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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr. Circuit Court Judge

Appellate Case No. 2017-001718

WILLIAM BRUCE JUSTICE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Petitioner's arguments that the post-conviction relief court erred in denying relief because Petitioner was treated differently due to his *pro se* status at the parole hearings and was denied his right to disclosure of the evidence against him, the opportunity to be heard in person and to present witnesses and evidence, and the right to a written statement by the factfinders as to the evidence relied upon and reasons for revoking parole, are not preserved for appellate review. Even if these arguments were preserved, they are conclusively refuted by the record, where the factfinder made specific findings as to each parole violation and when Petitioner did not assert his rights at the revocation hearing.

III. Petitioner's argument that South Carolina's statute restricting an inmate's right to confront the witnesses against him at a parole revocation hearing is unconstitutional is not preserved for appellate review. Even if this argument were preserved, the statute is not unconstitutional, where it is the State's responsibility to write a code of procedure for parole revocation proceedings as long as it meets the minimum requirements of due process, and where the right to confrontation may be denied by the State for good cause.

STATEMENT OF THE CASE

Summary of Procedural History

During its February 1989 term, the Lexington County Grand Jury indicted William Bruce Justice (Petitioner) for four counts of second-degree burglary (1989-GS-32-322; -323; -324; -325), two counts of petit larceny. (1989-GS-32-322; -323), and two counts of grand larceny (1989-GS-32-324; -325). *See* App. 363-64 (Indictment No. 1989-GS-32-325). Frederick I. Hall, III, Esquire, represented him on these charges. On June 28-29, 1989, Petitioner proceeded to a jury trial before the Honorable Marion H. Kinon. App. 3. Following deliberations, the jury convicted Petitioner as indicted on all counts. App. 3. Judge Kinon sentenced Petitioner to consecutive terms of imprisonment of fifteen years for each count of second-degree burglary. App. 3. Judge Kinon also sentenced Petitioner to concurrent terms of imprisonment of one month for each count of petit larceny and ten years for each count of grand larceny. App. 3.

Petitioner filed a timely notice of appeal, and Assistant Appellate Defender Franklin W. Draper, IV, formerly of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, perfected an appeal on Petitioner's behalf. App. 247-49. Following briefing, the Supreme Court of South Carolina affirmed Petitioner's convictions and sentence by memorandum opinion on July 16, 1991. *State v. Justice*, 91-MO-200 (S.C. Sup. Ct. filed July 16, 1991). The Remittitur was issued on August 1, 1991.

Prior to the South Carolina Supreme Court's decision affirming Petitioner's convictions and sentence, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina on May 18, 1989. *Justice v. Bost, et al.*, 3:89-1232-OJ.

Respondent then filed its motion for summary judgment on June 7, 1989. Thereafter, United States Magistrate Judge Robert S. Carr issued a report and recommendation on November 28, 1989, recommending Respondent's motion for summary judgment be granted. Subsequently, on January 22, 1990, the Honorable Matthew J. Perry, United States District Judge, issued an order accepting Judge Carr's recommendation, granting Respondent's motion for summary judgment, and dismissed the petition for habeas corpus without prejudice. Judgment was entered in accordance with Judge Perry's order on January 24, 1990.

Thereafter, on August 18, 1992, Petitioner filed an application for post-conviction relief. (Case No. 1992-CP-32-221). Respondent made its return on October 8, 1992, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on June 7, 1995, at the Lexington County Courthouse, before the Honorable Daniel E. Martin. John Rakowsky, Esquire, represented him. At the beginning of the hearing, Petitioner amended his application to include specific allegations of ineffective assistance of counsel. Thereafter, by written order date July 19, 1995, Judge Martin issued an order denying and dismissing the application for post-conviction relief.

Petitioner filed a timely notice of appeal, and Lesley M. Coggiola, Esquire, perfected an appeal on Petitioner's behalf. Thereafter, on June 19, 1996, the Supreme Court of South Carolina issued a written order denying the petition for a writ of certiorari. The Remittitur was issued on July 8, 1996.

Petitioner then filed a second petition for a writ of habeas corpus in the United States District Court for the District of South Carolina on July 10, 2003. Respondent moved for summary judgment on or about September 17, 2003. Thereafter, on December 23, 2003, Judge

Carr issued a report and recommendation, recommending Respondent's motion for summary judgment be granted. On January 30, 2004, Judge Perry issued an order adopting Judge Carr's recommendation. Summary judgment was issued in accordance with Judge Perry's order on February 4, 2004.

