ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

O'NEAL BERNARD BYRDIC, JR.,

APPELLANT

APPELLATE CASE NO. 2014-001675

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court violate Appellant's right to due process under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) when the court failed to provide Appellant with the opportunity to testify in his own defense, to present evidence, or to call witnesses?

II.

Did the trial court violate Appellant's right to due process under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) when the court refused to allow Appellant to confront or cross-examine Dr. William Burke who wrote a letter, submitted by the probation officer, accusing Appellant of failing to meaningfully participate in therapy and which formed the sole ground for revoking his probation?

STATEMENT OF THE CASE

On July 17, 2012, Appellant O'Neal Byrdic pled guilty to unlawful dissemination of obscene material to a person under the age of 18 years and criminal solicitation of a minor. Tr. 3, ll. 13-19. The Honorable Larry B. Hyman sentenced Appellant to concurrent sentences of five years imprisonment suspended on service of three years imprisonment and three years of probation. *Id.*

On July 18, 2014, Appellant appeared before the Honorable Edward B. Cottingham for a probation revocation hearing. *Id.* at ll. 1-12. Joseph Opperman represented Appellant and an unidentified probation officer represented the State. After hearing the allegations from the probation officer, Judge Cottingham partially revoked Appellant's probation, sentencing him to serve one year imprisonment. Tr. 7, ll. 10-15.

This appeal follows.

STATEMENT OF FACTS

At the probation revocation hearing, the State summarily recited its allegations against Appellant. The unidentified probation officer claimed that Appellant failed to provide proof of employment and failed to pay court ordered fees. Tr. 3, ll. 23 – Tr. 4, ll. 1. The officer continued, alleging that Appellant was:

> [T]erminated from treatment, and ***I've supplied you with a letter***, due to noncompliance. He's refused to engage in the therapy process. He doesn't take responsibility for his crime and denies any arousal with children. When confronted with penile plethysmograph results, which clearly indicate sexual arousal to young children, he responds that the test is wrong. He failed to take a compliance polygraph. They're given ten days to make up that polygraph, and he didn't reschedule it. ***His counselor, Dr. William Burke, has reason to believe that he's drinking alcohol.***

Tr. 4, ll. 1-14 (*emphasis added*); R.* (Dr. Burke's letter). When asked about the termination from treatment, the officer responded that Dr. Burke had alleged that Appellant was non-compliant. Tr. 5, ll. 1-2. At this point, defense counsel interjected, denied that these violations had occurred and began to explain that Appellant had sought gainful employment. *Id.* at ll. 4-5.

The trial court interrupted defense counsel, inquiring why Appellant had not paid any fees. *Id.* at ll. 9. Defense counsel responded that Appellant did not have the ability to pay. *Id.* at ll. 10-12. When asked by the court about Appellant's treatment, defense counsel stated that he did not agree with the officer's characterization or with the assessment in Dr. Burke's letter that Appellant was not participating in treatment. *Id.* at ll. 13-17.

When the court posited that "[defense counsel] may not [concur with Dr. Burke's findings], but I may," counsel countered that Appellant had attended all but one session with Dr. Burke and had attempted reschedule the missed session. *Id.* at ll. 17-22. The probation officer, citing to Dr. Burke's letter, interposed that, "Appellant's been terminated from treatment due to noncompliance.

He's refused to engage in the therapy process. He takes no responsibility for his crime and denies arousal to children." Tr. 6, ll. 2-6.

Without waiting for counsel's response or giving Appellant the opportunity to present any actual testimony or evidence in his defense, the trial court declared, "I've got enough . . . . I'm going to send him a message. I'm going to terminate one year this minute, and he will continue on probation." *Id.* at ll. 7-10. Counsel objected stating, "we would ask for a full hearing and then continue –." *Id.* at 24-25.

