

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court  
The Honorable H.W. Funderburk, Jr. Administrative Law Judge  
Case No.: 15-ALJ-15-0052-AP

**SC Court of Appeals**

Appellate Case No.: 2016-000445

JEFFERY FELTNER, #84361,.....RESPONDENT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,  
PAROLE AND PARDON SERVICES,.....APPELLANT

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**INITIAL BRIEF OF APPELLANT**

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**Tommy Evans, Jr.  
Assistant General Counsel**

**South Carolina Department of Probation,  
Parole and Pardon Services  
P.O. Box 50666  
Columbia, South Carolina 29250**

**ATTORNEY FOR APPELLANT**

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**STATEMENT OF ISSUE ON APPEAL**

- 1. Did the Appellant violate their operating procedure and §24-21-610 of the South Carolina Code of Laws by allowing a licensed professional counselor to perform a psychological evaluation of the Appellant who had been granted conditional parole?**

## STATEMENT OF THE CASE

On February 4, 1976, the sixteen year old Respondent left home supposedly on his way to school. However, he was suspended at the time, so he and another student decided to steal an automobile. While armed with his father's gun he went to the victims residence to steal their vehicle. Once he arrived, he observed one victim walking out the house. He pointed the gun at the victim and ordered her back into the residence. Once inside he ordered both victims to lie face down on the living room floor as he went through the house looking for valuables. Upon leaving the bed room he saw one of the victims standing before him. As the victim approached, the Respondent shot him in the head killing him instantly. The other victim grabbed a ceramic frog attempting to hit the Respondent. He shot her in the head also causing her death. The Respondent fled the scene in the victim's vehicle. He proceeded to pick up some friends to go joy riding, and later abandoned the vehicle in a parking lot across the street from Summerville High School.

The Respondent was later caught and questioned by authorities. Upon being lawfully informed of his *Miranda* rights, the Respondent gave a full confession. He was then arrested and charged with the offense of murder. On April 13, 1976, the Respondent appeared before the Honorable Louis Rosen for this offense. Upon the conclusion of this appearance the Court sentenced the Respondent to a term of incarceration for the remainder of his natural life. At the time the Respondent committed this offense, South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon the service of ten years.

On November 30, 1983, while serving his sentence the Respondent escaped incarceration. He was later found and returned to the Department of Corrections and charged with the offense of escape. On May 11, 1987, the Respondent appeared before the Honorable Frank Epps for this

offense. Upon the conclusion of this appearance the Court sentenced the Respondent to a one year period of incarceration to be served consecutively with his present sentence.

On April 1, 1987, the Respondent made his initial appearance before the Parole Board. Upon the conclusion of this hearing, the Board denied the Respondent an opportunity to be released on parole. Since this initial denial the Respondent has appeared before the Parole Board an additional fourteen times, each resulting in a denial of parole. His last appearance occurred on February 18, 2015. Upon the conclusion of this appearance the Board decided to deny parole due to: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) a use of a deadly weapon in this or a previous offense; and, 4) a prior criminal record indicates poor community adjustment.

The Respondent later contacted the Board and argued that he received four affirmative votes which should have allowed parole pursuant to *State v. Barton*. He requested a review of this previous decision to make a determination if he should be granted parole pursuant to *Barton*. Upon review of the hearing recording it was determined that the Appellant did receive four affirmative votes so the Board decided to once again review the previous decision. The Board ordered that the Respondent undergo a mental health evaluation pursuant to South Carolina law. Once this evaluation was returned unfavorable, the Board reviewed the case and once again decided to deny parole, due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.

Upon receiving the order of denial the Respondent filed a notice of appeal before the Administrative Law Court. Within this appeal the Respondent alleged that the Board relied on an evaluation of a non-licensed psychologist against Department policy and South Carolina law; therefore, this denial of parole is unlawful and should be subject to reversal.

The Appellant argued that South Carolina law only states that the person be **duly qualified** a determination that should only be made by the Board, not the Respondent, nor the Courts. The Appellant also argued that the Board has the ability to rescind a decision, and make a determination if there is a change of circumstances; also, the Supreme Court did not intend for *Barton* to be applied retroactively.

