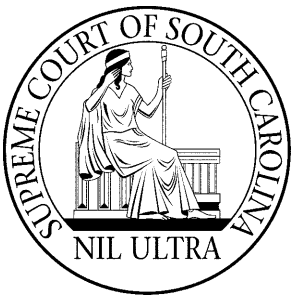

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26

June 26, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Office of Regulatory Staff, Appellant,

v.

South Carolina Public Service Commission, South Carolina Telephone Association, and Verizon South, Inc., Respondents.

South Carolina Cable Television Association and Southeastern Competitive Carriers Association, Appellants,

v.

South Carolina Public Service Commission, South Carolina Telephone Association, and Verizon South, Inc. Respondents.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26354
Heard October 9, 2003 – Filed June 25, 2007

AFFIRMED IN PART; REVERSED IN PART

Florence P. Belser, of Office of Regulatory Staff, Frank R. Ellerbe, III and Bonnie D. Shealy, both of Robinson, McFadden, and Moore, of Columbia, for Appellants.

F. David Butler, of South Carolina Public Service Commission, M. John Bowen, Jr., Margaret M. Fox, Robert T. Bockman, all of McNair Law Firm, P.A., of Columbia, and Steven W. Hamm, of Richardson Plowden Carpenter & Robinson, of Columbia, for Respondents.

JUSTICE BURNETT: Appellants, the Consumer Advocate for the State of South Carolina,[1] South Carolina Cable Television Association (SCCTA) and Southeastern Competitive Carriers Association (SECCA) bring this action challenging the Public Service Commission's (Commission)

[1] After this case was heard, we ordered that the Office of Regulatory Staff (ORS) be substituted for the Consumer Advocate as an appellant and counsel in this matter. See S.C. Code Ann. § 37-6-604(C) (Supp. 2006); Rule 236(c), SCACR.

Section 37-6-604(C) states after January 1, 2005, the Consumer Advocate must not represent consumers in matters or appeals under Title 58 that are pending on January 1, 2005, and such matters shall be transferred to the ORS. Additionally, S.C. Code Ann. § 58-4-10(B) (Supp. 2006) states the ORS must represent the public interest of South Carolina before the Commission and unless and until the ORS chooses not to participate, it must be considered a party of record in all filings, applications or proceedings before the Commission. For purposes of this opinion we refer to the Consumer Advocate, the appellant who initially presented the issues before the Court, but recognize the substitution of ORS as the successor to the Consumer Advocate in Title 58 matters such as this appeal.

implementation of the Universal Service Fund (USF). The trial court concluded the Commission's decisions regarding the State USF are supported by substantial evidence in the record. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

The concept of a USF originated when the United States Congress passed the Telecommunications Act of 1996, 47 U.S.C. § 609 (2002). The Telecommunications Act was intended, in part, to promote an initiative of "universal service." Congress hoped that a nationwide telecommunications policy of "universal service" would ensure access to basic telephone service at affordable rates for all Americans.[2] Congress did so by mandating that the new system of universal service be "explicit," *i.e.*, not dependent upon implicit subsidies. 47 U.S.C. § 254(e) (2002). The Telecommunications Act provides "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d) (2002). In furthering the goal of

[2] Before the Telecommunications Act, universal service was promoted through a system of implicit subsidies. Under the pre-Telecommunications Act plan, incumbent local exchange carriers charged some customers above-cost rates to offset the difference for those customers charged below-cost rates. Congress determined that the system of implicit subsidies stifled competition. Under the "implicit subsidy system," a telephone company agreed to provide services for all customers within its territory. In return, the State promised to set rates that would ensure the telephone company profited from its efforts. Competitors, which were not bound by this agreement with the State, targeted customers who were paying above-cost rates. Consequently, the implicit subsidies that funded universal service were lost when an incumbent local exchange carrier lowered its rates to compete with its competitors or lost its high paying customers, which funded universal service. See In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 98-322 (S.C. Pub. Serv. Commn. May 6, 1998).

nondiscriminatory universal service, Congress gave the states authority to adopt approaches for encouraging universal service.

With the enactment of S.C. Code Ann. § 58-9-280(E) (Supp. 2006), the South Carolina General Assembly authorized the Commission to establish a USF for South Carolina. The Commission held three proceedings to address implementation strategies for the fund. The first proceeding established the size of the USF as directed by S.C. Code Ann. § 58-9-280(E). In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 97-753 (S.C. Pub. Serv. Commn. Sept. 3, 1997). The second proceeding determined the appropriate cost models and sizing of South Carolina's USF.[3] In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 98-322 (S.C. Pub. Serv. Commn. May 6, 1998). The Commission selected a forward-looking cost proxy model for non-rural companies and the Benchmark Cost Proxy Model as the state forward-looking cost model for BellSouth, GTE, and Sprint/United. The Commission adopted the South Carolina Telephone Coalition's (SCTC) embedded cost model for rural local exchange carriers.[4] In the third

[3] Section 58-9-280(E)(4) provides the size of the fund is the sum of the difference, for each carrier of last resort, between its costs of providing basic local exchange services and the maximum amount it may charge for the services.

