

No.

IN THE

Gregory Green
(Your Name)

(Your Name)

— PETITIONER

Supreme Court, U.S.
FILED

JUL 01 2019

OFFICE OF THE CLERK

VS.

vs.
Alan Wilson, Attorney
General of South Carolina

- RESPONDENT(S)

COURT OF APPEALS FOR THE FOURTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

Gregory Green

(Your Name)

Manning Corr. Institution, 502 Beckman

(Address)

Dr., Columbia, S.C. 29203

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether South Carolina Appellate Court Rule 243
Violates due process and equal protection of law, by
not entitling petitioner the right to be heard on appeal,
due to its discretionary review process in both appellate
Court.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-6
REASONS FOR GRANTING THE WRIT	7-11
CONCLUSION.....	12

INDEX TO APPENDICES

APPENDIX A	<i>Decision of Court of Appeals for THE FOURTH CIRCUIT</i>
APPENDIX B	<i>Decision of U.S. District Court of South Carolina</i>
APPENDIX C	<i>Magistrate's Report and Recommendation</i>
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>BOARD of Regents of State Colleges v. Roth</u> , 408 U.S. 564 (1972) p. 9	
<u>Cole v. State of Arkansas</u> , 333 U.S. 196 (1948)	10
<u>Dist. Atty's Office for Third Jud. Dist. v. Osborne</u> , 557 U.S. 52 (2009)	9
<u>Evitts v. Lucey</u> , 469 U.S. 387 (1985)	8
<u>Green v. Beckwith</u> , 2018 WL 6829011	9
<u>Green v. South Carolina</u> , 2016-000658; (2018)	9
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956)	7
<u>McKane v. Durston</u> , 153 U.S. 684 (1894)	7
<u>Murdock v. State</u> , 417 S.E.2d 543 (1992)	11
<u>State v. Townsend</u> , 296 S.E.2d 528 (1992)	10

STATUTES AND RULES

Rule 243, SCACR	3
Rule 203, SCACR	10
S.C. Code Ann. 17-19-10	9
S.C. Code Ann. 17-27-20	9
S.C. Code Ann. 44-53-370(e)(3)(9) 1	10
S.C. Code Ann. 44-53-370(e)(3)(9) 2	10

OTHER

S.C. Const. art. 1, 11	9
S.C. Const. art. V, 28	9
S.C. Const. art. 1, 3	9
S.C. Const. art.	9

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 21, 2019.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment
"No State shall make or enforce any law which shall abridge the privilege 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."

RULE 243, SCACR - CERTIORARI TO REVIEW POST-CONVICTION RELIEF ACTIONS.

243 (a) "A Final decision entered under the Post Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of Certiorari"

243 (1) Transfer of Cases to the Court of Appeals
"The Supreme Court may transfer a case filed under this rule to the Court of Appeals. IF transferred, the Court of Appeals shall proceed in same manner . . ."

STATEMENT OF THE CASE

The Case underlying this petition is a Civil action pursuant to 42 U.S.C. 1983 Challenging South Carolina Appellate Court Rule 243, as being unconstitutional, due to its discretionary review process in both appellate Courts.

On November 17, 2014, petitioner filed an application for Post Conviction Relief ("PCR") in the Horry County Court of Common Pleas. Petitioner raised (3) issues (1) Trafficking, first offense, is not a lesser-included offense of trafficking, second offense; (2) Violation of notice requirement guaranteed by U.S. and S.C. Constitution and Statutes; (3) Breach of the plea agreement. App. B.

On February 11, 2016, the date of the PCR hearing, petitioner argued the above issues to the PCR Court. The PCR Court denied petitioner's PCR application from the bench stating: "Petitioner plea attorney did not render in effective assistance of Counsel." App. B.

On October 24, 2016, petitioner filed a petition for Writ of Certiorari to the South Carolina Supreme Court pursuant to South Carolina Appellate Court Rule 243. Petitioner raised only one issue on appeal to the

South Carolina Supreme Court — issue one in his PCR application.

