

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

ORIGINAL

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MAY 24 2010

S.C. SUPREME COURT

BRADLEY ISHMAN,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

M. CELIA ROBINSON
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Should the PCR judge's grant of relief be affirmed where the judge's decision was well supported by the evidence and consistent with the law?

STATEMENT

Respondent, Bradley J. Ishman, was indicted by the Anderson County Grand Jury for pointing and presenting a firearm at his ex-girlfriend, Kenon Giovanni. Ishman pled guilty to the charge on September 20, 2006, before the Honorable J. C. Nicholson, Jr. Ishman was sentenced to five years incarceration, suspended with three years probation. The judge included a special condition that Ishman stay away from his former girlfriend and that he pay assessments. Ishman did not appeal his conviction or sentence.

On December 13, 2006, Ishman was served with an arrest warrant alleging various violations of probation, including an allegation that he had had possession of a gun and that he had been arrested on a pending CDV charge. Ishman was incarcerated from the time of his arrest on December 13, 2006, until the revocation hearing. The probation revocation hearing was convened on January 19, 2007, before the Honorable Cordell Maddox, Jr. Judge Maddox revoked three years of Ishman's probation.

On January 11, 2008, Ishman filed an application for post-conviction relief (PCR). The Respondent made its Return on March 6, 2008. An evidentiary hearing was held on October 22, 2008, before the Honorable Alexander S. Macaulay. Judge Macaulay granted PCR by written order dated September 9, 2009. The State has petitioned for certiorari from the grant of PCR. This Return follows.

ARGUMENT

The PCR judge's grant of relief should be affirmed where the judge's decision was well supported by the evidence and consistent with the law.

The proper standard of review of a PCR decision is whether any evidence of probative value supports the PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Appellate courts "give great deference to the PCR judge's findings of fact and conclusions of law" so that a PCR judge's findings will be upheld on appeal if there is any evidence of probative value to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

This is a case where the record evidence wholly supports the PCR judge's factual findings and legal conclusions. The revocation transcript amply supports the PCR judge's rulings that the revocation judge improperly revoked Ishman's probation in violation of the guarantee of due process where Ishman was not provided an opportunity to respond to the State's allegations or to present a defense as the result of inaction on the part of defense counsel. A review of the transcript from Ishman's revocation hearing establishes that Judge Macaulay appropriately granted relief where Ishman's probation was revoked upon the revocation judge's hearing only one side of the case, in part as the result of ineffective assistance of counsel.

At the outset of the revocation hearing, defense counsel had indicated that Ishman would agree to a violation of conditions 3, 5, and 9, but that he asserted that although he missed his report on December 4, he had called, rescheduled, and kept the rescheduled appointment. The prosecutor indicated that one of the allegations of probation violation was that Ishman had been in possession of a firearm in violation of his conditions of probation. Counsel for Ishman responded to this allegation, indicating, "[I]n regards to the possession of a firearm, he denies that. Apart from that he

- - if Your Honor is going to consider those matters, he tells me he does have a witness that can address the issues, at the very least for the firearm.” (App. p. 27, lines 20-23). The prosecutor indicated that the original victim of the original charge of pointing and presenting and also the current victim of a pending CDV charge, Ishman’s ex-girlfriend, Kenan Giovanni, had brought the alleged possession of a weapon to the attention of the prosecutor. The prosecutor indicated, “Ms. Giovanni came into my office on the 12th of December and did an affidavit stating that Mr. Ishman showed her a picture of a firearm via webcam. And I have her affidavit as well as a picture and the statement she gave to law enforcement from the CDV incident.” (App. p. 28, lines 1-11).

Defense counsel responded, indicating, “Judge, I haven’t had a chance to review the affidavit or see a copy of that. He’s telling me that he does have a witness related to this particular allegation for his violation. So, if Your Honor wishes to go forward on that particular matter, I’m going to ask for a continuance so I can get the witness in and give me a chance to review the affidavit.” (App. p. 28, lines 13-19). The prosecutor interjected, “Your Honor, if it pleases the Court, the witness that he is speaking of is his sister. His sister did contact my office. And she could not verify if the gun was actually in the residence, but she could verify through the picture that that was her residence. She also had given the same statement to Ms. Giovanni. And I also have instant messages between the offender and the victim at which time he does not come out and actually point-blank say that he’s in possession of a firearm. He just makes references that if you would like to look at - - there are some - - I’ve highlighted some of the main points.” (App. p. 4, line 20-p. 5, line 5). Defense counsel responded, “Again, Judge, I haven’t had the opportunity to review that. I haven’t had an opportunity to review that paperwork either as well.” (App. p. 29, lines 6-8).

