

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-09-00004

Mikal Mahdi, Petitioner,

v.

State of South Carolina, Respondent.

Petition for Rehearing

Pursuant to Rule 221, SCACR, Mikal Mahdi petitions this Court for rehearing to reconsider its order dated April 19, 2018 declining to accept Mr. Mahdi's Rule 243(c), SCACR explanation and dismissing the appeal of the denial of his application for post-conviction relief. This petition is based on the following grounds.

1) As a threshold matter, this Court has never articulated the standard for reviewing a Rule 243(c), SCACR explanation. Mr. Mahdi contends the standard of review should be akin to a Rule 12(b)(6), SCRCR motion to dismiss a complaint in a civil case. It should be sufficient to articulate an "arguable basis for asserting that the determination by the lower court was improper" when it dismissed an application for post-conviction relief as being successive or barred by the statute of limitations. The standard should not be whether the explanation establishes the litigant will prevail on the merits. The former allows the litigant to file a petition for writ of *certiorari* and the Court to determine whether

that petition has enough merit to warrant consideration by the Court. The latter denies the litigant the opportunity to file a petition for writ of *certiorari* and develop the record for the Court to determine whether the petition has enough merit to warrant consideration by the Court, in effect skipping the cert stage and issuing a ruling on the merits. This consideration is particularly important in cases, like this one, where the court below addressed the issues on the merits and did not merely dismiss the application as successive or time barred.

2) This Court additionally has not articulated the procedure it follows for reviewing a Rule 243(c), SCACR explanation. Is it akin to an ordinary petition, where one justice can grant or deny the explanation for the Court pursuant to Rule 240(j), SCACR? Can two justices concur that the explanation is satisfactory and allow the appeal to proceed, which is akin to the procedure for granting a petition for writ of *certiorari* pursuant to Rule 243(j), SCACR. Do three members of the Court have to concur, which would be akin to deciding the case on the merits, which would have the effect of denying a litigant the opportunity to file a petition for writ of *certiorari* before the Court considers the issue on the merits?

3) The procedural considerations raised in paragraphs 2 and 3 above are not without consequence to the process. Here, Mr. Mahdi filed a 14-page Rule 243(c), SCACR explanation, which is well within the 25-page limit for a petition for writ of *certiorari*, Rule 243(f)(3), SCACR. Over four months after Mr. Mahdi filed his explanation, the State filed a 40-page response that exceeds the length allowed for a response to a petition for writ of *certiorari* without obtaining the permission of the Court.

4) Mr. Mahdi's Rule 243(c), SCACR explanation raised two issues that are recognized exceptions the procedural bars. Although purporting to apply the procedural bars, the court below addressed the merits of these two issues.

5) The first issue is whether *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, intended to apply retroactively, that can be addressed pursuant to S.C. Code Ann. § 17-27-45(B). This issue is set forth more fully in Section I of Mr. Mahdi's Rule 243(c), SCACR explanation. Because this explanation sets forth a *prima facie* showing entitling Mr. Mahdi to relief, this Court should allow Mr. Mahdi to file a petition for writ of *certiorari* to fully present this issue.

6) The second issue is whether prior PCR counsel's failure to brief "all arguable issues," as mandated by *Wade v. State*, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002), entitles Mr. Mahdi to an appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), a long-recognized exception to the bar against successive PCR applications and the statute of limitations. At a minimum, the broader issue set forth in Section II of the Rule 243(c), SCACR explanation seeks this Court's guidance regarding post-conviction appellate counsel's obligations pursuant to *Wade*. Again, the court below addressed the merits of these issues.

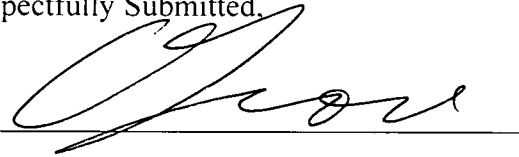
Therefore, this Court should rehear this matter and re-consider its order dated April 19, 2018. The Court below addressed these issues on the merits and did not merely dismiss Mr. Mahdi's PCR application a successive or time barred. As set forth in Mr. Mahdi's Rule 243(C), SCACR explanation, this appeal raises two novel questions of law. Both issues invoke already recognized exceptions to the bar against successive PCR

applications. This Court's guidance on these issues would be a benefit to the bench and bar.

IT IS SO MOVED.

Respectfully Submitted,

By

A handwritten signature in black ink, appearing to read "E. Grose", is written over a horizontal line.

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May 3, 2018.

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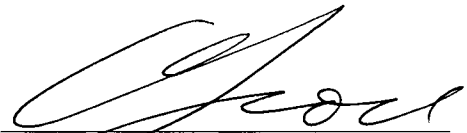
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I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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May 3, 2018.