STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

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Nov 09 2020
SC Court of Appeals

WILLIAM BRUCE JUSTICE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001718

BRIEF OF PETITIONER

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ISSUES PRESENTED

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II. Did the PCR court err by denying Petitioner relief, where Petitioner was likewise 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 relied on and reasons for revoking parole which are likewise constitutionally protected, and where Petitioner also received disparate treatment based upon his *pro se* nature?

III. Whether South Carolina's statute outlawing the right to confront witnesses at a parole revocation hearing fails to meet the minimum requirements of the Due Process Clause of the Fourteenth Amendment and as a result is flagrantly unconstitutional?

IV. Whether any of the matters described herein are moot, where at least one exception to the mootness doctrine is present in Petitioner's case, where the conduct admitted to by the parole agent and actions of the parole board are not only capable of repetition but likely designed to deny due process rights, and where the delay in bringing the PCR and subsequent appeal may prevent relief?

STATEMENT OF THE CASE

Petitioner was indicted in February 1989 for four counts of burglary second, two counts of grand larceny, and two counts of petit larceny. He was represented by Frederick I. Hall, III. On June 28, 1989, Petitioner was found guilty as indicted. He was sentenced to sixty years' imprisonment on the burglary charges, twenty years on the grand larceny charges, and one month on each of the petit larceny charge by the Honorable Marion H. Kinon. The burglary sentences were ordered to run consecutive to one another, and the remaining sentences ran concurrently.

Petitioner's convictions and sentence were affirmed by this Court following appellate representation by Franklin W. Draper. State v. William Bruce Justice, 91-MO-200 (S.C. Sup. Ct, filed July 16, 1991).

Petitioner also filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court, District of South Carolina on May 15, 1989. Justice v. Bost, et al., 3:89-1232-OJ. The Honorable Matthew J. Perry, Jr. filed an Order on January 1990 granting the Respondent's motion for summary judgment thereby dismissing Petitioner's 1989 Petition without prejudice based upon Petitioner's failure to exhaust his remedies in state court.

Soon thereafter, Petitioner filed an application for post-conviction relief on or about August 18, 1992. The State made its Return on or about October 8, 1992. An evidentiary hearing was held before the Honorable Daniel E. Martin, Sr. on June 7, 1995. Petitioner was represented by John R. Rakowsky, and Allen Bullard represented the State. Judge Martin denied relief by way of written order on July 19, 1995.

Lesley M. Coggiola filed a Petition for Writ of Certiorari following the denial of Petitioner's 1992 PCR. This Court denied certiorari on June 19, 1996.

Petitioner then filed a second Petition for Writ of Habeas Corpus in the United States District, District of South Carolina on July 10, 2003. On February 4, 2004, Senior United States District Judge Matthew J. Perry, Jr. issued an Order approving the Report and Recommendation of United States Magistrate Judge Robert S. Carr and thereby dismissing Petitioner's action.

On or about May 2, 2012, Petitioner was granted parole by the South Carolina Probation, Parole, and Pardon Services. Parole was to take effect from May 3, 2012 until March 6, 2032. A warrant was issued for Petitioner's arrest on August 7, 2013 following allegations that Petitioner violated four conditions of his parole.

Petitioner attended two hearings related to his parole revocation: a preliminary hearing and a revocation hearing. The former took place on August 27, 2013 at the Kershaw County Detention Center. Petitioner represented himself. Also present at the hearing were the Administrative Officer, Petitioner's parole agent, and two witnesses. The revocation hearing occurred on or about October 16, 2013. Petitioner was found to have violated four conditions of his parole, and his parole was revoked. He was ordered to serve the remainder of his sentence.

Petitioner filed a timely application for post-conviction relief on February 26, 2014. App. 251 – 265. It contained allegations that Petitioner's parole was revoked unlawfully, including the following claim:

> Petitioner was denied the right to confront and question witnesses testifying against him that is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the South Carolina Constitution and the South Carolina Department of Probation, Parole and Pardon Services (see forms stock #36, #1122, and #1124, therefore Due Process was violated[)].

App. 258.

The State made its Return on or about May 27, 2015 App. 266 – 274. A hearing on the State's motion to dismiss was held before the Honorable Perry H. Gravely on April 21, 2016.

App. 275. Anna R. Good represented Petitioner, and Caitlin Hastings appeared on behalf of the State. The PCR court denied the State's motion. App. 291 ll. 4 – 18.

An evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr. on February 1, 2017. App. 298. Anna Good again represented Petitioner, and Johanna Valenzuela appeared on behalf of the State. The court heard testimony from Petitioner and Nikita Cook, Petitioner's parole agent and an employee for the South Carolina Department of Probation, Pardon and Parole. At the conclusion of the hearing, the PCR judge took the matter under advisement. App. 343 ll. 4 – 21.

An Order of Dismissal was filed on August 2, 2017. App. 350. The PCR court found that Petitioner's due process rights were not violated. App. 360 – 361. A notice of appeal was filed with the South Carolina Supreme Court. The undersigned filed a petition for writ of certiorari on May 14, 2018. The state filed its return on September 28, 2018, and the undersigned filed a Reply on October 8, 2018. The case was transferred to this Court pursuant to Rule 243(l), SCACR, on January 8, 2019.

This Court granted certiorari on June 30, 2020 and issued an amended order granting certiorari on July 9, 2020. This Brief of Respondent follows.

ARGUMENT

I. The PCR court erred by denying Petitioner relief, where Petitioner was denied the minimum level of due process, including his right of confrontation and cross-examination of witnesses at two parole revocation hearings in contravention of the longstanding United States Supreme Court decision Morrissey v. Brewer which guarantees parolees such a right, and where there was no testimony presented from the state's only witness, Petitioner's parole agent, that either the administrative hearing officer or the parole board made a specific finding that any of the witnesses would be subjected to harm or that good cause existed for not allowing confrontation.

Petitioner was deprived of numerous due process rights at the preliminary hearing and the revocation hearing in his parole revocation case. Both his parole agent and the parole board showed no regard for his constitutional rights and seemed intent on only revoking his parole without any thoughts to fairness or justice. The evidence needed to reverse the PCR court in this matter comes from the audio contained on the CD from the revocation hearing as well as the unequivocal PCR testimony from both Petitioner and the parole agent.

Standard of Review

South Carolina appellate courts reviews questions of law *de novo,* with no deference to trial courts, and "'will reverse the decision of the PCR court when it is controlled by an error of law.'" Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 167-68 (2008)); see also Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 8439-40 n.2 (2018).

Relevant facts

The audio from the revocation hearing validates both Petitioner's written PCR allegations as well as his testimony at the PCR hearing. CD Containing Audio of Petitioner's Parole Revocation Hearing. At the 2:37 mark, Petitioner was asked if there was anything he wanted to "add in this case" following the allegations by the parole agent. Petitioner noted that he was deprived of his right to confront witnesses at the preliminary hearing. Audio 2:39 – 3:06. Petitioner then told the parole board that he wished to explain what happened. Id. He was met with an immediate "no" from the parole board member who was speaking. Id. The board member seemed to suggest that Petitioner was deemed to have violated his parole and nothing could change his mind. Audio 3:06 – 3:22.

After notifying the parole board that he was deprived of his constitutional rights, Petitioner was given approximately two minutes to provide his account of the circumstances giving rise to the parole revocation action. Audio 2:39 – 5:11. During questioning by the parole board member, Petitioner was repeatedly interrupted as he attempted to explain the situation. He answered in a straightforward fashion when asked about a scuffle; Petitioner defended himself on his own property, and a neighbor called the police.[1] Id. Notably, Petitioner denied the allegation that he had hit anyone with a metal pipe. Id. As Petitioner continued to explain the facts, he was interrupted yet again, and the parole board member stated: "We have enough information. We have reviewed the facts here so please step outside. We'll make a decision." Audio 4:50 – 5:10.

Outside of Petitioner's presence, two witnesses were introduced to the parole board. Audio 5:29 – 10:01. These two witnesses, Ms. Cotton and Ms. Wessinger, were afforded much

[1] Petitioner testified similarly at his PCR evidentiary hearing, over two years later. App. 312 ll. 3 – 16.

more deference and respect than Petitioner. The parole board member did not repeatedly interrupt Cotton; he repeatedly said "okay" and "right" as she spoke, signifying interest. Cotton was afforded more time to speak than Petitioner, and her remarks were rife with objectionable statements. After hearing from Cotton, the decision was made to revoke. Audio 10:06 – 10:11.