The revocation judge confirmed that Ishman was incarcerated and noted that, in addition to the stated allegations of violations of the terms of his probation, Ishman was also facing serious charges of CDV and kidnapping. However, the prosecutor advised that while such charges had originally been brought on the basis of the sheriff's incident report, the actual charge being pursued against Ishman was CDV second. Defense counsel indicated that Ishman's sister would testify that she had searched her home and that there was no gun in the house. Defense counsel further noted, "And like I said, I haven't had a chance to review the affidavit to exactly see whether or not there's a need for any other additional witnesses. The judge agreed to a short recess so that counsel could review the prosecution's evidence. (App. p. 6, lines 10-25).

Upon the hearing reconvening after a thirteen minute recess, defense counsel indicated, "Judge, I've had an opportunity to review the affidavit, the photograph as well as the instant messaging paperwork. The agent also showed me an email from his sister confirming what she told Your Honor, that it was a picture of the kids' playroom. I think the email message also indicated that there were no guns in the house. At least no toy guns or any guns were found in the house if I remember correctly. Judge, after showing that information to my client, he tells me the instant messages, he tells me, that wasn't him, that this is something that is being fabricated by the victim. Additionally, he's telling me that the photograph of the weapon is something that he claims was fabricated as well with a cut and paste using a computer." (App. p. 7, lines 7-20). The judge responded, "Okay." (App. p. 7, line 21). Counsel further indicated, "That's where we're at right now, Judge." (App. p. 7, line 22). The judge then stated, "Okay. All right. Well, this is one of those volatile situations. I'm going to revoke and terminate." (App. p. 7, lines 23-25). Apparently startled, the prosecutor replied, "I'm sorry?" The judge repeated, "Revoke in full and terminate."

The prosecutor and defense counsel both thanked the judge and the hearing was concluded. (App. pp. 31-32).

PCR counsel asserted that Ishman's claim of ineffective assistance of counsel stemmed from revocation counsel's lacking adequate time to prepare because he was appointed on the day of the hearing. PCR counsel conceded that revocation counsel had sought continuance, "but there was also a failure to file a motion to reconsider or an appeal following the hearing and I think that that likely would have been granted so he could come forward and have a hearing where evidence was actually presented. (App. p. 55, line 17-p. 56, line 4). PCR counsel indicated, "I think we definitely have proof of due process and probably ineffective assistance of counsel." (App. p. 56, lines 20-22). PCR counsel explained that the ineffective assistance of counsel allegation "really emanates" from counsel's failure to correct or to attempt to correct the deficiencies in the process provided during this revocation hearing. (App. p. 57, lines 4-6).

The prosecutor indicated that the allegations of a due process violation and the allegations of judicial and prosecutorial misconduct were direct appeal issues. However, PCR counsel responded, indicating, "You Honor, well, to the extent that - - I don't believe that's correct. But to the extent that would be true, it's ineffective assistance of counsel for failure to file a motion to reconsider, to advise the applicant to file an appeal or advise the applicant that he should file an appeal. So, that's - - I mean, that's my backup argument. But I think the due process argument is proper for P.C.R.'s. It's basically like habeas corpus, being held without good cause by the State. I mean, he didn't have a fair hearing. They can't just hold him in jail. And personally, I don't think necessarily that's an appellate area. That's a P.C.R. or a state habeas corpus-type issue. And I think he's entitled to

relief under, just for due process directly; but if not, certainly for ineffective assistance of counsel for not raising the argument that might correct that error.” (App. p. 9, line 18-p. 10, line 9).