The cost models are used to calculate the cost of providing universal service. As explained by the Commission, cost models are needed to determine the size of the implicit subsidy built into current rates that allow incumbent local exchange carriers to sustain low charges for basic services.

[4] "Local exchange carrier" means either an incumbent local exchange carrier or a new entrant local exchange carrier. S.C. Code Ann. § 58-9-10(12) (Supp. 2006).

An "incumbent local exchange carrier" means a telecommunications company, its affiliates, successors, or its assigns, which provide local exchange service pursuant to a certificate of public convenience and

Continued . . .

proceeding, the Commission addressed various outstanding issues relating to the implementation of the fund.[5] In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 2001-419 (S.C. Pub. Serv. Commn. June 6, 2001).

Appellants now challenge the Commission's findings arising out of these proceedings.

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necessity issued by the commission before July 1, 1995, or operating as a local exchange carrier before that date pursuant to commission authority, to provide local exchange service within a certificated geographic service area of the state. S.C. Code Ann. § 58-9-10(11) (Supp. 2006).

"Basic local exchange telephone service" means for residential and single-line business customers, access to basic voice grade local service with touchtone, access to available emergency services and directory assistance, the capability to access interconnecting carriers, relay services, access to operator services, and one annual local directory listing (white pages or equivalent). S.C. Code Ann. § 58-9-10(9) (Supp. 2006).

[5] Order No. 2001-419 primarily makes public policy findings regarding the fund. The Commission also opted for a phased-in approach from implicit to explicit support. The Order also discusses how the fund operates. Before an incumbent local exchange carrier can qualify for funding from the USF, it must reduce rates containing implicit support, dollar for dollar.

Order No. 2001-419 also requires that any local exchange carrier applying for funding from the State USF file detailed cost data with the Commission showing that implicit support exists in the rates that are proposed to be reduced. This is another method by which the Commission maintains sufficient control over the fund.

ISSUES

I. Did Appellants bring a timely appeal of Commission Orders 98-322, 97-753, and 97-942[6]?

II. Is the USF, as established and implemented by the Commission, "specific, predictable and sufficient" in accordance with Section 254(f) of the Federal Telecommunications Act and does the fund comply with S.C. Code Ann. § 58-9-280(E)(4)?

Is Section 254(f) of the Federal Telecommunications Act violated because the State USF burdens federal universal support mechanisms?

III. Does the State USF bar competitive entry in violation of Section 253 of the Federal Telecommunications Act?

IV. Does the State USF fail to match costs and revenues in violation of S.C. Code Ann. § 58-9-280(E)?

V. Did the Commission allocate 25% of network costs to federal jurisdiction, and if the Commission did not make such an allocation, did it violate FCC regulations?

VI. Does the evidence in the record support the Commission's finding that intrastate access charges are priced above cost and provide a significant implicit subsidy to basic local service?

[6] In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 97-942 (S.C. Pub. Serv. Commn. Dec. 31, 1997).

LAW/ANALYSIS

The findings of the Commission are presumptively correct and have the force and effect of law. Therefore, the burden of proof is on the party challenging an order of the Commission to show it is unsupported by substantial evidence and the decision is clearly erroneous in view of the substantial evidence on the whole record. Heater of Seabrook Inc. v. S.C. Pub. Serv. Comm'n, 332 S.C. 20, 27 n.4, 503 S.E.2d 739, 742 n.4 (1998). Substantial evidence is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Because Appellants have failed to prove the Commission's implementation of the State USF is clearly erroneous, we affirm.

The Commission's orders are meticulous in their factual determinations and decisions regarding the appropriate methods for implementing the State USF. The orders issued by the Commission throughout its consideration of the USF show careful consideration of numerous proposals on the fund's implementation. See *e.g.*, Or. No. 97-753 (Sept. 3, 1997); Or. No. 97-942 (Dec. 31, 1997); Or. No. 98-322 (May 6, 1998); Or. No. 2001-419 (June 6, 2001). The orders alone and the orders for which the Commission considered motions for reconsideration have presented an insurmountable hurdle for Appellants in refuting the Commission's conclusion substantial evidence supports its decisions in developing the intricacies of the fund. Before addressing Appellants' specific legal arguments, we discuss these orders to show how the Commission arrived at its decisions regarding the fund and to illuminate the evidence considered by the Commission in arriving at its decisions.

