

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Certiorari to Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

WILLIAM BRUCE JUSTICE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001718

REPLY BRIEF OF PETITIONER

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Board of Pardons and Paroles January 13, 2021 Administrative Meeting Minutes available at:

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ARGUMENT IN REPLY

Facing over eighteen years on his remaining sentence at the time of the revocation proceedings, Mr. Justice was afforded less than 137 seconds to explain multiple alleged violations. Supp. App. 30. He received less than one second of speaking time per month on his potential sentence. The state suggests “Petitioner was given ample opportunity to explain his version of events to the Board” yet later faults him for not contesting all of the alleged violations. Amended BOR 27. Ms. Cotton, on the other hand, spoke, largely uninterrupted, for over four minutes.

One of the alleged violations Cook brought before the parole board was nonpayment of fines and fees. Regarding nonpayment of fines, the South Carolina Supreme Court has held that probation may not be revoked solely for failure to make required payments of fines or restitution. Nichols v. State, 308 S.C. 334, 417 S.E.2d 860, 862 (1992). Specifically, in cases involving the failure to pay fines or restitution, our appellate 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. Cook’s testimony never established that Mr. Justice’s alleged failure to pay his fines and fees was willful, and Mr. Justice was never given an opportunity to address that contention.

The state also fails to reconcile the record that was before the PCR court with its claims that Petitioner received various documents both before and after the revocation hearing. Mr. Justice was notified by PCR counsel, long after the revocation hearings, that Ms. Cotton and her daughter-in-law were at the hearing. App. 306 ll. 1 – 25. Additionally, the state seems to suggest that because the parole board made factual findings, the record “conclusively” shows

Mr. Justice automatically received them. Amended BOR 28. However, neither witness at Mr. Justice's PCR evidentiary hearing testified that he was provided those materials.

Additionally, Mr. Justice was not provided the cell phone printout that Cook relied on and presented to the board. App. 322 l. 24 – 323 l. 9. As previously noted, Mr. Justice did not receive a copy of the packet that the parole board was provided, either. App. 334 l. 12 – App. 335 l. 12. At the final revocation hearing, the parole board member who spoke indicated that he was in possession of a packet. Audio of Revocation Hearing 3:22.

The Policy and Procedure Manual of the South Carolina Board of Pardons and Paroles, November 2019 version, sets forth:

Violations of parole do not always result in revocation. Revocation of parole is generally reserved for the most serious violations, including but not limited to: new criminal convictions; absconding from supervision; and other serious violations that threaten the safety of the community.

Policy and Procedure Manual at 40.¹ Upon information and belief, this language also existed in the 2017 version of the Manual as well.² Revisions to the Manual have been discussed during at least one recent administrative meeting of the Board of Pardons and Paroles.³ The record is unclear what guidelines were in place at the time of Petitioner's revocation hearing. The 2019 Manual contains the following provisions regarding "Constitutional Requirements of Procedural Due Process" for the final hearing:

- Have a final hearing conducted reasonably promptly after the preliminary hearing;
- Receive written notice of the alleged violations upon which revocation is sought;

¹<https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf> (last accessed May 23, 2021).

²https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/south_carolina_parole_profile.pdf (last accessed May 23, 2021).

³<https://www.dppps.sc.gov/content/download/232293/5408792/file/01.13.2021+Administrative+Meeting+Minutes.pdf> (last accessed May 23, 2021).

- Receive a fair and impartial hearing, at both the preliminary and the final hearing;
- Be present at the preliminary and final hearings, to offer evidence in their own defense, and to show that they did not violate the conditions of parole, or that, if they did, the violation was not willful;
- Obtain an attorney at his or her own expense;
- Have a bond set by a circuit court judge pending the outcome of the preliminary and the final hearing;
- Have the evidence against them disclosed;
- Cross examine witnesses to the violation who testify, unless there is good cause for not allowing it;
- Receive a written statement by the Board or the panel of the evidence relied on and the reasons for revoking parole (if the Board or the panel finds by a preponderance of the evidence that the parolee willfully violated parole and decides to revoke the parole).

