

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

JUL 23 2014

S.C. Supreme Court

JAMES ROBERT BYRD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002348  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
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CARMEN V. GANJEHSANI  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in failing to find that the Parole Board unlawfully, arbitrarily, and capriciously revoked Petitioner's parole on the basis of allegations arising out of a criminal domestic violence charge against Petitioner which had not yet been adjudicated in court and for which Petitioner was later found not guilty?

## STATEMENT

On April 9, 1981, Petitioner James Robert Byrd was indicted by the Greenville County Grand Jury for kidnapping and first degree criminal sexual conduct. App. 102-107. After the State brought the case to trial, Petitioner was found guilty on both charges. On July 28, 1981, the Honorable James B. Stephen sentenced Petitioner to life imprisonment for kidnapping and thirty-years for first degree criminal sexual conduct with the sentences to run concurrently. App. 93.

On November 26, 2003, Petitioner was paroled by the Parole Board of the South Carolina Department of Probation, Parole and Pardon Services (the "Department"). App. 96. On May 11, 2011, an arrest warrant was issued to Petitioner which stated that there was probable cause to believe that Petitioner committed the following acts in violation of his parole:

There is probable cause to believe that the offender [Petitioner] committed the offense of CDV [criminal domestic violence] 1<sup>st</sup> on 5-9-11 on a Leila Danice Banks verified by the Greenville County Sheriff's Office (GCSO) Supplemental report dated 5-10-11; By failing to refrain from the use of alcohol beverage also verified by the GCSO supplemental report dated 5-10-11; And by failing to follow the advice and instructions of his Supervising Agent. Such actions constitute a willful conditions [sic] 3 and 10 of his Conditions of Supervision dated 11-21-03 and 10 of the Standard Sex Offender Conditions dated 1-30-06 by the South Carolina Board of Probation, Parole and Pardon Services and continuation orders by the Administrative Hearing Officer dated 3/28/06, 10/3/06, 3/18/08, 6/4/09, and 3/14/11.

App. 27-28.

The affiant on this arrest warrant was Agent Tony Anderson. App. 28.

On August 2, 2011, an administrative hearing before Administrative Hearing Officer Fredna Gary was held. App. 29. Agent Allan Norfus appeared for Agent Tony Anderson, and Petitioner appeared on his behalf. App. 29.

Administrative Hearing Officer Gary recommended that Petitioner's parole be revoked and made the following findings and conclusions:

I find that there is probable cause to believe that [Petitioner] has used alcoholic beverages which is in direct violation of condition number 10 of the standard sex offender conditions. I find that there is also probable cause to believe that [Petitioner] used alcohol in excess as indicated in an incidence [sic] report dated 05-09-2011 by the Greenville County Sheriff's Department resulting in [Petitioner's] arrest and pending charge of Criminal Domestic Violence 1<sup>st</sup> Offense.

I find that there is probable cause to believe that [Petitioner] has violated Federal, State, and/or Local Laws. Agent Norfus testified and presented documents which show that probable cause exists indicating that [Petitioner] (while intoxicated) did commit the offense of Criminal Domestic Violence 1<sup>st</sup> Offense against Leila Banks who is his roommate/girlfriend. [Petitioner] has requested a jury trial and has yet to receive a hearing date. Please see the incidence [sic] report from the Greenville County Sheriff's Department in reference to the pending charge of Criminal Domestic Violence 1<sup>st</sup> Offense. Also, [Petitioner] admitted that he and Ms. Banks had an argument resulting from his belief that he saw a male leaving his room (also where Ms. Banks resides) as he returned home from work. [Petitioner denies any physical altercation with the victim. [Petitioner] also denies being intoxicated.

I find the aforementioned violations constitute a willful failure to follow the advice and instructions of the supervising agent. I base these findings on the Greenville County Sheriff's Department Incidence [sic] Report and on the testimony and evidence submitted by Agent Norfus.

...

Revocation of parole is justified for [Petitioner]. There is probable cause to believe that [Petitioner] did use alcoholic beverages as described in the incidence [sic] report thereby failing to follow the advice and instructions of the agent. There is also probable cause to believe that [Petitioner] committed the offense of Criminal Domestic Violence 1<sup>st</sup> Offense as described in the incidence [sic] report by the Greenville County Sheriff's Department authorities, thereby failing to follow the advice and instructions of the agent. [Petitioner] willfully failed to follow the advice and instructions of the agent. [Petitioner] has failed to make a good faith effort toward complying with the conditions of supervision and is therefore, not currently suitable for supervision in this community.

App. 29-30.