Petitioner knew that his rights were trampled on, and so at the outset of his PCR action, Petitioner concisely pled in his application the following facts which on their face support the contention that his parole was unlawfully revoked:

> [On] August 27, 2013, Petitioner was denied his right to confront and question the adverse witnesses testifying against him at his preliminary hearing when the hearing officer left the room and took testimony from the adverse witnesses outside the presence of the Petitioner. (Orally taped by the hearing officer and witnessed by Ms. Cook, his parole agent. (On record)[)].
>
> [On] October 16, 2013, Petitioner was against denied his right to confront and question the adverse witness at his Revocation Hearing by the Parole Board itself, cutting the Petitioner off when he tried to question the witness … who was sitting right next to him. (Video Taped by the Parole Board and witnessed by Ms. Cook, his parole agent). (On record).

App. 258 – 259.

Included in Petitioner's application for post-conviction relief were the forms he listed, #26, #1122, and #1124. App. 260 – 262. Each of these forms indicate that Petitioner had a right to confront and question any person who appeared as a witness against him, and as will be explained below, the law requires that he be afforded that right as well as others.

The uniqueness of this claim resulted in a motion to dismiss being bright by the state. At a hearing before the Honorable Perry H. Gravely on April 19, 2016, the state requested dismissal of Petitioner's claims. App. 277 l. 12 – 281 l. 7. During its recitation of the procedural history and facts of the case, the sate admitted that the hearing officer at the preliminary hearing took the testimony of two adverse witnesses outside of Petitioner's presence. App. 280 ll. 8 – 20. As

articulated by PCR counsel in response to the motion to dismiss, Petitioner's matter was correctly brought under the PCR statute:

> To start off with, the stated statute, South Carolina Code Section 17-27-20(a), a person who has been convicted of or sentenced for a crime can file a PCR … if his parole or conditional release is unlawfully revoked. It is our position … that it was unlawfully revoked in the sense of a due process claim."

App. 281 ll. 16 – 23. In particular, counsel argued that testimony was taken from witnesses who Petitioner was neither able to hear nor cross-examine. App. 281 l. 23 – App. 282 l. 2. Additionally, Petitioner asked for but never received copies of the incident reports related to his arrest which set in motion the revocation proceedings. App. 282 ll. 3 – 17.

The state then argued that Petitioner's claims were "inappropriate for a PCR review." App. 283 l. 5- 284 l. 1. Citing S.C. Code Ann. § 24-21-680, the state averred that decisions by the Parole Board cannot be appealed. Id. In response, PCR counsel argued that Petitioner's parole was unlawfully revoked and that the claim was therefore properly brought under the PCR statute:

> The argument is that he was unlawfully revoked and that he did not have the opportunity under [the due process claim] to cross-examine or see any of the evidence against him or to hear the evidence that was - - the opportunity to counter that against the Parole Board and in the initial preliminary hearing at the Kershaw jail, because I believe that they were also present there, Your Honor.

App. 285 ll. 12 – 23.

The state then provided the due process requirements under Morrisey v. Brewer 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972):

> [I]n regards to the Applicant's argument of not being able to confront the witnesses, the United States Supreme Court case of Morrisey v. Brewer lays out the minimal requirements of due process for a parole revocation hearing and talks about how parole revocation hearings and administrative hearings are criminal hearings. Therefore the applicant is entitled to less procedural protections, in that the hearings are not meant to be flexible and lays out specifically what the minimal requirements are.

> Those requirements are written notes of the claimed violations of parole; disclosure to the parolee of evidence against him; an opportunity to be heard in person, and to present witnesses and documentary evidence; the right to confront and examine witnesses unless the hearing officer **specifically** finds good cause for not allowing confrontation; a mutual and detached hearing body, such as a traditional parole board; and a written statement by the fact finders as to the evidence relied and the reasons for revoking parole.
>
> In this case, the State finds that the hearing officer had more than good cause to disallow the confrontation of the two adverse witnesses.

App. 286 l. 11 – App. 287 l. 19. (emphasis added).

The PCR court inquired to counsel for the State whether such a specific finding was made:

> Court: Did the judge make that finding?
>
> Counsel: (No verbal response).
>
> Court: Doesn't it require the judge, the actual parole officer, to make that finding?
>
> Counsel: (No verbal response).
>
> Court: What does it say?
>
> Counsel: Uh, - - -
>
> …
>
> Court: And I don't think that there is an Order- - is there an Order in my packet that makes - - is there an Order from the Parole Board?

App. 287 l. 20 – App. 289 l. 19. Respondent admitted that such a finding could not be located in the parole hearing Order or the administrative hearing summary. App. 289 l. 20 – App. 290 l. 7.[2]

[2] This discussion notwithstanding, the Order of Dismissal still contained language that seemed to suggest a lack of such a finding could still be held against Petitioner: "This Court finds that while

Following additional discussion, the PCR court denied the State's motion to dismiss:

> I think on the second ground - - I mean … it sounds like they have a right to confront witnesses unless - - according to what you read to me - - there are specific findings saying that would not be appropriate.
>
> In my review of that Order, the judge addresses that there are issues back and forth between the people but there's not a specific finding that that wouldn't be appropriate. So - - unless you have something else, I think this needs to proceed forward and actually have - - I believe it is the Court's position that your Motion should be denied.

App. 291 ll. 4 – 18.

Following the denial of the State's motion to dismiss, an evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr. on February 1, 2017. App. 298. Anna Good again represented Petitioner, and Johanna Valenzuela appeared on behalf of the state. The court heard testimony from two people: Petitioner and Nikita Cook, Petitioner's parole agent and an employee for the South Carolina Department of Probation, Pardon and Parole. Two exhibits were entered into evidence, a violation report and a script utilized by Cook. App. 347 – 349.

Testimony of Petitioner

Petitioner made parole on May 3, 2012. App. 301 ll. 14 – 15. He was arrested for alleged parole violations in August 2013. App. 301 ll. 11 – 13. He indicated that one of the alleged parole violations involved contact with his prior employer. App. 301 l. 19 – App. 302 l. 21. The other two parole conditions which he recalled the State claiming that he violated were a payment arrearage and drinking to excess. Id.

Petitioner advised the PCR court that his first parole revocation preliminary hearing was attempted but then rescheduled due to technical difficulties with the telephones. App. 302 l. 23 –

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it is unclear of whether there was a finding on the record of danger to the witnesses, there is testimony that the parole agent knew the witnesses had been allegedly subject to a physical attack by Applicant." App. 361.

App. 303 l. 12. The second preliminary hearing was held in a conference room at the Kershaw County Jail. App. 303 ll. 13 – 14. In the room with Petitioner were the parole examiner and Petitioner's parole officer, Cook. App. 303 ll. 16 – 20. Two witnesses against Petitioner, his former employer Ms. Cotton and her husband, were present at the facility but not in the conference room. App. 304 ll. 2 – 6.

Petitioner recalled Cook read allegations against him from a piece of paper without much specificity. App. 303 l. 21 – App. 304 l. 1. Because Cotton neither spoke nor testified under oath in Petitioner's presence, he was unaware at the time of the evidentiary hearing what was said. App. 304 ll. 7 – 14. As a result, Petitioner was unable to respond to any allegations made by either witness or cross-examine them. Id.

Petitioner wanted to utilize his right of confrontation regarding Cotton, because she "made a bunch of false accusations" against him. App. 305 ll. 2 – 18. Petitioner notified the PCR court that Cotton had applications on her phone which could spoof caller ID's and text messages. Id. However, he was never allowed to cross-examine or even confront Cotton.

Petitioner requested an attorney on more than one occasion. App. 304 ll. 15 – 19. He was never provided one, because "[t]he parole office doesn't … appoint lawyers." App. 304 l. 20 – App. 305 l. 1. All in all, Petitioner was deprived of his right of confrontation and his right to view the evidence against him. App. 304 l. 2 – 305 l. 18. Further, the current procedures for requesting an attorney appear illusory, such that no individual who is facing parole revocation could or would ever receive counsel.

