

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL .....3

STATEMENT OF THE CASE .....4

ARGUMENT .....6

CONCLUSION.....19

## TABLE OF AUTHORITIES

### **Cases**

<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).....	6
<u>Dangerfield v. State</u> , 376 S.C. 176, 656 S.E.2d 352 (2008) .....	7, 8, 16, 17
<u>Dempsey v. State</u> , 363 S.C. 365, 610 S.E.2d 812 (2005).....	6
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).....	7
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S.Ct. 2593 L.Ed.2d 484 (1972).....	7
<u>Rogers v. State</u> , 317 S.C. 392, 453 S.E.2d 892 (1995).....	17
<u>State v. Allen</u> , 370 S.C. 88, 634 S.E.2d 657 (2006) .....	6
<u>State v. Hamilton</u> , 333 S.C. 642, 511 S.E.2d 94 (Ct.App.1999).....	6
<u>State v. Hill</u> , 368 S.C. 649, 630 S.E.2d 274 (2006) .....	8, 17
<u>State v. King</u> , 221 S.C. 68, 69 S.E.2d 123 (1952) .....	6
<u>State v. Miller</u> , 122 S.C. 468, 115 S.E. 742 (1923) .....	6
<u>State v. Proctor</u> , 345 S.C. 299, 546 S.E.2d 673 (Ct.App.2001).....	6
<u>State v. Riddle</u> , 277 S.C. 110, 282 S.E.2d 863 (1981).....	7
<u>State v. White</u> , 218 S.C. 130, 61 S.E.2d 754 (1950).....	6
<u>Stepney v. State</u> , 278 S.C. 47, 292 S.E.2d 41 (1982).....	17
<u>Tiitsman v. Black</u> , 536 F.2d 678 (6th Cir.1976).....	7
<u>U.S. v. Dane</u> , 570 F.2d 840 (9th Cir.1977) .....	7

### **Statutes**

S.C.Code Ann. § 24-21-460 (1989).....	6
---------------------------------------	---

### **Constitutional Provisions**

SouthCarolina Constitutional article I, § 3 .....	7, 17
United States Constitutional amendment XIV, § 1.....	7, 17

STATEMENT OF ISSUE ON APPEAL

Did the PCR judge properly grant relief in the form of a new probation revocation hearing when the record supports the facts that the State failed to present sufficient evidence of a violation and that the initial revocation hearing failed to meet the minimum requirements of due process and counsel for the probationer failed to object to the insufficiency of the evidence and the inadequate hearing as a violation of due process?

## STATEMENT OF THE CASE

On September 20, 2006, Ishman appeared before the Honorable J. C. Nicholson, Jr., waived grand jury presentment and pled guilty to pointing and presenting a firearm at his girlfriend, Kenon Giovanni, indictment #2006-GS-04-3028. Attorney John J. Stathakis represented Ishman at the plea. Judge Nicholson sentenced Ishman to five years suspended with three years probation. The judge included a special condition that Ishman stay away from the victim and 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 was in possession of a gun and that he had been arrested on a pending CDV charge. On January 19, 2007, Ishman appeared before the Honorable Cordell Maddox, Jr. for the probation revocation hearing. Attorney Andrew Potter represented Ishman at the revocation hearing. Judge Maddox revoked probation in full and sentenced Ishman to five years with credit for time served.<sup>1</sup> Ishman did not appeal the revocation.

On January 11, 2008, Ishman filed an application for post-conviction relief. The State filed a return on March 6, 2008. Ishman filed an amended PCR application on October 7, 2008. Attorney John P. Griffith represented Ishman at the PCR hearing. On October 22, 2008, an evidentiary hearing was held before the Honorable Alexander S. Macaulay. In a written order dated September 9, 2009, Judge Macaulay granted post conviction relief and remanded the case for a new revocation hearing. The State filed a timely notice of intent to appeal. On January 8, 2010, the State filed a petition for writ of certiorari. Ishman filed a return on May 24, 2010. On August 18, 2011, this Court granted

---

<sup>1</sup> Ishman has been released from the South Carolina Department of Corrections.

the petition for writ of certiorari. On December 19, 2011, the State filed the brief of petitioner. This brief of respondent follows.

## ARGUMENT

The PCR judge properly granted relief in the form of a new probation revocation hearing when the record supports the facts that the State failed to present sufficient evidence of a violation and that the initial revocation hearing failed to meet the minimum requirements of due process and counsel for the probationer failed to object to the insufficiency of the evidence and the inadequate hearing as a violation of due process.

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).