Petitioner's case was referred to the Parole Board for revocation and on September 14, 2011, Petitioner appeared at a parole violation hearing before a three member panel of the Parole Board where his parole was revoked. App. 33-34.

On November 11, 2011, Petitioner filed an application for post-conviction relief ("PCR") pursuant to S.C. CODE ANN. § 17-27-20(A)(5) alleging in part that his parole was unlawfully revoked where the charges for the criminal domestic violence ("CDV") offense were still pending and he had not been convicted of those charges. App. 41-48. The State filed its Return on March 29, 2012. App. 49-56.

On March 13, 2013, Petitioner was found **not guilty** of the CDV charge. App. 63.

An evidentiary hearing on Petitioner's PCR application was held before the Honorable Robin B. Stilwell on August 28, 2013. App. 66 – 90. Petitioner was represented by Rodney W. Richey, and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 66. Agents Allen Norfus and Tony Anderson, Administrative Hearing Officer Fredna Gary, and Petitioner each testified at the evidentiary hearing. App. 70-87.

Allen Norfus testified that he was employed by the Greenville County office of the Department and presented the Department's case at the administrative hearing held on August 2, 2011 even though he was not Petitioner's supervising agent. App. 70, ll. 5-22. Norfus testified the reason for Petitioner's recommended revocation at this hearing was an incident report of criminal domestic violence which also stated that Petitioner had been drinking alcohol. App. 71, ll. 2-6. Norfus acknowledged that at the time of Petitioner's revocation, the CDV was a pending charge and Petitioner had not been convicted of that offense yet. App. 71, ll. 11 – 17.

Norfus admitted the allegations that Petitioner committed a CDV offense and used alcohol all arose out of the same incident, an incident for which Petitioner was later found not guilty. App. 72, l. 14 – 73, l. 8. Norfus further testified that other than the Department's own violation report, the only evidence submitted against Petitioner at the administrative hearing was the incident report from the Greenville County Sheriff's Office. App. 73, ll. 12-21.

Tony Anderson testified he was Petitioner's supervising agent but that he did not participate in the administrative hearing because of a conflict. App. 74, l. 21 – 75, l. 11. He did present Petitioner's case to the three member panel of the Parole Board. App. 76, l. 25 – 77, l. 2. He testified that the crux of Petitioner's present parole violations was the alleged CDV charge and the alleged drinking of alcohol during that incident. App. 75, ll. 15 – 24. He admitted that Petitioner was never convicted of the CDV charge. App. 75, l. 25 – 76, l. 2.

Anderson also testified that just being arrested for an offense does not constitute a parole violation. App. 76, ll. 18-21. He then asserted that not contacting your agent after an arrest is a parole violation and claimed that Petitioner did not contact him after Petitioner was arrested. App. 76, ll. 22-24.

Fredna Gary was the administrative hearing officer for the Department who recommended revocation of parole in Petitioner's case, finding probable cause that Petitioner had violated his parole. App. 77, l. 13 – 79, l. 12. She testified that she found probable cause based on the incident report from the Greenville County Sheriff's Office relating to the CDV charge and which described both Petitioner and the alleged victim as being intoxicated. She testified that she also considered Petitioner's prior violations,

although she also stressed that she had never used prior parole violations to revoke anyone's parole. App. 79, l. 13 – 81, l. 15.

Petitioner testified that his parole was improperly revoked where the allegations surrounding the CDV charge were still pending and had not yet been proven. App. 82, l. 20 – 83, l. 11. He affirmed that he was subsequently found not guilty of that charge. App. 83, ll. 12-16.

At the conclusion of the evidentiary hearing, Judge Stilwell orally denied Petitioner's PCR application. App. 87, l. 23 – 90, l. 15. Judge Stilwell filed his written Order of Dismissal on October 24, 2013. App. 92 – 101. Judge Stilwell first ruled that while "an inmate's non-collateral claim that his parole was unlawfully revoked falls squarely within the ambit of the PCR statute," the PCR court could not "otherwise sit in an appellate capacity to review the Parole Board's discretionary decision." App. 97. Therefore, Judge Stilwell ruled that the PCR court's "review of whether the [Petitioner's] parole was unlawfully revoked [was] limited to an examination of whether the revocation procedure itself was lawful." App. 98.