Revocation counsel recalled that he undertook representation of Ishman on the day of his revocation hearing. (App. p. 59, lines 8-17). Revocation counsel agreed that he probably had not had an opportunity to speak with Ishman; counsel indicated, “Prior to the day of the hearing, probably not. My notes don’t indicate exactly what day I spoke to him. I’m assuming I spoke to him the day of.” (App. p. 59, lines 18-23). Revocation counsel indicated that he had no independent recollection of what happened during Ishman’s hearing. (App. p. 60, lines 1-2). Revocation counsel explained that on a revocation day, he has never had less than five clients and he has averaged “between five to maybe 15 to 20.” (App. p. 60, lines 3-10). Upon reviewing the transcript, revocation counsel recalled that he moved for a continuance so that he could prepare a defense for Ishman. (App. p. 60, lines 16-19). Revocation counsel agreed that Ishman had told him that he denied the allegations of possession of a weapon, denied being intoxicated on December 18, 2006, and that he had indicated that he called to reschedule his missed report. (App. p. 61, lines 1-20). Revocation counsel further recalled that Ishman had denied to him that he was guilty of CDVHAN or kidnapping on December 8, 2006. Counsel recalled, “Yeah. He told me that that was a C.D.V. second and that was going to transfer court.” (App. p. 62, line 21-p. 62, line 1).

Revocation counsel did not recall Ishman’s attempting to speak up during the hearing or that he told him not to speak at that time. (App. p. 62, line 22-p. 63, line 1). However, counsel indicated, “According to the transcript, he didn’t get a chance to say anything.” (App. p. 64, lines 9-10). Revocation counsel agreed that the failure to provide Ishman an opportunity to speak was unusual; he indicated, “Typically a probationer will have an opportunity to explain themselves, to offer any

mitigation on themselves. If I neglect to mention something, typically my client will chime in and add what he thinks or she thinks is necessary for the judge to consider.” (App. p. 64, lines 16-20). However, revocation counsel agreed that Ishman did not speak one word during the hearing. (App. p. 64, lines 11-13). Revocation counsel testified that he could not recall another revocation hearing where the defendant was not given an opportunity to speak. (App. p. 76, lines 14-15). Nevertheless, despite agreeing that Ishman had not been given an opportunity to speak during the revocation hearing, revocation counsel asserted that he had conveyed to the judge everything that Ishman had wanted to say in response to the allegations of violation. (App. p. 70, lines 10-15). Revocation counsel indicated, “He didn’t get a chance to talk. But he did get a chance to talk through me.” (App. p. 78, lines 5-6). However, counsel admittedly had had little if any time to prepare for the hearing.

Ishman testified that he first met revocation counsel on the morning of his hearing; he recalled that revocation counsel spoke to him for some five minutes in the holding cell. He recalled that that was the first time he knew that he had an attorney for the hearing. (App. p. 84, lines 11-24). Ishman indicated that he tried to explain his defenses to counsel but that there was no time. (App. p. 85, lines 1-5). Ishman testified that he did not believe that his revocation attorney had sufficient time to prepare to defend his case. (App. p. 96, lines 16-19). Ishman recalled that he told his attorney about various witnesses and other evidence which could be used in his defense. (App. p. 96, lines 16-23).

Ishman recalled that he and revocation counsel were given a brief period to go through a large stack of documents during the hearing. Ishman indicated, “Well, we were granted a minor recess, and I still didn’t get to review any of the paperwork. He sat beside me and he just vaguely

went over it, but we didn't even get to discuss not even 90 percent of it." (App. p. 97, lines 1-10). Ishman further indicated that he was not allowed to speak during the hearing and that the revocation judge did not address him or ask him if he had committed the alleged violations or whether any violations were willful. (App. p. 97, lines 11-18). Ishman indicated that if he had committed any of the acts alleged to be violations, he did not commit those acts willfully. (App. p. 97, lines 19-22). Ishman testified that revocation counsel did not explain to him that he could file a motion to reconsider or an appeal after the hearing. Ishman testified, "I tried to speak to Mr. Potter three or four times from the jury-box inside the courtroom, and he just shrugged me off." (App. p. 98, line 24-p. 99, line 2).