Manual at 36 – 37. Concerning “Procedures for the Final Hearing,” the Manual states “[h]earsay is admissible, but may be challenged by the parolee.” Manual at 37. Notably, the remark from Ms. Cotton regarding what Petitioner’s ex-wife said to her met the definition of hearsay and would have been objectionable had Petitioner been able to sit in the room while Ms. Cotton spoke to the Parole Board member(s) for over four minutes. Audio of Parole Revocation Hearing at 9:42.

The state’s reference to S.C. Code Ann. § 24-21-710(E) is noteworthy in that in order for the statute to apply to Petitioner’s case (a parole revocation), Chapter 21: Probation, Parole and Pardon must be interpreted to apply to more than just parole hearings. BOR 22 n. 6. Subsection E reads as follows:

The Department of Corrections may install, maintain, and operate a two-way closed circuit television system in one or more correctional institutions of the department that confines persons **eligible for parole**. The Board of Probation, Parole and Pardon Services shall install, maintain, and operate closed circuit television systems at locations determined by the board and **conduct parole hearings** by means of a two-way closed circuit television system provided in this section. A victim of a crime must be allowed access to this system to appear before the board during a parole hearing.

S.C. Code Ann. § 24-21-710(E) (emphasis added). If nothing else, the state’s position lends credence to Petitioner’s argument that the statutory provision preventing cross-examination at “any such hearing” under S.C. Code Ann. § 24-21-50 applies to parole revocation hearings and is therefore unconstitutional.

S.C. Code Ann. § 24-21-50

Mr. Justice never specifically claimed that S.C. Code Ann. § 24-21-50 was unconstitutional. He did, however, plainly contend that his parole was unlawfully revoked. App. 255. Citing S.C. Code Ann. § 17-27-20(A)(5), Petitioner advised the PCR court that his parole had been unlawfully revoked. Complete with attachments to his PCR application, Petitioner outlined in great detail how his rights had been denied.

Regarding the merits of the argument that the statute preventing confrontation at “any such hearing while considering a case for parole,” S.C. Code Ann. § 24-21-50, the statute which immediately precedes it applies to “all proceedings” before the Board of Probation, Parole, and Pardon Services. S.C. Code Ann. § 24-21-40. An earlier section within the same Article (Article 1: Board of Probation, Parole, and Pardon Services) sets forth that “[i]t is the duty of the board to consider cases for parole, pardon, and any other form of clemency provided for under law.” S.C. Code Ann. § 24-21-13. The board is also the entity which makes the final determination regarding revocation of a prisoner’s parole released under Title 24, Chapter 21, of the South Carolina Code of Laws:

Upon failure of any prisoner released on parole under the provisions of this chapter to do or refrain from doing any of the things set forth and required to be done by and under the terms of his parole, the parole agent must issue a warrant or citation charging the violation of parole, and a final determination must be made by the board as to whether the prisoner’s parole should be revoked and whether he should be required to serve any part of the remaining unserved sentence. But such prisoner must be eligible to parole thereafter when and if the

board thinks such parole would be proper. The board shall be the sole judge as to whether or not a prole has been violated and no appeal shall be allowed.

S.C. Code Ann. § 24-21-680. Mr. Justice should have been afforded the rights that have been established by federal law.

Mootness

As a result of the parole revocation, Mr. Justice's criminal record will contain an additional violation. This Court is empowered to conclude that the revocation proceedings were tainted with due process violations, reverse the PCR court, and clear the parole revocation from Petitioner's record.

The undersigned craves reference to an explanation supporting the state's contention that the Brief of Petitioner contained a "blatant mischaracterization of Agent Cook's testimony." Amended BOR 8. Nikita Cook's testimony at Mr. Justice's PCR hearing is an unequivocal roadmap of why this case is capable of near-certain repetition. She testified under oath that Mr. Justice was not provided various documents which were distributed to the parole board. App. 322 l. 24 – App. 323 l. 9. She justified that decision based on Mr. Justice's status as a *pro se*, indigent individual. Id. Because he did not have an attorney, he was not given the documents he was entitled to receive. Id. Critically, he was not provided an attorney, either. Id.

