RECEIVED
Jan 23 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

---

Appellate Case No. 2022–001680

WILLIAM BRUCE JUSTICE, PETITIONER,

v.

THE STATE, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734–3737

MATTHEW C. BUCHANAN
General Counsel
S.C. Bar No. 73740

South Carolina Department of Probation,
Parole and Pardon Services
Post Office Box 207
Columbia, South Carolina 29202
(803) 734-9220

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENTS OF ISSUE ON CERTIORARI....1

STATEMENT OF THE CASE....2

STANDARD OF REVIEW....6

ARGUMENT....7

The Court of Appeals properly dismissed the appeal as moot since Petitioner is no longer incarcerated or otherwise subject to supervision such that a favorable decision would have no practical legal effect. Further, even if this Court determines the appeal should be addressed: 1) many of Petitioner's claims are not preserved for appellate review; 2) the statute is neither unconstitutional nor applicable to probation revocation proceedings; and 3) Petitioner's parole revocation proceedings did not violate his limited due process rights under *Morrissey*. 7

CONCLUSION....2

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Whether the Court of Appeals failed to apply an exception to the mootness doctrine, where, as a result of an unconstitutional parole revocation hearing, Justice has a parole violation on his criminal record, where the blatantly illegal procedures employed by the South Carolina Department of Probation, Parole and Pardon Services are the standards by which they treat every unrepresented, indigent individual in South Carolina, where the remedy for future violations proposed by the Court of Appeals—filing a PCR application—was followed in this case yet failed to yield appellate review due to perceived mootness, and where a current South Carolina statute is unconstitutional based on longstanding United States Supreme Court precedent?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals properly dismissed the appeal as moot since Petitioner is no longer incarcerated or otherwise subject to supervision such that a favorable decision would have no practical legal effect. Further, even if this Court determines the appeal should be addressed: 1) many of Petitioner's claims are not preserved for appellate review; 2) the statute is neither unconstitutional nor applicable to probation revocation proceedings; and 3) Petitioner's parole revocation proceedings did not violate his limited due process rights under *Morrissey*.

STATEMENT OF THE CASE

During its February 1989 term, the Lexington County Grand Jury indicted William Bruce Justice (Petitioner) for four counts of second-degree burglary (1989-GS-32-322; -323; -324; -325), two counts of petit larceny (1989-GS-32-322; -323), and two counts of grand larceny (1989-GS-32-324; -325). Frederick I. Hall, III, Esquire, represented Petitioner on these charges. On June 28–29, 1989, Petitioner proceeded to a jury trial before the Honorable Marion H. Kinon. At the conclusion of trial, the jury convicted him as indicted. Judge Kinon sentenced Petitioner to consecutive terms of sixty years' imprisonment on each count of second-degree burglary; concurrent terms of twenty years on each count of grand larceny; and concurrent terms of one month on each count of petit larceny. Petitioner's convictions were affirmed on appeal. *State v. Justice*, 91-MO-200 (S.C. Sup. Ct. filed July 16, 1991).

On May 2, 2012, Petitioner was granted parole by the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS). (Supp. App'x 36). Parole was to take effect from May 3, 2012, until March 6, 2032. (Supp. App'x 36). On August 7, 2013, Petitioner's parole officer, Niquita M. Cook (Agent Cook), issued a warrant for his arrest for failing to follow the advice and instructions of his parole agent. (App'x 263–64; Supp. App'x 19–20, 34–35). Specifically, the warrant alleged Petitioner failed to pay board ordered restitution (BORA) by being fifteen dollars in arrears and fifty dollars in arrears for supervision fees; failed to refrain from contacting his former employer, Leigh Cotton, and her family as instructed by his agent; and failed to refrain from drinking alcohol in excess. (App'x 263–64; Supp. App'x 19–20, 34–35). On August 8, 2013, Petitioner was served with the arrest warrant, taken into custody, and notified of his rights regarding revocation proceedings. (App'x 261–62; Supp. App'x 19–20).

Petitioner's administrative hearing was held on August 27, 2013 at the Kershaw County Detention Center before Officer Jerry F. Rivers. Petitioner, Agent Cook, Leigh Cotton, and Paul Cotton, III, were all present and testified at the hearing. Officer Rivers found Petitioner violated four conditions of his parole and recommended revocation. (Supp. App'x 22–24).

On October 16, 2013, Petitioner appeared before the Parole Board for his revocation hearing at Lee Correctional Institution.[1] (Supp. App'x 16). The Board revoked Petitioner's parole and ordered him to serve the remainder of his sentence. (Supp. App'x 25).

