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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2017–001718

WILLIAM BRUCE JUSTICE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

AMENDED BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES

I. Did the PCR court err 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?

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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES

I. This Court should dismiss this appeal as moot because Petitioner is no longer incarcerated or otherwise subject to supervision such that a favorable decision would have no practical legal effect on his situation and where the conduct giving rise to this action is not evading review because any person claiming their parole has been unconstitutionally revoked may pursue post-conviction relief.

II. Petitioner's claim that South Carolina's statute restricting an inmate's right to confrontation in parole hearings is not preserved for appellate review; however, the statute is not unconstitutional because it does not apply to parole revocation proceedings and therefore does not implicate *Morrissey*'s limited right to confrontation.

III. The PCR court properly denied relief where Petitioner's parole revocation proceedings did not violate his limited due process rights under *Morrissey*.

A. Petitioner's claims he (1) was denied his right of disclosure of evidence against him; (2) was denied the right to be heard in person and present witnesses and documentary evidence; (3) was denied the right of written statement by the factfinders; and (4) received disparate treatment by proceeding *pro se* or was somehow unconstitutionally denied counsel are not preserved for appellate review. However, even if preserved, the record reflects Petitioner's due process rights under *Morrissey* were not violated.

B. The PCR court properly denied relief where Petitioner's limited right to confrontation under *Morrissey* was not violated because the adverse information offered against him was not hearsay and he failed to establish how he was prejudiced by his inability to confront the witness directly.

STATEMENT OF THE CASE

During its February 1989 term, the Lexington County Grand Jury indicted William Bruce Justice (Petitioner) for four counts of second-degree burglary (1989-GS-32-322; -323; -324; -325), two counts of petit larceny (1989-GS-32-322; -323), and two counts of grand larceny (1989-GS-32-324; -325). Frederick I. Hall, III, Esquire, represented Petitioner on these charges. On June 28–29, 1989, Petitioner proceeded to a jury trial before the Honorable Marion H. Kinon. At the conclusion of trial, the jury convicted him as indicted. Judge Kinon sentenced Petitioner to consecutive terms of sixty years' imprisonment on each count of second-degree burglary; concurrent terms of twenty years on each count of grand larceny; and concurrent terms of one month on each count of petit larceny. Petitioner appealed.

Assistant Appellate Defender Franklin W. Draper, IV, represented Petitioner on appeal. On July 16, 1991, our Supreme Court affirmed Petitioner's convictions and sentences by memorandum opinion. *State v. Justice*, 91-MO-200 (S.C. Sup. Ct. filed July 16, 1991). The remittitur was issued on August 1, 1991.

On May 18, 1989, Petitioner filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. The State filed a return and motion for summary judgment on June 7, 1989. On November 28, 1989, the Honorable Robert S. Carr issued, United States Magistrate Judge, issued a report and recommendation that the State's motion for summary judgment be granted and the petition dismissed without prejudice for failure to exhaust remedies in state court. The Honorable Matthew J. Perry, United

States District Judge, issued an order accepting the report and recommendation, granting the motion for summary judgment, and dismissing the petition without prejudice on May 18, 1989.

On August 18, 1992, Petitioner filed an application for post-conviction relief. The State requested an evidentiary hearing through its return on October 8, 1992. On June 7, 1995, the PCR court convened a hearing before the Honorable Daniel E. Martin. Petitioner was present and represented by John Rakowsky, Esquire. Assistant Attorney General Allen Bullard appeared for the State. Petitioner and trial counsel both testified at the hearing. On July 19, 1995, Judge Martin issued an order denying the application on all grounds and dismissing with prejudice. Petitioner appealed.

Lesley M. Coggiola, Esquire, perfected Petitioner's appeal by filing a petition for writ of certiorari with the Supreme Court. On June 19, 1996, the Court issued an order denying the petitioner. The remittitur was issued on July 8, 1996.

On May 18, 1989, Petitioner filed a second *pro se* petition for writ of habeas corpus in the United States District Court for the District of South Carolina. The State filed a return and motion for summary judgment on September 17, 2003. On December 23, 2003, Judge Carr issued a report and recommendation that the State's motion for summary judgment be granted and the petition dismissed with prejudice. Judge Perry issued an order accepting the report and recommendation, granting the motion for summary judgment, and dismissing the petition without prejudice on January 30, 2004.

On May 3, 2012, Petitioner was granted parole by the South Carolina Probation, Parole, and Pardon Services. (Supp. App'x 36). Parole was to take effect from May 3, 2012 until March 6, 2032. (Supp. App'x 36). On August 7, 2013, Petitioner's parole officer, Niquita M. Cook (Agent Cook), issued a warrant for his arrest for failing to follow the advice and instructions of his parole agent. (App'x 263–64; Supp. App'x 19–20, 34–35). Specifically, the warrant alleged Petitioner failed to pay board ordered restitution (BORA) by being fifteen dollars in arrears and fifty dollars in arrears for supervision fees; failed to refrain from contacting his former employer, Leigh Cotton, and her family as instructed by his agent; and failed to refrain from drinking alcohol in excess. (App'x 263–64; Supp. App'x 19–20, 34–35). On August 8, 2013, Petitioner was served with the arrest warrant, taken into custody, and notified of his rights regarding revocation proceedings. (App'x 261–62; Supp. App'x 19–20).

Petitioner's administrative hearing was held on August 27, 2013 at the Kershaw County Detention Center before Officer Jerry F. Rivers. Petitioner, Agent Cook, Leigh Cotton, and Paul Cotton III, were all present and testified at the hearing. Officer Rivers found Petitioner violated four conditions of his parole and recommended revocation. (Supp. App'x 22–24).

On October 16, 2013, Petitioner appeared before the Board for his revocation hearing at Lee Correctional Institution.[1] (Supp. App'x 16). The Board revoked

[1] A copy of this audio recording was admitted into the record at the PCR hearing and is on file with this Court.

Petitioner's parole and ordered him to serve the remainder of his sentence. (Supp. App'x 25).

On February 26, 2014, Petitioner timely commenced the underlying PCR action challenging his parole revocation. (App'x 251–65). The State requested an evidentiary hearing through its return on May 27, 2015. (App'x 266–74). On April 19 and April 21, 2016, the PCR court convened a hearing on the State's motion to dismiss before the Honorable Perry H. Gravely. (App'x 275–97). Petitioner was present at the hearing and represented by Anna Good Browder, Esquire (PCR counsel). Assistant Attorney General Caitlin Hastings appeared for the State. After hearing arguments from the State and PCR counsel, Judge Gravely denied the State's motion and granted leave to proceed with a full evidentiary hearing.