On March 2, 2017, petitioner's petition was transferred to the South Carolina Court of Appeals pursuant to Rule 243(1), SCACR. On January 9, 2018, South Carolina Court of Appeals denied the petition for Writ of Certiorari. App. C

Petitioner filed a 42 U.S.C. 1983 Civil action in the United States District Court of South Carolina, alleging South Carolina Appellate Court Rule 243 is unconstitutional, because there were no intermediate Court mandated to address his assignment of error, due to Rule 243 discretionary review process in both appellate Courts.

The Magistrate Judge filed its Report and Recommendation ("R:R") on January 4, 2019. The R:R recommended that the Complaint be dismissed with prejudice, because petitioner had "identified no authority that establishes a Constitutional right to access an intermediate appellate Court in addition to a superior appellate Court." App. C.

Petitioner made objections to the R:R on the grounds that the gist of his Complaint was not about the order in which the appellate Court reviews his appeal, rather it was the failure of both appellate Courts to address on the merit the assignment of error presented to both appellate Courts, nullifying his protection of property and liberty interest in violation of due process and equal protection of law

Under the Fourteenth Amendment to the United States Constitution.

On February 4, 2019, the district Court accepted the R³R to dismiss petitioner's Complaint, with prejudice, without addressing petitioner's objections to the R³R. App. B. Petitioner appealed the district Court's Order to the Court of Appeals for the Fourth Circuit.

On appeal, petitioner stressed to the Fourth Circuit the property and liberty interest at stake on appeal from a criminal conviction. On May 21, 2019, the Fourth Circuit affirmed the district Court's Order, without elaboration. App. A.

Petitioner now seek review of the Fourth Circuit's Order affirming the district Court's Order of dismissal of the Complaint with prejudice, without addressing petitioner's objections to the Report and Recommendation. The Fourth Circuit's silence on the Constitutional issue presented by the objections and appeal — the deprivation of property and liberty interest without due process — will result in ~~a result in~~ a travesty of Justice, absent the grant of this petition for Writ of Certiorari by this Court.

REASONS FOR GRANTING THE PETITION

South Carolina Appellate Court Rule 243 deprived
— Petitioner of Property and Liberty Interest Without
Due Process of Law.

Petitioner asserts South Carolina Appellate Court Rule 243 is
UnConstitutional, due to its discretionary review process in both
appellate Courts, depriving him of property and liberty interest
without due process and equal ~~protection~~ protection of law guaranteed
under the Fourteenth Amendment to the United States Constitution.

— The Constitution does not require States to grant appeals of right to
Criminal defendants seeking to review alleged trial errors. McKene v.
Durston, 153 U.S. 684 (1894).

The Fourteenth Amendment guarantees a criminal appellant pursuing
a first appeal as of right certain minimum safeguards to make that
appeal "adequate and effective." Griffin v. Illinois, 351 U.S. 12, 13-14
(1956). If a state has created appellate Courts as "integral part of
the system for finally adjudicating the guilt and innocence of a
defendant" he must be given the opportunity to be heard on the merits.
Id. at 18.

South Carolina Appellate Court Rule 243 gives an appellant the right to appeal his PCR appeal to the South Carolina Supreme Court by way of a petition for a writ of certiorari. See 243(a), SCACR. Petitioner asserts a Writ of Certiorari is a discretionary appeal to which an appellant is not guaranteed a ruling on the merit of his Constitutional claim. The Rule states that "the Supreme Court may transfer a case filed under this rule to the Court of Appeals." Rule 243(1), SCACR. Petitioner contends under Rule 243, neither appellate court is obligated to grant the appellant a hearing on the merit of his appeal, due to its discretionary review process.

This Court have ruled that "when state opts to act in field where its action has significant discretionary elements, it must nonetheless act in accord with dictates of Constitution and, in particular, in accord with due process clause." Evitts v. Lucey, 469 U.S. 387, 393 (1985).

Petitioner asserts Rule 243 deprived him of liberty interest because there were no guaranteed right to be heard on the merits of his appeal, which is fundamental to freedom from bodily restraint.

"The Due Process Clause imposes procedural limitations on a state's power to take away protected entitlements." Dist. Atty's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52 (2009).