Order No. 98-322 is especially illustrative of the Commission's decision-making process. Under the Federal Telecommunications Act, states faced an April 24, 1998 deadline to submit to the Federal Communications

Commission (FCC) a cost model for calculating federal support for non-rural incumbent local exchange carriers serving rural, insular and high cost areas. States failing to select a study satisfying FCC criteria, or states failing to submit a study, would be required to follow the FCC's cost model for federal universal service. Not only did the Commission attempt to adopt a model consistent with the FCC guidelines,[7] it elected to adopt the FCC's criteria in establishing the intrastate USF.[8] In Order 98-322, the Commission primarily considered which cost proxy model to adopt.[9] In particular, the Commission evaluated the pros and cons of the Benchmark Cost Proxy Model Version 3.1 (BCPM 3.1) and the Hatfield Model Version 5.0a (HM 5.0a). The Commission meticulously weighed the characteristics of each model. One consideration was which model more accurately locates customers in rural and other high cost areas. Locating customers in high cost areas is an essential function in estimating the requisite amount of funding for the state universal service plan. The Commission ultimately selected the BCPM 3.1, in part, because it found the HM 5.0a geocoding process inferior in large rural areas. Furthermore, the Commission carefully weighed the testimony of

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[7] At the time Order No. 98-322 was issued, the FCC had not yet selected a cost model for federal universal service funding, but was considering various proposals.

[8] This demonstrates the Commission's intention to fully comply with federal guidelines—a point Appellants attempt to refute. The Commission was free to develop its own guidelines.

The Commission also designated itself to oversee the fund because it found if it did not select a cost model, a federal cost model may not be in South Carolina's best interest if this State's amount of federal support was to be determined by a federal model based upon national average default inputs.

[9] The Commission considered highly technical testimony on cost proxy models. It is clear from the record the Commission carefully considered the advantages and disadvantages of various models and clearly documented its findings.

various cost experts. For example, in selecting the BCPM 3.1, the Commission found its network to be superior to that of the HM 5.0a. A witness for AT&T testified that the HM 5.0a followed standard engineering design rules.[10] The Commission, however, determined the AT&T witness could not substantiate his claim and considered testimony of other witnesses who agreed that the BCPM 3.1 followed standard engineering practices. *Id.*

The Commission also painstakingly addressed the arguments of the parties on their motions for reconsideration. See *e.g.*, In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 98-201 (S.C. Pub. Serv. Commn. March 17, 1998); In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 2001-704 (S.C. Pub. Serv. Commn. Aug. 31, 2001). For example in Order No. 2001-704, the Commission carefully considered the arguments of the Consumer Advocate, an Appellant in this case. In that order the Commission noted it had held extensive proceedings in the five previous years addressing guidelines for the USF, cost models, and methodologies. On the cost methodology issue alone, the Commission heard the testimony of over twenty economic, engineering, and cost experts. The Commission went on to carefully consider the Consumer Advocate's arguments, which are raised again on appeal and discussed below. We turn now to the issues raised by Appellants.

I.

SCCTA, SECCA, and the Consumer Advocate have timely appealed Commission Order 98-322, which addressed the cost studies to be employed by the Commission in sizing South Carolina's USF. Commission Order No. 98-322 is not a final order because the order leaves further acts to be done by the Commission. S.C. Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 146, 522 S.E.2d 822, 825 (Ct. App. 1999). Appellants' SCCTA and SECCA

[10] We omit a technical discussion of network design because it is irrelevant to the ultimate issue of whether the Commission's findings are supported by substantial evidence. For efficiency purposes, we have selected examples from the record reflecting the Commission's thorough evaluation of the cost models.

correctly point out that in subsequent orders the Commission itself noted that it had not issued a final judgment on issues relating to the size of the USF. In In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 2000-0518 (S.C. Pub. Serv. Commn. June 21, 2000), the Commission specifically noted it had not yet considered issues such as "whether only intrastate revenues may be taxed to create the fund, whether wireless revenues may be taxed, and how the Commission can and should deal with the elimination of implicit subsidies." The Consumer Advocate correctly argues that the Commission ultimately determined the size of the fund in In re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Or. No. 2001-419 (S.C. Pub. Serv. Commn. June 6, 2001) and disavowed previous estimates. The Commission's orders relating to the size and funding of the State USF cannot be read in isolation. Until the Commission issued Order 2001-419, the Commission's orders allowed for modification as the particular strategy for implementation developed. Therefore, we reverse the trial court's finding on this issue.