On January 22, 2020, the PCR court convened an evidentiary hearing before the Honorable Eugene C. Griffith, Jr. (App'x 298–346). Petitioner was present and again represented by Ms. Good. Senior Assistant Deputy Attorney General Johanna C. Valenzuela appeared for the State. Petitioner and Agent Cook both testified. At the end of the hearing, Judge Griffith took the matter under advisement. On July 28, 2017, Judge Griffith issued an order denying the application on all grounds and dismissing with prejudice. (App'x 350–62). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

I. This Court should dismiss this appeal as moot because Petitioner is no longer incarcerated or otherwise subject to supervision such that a favorable decision would have no practical legal effect on his situation and where the conduct giving rise to this action is not evading review because any person claiming their parole has been unconstitutionally revoked may pursue post-conviction relief.

As an initial matter, this Court directed the parties to address whether the denial of Petitioner's PCR application is moot. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). "Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." *Id.* However, there are three exceptions to the mootness doctrine: (1) if the issue raised is capable of repetition but evading review; (2) if the issue before the appellate court is a question of "imperative and manifest urgency," and (3) if the decision by the trial court may affect future events or may have collateral consequences to the parties. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

This case meets every definition of mootness, and the exceptions do not apply. Petitioner's argument against mootness is based entirely on a blatant mischaracterization of Agent Cook's testimony. Specifically, Petitioner contends his case is not moot based on (1) Petitioner's "denial of his right to receive disclosure of the evidence against him;" (2) that parolees are being "deprived of their rights to speak on their behalf and to present evidence and/or witnesses;" and (3) Cook's

testimony that she personally has never personally "seen a hearing officer determine that an individual was entitled to an attorney based on extraordinary circumstances." These issues will be addressed more fully below.

Petitioner is correct that these events are capable of repetition because the "events" to which Petitioner is referring are the parole revocation proceedings in South Carolina. Petitioner claims the conduct 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." It is unclear how this particular matter is relevant to an inmate's ability to file for PCR, just as Petitioner was able to. Any inmate who claims they "should not have been returned to prison" on the basis their parole has been unlawfully revoked may file a PCR action under section 17–27–20(a)(5). *Al-Shabazz v. State*, 338 S.C. 354, 368, 527 S.E.2d 742, 749 (2000); *see, e.g., Kerr v. State*, 345 S.C. 183, 186, 547 S.E.2d 494, 495 (2001).

As to Petitioner, there is simply nothing this Court can do that will have any effect on the Petitioner's current situation. Petitioner is no longer incarcerated nor on parole or under any sort of supervision. He therefore no longer faces the prospects of additional revocation proceedings. This Court has no ability to rectify any error the PCR court purportedly made and this Court should dismiss the appeal as moot. However, should this Court find this matter is not moot and wishes to address the

merits of Petitioner's argument, this Court should affirm the PCR court's order denying relief.[2]

II. Petitioner's claim that South Carolina's statute restricting an inmate's right to confrontation in parole hearings is not preserved for appellate review; however, the statute is not unconstitutional because it does not apply to parole revocation proceedings and therefore does not implicate *Morrissey*'s limited right to confrontation

Petitioner's contention section 24–21–50 of the South Carolina Code is unconstitutional is not preserved for appellate review because it was neither raised nor ruled upon by the PCR court. For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); *see also* JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review); *cf. Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review.")).

If an issue is not presented to and ruled upon by the circuit court judge, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C.

[2] This Court should further deny Petitioner's request to remand this case to the PCR court to address Petitioner's unpreserved arguments.

125, 135, 620 S.E.2d 737, 742 (2005). Constitutional arguments are no exception to the issue preservation rule. *State v. Carlson*, 363 S.C. 586, 595–96, 611 S.E.2d 283, 288 (Ct. App. 2005); *see*, *e.g., State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008) (confrontation clause and due process arguments not preserved for review). Accordingly, the argument now made on appeal—that Petitioner's constitutional rights were violated by way of section 24–21–50—is not preserved for this Court's review. *State v. Jennings*, 394 S.C. 473, 481–82, 716 S.E.2d 91, 95 (2011).

In his argument regarding his purported right of confrontation, Petitioner aptly notes that this Court has authority to interpret the parole statute. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning." *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 334, 592 S.E.2d 335, 339 (Ct. App. 2004) (citations omitted). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); *see also Parsons v. Georgetown Steel*, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Whether the terms of a relevant statute are clear, there is no room for construction.").

Section 24–21–50 states:

> 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.

(emphasis added). The language of the statute does not indicate or otherwise imply that it was intended to apply to revocation proceedings. Petitioner cites to Representative Rutherford's proposed 2017 amendment to the statute in support of his argument. However, subsection (b) of the proposed amendment even specifies that the right of confrontation applies "only [to] a *potential parolee* who is being *considered for parole* . . ." (emphasis added). Because *Morrissey*'s limited due process rights apply only to parole *revocation* proceedings, it is not applicable to section 24–21–50 nor does it render the statute unconstitutional.

III. The PCR court properly denied relief where Petitioner's parole revocation proceedings did not violate his limited due process rights under *Morrissey*.

Because parolees are statutorily barred from appealing once their parole is revoked,[3] South Carolina case law on the topic is limited. However, both our Supreme Court and the United States Supreme Court have made it abundantly clear that "there is no thought to equate [parole and probation revocation proceedings] to a criminal prosecution in any sense." *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *State v. Hill*, 368 S.C. 649, 659, 630 S.E.2d 274, 280 (2006). A parolee is not entitled to "the full panoply" of due process rights to which a criminal defendant is entitled. *Morrissey*, 408 U.S. at 480. In *Morrissey*, the Supreme Court explained:

> Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not

[3] "The board shall be the sole judge as to whether or not a parole has been violated and *no appeal therefrom shall be allowed* . . ." S.C. Code Ann. § 24-21-680 (emphasis added).

> directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Id. at 480. Recognizing the interests involved in parole revocation proceedings differ significantly from those in criminal proceedings, the Court further noted:

> Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Id. at 483. On the other hand, the State has no interest in revoking parole without some informal procedural guarantees. *Id.* at 483–84. Parole proceedings, moreover, are designed to be "predictive and discretionary' as well as fact finding," rather than purely adversarial. *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973) (quoting *Morrissey*, 408 U.S. at 480). Therefore, "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior. *Morrissey*, 408 U.S. at 484.

The decision to revoke parole typically involves two distinct components: "(1) a retrospective factual question whether the [parolee] has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of [parole]." *Black v. Romano*, 471 U.S. 606, 611 (1985) (citing *Morrissey*, 408 U.S. at 479–80). A parolee is therefore entitled to two hearings before his parole is revoked: (1) a preliminary hearing to determine

whether there is probable cause or reasonable ground to believe the parolee has committed acts which would constitute a violation of the conditions of parole and (2) a final revocation hearing, if desired by the parolee, to determine whether the facts as determined at the preliminary hearing warrant revocation. *Morrissey*, 408 U.S. at 485, 487.

