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**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari to Anderson County

S.C. Supreme Court

The Honorable Alexander S. Macaulay, Circuit Court Judge

BRADLEY ISHMAN,..... Respondent,

v.

STATE OF SOUTH CAROLINA,.....Petitioner.

BRIEF OF PETITIONER

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INDEX

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT.....4

**THE PCR COURT IMPROPERLY REMANDED RESPONDENT'S
PROBATION VIOLATIONS, WHERE THE PCR COURT DID NOT HAVE
AUTHORITY TO GRANT RELIEF BASED UPON A DIRECT APPEAL
ISSUE, AND WHERE THE PCR COURT MISAPPLIED THE
DANGERFIELD CASE.....4**

CONCLUSION.....11

TABLE OF AUTHORITIES

Federal Cases

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972).....	9
--	---

State Cases

Bennett v. State, 371 S.C. 198, 638 S.E.2d 73 (2006).....	5
Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000).....	3
Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)	3
Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005).....	3
Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008).....	4,6,7
Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222 (2000)	3, 10
Rogers v. State, 317 S.C. 392, 453 S.E.2d892 (1995).....	5,6,7
Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004).....	3
Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).....	5
State v. Franks, 276 S.C. 636, 281 S.E.2d 227 (1981)	9
State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (2006)	9
State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950).....	9
Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982).....	4,5,6,7

State Statutes

S.C. Code Ann. § 17-27-20(a)(6).....	5,6
S.C. Code Ann. § 17-27-20(b).....	6

STATEMENT OF THE ISSUE ON APPEAL

DID THE PCR COURT IMPROPERLY REMAND RESPONDENT'S PROBATION VIOLATIONS, WHERE THE PCR COURT DID NOT HAVE AUTHORITY TO GRANT RELIEF BASED UPON A DIRECT APPEAL ISSUE, AND WHERE THE PCR COURT MISAPPLIED THE DANGERFIELD CASE?

STATEMENT OF THE CASE

Respondent was indicted by the Anderson County Grand Jury for pointing or presenting a firearm. John Stathakis, Esquire, represented him. On September 20, 2006, Respondent pled guilty as indicted. He was sentenced by the Honorable J.C. Nicholson to confinement for five years, suspended upon three years probation. Respondent did not appeal from his conviction or sentence.

Respondent subsequently violated the terms of his probation. On January 19, 2007, a probation revocation hearing was convened at which Respondent was present. Respondent was represented by Andrew Potter, Esquire. The Honorable J. Cordell Maddox revoked Respondent's probation in full and sentenced him to serve five years with credit given for time already served. Respondent did not appeal his probation revocation.

Respondent filed an application for post-conviction relief on January 11, 2008. Respondent made its Return on March 6, 2008. An evidentiary hearing was convened at the Anderson County Courthouse on October 22, 2008. Respondent was present at the hearing and was represented by John P. Griffith, Esquire. The Petitioner was represented by Gregory P. Jones, Jr., of the South Carolina Attorney General's Office. The Honorable Alexander S. Macaulay granted post-conviction relief by written Order dated September 9, 2009.

Petitioner filed a timely Notice of Appeal and a Petition for Writ of Certiorari on January 8, 2010. Respondent filed a Return to Petition for Writ of Certiorari on May 24, 2010. This Court granted the petition by Order dated August 18, 2011. This brief follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court “gives great deference to the post-conviction relief (PCR) court’s findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR judge’s decision can be reversed on PCR appeal when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

THE PCR COURT IMPROPERLY REMANDED RESPONDENT'S PROBATION VIOLATIONS, WHERE THE PCR COURT DID NOT HAVE AUTHORITY TO GRANT RELIEF BASED UPON A DIRECT APPEAL ISSUE, AND WHERE THE PCR COURT MISAPPLIED THE DANGERFIELD CASE.

Petitioner submits that Respondent's contention at the PCR hearing that his due process rights were violated during a probation revocation hearing was a direct appeal issue that was improperly before the PCR court. Issues that could have been raised on direct appeal cannot be considered in a post-conviction relief proceeding absent a claim of ineffective assistance of appellate counsel. Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982). The Petitioner further submits that the PCR court did not have authority to grant post-conviction relief based upon Respondent's allegations. In Stepney, an applicant for PCR alleged that his probation revocation hearing violated due process requirements. Id. The Stepney court held that alleged due process violations in a probation revocation hearing should have been raised by probationer on direct appeal and were not properly before the post-conviction hearing judge. Id.