Following the hearing in August 2013 at the Kershaw County Jail, Petitioner attended a second hearing before two members of the Parole Board at Lee Correctional in October 2013.

App. 305 ll. 19 – 25. Petitioner's recollections of this hearing over two years later, as compared to the audio CD, was remarkably accurate.

At this hearing, Cook made a presentation via a video camera to the partial board which appeared on a screen. App. 306 ll. 1 – 12. Petitioner was asked whether he had hit someone with a pipe; when he answered in the negative, the board cut him off and turned off the camera. Id. Once more, Petitioner was denied his right to confront either Cook or Cotton regarding the allegations leveled against him. App. 306 l. 9 – 25. He was unaware whether Cotton or her daughter-in-law, both who attended the hearing, spoke to the parole board. Id. He was denied the opportunity to confront either at the hearing in October. App. 306 l. 21 – App. 307 l. 3. When asked if he would have wanted to be able to hear their remarks and ask them questions, Petitioner answered "[a]bsolutely." App. 306 ll. 1 – 25.

Petitioner requested counsel at this hearing as well:

> I asked a gentleman that was sitting out there with us that rode down with us, I don't know his name, he was sitting with me and Ms. Cook. I said, "How do I go about getting a lawyer so I can prove some of this stuff is false?" He said it's too late for that.

App. 307 ll. 4 – 11.

Regarding the alleged drinking violation, Petitioner presented a medical defense at the PCR hearing. App. 308 ll. 10 – 22. With respect to the claim that he contacted his former employer, Petitioner explained that a responsive text message was the ground upon which the State attempted to revoke his parole: "I left my truck at her house and she text[ed] me and said your truck's on the way and I text[ed] her back. I said okay." App. 310 ll. 13 – 23.

Petitioner also disputed the late payment allegations. App. 311 ll. 3 – 13. He indicated that his parole agent always let him make his payments at the end of the month when he came in to report. Id. On cross-examination, Petitioner testified that he was defending himself on his

own property and never sought violence. App. 312 l. 3 – 313 l. 22. He was unsure whether the metal pipe allegations came from. Id. Perhaps the most noteworthy line from the entire PCR hearing came during this exchange between Petitioner and PCR counsel:

> Q: And everything that you just explained about this fight and them coming to your home that you just testified to, at your parole revocation hearing were you able to tell the parole board about that?
>
> A: **This is the first time three and a half years later that I have had an opportunity to tell my side of the story.**

App. 317 ll. 5 – 12. (emphasis added).

Testimony of Nikita Cook

After Petitioner's testimony concluded, Cook took the stand. App. 318. She described Petitioner as a "model citizen" during the beginning of his parole. App. 320 ll. 18 – 24. "He was clean cut. Just how he is today. He was very polite and he was on the right path. He was working. And like he said, he came in every month. He paid his fees." Id. However, Cook testified that she soon thereafter imposed a condition that Petitioner was not supposed to contact Cotton or her family. App. 321 ll. 13 – 16.

Regarding the parole revocation hearings, Cook was unable to recall whether more than one hearing took place. App. 322 ll. 5 – 18. Cook averred that she presented a statement and a cell phone printout at one of the hearings. App. 322 l. 24 – App. 323 l. 4; App. 323 l. 23 – App. 1.

When asked whether Petitioner was provided that evidence, Cook testified that Petitioner was shown none of it: "probably not because usually they go out and hire an attorney and you give all that information to the attorney." App. 323 l. 5 – 9. Cook also testified that "[a]n attorney will not be appointed except in the most extraordinary circumstances." App. 323 ll. 5 – 15. Therefore, because Cook did not deem Petitioner's matter to be one of "extraordinary

circumstances" and because Petitioner could not afford to hire an attorney, he represented himself. Because he represented himself, he was not provided any of the information that the parole board received.

However, even the attorneys at parole hearings are traditionally limited in their advocacy, according to Cook: "[i]n my most recent experience … where the offender actually had an attorney, the attorney was not allowed to say a whole lot." App. 327 ll. 7 – 14. Cook admitted that Petitioner was not allowed "to say a whole lot" to the members of the parole board. App. 326 l. 13 – 23. Petitioner was only allowed to respond to questions, according to Cook. The hearing was "not open dialogue." App. 326 l. 20 – App. 327 l. 6. The state concluded that Petitioner was therefore treated "similarly to any other person whether represented or not by the parole board." App. 327 ll. 15 – 18. Seemingly suggesting that Petitioner was afforded the presumption of innocence, Cook testified that Petitioner had "the opportunity to remain silent if he wished to" at the preliminary hearing. App. 327 l. 19 – 328 l. 3.

Cook admitted on cross-examination that she has never seen a parole examiner make a determination that extraordinary circumstances exist such that an individual would be appointed an attorney. App. 332 ll. 20 – 23. Furthermore, there was not a determination, one way or the other, at the initial hearing regarding extraordinary circumstances. App. 332 l. 24 – App. 333 l. 1.

Although Cook was unable to recall at first, the hearing officer's report refreshed her memory and she recalled that Cotton and her husband were at the preliminary administrative hearing. App. 333 ll. 2 – 25. Cook admitted that neither witness was in the same room as Petitioner. Id. Cook testified that "if [the witnesses] were present, they may have" spoken to the

administrative hearing officer, Mr. Rivers. App. 334 ll. 1 – 11. However, Petitioner would not have been present for that, according to "the jail's rules." Id.

According to the jail's rules, the hearing officer would have left the conference room and gone to where the witnesses were located. App. 336 ll. 3 – 24. Had Petitioner been represented, the attorney would have been allowed to go with the hearing officer. Id. However, in Petitioner's case, it was just the hearing officer who went and spoke with the witnesses. Id. Petitioner was not allowed to go and confront or cross-examine either witness. Id.

Respondent's Exhibit #1, Cook's script, was entered into evidence at the evidentiary hearing. App. 324 l. 2 – App. 326 l. 5. The script was read to the members of the parole board present for Petitioner's hearing. App. 334 ll. 12 – 16. Cook indicated that the parole board received a packet of information prior to the hearing. App. 334 ll. 17 – 19. The following exchange then took place between PCR counsel and Cook regarding Petitioner's due process rights:

Counsel: Did Mr. Justice get a copy of that packet?

Cook: No.

Counsel: Why not?

Cook: Because he's not an attorney.

App. 334 ll. 22 – 25.

Cook admitted that it was not standard practice to provide a *pro se* individual with this packet that the determining board would rely on to make a decision. App. 335 ll. 1 – 3. In a harrowing acknowledgement, Cook disclosed that Petitioner "was not even allowed to see what the parole board had in front of them." App. 335 ll. 10 – 12. Worse, Petitioner did not "get to say anything to the parole board to defend himself." App. 335 ll. 17 – 23.

PCR counsel succinctly summarized in closing remarks the unconstitutional nature of the two parole revocation hearings in Petitioner's case:

> Mr. Justice was not allowed to have due process in his parole violation hearing. There were two separate hearings. The original preliminary hearing as well as the second parole hearing. You heard Ms. Cook testify that she did not give - - Mr. Justice did not even have the opportunity to have a copy of any of the paperwork or packet because he did not have an attorney. He was representing himself, Your Honor. We believe he should have been allowed to have a copy of the packet. In addition, there was no finding in any of these records. … There was no finding anywhere that was determined whether there was any extraordinary circumstances or not and he testified that he did ask for an attorney.
>
> …
>
> He was not allowed to address the parole board. [Cook] indicated he's not allowed to have open dialogue. They may have asked him a couple of questions, however, she remembers them cutting him off and not letting him necessarily speak. So we would say, Your Honor, that he was not given due process in this hearing. He was not allowed to confront the witnesses. They were at the original preliminary hearing and we believe they were at the second hearing also, Your Honor. They spoke to the parole board. So we would ask that you grant the PCR and allow him to have a full parole revocation hearing.

App. 340 l. 3 – App. 341 l. 25.

During each of the hearings in Petitioner's PCR matter, the PCR court admitted that it was not familiar with various portions of the parole process. App. 289 ll. 20 – 23; App. 343 ll. 4 – 14. At the end of the PCR evidentiary hearing, the court took the matter under advisement. App. 343 ll. 4 – 22.