Importantly, however, the Court "in *Morrissey* left the states with the responsibility of determining the exact procedures to be followed." *Hill*, 368 S.C. at 655. In South Carolina, the Board of Paroles and Pardons (the Board) is a gubernatorial appointed, independent decision making body statutorily vested with sole authority in making discretionary parole decisions. A prisoner who is released on parole remains under the legal jurisdiction of the Board, and must comply with the terms and conditions of release as set by the Board. *See* S.C .Code Ann. § 24–21–660; *Sanders v. MacDougall*, 244 S.C. 160, 163, 135 S.E.2d 836, 837 (1964). Under South Carolina law, "[w]hen a parolee violates the terms of his parole, "the parole agent must issue a warrant or citation charging the violation of parole." § 24-21-680. "The board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed." *Id.*

Preliminary Hearing

Preliminary hearings are conducted by hearing officers employed by the Department of Probation, Parole, and Pardon Services, who must be neutral, detached, fair and impartial. Prior to the preliminary hearing, the parolee is entitled

to notice of the hearing and its purpose, as well as the violations which the parolee is alleged to have committed. *Id.* at 487; *Gagnon*, 411 U.S. at 786.

At the preliminary hearing itself, the parolee is entitled to: (1) appear and speak on his behalf; (2) present documentary evidence and witnesses on his behalf; (3) confront the witnesses against him, if requested by the parolee; (4) an independent decision maker; and (5) a written report of the hearing. *Gagnon*, 411 U.S. at 786 (extending *Morrissey*'s holding to probation revocation because "revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole").[4]

At the conclusion of Petitioner's preliminary hearing, Officer Rivers made the following findings based on "[Petitioner]'s own admission during testimony and on the testimony and evidence submitted by Agent Cook and Mrs. Leigh Cotton:"

> I find that Mr. Justice has used alcoholic beverages to excess. Agent Cook testified that Mr. Justice was found to have used alcoholic beverages to excess, and found to be highly intoxicated during a home visit conducted by the

[4] Although most of the same constitutional principles apply to both, it is important to note the distinctions between parole and probation in the context of revocation proceedings given that the General Assembly has seen fit to provide for different revocation authorities depending upon the status of a person as a parolee or a probationer. *State v. Crouch*, 355 S.C. 355, 360, 585 S.E.2d 288, 291 (2003). As an initial matter, probation implicates suspended sentence while parole is active sentence. "Probation is judicially-imposed at the time of sentencing: whether a violation of probationary terms has occurred, and, if so, the consequences of such a violation, are matters for the court." *Duckson v. State,* 355 S.C. 596, 598 n.2, 586 S.E.2d 576, 578 n.2 (2003) (citations omitted). "On the other hand, the Board of Parole, and Pardon Services determines both parole eligibility and revocations." *Id.* Thus, a parole revocation hearing, unlike a probation hearing, "is an administrative rather than a criminal proceeding." *Id.* at 598, 586 S.E.2d at 578. The board therefore has no power to partially revoke parole unlike a judge in a probation revocation proceeding.

agent on August 5, 2013. Agent Cook further testified that the purpose of the home visit was to instruct Mr. Justice to refrain from having any contact with Mrs. Leigh Cotton, his former employer, or Mrs. Cotton's family due to recent negative messages from Mr. Justice to Mrs. Cotton, and additional negative messages between Mr. Justice and Mrs. Cotton's son Herbert Dorsey Jr. Agent Cook further testified that she observed numerous alcohol (beer) containers in and around Mr. Justice's residence, and that Mr. Justice's appearance gave the agent reason to believe he had been consuming excessive amounts of alcoholic beverages.

I find that Mr. Justice willfully failed to pay the Board ordered Victim Restitution, statutory collection fee and the statutorily required Supervision Fee. Agent Cook testified that Mr. Justice failed to pay his required financial obligations as instructed yet reported employment at his last progress report, thus having the ability to pay based on income from employment. Agent Cook further stated that Mr. Justice has been terminated from his employment with Mrs. Leigh Cotton since his last progress report due to recent developments, that Mr. Justice does not suffer any medical, mental or physical infirmities to preclude employment, and as such had the ability to pay based on both his abilities to work and earn an income.

I find that Mr. Justice failed to follow the advice and instructions of the supervising agent. Agent Cook testified that Mr. Justice repeatedly failed to follow the advice and instructions of the supervising agent by having contact with Mrs. Leigh Cotton and her family despite being given explicit instructions and warnings from the supervising agent on August 5, 2013. Agent Cook additionally testified that despite the instructions and warnings, Mr. Justice continued to send threatening text messages and voicemail messages to Mrs. Cotton and her son Herbert Dorsey Jr. Mrs. Cotton also testified and presented multiple voicemail messages from her cellular telephone which clearly show the extent of Mr. Justice's threatening behavior on August 5, August 6, and August 7, 2013. Agent Cook also testified that Mr. Justice's threatening behavior escalated to the point of violence after he did assault Mr. Dorsey and his wife, Amanda Wessinger on August 7, 2013.

(Supp. App'x 22–23). Officer Rivers ultimately recommended the Board revoke Petitioner's parole. (Supp. App'x 24).

Final Hearing

At the final revocation hearing, the Board makes a "final determination" as to whether "parole should be revoked and whether [the parolee] should be required to serve any part of the remaining unserved sentence." S.C. Code Ann. § 24–21–680. Pursuant to *Morrissey*, "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. at 488.[5] Accordingly, the final hearing must go beyond the inquiry made at the preliminary hearing—it must lead to a final evaluation of any contested relevant facts, and it must consider whether the facts, as they are found, warrant full revocation, or something less severe.

At Petitioner's revocation hearing, Agent Cook presented the following information to the Board: On August 7, 2013, legal process was issued and served on Petitioner, charging that Petitioner failed to follow the advice and instructions of his agent by: (1) failing to pay BORA by being fifteen dollars in arrears; (2) failing to pay

[5] Under *Morrissey*, the minimum requirements of due process afforded during this hearing include (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of the evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id.* at 489; *Gagnon*, 411 U.S. at 786.

supervision fees by being fifty dollars in arrears; (3) failing to refrain from contacting Leigh Cotton and her family as instructed by his parole agent on August 5, 2013; and (4) failing to refrain from drinking alcohol in excess. (Audio of Parole Revocation Hearing 0:54–2:35; Supp. App'x 30). It was further alleged Petitioner assaulted two members of Ms. Cotton's family by striking one individual with a metal pipe across her stomach and by striking the other individual with his closed fist. (Audio of Parole Revocation Hearing 0:54–2:35). A written violation report was provided to the Board, as was the written hearing summary prepared by Mr. Rivers following the administrative hearing. (Supp. App'x 17–18, 22–24, 31–33).