Petitioner remained in prison serving the sentences imposed by Judge Kinon until May 3, 2012, when he was granted parole. Supp. App. 36. On August 7, 2013, an arrest warrant was issued for Petitioner's arrest, alleging he failed to follow the advice and instructions of his parole agent. App. 263-64; Supp. App. 19-20, 34-35. The arrest warrant specifically alleged Petitioner had failed to pay board ordered restitution (BORA) by being fifteen dollars in arrears and fifty dollars in arrears for supervision fees, failed to refrain from contacting his former employer, Leigh Cotton, and her family, and failed to refrain from drinking alcohol in excess. App. 263; Supp. App. 19, 34. When the arrest warrant was served on August 8, 2013, and Petitioner was taken into custody, he was then notified of his rights at the revocation hearings. App. 261-62.

Subsequently, an administrative hearing to determine if reasonable grounds existed for revocation was held at the Kershaw County Detention Center on August 27, 2013, before Jerry F. Rivers, the administrative hearing officer. Supp. App. 22-24. Petitioner appeared at the hearing and was given the opportunity to appear on his own behalf. Supp. App. 22. Mr. Rivers also heard from Leigh Cotton and Paul Cotton, III. Supp. App. 22. Petitioner did not request the Cottons be made available for questioning in his presence and did not ask to confront or cross-examine them. Following the hearing, Mr. Rivers found Petitioner had used alcoholic beverages to excess, had willfully failed to pay the board ordered victim restitution, statutory collection fee, and the supervision fee, and had failed to follow the advice and instructions of the supervising

agent in that he contacted Ms. Cotton. Supp. App. 22-23. Mr. Rivers also recommended Petitioner's parole be revoked. Supp. App. 24.

On October 16, 2013, a parole revocation hearing was held before the parole board at Lee Correctional Institution. Supp. App. 25. The board found Petitioner had violated the conditions of his parole and revoked parole. Supp. App. 25.

Petitioner then filed an application for post-conviction relief, challenging his parole revocation, on February 26, 2014. App. 251-65. Respondent made its return, requesting an evidentiary hearing be held. App. 266-74. A hearing into the matter was convened on April 19, 2016, and April 21, 2016, before the Honorable Perry H. Gravely. App. 275. Petitioner was present at the hearing and represented by Anna Good Browder, Esquire. App. 275. At the hearing, Respondent moved to dismiss the application. App. 281, 283-90. After hearing arguments from both Petitioner and Respondent, Judge Gravely denied Respondent's motion to dismiss. App. 291. Thereafter, a full evidentiary hearing into the application for post-conviction relief was convened on February 1, 2017, before the Honorable Eugene C. Griffith, Jr. App. 298. After hearing all of the testimony presented at the hearing and arguments from both parties, Judge Griffith issued an order of dismissal on July 28, 2017, denying and dismissing the application with prejudice. App. 350-62. Specifically, Judge Griffith found although it was unclear whether there was a finding on the record by the administrative hearing officer as to the danger to the witnesses at the revocation hearing, there was testimony indicating the parole agent knew the witnesses had been allegedly subject to a physical attack by Petitioner. App. 361. Judge Griffith further found even if Petitioner succeeded on one of his reasons for revocation, he would still be successfully revoked due to the allegation supported by the parole agent. App.

361. Additionally, Judge Griffith found Petitioner had failed to meet his burden in establishing his parole had been unlawfully revoked. App. 362.

Petitioner filed a timely notice of appeal on August 16, 2017. Petitioner filed his petition for a writ of certiorari on May 14, 2018. This Return follows.

Summary of Facts Adduced at Parole Revocation Hearing

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

At the parole revocation hearing, Petitioner claimed he was denied his right to confront the witnesses against him at the preliminary hearing. Audio of Parole Revocation Hearing 2:45-2:51. In regard to the charged violations, he stated his parole agent came to his house on August 5, 2013, and told him not to have any contact with Ms. Cotton or her family and also advised him not to drink alcohol in excess. Audio of Parole Revocation Hearing 3:35-3:44. He testified on

[1] A copy of this audio recording is incorporated herein.