The trial court again interjected, accusing counsel of not misconstruing his ruling and clarifying that revocation was based solely on Dr. Burke's letter alleging Appellant failed to meaningfully participate in treatment. Tr. 7, ll. 1-7. Defense counsel reiterated his objection stating that Appellant was denied due process: "Your Honor, we haven't had the opportunity to address whether or not –." *Id.* at ll. 8-9. The trial court then interrupted:

> I don't need it. I've heard enough to know that he's a danger to children, doesn't believe he's got a problem. He needs to be in jail. Now, I ought to revoke him in full. I'm not going to do that. ***I am going to revoke one year for his attitude. It's not because of failure to pay***.

Id. at, ll. 10-15 (*emphasis added*). Counsel finally, without interruption, stated a due process objection which the trial court noted and denied. *Id.* at ll. 16-21.

ARGUMENT

I.

The trial court violated Appellant's right to due process under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) when the court failed to provide Appellant with the opportunity to testify in his own defense, to present evidence, or to call witnesses.

"'A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.'" *State v. Singleton*, 395 S.C. 6, 15, 716 S.E.2d 332, 336 (Ct. App. 2011) (quoting *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)). "The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985). The procedural limits include affording a probationer a number of rights:

> The probationer is [1] entitled to written notice of the claimed violations of his probation; **[2] disclosure of the evidence against him; [3]** ***an opportunity to be heard in person and to present witnesses and documentary evidence;*** [4] a neutral hearing body; and [5] a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. . . . [6] ***The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation.***

Id. at 611-12 (*citing Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)) (*emphasis added*). *Accord State v. Allen*, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006). These requirements "protect the defendant against revocation of probation in a constitutionally unfair manner." *Black* at 613.

While the trial court has the duty to determine, based on its discretion, "whether to revoke probation in whole or part," the State has the duty to "present sufficient evidence to establish that a probationer has violated the conditions of his probation." *Allen*, 370 S.C. at 94, 634 S.E.2d at 655-56 (citations omitted). "While probation is a matter of grace, the probationer is entitled to fair treatment." *Id.* (citation omitted). In sum, revocation of probation should not be ordered unless

"predicated upon an evidentiary showing of fact tending to establish violations of conditions." *State v. White*, 218 S.C. 130, 61 S.E.2d 754 (1950).The decision to revoke a probationary sentence is discretionary with the trial court. *State v. Hamilton*, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). The exercise of that judicial discretion:

> "implies conscientious judgment, not arbitrary action . . . . . It takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result. . . .While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

White, 218 S.C. at 135-136, 61 S.E.2d at 756. Minimal due process requires that a probationer be given the opportunity to be heard in person, to present witnesses and documentary evidence, and to cross-examine adverse witnesses. *Gagnon*, 411 U.S. at 778; *Morrissey v. Brewer,* 408 U.S. 471, 488-489 (1972); *see also State v. Riddle*, 277 S.C. 110, 282 S.E.2d 863 (1981)(the revocation hearing was so summary that the record was insufficient for appellate review, accordingly revocation of probation was reversed and remanded for a hearing consistent with *Gagnon* and *Morrissey*).

In the present case, the trial court deprived Appellant of the opportunity to be heard and to present witnesses or evidence in his defense. Counsel objected to the trial court's rash rush to judgment on Appellant's case and requested a full hearing. Tr. 6, ll. 18 – Tr. 7, ll. 21. The trial court never allowed Appellant the chance to refute the probation officer's allegations. *Id.* Moreover, the only evidence supporting the State's alleged violations was uncorroborated hearsay in the form of a letter written by Burke to the Court. Tr. 3, ll. 23 – Tr.6, ll. 12; R.* (Dr. Burke's letter). Burke was not made available to testify and the court conducted no analysis regarding whether good cause existed for his absence. In sum, Appellant was not given the opportunity to answer to the allegations. *Id.* This was an abuse of discretion by the trial court, violated Appellant's due process rights, and constitutes a reversible error.

Appellant had the right to testify in his own defense, to present evidence, and to call witnesses. The trial court erred by revoking appellant's probation based without allowing Appellant the opportunity to respond to the State's allegations. Accordingly, the revocation should be reversed, and Appellant should be released from custody.