At the parole revocation hearing, Petitioner claimed he was denied his right to confront the witnesses against him at the preliminary hearing. (Audio of Parole Revocation Hearing 2:45–2:51). In regard to the charged violations, he stated his parole agent came to his house on August 5, 2013, and told him not to have any contact with Ms. Cotton or her family and also advised him not to drink alcohol in excess. (Audio of Parole Revocation Hearing 3:35–3:44). He further stated that, on August 6, 2013, Ms. Cotton's son, daughter-in-law, and uncle came to his house and "jumped" him. (Audio of Parole Revocation Hearing 3:45–3:59). He explained he did not strike anyone with a metal pipe but did hit Ms. Cotton's son with his fist. (Audio of Parole Revocation Hearing 4:54–5:02). He further explained his neighbor called law enforcement, and law enforcement talked to him, as well as Ms. Cotton's family, when they arrived. (Audio of Parole Revocation Hearing 4:07–4:09, 4:21–4:24). Petitioner stated he informed law enforcement he was not hurt and did not want to

file charges against anyone, but he wanted law enforcement to make Ms. Cotton's family leave his home. (Audio of Parole Revocation Hearing 4:25–4:34). He elaborated law enforcement did not take any action against Ms. Cotton's family. (Audio of Parole Revocation Hearing 4:14–4:20).

Following Petitioner's response, the Board chairperson stated "we have enough information and we have reviewed the facts here" and asked everyone to step outside of the room. (Audio of Parole Revocation Hearing 5:03–5:10). Ms. Cotton and her daughter entered the room. (Audio of Parole Revocation Hearing 5:11–5:12). She stated Petitioner worked for her for approximately nine or ten months, and he was a hard worker. (Audio of Parole Revocation Hearing 5:54–6:00). Petitioner's demeanor, however, suddenly changed. (Audio of Parole Revocation Hearing 6:02–6:05). Ms. Cotton typically let Petitioner drive one of her vehicles at night and return it the next morning; but on August 5, 2013, she drove by his house at eleven o'clock in the evening and her vehicle was not there. (Audio of Parole Revocation Hearing 6:17–630). She called Petitioner to see where he was, and Petitioner lied to her about his location. (Audio of Parole Revocation Hearing 6:30–6:33). Ms. Cotton could tell Petitioner was drunk and at a bar. (Audio of Parole Revocation Hearing 6:33–6:41).

Ms. Cotton stated she, her fifteen-year-old daughter, and her husband then went to the bar, where an altercation with Petitioner ensued. (Audio of Parole Revocation Hearing 6:41–6:50). Petitioner called her daughter "un-Godly names" and also called her names. (Audio of Parole Revocation Hearing 6:47–6:48, 7:05–7:11). Petitioner then got in her husband's car and demanded he take him to Ms. Cotton's

home so that Petitioner could get his truck. (Audio of Parole Revocation Hearing 6:50–6:58). Ms. Cotton eventually called 911, and as they were about to leave the parking lot, Petitioner started walking home. (Audio of Parole Revocation Hearing 7:14–7:20). She stated while Petitioner was walking to his home from the bar he was constantly texting her, threatening her and her family. (Audio of Parole Revocation Hearing 7:20–7:32).

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

Ms. Cotton stated that despite this instruction, Petitioner began calling and texting her again, threatening her family and her job. (Audio of Parole Revocation Hearing 8:00–8:15). She also said on August 6, 2013, her son and Petitioner got into an altercation. (Audio of Parole Revocation Hearing 8:18–8:22). She explained Petitioner left a message on her phone saying he would bury her child. (Audio of Parole Revocation Hearing 8:22–8:27). She further explained Petitioner hit her

daughter-in-law, who had had surgery three weeks prior to the altercation, with a metal pipe across her stomach. (Audio of Parole Revocation Hearing 8:44–8:51). Ms. Cotton also stated Petitioner hit her son. (Audio of Parole Revocation Hearing 8:53–8:54). She said when she got to the location of the altercations, she called law enforcement, who filed assault charges against Petitioner. (Audio of Parole Revocation Hearing 8:58–9:02). After hearing Ms. Cotton essentially repeat the information given by the agent, the Board revoked Petitioner's parole. (Audio of Parole Revocation Hearing 10:09–10:10; Supp. App'x 25).

A. Petitioner's claims he (1) was denied his right of disclosure of evidence against him; (2) was denied the right to be heard in person and present witnesses and documentary evidence; (3) was denied the right of written statement by the factfinders; and (4) received disparate treatment by proceeding *pro se* or was somehow unconstitutionally denied counsel are not preserved for appellate review. However, even if preserved, the record reflects Petitioner's due process rights under *Morrissey* were not violated.

For the first time on appeal, Petitioner contends a litany of his rights und *Morrissey* were violated. The only issue raised in his PCR related to his right to confrontation. Accordingly, Petitioner's claim he was he was denied his right of disclosure of evidence against him; was denied the right to be heard in person and present witnesses and documentary evidence; was denied the right of written statement by the factfinders; and received disparate treatment by proceeding *pro se* or was somehow unconstitutionally denied counsel are not properly before this Court. However, even if preserved, these claims all fail on the merits. Accordingly, this Court the PCR judge's order denying Petitioner's application should be affirmed.

Petitioner first contends he was denied the opportunity to be heard,[6] and in fact most his complaints arise from the final revocation hearing, which is understandable given there is no recording of the preliminary hearing. However, as aforementioned, the Court "in *Morrissey* left the states with the responsibility of determining the exact procedures to be followed." *Hill*, 368 S.C. at 655. In South Carolina, the preliminary hearing—i.e., the fact-finding stage—is delegated to the administrative hearing officers. This procedure was expressly approved of in *Gerstein v. Pugh*, where the Supreme Court noted that a preliminary parole revocation hearing "serves the purpose of gathering and preserving life testimony, since the final revocation hearing frequently is held some at some distance from the place where the violation occurred." 420 U.S. 103, 122 n.22 (1975); *see also Harris v. United States*, 612 A.2d 198, 208 (D.C. 1992) (The first step, which consists of fact-finding, is to determine whether the defendant has violated the terms of his probation. If the answer is yes, then the second (discretionary) step is to determine what should be done about the fact that the defendant has violated his probation—in other words, what (if any) sanction should be imposed).