Upon reviewing the briefs of both sides, on February 23, 2016, the Honorable H.W. Funderburk, Jr., Administrative Law Court Judge issued his decision. He decided that the Appellant erred by not using a licensed psychologist or psychiatrist in the mental health evaluation. He reversed and remanded the case to the Board to conduct a mental evaluation by a psychiatrist or psychologist, and then the Board shall conduct a rehearing regarding parole.

Upon receiving this decision the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. The Appellant will argue it they committed no wrongdoing in allowing a licensed professional counselor to conduct the evaluation, since this was not an examination, there exist no diagnoses, just an opinion by a duly qualified professional. The Appellant will further argue that the Board had the ability to rescind the Respondent's parole. The brief of the Appellant supporting these defenses follows.

### ARGUMENT

- 1. The Appellant did not err in allowing a licensed professional counselor make an evaluation regarding the Respondent's ability to function outside of prison.**

The Respondent approached the Board revealing that he received four affirmative votes, in his opinion he should have been awarded parole pursuant to *Barton*. Upon completion of the mandatory investigation, the Respondent was scheduled another hearing to make a determination if he should be awarded parole. Since the Respondent has been incarcerated greater than ten continuous years, he must be evaluated to make a determination of his ability to succeed outside

of prison. "Notwithstanding any other provision of this section or of law, no prisoner who has served a total of ten consecutive years or more in prison may be paroled until the Board has first received a report as to his mental condition and his ability to adjust to life outside the prison from a duly qualified psychiatrist or psychologist." S.C. Code Ann. §24-21-610 (Supp. 1986).

The Respondent was evaluated by Mr. Kevin Chadbourne Downs who is not a licensed psychologist; however, he does have a masters in psychology. The Court reversed due to the person conducting the evaluation not being a licensed psychologist. The statute does not make having a license a qualification; the individual who conducts the evaluation just needs to be duly qualified to make an opinion on this matter. The lower Court decided that since the person who conducted the evaluation was not licensed he is not a psychologist, therefore, this evaluation was done in error. Mr. Downs has a Masters in Psychology; therefore, he is duly qualified to make an opinion on this matter. This evaluation falls under one of the exceptions which does not require a license. Pursuant to South Carolina law a license member of another profession who is regulated by the Department of Labor, Licensing, and Regulation and who is rendering services of a psychological nature and does not represent himself to be a psychologist or his services to be psychological is not required to have a license. S.C. Code Ann. §40-55-90(A)(1)(c)(Supp. 2015). The South Carolina Code of Laws also state that a person is exempt from requiring a license if:

A person employed by any entity who professional employment is funded through an agency of the State and who provides services of a psychological nature within the scope of employment if the person does not describe himself or his services by any title or description which states or implies that the person holds a license or otherwise required by this chapter.

S.C. Code Ann. §40-55-90(A)(13)(Supp. 2015).

Mr. Downs never held himself out to be a psychologist but a licensed counselor with a masters in psychology. It is the opinion of the Appellant that Mr. Downs is duly qualified to make this

evaluation; therefore, there exists no error in allowing him to make the evaluation. If having a license in the field of psychology or psychiatry was a condition, it would have been placed in the statute. The General Assembly's only qualification was that the person be "duly qualified" which in the opinion of the Appellant Mr. Down is truly duly qualified to make his opinion in the matter he was requested to make.

Pursuant to *Sims v. Colvin*, 2014 WL 793065, the United States District Court determined that examiners are qualified if they are "currently licensed" in the State and have the training and experience to perform the type of examination or test requested. In *Sims*, the U.S. District Court for South Carolina noted that while the consultative examiner used by the ALJ was not a licensed psychologist, he was a licensed professional counselor with an advanced degree. The District Court Judge upheld the ALJ's decision to consider the examiner's assessment because the Plaintiff failed to show that the consultative examiner did not have the training and experience to perform the psychological examination. Ultimately, the Court ruled against the Plaintiff by determining that the ALJ did not err in relying on the licensed professional counselor's exam in lieu of one performed by a licensed psychologist.

