THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk Jr., Administrative Law Judge
Appellant Case No. 2016-002492

Filed May 4, 2017

Melissa Burris, #212040, RESPONDENT

v.

South Carolina Department of Probation, Parole and Pardon Services, APPELLANT

PETITION FOR REHEARING

The Appellant, the South Carolina Department of Probation, Parole and Pardon Services, respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. The Appellant hereby seeks a rehearing on the grounds that the Court may have misapprehended or overlooked several crucial points by concluding that the Administrative Law Court (ALC) had not made its final decision; therefore, this case is not appealable.

Specifically, the Appellant submits this Court may have misapprehended its determination that the ALC had not made a final order regarding these proceedings. The Appellant will argue that the ALC made the determination that the Appellant erred in not allowing a duly qualified psychiatrist or psychologist to make the determination of whether or not the Respondent would be

fully functional outside of prison, and that decision was final. The denial of parole was overturned the case was remanded for another evaluation to be completed by a psychiatrist or psychologist and have a re-hearing regarding his parole. Any appeal after a re-hearing would be considered moot and have no value regarding the matter what that originally brought before this Court.

The Respondent is currently serving a life sentence for murder. At the time she committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years. On November 6, 2013, the Appellant made her initial appearance before the Parole Board. At the conclusion of this hearing the Board decided to deny the Respondent an opportunity to be released on parole. The Respondent re-appeared before the Board on January 13, 2016. At the conclusion of this hearing the Board decided to grant parole conditionally. Due to the length of time the Respondent was incarcerated, she was required to be mentally evaluated as to her ability to conduct herself in society, *see,* S.C. Code Ann. §24-21-610 (2015). She was examined and evaluated by Dr. Robin Lyn Moody, Ph.D. Upon completion of this evaluation, Dr. Moody determined that the Respondent would not be able to adjust to life outside of prison. After receiving those results, the Board decided to rescind the Respondent's conditional parole and reexamine their previous decision. After this reexamination the Board 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.

This decision was appealed to the Administrative Law Court who decided that pursuant to South Carolina law this evaluation must be done by a licensed psychiatrist or psychologist. The ALJ determined that the Board's decision to consider this evaluation was reversible error. The lower Court ordered that this case be remanded for a new evaluation and a re-hearing.

After this decision the Appellant immediately filed a notice of appeal before this Court, arguing that the ALC erred in its interpretation of the statute. The Appellant argued that Dr. Moody falls under an accepted person who is exempted from requiring a license to perform psychological evaluations, *see,* S.C. Code Ann. §40-55-90(A)(1)(c)(2015). Thereby making her duly qualified pursuant to statute. This court ruled that this decision is not appealable due to it not being a final decision, and thereby dismissed this appeal.

The Appellant respectfully request this Court to grant this petition for rehearing and withdraw its previous order dismissing this appeal. The Appellant will argue that the decision of the ALC was final, and any appeal stemming from another decision of the Board would be moot regarding the issues originally brought before this Court.

ARGUMENTS

1. **The decision of the ALC was final; therefore, this Court does have jurisdiction over this cause of action.**

The ALC's jurisdiction to review a final decision of the Department is derived from the decisions of the South Carolina Supreme Court in *Al-Shabbaz v. State,* 338 S.C. 334, 527 S.E.2d 724 (2000); *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services,* 352 S.C. 594, 576 S.E.2d 146 (2002); and, *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 481, 661 S.E.2d 106 (2008). In *Al-Shabbaz,* the South Carolina Supreme Court created a new avenue by which an inmate could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction and sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz,* at 376. In *Al-Shabbaz,* the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and

punishment is imposed; and (2) when an inmate believes prison officials have erroneously calculated sentence; sentence-related credits or custody status." *Id.*, at 369

In *Furtick*, the Court noted that the appealable final decision arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The review by the ALC under procedures set forth in *Al-Shabbaz* is necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. The Court determined that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.* The *Furtick* decision gave the ALC jurisdiction over the denial of parole eligibility.

The Supreme Court in *Cooper* decided to give the ALC the authority to review the denial of parole. The ALC was given the very narrow ability to determine if the process was legally followed by the Board prior to the final decision. If it is shown that the Board considered the mandatory criteria and risk assessment, the final decision stands. If it is found that the Board in some way failed to abide by the mandatory criteria or risk assessment the ALC can order the case remanded for a new hearing. Pursuant to these decisions, the ALC only has one action available, to remand the decision for another hearing. This is what was decided, which is a final decision, therefore, this court has jurisdiction.

The Court of Appeals has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree in the circuit court, family court, a final decision of an agency, **a final decision of an administrative law judge,** or the final decision of the Worker's Compensation Commission. S.C. Code Ann. §14-8-200(2015)(emphasis added). This Court made the decision that the ALC did not make a final decision so this court dismissed this appeal.