II.

The trial court violated Appellant's right to due process under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) when the court refused to allow Appellant to confront or cross-examine Dr. William Burke who wrote a letter, submitted by the probation officer, accusing Appellant of failing to meaningfully participate in therapy and which formed the sole ground for revoking his probation.

Appellant was denied the right to confront Dr. Burke on the contents of his letter to the court. The right to confront adverse witnesses is essential to due process, the denial of which compels reversal unless it is harmless beyond a reasonable doubt. *U.S. Const. Amend. VI*; *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *State v. Graham*, 314 S.C. 383, 444 S.E.2d 525 (1994). Burke's letter was a testimonial statement. *Crawford v. Washington*, 41 U.S. 36, 51-52 (2004) ("Testimonial" statements include "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony . . . or **similar pretrial statements that declarants would reasonably expect to use prosecutorially**.")(*emphasis added*). The *Crawford* rule applies to all "testimonial" evidence regardless of any indicia of reliability that would have made it admissible in previous cases and should be understood as defining the contours of the right to confront adverse witnesses. *Id.*

The right to cross-examine adverse witnesses is explicitly granted to probationers. *Gagnon v. Scarpelli*, 411 U.S. at 786 (*citing Morrissey*, 408 U.S. at 487). The Supreme Court elucidated only one exception limiting the right to confront an adverse witness in a probation revocation hearing:

> On request of the parolee, person **who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence**. However, if the hearing officer determines that an ***informant would be subjected to risk of if his identity were disclosed***; he need not be subjected to confrontation and cross-examination.

Morrissey, 408 U.S. at 487 (*emphasis added*). This narrow exception requires a "hearing officer to "specifically [find] good cause for not allowing confrontation". *Id.*at 489. In *Morrissey*, the Court also advised that the process for holding a revocation hearing should be flexible and that the trial court should be allowed to consider evidence – i.e. letters, affidavits, and other materials – that would not be admissible in a fully adversarial trial. *Id.*

However, the Court unequivocally established that a "few basic requirements" of due process are necessary to insure that probationers and parolees are not deprived of their liberty unconstitutionally, among them the right of the probationer to confront adverse witnesses subject only to a showing of good cause for the declarant's absence. *Id.* at 482. The Supreme Court delegated to the states the creation of judicial mechanisms for securing the due process protections outlined in *Morrissey* and *Gagnon*. *Id.* The Supreme Court also left to the states the option of providing additional protections and rights to individuals facing revocation of probation or parole. *Id.*

For example, South Carolina requires General Session judges to act as the hearing officers for probation and parole violations. S.C. Code Ann. § 24-21-460 (1959). Further, probationers facing revocation are entitled to representation. *Barlet v. State,* 288 S.C. 481, 343 S.E.2d 620 (1986). Neither of these protections are required by *Morrissey* and *Gagnon*. Despite these additional protections, this Court has held that the confrontation clause does not apply to revocation hearings and that, by extension, probationer's have no constitutional right to cross-examine adverse witnesses. *State v. Pauling*, 371 S.C. 435, 639 S.E.2d 680 (Ct. App. 2006).

In *Pauling*, the defendant's probation was revoked after he was arrested for assault and battery. *Id.* at 436, 639 S.E.2d at 681. The State relied on the arrest warrants and the accompanying affidavits of law enforcement officers as the sole evidence that a violation had occurred. *Id.* At the trial level and again on appeal, the defendant argued that revoking probation based only on the

allegations contained in the affidavits and warrants violated his right to confrontation as stated in *Crawford v. Washington. Id.* at 436-437, 639 S.E.2d at 681.