The PCR court inexplicably found that Petitioner's due process rights were not violated even though there was not an express finding that witnesses would be at risk if Petitioner was afforded his constitutional right of confrontation and cross-examination. App. 360 – 361. Contained within the Findings of Fact and Conclusions of Law section for the allegation that petitioner was deprived his right to confront witnesses were two paragraphs containing brief reference to two cases: Morrissey, supra, and State v. Hicks, 387 S.C. 378, 692 S.E.2d 919

(2010). The Order of Dismissal also contained a false assertion that there were no tapes or transcripts of the hearings.[3] App. 360.

For the reasons listed below, the decision by the PCR court should be reversed.

Discussion

Petitioner received a sixty year sentence in 1989 and was granted parole in 2012. Following a revocation hearing that failed to afford him his constitutionally protected due process rights, his parole was revoked and he was ordered to remain incarcerated.

As will be discussed more fully *infra*, Petitioner was denied multiple rights afforded to him by the United States Constitution and years of United States Supreme Court jurisprudence. An outline of the applicable due process rights can be found in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

> 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. 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 affect 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).

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[3] The CD before this Court was provided to the PCR court at the evidentiary hearing. App. 328 l. 13 – 329 l. 13.

In Morrissey, two petitioners' paroles were revoked without a hearing. 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Through habeas corpus proceedings, they maintained that they were thereby deprived of their due process rights under the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court granted certiorari, and in a landmark opinion, held that due process rights are afforded to parolees.

At the preliminary hearing, the parolee is entitled to: (1) notice of the alleged violations of parole; (2) an opportunity to appear and to present evidence; (3) a conditional right to confront adverse witnesses; (4) an independent decisionmaker; and (5) a written report supporting whether or not there is probable cause to hold a final revocation hearing. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (citing Morrissey, 408 U.S. at 487).

At a final revocation hearing, the "minimum requirements of due process" require (1) written notice of the claimed violations; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and the right to confront witnesses; (4) the right to cross examine adverse witnesses; (5) a neutral and detached adjudicator; and (6) a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole. Morrissey, 408 U.S. at 489; see Gagnon, 411 U.S. at 786.

Petitioner was therefore entitled to numerous due process protections according to Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In Gagnon, the United States Supreme Court was faced with the question of whether "an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings." Id. at 783, 93 S.Ct. 1756. The Supreme Court started its analysis by looking at Morrissey, which established the

minimum requirements of due process for parole revocation. Those basic minimum requirements were not met in Petitioner's case.

The Supreme Court noted that "the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess." 411 U.S. at 786, 93 S.Ct. 1756. The Gagnon Court concluded that the entitlement of counsel should be determined on a case-by-case basis. The Court offered guidance on how to make this determination:

> [C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the condition upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

411 U.S. at 790-91, 93 S.Ct. 1756.

Recognizing that a Sixth Amendment right to counsel does not exist in the context of a parole revocation hearing under Duckson v. State, 355 S.C. 596, 586 S.E.2d 576 (2003), statutory law permits counsel to appear at such a hearing: "The [Board of Probation, Parole, and Pardon Services] shall grant hearings and permit arguments and appearance by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law." S.C. Code Ann. § 24-21-50.

Petitioner recognizes that prisoners have no constitutional right to parole. Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Parole is a privilege, not a right. Cooper v. South Carolina Dept. of Probation, Parole and Pardon Services, 337 S.C. 489, 661 S.E.2d 106 (2008). The Fourth Circuit Court of Appeals

has also indicated that federal courts must allow state parole authorities wide discretion and must not involve themselves in the merits of the state's parole statute or its individual parole decisions. Franklin v. Shields, 569 F.2d 784, 800 (4th Cir. 1977).

However, "[t]he distinction between a right and a privilege is no longer an acceptable basis for determining whether the due process clause applies to a governmental benefit. Id.; See Gagnon v. Scarpelli, 411 U.S. 778, 782 n. 4, 93 S.Ct. 1756, 1760, 36 L.Ed2d 656 (1973) (It is clear at least after Morrissey v. Brewer … that a probationer can no longer be denied due process, in reliance on the dictum in Escoe v. Zerbst, 295 U.S. 490, 492 (55 S.Ct. 818, 79 L.Ed. 1566 (1935), that probation is an "act of grace."); See also Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 842-48 (1975).

"It is difficult to imagine a context more deserving of federal deference than state parole decisions." Vann v. Angelone, 73 F.3d 519 (4th Cir. 1996). The Supreme Court has established the process that is due before an individual's probation may be revoked. Prior to revocation, a probationer is entitled to two hearings: a preliminary hearing following arrest, and a final revocation hearing. Morrissey v. Brewer, 408 U.S. 471, 485-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Black v. Romano, 471 U.S. 606, 611, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985).

State Law on Due Process and Parole Revocation Proceedings

South Carolina Post-Conviction Relief Act

As noted above, the state initially contested the avenue through which Petitioner brought his claim. However, under South Carolina's Uniform Post-Conviction Procedure Act, "[a]ny person who has been convicted of, or sentenced for, a crime and who claims … his probation,

parole or conditional release [has been] unlawfully revoked" may institute a PCR proceeding. S.C. Code Ann. § 17-27-20(A)(5).

In Al–Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), this Court held that "aside from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17–27–20(a)." Id. at 367, 527 S.E.2d at 749 (emphasis in original). One of the exceptions is when a PCR applicant claims that his parole has been "unlawfully revoked." See S.C. Code Ann. § 17–27–20(a)(5) (1985). In Al–Shabazz, this Court described this exception as one which authorizes a PCR action when "the applicant asserts he should not have been returned to prison to serve the remainder of a valid sentence." 338 S.C. at 368, 527 S.E.2d at 749. In Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001), this Court held that an individual whose parole had been revoked had cognizable claims under the PCR statute. Id. "This exception in the PCR statute covers an applicant's claim that he has been unlawfully returned to prison. It matters not whether the action is called a revocation, a rescission, or a termination." Id. at 186, 547 S.E.2d 494, 495. Thus, there can be no question that Petitioner's case was properly brought in a PCR action.

As this Court noted in Brown v. State:

> The South Carolina Code contains a scrivener's error in the publication of subsection 17-27-20(A). In the text of Section 1 of the original 1969 Uniform Post-Conviction Relief Procedure Act—which became section 17-27-20 in the 1976 Code—subsection (A)(6) ends with the language "… available under any common law, statutory, or other writ, motion, petition, proceeding or remedy;" followed by a line break, with the language "may institute … a proceeding under this chapter to secure relief" on the next line, in the body of subsection (A). See Act No. 164, 1969 S.C. Acts 158-59. The Code Commissioner made the error in the 1970 Code supplement, in which the Act was published as part of our Code. See S.C. Code Ann. § 17-601 (Supp. 1970). Thus, the language "may institute … a proceeding" applies to all six subsections of subsection 17-27-20(A).

423 S.C. 56, 814 S.E.2d 146 (2018).

The chapter under which Petitioner brought the underlying claim encompasses an action seeking an initial declaration that procedures employed by the parole board are unconstitutional and seeking by way of such a second proceeding by which he might ultimately secure his release. Baskins v. Moore, 362 F. Supp. 187, 193 (D.S.C. 1973). Petitioner's matter was therefore properly brought under the post-conviction relief statute.

South Carolina Jurisprudence

In State v. Hill, the South Carolina Supreme Court considered whether Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and Rule 5, SCRCrimP applied to probation revocation proceedings. 368 S.C. 649, 630 S.E.2d 274 (2006). The Court discussed the minimal due process framework established in Morrissey, noting that the state in that case had "no interest in revoking parole without some informal procedural guarantees." Id. at 655, 630 S.E.2d at 278. Furthermore, the Court pointed out the important notion that fundamental justice required a parolee be given a reasonable opportunity to explain an alleged violation. Id. The Court held that neither Brady nor Rule 5, SCRCrimP apply because probation revocation proceedings are not criminal trials.

Prior to Hill, the Court held that there is a right to counsel at probation revocation hearings. Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) (discussing Gagnon, as well as holding that Supreme Court Rule 51 [now Rule 602, SCACR] requires that all persons charged with probation violations be advised of their right to counsel, and indigent persons be advised of their right to court appointed counsel); see also Salley v. State, 306 S.C. 213, 215 410 S.E.2d 921, 922 (1991) ("The right to counsel attaches in probation revocation hearings.").

