be destined for mootness prior to resolution.

Based on the foregoing, and in the interests of Justice, undersigned counsel respectfully requests that this Court grant certiorari.

Respectfully Submitted



Taylor D. Gilliam

Counsel of Record

University of South Carolina School of Law
Pro Bono Program
1525 Senate Street
Room 386
Columbia, SC 29201
GilliaTD@mailbox.sc.edu
(803) 777-3405

Attorney for Petitioner