On February 26, 2014, Petitioner timely commenced the underlying PCR action challenging his parole revocation. (App'x 251–65). The State requested an evidentiary hearing through its return on May 27, 2015. (App'x 266–74). On April 19 and April 21, 2016, the PCR

[1] A copy of this audio recording was admitted into the record at the PCR hearing and is on file with this Court.

court convened a hearing on the State's motion to dismiss before the Honorable Perry H. Gravely. (App'x 275–97). Petitioner was present at the hearing and represented by Anna Good Browder, Esquire (PCR counsel). Assistant Attorney General Caitlin Hastings appeared for the State. After hearing arguments from the State and PCR counsel, Judge Gravely denied the State's motion and granted leave to proceed with a full evidentiary hearing. (App'x 291).

On February 1, 2017, the PCR court convened an evidentiary hearing before the Honorable Eugene C. Griffith, Jr. (App'x 298–346). Petitioner was present and again represented by Ms. Good. Senior Assistant Deputy Attorney General Johanna C. Valenzuela appeared for the State. Petitioner and Agent Cook both testified. At the end of the hearing, Judge Griffith took the matter under advisement. On July 28, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing with prejudice. (App'x 350–62).

Petitioner filed a timely notice of appeal and petition for writ of certiorari. The State filed its return on September 28, 2018. Petitioner subsequently filed a reply to the State's return on October 8, 2018. This Court transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR, on January 8, 2019.

On July 9, 2020, the Court of Appeals granted certiorari to review all issues of arguable merit and, in the event Petitioner is released from incarceration before the briefs are filed and served, instructed the parties to address the issue of whether the denial of Petitioner's application for post-conviction relief is moot. Following further briefing, the Court of Appeals dismissed the petition as moot. *Justice v. State*, Op. No. 2022-UP-186 (S.C. Ct. App. filed May 4, 2022). Petitioner appealed.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions *de novo*. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The Court of Appeals properly dismissed the appeal as moot since Petitioner is no longer incarcerated or otherwise subject to supervision such that a favorable decision would have no practical legal effect. Further, even if this Court determines the appeal should be addressed: 1) many of Petitioner's claims are not preserved for appellate review; 2) the statute is neither unconstitutional nor applicable to probation revocation proceedings; and 3) Petitioner's parole revocation proceedings did not violate his limited due process rights under *Morrissey*.

The Court of Appeals correctly found the issue raised by Petitioner regarding the constitutionality of parole revocation procedures is moot and properly dismissed the appeal without addressing the issue. Further, Petitioner's claims are not properly preserved for review on appeal. Finally, the statute, section 24-21-50 of the South Carolina Code is not unconstitutional and only applies to parole consideration hearings and not revocation hearings such as Petitioner's. Finally, the proceedings did not violate Petitioner's limited due process rights.

I. Mootness

The Court of Appeals properly dismissed Petitioner's petition as moot. "Before any action can be maintained, there must exist a justiciable controversy. A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High Sch.*,

321 S.C. 426, 430–31, 468 S.E.2d 861, 864 (1996) (internal citations omitted). "This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008) (internal quotation marks and citations omitted).

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). "Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." *Id.*; *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("[A]n appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant . . ." (citations omitted)); *cf. McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994) ("Cases must be justiciable not only when they are first filed but must also remain justiciable throughout the entire course of the litigation, including the appeal." (citing *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477 (1990))).

The appellate courts have recognized three exceptions to the mootness doctrine. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001); *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). These are, (1) if the issue raised is capable of repetition but evading review; (2) if the issue before the appellate court is a question of "imperative and manifest urgency," and (3) if the decision by the trial court may affect future events or may have collateral consequences to the parties. *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596.

This case meets every definition of mootness, and the exceptions do not apply. Petitioner contends the Court of Appeals erroneously dismissed his case as moot, despite his subsequent release from prison, because (1) a justiciable controversy still exists due to future, unspecified

collateral consequences of having a parole violation on his record; and (2) even assuming his case is moot, the first exception to the mootness doctrine applies because the issues presented in his case regarding alleged due process violations in parole revocation hearings are capable of repetition yet evading review. Both of those arguments fail.

A. Capable of Repetition Yet Evading Review

The issues raised by Petitioner, while clearly capable of repetition because the "events" to which Petitioner is referring are the parole revocation proceedings happening regularly in South Carolina, will not often evade review. As this Court has noted: "When asserting the controversy falls under this exception, '[t]he party bringing the action need only show the issue raised is capable of repetition and is not required to prove there is a 'reasonable expectation' the issue will arise again.'" *S.C. Pub. Int. Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) (quoting *Sloan v. Greenville Cnty.*, 356 S.C. 531, 554-55, 590 S.E.2d 338, 351 (Ct. App. 2003)). Significantly, this Court explained: "However, the action must be one which will truly evade review." *S.C. Pub. Int. Found.*, 421 S.C. at 121, 804 S.E.2d at 860 (quoting *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006)).

Petitioner claims the conduct evades review "because individuals who have had their parole revoked will likely 'max out' their sentence before appellate review is complete." However, Petitioner's argument against mootness is full of hypothetical examples and generalizations regarding other potential situations. For example, he asks this Court to consider a "hypothetical individual's appeal, and claims that "*if* his parole was revoked and the remaining sentence was less than three years, the PCR process would not allow for judicial review." The fact that his post-conviction relief action took three years to be resolved is insufficient to show "that the time

between parole revocation and expiration of sentence is *always* so short as to evade review." *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998).

