

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

COURT OF APPEALS
Appellate Case No.: 2018-000660

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SC Court of Appeals

Melissa Burris #212040,

Respondent,

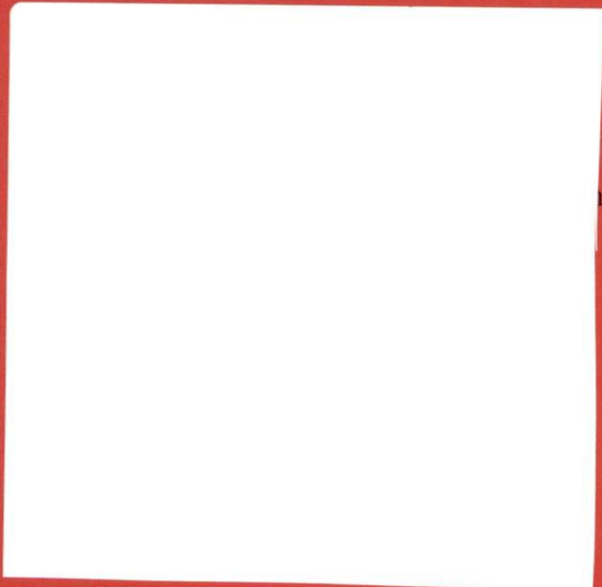
vs.

South Carolina Department of Probation, Parole and Pardon Services,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

Sims v. Colvin, 2014 WL 793065

South Carolina Board of Pardons and Pardon, Operations Manual, January, 2014.

Statute:

S.C. Code of Laws Ann. §1-23-380 (5) (Supp. 2015)

S.C. Code of Laws Ann. §24-21-610

S.C. Code of Laws Ann. §24-21-715

S.C. Code of Laws Ann. §40-53-90 (a)

S.C. Code of Laws Ann. §40-55-10 *et seq* (2011 & Supp. 2016)

S.C. Code of Laws Ann. §40-55-55 (2011)

S.C. Code of Laws Ann. §40-55-80

South Carolina Rules of Evidence Rule 702

STATEMENT OF ISSUE ON APPEAL

Did the Lower court err 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?

STATEMENT OF THE CASE

On January 13, 2016, the Respondent appeared before the South Carolina Department of Probation, Parole and Pardon Services, hereinafter referred to as the Parole Board, and was granted parole. The Respondent had been convicted in Anderson County on January 5, 1994, for the crime of Murder and Possession of a Firearm during the commission of a violent crime. The Respondent was sentenced to life and five years respectively. The Respondent has served the requisite amount of time to be considered for Parole. On January 13, 2016, the Respondent was granted conditional parole.

On March 10, 2016, Respondent received a letter from Probation and Parole indicating that her case was reconsidered on February 17, 2016, and the Board rescinded her parole for the following three reasons:

1. The Nature and Seriousness of the Current Offense,
2. Indication of Violence in this or Previous Offense; and
3. Use of Deadly Weapon in this or Previous Offense.

A Notice of Appeal was timely filed on March 25, 2016, in the South Carolina Administrative Law Court.

The Appeal was decided by the Lower Court and by Order of The Honorable H. W. Funderburk the case was remanded back to the South Carolina Department of Probation, Parole and Pardon Services.

A timely Notice of Appeal was filed by the Appellant. On May 4, 2017, The Court of Appeals dismissed the Appeal. On May 8, 2017, the Appellant filed a Petition

for Rehearing. On August 9, 2017, the Court of Appeals denied the Petition for Rehearing. A timely Petition for Writ of Certiorari was filed.

This petition was denied on August 9, 2017. The Appellant then filed a petition for writ of certiorari before the South Carolina Supreme Court. The Supreme Court dismissed this petition on September 15, 2017.

The Respondent was later evaluated by a licensed psychologist who determined her to have the mental ability to conduct herself in society. The Respondent later appeared before the Board on April 10, 2018. Upon the conclusion of this hearing the Board decided to grant conditional parole.