SCCTA's and SECCA's appeal of Commission Order Nos. 97-753 and 97-942 are also properly before the Court. Order No. 97-753 delineated guidelines for the State USF, determined the Commission would be the fund's administrator, and estimated the size of the fund.[11] In Order No. 97-753, the Commission specifically noted that certain issues relating to the fund would be decided in the future. Order No. 97-942 clarified issues discussed in Order No. 97-753 and held that the actual size of the fund would be determined *de novo* in future proceedings. Appellants were not required to appeal within thirty days after issuance of this order pursuant to S.C. Code Ann. § 1-23-380(A)(1) (2005) because the order was not final. The hearings in 1999 and 2000 left various issues to be resolved. It was not until 2001 that

[11] Respondent South Carolina Telephone Association (SCTA) proposed the guidelines for the fund. Under the SCTA plan, incumbent local exchange carriers reduce prices for intrastate services that include implicit support for universal service to offset the gross amount received from the USF.

the Commission issued final orders from which Appellants now timely appeal.[12]

II.

SCCTA and SECCA argue the fund violates Section 254(f) of the Federal Telecommunications Act because the Commission does not have sufficient control over the establishment, growth or operation of the fund. Section 254(f) of the Federal Telecommunications Act specifically requires a plan set forth "specific, predictable, and sufficient" mechanisms of control.[13]

SCCTA and SECCA fail to prove the Commission's findings relating to its control over the fund are erroneous. The record shows the Commission does, in fact, have sufficient control over the size of the fund. The Commission has twice changed the estimate of the actual size of the fund suggesting it has sufficient control over the fund's size.[14] Testimony by

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[12] Order No. 2001-419 created the fund and was the first final order. SCCTA and SECCA filed a motion for reconsideration and then filed this appeal.

[13] "A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent such regulations adopt additional *specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms*." 47 U.S.C. § 254(f) (emphasis added).

[14] The Commission initially estimated that the fund would be around $439.7 million, and later lowered that figure to $340 million.

experts before the Commission indicates these estimates are still subject to modification. Testimony indicates the Commission will be reviewing any further implementation and the Commission has full oversight. Gary Walsh, Executive Director of the Commission, provided detailed testimony on how certain variables can cause the estimated size of the fund to fluctuate. Testimony also showed the $340 million estimate was calculated using the formula mandated by the General Assembly. Under the SCTA's plan, the support per line changes when there is a new cost study. After the Commission reduces rates and allocates support for half of the $340 million, the Commission would conduct another cost study. Through this review process the Commission maintains control over the size of the fund.[15]

The record further reflects the Commission has imparted control mechanisms to ensure its control over the size of the fund by requiring incumbent local exchange carriers that apply for funding beyond the initial access step, file detailed cost data reports. The local incumbent exchange carriers must also update their cost studies before they can implement more than one-third of its company specific funding requirement.

Control of the fund is also accomplished through the Commission's phased-in approach. The phased-in approach allows a gradual transition from the implicit support system to an explicit funding system. The phased-in approach permits local exchange carriers to receive additional universal service funding to remove implicit support if the local exchange carriers can show the Commission that implicit support exists in particular rates. This process illustrates another method by which the Commission maintains control of the fund.

Further, the mechanism does not lack specificity and predictability because the term "implicit subsidies" is undefined. As Respondents point out, the term implicit subsidy has been repeatedly discussed throughout the Commission's proceedings. It is also true the FCC has likewise found it

[15] We note our ruling would not preclude future reviews of challenges to the fund's size. We suggest the Commission engage in periodic review of the fund's size to enhance the requirements of federal and state law.

unnecessary to define the term. Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket NO. 96-45, FCC 00-1893 (released May 31, 2000) at ¶¶ 3, 23-24.

The State USF does not violate South Carolina Code Ann. § 58-9-280(E)(4). This statute specifically determines the size of the fund. The size of the fund is the difference between the cost of providing basic local exchange service for each carrier of last resort and the maximum amount the carrier could charge.[16] The Commission noted in Order No. 97-953 it must comply with the requirements of the Code, but "the size of the fund must be adjusted over time as cost models are employed by the Commission and actual funding is required." The sizing of the fund is flexible because variables such as federal funding, subscriber line charge, and cost requirements determined by updated studies may continually affect the fund's size.

SECCA and SCCTA argue another violation of Section 254(f) in that the State USF imposes an impermissible burden on federal universal support mechanisms.[17] SECCA and SCCTA contend that the State fund burdens the federal fund because the Commission's plan assesses contributions to the State USF on interstate and intrastate revenues. In other words, the State USF imposes an additional surcharge on the same interstate revenues subject to the federal surcharge for the federal USF.

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[16] A "carrier of last resort" means a facilities-based local exchange carrier, as determined by the Commission, not inconsistent with the Federal Telecommunications Act of 1996, which has the obligation to provide basic local exchange service, upon reasonable request, to all residential and single-line business customers within a defined service area. Initially, the incumbent local exchange carrier must be a carrier of last resort within its existing service area. S.C. Code Ann. § 58-9-10(10) (Supp. 2006).