Rather, the Court of Appeals correctly found that in the future, if another inmate who is still incarcerated "believes his parole has been unlawfully revoked and the parole board has denied him similar due process rights, that inmate may file a PCR petition, and a court will have the opportunity to rule on the issues at that time." Any inmate who claims they "should not have been returned to prison" on the basis their parole has been unlawfully revoked may file a PCR action under section 17–27–20(a)(5) of the South Carolina Code. *See Al-Shabazz v. State*, 338 S.C. 354, 368, 527 S.E.2d 742, 749 (2000); *see, e.g., Kerr v. State*, 345 S.C. 183, 186, 547 S.E.2d 494, 495 (2001). As the Court of Appeals properly found, it is possible review can be had when the issue arises at a later hearing—and not truly evade review by this Court. As a result, this Court should find the issues raised to be moot and not grant the Petition for Writ of Certiorari because any opinion issued by the Court would have no practical effect on Petitioner.

B. Future Adverse Consequences

Specifically, in response to the Court of Appeals' finding that nothing in the record indicates Petitioner's parole revocation holds future adverse collateral consequences for him, Petitioner merely points out that he now has a parole violation on his record. His record also includes four convictions of second-degree burglary, two convictions of grand larceny, and two convictions of grand larceny. The fact that the parole revocation is on his record does not sufficiently demonstrate a real and substantial controversy exists in light of his release from incarceration. The Court of Appeals, therefore, correctly concluded that noting in the record indicates Petitioner's parole revocation holds future adverse collateral consequences for him. *See Spencer*, 523 U.S. at 12 ("In the context of criminal conviction, the presumption of significant

collateral consequences is likely to comport with reality . . . The same cannot be said of parole revocation."); *United States v. Jones*, 639 F. App'x 184, 185 (4th Cir. 2016) (explaining that "[w]ithin the context of challenges to a defendant's imprisonment, 'once the convict's sentence has expired some concrete and continuing injury other than the now-ended incarceration or parole-some collateral consequence of the conviction-must exist if the suit is to be maintained'" (quoting *United States v. Hardy,* 545 F.3d 280, 283 (4th Cir. 2008)); *see Hardy*, 545 F.3d at 284 (dismissing appeal of revocation sentence as moot because Hardy had completed serving his sentence and failed to identify any collateral consequence).

As to Petitioner, there is simply nothing this Court can do that will have any effect on the Petitioner's current situation. Petitioner is no longer incarcerated, nor on parole, nor under any sort of supervision. He, therefore, no longer faces the prospects of additional revocation proceedings. The Court of Appeals properly dismissed the appeal as moot and this Court should deny the Petition for Writ of Certiorari.

II. Issue preservation

Petitioner's contention § 24–21–50 of the South Carolina Code is unconstitutional is not preserved for appellate review because it was neither raised nor ruled upon by the PCR court. For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (citing JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review)); *cf. Sevens & Wilkinson of S.C., Inc. v. Cty. Of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695

(2014) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review.")).

If an issue is not presented to and ruled upon by the circuit court judge, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Constitutional arguments are no exception to the issue preservation rule. *State v. Carlson*, 363 S.C. 586, 595–96, 611 S.E.2d 283, 288 (Ct. App. 2005); *see, e.g., State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008) (confrontation clause and due process arguments not preserved for review). Accordingly, the argument now made on appeal—that Petitioner's constitutional rights were violated by way of § 24–21–50—is not preserved for this Court's review. *State v. Jennings*, 394 S.C. 473, 481–82, 716 S.E.2d 91, 95 (2011).

III. Constitutionality of Statute

Without conceding that the question of the constitutionality of § 24-21-50 was not preserved for review, Respondent submits that the statute in question is constitutional. Section 24-21-50 clearly applies to parole *consideration* hearings, not parole *revocation* hearings.

This Court has authority to interpret the parole statute. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning." *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 334, 592 S.E.2d 335, 339 (Ct. App. 2004) (citations omitted). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); *see also Parsons v. Georgetown Steel*, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Where the terms of a relevant statute are clear, there is no room for construction.").

Section 24–21–50 states:

> 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.

(emphasis added). The language of the statute does not indicate or otherwise imply that it was intended to apply to parole *revocation* proceedings. Parole revocations are outlined in § 24-21-680. Instead, § 24-21-50 states that when the board is "considering a case for parole," the inmate has no right of confrontation at *the* hearing. This makes sense, as parole is a privilege, not a right,[2] and inmates should not be allowed to turn a parole consideration hearing into a pseudo-trial where they can confront victims or others opposed to their release over minutiae of their crimes.

Because the limited due process rights under *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), apply only to parole *revocation* proceedings, the decision is not applicable to section 24-21-50 nor does it render the statute unconstitutional.

