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S.C. SUPREME COURT

EXHIBIT 1

*(Brief of Amicus Curiae Root and Rebound
in Support of Petitioner)*

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Dec 05 2022

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2022-001680
Opinion No. 2022-UP-186 (S.C. Ct. App. filed May 4, 2022)

William Bruce Justice Petitioner,

v.

State of South Carolina, ... Respondents.

**Brief of *Amicus Curiae* Root and Rebound
in Support of Petitioner**

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Interest of the Amicus Curiae

Through public education, legal advocacy, policy reform and litigation, Root and Rebound works to support, empower, and defend communities harmed by mass incarceration. Root and Rebound provides direct legal support for system-impacted persons; reintegration and reentry training; assistance with accessing employment, housing, and family reunification; and promotes policy reform and legal innovation to advance systems changes. Root and Rebound's work directly involves systems-impacted persons who have been through parole and probation processes. Root and Rebound is foundationally dedicated to pursuing and defending the constitutional rights of systems-impacted individuals.

Root and Rebound has an interest in preserving the due process rights of individuals in parole proceedings. Root and Rebound's South Carolina office has a parole project in which it represents individuals before the parole board and recruits pro bono attorneys to do the same. Additionally, Root and Rebound regularly assists clients with record cleaning and sees the ways in which violations on someone's criminal record can worsen collateral consequences, including by making their criminal history look longer and more recent. It agrees with Mr. Justice here that the Fourteenth Amendment Due Process Clause to the United States Constitution guarantees a limited right to confront and cross-examine out-of-court declarants in revocation proceedings. Relevant here, the United States Supreme Court has recognized that individuals have due process rights in formal and informal stages of the revocation process, and has outlined the requirements to ensure revocation hearings meet minimum constitutional requirements. *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The public interest is advanced by these important constitutional protections. These constitutional protections are substantially and directly involved in this case. As a result, Root and Rebound urges the Court to grant Mr. Justice's Petition to address these important issues.

Statement of the Facts and the Case

More than 30 years ago, William Justice was found guilty on four counts of burglary second, two counts of grand larceny, and two counts of petit larceny, and was sentenced to sixty years' imprisonment. In 2012, Mr. Justice was granted parole through 2032, but in August 2013, an arrest warrant was issued following allegations that Mr. Justice violated four conditions of his parole. Mr. Justice attended a preliminary hearing and revocation hearing in August and October 2013. Following the revocation hearing at which he appeared pro se, Mr. Justice was summarily found to have violated four conditions of his parole, and his parole was revoked.

While incarcerated, Mr. Justice filed a timely and valid post-conviction relief application alleging his parole was unlawfully revoked and his due process rights under the federal and state constitutions violated when he was denied the right to confront and question witnesses testifying against him. After the PCR court denied the State's motion to dismiss, it held an evidentiary hearing on Mr. Justice's application in April 2016, and took the matter under advisement. The PCR court denied Mr. Justice's application more than a year later.

Mr. Justice timely appealed and the matter was transferred to the Court of Appeals in January 2019. The Court of Appeals granted certiorari nearly eighteen months later, but following briefing from both, it issued its opinion in May 2022 concluding the appeal was moot. Although the Court of Appeals acknowledged the allegations were troubling, it reasoned that it could not entertain the appeal because Mr. Justice was no longer incarcerated.

After his rehearing petition was timely filed, but denied, Mr. Justice filed his Petition for Writ of Certiorari to this Court. Root and Rebound files this amicus brief in support of that petition and urges the Court to grant certiorari given the important constitutional rights denied to Mr. Justice during his parole hearings.

Argument

In light of *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), South Carolina law infringes on individuals' constitutional right of confrontation at parole and probation hearings. Because Mr. Justice was improperly denied the right to confront witnesses against him this Court should grant certiorari to ensure constitutional protections are afforded to all citizens of South Carolina.

I. This Court should grant review because Mr. Justice was denied important due process protections in his parole-revocation proceedings.

Due process requires that states employ sufficient procedural protections to safeguard identifiable liberty interests. The Fourteenth Amendment to the United States Constitution and South Carolina Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XVI; S.C. Const. art. I, § 3. Due process protections have additionally been required for “deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). While due process rights of individuals involved with the criminal justice system have been subject to fluctuation and revision over time, the Supreme Court has consistently applied due process protections throughout the entire process to protect the liberty interests at stake in the context of incarceration.