August 6, 2013, Ms. Cotton's son, daughter-in-law, and uncle came to his house and "jumped" him. Audio of Parole Revocation Hearing 3:45-3:59. He explained he did not strike anyone with a metal pipe but did hit Ms. Cotton's son with his fist. Audio of Parole Revocation Hearing 4:54-5:02. He further explained his neighbor called law enforcement, and law enforcement talked to him, as well as Ms. Cotton's family, when they arrived. Audio of Parole Revocation Hearing 4:07-4:09, 4:21-4:24. Petitioner testified he informed law enforcement he was not hurt and did not want to file charges against anyone, but he wanted law enforcement to make Ms. Cotton's family leave his home. Audio of Parole Revocation Hearing 4:25-4:34. He elaborated law enforcement did not take any action against Ms. Cotton's family. Audio of Parole Revocation Hearing 4:14-4:20.

Following Petitioner's response, the parole board chairperson stated "we have enough information and we have reviewed the facts here" and asked everyone to step outside of the room and then Ms. Cotton and her daughter entered the room. Audio of Parole Revocation Hearing 5:03-5:12. Ms. Cotton stated Petitioner worked for her for approximately nine or ten months, and he was a hard worker. Audio of Parole Revocation Hearing 5:54-6:00. Petitioner's demeanor, however, suddenly changed. 6:02-6:05. Ms. Cotton typically let Petitioner drive one of her vehicles at night and return it the next morning; but on August 5, 2013, she drove by his house at eleven o'clock in the evening and her vehicle was not there. Audio of Parole Revocation Hearing 6:17-630. She called Petitioner to see where he was, and Petitioner lied to her about his location. Audio of Parole Revocation Hearing 6:30-6:33. Ms. Cotton could tell Petitioner was drunk and at a bar. Audio of Parole Revocation Hearing 6:33-6:41.

Ms. Cotton stated she, her fifteen-year-old daughter, and her husband then went to the bar, where an altercation with Petitioner ensued. Audio of Parole Revocation Hearing 6:41-6:50. Petitioner called her daughter "un-Godly names" and also called her names. Audio of Parole Revocation Hearing 6:47-6:48, 7:05-7:11. Petitioner then got in her husband's car and demanded he take him to Ms. Cotton's home so that Petitioner could get his truck[2]. Audio of Parole Revocation Hearing 6:50-6:58. Ms. Cotton eventually called 911, and as they were about to leave the parking lot, Petitioner started walking home. Audio of Parole Revocation Hearing 7:14-7:20. She stated while Petitioner was walking to his home from the bar he was constantly texting her, threatening her and her family. Audio of Parole Revocation Hearing 7:20-7:32.

She said she went to the Kershaw County Sheriff's Office the next day, August 5, 2013, about Petitioner's behavior, and they told her it could take thirty days for them to be able to do anything. Audio of Parole Revocation Hearing 7:38-7:47. Ms. Cotton then went to speak with Petitioner's parole officer, Niquita Cook, to inform her about Petitioner's behavior. Audio of Parole Revocation Hearing 7:47-7:50. She elaborated she showed Agent Cook the text messages and voicemails from Petitioner on Ms. Cotton's phone. Audio of Parole Revocation Hearing 7:54-7:58. This prompted Agent Cook to speak with Petitioner and inform him he was to have no contact with Ms. Cotton or her family. Audio of Parole Revocation Hearing 7:50-7:54.

Ms. Cotton stated that despite this instruction, Petitioner began calling and texting her again, threatening her family and her job. Audio of Parole Revocation Hearing 8:00-8:15. She also said on August 6, 2013, her son[3] and Petitioner got into an altercation. Audio of Parole

[2] Petitioner had an old truck that he parked at Ms. Cotton's home. Audio of Parole Revocation Hearing 6:59-7:00.
[3] She explained her son was "ruffled" already by the fact Petitioner had called Ms. Cotton a whore. Audio of Parole Revocation Hearing 8:31-8:37.

Revocation Hearing 8:18-8:22. She explained Petitioner left a message on her phone saying he would bury her child. Audio of Parole Revocation Hearing 8:22-8:27. She further explained Petitioner hit her daughter-in-law, who had had surgery three weeks prior to the altercation, with a metal pipe across her stomach. Audio of Parole Revocation Hearing 8:44-8:51. Ms. Cotton also stated Petitioner hit her son. Audio of Parole Revocation Hearing 8:53-8:54. She said when she got to the location of the altercations, she called law enforcement, who filed assault charges against Petitioner. Audio of Parole Revocation Hearing 8:58-9:02. After hearing Ms. Cotton essentially repeat the information given by the agent, the parole board decided to revoke Petitioner's parole. Audio of Parole Revocation Hearing 10:09-10:10.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d. 836 (2018). The general standard of review in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). When reviewing a question of law, the reviewing court will review the issue *de novo*, with no deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber*

v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

ARGUMENT

I. The post-conviction relief court properly denied Petitioner relief on grounds he was denied the right to confrontation when (1) the person he contends he did not get to confront did not offer evidence to the parole board at the parole revocation hearing when it made the decision to revoke; and (2) he did not specifically request that the person who gave adverse information on which the parole revocation was to be based be made available for questioning in his presence. Even if Petitioner were denied due process as to the violation concerning the person who gave adverse information, he suffered no prejudice, as Petitioner did not challenge his parole revocation with respect to his three other violations.

