

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.: 16-ALJ-15-00010

**SC Court of Appeals**

Appellate Case No.: 2016-002492

MELISSA BURRIS, #212040.....RESPONDENT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND  
PARDON SERVICES,..... APPELLANT

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**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUE ON APPEAL**

- 1. Did the ALC err in determining that Dr. Robin Lyn Moody was not qualified to conduct a mental examination to determine the fitness of the Respondent to conduct herself in society; thereby, reversing the decision of the Parole Board.**

## STATEMENT OF THE CASE

On September 11, 1993, an officer with the Anderson police department responded to a call at the Respondent's residence. Upon arriving, he witnessed the victim in a chair unresponsive with several gunshot wounds. The officer requested the Respondent to provide him with the weapon used to commit this crime. She gave him the weapon in which he secured, then contacted Emergency Medical Services. Upon their arrival they determined the victim to be deceased, her cause of death due to the multiple gunshot wounds. The Respondent was then taken into custody and charged with the offense of murder, and possession of a weapon during the commission of a violent offense. The Respondent was later questioned, and after being informed of her *Miranda* rights gave a full confession.

On January 5, 1994, the Respondent appeared before the Honorable H. Hall for the offenses of murder and possession of a weapon in the commission of a violent crime. Upon the conclusion of this appearance, the Court sentenced the Respondent to a period of incarceration for the remainder of her natural life for the offense of murder; and, a five year period of incarceration for the offense of possession of a weapon during the commission of a violent crime.<sup>1</sup> At the time the Respondent 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 Respondent made her initial appearance before the Parole Board. Upon 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 served incarcerated; prior any release from incarceration she was

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<sup>1</sup> The Appellant completed the sentence for the weapons offense on September 13, 1998.

required to be evaluated as to her ability to conduct herself in society. 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 conduct herself in society. Upon receiving the results of Dr. Moody's evaluation 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.

Upon receiving this denial of parole the Respondent filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Respondent argued that the decision of the Board was arbitrary and capricious; that she was denied due process by not being provided the results of the psychological evaluation; and, the final decision failed to reveal the findings of facts and conclusion of law separately stated. The Appellant argued that the denial of parole was lawful, and that every statutory and Department criteria was considered. The Appellant further argued that the Board was well within their rights to rescind parole pursuant to Department policy.

During litigation the Honorable H.W. Funderburk, Administrative Law Court Judge, ordered that a redacted copy of the evaluation report and Dr. Moody's professional vita be included in the record. After the submission of the final briefs by each party Judge Funderburk issued his decision on December 6, 2016. Within this decision he determined that since Dr. Moody is not a licensed psychologist, per statute she was not qualified to issue a determination as to Respondent's prior mental state and ability to function in society. He ordered that the case be remanded so a licensed psychologist can examine the Respondent to make the determination as to the Respondent's ability to function outside of prison. The lower court also ordered that upon the

completion of this evaluation another hearing will be held to determine if the Respondent is to be granted parole. The Appellant's brief supporting their argument follows.

### ARGUMENT

- 1. The lower Court erred in determining that Dr. Robin Lyn Moody, Ph. D., was not qualified to conduct an evaluation to determine the Respondent's ability to function outside of prison because she is not a licensed psychologist.**

The Respondent was conditionally granted parole; however, due to the amount of time the Appellant was incarcerated she could not be released from incarceration until a mental evaluation was completed to determine her ability to function outside of prison.<sup>2</sup> A mental health evaluation was conducted by Dr. Robin Lyn Moody, Ph.D., who determined that the Respondent was not fit mentally handle the rigors of society. Upon being informed of Dr. Moody's findings, the Board reevaluated her case and made a determination to rescind the Respondent's conditional parole.

The ALC determined that due to Dr. Moody not being a licensed psychologist she was not qualified under the statute to conduct an evaluation. The Appellant will argue that the statute does not require the evaluator be a licensed psychologist, but a person **duly qualified** to make this determination. Dr. Robin Lyn Moody possesses a doctorate in psychology, clinical psychology, and industrial organized psychology. She conducts clinical evaluations for attorneys, governmental agencies, and physicians. She also teaches undergraduate and graduate courses in counseling, and psychology. She instructs students who will become licensed psychologist; therefore, she should be capable of making the determination as to a person's ability to conduct themselves in society. Nothing in the statute states that there is a requirement, that the evaluator be

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<sup>2</sup> 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 of prison from a duly qualified psychiatrist or psychologist. S.C. Code Ann. §24-21-610 (Supp. 1986).

licensed. Instead, the individual who conducts this evaluation must be “duly qualified.” The above referenced qualifications should reveal that Dr. Moody is duly qualified to make these evaluations.

The lower Court determined that in order to be able to make these evaluations the person must be a licensed psychologist; however, that is not stated within the statute. This evaluation falls under one of the exceptions which does not require a license. Pursuant to South Carolina law a licensed 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 obtain 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).