IV. Petitioner's Due Process Rights under *Morrissey*

Because parolees are statutorily barred from appealing once their parole is revoked, South Carolina case law on the topic is limited. *See* S.C. Code Ann. § 24-21-680. However, both this Court and the United States Supreme Court have made it abundantly clear that "there is no thought to equate [parole and probation revocation proceedings] to a criminal prosecution in any sense." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *State v. Hill*, 368 S.C. 649, 659, 630 S.E.2d 274, 280 (2006); Accordingly, a parolee is not entitled to "the full panoply" of due process rights to which a criminal defendant is entitled. *Morrissey*, 408 U.S. at 480. In *Morrissey*, the Supreme Court explained:

> Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but

[2] *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003).

> by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Id. Recognizing the interests involved in parole revocation proceedings differ significantly from those in criminal proceedings, the Court further noted:

> Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Morrisey, 408 U.S. at 483. On the other hand, the State has no interest in revoking parole without some informal procedural guarantees. *Id.* Parole proceedings, moreover, are designed to be "predictive and discretionary' as well as fact finding," rather than purely adversarial. *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973) (quoting *Morrissey*, 408 U.S. at 480). Therefore, "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey*, 408 U.S. at 484.

The decision to revoke parole typically involves two distinct components: "(1) a retrospective factual question whether the [parolee] has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of [parole]." *Black v. Romano*, 471 U.S. 606, 611 (1985) (citing *Morrissey*, 408 U.S. at 479–80). A parolee is therefore entitled to two hearings before his parole is revoked: (1) a preliminary hearing to determine whether there is probable cause or reasonable ground to believe the parolee has committed acts which would constitute a violation of the conditions of parole and (2) a final revocation hearing, if desired by the parolee, to determine whether the facts as determined at the preliminary hearing warrant revocation. *Morrissey,* 408 U.S. at 485-487.

Importantly, however, the Court "in *Morrissey* left the states with the responsibility of determining the exact procedures to be followed." *State v. Hill*, 368 S.C. 649, 655, 630 S.E.2d 274, 278 (2006). In South Carolina, the Board of Paroles and Pardons (the Board) is a gubernatorially appointed, independent decision making body statutorily vested with sole authority in making discretionary parole decisions. A prisoner who is released on parole remains under the legal jurisdiction of the Board, and must comply with the terms and conditions of release as set by the Board. *See* S.C .Code Ann. § 24–21–660; *Sanders v. MacDougall*, 244 S.C. 160, 163, 135 S.E.2d 836, 837 (1964). Under South Carolina law, "[w]hen a parolee violates the terms of his parole, "the parole agent must issue a warrant or citation charging the violation of parole....The 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.

A. Preliminary Hearing

Preliminary hearings are conducted by hearing officers employed by the Department of Probation, Parole, and Pardon Services, who must be neutral, detached, fair and impartial. § 24-21-230(B). Prior to the preliminary hearing, the parolee is entitled to notice of the hearing as well as the violations the parolee is alleged to have committed. *Morrissey*, 408 U.S. at 487.

At the preliminary hearing itself, the parolee is entitled to: (1) appear and speak on his behalf; (2) present documentary evidence and witnesses on his behalf; (3) confront the witnesses against him, if requested by the parolee; (4) an independent decision maker; and (5) a written report of the hearing. *Morrissey*, 408 U.S. at 486–87; *Gagnon*, 411 U.S. at 786.

Although most of the same constitutional principles apply to both, it is important to note the distinctions between parole and probation in the context of revocation proceedings given that the General Assembly has seen fit to provide for different revocation authorities depending upon

the status of a person as a parolee or a probationer. *State v. Crouch*, 355 S.C. 355, 360, 585 S.E.2d 288, 291 (2003). As an initial matter, probation implicates suspended sentence while parole is active sentence. "Probation is judicially-imposed at the time of sentencing: whether a violation of probationary terms has occurred, and, if so, the consequences of such a violation, are matters for the court." *Duckson v. State,* 355 S.C. 596, 598 n. 2, 586 S.E.2d 576, 578 n. 2 (2003) (citations omitted). "On the other hand, the Board of Parole, and Pardon Services determines both parole eligibility and revocations." *Id.* Thus, a parole revocation hearing, unlike a probation hearing, "is an administrative rather than a criminal proceeding." *Id.* at 598, 586 S.E.2d at 578. The Board has no power to partially revoke parole unlike a judge in a probation revocation proceeding.

After hearing the evidence and determining probable cause existed that Petitioner violated one or more terms of parole, Officer Rivers recommended the Board revoke Petitioner's parole. (Supp. App'x 24).

B. Final Hearing

At the final revocation hearing, the Board makes a "final determination" as to whether "parole should be revoked and whether [the parolee] should be required to serve any part of the remaining unserved sentence." S.C. Code Ann. § 24–21–680. Pursuant to *Morrissey*, "the parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." 408 U.S. at 488.[3] Accordingly, the final hearing must go beyond the inquiry made at

[3] Under *Morrissey*, the minimum requirements of due process afforded during this hearing include (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of the evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers;

the preliminary hearing—it must lead to a final evaluation of any contested relevant facts, and it must consider whether the facts, as they are found, warrant full revocation, or something less severe.