Petitioner asserts the post-conviction relief court erred in denying Petitioner relief when he was denied his tight to confront two witnesses against him at his parole revocation hearing. Specifically, Petitioner contends he was denied his right to confront two witnesses against him, Leigh Cotton and Paul Cotton, III, at his preliminary parole revocation hearing, as well as his right to again confront Ms. Cotton at the final parole revocation hearing. However, Petitioner never specifically requested Ms. Cotton to be made available for questioning in his presence. In addition, Ms. Cotton did not provide testimony to the parole board, as she was merely commenting on the impact of Petitioner's behavior on her as a victim. Therefore, certiorari should be denied, as the post-conviction relief court properly denied relief.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1; S.C. Const. Art. I, § 3. "Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial

review." *Thompson v. State*, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) (citing *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)).

Parole revocation is not a part of criminal prosecution; therefore, "the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v. Brewer*, 408 U.S. 471, 480. However, due to the liberty interests of both the parolee and society, procedural guarantees must be afforded to the parolee, however informal. *Id.* at 483-84. Indeed, "what is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id.* at 484.

A parolee is afforded two hearings before his parole is revoked: (1) a preliminary hearing to determine whether there is probable cause or reasonable ground to believe the parolee has committed acts which would constitute a violation of the conditions of parole and (2) a final revocation hearing, if desired by the parolee, to determine whether the facts as determined at the preliminary hearing warrant revocation. *Id.* at 485, 487.

Prior to the preliminary hearing, the parolee is entitled to notice of the hearing and its purpose, as well as the violations which the parolee is alleged to have committed. *Id.* at 487; *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (a parolee is entitled to notice of the alleged violations of probation or parole). At the preliminary hearing itself, the parolee is entitled to: (1) appear and speak on his behalf; (2) present documentary evidence and witnesses on his behalf; (3) confront the witnesses against him, **if requested by the parolee**; (4) an independent decision maker; and (5) a written report of the hearing. *Id.* at 486-87; *Gagnon*, 411 U.S. at 786. Indeed, the parolee's right to confront the witnesses against him is conditional. *Id.* at 487; *Gagnon*, 411

U.S. at 786. If a parolee wishes to have a witness who has provided adverse information available for questioning in his presence, the parolee **must request the witness be available.** *Morrissey*, 408 U.S. at 487. However, even if a request is made, the witness need not be subjected to confrontation and cross-examination "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed." *Id.*

At the final revocation hearing, "the parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Id.* at 488. The minimum requirements of due process afforded during this hearing include:

> [(1)] written notice of the claimed violations of parole; [(2)] disclosure to the parolee of the evidence against him; [(3)] opportunity to be heard in person and to present witnesses and documentary evidence; [(4)] the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); [(5)] a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and [(6)] a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489; *Gagnon*, 411 U.S. at 786.

At Petitioner's preliminary hearing, Ms. Cotton was present to offer evidence in support of the alleged violations, though she did so outside of his presence. App. 304, 333, 336; Supp. App. 22. There is no indication, however, Petitioner requested that he be allowed to confront the witnesses against him. Petitioner merely claimed at the post-conviction relief hearing he **wanted** to confront Ms. Cotton, not that he asked the hearing officer if he could confront the witnesses against him and was denied that right. Because Petitioner is only afforded a conditional right to

confront the witnesses against him at a preliminary hearing and he did not assert that right, Petitioner was not denied due process and the post-conviction relief court did not err.