At the PCR hearing, Agent Cook testified Petitioner had the opportunity to address Officer Rivers at the administrative hearing. (App'x 327). She stated those

[6] To the extent Petitioner alleges he had a right to be heard in person, there is nothing in the record indicating Petitioner requested an in-person hearing. Section 24–21–710(E) of the South Carolina Code nonetheless specifically provides that parole hearings be conducted by closed circuit television. *Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 775–76 (6th Cir. 2008) (holding that allowing a parole officer and witnesses to participate via video conferencing technology at a parole revocation hearing did not violate due process).

hearing involve more of an open dialogue than revocation hearings before the Board. (App'x 327). Agent Cook further testified Petitioner was able to raise the issues regarding Ms. Cotton at that time. (App'x 327–28). Following the preliminary hearing, Officer Rivers issued a thorough summary of what occurred at the hearing, including the "substance of the documents or evidence given in support of parole revocation and of the parolee's position." *Morrissey*, 408 U.S. at 487. The report indicates Officer Rivers heard testimony from Petitioner, Agent Cook, Leigh Cotton, and Paul Cotton, III. (Supp. App'x 22).

As to the general nature of final revocation hearings, Agent Cook testified they were different from the administrative hearings in that there is no "open dialogue." (App'x 327). Rather, the Board will generally ask her or the parolee a question and they will answer. (App'x 327). She testified attorneys were "not allowed to say a whole lot" either. [7] (App'x 327). She further testified Petitioner was treated similarly to any other person, whether or not they are represented by counsel. (App'x 327).

Agent Cook also read the script into the record that she read to the Board at the start of Petitioner's revocation hearing. (App'x 324–25; Supp. App'x 21). The script

[7] Federal Rule of Criminal Procedure 32.1(b)(2)(C) governs federal parole and probation revocation proceedings. The Advisory Committee notes that, regarding the preliminary vs. final hearing, the rights to which a probationer is entitled at the final revocation hearing are limited. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing; (i) the notice under (A) must be written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him.

included incident report from the Kershaw County Sheriff's Office, which stated that Petitioner "assaulted two victims of Ms. Cotton's family by striking victim #1 with a metal pipe across her stomach and victim #2 with a closed fist. (App'x 325–26; Supp. App'x 21). Petitioner characterizes Agent Cook reciting her report the Board giving Agent Cook "carte blanche to level accusations" and takes issue with the Board "seemingly accept[ing] her remarks as truthful." (BOP 32).

As the D.C. Circuit Court of Appeals noted in *Hyser v. Reed*, "there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case." 318 F.2d 225, 237 (D.C. Cir. 1963). Thus, there is a "genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible." *Id.* Yet Petitioner consistently refers to Agent Cook as if she is a prosecutor or at the very least an adversary. *See Williams v. People of State of New York*, 337 U.S. 241, 249 (1949) ("Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.").

Moreover, Petitioner's claims pertaining to structural defects and trial error are wholly inapplicable to parole and probation revocation hearings. *See, e.g., Duckson*, 355 S.C. 596 (recognizing the differences between parole and probation revocation proceedings and criminal trials). In *Hill*, our Supreme Court reiterated its holding in *State v. Franks,* 276 S.C. 636, 639, 281 S.E.2d 227, 228 (1981)—"that the rights of an offender in a probation revocation hearing are not the same as those

extended him . . . upon the trial of the original offense." *Id.* at 658 (alterations in original).

The Court in *Hill* additionally refutes Petitioner's contention he was denied the right to disclosure of the evidence against him: "*Brady's* rule should not, and indeed, cannot be applied to probation revocation proceedings." *Id. Hill* further addressed S.C. Code Ann. § 24–21–290,[8] pointing out that the statute "would be meaningless" were probation agents' files subject to disclosure under *Brady* or Rule 5. "A disclosure standard that governs when nearly concrete proof is required is unworkable and impractical in a proceeding where a party need only *tend* to look guilty." *Id.*

At the PCR hearing, Petitioner was asked whether there were "any incident reports or any other paperwork [he] asked for that [he] was not allowed to have access to." (App'x 305). Petitioner responded that he "just didn't know what all the allegations were against me." (App'x 305). Petitioner then admitted on cross-examination that he was served with the arrest warrant that listed the violations and Ms. Cotton as one of the complainants. (App'x 310; Supp. App'x 19–20).

He then admitted to contacting Ms. Cotton, but claimed he only responded to a text message from her about his truck. Petitioner even admitted contacting Ms.

[8] § 24-21-290 provides that "[a]ll information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director."

Cotton via text message.[9] (App'x 310–12). Petitioner then testified he was aware the allegation involved him responding to Ms. Cotton's text message because it was contained in the warrant. (App'x 310–311). He further explained:

> My PO came to my house and told me not to have contact with Ms. Cotton I think it was on the 5th. On the 6th her son came up in my yard and jumped on me but he 'didn't win. He left. He come back with his girlfriend and her uncle and we fought again. That's how everybody got hurt. I got beat up and they got beat up but the people came to my house and jumped on me.

(App'x 312). Petitioner claimed he was defending himself. (App'x 312). When asked specifically about the metal pipe, Petitioner stated:

> There was no metal pipe. What it was was, I was fighting Ms. Cotton's son Herbert. I was fighting him and Amanda, Mandy jumped on my back and I reached around and I grabbed her and throwed her off and I elbowed her on her stomach when I fell on her so she would get off my back and quit scratching my eyes out.

(App'x 312). Thus, in accordance with *Morrissey* and *Gagnon*'s notice and disclosure requirement Petitioner was provided a copy of his arrest warrant, as well as a copy of the violation report, which specifically enumerated the violations of Petitioner's parole. (App'x 263–64, Supp. App'x 17–18). Petitioner additionally Agent Cook's testimony as having constitutional implications although she is not a lawyer and that is not her role. For example, Petitioner interprets Agent Cook's statement that

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[9] The Montana Supreme Court addressed a similar situation where the defendant claimed that because the victim made contact with him rather than vice versa, he did not violate his probation. In rejecting this claim, the Court explained, "The probation agreement made no reference to 'willful contact,' instead it stated: 'You will have *no contact* with the victim of this offense or her family.' *State v. Pease*, 233 Mont. 65, 70, 758 P.2d 764, 768 (1988). The Court stated the defendant "misconstrued the agreement. 'No contact' means just that, whether or not [the defendant] was the initiator. *Id.* at 70–71, 758 P.2d at 768.

Petitioner was given "the opportunity to remain silent if he wished to" at the preliminary hearing as "seemingly suggesting that Petitioner was afforded the presumption of innocence." *See* 59 Am. Jur. 2d Pardon and Parole § 147 ("Since a parole-revocation proceeding is not a criminal trial, no presumption of innocence exists as to a parolee."). It is unclear how Petitioner made this connection considering *Morrissey* specifically provides that a "parolee may appear and speak in his own behalf" at the hearing. 408 U.S. at 487. The Board or hearing officer obviously cannot a force a parolee to address them regarding his violations.