During the PCR hearing, Ishman indicated that while the Department had alleged that he was at Mark and Jeannie's bar on December 8, 2006, in fact, he met with some friends and family in the parking lot of Mark and Jeannie's before leaving for another location. (App. p. 86, lines 2-14). Ishman denied being in possession of a firearm. Ishman recalled that there had been an order of protection but that Ms. Giovanni had had that dropped. However, because there was still an order of no contact, he asked his probation officer what to do about the no contact order given that he and Ms. Giovanni were engaged to be married. Ishman recalled that his probation officer responded by advising that Ms. Giovanni would have to come to her office to sign an affidavit stating that it was okay for her to have contact with Ishman until the agent could get the matter in front of a judge. Ishman testified that Ms. Giovanni came in and signed the affidavit. (App. p. 88, lines 13-24). The probation agent confirmed that Giovanni signed an affidavit on November 29, 2006, indicating, "I am the victim in the pointing and presenting case against Bradley William Ishman. I wish to have

the no contact with victim clause removed from the condition of Bradley Ishman's probation." (App. p. 138, lines 19-25).

Ishman explained that he had been fired from his job because he was trying to look for a better job; he recalled that he missed work because he had a job interview. (App. p. 90, lines 1-3). Ishman recalled that the CDV allegations arose after Ms. Giovanni's birthday when she had come to pick him up to go out with her to celebrate her birthday. Ishman recalled that there was a car accident after which he called a friend, Bryan Stewart; he testified that Stewart dropped him and Ms. Giovanni at their homes. However, Ishman recalled that the next week, he had indicated to Ms. Giovanni that he thought they should break up. Ishman recalled, "Well, she called me the following morning. After I told her maybe it would be best for us to go our separate ways, the next morning she called me and told me that there was a warrant for my arrest." (App. p. 95, lines 3-9). Ishman indicated that Ms. Giovanni was angry about the break up and that that was followed by his arrest for C.D.V.H.A.N. and kidnapping. Ishman indicated that he could have denied the allegations and that his friend, Bryan Stewart, could have denied Ms. Giovanni's allegations. (App. p. 96, lines 5-9). Ishman testified that the emails supposedly sent by him to Ms. Giovanni had been fabricated. (App. p. 102).

Tanya Vaughn is Ishman's sister. Ms. Vaughn is a Detention Officer at the Anderson County Detention Center. Ms. Vaughn testified that her brother was living with her at the time he was alleged to have violated his probation. She testified that upon learning of the allegation that Ishman had had a gun in her house, she searched through her entire house and Ishman's belongings but that she did not find a weapon. (App. p. 108, line 20-p. 110, line 12). Ms. Vaughn recalled that Ms. Giovanni had come to her home to visit her brother on several occasions and that she knew that

they were engaged. (App. p. 111, lines 1-7). Ms. Vaughn's husband likewise testified that he searched and found no weapon in his home. (App. p. 113, lines 2-9).

Brian Stewart testified at PCR that he remembered a night in December 2006, when Ishman and Ms. Giovanni called him in the early morning hours indicating that their car had broken down and they needed a ride. (App. p. 116, lines 6-19). Stewart testified that they attempted to re-start the car unsuccessfully and then they waited for a tow truck. Stewart confirmed that he then took Ishman to his sister's home and then took Ms. Giovanni home. Stewart recalled that Ishman and Giovanni were getting along well while he was there. (App. p. 117, lines 8-22). Stewart further testified that when he was talking alone with Giovanni, she said nothing negative about Ishman. (App. pp. 117-118).

Probation agent Metcalf confirmed that Ishman and Giovanni had informed her that they were engaged and that they would like the no-contact condition removed. The agent confirmed that Giovanni had signed an affidavit indicating that she wished to remove the no-contact provision. However, Metcalf then testified that before the whole process of getting the no-contact order lifted was when all the other allegations arose. The agent indicated that, at that point, Ishman was to have no contact with Giovanni. She indicated that it was while she and her supervisor were proceeding to have the no-contact provision removed that the other violations occurred. (App. pp. 127-128). The agent could not specifically recall whether Ishman had notified her that he was looking for a new job. (App. p. 130, lines 1-7). The agent testified that she was not contacted by Ishman to reschedule his report in December. (App. p. 133-134).