The Appellant filed a Notice of Appeal and asked the Court to answer the question of can Dr. Moody be considered duly qualified to make an opinion regarding the ability of an inmate to function in society? The Appellant is not seeking a reversal of the Board's decision to grant the Respondent's parole. Since the decision has been made regarding parole, the Appellant contends that the ALJ's decision is now final.

STATEMENT OF THE FACTS

The Respondent has served a period of incarceration that exceeds ten (10) years, therefore she would be required to have a psychological examination by a duly qualified psychologist or psychiatrist pursuant to South Carolina Code of Law §24-21-610.

It was only discovered after the filing of the initial appeal and the receipt of the Record on Appeal from the Administrative Law Court that the Respondent received a negative psychological (R. p. 62-68). This document and/or information was never given to the Respondent.

Between the time of being granted conditional Parole, and her notice of rejection, the Respondent received no disciplinaries from the South Carolina Department of Corrections, nor was she charged with any additional crimes. The factual nature of her crime and the circumstance revolving around her crime did not change.

The psychological was performed by Dr. Robin Lyn Moody a Licensed Clinical Counselor (R. p. 69-76). Dr. Moody is not a Licensed Psychologist. The Lower court determined that pursuant to State Law and §24-21-610, she was not qualified to render a psychological report.

ARGUMENT

The Appellant in this case asks the question whether the Administrative Law Court erred in determining that Dr: Robin Lyn Moody was not qualified to conduct a mental evaluation to determine the fitness of the Respondent for parole purposes.

More specifically, the Appellant has filed this Appeal regarding the question of whether an individual who is a licensed professional counsellor can provide a psychological evaluation pursuant to the S.C. Code of Law Ann. 24-21-610 (1986). This statute provides in part that “no person who has served a total of ten (10) consecutive years or more in prison may be paroled until the Board has first received a report as to his mental condition in his ability to adjust to life outside of prison from a duly qualified psychiatrist or psychologist.” (R. p. 108)

The Respondent would argue that this matter is not properly before the Court. In the case of Melissa Burris, she was reevaluated by a licensed psychologist, was found that she met the criteria of the above statute and has been released on parole. The Respondent specifically states that this action is not brought seeking a reversal of the Board decision to grant the Respondent’s parole. The Respondent would respectfully argue that this Court lacks the ability to address this issue in its current form. The Respondent’s case is concluded.

However, should the Court determine that this question should be considered, then the Respondent would reiterate her position and argument as set forth previously before the Administrative Law Court, and South Carolina Court of Appeals as follows:

The Respondent was serving a life sentence, but was eligible for parole. She appeared before the Parole Board November 6, 2013 and was denied. She appeared a second time before the Board on January 13, 2016 and was granted conditional parole upon receiving a favorable psychological as required by S.C. Code Section 24-21-610. The evaluation in this case was performed by Dr. Robin Lyn Moody, a contract employee of The South Carolina Department of Probation, Parole and Pardon Services. This evaluation was provided to the Parole Board. Upon receipt of Dr. Moody's psychological report, the Respondent's conditional parole was rescinded.

This decision was appealed to the Administrative Law Court in which the Honorable H. W. Funderburk, Administrative Law Court Judge found:

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. §1-23-380 (5) (Supp. 2016), which reads:

The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on question of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (R. p. 108)

The Court also found that the Respondent argues she is entitled to a reexamination of her mental condition followed by a rehearing on the basis the Department did not comply with the statute because the evaluation was not conducted by an appropriate person. S.C. Code Ann. §24-21-610 states:

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**. [Emphasis added].

The Lower Court determined that this evaluation did not conform with the requirements of S.C. Code Ann. §24-21-610 and found Respondent was entitled to a new mental health evaluation conducted by a duly qualified psychiatrist or psychologist, as mandated by S.C. Code Ann. §40-55-10 *et seq* (2011 & Supp. 2016). After receipt of the report from the new evaluation, a rehearing shall be held to consider Respondent's parole. (R. p. 109)

The Appellant appears to argue that:

1. The Board is allowed to conduct a rehearing and make a determination if the Respondent should be granted parole as if she was receiving a completely new parole hearing. Their basis for their decision is that after the examination, the Board decided to revoke the original granting of parole and then rescinded her parole on the following basis:

1. Nature and Seriousness of the Current Offense
2. An indication of Violence in this or previous offenses; and
3. Use of a deadly weapon in this or other previous offenses.