The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court. State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct.App.2001); S.C.Code Ann. § 24-21-460 (1989). The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation. State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648-49, 511 S.E.2d 94, 97 (Ct.App.1999). "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 136, 61 S.E.2d at 756.

In State v. Allen, 370 S.C. 88, 96-97, 634 S.E.2d 657 (2006), the South Carolina Supreme Court wrote:

The revocation of probation or parole is not a stage of criminal prosecution. However, a probationer or parolee has a constitutionally protected liberty interest and cannot

be denied due process simply because probation has been described as an act of grace. Morrissey v. Brewer, 408 U.S. 471, 480-90, 92 S.Ct. 2593, 2600-05, 33 L.Ed.2d 484 (1972) (holding that minimum requirements of due process in parole revocation proceeding include “(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole”); Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973) (holding that “a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey”); State v. Riddle, 277 S.C. 110, 282 S.E.2d 863 (1981) (reversing probation revocation and remanding for hearing consistent with guidelines set forth in Morrissey and Gagnon). “It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation.... [W]here the proscribed acts are not criminal, due process mandates that [a probationer or parolee] cannot be subjected to forfeiture of his liberty for those acts unless he is given prior fair warning.” U.S. v. Dane, 570 F.2d 840, 843-44 (9th Cir.1977) (citing Tiitsman v. Black, 536 F.2d 678 (6th Cir.1976)).

In Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008), the South

Carolina Supreme Court wrote:

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. *See State v. Hill*, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006).

The PCR judge here found both that the State failed to present sufficient evidence that Ishman violated the conditions of probation and found that the revocation hearing failed to meet the minimal requirements of due process. In the order granting relief the PCR judge wrote, “Upon review of the record of the Probation Revocation hearing, this court finds that there was a lack of evidence presented by the State to impose the suspended sentence. Although the Applicant was provided a hearing, he was not afforded the considerations addressed by the South Carolina Supreme Court in Dangerfield.” (App. p. 188). In the order granting relief the PCR judge noted that the State did not disclose the evidence against the applicant until the day of the revocation hearing and there was not sufficient time to rebut the evidence against the probationer. (App. p. 188). The record fully supports the PCR judge’s findings.

While there was a pending, unadjudicated charge of CDV and alleged minor violations such as a missed report, consensual contact with the victim, entering an establishment that sold alcohol, and failure to work diligently at a lawful occupation, the PCR judge found that the violation of most concern to the revocation judge was the alleged possession of a gun by the probationer. (App. pp. 173-176). During the revocation hearing the probation agent indicated that one of the alleged violations 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 probation agent 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, brought the alleged possession of a weapon to the attention of the agent. The agent stated, “Ms. Giovanni came into my office on the 12<sup>th</sup> 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, “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 agent 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.28, line 20-p. 29, lines 1- 5). 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. 30, lines 10-25).

After a thirteen minute recess, defense counsel stated, "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. 31, lines 7-20). The judge responded, "Okay." (App. p. 31, line 21). Counsel further indicated, "That's where we're at right now, Judge." (App. p. 31, 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. 31, lines 23-25). Revocation counsel failed to object to the revocation based on insufficiency of the evidence and failed to object to the hearing based on due process grounds. Revocation counsel was ineffective.

The alleged picture of a gun sent via webcam was the only evidence presented by the State that Ishman was in possession of a firearm. Ishman denied possession of a firearm and challenged the authenticity of the photo. Neither the photos nor the alleged instant messages were introduced in evidence. The State failed to produce sufficient evidence that Ishman possessed a firearm. Revocation counsel was ineffective for failing to object to the insufficiency of the evidence. Ishman was not advised of his right to appeal the decision to

revoke probation. The judge's failure to grant a continuance was preserved and could have been presented on direct appeal. 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 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). Ishman had no opportunity to challenge the authenticity of the “gun” evidence.

During the PCR hearing Tanya Vaughn, Ishman’s sister, 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 also testified at the PCR hearing that he searched and found no weapon in his home. (App. p. 113, lines 2-9). While this information was conveyed to the revocation judge through the probation agent, the revocation judge did not have the benefit of the live testimony and the ability to judge the credibility of the two witnesses.

As to the violation of the no contact order, Ishman testified at the PCR hearing that, prior to the CDV allegation, he and Kenan Giovanni were engaged and that they both had taken steps to remove an order of protection as well as the no contact condition of

probation. (App. p. 88, lines 2-25). 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). This information was not presented to the revocation judge.