Revocation counsel indicated that it was his practice to go over each alleged violation with his client and to ask the client if that was true. However, counsel agreed that he did not specifically

go over the alleged violations with Ishman asking him if any violations were willful or not. (App. p. 73, lines 23-24). Revocation counsel testified that he did not advise Ishman to file a motion to reconsider the finding of violation or sentence. Revocation counsel indicated, "That's not my - - I usually don't do that. After a sentence is entered, I don't turn to my client and say you can appeal within ten days. I don't do that." (App. p. 64, lines 21-25). Revocation counsel confirmed that he typically did not explain to a client that he had a right to appeal after a hearing. (App. p. 65, lines 1-3).

Revocation counsel further agreed that he did not file a motion to reconsider for Ishman or advise Ishman to file one for himself. Revocation counsel indicated, "I don't know if a motion to reconsider would be appropriate. It was a Friday morning. Court was ending at this point in time. Honestly I don't think that would come across my mind, though, to do a motion to reconsider." (App. p. 65, lines 10-14). Revocation counsel indicated that it was not his general practice to discuss with an applicant his right to appeal. (App. p. 70, lines 23-25). Counsel indicated that, even after a hearing, he does not have time to explain appeal rights. Counsel testified, "Don't have time, obviously. We do the hearing. The judge issues the order, we move on to the next case. So, I don't have - - I honestly don't have time to sit down and explain the post-conviction rights or rights to appeals." (App. p. 71, lines 1-6). Revocation counsel indicated that he had no memory of Ishman's demeanor after his probation was revoked; however, he did recall that Ishman refused to sign the sentencing sheet. (App. p. 71, lines 20-25).

PCR counsel did argue that the revocation proceeding had violated Ishman's rights to due process. However, PCR counsel further argued ineffective assistance of counsel as the basis for relief. PCR counsel argued, "Additionally, as ineffective assistance of counsel his attorney didn't

have time to properly prepare the case, he didn't have enough information about what his defenses were, he had no time to get any witnesses. If he had time, and he could properly prepare it, he didn't properly prepare it or get those witnesses here. He did ask for a continuance which I think was proper. I think the court abused his discretion by not giving him that. I don't know - - that's another part of the due process problem I think in our case. He failed to speak up and present evidence on behalf of the defendant. Even after the court announced the sentence, he could have objected or done something to indicate that the defendant in that case had not had a chance to say anything to the court. And I think the court would have taken that into consideration and possibly made some other ruling, or at the very least head the evidence." (App. p. 166, line 6-24). PCR counsel concluded, "We'd ask the court to find that my client's due process rights were violated, that he did not get effective assistance of counsel in this particular case, and remand his case back for a fair hearing." (App. p. 168, lines 19-23).

The PCR judge specifically referenced the Court's holding in Dangerfield, *supra*, to explain his finding that due process was a proper basis for an order of relief in P.C.R.: "We hold that the P.C.R. court properly concluded that due process requires that respondent be afforded notice and a hearing on the willfulness of a violation.' So, I do find that due process is a proper consideration for a P.C.R. application." (App. p. 173, lines 6-19). The PCR judge granted relief upon finding that there was insufficient evidence submitted by the prosecution to support the revocation of Ishman's probation and that, while Ishman had a revocation hearing, he was not afforded the considerations addressed by the Court in Dangerfield. The Dangerfield Court specifically found:

Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions. See U.S.

Const. amend. XIV, § 1; S.C. Const. art. I, § 3. The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.

Dangerfield, 656 S.E.2d at 353. The PCR judge relied on the Dangerfield Court's finding that due process concerns are relevant in PCR to specifically find that although a short recess was granted, "this was not an adequate amount of time to obtain witnesses to testify in order to rebut the evidence against the probationer." (App. p. 188). The PCR judge noted that revocation counsel had indicated to the trial judge that Ishman denied the alleged violations and that he could produce witnesses if a continuance was granted, but that the continuance revocation counsel requested was not granted. (App. p. 189).

The PCR judge's Order referenced Ishman's allegations of ineffective assistance of counsel, including his allegation that he was denied effective assistance by his attorney and that he was prejudiced by revocation counsel's failure to present defenses or defense evidence including the testimony of Ishman, by his failure to timely meet with his client to prepare a defense, by his failure to properly investigate, by his failure to present evidence in mitigation, by his failure to file a timely motion to reconsider, by his failure to advise Ishman of his right to move to reconsider, and by his failing to advise Ishman of his right to appeal. (App. p. 185). As the PCR judge found, Ishman was denied the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.