In this matter the Respondent failed to reveal that Mr. Downs did not have the requisite training and experience to perform a pre-parole psychological assessment. In the present case, the one-time pre-parole psychological evaluation is not a treatment device that might require the Board to give a licensed psychologist more weight than a duly qualified consultative examiner. "When the nature and length of the treatment relationship by a licensed psychologist indicates that the evaluation at issue was not conducted primarily for medical treatment the opinion of the licensed psychologist should not be given controlling weight." *Caudill v. Astrue*, 2010 WL 148806 (2010). Thus, the use of a licensed psychologist or psychiatrist for a non-treatment cause such as a need to

obtain a report as in the present case is not necessary. The Board only considered the result of the exam as one factor among several in making the decision to deny parole.

The Appellant also argues the determination of a person being duly qualified to make the evaluation is completely in the control of the Board and not the Courts. The Board was made aware of the qualifications of Mr. Downs and determined that he is duly qualified to make his opinion regarding the possibility of the Respondent's ability to succeed outside of prison. Mr. Downs has a Masters in Psychology, a law degree, and, is a licensed addictions counselor. Pursuant to the rules, this makes him duly qualified to make an opinion on this matter. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge skill, experience training or education may testify thereto in the form of an opinion or otherwise. Rule 702 SCRE.

The ability to decide if Mr. Downs is qualified belongs with the Board and not the ALC. All expert testimony must satisfy criteria of rule of evidence governing testimony of experts, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). The person who conducted this evaluation has a masters degree in this field which makes him more qualified than an average person to make an opinion regarding the Appellant's ability to function outside of prison. An expert witness is a witness with knowledge must generally be such as not normally possessed by the average person. *Potter v. Glosser Bros. Department Store, Inc.*, 146 Pa. Super. 129, 22 A2d 28 (1941).

Mr. Downs not only has more training and knowledge than the average person, he uses psychological test as part of this evaluation. The MMPI, PAI, and P3 are known psychological tests used to make the determination of whether or not the Respondent will be successful outside

of prison. So Mr. Downs, who has a Masters in Psychology and a law degree, has revealed with substantial evidence that he is duly qualified to give his opinion regarding the Respondent's ability to function outside of prison. The ALC cannot remand a decision of the Board without being presented any evidence of wrongdoing. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999). Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The Board decided to use Mr. Downs due to the fact he is qualified to make a decision regarding the ability of the Respondent to live his life outside of prison. There are also a limited number of licensed psychologist that are willing to conduct these evaluations. In order to expedite these evaluations the Appellant sought other duly qualified individuals willing to conduct these evaluations. The General Assembly did not intend this to be a medical diagnosis, but a look into an inmate who has spent at least ten years in prison for his ability to adjust to the changes in society, and his ability to handle these changes, so as to not violate parole or reoffend. This statute does not apply to individual who has max-out a sentence, but only to individuals who might be released on parole. Mr. Downs is a licensed counselor who applied this mental evaluation to many inmates, some he has determined will be successful once released on parole. Although the Board did not release them solely for this reason, or denied due to his determination, they have taken his opinion into consideration. If this Court agrees with the ALC, the question must be asked, should the Board rescind all individuals Mr. Downs has determined will successfully handle themselves in society, and who have been released on parole? Since the ALC determination that the Board erred in his

case, if the Court accepts this determination that decision applies to each case Mr. Downs considered while under contract with the Department.

**2. The Board had the jurisdiction to rescind the Respondent's parole.**

The Respondent brought to the Board's attention that during his hearing he received four affirmative votes so he should have been awarded parole pursuant to *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013). In *Barton*, the Appellant Thalma Barton was serving a life sentence for the offense of murder. She appeared before the Parole Board on January 8, 2012, of the six members present, four voted in the affirmative. *Barton*, at 399. At the time Ms. Barton committed her offense South Carolina law stated:

The Board may issue an order authorizing the parole which shall be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of parole.

S.C. Code Ann. §24-21-645(Supp. 1984).

As part of the Omnibus Criminal Justice Improvement Act of 1986 additional language was added to state, "as least two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60." S.C. Code Ann. §24-21-645(Supp. 2012). The Board determined Ms. Barton failed to receive the required number of votes to be released on parole. Upon receiving the order of denial Ms. Barton appealed. The South Carolina Supreme Court decided that since the law existing at the time of the offense allowed a majority, it was unlawful to deny parole.