As for the pending charge, Ishman testified at the PCR hearing that the allegations arose after Giovanni's birthday on December 8, 2006, when she picked him up to go out with her and celebrate her birthday. (App. pp. 90-91). Ishman testified that Giovanni was intoxicated and wrecked the car. (App. p. 92, lines 5-12). Ishman testified that he called a friend, Bryan Stewart; who picked them up and took them to their respective homes. (App. p. 92, lines 13- p. 93, lines 1-25). Ishman testified, "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 CDV. (App. p. 95, lines 10-21). This information was not presented to the revocation judge.

Brian Stewart testified at PCR that he remembered a night in December 2006, when Ishman and 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 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). This information was not presented to the revocation judge.

As for the failure to work diligently at a lawful occupation, Ishman testified that he was fired from his job on November 27, 2006, when he missed work to interview for a better job. (App. p. 89, lines 10 – p. 90, lines 1-5). As for the alcohol violation, Ishman denied going into Mark and Jeannie’s Bar but admitted to going into Nightshades, a sports bar that sold food. This information was not presented to the revocation judge.

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 things 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 insufficient time to prepare for the hearing.

The probation revocation hearing failed to meet the minimum requirements of due process. The evidence against Ishman was only provided to him and counsel on the morning of the hearing. Counsel's request for a continuance was denied. Ishman was denied the opportunity to be heard in person and present witnesses and evidence to rebut the State's evidence. Revocation counsel did not object to the proceedings as a violation of due process. Revocation counsel was ineffective for failing to object on due process grounds.

PCR counsel argued that the revocation proceeding violated Ishman's rights to due process. 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 heard 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 State argues that the PCR Court did not have authority to grant relief based on the fact that both the insufficiency of the evidence and the due process claims are direct appeal issues. As neither claim was raised below, the issues could not have been raised on direct appeal and were appropriately addressed in post conviction relief. The State also argues that the PCR Court misapplied Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008). In the brief the State argues, "The Petitioner submits that the PCR court's reliance was erroneous because Dangerfield is limited to scenarios where a court imposes a

suspended sentence without a hearing.” (Brief of Petitioner p. 6). The State construes Dangerfield far too narrowly. In Dangerfield the Court held that a magistrate’s imposition of a suspended sentence without a hearing violated due process. As noted above, however, the Court also wrote:

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. *See State v. Hill*, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006).

Dangerfield, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008).

While there was a hearing in the present case, the hearing did not comply with minimal due process requirements. Ishman was denied the opportunity to be heard in person, to introduce evidence or rebut the State’s evidence. As a result, Ishman was denied the right to meaningful judicial review in the same fashion as if no hearing had been held.

The State argues that the present case is analogous to Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982) and Rogers v. State, 317 S.C. 392, 453 S.E.2d 892 (1995) where the Court found that a PCR court does not have authority to grant relief based upon direct appeal issues. Again, neither the insufficiency of the evidence claim nor the due process claim were raised and ruled upon by the revocation judge. The issues could not have been raised on direct appeal.

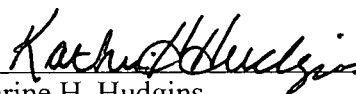
The order granting relief does not specifically find revocation counsel ineffective. A finding of ineffective assistance of revocation counsel, however, is implicit in the PCR

judge's findings that the hearing did not comply with the minimum requirements of due process and that the State failed to present sufficient evidence to support the revocation. PCR counsel argued that revocation counsel was ineffective. The record supports the fact that revocation counsel was ineffective in failing to object to the insufficiency of the evidence and failing to object to the hearing on due process grounds. Because revocation counsel did not object on due process grounds, Ishman was not given an opportunity to challenge to State's evidence. Ishman was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the result of the revocation hearing would have been different.

CONCLUSION

Based on the above argument, this Court should affirm the grant of relief by the PCR judge and remand the case for a new revocation hearing.

Respectfully submitted,



Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 25th day of April, 2012.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Anderson County

Alexander S. Macaulay, Judge  
\_\_\_\_\_

BRADLEY ISHMAN,

RESPONDENT,

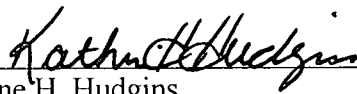
V.

STATE OF SOUTH CAROLINA,

PETITIONER

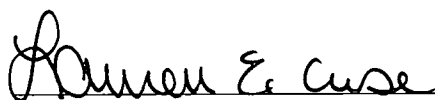
\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent and Designation of Matter in the above referenced case has been served upon Kaelon E. May, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of April, 2012.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me  
this 25th day of April, 2012.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2014.