In elaborating on the framework established by the United States Supreme Court, the South Carolina Supreme Court has stated that while the underlying probation violations "may themselves be criminal offenses, the 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) (holding that the Fourth Amendment's requirement that a neutral magistrate issue an arrest warrant is not applicable to a probationer charged with a violation). It logically follows that "the rights of an offender in a probation revocation hearing are not the same as those extended to him … upon the trial of the original offense." Id. at 639, 281 S.E.2d at 228; see also Duckson v. State, 355 S.C. 596, 586 S.E.2d 576 (2003) (recognizing the differences between parole and probation revocation proceedings and criminal trials).

Three months after Hill, supra, the South Carolina Supreme Court decided State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006). In Allen, the Court certified for review a single question pursuant to Rule 204(b), SCACR:

> Did the trial court abuse its discretion in revoking Appellant's probation because he associated with a person who has a criminal record, a condition which is so overly broad that it violates due process?

Id. at 93-4, 634 S.E.2d at 655. Although there was a holding that due process was not violated, Allen is instructive in the due process context.

Citing heavily to Morrissey, the Court in Allen examined the minimum requirements of due process in parole revocation hearings and noted that 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. Allen at 96, 634 S.E.2d 657.

Soon after deciding Allen, the Court affirmed the PCR court's granting of relief in Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008). In that case, Dangerfield pled guilty to passing 110 fraudulent checks. After Dangerfield ceased making restitution payments as ordered, the magistrate court contacted Dangerfield's counsel and advised that bench warrants may be issued. After Dangerfield was arrested, the magistrate imposed a suspended sentence without a hearing. Id. at 177-8, 656 S.E.2d at 353.

Dangerfield filed a PCR application alleging ineffective assistance of counsel, and the PCR court found that counsel's failure to notify Dangerfield of the bench warrant and failure to request a hearing amounted to ineffective assistance of counsel because it deprived Dangerfield of her due process rights. Id. The resulting analysis of due process rights is applicable in the matter *sub judice*:

> 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 require the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.

Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-4 (2008) (citing State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006). The Court also noted:

> Like that of parolees and probationers, the extent of Respondent's conditional liberty interest encompasses many of the core values of absolute liberty. Respondent may spend unlimited time with family and friends, take on gainful employment, and participate in other hobbies and activities available to unincarcerated members of society.

Dangerfield at 181, 656 S.E.2d at 355. Similar language can be found in Morrissey:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to

> return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends to form the other enduring attachments of normal life.

Morrissey, 408 U.S. 471, 481-2, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484.

It is worth pointing out that probation may not be revoked solely for failure to make required payments of fines or restitution. Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992). Specifically, in cases involving the failure to pay fines or restitution, South Carolina courts have held that due process requires the court to first make a determination on the record that the probationer willfully violated these terms of probation. Id.

The South Carolina Supreme Court has remanded matters like Petitioner's for a hearing consistent with the guidelines set forth in Morrissey and Gagnon. State v. Riddle, 277 S.C. 110, 282 S.E.2d 863 (1981). "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 was no less true whether the loss of liberty arises from a criminal conviction of probation… [W]here the prescribed 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)). As recognized by this Court in its amended order granting certiorari, Petitioner is no longer incarcerated at this time. However, his due process rights were still violated, and he has a parole violation on his criminal record.

Argument

Petitioner's parole was revoked following the allegation that he violated the conditions of his release in three ways: drinking alcohol in excess, payment arrearage, and contact with his former employer, Ms. Cotton. App. 320 l. 18 – App. 322 l. 4; App. 347 – App. 349.

As articulated by Cook at the evidentiary hearing, the "main violation" for which was Petitioner's parole was revokes was "this Ms. Cotton thing" wherein Petitioner allegedly responded to a text message sent by Cotton to Petitioner. App. 332 ll. 10 – 12. Cook admitted that although Petitioner was allegedly in arrears sixty-five dollars, she would not have violated him unless there were other allegations. App. 329 ll. 18 – 24. Cook outright conceded that the payment arrearage "[was not] an issue" for her. App. 329 l. 25 – App. 330 l. 1. Petitioner was actually "more on top of his payments" than any other violation. App. 330 ll. 2 – 4. In fact, in the months prior to his parole revocation, Petitioner had made payments in the amount of $535. App. 316 ll. 4 – 17.

However, Petitioner was not afforded his constitutionally protected due process rights in responding to any of these allegations. As admitted by the state, the hearing officer in Petitioner's case left the room during the August 27, 2013 hearing and took the testimony of "two adverse witnesses," Lee Cotton and Paul Cotton, III outside Petitioner's presence. App. 280 ll. 3 – 20. "This testimony was both orally taped by the hearing office and witnessed by [Petitioner's] parole agent." Id.; Audio CD of hearing.

Following that hearing, a revocation hearing was held before two members of the Parole Board on October 16, 2013. App. 280 ll. 21 – 23. Petitioner's parole was revoked, and he was ordered to serve the remainder of his sentence. App. 280 l. 21 – App. 281 l. 1.

The PCR court's Order of Dismissal misapplied the law under its "Findings of Fact and Conclusions of Law" section, subheading "Ineffective Assistance of Counsel" wherein the court conflated Petitioner's allegations that the revocation was unlawful with an irrelevant case, State v. Hicks, 387 S.C. 378, 692 S.E.2d 919 (2010) which stands for the notion that an applicant must successfully challenge all grounds of a parole revocation in order to vacate the revocation. App.

358 – 360. Additionally, the PCR court erred when it stated that "[t]here are no tapes or transcripts of the hearing," because as counsel for Respondent indicated at the evidentiary hearing, an audio CD is available and has been provided to this Court. App. 328 l. 13 – App. 329 l. 8. Upon information and belief, a recording of the preliminary administrative hearing is unavailable, S.C. Code Ann. § 24-21-40 ("[t]he Board shall keep a complete record of all its proceedings…") notwithstanding. Furthermore, the PCR court erred by finding that the hearing officer made a determination that an "informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination" under Morrissey where no such finding occurred or was even warranted. App. 360 – 361.

The most incongruous conclusion made by the PCR court was the notion that testimony by the parole agent constituted a finding by the hearing officer, located under the subsection titled "Allegation #1: Right to Confront Witnesses":

> This Court finds that while it is unclear of whether there was a finding on the record of danger to the witnesses, there is testimony that the parole agent knew the witnesses had been allegedly subject to a physical attack by Applicant. And, more importantly, pursuant to Hicks, Applicant had his parole revoked **not only** for failing to follow orders and contacting these victims and the alleged assault on these victims, but also for consuming alcohol. Testimony at the hearing was that Agent Cook, who witnessed Applicant under the influence, was present at the hearing. Therefore, even if Applicant succeeded on one of his reasons for revocation, he would still be successfully revoked due to the allegations supported by Agent Cook.

App. 361. (emphasis in original). This seems to suggest that because Petitioner was alleged to have committed infractions (which were inextricably tied to these witnesses), *he should not have been entitled to due process*.

The parole board would not even let Petitioner speak for himself, much less demonstrate whether he could be effective in disputing the allegations leveled against him. It is illogical to suggest that Cook's testimony regarding Petitioner and any alleged security concerns constitute a

specific finding such that Petitioner would not have been allowed to confront witnesses, yet that is what was found by the PCR court. The following exchange was the only discussion of such a concern:

> Counsel: Do you remember if the hearing officer made a finding that he was not bringing the applicant with him because of either security concerns or concerns due to the victims being, the witnesses being victims?
>
> Cook: Well, in this case, there was an alleged assault that took place so having them in the same quarters would not be, it wouldn't be smart at that point.
>
> Counsel: Do you remember if the hearing officer said that? If he at any point said - -
>
> Cook: **I can't recall if he said that directly but …**

App. 336 l. 25 – App. 337 l. 17. (emphasis added).