The Appellant seems to argue that upon receipt of a psychological, that they have the ability to completely review the case de novo and make a decision that is inconsistent with their previous decision.

The fallacy in this argument and logic is that the Respondent received no further criminal charges, no disciplinaries, or any other substantive reason as to why her condition changed from the original granting of conditional parole and the so called

reexamination and revocation of parole. The Respondent would argue that this is outside of proper procedure. Clearly this decision is arbitrary and capricious and there is no basis for a parole revocation.

2. The Appellant then argues that the Robin Lyn Moody was duly qualified by the “agency itself” and therefore is not required to be a licensed psychologist. The Statute states that the person has to be a duly qualified psychologist or psychiatrist. It does not appear that it is the intent of the legislature to say that the psychologist could to meet lower legal requirements to practice as a psychologist. The Lower Court clearly points out that pursuant to the South Carolina Department of Labor and Licensing an individual who is practicing psychology in the State of South Carolina must be licensed. It notes there are certain criteria that a person must meet in order to obtain a license from the State. S.C. Code Ann. §40-55-55 (2011) requires a license to engage in the practice of psychology. In order to obtain a license, the applicant must have a doctoral degree in psychology and meet other requirements such as examinations and supervised experience. S.C. Code Ann. §40-55-80. There is nothing in the Lower Court Record to support a conclusion that Counselor has met the examination and supervised experience requirements necessary for licensure in South Carolina. (R. p. 109)

While Dr. Moody does have a PhD in psychology, she has never taken the exam for licensing of psychologist in our State nor has she ever obtained a license to practice psychology.

3. The Appellant argues that Dr. Moody is exempt from the requirement of licensing. Pursuant to §40-55-90 (a) which exempts a person employed by any entity whose professional employment is funded through an Agency of the State or 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 a person holds a license or otherwise required by the chapter.

The fallacy of this argument is that the Doctor in question is not a full time employee of the South Carolina Department of Probation and Parole Services, nor is she involved with any full time research within any agency of South Carolina Government. She holds herself out as a psychologist by performing a psychological examination and rendering a psychological report. She has a contract as an independent contractor to provide services for the South Carolina Department of Probation, Parole and Pardons Services.

The Appellant admits in their Brief, that Dr. Moody is employed and works outside of her contract with the State of South Carolina. Therefore, this exemption does not apply to her. She does not meet this criteria. She rendered a **psychological** [emphasis added] report to the Parole Board. By nature, a psychological report would be performed by a Psychologist and pursuant to Statute, a psychologist must be licensed by the State.

4. The South Carolina Department of Probation, Parole and Pardon Services, cannot on their own, duly qualify a person to provide psychological services. The Laws of the State of South Carolina require that the individual be licensed. The Appellant cannot avoid this licensing requirement by providing their own duly qualification of certification of that individual.

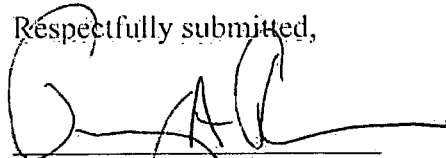
Appellant refers to the case of Sims v. Colvin, 2014 WL 793065 and Rule 702 South Carolina Rules of Evidence. The Respondent would respectfully argue that those

situations do not apply to the issue at hand. The Statute regarding evaluations for Probation and Parole, does not mention a Licensed Professional Counsellor, in fact, it specifically requires a duly qualified psychologist. The Statute does not envision an expert witness pursuant to Rule 702. It is not envisioned that Dr. Moody would only be asked to make herself more qualified than an average person as contemplated in Rule 702.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the appeal of the Appellant should be dismissed or in the alternative affirm the decision of the Administrative Law Court.

Respectfully submitted,



Tommy A. Thomas
Attorney for the Respondent

August 21, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appeals Court Rule.



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