Similarly, Petitioner was not denied his right to confront the witnesses against him at the final revocation hearing. After the parole agent explained the violations and the evidence supporting those claims, and Petitioner gave his version of events regarding the altercation between him, Ms. Cotton, and Ms. Cotton's family, the parole board asked everyone to leave, specifically stating they had enough information and had reviewed the facts in order to make a decision. Audio of Parole Revocation Hearing 5:03-5:10. It was only after the parole board indicated it had enough information from which it could make a decision that Ms. Cotton entered the room to rehash the facts and comment as to the impact of Petitioner's behavior. A victim of a crime has the right to "be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision." S.C. Const. Art I, § 24(A)(10). Indeed, a victim has the right to not only attend but also comment at post-conviction proceedings affecting the probation, parole, or release of an offender. S.C. Code Ann. § 16-3-1560(A). Furthermore, a victim has the right "to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process." S.C. Const. Art. I, § 24(A)(1). Here, Ms. Cotton merely exercised her right to comment on the impact of Petitioner's behavior, and Petitioner did not have the right to confront or cross-examine Ms. Cotton at this post-evidentiary stage of the proceeding.

Notwithstanding the fact Petitioner was not denied his due process rights at either the preliminary or final parole hearing, Petitioner suffered no prejudice. Even if Ms. Cotton had not commented on the impact of Petitioner's behavior on her at the final revocation hearing, the

parole board still would have had the benefit of her statements from the preliminary hearing as related through the administrative hearing officer's summary. *See* Supp. App. 23. Specifically, the hearing officer noted: "Mrs. Cotton also testified and presented multiple voicemail messages from her cellular telephone which clearly show the extent of [Petitioner's] threatening behavior on August 5, August 6, and August 7, 2013." Supp. App. 23.

Furthermore, "when the trial court's revocation decision is upheld on one ground, it ordinarily is immaterial whether probation was properly revoked on other grounds unless the entire proceeding was tainted by a given error." *State v. Allen*, 370 S.C. 88, 102, 634 S.E.2d 653, 660 (2006). The same should be true of parole revocation decisions made by the parole board. Petitioner's parole was revoked for violating four conditions of his parole. Supp. App. 16, 25. Only one of those conditions relied exclusively on information provided by Ms. Cotton. Specifically, the parole board found Petitioner violated conditions three[4], seven[5], nine[6], and ten[7] of his parole. Supp. App. 16, 25. At the time of his parole revocation, Petitioner was sixty-five dollars in arrears on his supervision and BORA fees. App. 316, 329; Supp. App. 23. Moreover, evidence was presented to indicate Petitioner used alcoholic beverages to excess. In particular, Agent Cook testified Petitioner was hanging out in bars and had also been arrested for driving under the influence. App. 321. She further testified when she conducted a home visit, Petitioner

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[4] Condition number three of Petitioner's probation states: "I shall not use controlled substances, except when properly prescribed by a licensed physician, not consume alcoholic beverages to excess nor enter establishments whose primary business is the sale of drinking of alcoholic beverages." Supp. App. 36.

[5] Condition number seven of Petitioner's parole states: "I shall pay a supervision fee as determined by the Department." Supp. App. 36.

[6] Condition number nine states: "I shall obey all conditions of supervision set forth in this order including the payment of fines, restitution, or other payments, and the services of any period of incarceration." Supp. App. 36.

[7] Condition number ten of Petitioner's parole states: "I shall follow the advice and instruction of my Agent and I agree to comply with **any further conditions imposed by the Department or its' Agents.**" Supp. App. 36 (emphasis added).

appeared to be intoxicated. App. 330. She elaborated she could smell alcohol on Petitioner's breath, saw beer cans all over his property, and Petitioner was sweating heavily. App. 330. Because Petitioner did not challenge his revocation with respect to his failure to pay supervision and BORA fees nor his failure to use alcohol to excess and because Petitioner's entire proceeding was not tainted by error, it is immaterial whether or not revocation was proper with respect to his failure to refrain from having contact with Ms. Cotton or her family.

In conclusion, the post-conviction relief court properly denied Petitioner relief on grounds he was denied the right to confrontation when (1) Ms. Cotton did not offer evidence to the parole board at the parole revocation hearing when it made the decision to revoke; and (2) he did not specifically request that Ms. Cotton be made available for questioning in his presence. Even if Petitioner were denied due process as to the violation concerning Ms. Cotton, he suffered no prejudice, as he did not challenge his parole revocation with respect to his other violations.

II. Petitioner's arguments that the post-conviction relief court erred in denying relief because Petitioner was treated differently due to his *pro se* status at the parole hearings and was denied his right to disclosure of the evidence against him, the opportunity to be heard in person and to present witnesses and evidence, and the right to a written statement by the factfinders as to the evidence relied upon and reasons for revoking parole, are not preserved for appellate review. Even if these arguments were preserved, they are conclusively refuted by the record, where the factfinder made specific findings as to each parole violation and when Petitioner did not assert his rights at the revocation hearing.