Although the “full panoply” of rights afforded to a criminal defendant would not apply in revocation proceedings because revocations are not part of criminal prosecution, *Morrissey*, 408 U.S. at 480, the interest of a parolee in his continued liberty is still “valuable and must be seen as within the protection of the Fourteenth Amendment,” *Id.* at 482. Therefore, the loss of such liberty is a serious deprivation requiring a parolee be afforded due process.

In *Morrissey*, the Court first chose to analyze the function of the parole and correctional process, noting that parole “has become an integral part of the penological system” and an established variation on imprisonment unlike the “*ad hoc* exercise of [executive] clemency.” *Id.* at 477. The Court emphasized that once released to the community, a parolee was at liberty. Despite the conditional nature of release, a parolee had freedoms including the ability to hold a job and be with friends and family. *Id.* at 478. Given that a “parolee is entitled to retain his liberty as long as he substantially abides by the conditions of parole,” a parolee has a liberty interest in any decision to revoke parole, thus requiring due process. *Id.* at 479. Stemming from this analysis, the Court adopted a set of minimum requirements that must be afforded to parolees in revocation hearings.

Shortly after, the Court decided *Gagnon v. Scarpelli*, which concerned similar questions of due process protections at probation revocation hearings. Ultimately, the Court used the same rationale to extend parole revocation protections granted in *Morrissey* to individuals facing probation revocation. 411 U.S. at 782. “Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*.” *Id.*

Under *Morrissey*, the specified minimum requirements to protect due process in revocation proceedings varies by stage. In the less-formal 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*, 411 U.S. at 786 (1973) (citing *Morrissey*, 408 U.S. at 487). The conditional right to

confront witnesses in this stage is based on a hearing officer's determination of whether "an informant would be subjected to risk of harm if [their] identity was disclosed." *Morrissey*, 408 U.S. at 487. Because parole and probation proceedings are deemed less formal than criminal trials with no technical rules of procedure or evidence, hearsay evidence is often admissible. The conditional right to confrontation in these proceedings is therefore even more important to protect the liberty interest of the individual by providing an opportunity to cross-examine witnesses providing hearsay evidence.

In the second stage—at the formal revocation hearing—six "minimum requirements of due process" apply: (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. The right to confrontation here should only be curtailed if the hearing officer "specifically finds good cause for not allowing confrontation." *Id.*

Since *Gagnon*, state courts have been required to uphold a parolee's right to confrontation under the Due Process Clause, among other constitutional protections. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding a liberty interest in good time credits exist under the specific state statute); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (holding an inmate has a protected liberty interest in the decision to transfer inmate from a prison to a mental health facility); *Young v. Harper*, 520 U.S. 143, 147 (1997) (concluding pre-parole program releasing prisoner into community was sufficiently like parole to merit due process protections).

South Carolina recognizes that a probationer or parolee has a constitutionally protected liberty interest and cannot be denied due process simply because probation or parole has been described as “an act of grace.” *State v. Allen*, 370 S.C. 88, 96, 634 S.E.2d 653, 657 (2006) (citing *Morrissey*, 408 U.S. 480–90) (listing the minimum requirements of due process in parole revocation proceedings). Additionally, this Court has required hearings consistent with the guidelines set forth in *Gagnon* and *Morrissey* as evidenced by *State v. Riddle*, when the Court reversed and remanded a revocation because “[t]he revocation hearing was so summary that the record [was] insufficient for our review.” 277 S.C. 110, 110, 282 S.E.2d 863, 863 (1981).

The South Carolina Board of Pardons and Paroles’ Policies and Procedures Manual largely adopts the guidelines of *Morrissey* and *Gagnon*. See Manual, SCDPPPS (Nov. 2019), available at <https://bit.ly/3uiIJqz>. It lists the constitutional requirements for procedural due process at preliminary and final revocation hearings, clearly including the right to “[c]ross examine witnesses to the violation who testify, unless there is good cause for not allowing it.” *Id.* at 36. The manual also requires that parolees receive a written statement by the Board or panel of the evidence relied on and the reasons for revoking parole. *Id.* at 37. Yet the South Carolina Department of Probation, Parole and Pardon Services (“SCDPPPS”) wields significant power over a parolee’s liberty, one that is virtually unchecked absent constitutional restraints. Despite clear directives from this court and policies and procedures in place, Mr. Justice was not afforded the right of confrontation in violation of his due process rights.

Due process requirements operate to safeguard parolee rights in the revocation process, ensure adequate, just, review of the parolee’s case, and avoid abuses of discretion. “Considering the importance and deeply-rooted history of the constitutional right to confrontation, its violation is much more substantive than the type of technical or nominal error that originally motivated the

harmless error standard.” *United States v. Ferguson*, 752 F.3d 613, 619 (4th Cir. 2014). When the due process has been explicitly identified and requirements outlined for its protection, dilution and violation of the right cannot be ignored under the guise of statutory oversight. The Court should grant certiorari to correct this error.