In Dangerfield, the PCR judge had found that counsel's failure to notify Dangerfield of the bench warrants and to request a hearing amounted to ineffective assistance of counsel because it

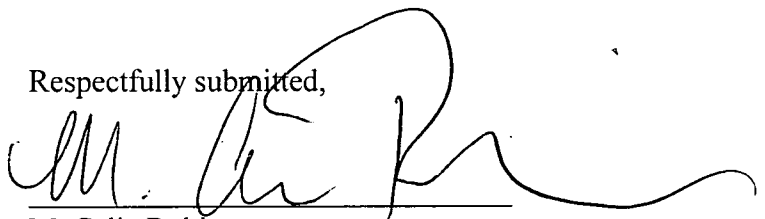
deprived Dangerfield of her due process rights. Dangerfield, 656 S.E.2d at 353. The PCR judge found that, here, petitioner had met his burden of establishing his entitlement to relief by a preponderance of the evidence. (App. p. 189). The PCR judge properly found that Ishman was entitled to relief upon his finding that Ishman's rights to due process were violated and that his counsel had insufficient time or preparation to protect Ishman's rights to due process.

The State seeks to distinguish the Dangerfield decision by stressing that Dangerfield was not provided a hearing at all whereas Ishman had a hearing during which he was represented by counsel. However, as the PCR judge found, there is little difference between no hearing and the proceeding provided Ishman wherein he was not allowed to respond to the allegations of violation himself and where his attorney failed to respond as the result of insufficient time to prepare. The PCR judge's findings were amply supported by the record which established that revocation counsel first met his client on the morning of the hearing and where the prosecution's materials were first provided to the defense during the hearing. The PCR judge properly found that Ishman was entitled to relief given that his attorney had insufficient time to prepare so that he was unable to protect Ishman's rights to due process of law during the revocation hearing.

CONCLUSION

The State's petition should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Celia Robinson', written over a horizontal line.

M. Celia Robinson
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of May, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

BRADLEY ISHMAN,

RESPONDENT,

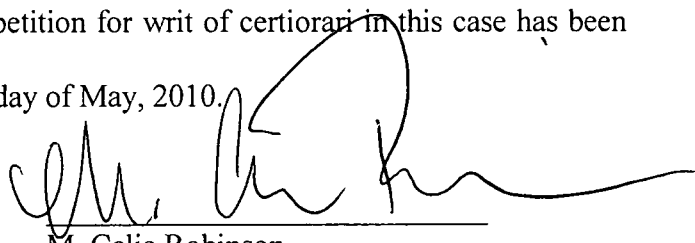
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

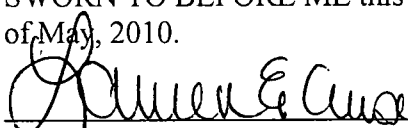
I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Gregory P. Jones, Jr., Esquire this 24th day of May, 2010.



M. Celia Robinson
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of May, 2010.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 23, 2014.

The Supreme Court of South Carolina

Bradley J. Ishman, Respondent,

v.

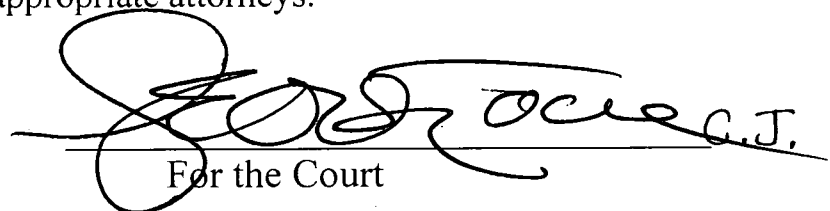
State of South Carolina, Petitioner.

The Honorable Alexander S. Macaulay
Anderson County
Trial Court Case No. 2008-CP-04-00104

ORDER

Petitioner seeks an extension until April 25, 2012 (one-week ext) to serve and file the Brief of Respondent, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

 C.J.
For the Court

Columbia, South Carolina

April 20, 2012

cc: Assistant Attorney General Kaelon E. May
Appellate Defender Kathrine H. Hudgins