Within its decision this Court cited Section 1-23-610 of the South Carolina Code of Laws which state:

> (A)(1)For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right. (2) Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision. The serving and filing of a notice of appeal by a licensee for review of a fine or penalty or of its license stays only those provisions from which review is sought and matters not affected by the notice of appeal are not stayed. The serving or filing of a notice of appeal does not automatically stay the suspension or revocation of a permit or license authorizing the sale of beer, wine or alcoholic liquor. Upon motion the administrative law judge may grant, or the court of appeals may order, a stay upon appropriate terms.

S.C. Code Ann. §1-23-610(A)(1-2)(2015)

This Court referred to the above referenced statute to dismiss this Appeal. The Court is not allowed to make a decision regarding interlocutory decisions. In the absence of a statute or rule that permits the immediate appeal of an interlocutory order, only final orders are generally appealable. *Culbertson v. Clemens,* 322 S.C. 20, 471 S.E.2d 163 (1996) An order is interlocutory and not final when "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Mid-State Distribs., Inc. v. Century Imps. Inc.,* 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). The order of the ALC was final. The Judge made the decision for the case to be remanded for another evaluation to be completed and another hearing held by the Board. The initial subject of appeal that was raised by the Appellant was whether or not it was lawful for Dr. Moody to give her opinion regarding the ability of the Respondent to function outside of prison. The decision of the ALC was that Dr. Moody was not qualified to make this determination.

Cited within the order of dismissal is the South Carolina Supreme Court case of *Charlotte-Mecklenburg Hospital Authority v. S.C. Dept. of Health and Environmental Control,* 387 S.C. 265, 692 S.E.2d 894 (2010) which the court decided that the decision was interlocutory and not a final decision so the appeal was subject to dismissal. The Appellant argues that the present case is not identical to that of *Charlotte – Mecklenburg*. In that case the issue before the Court was whether or not the Department of Health of Environmental Control (DHEC) made the proper determination of which party were entitled a certificate of need. The ALC remanded this case for DHEC to make a decision. Once DHEC made the decision as to which party was entitled this certification, that decision was once again appealable. In the present case the issue brought before the lower court was decided, there is no further determination that could be made concerning the qualifications of Dr. Moody. The ALC determined that she was not qualified and ordered a new parole hearing. For this decision to be interlocutory the Department would have to be able to make a decision on the merits of Dr. Moody, which will be re-heard by the ALC. The decision of the ALC was final which gives this Court jurisdiction.

There is no further act can be made regarding this decision. Once the ALC made this decision the Appellant only had two actions, one, to have the Respondent evaluated by another doctor, or, two, appeal this decision to this Court. This issue cannot be brought again before the ALC, the decision made on this issue was final. In *Good v. Hartford Accident & Indemnity Co.,* 201 S.C. 32, 21 S.E.2d 209 (1942), the South Carolina Supreme Court decided what makes a decision final, in *Good* it states:

> "A judgment order of decree to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, as to all parties, reserving no further questions or directions for future determination. It must be finally dispose of the whole subject – matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has

> been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.

Good, at 212, *quoting,* 2 Am.Jur. 860, Section 22.

In South Carolina, an immediate appeal may be taken where the rights of the State would be substantially impaired if the appeal is not heard. When error in the decision or ruling cannot be vindicated on appeal, a substantial right is involved. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). It is clear by the decision of the ALC that the right of the Appellant would be dramatically impaired due to the fact there are limited number of psychiatrist or psychologist available in this State many of whom are not willing to perform such evaluations within the state's prison system. This decision would cause a substantial delay in the final decisions of many individuals who are awaiting the chance to be released on parole. There is also the question of the individuals who have been given a positive evaluation by Dr. Moody and have already been released on parole. If this evaluation has been done in error, each evaluation done by Dr. Moody, including those who has resulted in positive evaluations, has been done in error and maybe subject to remand. The ALC remanded the case back to the Board for a future evaluation and another parole hearing; however, the decision regarding the qualifications of Dr. Moody was the only issue raised before the ALC. This is a final decision which cannot be brought again before the ALC, so this Court has jurisdiction.

Respectfully submitted,

Tommy Evans, Jr.
Assistant General Counsel

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Columbia, South Carolina
May 8, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr.
Administrative Law Judge
Case No. 16-ALC-15-0010-AP

Appellate Case No. 2016-002492

MELISSA BURRIS, #212040,

Respondent,

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,

Appellant

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, certify that I have served the within *Petition for Rehearing*, dated May 8, 2017, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, this 8th day of May, 2017, addressed to her attorney of record:

Tommy Thomas, Esquire
PO Box 88
Irmo, S.C. 29063

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
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May 8, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: Melissa Burris v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Petition for Rehearing*, dated May 8, 2017, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: Tommy Thomas, Esquire