Petitioner asserts the South Carolina Constitution and Statutes establishes property and liberty interest that he has acquired, therefore, he was entitled to be heard on appeal from his PCR hearing to safeguard those interests.

S.C. Const. art. I, 3 (Privileges and immunities; due process; equal protection of law); S.C. Const. art. I, 11 (Presentment or indictment); S.C. Const. art. V, 22 (Grand and Petit Juries); S.C. Code Ann. 17-19-10 (offense shall be prosecuted upon Grand jury indictment); S.C. Code Ann. 17-27-20 (person who may institute proceedings; exclusiveness of remedy), are property and liberty interest that has been acquired by South Carolina Constitution and Statutes. The "Fourteenth Amendment's procedural protection of property is a safeguard of security of interests that a person has already acquired in specific benefits." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972).

Petitioner contends the appeal process pursuant to Rule 243, SCACR, deprived him of property and liberty interest when both appellate courts exercised discretion pursuant to Rule 243, SCACR, to not protect his Constitutional rights by refusing to address the assignment of error presented on appeal in Green v. South Carolina, 2014-CP-26-7332; (2016-000658); See Green v. Beckwith, 2018 WL 6829011.

Petitioner avers the legal question presented to both appellate Court encompassed the fundamental entitlement to "Notice of the Charge" guaranteed by the Due Process Clause of the Fourteenth Amendment:

"Whether S.C. Code Ann. 44-53-370(e)(3)(a) 1 is a lesser included offense of S.C. Code Ann. 44-53-370(e)(3)(a) 2."

See Cole v. Arkansas, 333 U.S. 196, 201 (1948) (An accused has a Constitutional right to sufficient notice of specific charge).

Moreover, petitioner asserts, Rule 243, SCACR, deprived him of equal protection of law under the Fourteenth Amendment. Petitioner contends S.C. Code Ann. 17-27-20(A), creates an avenue to protect property and liberty interest which is fundamental to physical liberty.

Without the right to be heard on appeal pursuant to Rule 243 discretionary review process, S.C. Code Ann. 17-27-20, is stripped of its objective to safeguard property and liberty interest.

In Contrast, had petitioner filed a direct appeal pursuant to Rule 203, SCACR, to appeal his guilty plea he would have been afforded a hearing on the merit of his assignment of error. Because there is no right to a Conditional plea in South Carolina, it is extremely difficult or near impossible, to preserve issues for direct review in a guilty plea proceeding. See State v. Trivedi, 296 S.E. 2d. 528 (1992) ("Conditional guilty pleas is a practice.... we expressly disapprove.") see also Rule 203(IV), SCACR.

The majority of PCR claims are filed for ineffective assistance of counsel, (albeit petitioner did not raise such a claim) cannot be raised on direct review pursuant to Rule 243, SCACR, but must be raised pursuant to S.C. Code Ann. 17-27-20(A),(B).

Because Rule 243, SCACR, does not entitle an appellant the right to be heard on the merit of his PCR appeal vis-à-vis Rule 203, SCACR, right to be heard on the merit of appeal; Rule 243 violates the equal protection clause of the Fourteenth Amendment.

Had petitioner been entitled a hearing on the merit of his PCR appeal, the South Carolina Supreme Court decision in Murdoch v. State, 417 S.E. 2d. 543 (1992), would have been on point to invalidate petitioner's conviction.

In Murdoch, the South Carolina Supreme Court addressed: whether PWID Counterfeit was a lesser included offense of PWID. The Court applied — the elements test — determining PWID Counterfeit was not a lesser included offense of PWID, due to the additional element of Counterfeit that was not confined within the parent offense PWID. Petitioner asserts both appellate courts exercised discretion pursuant to Rule 243, SCACR, and refused to afford him equal protection of the applicable law on his appeal.

"Federal Courts may upset a state postconviction relief procedure only if they are fundamentally inadequate to vindicate the substantive rights involved." Osborne, *supra*, 557 U.S. at 69 (2009).

Petitioner asserts South Carolina Appellate Court Rule 243, is unconstitutional, because it nullifies property and liberty interest it purports to protect, by denying petitioner the right to be heard on the merit of his PCR appeal, due to its discretionary review process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gregory Green

Date: June 28, 2019