Respondent cited to State v. Hicks, 387 S.C. 378, 692 S.E.2d 919 (2010) at the evidentiary hearing, and the PCR court adopted an identical argument in the Order of Dismissal. Hicks pled guilty to assault and battery of a high and aggravated nature and was sentenced to ten years' imprisonment, suspended upon time served and give years' probation. Id. at 378, 692 S.E.2d 919, 919-20. His probation was revoked, and Petitioner appealed to this Court. Id. at 379, 692 S.E.2d at 920. He "challenged only one of the three conditions the probation revocation judge found he violated." Id. The South Carolina Supreme Court held that this Court erred in addressing he merits of Hicks' argument regarding probation revocation "because the probation revocation judge revoked petitioner's probation on two additional grounds, which petitioner did not challenge." Id. (citing Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) ("Where the ruling of a trial judge is based on more than one ground, an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based.").

Hicks is wholly inapplicable in this matter, and the PCR court erred in relying on an irrelevant case to deny Petitioner relief. Petitioner is challenging the denial of his parole revocation on the grounds that he was denied his due process rights. He was not even afforded the right to challenge the merits of these allegations. It logically follows that his parole was revoked; due to the one-sided and unconstitutional system, Petitioner was doomed to fail.

The three forms included in Petitioner's application for post-conviction relief are illustrative of policies seemingly enacted by the South Carolina Department of Probation, Parole and Pardon Services which govern a parolee's constitutional due process rights yet were overlooked in Petitioner's case. Form #36, entitled "Acknowledgement of Notice Parole/EPA/YOA Conditional Release" includes an Acknowledgement of Notice for parole matters which contains the following language:

> I have also been advised that I will be permitted to have attorneys, at my own expense, and witnesses appear in my behalf if I so desire and have the right to question any person making an allegation against me at this hearing.

App. 260.

The second form included in Petitioner's application for post-conviction relief, Form # 1122, is titled "South Carolina Department of Probation, Parole and Pardon Services Notice of Offender Rights at Hearing and Hearing Waiver Option." App. 261. Similar to the previous form, it includes the following list of rights:

- You have a right to have a hearing on the charge of violation of release program.
- You have the right at the hearing to confront and question any person who appears as a witness against you.
- You may have witnesses appear in your behalf.
- You have a right to obtain an attorney at your expense.

App. 261.

The third and final form attached to Petitioner's application for post-conviction relief, Form #1124, is a Notice of Administrative Hearing. App. 262. Much like the two prior forms, this form indicated that Petitioner had "the right to question any person making allegations against [him] at the hearing." App. 262.

These three forms tell a different story than the procedure Petitioner experienced. The forms appear to respect Petitioner's constitutional rights. Unfortunately, he was not afforded the rights listed in these forms. Much like the nonexistent extraordinary circumstances which would afford a parolee the right to have an attorney appointed, the guidelines in these signed forms never manifested themselves during Petitioner's hearings.

Integral to the right of cross-examination is the right to be aware of the witnesses against oneself. Petitioner was not afforded his well-established right to confront the witnesses against him. The system appears designed to prevent a parolee from offering any sort of meaningful defense. Without an opportunity to present any mitigating circumstances or to challenge the evidence, both the preliminary hearing and revocation hearing fall well short of the clear minimums established by the United States Supreme Court.

The state contends that "Petitioner never specifically requested Ms. Cotton to be made available for questioning in his presence." Return to Petition for Writ of Certiorari p. 9. The state further argues that "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." Id. These statements are disingenuous and misrepresent both the audio from the revocation hearing as well as Petitioner's testimony at the PCR hearing.

Petitioner plainly testified that he was not allowed to confront the witnesses—Cotton or Cook—at his preliminary hearing:

Q: Was anyone else present at that hearing?

A: Yes, ma'am. Ms. Cotton and her husband were outside but they wouldn't let the[m] come in. He denied confrontation. He said I couldn't confront them.

App. 304 ll. 2 – 14; App. 306 ll. 1 – 25. As previously noted, Petitioner's recollection of both the parole revocation hearings was reliable. His unequivocal testimony was that he was denied the right to cross-examine the witnesses. Later, at the revocation hearing, he advised the parole board that he had previously been denied that right.

Cook admitted to PCR counsel that Petitioner's involvement with Cotton was one of the main allegations giving rise to the revocation action. It naturally follows that Cotton's testimony likely served as the tipping point resulting in the revocation. Petitioner's requests that he be afforded his constitutional right to cross-examine witnesses were doomed to fail, according to the jail's rules. App. 334 ll. 1 – 11.

Petitioner was therefore not only denied his right of confrontation, he was entirely unaware of her testimony. Id. Petitioner outright stated that he "wanted to confront Ms. Cotton and [the other witnesses] because they made a bunch of false accusations against me." App. 305 ll. 2 – 18. Notably, Petitioner was not aware until after the conclusion of the hearing that any adverse witnesses attended his revocation hearing. App. 306 l. 1 – App. 307 l. 3. It is therefore illogical to hold him to such an impossible standard. Petitioner could not have requested that Ms. Cotton or other adverse witnesses be made available for questioning if he did not know of their presence at the hearings. Nonetheless, he opened his remarks at the final revocation hearing by indicating that he was denied his right of confrontation at the preliminary hearing.

Notably, the forms included in Petitioner's PCR application did not denote that the right of confrontation at the preliminary hearing was a conditional one, as Respondent posits. Form

1122 simply advised that Petitioner had "the right at the hearing to confront and question any person who appears as a witness." App. 261. Similarly, Form 1124 noted that Petitioner had "the right to question any person making allegations against [him] at the [administrative] hearing." App. 262. Petitioner, representing himself at the time, indicated at the final revocation hearing and the evidentiary hearing in his PCR matter that he desired to cross-examine the adverse witnesses but that he was denied his right to do so.

The state's argument that the parole board "specifically stat[ed] they had enough information and reviewed the facts in order to make a decision" before it heard from Ms. Cotton supports Petitioner's contention that he was denied the litany of rights afforded to him by Morrissey and Gagnon. In fact, the parole board member who uttered those words did so once before, immediately after Agent Cook provided her testimony yet before Petitioner was given the opportunity to be fully heard in person, or in his words simply "explain what happened." Audio of Parole Revocation Hearing 2:38 – 3:07.

Petitioner attempted to bring to the board's attention that he was denied his right to confront witnesses and then sought to explain what happened. Id. The parole board member interrupted Petitioner and indicated that he had everything he needed in order to make a decision. Id. After giving Cook carte blanche to level accusations which Petitioner later refuted, the parole board member seemingly accepted her remarks as truthful, interrupted Petitioner, and refused to let him fully be heard in person.

After once more interrupting Petitioner around the five-minute mark on the audio, the parole board forced him from the room and heard from at least one fact witness who described Petitioner's alleged conduct. Respondent explained that this testimony from Ms Cotton was "rehash[ing] the facts." Return p. 12. Seemingly in contravention to the assertion that "Ms.

Cotton merely exercised her right to comment on the impact of Petitioner's behavior," the August 27, 2013 administrative hearing summary indicated that "Mrs. Cotton also testified and presented multiple voicemail messages from her cellular telephone which clearly show[ed] the extent of Mr. Justice's … behavior." Supplemental Appendix 23. Furthermore, both Leigh Cotton and Paul Cotton III were listed as witnesses of Agent Cook. Supp. App. 22.

Petitioner was not obligated to request that adverse witnesses be made available for the final revocation hearing. To the extent that the state argues that he should have done so for the preliminary hearing, Petitioner's testimony sets forth his multiple requests and attempts to cross examine the witnesses. At every stage of his case, Petitioner has expressed a desire to utilize his right of confrontation. Ms. Cotton testified before the parole board, which in turn relied on her testimony in order to make factual findings. The prejudice in Petitioner's matter manifests itself within the entirety of the tainted hearings; Petitioner was not provided the materials which were used against him, he was denied the right to confront adverse witnesses, he was interrupted and not allowed to be heard, and could not respond to allegations or questions raised.

The State's reliance on State v. Allen supports Petitioner's claim that the PCR court should be reversed. 370 S.C. 88, 634 S.E.2d 653 (2006). As cited in the Return, "[w]hen 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.**" Id. (internal citations omitted) (emphasis added). The error that pervaded this case is the very reason Petitioner sought an appeal under S.C. Code Ann. § 17-27-20: Petitioner was denied multiple due process rights that should have been afforded to him under longstanding case law from the United States Supreme Court. The State noted this distinction in its Return to Petitioner's application for post-conviction relief: "The court's review of whether the

Applicant's parole was unlawfully revoked is limited to an examination of whether the revocation procedure itself was lawful." App. 273. This appeal revolves around the legality of the parole revocation procedures which prevented Petitioner from fully defending himself as he is allowed to do under Morrissey and Gagnon, supra.