Cook further testified that Mr. Justice's treatment at the final revocation hearing, wherein he was allowed less than two-and-a-half minutes to speak, was mostly identical to other individuals appearing before the parole board. App. 326 l. 13 – App. 327 l. 18. Illustrating the deceitful notion that individuals in Mr. Justice's position could be appointed an attorney, even in extraordinary circumstances, Cook's experience was that never in her career had she seen an attorney appointed to someone at the parole revocation stage. App. 332 ll. 13 – 25.

Regarding the right of confrontation, Cook's straightforward response was that the jail's rules prevented Mr. Justice from cross-examining witnesses. App. 334 ll. 1 – 11. The undersigned has been unable to locate a copy of the Kershaw County jail's policies and/or manual to know whether they have been modified. In a remarkable admission, Cook also stated that it was "not standard procedure" to provide a self-represented individual with the same packet that the parole board received. App. 334 l. 12 – 335 l. 12.

Last year, the South Carolina Supreme Court addressed mootness in a case involving a sentencing question. State v. Simpson, 429 S.C. 83, 837 S.E.2d 669 (2020). The Court found the question of Simpson's sentence moot due to his completion of the home detention portion of the sentence but found that the issue was capable of repetition and would generally evade review. Id. at 89, 837 S.E.2d at 672. In Byrd v. Irmo High School, our Supreme Court clarified that a less restrictive approach should be taken when determining the applicability of the evading review exception of the mootness doctrine. 321 S.C. 426, 468 S.E.2d 861 (1996). In South Carolina Public Interest Foundation v. South Carolina Department of Transportation, the South Carolina Supreme Court concluded that the issue of whether SCDOT could inspect bridges inside private, gated communities is one that is capable of repetition yet will generally evade review. 421 S.C. 110, 121-22, 804 S.E.2d 854, 860-61.

The state would have this Court conclude that because other inmates can file a PCR action similar to Mr. Justice's, this situation is not capable of evading review. That argument fails for two reasons. First, as evidenced in Mr. Justice's case, the state sought to dismiss Mr. Justice's PCR action. Had it been successful, the resulting appeal would have complicated and delayed this matter even further. There is no guarantee that in a future PCR filed by a different inmate, the state would not again seek to dismiss the action.

Secondly, there has been a significant delay in getting to this point. Mr. Justice filed his PCR application on or about February 26, 2014, over seven years ago. App. 251. The state's Return was signed fifteen months after the PCR application was filed. App. 273. The motion to dismiss hearing was held on April 19, 2016. App. 275. After that was denied, the PCR evidentiary hearing occurred on February 1, 2017. App. 298. Later that year, on August 2, 2017, the Order of Dismissal was filed. App. 350.

As noted in the Brief of Respondent, Petitioner never received parole again. BOR 46. He likely maxed out his sentence during the duration of this appeal. The state would have other inmates go through an identical process and "run out the clock" on future PCR applicants. This case is ripe for review.

Petitioner's parole revocation proceedings were a farce. The concept of appointing counsel, even in extraordinary circumstances, is illusory. The safeguards established by the United States Supreme Court decades ago were ignored, Petitioner's due process rights seemingly nonexistent. In essence, this one-sided effort saw the full force of the state completely trample an elderly, indigent individual, in direct contravention to well-established law. Unable to defend himself because the state failed to recognize the bare minimum panoply of rights that people in Mr. Justice's position should be afforded, these proceedings were tainted from the start. Simply put, this should not have happened. The law on this front is not ambiguous; it is not hidden. Based on Cook's testimony at the PCR hearing, however, Mr. Justice's experiences are indicative of the plight that people of this state encounter when attempting to exercise their rights. The parole revocation proceedings in this case represent a manifest injustice that is entirely inconsistent with what the law envisions, and Mr. Justice is asking this Court to prevent further abuses of power.

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.



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This 24th day of May, 2021.