At Petitioner's revocation hearing, Agent Cook presented the following information to the parole board: On August 7, 2013, legal process was issued and served on Petitioner, charging that Petitioner failed to follow the advice and instructions of his agent by: (1) failing to pay BORA by being fifteen dollars in arrears; (2) failing to pay supervision fees by being fifty dollars in arrears; (3) failing to refrain from contacting Leigh Cotton and her family as instructed by his parole agent on August 5, 2013; and (4) failing to refrain from drinking alcohol in excess. (Audio of Parole Revocation Hearing 0:54–2:35; Supp. App'x 30). It was further alleged Petitioner assaulted two members of Ms. Cotton's family by striking one individual with a metal pipe across her stomach and by striking the other individual with his closed fist. (Audio of Parole Revocation Hearing 0:54–2:35). A written violation report was provided to the parole board, as was the written hearing summary prepared by the administrative hearing officer. (Supp. App'x 17–18, 22–24, 31–33).

At the parole revocation hearing, Petitioner claimed he was denied his right to confront the witnesses against him at the preliminary hearing. (Audio of Parole Revocation Hearing 2:45–2:51). In regard to the charged violations, he stated his parole agent came to his house on August 5, 2013, and told him not to have any contact with Ms. Cotton or her family and also advised him not to drink alcohol in excess. (Audio of Parole Revocation Hearing 3:35–3:44). He further stated that, on August 6, 2013, Ms. Cotton's son, daughter-in-law, and uncle came to his house and "jumped" him. (Audio of Parole Revocation Hearing 3:45–3:59). He explained he did not strike anyone with

---

and (6) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id.* at 489; *Gagnon*, 411 U.S. at 786.

a metal pipe but did hit Ms. Cotton's son with his fist. (Audio of Parole Revocation Hearing 4:54–9:02). Although he offered further testimony, he admitted to an assault.

Following Petitioner's response, the parole board chairperson stated "we have enough information and we have reviewed the facts here" and asked everyone to step outside of the room. (Audio of Parole Revocation Hearing 5:03–5:10). The Board then heard from Ms. Cotton, who testified about several altercations between Petitioner and herself and other members of her family, including both verbal and physical altercations resulting in police reports and reports to Petitioner's parole agent. (Audio of Parole Revocation Hearing 5:11–9:02).

C. Petitioner's Specific Claims

For the first time on appeal Petitioner contends a litany of his rights under *Morrissey* were violated. The only issue raised in his PCR was related to his right to confrontation. Accordingly, Petitioner's claims he was denied his right of disclosure of evidence against him; was denied the right to be heard in person and present witnesses and documentary evidence; was denied the right of written statement by the factfinders; and received disparate treatment by proceeding *pro se* or was somehow unconstitutionally denied counsel are not properly before this Court. However, even if preserved, these claims all fail on the merits.

Petitioner first contends he was denied the opportunity to be heard, and in fact most of his complaints arise from the final revocation hearing, which is understandable given there is no recording of the preliminary hearing. [4] However, as aforementioned, the Court "in *Morrissey* left

---

[4] To the extent Petitioner alleges he had a right to be heard in person, there is nothing in the record indicating Petitioner requested an in-person hearing. Section 24–21–710(E) of the South Carolina Code nonetheless specifically provides that parole hearings be conducted by closed circuit television. *Wilkins v. Timmerman–Cooper*, 512 F.3d 768, 775–76 (6th Cir. 2008) (holding that allowing a parole officer and witnesses to participate via video conferencing technology at a parole revocation hearing did not violate due process).

the states with the responsibility of determining the exact procedures to be followed." *State v. Hill*, 368 S.C. 649, 655, 630 S.E.2d 274, 278 (2006). In South Carolina, the preliminary hearing—i.e., the fact-finding stage—is delegated to the administrative hearing officers.

At the PCR hearing, Petitioner had the opportunity to address Officer Rivers at the administrative hearing. (App'x 327). Agent Cook further testified Petitioner was able to raise the issues regarding Ms. Cotton at that time. (App'x 327–28). Following the preliminary hearing, Officer Rivers issued a thorough summary of what occurred at the hearing, including the "substance of the documents or evidence given in support of parole revocation and of the parolee's position." *Morrissey*, 408 U.S. at 487. The report indicates Officer Rivers heard testimony from Petitioner, Agent Cook, Leigh Cotton, and Paul Cotton, III. (Supp. App'x 22).

Regarding the final revocation hearing, Agent Cook testified they were different from the administrative hearings in that there is no "open dialogue." (App'x 327). Rather, the Board will generally ask questions of either the parolee or agent. (App'x 327). She testified attorneys were "not allowed to say a whole lot" either.[5] (App'x 327). She further testified Petitioner was treated similarly to any other person, whether or not they are represented by counsel. (App'x 327).