The Court of Appeals held that the protections afforded in *Crawford* only apply to criminal proceedings. *Id.* This Court, without referencing *Gagnon* or *Morrissey*, stressed that probationers are provided only minimal due process rights and that prior South Carolina case law allowed the revocation of probation based on a criminal charge that did not result in a conviction. *Id.* at 438, 639 S.E.2d at 682, (*citing State v. Williamson*, 356 S.C. 507, 589 S.E.2d 787 (Ct. App. 2003)). The *Pauling* court also extensively relied on a Seventh Federal Circuit Court of Appeals opinion *U.S. v. Kelley*, which posited that the confrontation clause limits on admitting hearsay does not apply to probation revocation hearings. , 446 F.3d 688 (7th Cir. 2006).

Kelley and *Pauling* are among a small minority of Federal and State courts that allow hearsay evidence at a revocation hearing without also requiring a showing of good cause for the declarant's absence. *Id.*; *see also Crawford v. Jackson,* 323 F.3d 123, 131 (D.C. Cir. 2003) (hearsay admissible because it was reliable, no cause analysis required); *see also Kell v. U.S. Parole Comm'n,* 26 F.3d 1016, 1020 (10th Cir.1994) (suggesting that sufficiently reliable hearsay may be admissible without a showing of cause). *Kelley* and *Pauling* directly contradict *Morrissey*, which **limited good cause excusing an adverse witness's absence to situations where an informant would be "subject to risk" if his/her identity were disclosed**. 408 U.S. at 487 (*emphasis added*).

The majority of federal circuit courts of appeals have interpreted ***Morrissey* as requiring a balancing test weighing the reliability of the proffered hearsay against the reasons why the declarant is not produced**. *See U.S. v. Doswell*, 670 F.3d 526 (4th Cir. 2012)(overturning precedent courts must balance releasee's interest in confronting an adverse witness against proffered good cause for denying such confrontation); *U.S. v. Taveras,* 380 F.3d 532, 537 (1st Cir. 2004)(unreliable hearsay inadmissible under Rule 32.1(b)(2)(C) and interest of justice supported

inadmissibility), Fed. R. Crim. Proc.); *U.S. v. Williams,* 443 F.3d 35, 46 (2d Cir.2006) (no abuse of discretion in admission of hearsay after balancing reliability and good cause for declarant's absence); *Barnes v. Johnson,* 184 F.3d 451, 454 (5th Cir.1999) (court must balance reliability and cause); *U.S. v. Zentgraf,* 20 F.3d 906(8th Cir. 1994) (only explanation offered for failing to produce adverse witness was that witness did not want to testify or be identified as a "snitch" in prison; this did not satisfy good cause excusing confrontation); *U.S. v. Comito,* 177 F.3d 1166, 1171–72 (9th Cir.1999) (hearsay inadmissible because it was unreliable and government failed to prove the cause asserted for declarant's absence); *U.S. v. Frazier,*26 F.3d 110, 114 (11th Cir.1994) (district court erred in failing to establish both reliability and good cause); *U.S. v. Lloyd,* 566 F.3d 341, 344–45 (3d Cir.2009)(court must balance probationer's interest in constitutionally guaranteed right to confrontation against the government's good cause for denying).

State courts largely mirror the split among the federal circuit courts of appeals. A majority of state courts apply, with varying degrees of stridency, the same balancing test as the Fourth Circuit. *Comm. v. Allshouse*, 969 A.2d 1236 (Pa. 2009)(probation officer's summary of complaints on alleged violations made in letter authored by victim's mother and discussed in a police report, was inadmissible double hearsay absent a finding of good cause for not allowing confrontation); *Henderson v. Comm.*, 722 S.E.2d 275 (Va. 2012)(good cause existed for admission of hearsay statements regarding home break-in as declarant refused to testify for fear of retaliation); *Wolcott v. State*, 604 S.E.2d 478 (Ga. 2004)(hearsay evidence is inadmissible in a probation revocation proceeding).[1]

[1] For a full analysis of the admissibility of hearsay evidence in probation revocation hearings; *see* 11 A.L.R.4th 999 (Originally published in 1982).