At the PCR hearing, Respondent claimed that his due process rights were violated during his probation revocation hearing because he was unable to present his case; he did not timely receive the evidence against him; he was unable to present witnesses or confront adverse witnesses; and he did not receive a written statement of the fact-finder as to the reasons for revoking probation. (App. p.54, line18 – p.55, line3); (App. p.55, lines11-16). The Respondent relied on Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008), to

assert that violations of due process are proper to support the granting of post-conviction relief.

South Carolina law dictates that an application for post-conviction relief is not a substitute for appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Trial court error does not constitute an appropriate basis for a finding of ineffective assistance of counsel. Bennett v. State, 371 S.C. 198, 638 S.E.2d 73 (2006). The PCR court found that due to a lack of evidence presented by the State, the probation judge should not have revoked probation and imposed the suspended sentence. (App. p.188). Insufficiency of the evidence is not a ground for post-conviction relief absent a claim of ineffective assistance of counsel. Simmons, 264 S.C. 417; S.C. Code Ann. § 17-27-20(a)(6). The PCR court did not make a finding that probation revocation counsel rendered ineffective assistance.

In Rogers v. State, 317 S.C. 392, 453 S.E.2d 892 (1995), a PCR court erroneously granted post-conviction relief on the ground that “[t]he record did not sufficiently show that [Rogers’] attorney had the opportunity to be fully heard regarding [Rogers’] alleged violations.” Id. The Rogers court reversed the PCR court, ruling that a PCR judge improperly remanded for a rehearing of alleged probation violations where the PCR court did not have authority to grant relief based upon direct appeal issues. Id.

Like the defendants in Stepney and Rogers, Respondent claimed that his due process rights were violated at his probation revocation hearing. Consistent with the holding in Stepney and Rogers, Respondent’s due process claims were not properly before the PCR court. Respondent could have addressed his due process allegations in a direct appeal. Because Respondent’s due process allegations were not properly before the PCR court, the

PCR court did not have the authority to rule upon these claims, and the PCR court improperly remanded the matter for rehearing of the probation violations. Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982); Rogers v. State, 317 S.C. 392, 453 S.E.2d 892 (1995); S.C. Code Ann. § 17-27-20 (a)(6) & (b) (1976).

The PCR court in granting relief erroneously relied on Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008), in reaching a conclusion that Respondent's alleged due process violations were properly before the PCR court. 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. In Dangerfield, the defendant pled guilty to passing 110 fraudulent checks in July 2001. Id. A magistrate sentenced Dangerfield to thirty days imprisonment to be served consecutively on each fraudulent check, but suspended the sentence conditioned upon the payment of restitution plus court costs. Id. Dangerfield stopped making restitution payments after November 2001. Id. Thereafter, in February 2002, the magistrate court sent Dangerfield's trial counsel a copy of the order reflecting the terms of the plea agreement along with a memorandum advising counsel to contact the court or the attorney for the State "if you have any questions before bench warrants are issued." Id. Counsel did not contact Dangerfield or request a hearing into the matter. Id. In May 2003, the magistrate had bench warrants served on Dangerfield. Id. Following Dangerfield's arrest, the magistrate imposed the suspended sentence without a hearing. Id.

Dangerfield filed a PCR application alleging ineffective assistance of counsel for negotiating an unreasonable plea deal, failing to notify Respondent of the bench warrants, and failing to request a hearing. Id. The PCR court found that counsel's conduct in

negotiating a plea deal was not objectively unreasonable; however, the court found that counsel's failure to notify Respondent of the bench warrants and to request a hearing amounted to ineffective assistance of counsel because it deprived Respondent of her due process rights. Id. On appeal, this Court affirmed the decision of the PCR court, reasoning that the magistrate's court imposition of a suspended sentence was analogous to a probation judge revoking probation. Id. This Court further reasoned that since due process requires that a defendant be afforded notice and a hearing before a person is sentenced for a probation violation, so should due process require that a defendant be afforded notice and a hearing on the willfulness of her alleged failure to pay restitution before the imposition of a suspended sentence by a magistrate court. Id. Thus, counsel was ineffective for failing to ensure Dangerfield's due process rights.