[17] 47 U.S.C. § 254(f) states that the mechanisms states adopt cannot burden universal support mechanisms.

We agree with the trial court's analysis on this issue. Both the trial court and the Commission determined that including interstate revenues does not burden federal universal support mechanisms. SECCA and SCCTA cite AT&T Communications v. Eachus, 174 F.Supp.2d 1119 (D. Or. 2001) in support of their position. Eachus was decided subsequent to Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) (TOPUC). In TOPUC, the court held that the FCC lacked jurisdiction to assess intrastate revenues because of a statutory limitation on its jurisdiction. The TOPUC case dealt only with the FCC's jurisdiction, not the states' jurisdiction, and therefore has no relevance in the present case. Relying on TOPUC, the Eachus court did, in fact, hold the assessment of interstate revenues for a state fund burdens the federal support mechanism. We believe the case was incorrectly decided. In Eachus, the court concluded if interstate carriers are assessed for both state and federal funds, then the carriers are burdened and therefore the federal mechanism is burdened. 174 F.Supp.2d at 1124. Clearly, the burden on carriers and the burden on the federal support mechanism are not necessarily synonymous.[18]

We conclude substantial evidence demonstrates the State USF does not violate Section 254(f).

III.

SECCA and SCCTA argue the State USF violates the Federal Telecommunications Act because it is not competitively neutral and acts as a barrier to competition.[19] A close analysis of how the USF operates reveals

[18] The Connecticut Supreme Court has recently stated an overlap in terms of revenues being assessed for both state and federal funds does not suggest that federal funding mechanisms have been relied on or burdened. Bell Atl. Mobile, Inc. v. Dep't of Pub. Util. Control, 754 A.2d 128, 148 (Conn. 2000).

[19] Section 253 of the Telecommunications Act prohibits states from passing regulations which prohibit competitive entry and requires that a

Continued . . .

Appellants have failed to prove the fund operates on a discriminatory basis. Essentially, SECCA and SCCTA argue the USF, as currently adopted by the Commission, functions to discriminate against competitive local exchange services because incumbent local exchange carriers can lower prices for competitive services and then have the reduction subsidized by the USF. Appellants' argument is only valid if competitive local exchange carriers are denied access to the funds under the Commission's plan. The record shows this is not necessarily the case. In fact, as the trial court points out, the competitive local exchange services may actually lose a competitive advantage with the implementation of the USF.[20] Because the implicit support becomes explicit, all companies should be able to compete on a more equal playing field. Competitive local exchange carriers will also become responsible for paying into the fund. Furthermore, competitive local exchange carriers are not denied access to the fund. Commission Order No. 2001-419 states,

> There is no earnings review requirement before a company can receive Federal Universal service funding. We likewise reject the argument that the State USF will provide [incumbent local exchange carriers] with a guaranteed level of earnings—in effect, some kind of "insurance" against competitive loss. State USF funding is portable and, as such, can be competed away just like other sources of customer revenue.

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state's universal service plan be competitively neutral. 47 U.S.C. § 253(a) & (b) (2002).

[20] Essentially, the trial court and Respondents argue competitive local exchange carriers seek to delay implementation of the fund because they are not currently subject to implicit support within their rates. Therefore, they can offer services at a lower cost to customers. Under the Commission's plan, competitive local exchange carriers would eventually pay into the fund therefore forcing them to increase rates and lose their competitive edge.

SECCA and SCCTA also argue the State USF is not competitively neutral because it only allows withdrawal of funds once a local exchange company shows that it has reduced rates to remove implicit subsidies. Therefore, only incumbent local exchange companies can withdraw funds.

While incumbent local exchange companies are initially the carriers of last resort, competitive local exchange carriers may qualify as a carrier of last resort.[21] Competitive local exchange carriers are only prohibited from receiving funds from the USF, if they choose not to undertake an obligation to provide universal service.

IV.

SECCA and SCCTA argue the State USF fails to match costs and revenues in violation of § 59-9-280(E)(4), which requires the Commission to establish the size of the fund by calculating the difference between the "costs of providing basic local exchange services and the maximum amount it may charge for the services." SECCA and SCCTA contend that because the Commission's approach mismatches costs and revenues, the fund will ultimately be oversized.[22] Appellants' SECCA and SCCTA believe that the fund will become so over-sized that it will serve as a barrier to entry by potential competitors in contravention of the Federal Telecommunications Act.

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[21] The USF is available to carriers who undertake the carrier of last resort obligation. See supra note 16 for the meaning of the term "carrier of last resort."

[22] Specifically, SECCA and SCCTA argue that the Commission's formula uses all costs associated with the facilities used by local exchange companies to provide telecommunications services, but uses revenues received from the provision of only basic local residential and business services.