Among states with a more permissive approach to the admissibility of hearsay in revocation hearings, the vast majority of jurisdictions ***will not permit uncorroborated hearsay to form the sole basis of revocation***, as the trial court did in Appellant's case. *State v. Decoteau*, 940 A.2d 661 (Vt. 2007)(discharge summary and probation officer's testimony were both uncorroborated hearsay on why probationer was terminated from treatment program and so could not form the sole basis for revocation); *People v. Cambitsis*, 161 Cal. Rptr. 441 (1st. Dist 1980)(good cause exists where [1]the declarant would be subject to risk of harm in testifying, [2] where the evidence is merely cumulative, or [3] where the out-of-court declarant is not actually adverse to the defendant); *cf. Marshall v. Comm.*, 638 S.W.2d 288, 289 (Ky. Ct. App. 1982)(no absolute right to confront witnesses, especially when reliability of the witnesses can be easily ascertained, witnesses were unavailable as they were outside the jurisdiction of the court, ***but defense never moved the court to make a determination of good cause***) (*emphasis added*).

The right to cross-examine and confront adverse witnesses is rendered worthless if the State can avoid subjecting key witnesses to adversarial questioning by simply having those it wishes to shield submit a letter with their allegations against the probationer. Even *Kelley*, which the *Pauling* court depended on, recognized that the trial court erred in failing to find good cause for the admission of hearsay, but that the revocation hearing testimony of the defendant's arresting officer rendered the error harmless. 446 F.3d at 690. The confrontation clause requirements of *Crawford* are applicable to revocation hearings in a manner consistent with the minimal due process rights afforded to probationers in *Morrissey*, *Gagnon*, *et. al.*

Accordingly, this court should overrule *Pauling* to the extent that it flatly holds a probationer has no right to confront or cross-examine adverse witnesses. Instead this Court should join the vast majority of other state courts and the majority of the federal circuit courts of appeals in

applying a balancing test which weighs the probationer's interest in confronting an adverse witness against any proffered good cause for denying such confrontation. *Morrissey*, 408 U.S. at 486.[2]

Adopting this test would insure that probationer's conditional liberty is sufficiently protected by the "limited panoply" of constitutional protections afforded to him under the Fourteenth Amendment – in Appellant's case, the right to confront and cross-examine adverse witnesses – while also recognizing the informal, flexible nature of revocation hearings and society's interest in probationer's rehabilitation to a useful life. *Morrissey*, 408 U.S. at 482-484.

Under *Morrissey*, Appellant had the right to confront Dr. Burke regarding the allegations made in his letter unless there was a showing by the State of good cause excusing Burke's presence. 408 U.S. at 487. At a minimum, the trial court abused its discretion in revoking Appellant's probation based solely on uncorroborated hearsay contained in Burke's letter. Tr. 7, ll. 10-15. Therefore, the Appellant's revocation should be reversed and the Appellant released from custody.

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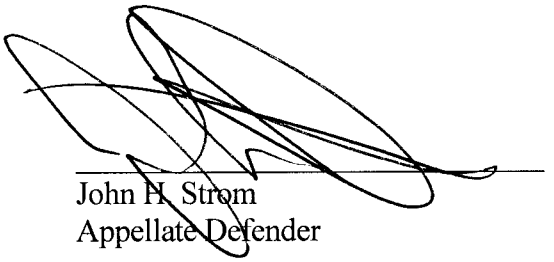
[2] Appellant is mindful of the imprint of correctness which stare decisis lends to this Court's decision in *Pauling*. However, stare decisis is not an unbreakable command: "when [the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. *State v. Williams*, 13 S.C. 546, 554-55 (1880).

Further, stare decisis is a respect for a body of decisions as opposed to a single case standing alone. *See Langley v. Boyter*, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct. App. 1984). "Stare decisis should be used to foster stability and certainty in the law, but not to perpetuate error." *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse the ruling of the trial court, release Appellant from custody, and remand for a new probation hearing.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 23rd day of February, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of February, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021 .