After the *Barton* decision the Board developed a three pronged verification to determine if the inmate has received four affirmative votes, and whether he should be allowed to be released on parole. First, the Department's Office of Parole Support Services staff will investigate to verify

if the offender did receive the proper number of votes; second, the Department's Office of Legal Services will verify if it qualifies under *Barton*; and, third, the Board will hold a *Barton* hearing to determine if he should be released. Prior to the hearing the Board decided to have the Appellant evaluated pursuant to South Carolina law. Although this evaluation was considered it was not the reason the Board decided to deny the Appellant's parole.

The Board has the ability to rescind parole and conduct a re-hearing if after-acquired information about the prisoner is obtained. Once they received this evaluation it made the Board re-hear the case and make a determination if he should be granted parole. Upon being re-heard the Board decided to deny parole on August 13, 2015 due to: 1) nature and seriousness of the offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense. The ALC is of the opinion that just because parole was rescinded, the unfavorable evaluation, caused the denial. The rescission caused the re-hearing, the denial was due to the above referenced reasons. The Board might have taken the unfavorable evaluation into consideration, like many other criteria considered; however, it is clearly stated in the order this was not the reason for denial. The Respondent revealed no prejudice due to this evaluation, this denial of parole should have been affirmed by the lower court. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice. *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

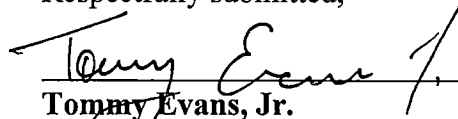
The Respondent was never awarded parole. It was never final, so it continued to be subject to rescission. Parole is not final until the order authorizing the parole is signed by at least a majority of its members with term and conditions. Then the director, or one lawfully acting for him, must issue a parole order which, if accepted by the prisoner, provides for his release from custody. S.C. Code Ann. §24-21-650 (Supp. 2004). There was never an order granting parole signed by a

majority of the Board, so Parole was never final, thus, the Board had the ability to rescind the conditional order.

**CONCLUSION**

Based on the foregoing reasons the ALC incorrectly remanded the final decision of the Parole Board; therefore the Appellant respectfully requests the final decision of the Administrative Law Court be reversed.

Respectfully submitted,

  
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**Tommy Evans, Jr.**  
**Assistant General Counsel**

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Columbia, South Carolina  
March 29, 2016

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
The Honorable Deborah Brooks Durden  
Administrative Law Judge

MAR 30 2016  
SC Court of Appeals

Case No. 15-ALC-15-0052-AP

JEFFERY FELTNER, #84361,

Respondent,

SOUTH CAROLINA DEPARTMENT OF PROBATION,  
PAROLE AND PARDON SERVICES,

Appellant.

**CERTIFICATE OF SERVICE**

I, Dawn Nichols, Executive Administrative Assistant, hereby certify that this 29<sup>th</sup> day of March,

2016, I served the following documents:

1. Initial Brief of Appellant and Designation of Matter; and
2. Certificate of Service.

by first class mail, postage prepaid as follows:

Tommy Thomas, Esquire  
Post Office Box 88  
Irmo, South Carolina 29063



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Executive Administrative Assistant  
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NIKKI R. HALEY  
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SC Court of Appeals

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March 29, 2016

The Honorable Jenny Kitchings  
Clerk of the South Carolina Court of Appeals  
1015 Sumter Street- 5<sup>th</sup> Floor  
Columbia, South Carolina 29201

RE: Jeffery Feltner v. SCDPPPS

Dear Ms. Kitchings:

Please find enclosed the original Initial Brief of Appellant and Designation of Matter and Certificate of Service in the above referenced matter.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tommy Evans, Jr.".

Tommy Evans, Jr.  
Assistant General Counsel

TE:dn  
Enclosures

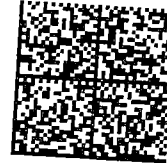
cc: Tommy Thomas, Esquire

State of South Carolina

Department of Probation, Parole, and Pardon Services

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