SECCA and SCCTA have not presented substantial evidence showing that the cost models adopted by the Commission "mismatch" costs and revenues in violation of the General Assembly's directive. The Commission was specifically required to adopt cost models, which comply with the formula set out by the General Assembly. This is precisely what the Commission did, and its decisions on appropriate cost models are supported by substantial evidence in the record. Therefore, we give deference to the Commission on this issue. In Order No. 98-322, the Commission selected an appropriate cost model and inputs that can produce reasonable cost estimates of providing universal service in South Carolina and that can meet the FCC criteria for calculation of the appropriate level of support from the federal high cost fund. In deciding on the appropriate cost model, the Commission considered the testimony of over thirty experts. The Commission carefully analyzed the two models presented to it for consideration.[23] In adopting BCPM 3.1, the Commission made a specific finding that HM 5.0a fails to accurately reflect the cost of providing universal service in South Carolina. Similarly, it made specific findings on how BCPM 3.1 does accurately reflect the cost of providing universal service in South Carolina. Or. No. 98-322. In its order, the Commission gives technical support to its finding and discusses the expert opinions of both sides in detail.[24]

The Consumer Advocate makes a similar argument questioning the Commission's adoption of certain cost methodologies. According to the Consumer Advocate, the Commission violated the Federal Telecommunications Act because it failed to fully allocate the costs of the local telephone network among all services that use the network. Section 254(k) of the Federal Telecommunications Act states,

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[23] BellSouth, GTE, and United wanted the Commission to adopt BCPM 3.1, while AT&T and MCI wanted the Commission to adopt HM 5.0a.

[24] It would be impractical to discuss the scientific findings of the Commission. However, the Commission's findings are specific and consistent with a finding of substantial evidence in the record.

> A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

The Consumer Advocate also argues the Commission violated S.C. Code Ann. § 58-9-280(E)(4) when it allocated the costs of the telephone network to services other than basic local service.

There is substantial evidence in the record showing the Commission did allocate joint and common costs to different services and did isolate the cost of providing basic local service. Witnesses for the SCTC testified that the Commission allocated joint and common costs to the various services using the network. Both the circuit court and Respondents quote the testimony of Azita Sparano[25] and Douglas Meredith[26] extensively. This testimony does reflect the Commission complied with Section 254(k) of the Federal Telecommunications Act. Meredith testified,

> In order to develop an embedded cost of service for residential and business one-party service, JSI used information obtained from each cost company….The financial information obtained…included booked investment amounts, including depreciation reserves, for investments under [47 C.F.R.] Part 32 Accounting rules. This financial information also included allowable expense amounts for the

[25] Sparano is Director of Southeast Operation of John Staurulakis, Inc. in Alpharetta, Georgia. She was a SCTC witness.

[26] Meredith is the Director of Economic and Pricing Division of John Staurulakis, Inc. in Alpharetta, Georgia. He was a SCTC witness.

> telecommunications activity of the company. *Finally, information relating to the operation of the company that relate to how shared and common investments and expenses are allocated, and the usage of the network for various types of calling activity, was obtained.* The actual cost information is allocated to department and then to functional components within department based upon the information provided by the company. These functional components are then combined to form a basic residential or business service cost. *This procedure utilizes cost allocation principles that are used in embedded cost methodologies. For instance, the switching function is allocated between local and toll calls.* The only notable exception to an embedded allocation procedure that was used under our analysis is in the treatment of the loop. In the current analysis, the loop is fully allocated to the basic service. This exception is consistent with the treatment of non-traffic sensitive ("NTS") loop cost by the FCC, and is consistent with the treatment used by other companies involved in this proceeding.

The trial court also outlines testimony illustrating how the non-rural companies and Sprint/United allocated the costs of the network through inputs to BCPM 3.1. For example, one expert testified as part of the FCC's Automated Reporting Management Information System, cost data is used to assign only a fraction of the general expense categories. *Id.* Furthermore, in Commission Order No. 98-322, the Commission specifically found that BCPM 3.1 and the inputs proposed by BellSouth satisfied the criteria established by the FCC.

The Consumer Advocate raises another argument related to the cost methodologies in contesting the Commission's treatment of the local loop. We agree with the trial court and Respondents the Commission's treatment of the local loop as a direct cost was proper. The local loop is the transmission facility between the telephone company's central office and the end user's premises. 47 C.F.R. § 51.319(a) (2003). The trial court explained why the local loop is treated differently. Because the local loop is a "cost-causer," the entire cost of the loop is appropriately designated to one service. Respondents

make a similar argument. Opinions on how to treat the local loop costs vary. However, treating the loop cost as a direct cost is supported by substantial evidence in the record.

V.