II. South Carolina Code § 24-21-50 unconstitutionally restricted Mr. Justice’s right of confrontation, depriving him of due process.

The current version of South Carolina Code Section 24-21-50 governs the arguments and appearances by counsel or individuals at probation and parole hearings, but expressly limits the right to confrontation:

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

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

This procedure is in direct conflict with the minimum due process protections required by *Morrissey*. Contrary to well-established Supreme Court precedent that parolees have a due process right and liberty interest in confronting the witnesses against them at a revocation hearing unless the board specifically finds good cause for not allowing the confrontation, the statute unconstitutionally prescribes a blanket prohibition. It additionally conflicts with the South Carolina Board of Pardons and Paroles manual which explicitly lists the right to cross-examine a witness absent good cause for not doing so. The statutory provision’s “repugnance to the constitution” is clear and beyond a reasonable doubt, overcoming any presumption of validity. *Joytime Distrib. and Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Indeed, the Court of Appeals Opinion in Mr. Justice’s case acknowledges that Mr. Justice’s allegations concerning the due process issues under S.C. Code Ann. § 24-21-50’s hearing and pre-

hearing procedures and practices are “profoundly troubling.” Root and Rebound agrees with Petitioner that the record in this case demonstrates that Mr. Justice’s rights were blatantly ignored during his preliminary and revocation hearings, warranting certiorari in this case.

The audio recordings of the revocation hearing indicate Mr. Justice directly raised the issue that he was deprived of his right to confront the witnesses present at his preliminary hearing. (Pet. Writ Cert. at 7). The board provided Mr. Justice with approximately two minutes to offer his version of the events leading to his parole revocation, during which he was repeatedly interrupted. (*Id.*) After being asked to leave the room, two additional witnesses were introduced to the parole board. (*Id.*) Without explanation, these witnesses were presented outside of Mr. Justice’s presence. (*Id.*) The State concedes that Mr. Justice was not present for these witnesses. (App’x at 280).

The record also reflects the hearing officer failed to make a specific finding of good cause for why confrontation of the two adverse witnesses was not allowed. (App’x. at 287–90). During the hearing on the state’s motion to dismiss in post-conviction relief, Judge Gravely determined “it sounds like they have a right to confront witnesses unless . . . there are specific findings saying that would not be appropriate. In my review of that Order, the judge addresses that there are issues back and forth between the people but there’s not a specific finding that that wouldn’t be appropriate.” (App. 291). Yet the PCR court ultimately disagreed. Although it acknowledged that confrontation can be limited under *Morrissey* when a hearing officer determines an informant would be subject to risk of harm, (App’x. at 360), the court also acknowledged it was unclear (at best) if any finding was made on the record regarding any danger to the witnesses. (App’x. at 361). Notably, the court ignored the suggested limitation on confrontation in *Morrissey* applies in circumstances where revealing the identity of the witness may lead to the harm, which is not at issue here. Mr. Justice knew the identity of the adverse witnesses against him. And if the

justification for preventing Mr. Justice from confronting the witnesses was so strong, then why did the hearing officer and court fail to articulate any justification for refusing confrontation on the record as required by due process? This failure was legal error amounting to a constitutional deprivation.

Significantly, legislation was introduced to the South Carolina General Assembly in 2021 proposing an amendment to Section 24-21-50. The proposed amendment modifies the language of the statute to provide that a parolee has a right to confront any witness that appears before the board during their hearing, and that all testimony presented at a parole hearing must be taken under oath. *See* 2021 South Carolina House Bill No. 3141, South Carolina One Hundred Twenty-Fourth Session General Assembly - First Regular Session. The proposed amendment illustrates the deficiencies in the current law. The new language, if adopted, would bring the statute into constitutional compliance, and would match the protections already contained in the South Carolina Parole Board's own policy and procedure manual. As it stands now, Section 24-21-50 blatantly prevents individuals from exercising a right guaranteed by due process where a serious liberty interest is at stake. In the matter of Mr. Justice, no good cause existed to deprive him of the opportunity to examine and confront the witnesses against him. Accordingly, this Court should grant certiorari.

Conclusion

For the reasons set forth above, the Court should grant certiorari, review the constitutionality of S.C. Code Ann. § 24-21-50 and reverse the holding of the South Carolina Court of Appeals.

[Signature on following page.]

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