Petitioner's argument he was not afforded his right to be heard nor to present witnesses or evidence on his behalf is further conclusively refuted by the record. Petitioner was given ample opportunity to explain his version of events to the Board. (Audio of Parole Revocation Hearing 2:45–5:02). He was able to explain to the Board that Ms. Cotton's son and daughter-in-law came to his house and "jumped him."[10] (Audio of Parole Revocation Hearing 3:45–3:59). He also admitted striking Ms. Cotton's son but denied hitting anyone with a metal pipe. (Audio of Parole Revocation Hearing 4:54–5:02). Petitioner also explained he did not want to file charges against Ms. Cotton's son. (Audio of Parole Revocation Hearing 4:25–4:34). Clearly, Petitioner was able to address the Board at his final revocation hearing. Furthermore, Petitioner wholly failed to explain at the post-conviction relief hearing what

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

witnesses or evidence he would have presented at the revocation hearings that he was unable to present. Accordingly, Petitioner was neither denied his right to be heard nor denied his right to present witnesses and evidence on his behalf.

Petitioner's allegation he was denied his right to a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole is also conclusively refuted by the record. Following the preliminary hearing, the administrative hearings officer issued a detailed summary of the hearing, articulating his findings and recommending Petitioner's parole be revoked. (Supp. App'x 22–24). Specifically, Officer Rivers found Petitioner had used alcoholic beverages to excess, relying on the testimony and observations of Agent Cook. (Supp. App'x 22). Officer Rivers further found Petitioner had willfully failed to pay BORA and supervision fees, again relying on the testimony of Agent Cook. (Supp. App'x 23). Finally, Officer Rivers found Petitioner had failed to follow the advice and instructions of the parole agent regarding Ms. Cotton. (Supp. App'x 23). In finding Petitioner had repeatedly contacted Ms. Cotton and her family despite explicit instructions not to, Officer Rivers relied on the statements of both Agent Cook and Ms. Cotton. (Supp. App'x 23). He also relied on text messages and voicemail messages from Petitioner to Ms. Cotton or her son. (Supp. App'x 23). Officer Rivers gave a detailed account of his findings; therefore, Petitioner was not denied his right to a written statement of the findings from his preliminary hearing.

Similarly, the Board issued an order revoking Petitioner's parole and explaining the violations. (Supp. App'x 16, 25). In this order, the Board found

Petitioner had "violated one or more of the conditions of supervision as set forth in the affidavit herein and dated a copy of which is incorporated by reference." (Supp. App'x 16, 25). In adopting the affidavit from the arrest warrant, the Board explicitly found Petitioner had:

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

(Supp. App'x 19, 28). Again, Petitioner was provided with a detailed written statement of the findings of the Board and was not denied this right.

Finally, to the extent Petitioner claims he was somehow denied the right to counsel, there is no "inflexible constitutional rule with respect to the requirement of counsel" for a probationer or parolee. *Gagnon*, 411 U.S. at 789-90. Rather, the decision with respect to the need for counsel "must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." *Id.* at 790. Our Supreme Court has held that no Sixth Amendment right to counsel during a parole revocation hearing. *Duckson*, 355 S.C. 596, 586 S.E.2d 576. Although a parolee is statutorily permitted to hire private counsel to represent him, this "statutory right to have counsel present is not comparable to a probationer's absolute right under state law to appointed counsel." *Turner v. State*, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009).

Petitioner had no right to court appointed counsel at his parole revocation hearings. *See Ex parte Foster*, 350 S.C. 238, 565 S.E.2d 290 (2002) ("The unnecessary appointment of lawyers to serve as counsel or GALs places an undue burden on the lawyers of this State.... [A] lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule or the case law of this State"); *cf. Bearden v. State of S.C.*, 443 F.2d 1090, 1095 (4th Cir. 1971) ("Right to assigned counsel and compulsory process in revocation proceedings are obviously desirable, but the price in terms of the number of persons paroled, or more accurately, not paroled, may be too high."). The State nonetheless submits that Petitioner's case

B. The PCR court properly denied relief where Petitioner's limited right to confrontation under *Morrissey* was not violated because the adverse information offered against him was not hearsay and he failed to establish how he was prejudiced by his inability to confront the witness directly.

As now-Justice Gorsuch has explained, "under settled precedent the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings and the due process guarantees associated with these proceedings are 'minimal.'" *United States v. Henry*, 852 F.3d 1204, 1206 (10th Cir. 2017) (quoting *Morrissey*, 408 U.S. at 485); *see United States v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) (Confrontation Clause does not apply at sentencing): *Black*, 471 U.S. at 610 (Due Process Clause governs procedures at revocation hearing).

While the Court in *Morrissey* outlined the requirements of a preliminary and final revocation hearing—including a qualified right to cross-examine and confront

adverse witnesses—it did not explicitly detail the contours of the right. *Id.* at 488–89. Nor did it clarify how courts or hearing officers should determine when and how parolees have a right to confront adverse witnesses at revocation hearings. "We cannot write a code of procedure," the Court explained; "that is the responsibility of each State." *Id.* at 488. The Court in *Gagnon* further provided:

> An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

Gagnon, 411 U.S. at 782. Accordingly, our appellate courts have refused to "deviate from the long tradition of limiting a defendant's rights in probation revocation proceedings, where the evidence is often limited to the testimony of a probation officer or . . . affidavits of victims or police officers." *State v. Pauling*, 371 S.C. 435, 439, 639 S.E.2d 680, 682 (Ct. App. 2006) (holding that the Sixth Amendment—including the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004)—does not apply to parole and probation revocation hearings).

In *Pauling*, the defendant's probation was revoked after he was arrested for assault and battery with intent to kill and pointing and presenting a firearm. *Id.* at 436, 639 S.E.2d at 681. At the time of the revocation hearing, Pauling had not been

tried on these charges. *Id.* The State presented the arrest warrants and affidavits of police officers and investigators at the hearing in support of revocation. *Id.* On appeal, Pauling claimed his Sixth Amendment right to confrontation was violated because none of the officers testified at the revocation hearing. *Id.* In declining to extend *Crawford* to probation and parole revocation proceedings, this Court cited the Seventh Circuit's opinion in *United States v. Kelley*, 446 F.3d 688 (7th Cir. 2006).

In *Kelley*, the probationer argued his due process rights were violated because the judge did not specifically find good cause to deny confrontation of the victims. *Id.* at 689. At the revocation hearing, the State presented testimony and the report of the police officer who responded to a report of a "man with a gun." *Id.* The victims told the officer Kelley had punched them and displayed a rifle he retrieved from the trunk of his car. *Id.* at 690.