Petitioner contends the post-conviction relief court erred in denying Petitioner relief, where Petitioner was allegedly "denied his right of disclosure of evidence against him, his right of an opportunity to be heard in person and to present witnesses and documentary evidence, and his right of a written statement by the factfinders as to the evidence relief on and reasons for

revoking parole." PWC 1. Petitioner also alleges he received disparate treatment based on his *pro se* status at the parole revocation hearings.[8]

None of Petitioner's arguments are preserved for appellate review, as these arguments were not ruled upon by the post-conviction relief court. Pursuant to section 17-27-80 of the South Carolina Code, the post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. S.C. Code Ann. § 17-27-80. The failure to specifically rule on the issues precludes appellate review of the issues. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). In the present case, the post-conviction relief court did not specifically address whether Petitioner was denied his right of disclosure of the evidence against him, the opportunity to be heard, to present witnesses and evidence on his behalf, and to a written statement by the factfinders. Instead, the ruling by the post-conviction relief court addressed only the alleged denial of the right to confrontation.

In *Marlar v. State*, this Court held the applicant's failure to file a Rule 59(e), SCRCP, motion asking the post-conviction relief judge to make specific findings of fact and conclusions of law as to rejected post-conviction challenges rendered those challenges waived for appellate

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[8] Petitioner also asserts, within his argument, he was denied his right to appointed counsel. Respondent submits this is not properly raised for appellate review. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."). Even if this issue is properly presented for appellate review, this argument is wholly without merit. There is no "inflexible constitutional rule with respect to the requirement of counsel" for a probationer or parolee. *Gagnon*, 411 U.S. 789-90. Rather, the decision with respect to the need for counsel "must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." *Id.* at 790. There is no Sixth Amendment right to counsel during a parole revocation hearing. *Duckson v. State*, 355 S.C. 596, 586 S.E.2d 576 (2003). Moreover, "the board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing which considering a case for parole." S.C. Code Ann. § 24-21-50. However, this "statutory right to have counsel present is not comparable to a probationer's absolute right under state law to appointed counsel." *Turner v. State*, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009). Here, Petitioner had no right to court appointed counsel at his parole revocation hearings. Because he had no right to appointed counsel, it cannot be said Petitioner was denied this right.

review, precluding further review on the merits. 375 S.C. 407, 653 S.E.2d 266 (2007). Indeed, this Court noted:

> Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP.

Id. at 410, 653 S.E. 2d at 267. In the current case, to the extent Petitioner believed the post-conviction relief court failed to address some issues he raised, Petitioner failed to make the proper motion under Rule 59.

The current case is similar to *Marlar* because Petitioner did not make a Rule 59(e) motion. Petitioner's argument to this Court is the post-conviction relief judge erred in refusing to find Petitioner was denied specific due process rights at his parole revocation hearings. However, the only issue ruled upon by the post-conviction relief court in its Order of Dismissal concerning Petitioner's due process rights was whether Petitioner was denied his right to confront the witnesses against him. App. 360-61. Petitioner did not make a Rule 59(e) motion asking the post-conviction relief court to make specific findings of fact and conclusions of law on the current allegations he now raises for appellate review. Therefore, under *Marlar*'s holding, the additional issues now raised are not preserved for appellate review. These issues are not preserved for appellate review.

Even if Petitioner's argument were preserved for appellate review, Petitioner's argument lacks merit. A parolee merely has the right to written notice of the alleged violations of parole, as well as the right of disclosure of the evidence against him. *Morrissey,* 408 U.S. at 489.

Because a revocation hearing does not seek to establish a parolee or probationer's guilt and because the level of proof required during a revocation hearing is much lower than that during a criminal trial, the extensive requirement of disclosure of favorable evidence to the accused as outlined in *Brady*[9] does not apply. *See State v. Hill*, 368 S.C. 649, 658, 630 S.E.2d 274, 279 (2006) (declining to extend the *Brady* rule to probation revocation hearings). Similarly, the requirement for the disclosure of evidence in criminal cases under Rule 5, SCRCrimP, "does not apply in probation revocation proceedings because these proceedings are not criminal trials." *Id.* at 659, 630 S.E.2d at 280. The same is true for parole revocation proceedings.