The Consumer Advocate alleges that the trial court erred in upholding the Commission's finding it was unnecessary to allocate 25% of network costs to the federal jurisdiction. Commission Order No. 98-322 explains the origin of this 25% allocation. "After deciding upon a methodology for determining the overall size of universal service costs that required support from a subsidy source, the FCC decided to construct the federal universal service fund to cover only 25 percent of those costs. The FCC explained that under the current separations process, roughly 25 percent of the costs of the local loop are assigned to interstate jurisdiction and, therefore, the new federal fund would cover only 25 percent of the total cost of subsidizing universal service." Or. No. 98-322. We agree with Respondents that the split to which the Consumer Advocate refers, is not a requirement for USF cost study allocations. The Consumer Advocate cites 47 C.F.R. § 36.154(c) (2003) in support of its argument. Although, the FCC did adopt a 25/75 split, 47 C.F.R. § 36.154 is not an applicable reference to this split because it refers to an allocation of cost of services between the interstate and intrastate jurisdictions for regulatory purposes.[27] The 25% allocation to which Appellants refer was abandoned for universal service funding.

[27] 47 C.F.R. § 36.154 (c) states, "[e]xcept as provided in § 36.154(d) through (f), effective January 1, 1986, 25 percent of the costs assigned to subcategory 1.3 shall be allocated to the interstate jurisdiction." Subcategory 1.3 includes "[s]ubscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services." The Part including these provisions is entitled "Jurisdiction Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Expenses, Taxes and Reserves for Telecommunications Companies."

Even if a 25% allocation is required, the record reflects the Commission did allocate a portion of the cost to the federal jurisdiction by "backing out" federal support from the total USF requirement. Respondents argue the methodologies proposed by the SCTC companies take into account and back out the federal subscriber line charge, which is a direct form of federal support for universal service, as well as the actual amounts received in high cost federal universal service.[28]

VI.

The Consumer Advocate argues that the evidence in the record does not support that intrastate access charges are priced above cost and provide a significant implicit subsidy to basic local service.[29] Access charges are those paid by long distance companies to local exchange carriers for originating and terminating long distance calls. Access charges are a significant source of implicit support for basic local exchange services. The Commission initially reduced access charges by 50% and allowed the recovery of these through the State USF. In effect, the Commission removed a portion of the implicit subsidy and converted it to the explicit USF.

There is substantial evidence in the record showing that intrastate access charges are priced above cost and provide significant support for basic local exchange service. As Respondents note, BellSouth, GTE, and the SCTC all agree an access rate of three cents is above cost for the companies.

In issuing Order 98-322, the Commission found the cost of providing service for many companies was shown to exceed the amount the company could charge for the service by $35.07- $70.81 per month. This finding was

[28] Respondents outline how Sprint/United also backed out actual amounts received in universal funding. BellSouth and GTE subtracted the subscriber line charge and an estimate of additional anticipated federal support.

[29] In Order No. 2001-419 the Commission reduced access charges by 50% and recovery of that amount from the State USF.

supported by testimony indicating each company could charge $8.08 to $16.15 per month for basic residential service. The record shows there are subsidies flowing from these rates.

The FCC's reform of interstate access charges, which reduced access charges and provided explicit support, bolsters Respondents' position. At the request of the Coalition for Affordable Local and Long Distance Service (CALLS), the FCC adopted a compromise proposal CALLS developed. The trial court and Respondents quoted the following language from the FCC order in support of their position illustrating why a reduction in access charges can provide explicit support.

> This "patchwork quilt" of implicit support helped keep rates largely affordable in a monopoly environment where incumbent [local exchange carriers or] LECs could be guaranteed an opportunity to earn returns from certain services and customers that are sufficient to support the high cost of providing other services to customers. The new competitive environment envisioned by the 1996 Act, however, threatens to undermine this implicit support structure over the long run. The 1996 Act removed barriers to entry in the local market, generating competitive pressures that may make it difficult for incumbent LECs to maintain access charges above economic cost. Thus, where existing rules require an incumbent LEC to set access charges above cost for a high-volume user, a competing provider of local service can lease unbundled network elements at cost, or construct new facilities, thereby undercutting the incumbent's access charges. As competition develops, incumbent LECs may be forced to lower their access charges or lose market share, in either case jeopardizing the source of revenue that, in the past, has permitted the incumbent LEC to offer service to other customers, particularly those in high-cost areas, at below-cost prices. CALLS Order at para. 24.

CONCLUSION

Appellants have failed to show that the Commission's decisions in establishing and implementing South Carolina's USF are unsupported by substantial evidence. Because Appellants have not met their burden of proof, we affirm in part and reverse in part.

AFFIRMED IN PART AND REVERSED IN PART.