On appeal, Kelley argued the trial court erred in admitting the victims' hearsay statements. *Id.* at 692. The Court rejected Kelley's argument, holding the hearsay in the officer's testimony and police report "bore substantial indicia of reliability" since "[t]he physical evidence and the officer's personal observations and investigation corroborated the [victims'] accusations." *Id.* Because *Morrissey*'s "good cause" showing was established to limit the use of unreliable evidence at revocation hearings, the Court explained that "*Morrissey* and *Gagnon* permit the admission of *reliable* hearsay at revocation hearings without a specific showing of good cause." *Id.* at 692; *Egerstaffer v. Israel*, 726 F.2d 1231, 1234 (7th Cir. 1984).

The "reliability test" outlined in *Kelley* is one of two tests courts have applied for finding "good cause" to deny the right of confrontation. Under the reliability test, "the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness,"[11] and "the substantial trustworthiness test implicitly incorporates good cause into its calculus." *Reyes v. State*, 868 N.E.2d 438, 441 (Ind. 2007) (citations omitted).

Alternatively, the "balancing test," requires the court to weigh the interests of the defendant in cross-examining his accusers against the government's "good cause" for not producing the witness—or hearsay declarant—at the revocation hearing. Under this approach, "the weight given to a parolee's right to confrontation is assessed by two non-exhaustive factors: the importance of the hearsay evidence to the court's ultimate finding and the nature of the facts to be proven by the evidence." *United States v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999). Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right." *Id.* at 1172.

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[11] Some guarantees include (1) detailed police reports (as opposed to mere summaries of such reports by probation officers), (2) affidavits or other hearsay given under oath, (3) statements by the probationer that directly or circumstantially corroborate the accusations, (4) corroboration of accusers' hearsay by third parties or physical evidence, (5) statements that fall within a well-established exception to the hearsay rule, (6) evidence of substantial similarities between past offenses and the new accusations that bolsters the accuser's credibility, and (7) a probationer's failure to offer contradictory evidence. *See generally Crawford v. Jackson*, 323 F.3d 123 (D.C. Cir. 2003); *Curtis v. Chester*, 626 F.3d 540, 543 (10th Cir. 2010); *Henderson v. Commonwealth*, 285 Va. 318, 325, 736 S.E.2d 901, 905 (2013).

The two tests are overlapping and are not mutually exclusive. For instance, when applying the balancing test, the reliability of the evidence may, in some circumstances, be so strong as to overwhelm the defendant's interests in confrontation "such that the [g]overnment need not show cause for a declarant's absence." *United States v. Lloyd*, 566 F.3d 341, 345 (3d Cir. 2009). Moreover, the failure to make "a specific finding of good cause" is harmless if "good cause exists, its basis is found in the record, and its finding is implicit in the district court's rulings." *United States v. Grandlund*, 71 F.3d 507, 510 (5th Cir. 1995), *opinion clarified,* 77 F.3d 811 (5th Cir. 1996).

While South Carolina has not expressly adopted a specific approach, standard, or test to be applied to determine whether "good cause" exists to deny the right of confrontation, good cause is not a precise standard, and there is no bright-line rule for determining whether good cause exists. The inquiry is factually driven and may, in large measure, depend on the nature and purpose of the evidence sought to be introduced.

Petitioner complains his due process rights were violated based solely on the absence of "an express finding that witnesses would be at risk." Nothing in *Morrissey* indicates an express finding is required nor is risk of physical harm the only reason the hearing officer or board may legitimately decline confrontation. Rather, *Morrissey* referred specifically to the situation where a confidential informant "has given adverse information on which parole revocation is to be based" who "would be subjected to risk of harm if his identity were disclosed." *Id.* at 487. In *State v. Allen*,

370 S.C. 88, 634 S.E.2d 660 (2006), our Supreme Court cited *Birzon v. King*, 469 F.2d 1241, 1242–43 (2d Cir. 1972) in support of its finding that a condition of probation that probationer not associate with people who had criminal records was not so overly broad that it violated due process.

The Second Circuit *Birzon* held that due process was violated when parole was revoked on the basis of a parole violation report that relied on statements by several confidential informants. 469 F.2d at 1244. The Court took issue with the parole board "resolv[ing] the credibility issue solely on the basis of the state report, without itself taking the statements from the informants." *Id.* Hence, the Court stated, "the Board had no way of knowing how reliable the informants were and had no real basis on which to resolve the credibility issue against the parolee and conclude that he did in fact violate [a] condition . . . of his parole." *Id.* The "board should have received the information directly from the informants [*in camera*] (although not necessarily in the presence of the parolee)," the Court concluded, "instead of relying solely on the state report. The board could then have reached its own conclusions about the relative reliability of the informants' statements and those of the parolee and his witnesses." *Id.* at 1244–45.

At Petitioner's preliminary hearing, Ms. Cotton was present to offer evidence in support of the alleged violations, though she did so outside of his presence. (App'x 304, 333, 336; Supp. App'x 22). Unlike the parolee in *Birzon*—who was unaware of the contents of a report based on information provided by anonymous informants—Petitioner knew the identity of the victim and the general allegations against him.

At the PCR hearing, Petitioner admitted he was served with the arrest warrant that listed the violations and Ms. Cotton as one of the complainants although he initially testified that he didn't know what all the allegations were against me." (App'x 305, 310; Supp. App'x 19–20). Petitioner further testified that, at the preliminary hearing, Ms. Cotton and her husband were outside the room but "they wouldn't let them come in." (App'x 304). He stated"[Officer Rivers] denied confrontation" and told Petitioner he "couldn't confront them." (App'x 304). Although Petitioner initially testified he had "no idea" what Ms. Cotton said at the hearing and that no one told him what she said, he testified minutes later

> I wanted to confront Ms. Cotton and them because they made a bunch of false allegations against me. They got -- All she read was what was on their phones and on both of them peoples' phones they got apps on them phones that are identified as caller or fake or ID and text, fake or ID. Both of them had it for purpose of Ms. Cotton's business.

(App'x 304–05). Petitioner testified he was never given a copy of those text message. (App'x 305). However, he was at the very least *aware* that Ms. Cotton showed text messages and voicemails to Officer Rivers. The inability to confront Ms. Cotton directly clearly did not prevent him from explaining his side of the story.

As to the final hearing, Petitioner testified at the PCR hearing:

> [I]t was me and Ms. Cook in the room. There was two guys on the screen and they allowed Ms. Cook to give her definition of everything that happened, her statement and all. When I went to speak to them, they asked me, they said, "Did you hit somebody with a pipe?" I said no. And they said, well, that's all we need to know and they cut the camera off.