Dr. Moody has never held herself out to be a psychologist, but is a National Certified Counselor, and a Licensed Professional Counselor, with a doctorate in clinical, industrial, and organizational psychology with also has a doctorate in Christian Psychology Counseling. Black’s Law Dictionary defines “Duly qualified” in a proper manner in accordance to with legal requirements as, possessing the necessary qualifications, a person trained and prepared to perform tasks to fulfil an office. BLACK’S LAW DICTIONARY (2nd Ed.)It should be clear to this Court that Dr. Moody is duly qualified to make a determination as to the ability of the Respondent to be able to conduct herself into society if released from incarceration. This is the only requirement listed within the statute. The lower Court erred in determining that the evaluator must be a licensed psychologist

when it does not state that within the statute. If having a license in the field of psychology or psychiatry was a condition it would have been listed within the statute. The General Assembly's only qualification was that the person be "duly qualified."

Pursuant to *Sims v. Colvin*, 2014 WL 793065, the United States District Court of South Carolina 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 required. 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 the one performed by a licensed psychologist.

In this cause of action, the Respondent never presented any evidence revealing that Dr. Moody did not have the requisite training and experience to perform a pre-parole mental health assessment. In the present case, the one-time mental health 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 that the determination of a person qualifications to make this evaluation is completely in the control of the deciding body, which in this case is the Parole Board. The Board was made aware of the qualifications of Dr. Moody and determined that she is duly qualified to make her opinion regarding the possibility of the Respondent's ability to succeed outside of prison. Dr. Moody has a doctorate in Psychology, is a national certified counselor, a licensed professional counselor, conducts mental exams for attorneys, and governmental agencies, and teaches undergraduate and graduate courses in counseling and psychology. Pursuant to the rules, this makes her duly qualified to make an opinion on this matter. If scientific, technical, or other specialize 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 authority to decide if Dr. Moody is qualified belongs with the deciding body, the Parole Board. All expert testimony must satisfy criteria of the rules 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 doctorate in psychology, which makes her 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).

Dr. Moody not only has more training and knowledge than the average person, she uses psychological testing as part of this evaluation. Within her report Dr. Moody revealed the instruments used in her evaluation which included, the mini-mental state examination 2<sup>nd</sup> edition, the Minnesota Multiphasic Personality Inventory 2<sup>nd</sup> edition and a clinical interview. So Dr. Moody, who has a Doctorate in Psychology, has revealed substantial evidence that she is duly qualified to give her 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). It should be considered reasonable that the qualifications presented by Dr. Moody reveals that she is more than qualified to give the examination and her opinion as to the ability of the Respondent's ability to function outside of prison.

The lower court ruled that the evaluation completed by Dr. Moody is unlawful due to the fact she is not a licensed psychologist. Nothing in the statute states that the person should be licensed to conduct this evaluation. The statute only said that the person must be "duly qualified." If the General Assembly wished the person who conducted this evaluation be a licensed psychologist or psychiatrist the statute would have specifically stated this, as it exists in other statutes when it requires a licensed psychologist or physician. (Ex. Section 24-21-715, parole for a terminally ill inmate; Section 62-8-109, when a power of attorney is effective.) Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which

limits or expands the statutes operation. *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). Court should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997). A law must be interpreted reasonably and practically consistent with the purpose and policy of the General Assembly. *Abell v. Bell*, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956).

The Board decided to use Dr. Moody due to the fact she is highly qualified to form an opinion on the ability of the Respondent to live a life outside of prison. There are a limited number of licensed psychologists willing to conduct these evaluations. In order to expedite these evaluations the Appellant sought another duly qualified individual. 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 to determine his or her ability to adjust to the changes in society, and his or her ability to handle these changes, so as to not violate parole. This statute does not apply to an individual who has maxed out a sentence, but only to individuals who might be released on parole.

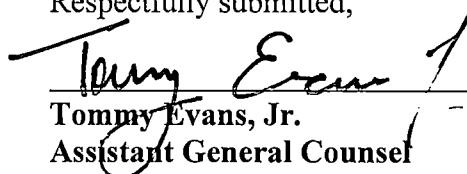
Dr. Moody is a nationally certified and licensed professional counselor who conducted mental evaluations to many inmates, several of which she has determined will be successful once released on parole. Although the Board did not release them solely for this reason, or denied their release on parole due to her determination, they have taken her opinion into consideration. If this Court rules with the ALC, the question must be asked, should the Board rescind all individuals Dr. Moody has determined will successfully handle themselves in society, and who have been released on parole? Since the ALC determined that the Board erred in his case, and if the Court accepts this determination, that decision would apply to each case Dr. Moody considered while under contract with the Department.

It should be clear that Dr. Moody is extremely qualified to make an opinion as to the Respondent's ability to function outside of prison. The statute clearly states "duly qualified," not "licensed." Since Dr. Moody was duly qualified the decision of the Board should be upheld.

**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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