Here, Petitioner was provided a copy of his arrest warrant, as well as a copy of the violation report, which specifically enumerated the violations of Petitioner's parole. App. 263-64; Supp. App. 17-18. Specifically, the arrest warrant alleged:

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

App. 263. Clearly, Petitioner was provided notice of the violations prior to his parole revocation hearings. Furthermore, because the revocation hearing does not seek to determine Petitioner's guilt and because the level of proof required for a revocation hearing is much lower than the standard in criminal trials, Petitioner had no right to disclosure of exculpatory or impeaching evidence under *Brady* or Rule 5.

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[9] *Brady v. Maryland*, 373 U.S. 83 (1963).

Petitioner's argument he was not afforded his right to be heard nor to present witnesses or evidence on his behalf is conclusively refuted by the record. Petitioner was given ample opportunity to explain his version of events to the parole board. *See* Audio of Parole Revocation Hearing 2:45-5:02. He was able to explain to the parole board that Ms. Cotton's son and daughter-in-law came to his house and "jumped him[10]." Audio of Parole Revocation Hearing 3:45-3:59. He also admitted striking Ms. Cotton's son but denied hitting anyone with a metal pipe. Audio of Parole Revocation Hearing 4:54-5:02. Petitioner also explained he did not want to file charges against Ms. Cotton's son. Audio of Parole Revocation Hearing 4:25-4:34. Clearly, Petitioner was able to address the parole board at his final revocation hearing. Furthermore, Petitioner wholly failed to explain at the post-conviction relief hearing what witnesses or evidence he would have presented at the revocation hearings that he was unable to present. Accordingly, Petitioner was neither denied his right to be heard nor denied his right to present witnesses and evidence on his behalf.

Petitioner's allegation he was denied his right to a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole is also conclusively refuted by the record. Following the preliminary hearing, the administrative hearings officer issued a detailed summary of the hearing, articulating his findings and recommending Petitioner's parole be revoked. *See* Supp. App. 22-24. Specifically, the hearing officer found Petitioner had used alcoholic beverages to excess, relying on the testimony and observations of Agent Cook. Supp. App. 22. The hearing officer further found Petitioner had willfully failed to pay BORA and

[10] At the post-conviction relief hearing, Petitioner testified similarly—that Ms. Cotton's son came on his property and "jumped him." App. 312. He elaborated Ms. Cotton's son, however, "didn't win." App. 312. Petitioner also admitted to responding to Ms. Cotton's text message, even though he was aware he was supposed to have no contact with Ms. Cotton or her family. App. 310, 311-12.

supervision fees, again relying on the testimony of Agent Cook. Supp. App. 23. The hearing officer also found Petitioner had failed to follow the advice and instructions of the parole agent. Supp. App. 23. In finding Petitioner had repeatedly contacted Ms. Cotton and her family despite explicit instructions not to, the hearing officer relied on the statements of both Agent Cook and Ms. Cotton. Supp. App. 23. He also relied on text messages and voicemail messages from Petitioner to Ms. Cotton or her son. Supp. App. 23. The hearing officer gave a detailed account of his findings; therefore, Petitioner was not denied his right to a written statement of the findings from his preliminary hearing.

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

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

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

No part of this argument is preserved for appellate review, as it was never ruled upon by the post-conviction relief court. Even if this argument were preserved, Petitioner was not denied

his rights at the parole revocation hearings, as he was given ample opportunity to explain his version of events to the parole board, failed to identify any witnesses or evidence which he desired to present at the hearings, and was provided detailed findings from both the administrative hearing officer and the parole board. Also, Petitioner made no showing as to how his *pro se* status worked to his disadvantage during the proceedings.

III. Petitioner's argument that South Carolina's statute restricting an inmate's right to confront the witnesses against him at a parole revocation hearing is unconstitutional is not preserved for appellate review. Even if this argument were preserved, the statute is not unconstitutional, where it is the State's responsibility to write a code of procedure for parole revocation proceedings as long as it meets the minimum requirements of due process, and where the right to confrontation may be denied by the State for good cause.

Petitioner finally contends section 24-21-50 of the South Carolina Code is unconstitutional because the statute prohibits an inmate from confronting witnesses at a parole hearing. However, it is the State's responsibility to write a code of procedure for parole revocation proceedings, so long as it meets the minimum requirements of due process.

