STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPELLATE CASE NO. 2013-000696

APPEAL FROM GREENWOOD COUNTY
FRANK R. ADDY JR., CIRCUIT COURT JUDGE
Case No. 2012-CP-24-1485

State of South Carolina,

Respondent,

vs.

Regan Berkley Chrisley,

Appellant.

REPLY BRIEF OF APPELLANT

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Appellant raises two principal arguments on appeal: no evidence existed in the record upon which the revocation could be upheld, and that he was not afforded sufficient due process prior to the revocation of his probation. The Brief of Respondent fails to adequately address or refute the grounds raised on appeal.

I. The decision was without any evidentiary support in the record, and thus should be reversed.

As Respondent states, "the authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions." (Resp. Brief, p. 9, citing State v. Spare, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007)). However, Appellant's Amended Initial Brief repeatedly addressed and referenced the basic, obvious deficiency of the proceedings in which his conditional discharge was revoked, that no evidence existed in the record that Appellant ever failed a drug test. Thus any factual findings that purport to be predicated on that record would be unsupported by the evidence and clearly wrong, and thus not controlling upon appellate review. See State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997).

The State's Designation of Matter merely states "Respondent proposes the same Designation of Matter to be included in the Record on Appeal as Appellant." But of course Appellant has not designated any evidence of a failed drug test, and none exists in the proposed record on appeal, a fact that Appellant's brief noted repeatedly when it said the "record fails to have any evidence" (p. 4), the magistrate "failed to require the State ... to ... make a lawful introduction of purported drug test results into evidence" (p. 7), the "report was never entered into evidence" (p. 7), the State "failed to... submit any evidence

at all" (p. 7), "record is devoid of sufficient information and evidence" (p. 7), and "no evidence exists at all" (p. 7).

In response, the Respondent offers two arguments. First, Respondent cites State v. Brown, 358 S.C. 382, 596 S.E.2d 39 (2004), for the broad proposition that "this Court is bound by the factual findings in the magistrate's return." (Resp. Brief, p. 9). However, closer review of that cited authority reveals that the State Supreme Court reversed the Court of Appeals because it considered additional information beyond the magistrate's return, thus considering information that was outside the Record on Appeal. Id. That merely confirms basic appellate procedure, that review is limited to the record before the court below.

By way of analogy, the law as presented by Respondent would allow a magistrate to find that the Sun orbited the Earth, and that such a factual finding could not be disturbed on appeal. Although State v. Brown ensures that the Court of Appeals could not consider a new affidavit from an astronomer to refute the magistrate's findings in such an example, the appropriate appellate court still must enforce a standard of review. And as the Respondent acknowledges in its discussion of the standard of review, the magistrate court order is subject to review to determine if it is supported by "any evidence" in the record, or if it is clearly erroneous. In these circumstances, Appellant is pointing to the deficiency of the Record on Appeal itself, not requesting information to be added to that record. It is this static, barren Record on Appeal that damns the proceedings against Appellant, and to which Appellant accepts as the final hollow record.

For a second argument, the Respondent merely references South Carolina Rule of Evidence 1101(d)(3) in support of the position that the rules of evidence do not apply to

hearing regarding revocation of probation. While the Rules of Evidence may not apply, rules *requiring evidence* still do, as referenced above in the standard of review analysis. Thus the citation proffered by the Respondent on this point is inapposite in that it merely addresses some relaxed formalities for receiving evidence, not the nature and extent of evidence required which is addressed in case law, not procedural rules.

The Respondent has thus failed to address the glaring insufficiency of the Record on Appeal in that it includes no evidence of a failed drug test. The failure of the State to address the obvious failure of any failed drug test to be included in the record below, and now record on appeal, amounts to an abandonment of the contested issue. See Turner v. S. Carolina Dep't of Health & Envtl. Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct).

II. Procedural Due Process protects Appellant to a greater extent than was afforded prior to revocation of his probation.

Appellant was entitled to more due process than just a gathering of parties in a courtroom and a recitation of his alleged wrongdoing. Even if probation is a "matter of grace" for the sentencing judge, revocation is not subject to the whims of the magistrate once imposed as the lawful sanction. Nevertheless, a large portion of Respondent's argument addressing due process considerations is an explanation of the diminished nature of due process to be afforded in the context of probation revocations relative to trials to determine guilt. Appellant disputes none of that comparison in the abstract, but dispute the relevancy of the inquiry in this matter, since he has not made any argument in favor of a right to equal due process procedures. Instead, Appellant has merely cited the

same authority as Respondent for the minimum due process constraints that are applicable to Appellant, as outlined in Morrissey v. Brewer, 408 U.S. 471 (1972) and applied in this specific context in Gagnon v. Scarpelli, 411 U.S. 778 (1973).

Respondent's own quote from a portion of Morrissey includes the requirement that for someone such as Appellant, the structure of the proceedings should "assure the finding of a parole violation will be based on verified facts." (Resp. Brief p. 14). Surely "verified facts" at least means facts within the record on appeal, which does not apply in Appellant's circumstances as neither the drug test results itself, nor any witness statements on the record, are before this Court and eligible for review. Respondent cites Morrisey's allowance of relaxed procedures for the admission of such evidence, but again, ease of entry of evidence into the record does not excuse a *lack* of evidence in the record.

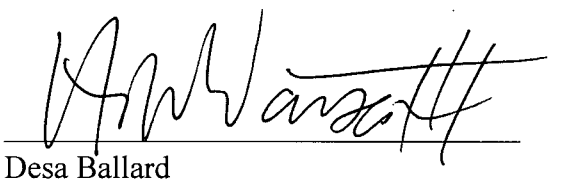
Furthermore, Morrisey expressly requires, among other minimal protections to those similarly situated to Appellate, disclosure of evidence and the right to confront and cross-examine adverse witnesses. Neither of those were afforded to Appellant, nor were they addressed by Respondent. As to the right to disclosure of evidence, Respondent merely states that Appellant received "disclosure that there had been a positive drug test", i.e. he was told there was evidence, but not given the evidence itself. As to confrontation rights, Respondent merely noted that they could be denied for "good cause" but did not bother with even a cursory argument as to whether any such determination had in fact been made, or whether "good cause" existed such that it could have been denied to Appellant.

As stated above, the failure to address these issues should be treated as a concession that neither of these required elements of procedural due process were met. See Turner v. S. Carolina Dep't of Health & Envtl. Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008).

CONCLUSION

For all of the foregoing reasons, as well as those more fully set forth in Appellant's Brief, it is respectively submitted that the Order of the Circuit Court should be reversed.

Respectfully submitted,



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April 3, 2014

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PROOF OF SERVICE

I, Beth Cogan, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on April 3, 2014, I served a copy of the **Reply Brief of Appellant** in the above-captioned case on the following individuals by standard US Mail:

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April 3, 2014
West Columbia, South Carolina