Judge Stilwell then found that Petitioner "failed to meet his burden of proving his due process rights were violated and his parole unlawfully revoked." Judge Stilwell ruled:

This Court finds that [Petitioner] was arrested for CDV and the arresting officer noted the [Petitioner's] intoxication on the incident report. This Court finds the [Petitioner's] use of alcohol and the failure to report the arrest were the basis for the [Petitioner's] parole arrest warrant. . . . [The Petitioner] clearly violated the terms of his parole. Hearing Officer Gary did not find the [Petitioner] committed the offense. Rather, she found the parole arrest warrant was issued based on probable cause and also considered the [Petitioner's] five prior parole violations in reaching this conclusion. The [Petitioner's] case was properly before the Parole Board and this Court finds the Parole Board's revocation procedure in this case was lawful. This Court concludes the [Petitioner] is not entitled to a new parole revocation hearing.

App. 99.

This petition for writ of certiorari follows.

## ARGUMENT

**The PCR court erred in failing to find that the Parole Board unlawfully, arbitrarily, and capriciously revoked Petitioner's parole on the basis of allegations arising out of a criminal domestic violence charge against Petitioner which had not yet been adjudicated in court and for which Petitioner was later found not guilty.**

The Parole Board revoked Petitioner's parole on unproven allegations arising out of a CDV charge for which Petitioner was later found not guilty. The Parole Board's decision to revoke Petitioner's parole was arbitrary and capricious and not supported by sufficient evidence. In upholding the Parole Board's revocation of Petitioner's parole, the PCR court made findings and conclusions unsupported by law and any evidence.

The PCR court first ruled that its review was limited solely to "an examination of whether the revocation procedure itself was lawful." App. 98. This ruling is erroneous as a matter of law because S.C. CODE ANN. § 17-27-20(A)(5) of the Uniform Post-Conviction Procedure Act (the "PCR Act") expressly provides that a person who claims that "his probation, parole or conditional release" was "unlawfully revoked" may institute a post-conviction relief proceeding under the Act.

This Court has held that a non-collateral claim that an applicant's probation, parole or conditional release has been unlawfully revoked is specifically listed in the PCR Act and therefore can be raised in a post-conviction relief action. Al-Shabazz v. State, 338 S.C. 354, 368, 527 S.E.2d 742, 749 (2000); see also Kerr v. State, 345 S.C. 183, 185-86, 547 S.E.2d 494, 495-96 (2001). Thus, an applicant can assert in a post-conviction relief action that he should not have been returned to prison to serve the remainder of a valid sentence. Al-Shabazz, 338 S.C. at 368, 527 S.E.2d at 749. There is no limitation in the PCR Act that confines a PCR court's review to solely whether the revocation procedure itself was lawful as the PCR court in Petitioner's case ruled. Rather, the PCR court may review the Parole

Board's decision to return Petitioner to prison and determine whether there was any evidence supporting that decision or whether the Parole Board's decision was arbitrary or capricious. The PCR court therefore erred in ruling that its review was confined to determining whether the revocation procedure itself was lawful.

The PCR court then ruled that Petitioner's parole was revoked for two reasons: Petitioner's use of alcohol and Petitioner's failure to report the CDV arrest. Based on those two factors, the PCR court ruled that Petitioner clearly violated his parole such that the Parole Board properly revoked his parole. App. 99. This conclusion by the PCR court is erroneous for at least two primary reasons. First, the evidence does not support a finding that Petitioner's parole was revoked for failing to report an arrest. Second, where Petitioner was found not guilty of the CDV charge and the allegations of alcohol use arose out of this charge and there was no other independent evidence that Petitioner used alcohol, the Parole Board's decision to revoke Petitioner's parole lacked an evidentiary basis thus rendering the Parole Board's decision arbitrary and capricious.

The revocation of parole may not be capriciously or arbitrarily exercised, but should be predicated on an evidentiary showing of facts tending to establish the violations of the conditions of parole. State v. White, 218 S.C. 130, 134-35, 61 S.E.2d 754, 756 (1950); see also State v. McCray, 222 S.C. 391, 396, 73 S.E.2d 1, 3 (1952) ("Revocation of probation or parole, in whole or in part, is the means of enforcement of the conditions of it; and in the absence of capricious or arbitrary exercise, the discretion of the revoking court will not be disturbed"); cf. State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001) (the determination to revoke probation is reversible only when based on an error of law or a lack of supporting evidence renders it arbitrary or capricious).

The PCR court ruled that one basis for Petitioner's parole arrest warrant was his failure to report his CDV arrest and thus the Parole Board properly revoked his parole for this violation. App. 99. There is no evidentiary support in the record for this ruling. While Agent Anderson testified at the PCR evidentiary hearing that failure to report an arrest could constitute a parole violation and claimed that Petitioner did not contact him after Petitioner was arrested, there was absolutely no testimony at the hearing that Petitioner's parole was actually revoked for his failure to report an arrest. App. 76, ll. 20-24.