Petitioner's argument is not preserved for appellate review, as Petitioner never raised this argument in the lower court nor was it ruled upon by the post-conviction relief court. Pursuant to section 17-27-80 of the South Carolina Code, the post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. S.C. Code Ann. § 17-27-80. The failure to specifically rule on the issues precludes appellate review of the issues. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Moreover, "a constitutional claim must be raised and ruled upon to be preserved for appellate review." *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (citing *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989)). In the present case, the post-conviction relief court did not specifically

address whether section 24-21-50 is unconstitutional. Indeed, Petitioner never raised this argument to the post-conviction relief court. Thus, it was neither raised to nor ruled upon.

As aforementioned, Petitioner did not make the proper motion under *Marlar*. Petitioner's argument to this Court is the statute prohibiting inmates from confronting witnesses at a parole revocation hearing is unconstitutional. Neither Petitioner nor the post-conviction relief court addressed the constitutionality of this statute. *See* App. 350-62. Therefore, under *Marlar*'s holding, the current issue now raised is not preserved for appellate review.

Even if Petitioner's argument were preserved for appellate review, Petitioner's argument lacks merit. "Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.'" *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). Despite the fact an inmate's rights are diminished in prison, prisoners may claim the protections of the Due Process Clause. *Id.* at 556. However, "the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id.* Because parole revocation hearings are not part of a criminal prosecution, "the full panoply of rights due a defendant in such a proceeding does not apply." *Morrissey*, 408 U.S. at 480. Indeed, "there must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff*, 418 U.S. at 556.

Section 24-21-50 of the South Carolina Code provides: "No inmate has a right of confrontation at the [parole] hearing." S.C. Code Ann. 24-21-50. It is the State's responsibility to write a code of procedure for parole revocation proceedings, as long as it meets the minimum

requirements of due process, and where the right to confrontation may be denied by the State for good cause. *See Morrissey*, 408 U.S. at 488 ("We cannot write a code of procedure; that is the responsibility of each State."); *see also id.* at 490 ("We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements . . . which are applicable to future revocations of parole, should not impose a great burden on any State's parole system."). As explained by Agent Cook at the post-conviction relief hearing, if a parole revocation hearing "is held in the multipurpose room, that's behind in a secured area and they do not allow people off the street in that secured area." App. 336. Clearly, the jail has an interest in keeping everyone present at the hearing safe. Therefore, the decision to hold the hearings in a secured location and not allow laypersons to enter that secured area is a reasonable restriction on an inmate's rights under the Due Process Clause. Accordingly, South Carolina's statute prohibiting inmates from confronting witnesses at a parole revocation hearing is not unconstitutional.

In conclusion, Petitioner's argument section 24-21-50 is unconstitutional is not preserved for appellate review, as it was neither raised before nor ruled upon by the post-conviction relief court. Even if this argument is preserved for appellate review, the statute is not unconstitutional, as it is a reasonable restriction on an inmate's rights under the Due Process Clause.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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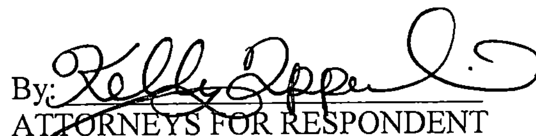
S.C. Bar No. 103245
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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September 28, 2018.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001718

WILLIAM BRUCE JUSTICE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

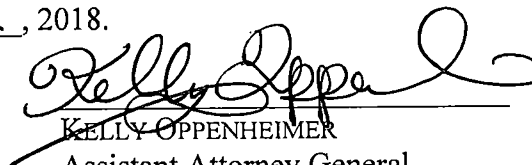
PROOF OF SERVICE

I, Kelly Oppenheimer, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
South Carolina Commission on Indigent Defense—Office of Appellate Defense,
Post Office Box 11433
Columbia, South Carolina 29211-1433

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

This 28th day of September, 2018.



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001718

WILLIAM BRUCE JUSTICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

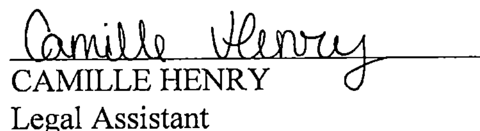
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Taylor D. Gilliam, Esquire
SC Commission of Indigent Defense- Appellate Division
PO Box 11589
Columbia, South Carolina 29211-1589

This 28th day of September, 2018



CAMILLE HENRY
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 28 2018
S.C. SUPREME COURT

September 28, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **William Bruce Justice v. State of South Carolina**
Appellate Case No. 2017-001718
Lower Court Case No. 2014-CP-32-0698

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Kelly Oppenheimer
Assistant Attorney General
SC Bar No. 103245

KO/ch
Enclosures

cc: Taylor Gilliam, Esquire (2 copies)