As described by Petitioner and his counsel, Petitioner was denied multiple rights guaranteed by the United States Constitution and South Carolina Constitution. App. 258; App. 281 l. 16 – App. 282 l. 17. The resulting errors are structural; they affected the entire conduct of both hearings. Petitioner was not provided the packet of documents which were relied on by the parole board, he was denied the right to confront and cross-examine witnesses, and he was denied the fundamental right of defending himself.

II. The PCR court erred by denying Petitioner relief, where Petitioner was likewise 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 relied on and reasons for revoking parole which are likewise constitutionally protected, and where Petitioner also received disparate treatment based upon his *pro se* nature.

Standard of Review

South Carolina appellate courts reviews questions of law *de novo,* with no deference to trial courts, and "'will reverse the decision of the PCR court when it is controlled by an error of law.'" Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 167-68 (2008)); see also Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 8439-40 n.2 (2018).

In addition to being denied his right of confrontation and the opportunity to cross-examine witnesses, Petitioner was denied his rights under Morrissey to be heard, to present witnesses and documentary evidence, and to receive disclosure of the evidence against him. "[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). Recognizing that a parole revocation differs from a trial, Petitioner's constitutional rights were nonetheless violated. Such a deprivation of rights cannot be harmless. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). The resulting error is structural and affected both of Petitioner's revocation hearings. Essentially, he was denied the opportunity to review evidence against him based on his decision to represent himself, and he was treated

differently than a represented parolee as evidenced by Cook's testimony that he did not receive a copy of the packet reviewed by the parole board "because he's not an attorney." App. 334 ll. 12 – 25.

The United States Supreme Court has distinguished between trial errors and structural defects in the trial mechanism itself. State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 919, 921 (1997) (discussing Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Structural defects "affect the entire conduct of the trial from beginning to end." Id. (quoting Fulminante, 499 U.S. at 307-08, 111 S.Ct. 1246) (internal quotation marks omitted).

Differentiating between structural and trial errors serves "to enforce procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial." State v. Chavis, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) (Hearn, J., dissenting).

The notion that Petitioner's parole revocation hearings complied with his constitutionally protected rights is a fallacy. He did not receive the very packet which the parole board relied on to revoke his parole, in direct contravention of Morrissey v. Brewer:

> With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. This notice should state what parole violations have been alleged.
>
> …
>
> The Revocation Hearing. There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. … 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.

408 U.S. 471, 486-9, 92 S.Ct. 2593, 2603-4, 33 L.Ed.2d 484.

Petitioner was not afforded these rights. App. 332 l. 20 – App. 335 l. 23. He was not appointed an attorney; such a concept appears to be foreign to all involved. Id. Petitioner was

not allowed to be present when witnesses spoke to the hearing officer; that was against the jail's rules. Id. He did not receive a copy of the packet provided to the parole board, because he was not an attorney. Id. Because he was representing himself, it was not standard practice to provide him with the same materials that a represented individual would receive. Id. He "did not get to say anything to the parole board to defend himself." Id. Petitioner was punished for electing to represent himself. His most basic rights, the minimum requirements of due process established in 1972, were denied.

The parole board overlooked both Morrissey and S.C. Code Ann. § 24-21-710, which provides that "the person whose parole is being considered" may submit electronic information which "must be considered by the Board of Probation, Parole, and Pardon Services." Petitioner stood no chance, and it was all but guaranteed that his parole would be revoked after he was not afforded any of his constitutionally protected due process rights.

The state alleges "[n]one of Petitioner's arguments are preserved for appellate review, as these arguments were not ruled upon by the post-conviction relief court." Return at 15. The state's return was filed September 28, 2018. Last year, the Supreme Court of South Caroline issued an opinion in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

The Court remanded the case to the PCR court "for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that was not addressed in the original order." Id. at 517, 832 S.E.2d at 590. The Court discussed the importance of an order of dismissal including findings of fact and conclusions of law in addition to listing many of the prior cases with similar holdings. See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); McCullough v. State, 320 S.C. 270,

464 S.E.2d 340 (1995); Bryson v. State, 328 S.C. 236, 493 S.E.2d 500 (1997); Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016).

As noted, the Findings of Fact and Conclusions of Law section regarding the denial of Petitioner's right to confrontation in the Order of Dismissal was only two paragraphs long. App. 360 – 361. The other claims were described as "Allegations #2 & 3: No Factual Support, No Probable Cause" and did not reference any of the due process violations described herein. Should this Court decline to grant relief on Issue # 1, Petitioner would request a remand in accordance with Fishburne in order to allow for meaningful appellate review of a complete Order of Dismissal. In addition to the uncontested testimony from both Petitioner and Cook, PCR counsel offered argument at the conclusion of the hearing on this issue:

> [I]t's our position that Mr. Justice was not allowed to have due process in his parole violation hearing. There were two separate hearings. The original preliminary hearing as well as the second parole hearing. You heard Ms. Cook testify that she did not give - - Mr. Justice did not even have the opportunity to have a copy of any of the paperwork or packet because he did not have an attorney. He was representing himself, Your Honor. We believe he should have been allowed to have a copy of the packet. In addition, there was no finding in any of these records. She testified that he was given the instruction when he was arrested that you have to get your own attorney, however, under extraordinary circumstances you could be appointed one. There was no finding anywhere that that was determined whether there was any extraordinary circumstances or not and he testified that he did ask for an attorney.

App. 340 ll. 3 – 19. Petitioner did not waive this argument. He was not tasked with either drafting a proposed order or filing a Motion to Alter or Amend under Rule 59(e), SCRCP. He is entitled to an appeal on the merits of this issue.

III. South Carolina's statute outlawing the right to confront witnesses at a parole revocation hearing fails to meet the minimum requirements of the Due Process Clause of the Fourteenth Amendment and as a result is flagrantly unconstitutional.

As discussed *supra*, the United States Supreme Court set forth the due process requirements afforded to parolees at both the Preliminary Hearing and Revocation hearing in 1972. At the preliminary hearing, the parolee is entitled to: (1) notice of the alleged violations of parole; (2) an opportunity to appear and to present evidence; (3) a conditional right to confront adverse witnesses; (4) an independent decisionmaker; and (5) a written report supporting whether or not there is probable cause to hold a final revocation hearing. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (citing Morrissey, 408 U.S. at 487).

At a final revocation hearing, the "minimum requirements of due process" require (1) written notice of the claimed violations; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and the right to confront witnesses; (4) the right to cross examine adverse witnesses; (5) a neutral and detached adjudicator; and (6) a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole. Morrissey, 408 U.S. at 489; see Gagnon, 411 U.S. at 786.

The South Carolina General Assembly amended S.C. Code Ann. § 24-21-50 in 1995 to include the emphasized sentence below, in direct violation of the United States Supreme Court's holding in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct 2593, 33 L.Ed.2d 484 (1972):

> The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law. *No inmate has a right of confrontation at the hearing.*

S.C. Code Ann. § 24-21-50. (emphasis added).

Because this Court may affirm any ruling, order, decision upon any ground(s) appearing in the record under Rule 220(c), SCACR, Petitioner believes the below discussion regarding the unconstitutional nature of this statute is both necessary for Petitioner's matter and helpful to this Court.

This Court has the authority to interpret the parole statute. In interpreting statutes, this Court should look to the plain meaning of the statute and the intent of the Legislature. Hinton v. S.C. Dep't of Prob., Parole, & Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct.App.2004). Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the State. See Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (construing in favor of the defendant the different time frames for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary). Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

Legislation was proposed by members of the South Carolina General Assembly that may have brought this statute back into the realm of constitutionality. Sponsored by Representative Todd Rutherford, 2017 South Carolina House Bill No. 3282 would have amended the above statute accordingly:

> **(A)** The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law.
>
> **(B)** ~~No~~ **Only a potential parolee** ~~inmate~~ **who is being considered for parole or their counsel** has a right of confrontation at the hearing.
>
> **(C)** **All testimony presented at a parole hearing must be taken under oath**

2017 South Carolina House Bill No. 3282, South Carolina One Hundred Twenty-Second Session General Assembly - First Regular Session. The emphasized sections were to be added, and the

portions which appear struck through were to be deleted. The General Assembly adjourned *sine die* on May 9, 2018 without addressing this bill.