Agent Cook also read the script into the record that she read to the Board at the start of Petitioner's revocation hearing. (App'x 324–25; Supp. App'x 21). The script included the incident report from the Kershaw County Sheriff's Office, which stated that Petitioner "assaulted two

[5] Federal Rule of Criminal Procedure 32.1(b)(2)(C) governs federal parole and probation revocation proceedings. The Advisory Committee notes that, regarding the preliminary vs. final hearing, the rights to which a probationer is entitled at the final revocation hearing are limited. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing; (i) the notice under (A) must be written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him.

victims of Ms. Cotton's family by striking victim #1 with a metal pipe across her stomach and victim #2 with a closed fist. (App'x 325–26; Supp. App'x 21). Petitioner characterizes Agent Cook reciting her report the Board giving Agent Cook "carte blanche to level accusations" and takes issue with the Board "seemingly accept[ing] her remarks as truthful." (BOP 32).

As the D.C. Circuit Court of Appeals noted in *Hyser v. Reed*, "there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case." 318 F.2d 225, 237 (D.C. Cir. 1963). Thus, there is a "genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible." *Id.* Yet Petitioner consistently refers to Agent Cook as if she is a prosecutor or at the very least an adversary. *See Williams v. People of State of New York*, 337 U.S. 241, 249 (1949) ("Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.").

Moreover, Petitioner's claims pertaining to structural defects and trial error are wholly inapplicable to parole and probation revocation hearings. *See, e.g., Duckson, supra* (recognizing the differences between parole and probation revocation proceedings and criminal trials). In *Hill*, our Supreme Court reiterated its holding in *Franks* "that the rights of an offender in a probation revocation hearing are not the same as those extended him . . . upon the trial of the original offense." *Hill*, 368 S.C. at 658, 630 S.E.2d at 279 (alterations in original) (citing *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981)).

The Court in *Hill* additionally refutes Petitioner's contention he was denied the right to disclosure of the evidence against him: "*Brady's* rule should not, and indeed, cannot be applied to probation revocation proceedings." *Id. Hill* further addressed S.C. Code Ann. § 24–21–290—significantly limiting the use of information and data obtained in the discharge of his official duty

by a probation agent—noting the statute "would be meaningless" were probation agents' files subject to disclosure under *Brady* or Rule 5. "A disclosure standard that governs when nearly concrete proof is required is unworkable and impractical in a proceeding where a party need only *tend* to look guilty." *Id.*

At the PCR hearing, Petitioner was asked whether there were "any incident reports or any other paperwork [he] asked for that [he] was not allowed to have access to." (App'x 305). Petitioner responded that he "just didn't know what all the allegations were against me." (App'x 305). Petitioner then admitted on cross-examination that he was served with the arrest warrant that listed the violations and Ms. Cotton as one of the complainants. (App'x 310; Supp. App'x 19–20).

Petitioner then admitted to contacting Ms. Cotton, but claimed he only responded to a text message from her about his truck. He even admitted contacting Ms. Cotton via text message.[6] (App'x 310–12). Petitioner then testified he was aware the allegation involved him responding to Ms. Cotton's text message because it was contained in the warrant. (App'x 310–311). Thus, in accordance with *Morrissey* and *Gagnon*'s notice and disclosure requirement, Petitioner was provided a copy of his arrest warrant, as well as a copy of the violation report, which specifically enumerated the violations of Petitioner's parole. (App'x 263–64, Supp. App'x 17–18).

Petitioner's argument he was not afforded his right to be heard nor to present witnesses or evidence on his behalf is further conclusively refuted by the record. Petitioner was given ample opportunity to explain his version of events to the parole board. (Audio of Parole Revocation

---

[6] The Montana Supreme Court addressed a similar situation where the defendant claimed that because the victim made contact with him rather than vice versa, he did not violate his probation. In rejecting this claim, the Court explained, "The probation agreement made no reference to 'willful contact,' instead, it stated: 'You will have *no contact* with the victim of this offense or her family.' *State v. Pease*, 233 Mont. 65, 70, 758 P.2d 764, 768 (1988). The Court stated the defendant "misconstrued the agreement. 'No contact' means just that, whether or not [the defendant] was the initiator." *Id.* at 70–71, 758 P.2d at 768.

Hearing 2:45–5:02). Accordingly, Petitioner was neither denied his right to be heard nor denied his right to present witnesses and evidence on his behalf.

Petitioner's allegation he was denied his right to a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole is also conclusively refuted by the record. Following the preliminary hearing, the administrative hearings officer issued a detailed summary of the hearing, articulating his findings and recommending Petitioner's parole be revoked. (Supp. App'x 22–24).