(App'x 306). He stated he was not able to respond to any of the allegations against him, and further that he "couldn't even confront Ms. Cook about her allegations and she was sitting right beside [him]." (App'x 306). Had he known, Petitioner testified, he would have asked to be able to hear what they said and question them about it. (App'x 306).

On appeal, Petitioner again states "he was entirely unaware of [Ms. Cotton's] testimony" and that he was not aware she attended the hearing until it concluded. Petitioner further accuses the State of being disingenuous by pointing out that Petitioner never requested Ms. Cotton be made available for questioning in his presence. Rather, he states he could not have requested Ms. Cotton or other adverse witnesses be made available for questioning if he did not know of their presence at the hearings."

Petitioner misses the entire point of *Morrissey*'s limited right of confrontation. "Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts *tending to establish* a violation. *Hill*, 368 S.C. at 658 (citing *State v. White*, 218 S.C. 130, 61 S.E.2d 754, 756 (1950)). Accordingly, a parole revocation hearing "is a narrow inquiry[—]the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489; *accord. Pauling*, 371 S.C. at 439, 639 S.E.2d at 682. All that is required is

In *Gagnon*, the Court explained that (1) the government does not always have to present live witnesses, but can rely on "conventional substitutes for live testimony"

such as documentary evidence where appropriate; and (2) "formal procedures and rules of evidence are not employed." 411 U.S. at 782 n.5. As discussed in *Kelley* and *Pauling*, this broad grant of authority under *Morrissey* and *Gagnon* necessarily includes such documentary material as police reports, and similar investigative documents prepared by law enforcement professionals. However, it does not oblige the Board to produce witnesses at a parole revocation hearing to prove a charged violation if the accused parolee does not ask for them. *See Duckett v. Quick*, 282 F.3d 844, 847–48 (D.C. Cir. 2002).

The vast majority of state and federal case law addresses situations similar to that in *Pauling* and *Kelley*, where hearsay is introduced through police or probation officer's reports. *See Farrish v. Mississippi State Parole Bd.*, 836 F.2d 969, 978 (5th Cir. 1988) ("The use of hearsay presents a two-fold problem: it prevents the parolee from confronting and cross-examining the declarant, and unreliable hearsay undermines the accuracy of the fact-finding process."). Petitioner's case, however, does not involve hearsay or a hearsay problem because Ms. Cotton testified in person. Petitioner does not object to hearsay contained within the police report, but rather Ms. Cotton's testimony in general. To the extent Petitioner challenges Agent Cook's report on the basis of hearsay, it was certainly corroborated by Ms. Cotton's testimony.

Accordingly, Petitioner cannot show prejudice in this context. "The inability to confront an adverse witness at a parole revocation hearing reaches a constitutional dimension only upon a showing of resulting prejudice." *Ash v. Reilly*, 431 F.3d 826,

830 (D.C. Cir. 2005); *cf. State v. Williamson*, 356 S.C. 507, 511–12, 589 S.E.2d 787, 789 (Ct. App. 2003) (finding no abuse of discretion in revoking probation where the trial court heard testimony and determined the probationer committed an act of violence against his mother). Prejudice is determined by examining the "quality and quantity of nonhearsay and reliable hearsay evidence supporting the decision to revoke parole." *Ash*, 431 F.3d at 830.

As aforementioned, there was no hearsay problem because Ms. Cotton was actually present at both hearings and available to speak to the Board, albeit not in Petitioner's presence. Regarding the final revocation hearing, it is questionable whether Ms. Cotton's discussion with the Board member at that point even constitutes "testimony." Even if Ms. Cotton had not commented on the impact of Petitioner's behavior on her at the final revocation hearing, the Board still would have had the benefit of her statements from the preliminary hearing as related through the administrative hearing officer's summary. (Supp. App'x 23). Specifically, Officer Rivers noted: "Mrs. Cotton also testified and presented multiple voicemail messages from her cellular telephone which clearly show the extent of [Petitioner's] threatening behavior on August 5, August 6, and August 7, 2013." (Supp. App'x 23). Notably, Petitioner has not indicated what testimony he could have elicited from Ms. Cotton that may have changed the outcome of the proceeding.

Moreover, Petitioner cannot show he was prejudiced because his parole was revoked based on two other violations which were entirely unrelated to Ms. Cotton. (Supp. App'x 16, 25). He was sixty-five dollars in arrears on his supervision and

BORA fees. (App'x 316, 329; Supp. App'x 23). He also found violated the condition ordering him to refrain from using alcoholic beverages to excess. (Supp. App'x 19, 22). Agent Cook testified Petitioner was hanging out in bars and had even been arrested for driving under the influence. (App'x 321). She further testified Petitioner appeared to be intoxicated when she conducted a home visit. (App'x 330). She stated she could smell alcohol on Petitioner's breath, observed beer cans all over his property, and noted Petitioner sweating heavily. (App'x 330). Because Petitioner did not challenge his revocation with respect to these violations, he cannot show prejudice.

Petitioner urges this Court to ignore Petitioner's other two violations, citing *State v. Allen* in support. In that case, our Supreme Court held that "when the trial court's revocation decision is upheld on one ground, it ordinarily is immaterial whether probation was properly revoked on other grounds unless the entire proceeding was tainted by a given error." *Id.* at 102, 634 S.E.2d at 660. Petitioner does not identify precisely how his inability to cross-examine Cotton "tainted the entire proceeding"—he merely states that it was based on the "revocation procedure itself."

In other words, Petitioner's PCR claim was based exclusively on the Ms. Cotton violation—i.e., his claim that he was denied his right to confront Ms. Cotton and corresponding arrest warrant did not have sufficient probable cause. Petitioner does not raise a constitutional issue with respect to his failure to pay supervision and BORA fees nor his failure to use alcohol to excess and because Petitioner's entire proceeding was not tainted by error, it is immaterial whether or not revocation was

proper with respect to his failure to refrain from having contact with Ms. Cotton or her family.

In conclusion, Petitioner's limited right to confrontation under *Morrissey* was not violated. Petitioner had sufficient notice of the adverse information Ms. Cotton provided to Agent Cook, and was able to address Officer Rivers and Board regarding the alleged violations. He further failed to show how he was prejudiced from his inability to confront Ms. Cotton directly at either hearing. The Board ultimately revoked Petitioner's parole by making its own credibility determination and considering the evidence.

CONCLUSION

Based on the foregoing argument, this Court affirm the PCR court's dismissal of Petitioner's PCR application.

Respectfully submitted,

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May 13, 2021

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ON CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2017–001718

WILLIAM BRUCE JUSTICE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the motion for fourth extension to file the Amended Brief of Respondent has been served upon opposing counsel, Taylor D. Gilliam, Esquire, by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

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This 13th day of May, 2021.

s/LillianMeadows
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