Although not referenced in the Order of Dismissal, upon information and belief, S.C. Code Ann. § 24-21-50 has only been referenced in two published opinions since the statute was amended in the mid 1990's: Duckson v. State, 355 S.C. 596, 586 S.E.2d 576 (2003) and Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009). In Duckson, the statute was tangentially mentioned in an opinion which declared that parolees are not entitled to effective assistance of counsel because an individual's Sixth Amendment right to counsel does not exist in the context of an administrative parole revocation hearing. Id. at 598-9, 586 S.E.2d 576, 577-8. In Turner, this Court similarly held that a defendant does not have a Sixth Amendment right to counsel in probation revocation proceedings. Id. at 454-6, 682 S.E.2d 794. The statute was referenced only in a footnote and only in the context of a defendant's right to counsel.

The rights afforded by the United States Constitution as interpreted by the United States Supreme Court in Morrissey are blatantly disregarded by the South Carolina statute. As written, the statute governs "any such hearing" while considering a parole case. It is unknown whether this statute affected the policy-making such that the jail rules referenced at the PCR hearing were modified as a result. Regardless, this statute prevents individuals from receiving their due process rights and needs to be found unconstitutional.

In direct contravention to a United States Supreme Court decision from nearly fifty years ago, the General Assembly in 1995 voted to remove a constitutional right of confrontation. The statute cannot be applied as written without violating the right of confrontation provided in Morrissey v. Brewer:

> At the [preliminary] hearing, the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, person[s] who [have] given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.

408 U.S. 471, 487, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484.

South Carolina's statute is inconsistent with longstanding United States Supreme Court jurisprudence and should be declared unconstitutional by this Court.

IV. None of the matters described herein are moot, where at least one exception to the mootness doctrine is present in Petitioner's case, where the conduct admitted to by the parole agent and actions of the parole board are not only capable of repetition but likely designed to deny due process rights, and where the delay in bringing the PCR and subsequent appeal may prevent relief.

By way of the amended order granting certiorari on July 9, 2020, this Court instructed the parties to brief all issues of arguable merit. Additionally, in the event Petitioner was released from incarceration before the briefs are filed and served, this Court directed the parties to address whether the denial of Petitioner's PCR application is moot. Petitioner is no longer incarcerated. In order to determine that the matter is not moot, this Court need only look at Cook's testimony at the PCR hearing.

Relevant facts

But for Cook's honest testimony at the PCR hearing, Petitioner may have struggled to show why his case was not moot. However, because Cook was upfront with how the structure of parole revocations seems to disfavor unrepresented individuals, the evidence before this Court establishes how similar results are likely to occur in other cases.

Regarding Petitioner's denial of his right to receive disclosure of the evidence against him, Cook candidly testified that at the preliminary hearing she may have presented a statement from Petitioner as well as printouts from a cell phone. App. 322 l. 24 – 323 l. 9. When asked if any of those materials would have been provided to Petitioner, Cook expanded the scope of her answer to beyond just Petitioner's case: "[P]robably not because usually they go out and hire an attorney and you give all that information to the attorney." Id. Therefore, Cook has established a

pattern or practice of not providing unrepresented individuals the disclosures to which they are entitled.

Regarding some of the other rights under Morrissey and Gagnon, Cook's testimony showed how even represented individuals may be deprived of their rights to speak on their behalf and to present evidence and/or witnesses. Cook noted that in her most recent experience with an individual who was represented, "the attorney was not allowed to say a whole lot." App. 327 ll. 7 – 18. Cook admitted this was similar to Petitioner's case. App. 326 ll. 13 – 23. The state attempted to turn this revelation into a positive by asking whether Petitioner was treated similarly to someone who would have been represented. App. 327 ll. 15 – 18. However, Cook's answer in the affirmative only served to illustrate how unfair the parole revocation hearings are for the individuals subject to revocation.

The third instance of Cook's testimony making the case against mootness was when Cook offered a startling admission: that she had never seen a hearing officer determine that an individual was entitled to an attorney based on extraordinary circumstances. App. 332 ll. 13 – 23. Cook plainly stated she had not seen that done at any point in her career. Id. The beginning of Cook's direct examination did not indicate how long she had been serving as a parole agent. App. 318 ll. 7 – 15. Nonetheless, her testimony in this arena shows how flowed the revocation system is for the alleged offenders. Further, even with representation they are not always afforded their constitutional rights.

As previously discussed, Petitioner was prohibited from even listening to what witnesses told the authorities at the preliminary or revocation hearing. App. 333 l. 22 – 334 l. 11. The fourth example of why this case is not moot came when Cook disclosed that the jail's rules prevented this basic due process right. Rather than allow Petitioner the rights afforded to him

from longstanding SCOTUS jurisprudence, the jail's rules prevented Petitioner from both hearing what witnesses said responding to their allegations.

Seconds later, Cook reiterated that "[i]t's not standard procedure" to provide a *pro se* individual with the packet that the parole board received. App. 334 l. 12 – 335 l. 12. Based on Cook's characterization of this as "standard procedure," this Court can safely determine that this situation is not only capable of repetition but likely to reoccur.

Discussion

A case becomes moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy, thus making it impossible for the reviewing court to grant effectual relief. Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996); Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct.App.2002). In Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct.App.2003), this Court stated the law of mootness with exactitude:

> In general, this court may only consider cases where a justiciable controversy exists. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.... The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review.

Id. at 552, 590 S.E.2d at 349 (internal quotation marks and citations omitted). The mootness doctrine is subject to several exceptions, however. In Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), our supreme court enunciated the three primary exceptions to the doctrine:

> First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Id. at 568, 549 S.E.2d at 596 (citations omitted).

Petitioner is no longer incarcerated. He was eligible for parole in February 2020 but did not receive it. His projected release date was July 22, 2020 according to SCDC records, and he was released sometime in July 2020.

The Order of Dismissal summarized Cook's testimony in a manner that shows why this matter is not moot: "Agent Cook agreed Applicant was not allowed to speak freely aside from answering questions at the hearing and confirmed this was standard practice." App. 357 – 358.

Cook's testimony alone shows how and why this behavior is capable of repetition. The deck is stacked against people in Petitioner's situation, such that an already unfavorable scenario has shifted into the realm of impossible. Petitioner was deprived of many of his constitutional due process rights, and Cook's testimony proves that this likely occurs to many individuals who are facing parole revocation. This conduct also likely evades review, because many of the inmates who are then re-incarcerated may not know that they may file a PCR application alleging that the process was unfair. To date, this is the only such appeal the undersigned has briefed. Petitioner wisely raised the issue in his original PCR application, and but for his knowledge of the PCR statute, he may not have been able to seek relief.[4] Unfortunately for Petitioner, however, the PCR process moved too slowly for him to receive relief before he was released.

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[4] As previously mentioned, the Supreme Court noted that "the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess." 411 U.S. at 786, 93 S.Ct. 1756.

Petitioner's application for post-conviction relief was filed in February 2014. App. 251 – 265. The state's return was signed **over fifteen months later** on May 27, 2015. App. 266. The motion to dismiss hearing was held on April 19, 2016. App. 275. The PCR evidentiary hearing was held on February 1, 2017, almost three years after Petitioner filed his PCR application. App. 298. The Order of Dismissal was signed on August 2, 2017. App. 350 – 362. The shortest delay in this case was between the date Petitioner's parole was revoked, October 16, 2013, and the date he filed his PCR application, February 25, 2014.

It has been over six years since Petitioner has filed his application for post-conviction relief. The conduct observed in the audio CD as well as the admissions of Agent Cook prove that Petitioner is not the only one who has been deprived his due process rights. Without judicial action in this case, other unrepresented individuals will have identical experiences. Because there is no automatic appointment of counsel, the will of the parole agent is accomplished with relative ease. In this case, presumably like many others, the result is fundamental unfairness.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the PCR court, hold that the statute is unconstitutional, and issue a published opinion clarifying the proper procedures for situations such as this one.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2020.