Similarly, the parole board issued an order revoking Petitioner's parole and explaining the violations. (Supp. App. 16, 25). In this order, the parole board found Petitioner had "violated one or more of the conditions of supervision as set forth in the affidavit herein and dated a copy of which is incorporated by reference." (Supp. App. 16, 25). In adopting the affidavit from the arrest warrant, the parole board explicitly found Petitioner had:

> [F]ailed to follow the advice and instructions of his agent by failing to pay BORA by being $15 in arrears at issuance of process and $50 in arrears on supervision fees; failed to refrain from contacting Leigh Cotton and her family as instructed by agent on Monday, August 5, 2013; failed to refrain from drinking alcohol in excess. According to incident report 2013-3696 with the Kershaw County Sheriff's Office, [Petitioner] assault[ed] two victims of Ms. Cotton's family by striking victim #1 with a metal pipe across her stomach and victim #2 with a closed fist.

(Supp. App. 19, 28). Again, Petitioner was provided with a detailed written statement of the findings of the parole board and was not denied this right.

Finally, to the extent Petitioner claims he was somehow denied the right to counsel, there is no "inflexible constitutional rule with respect to the requirement of counsel" for a probationer or parolee. *Gagnon*, 411 U.S. 789-90. Rather, the decision with respect to the need for counsel "must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." *Gagnon*, 411 U.S.

790. This Court has held that no Sixth Amendment right to counsel during a parole revocation hearing. *Duckson*, 355 S.C. at 596, 586 S.E.2d at 576; *See Ex parte Foster*, 350 S.C. 238, 565 S.E.2d 290 (2002) ("The unnecessary appointment of lawyers to serve as counsel or GALs places an undue burden on the lawyers of this State.... [A] lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule or the case law of this State"). However, the Court has not yet addressed to what extent a parolee may have a right to counsel under the limited due process protections set forth in *Morrissey* and *Gagnon*. *Cf. Bearden v. State of S.C.*, 443 F.2d 1090, 1095 (4th Cir. 1971) ("Right to assigned counsel and compulsory process in revocation proceedings are obviously desirable, but the price in terms of the number of persons paroled, or more accurately, not paroled, may be too high.").

D. Confrontation Right

As now-Justice Gorsuch has explained, "under settled precedent the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings and the due process guarantees associated with these proceedings are 'minimal.'" *United States v. Henry*, 852 F.3d 1204, 1206 (10th Cir. 2017) (quoting *Morrissey*, 408 U.S. at 485); *see United Staztes v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) (Confrontation Clause does not apply at sentencing): *Romano*, 471 U.S. at 610 (Due Process Clause governs procedures at revocation hearing).

While the Court in *Morrissey* outlined the requirements of a preliminary and final revocation hearing—including a qualified right to cross-examine and confront adverse witnesses—it did not explicitly detail the contours of the right. *Morrissey*, 408 U.S. at 488–89. Nor did it clarify how courts or hearing officers should determine when and how parolees have a right to confront adverse witnesses at revocation hearings. "We cannot write a code of

procedure," the Court explained; "that is the responsibility of each State." *Morrissey*, 408 U.S. at 488. The Court in *Gagnon* further provided:

> An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

Gagnon, 411 U.S. at 782, fn 5. Accordingly, our appellate courts have refused to "deviate from the long tradition of limiting a defendant's rights in probation revocation proceedings, where the evidence is often limited to the testimony of a probation officer or . . . affidavits of victims or police officers." *State v. Pauling*, 371 S.C. 435, 439, 639 S.E.2d 680, 682 (Ct. App. 2006) (holding that the Sixth Amendment—including the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004)—does not apply to parole and probation revocation hearings). In declining to extend *Crawford* to probation and parole revocation proceedings, this Court cited the Seventh Circuit's opinion in *U.S. v. Kelley,* 446 F.3d 688, 691–92 (7th Cir. 2006) for the proposition nothing suggested revocation proceedings should be considered "'criminal prosecutions' within the meaning of the Sixth Amendment." *Pauling*, 371 S.C. at 438-9, 639 S.E. 2d at 682.

In *Kelley*, the Court held the hearsay in the officer's testimony and police report "bore substantial indicia of reliability" since "[t]he physical evidence and the officer's personal observations and investigation corroborated the [victims'] accusations." *Id.* Because *Morrissey*'s "good cause" showing was established to limit the use of unreliable evidence at revocation hearings, the Court explained that "*Morrissey* and *Gagnon* permit the admission of

reliable hearsay at revocation hearings without a specific showing of good cause." *Id.* at 692; *Egerstaffer v. Israel*, 726 F.2d 1231, 1234 (7th Cir. 1984).

The "reliability test" outlined in *Kelley* is one of two tests courts have applied for finding "good cause" to deny the right of confrontation. Under the reliability test, "the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness,"[7] and "the substantial trustworthiness test implicitly incorporates good cause into its calculus." *Reyes v. Indiana,* 868 N.E.2d 438, 441 (2007) (citations omitted).