In fact, the documentary evidence does not support a finding that Petitioner's parole was revoked due to any alleged failure on his part to report the arrest. The parole arrest warrant makes no mention of a parole violation for the failure to report the arrest and only gives notice to Petitioner that he violated the conditions of his parole by committing the offense of CDV (for which he was later found not guilty), for using alcohol, and for not following the advice and instructions of his supervising agent. App. 28. The United States Supreme Court has held that minimal due process for parole revocation requires that Petitioner receive "written notice of the claimed violations of parole." Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972). Petitioner did not receive written notice of this claim in the arrest warrant served upon him. App. 27-28. Furthermore, the alleged CDV incident occurred on May 9, 2011 and the parole arrest warrant was issued just two days later on May 11, 2011. App. 27-28; 31-32. There did not seem to be any delay by Agent Anderson in issuing the parole arrest warrant and rather it seems that he knew about the arrest shortly after the alleged incident.

In addition, Hearing Officer Gary does not mention any failure to report the arrest in her findings or conclusions in the Administrative Hearing Summary issued by her on

August 2, 2011 which recommended revoking parole. App. 29-30. Failure to report the arrest was not mentioned as a basis for revoking parole at the September 14, 2011 hearing before the Parole Board and not mentioned in the Parole Board's order revoking Petitioner's parole. App. 33-34. Accordingly, the PCR court's finding that Petitioner's parole was validly revoked due to his failure to report the CDV arrest has no evidentiary support.

Whether Petitioner violated the conditions of his parole and whether the Parole Board lawfully revoked Petitioner's parole therefore turns on whether Petitioner's alleged use of alcohol supported the revocation of Petitioner's parole.<sup>1</sup> The allegations of alcohol use by Petitioner derived from an incident report prepared by the Greenville County Sheriff's Office regarding the allegations of criminal domestic violence against Petitioner. In that incident report, the reporting officer stated that Petitioner and the alleged victim were "noticeably intoxicated" and "had the odor of an alcoholic beverage on their person." The incident report alleged that there were empty beer cans throughout the room and that both Petitioner and the alleged victim reportedly confirmed they were drinking. App. 31-32.

Agent Anderson relied on the allegations in this incident report in issuing his parole arrest warrant against Petitioner. App. 28. Agent Norfus, in presenting the case to Hearing Officer Gary, relied on the allegations in this incident report. App. 29-30. Hearing Officer Gary also relied on the allegations in the incident report in making her probable cause finding that Petitioner's parole should be revoked for his use of alcohol. Id. Agent

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<sup>1</sup> While the PCR court noted that Hearing Officer Gary also considered Petitioner's previous parole violations in making her probable cause conclusion, the PCR court did not rule that the prior parole violations were sufficient in themselves for the revocation of Petitioner's parole. In fact, Hearing Officer Gary testified that she has never used prior parole violations to revoke anyone's parole. App. 81, ll. 13-15. Her Administrative Hearing Summary report also does not mention any previous parole violations. App. 29-30.

Anderson again relied upon the allegations in the incident report in making the case for revocation of Petitioner's parole at the Parole Board hearing held on September 14, 2011. App. 33.


After Petitioner's parole was revoked, Petitioner was found not guilty of the CDV charge. App. 63, 83, ll. 12-16. The Department's accusations of alcohol use by Petitioner stemmed only from the allegations made by the Greenville County Sheriff's reporting officer surrounding the CDV charge for which Petitioner was found not guilty. Other than the allegations of alcohol use contained in this incident report, there was no other evidence that Petitioner had used alcohol. Agent Anderson, Agent Norfus and Hearing Officer Gary had no independent knowledge of Petitioner's alleged use of alcohol other than what was contained in the incident report leading to the CDV charge for which Petitioner was eventually found not guilty. The Greenville County Sheriff's reporting officer was not asked to testify at the Administrative Hearing or the Parole Board hearing. At the administrative hearing, Petitioner denied being intoxicated. App. 35.

The Parole Board based its decision to revoke Petitioner's parole on allegations in an incident report regarding a CDV charge for which Petitioner was later found not guilty. The Parole Board decided to revoke Petitioner's parole without even waiting to see what the outcome would be on the CDV charge. Therefore, the Parole Board arbitrarily, capriciously and unlawfully revoked Petitioner's parole. Petitioner's parole should be reinstated by this Court.

**CONCLUSION**

For the reasons set forth herein, Petitioner James Robert Byrd respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of the reinstatement of his parole.

Respectfully submitted,

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge

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JAMES ROBERT BYRD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.


APPELLATE CASE NO. 2013-002348

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and James Byrd #98230, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 this 23rd day of July, 2014.

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day  
of July, 2014.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.