The present case is distinguishable from Dangerfield and instead is analogous to Stepney and Rogers. In Dangerfield, the PCR court based its relief on a claim of ineffective assistance of counsel for failure to protect a defendant's due process rights to obtain notice and a hearing before sentencing. In contrast to this case, Respondent's due process claims were based upon trial court error and insufficient evidence in his probation revocation hearing, as opposed to trial counsel error. In Dangerfield, the defendant did not have sufficient notice, or a hearing before the magistrate court sentenced her. Id. In this case, Respondent had a hearing, was present at the hearing, and was represented by counsel. At the probation revocation hearing, Respondent admitted violating conditions three, five, and nine. (App. p.27, lines15-16). However, Respondent denied the allegation that he was in possession of a firearm. (App. p.27, lines20-23). Respondent's probation agent presented an affidavit, picture, and instant messages as evidence of the possession of a firearm violation.

(App. p.28, lines7-11). In response, Respondent's counsel requested a continuance to review the affidavit, picture, and instant messages; counsel also informed the judge that Respondent had a witness who would testify concerning the firearm violation. (App. p.28, lines13-19). The probation judge gave Respondent additional time to review the evidence against him. (App. p.30, line24 – p.31, line2).

After receiving additional time to review the evidence, Respondent maintained his denial of the allegation that he possessed a firearm and that he sent the instant messages. (App. p.31, lines7-20). Respondent's counsel testified at the PCR hearing that he relayed to the probation judge everything that Respondent stated to counsel regarding the affidavit, photo, and instant messages. (App. p.63, lines20-23). The witness that Respondent wanted to present at the probation revocation hearing was his sister, Tanya Vaughn. (App. p.63, lines17-19). Respondent's probation agent informed the probation judge that she had spoken to the Respondent's sister and that Respondent's sister searched the residence but did not find any firearms. (App. p.137, lines13-20). Respondent's sister also could testify that the photograph of the firearm was taken in her house based on the background in the photograph. (App. p.137, lines13-20). Respondent's sister, Ms. Vaughn, testified to the same at the PCR hearing, and additionally admitted that she was not home when the photograph of the gun was taken and could not really say for sure whether or not there was a gun in her house. (App. p.111, lines21-25). Petitioner submits that the probation judge was provided the same information by the probation agent that Respondent claimed he was prohibited from presenting at the PCR hearing. The Respondent was provided the evidence against him and was able to review the evidence with counsel. The Petitioner submits that Dangerfield does not apply to this case.

Moreover, the PCR court's reversal on the basis of "insufficient evidence" is equivalent to the PCR court assuming the role of an appellate court. However, this PCR court's finding is even more egregious because a probationer is only entitled to minimal due process. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). The Dangerfield case was not intended to allow PCR courts to usurp the authority of the appellate court to review allegations of trial court error. The PCR court has, erroneously, given Respondent more procedural safeguards than a defendant on trial receives. "[T]he probation revocation proceeding is not a criminal trial of those charges, but a more informal proceeding with respect to notice and proof of the alleged violations." State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981). Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts tending to establish a violation. State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950). At the probation revocation hearing, Respondent admitted to violating conditions three, five, and nine; and also maintained his admissions at the PCR hearing. (App. p.27, lines 15-16; p. 105-107). In Franks, this Court explained "that the rights of an offender in a probation revocation hearing are not the same as those extended him by the United States Constitution upon the trial of the original offense." Franks, 276 S.C. 636, 639. In State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (2006), the Court of Appeals applied the reasoning in Franks and found no reason to extend the right to confront witnesses to probationer in a revocation proceeding. The court in Pauling stated "[a]bsent direction from our supreme court, we will not 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." Id. Assuming, *arguendo*, that the PCR court properly considered Respondent's due process

allegations, Petitioner submits that the PCR court erred in finding that Respondent was not afforded the considerations addressed by this Court in Dangerfield. Additionally, the Petitioner would submit that the PCR court erred in finding that there was a lack of evidence presented by the State at the probation revocation hearing to impose the suspended sentence.

Petitioner submits that the PCR court's grant of relief was controlled by an error of law because any error made by the probation revocation court is a direct appeal issue and cannot be considered in a post-conviction relief proceeding. Accordingly, because the PCR court improperly granted relief in this case, this Court should reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

CONCLUSION

For the reasons stated above, this Court should reverse the PCR court's Order and deny the relief sought by the Respondent.

Respectfully submitted,

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By: 
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Columbia, South Carolina
December 19, 2011

STATE OF SOUTH CAROLINA

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Honorable Alexander S. Macaulay, Circuit Court Judge

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Respondent,

vs.

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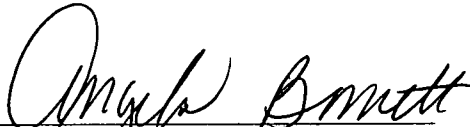
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of December, 2011.



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