Alternatively, the "balancing test," requires the court to weigh the interests of the defendant in cross-examining his accusers against the government's "good cause" for not producing the witness—or hearsay declarant—at the revocation hearing. Under this approach, "the weight given to a parolee's right to confrontation is assessed by two non-exhaustive factors: the importance of the hearsay evidence to the court's ultimate finding and the nature of the facts to be proven by the evidence." *U.S. v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999). Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right." *Id.* at 1172.

The two tests are overlapping and are not mutually exclusive. For instance, when applying the balancing test, the reliability of the evidence may, in some circumstances, be so strong as to overwhelm the defendant's interests in confrontation "such that the [g]overnment need not show

---

[7] Some guarantees include (1) detailed police reports (as opposed to mere summaries of such reports by probation officers), (2) affidavits or other hearsay given under oath, (3) statements by the probationer that directly or circumstantially corroborate the accusations, (4) corroboration of accusers' hearsay by third parties or physical evidence, (5) statements that fall within a well-established exception to the hearsay rule, (6) evidence of substantial similarities between past offenses and the new accusations that bolsters the accuser's credibility, and (7) a probationer's failure to offer contradictory evidence. *See generally Crawford v. Jackson,* 323 F.3d 123 (D.C.Cir.2003); *Curtis v. Chester*, 626 F.3d 540, 543 (10th Cir. 2010); *Henderson v. Commonwealth*, 736 S.E.2d 901, 905 (Va. 2013).

cause for a declarant's absence." *United States v. Lloyd*, 566 F.3d 341, 345 (3d Cir. 2009). Moreover, the failure to make "a specific finding of good cause" is harmless if "good cause exists, its basis is found in the record, and its finding is implicit in the district court's rulings." *U.S. v. Grandlund*, 71 F.3d 507, 510 (1995).

While South Carolina has not expressly adopted a specific approach, standard, or test to be applied to determine whether "good cause" exists to deny the right of confrontation, good cause is not a precise standard, and there is no bright-line rule for determining whether good cause exists. The inquiry is factually driven and may, in large measure, depend on the nature and purpose of the evidence sought to be introduced.

Petitioner misses the entire point of *Morrissey*'s limited right of confrontation. "Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts *tending to establish* a violation." *Hill*, 368 at 658, 630 S.E.2d at 279 (2006) (citing *State v. White,* 218 S.C.130, 136, 61 S.E.2d 754, 756 (1950)). Accordingly, a parole revocation hearing "is a narrow inquiry[—]the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489; *accord. Pauling*, 371 S.C. at 439, 639 S.E.2d at 682.

In *Gagnon*, the Court explained that (1) the government does not always have to present live witnesses, but can rely on "conventional substitutes for live testimony" such as documentary evidence where appropriate; and (2) "formal procedures and rules of evidence are not employed." 411 U.S. at 782 n.5. As discussed in *Kelley* and *Pauling*, this broad grant of authority under *Morrissey* and *Gagnon* necessarily includes such documentary material as police reports, and similar investigative documents prepared by law enforcement professionals. However, it does not oblige the Board to produce witnesses at a parole revocation hearing to prove a charged

violation if the accused parolee does not ask for them. *See Duckett v. Quick*, 282 F. 3d 844, 847–48 (D.C. Cir. 2002).

Moreover, Petitioner cannot show he was prejudiced because his parole was revoked based on two other violations which were entirely unrelated to Ms. Cotton. (Supp. App'x 16, 25). He also violated the condition ordering him to refrain from using alcoholic beverages to excess. (Supp. App'x 19, 22). Agent Cook testified Petitioner was hanging out in bars and had even been arrested for driving under the influence. (App'x 321). She further testified Petitioner appeared to be intoxicated when she conducted a home visit. (App'x 330). She stated she could smell alcohol on Petitioner's breath, observed beer cans all over his property, and noted Petitioner sweating heavily. (App'x 330). Because Petitioner did not challenge his revocation with respect to these violations, he cannot show prejudice.

Petitioner urges this Court to ignore Petitioner's other two violations, citing *State v. Allen*, 370 S.C. 88, 634 S.E.2d 653 (2006) in support. In that case, this Court held "when the trial court's revocation decision is upheld on one ground, it ordinarily is immaterial whether probation was properly revoked on other grounds unless the entire proceeding was tainted by a given error." *Id.* at 102, 634 S.E.2d at 660. Petitioner does not identify precisely how his inability to cross-examine Cotton "tainted the entire proceeding"—he merely states that it was based on the "revocation procedure itself."

In other words, Petitioner's PCR claim was based exclusively on the Ms. Cotton violation—i.e., his claim that he was denied his right to confront Ms. Cotton and the corresponding arrest warrant did not have sufficient probable cause. Petitioner does not raise a constitutional claim with respect to his failure to use alcohol to excess and because Petitioner's entire proceeding was not tainted by error, it is immaterial whether or not revocation was proper with respect to his

failure to refrain from having contact with Ms. Cotton or her family. Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

MATTHEW C. BUCHANAN
General Counsel

BY:

William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 23, 2023