MOORE, A.C.J., WALLER and PLEICONES, JJ., and Acting Justice L. Casey Manning, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

Jason Sinatra Edwards,
Maceo Latonya Edwards, and
Jonais Edwards, Appellants.

Appeal from Williamsburg County
Howard P. King, Circuit Court Judge

Opinion No. 4261
Heard June 6, 2007 – Filed June 21, 2007

AFFIRMED

Steven Smith McKenzie, of Manning, for Appellants.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

ANDERSON, J.: Jason, Maceo, and Jonais Edwards (collectively Defendants) appeal their criminal convictions, contending the trial court erred in 1) failing to follow the proper procedure for a Batson[1] challenge during jury selection; 2) denying Defendants' motion to dismiss the criminal charges because they were not granted a speedy trial; and 3) denying Defendants' motion to dismiss based on the State's violation of Rule 3, SCRCrimP. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On October 11, 2004, the Williamsburg County Grand Jury indicted Jason and Maceo Edwards, each on two counts of murder and one count of possession of a weapon during a violent act. The Grand Jury indicted Jonais Edwards for accessory after the fact of murder. The charges stemmed from the June 19, 2002, murders of Joe Woods and Jimmy Robinson. Arrest warrants for Jonais and Maceo were issued on June 22, 2002, and for Jason on October 31, 2002. Each defendant filed a motion for a speedy trial.

Defendants were tried jointly before a jury in January of 2006. The trial court quashed the first jury and impaneled a second jury in response to the State's Batson motion. Jason Edwards[2] moved to dismiss the charges based on alleged violations of his right to a speedy trial and Rule 3, SCRCrimP. The trial court denied the motion to dismiss.

The jury returned guilty verdicts on all counts. The trial court sentenced Jason to life imprisonment for the murders and five years, concurrent, for possession of a weapon during a violent crime. Maceo received thirty years for the murders and a concurrent five-year sentence for possession of a weapon during a violent crime. The trial court sentenced

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[1] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[2] The record on appeal provides only Defendant Jason Edwards' Motion to Dismiss Criminal Charges. In the Brief on Appeal, Defendants' counsel addresses the issues in the Motion on behalf of all appellants. However, the record indicates Maceo and Jonais subsequently obtained separate counsel. Therefore, we only consider the Motion before us filed on behalf of Jason Edwards.

Jonais to fifteen years for his conviction on accessory after the fact, suspended upon service of seven years in prison, and five years probation. Defendants were credited with time served.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997); State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006) cert. pending; State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 1, 545 S.E.2d at 827; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v. Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) ("[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law.").

In determining whether a party exercised strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986), the appellate court must examine the

totality of the facts and circumstances in the record surrounding the strikes. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). The trial judge's findings regarding purposeful discrimination in the exercise of peremptory strikes rest largely on evaluation of demeanor and credibility. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination. Hernandez v. New York, 500 U.S. 352 (1991); Shuler, 344 S.C. at 615-16, 545 S.E.2d at 810. Furthermore, a strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. Id. at 616, 545 S.E.2d at 810-11.

The judge's findings as to purposeful discrimination are entitled to great deference and will be set aside on appeal only if clearly erroneous. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). The body of law extant in regard to rulings made by a trial judge in a Batson hearing reveals luculently that the appellate court must give deferential treatment to the trial judge on review. State v. Cochran, 369 S.C. 308, 326, 631 S.E.2d 294, 304 (Ct. App. 2006) Anderson, J. concurring in result only.

LAW/ANALYSIS

I. Batson v. Kentucky

Defendants assert the trial court erred by quashing the first jury panel following a Batson hearing. Specifically, Defendants contend the trial court's handling of the Batson hearing effectively placed the burden on Defendants to prove the absence of purposeful discrimination after they had articulated racially neutral explanations for their strikes. We disagree.

In Batson v. Kentucky, 476 U.S. 79, 89 (1986), the Supreme Court, through the Equal Protection clause, forbade prosecutors from using peremptory challenges to strike jurors because of their race. The purposes of Batson v. Kentucky and its progeny are to protect a defendant's right to a fair trial by a jury of his peers, protect each venireperson's right not to be

excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of the justice system by seeking to eradicate discrimination in the jury selection process. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Flynn, 368 S.C. 83, 627 S.E.2d 763 (Ct. App. 2006). It is unconstitutional to strike a juror on the basis of race or gender. See J.E.B. v. Alabama, 511 U.S. 127 (1994). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venireperson on the basis of race. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Haigler, 334 S.C. at 628, 515 S.E.2d at 90. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson, 476 U.S. at 86. A criminal defendant may object to race-based peremptory challenges on equal protection grounds regardless of whether the defendant and potential juror share the same race. Powers v. Ohio, 499 U.S. 400 (1991); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. Georgia v. McCollum, 505 U.S. 42 (1992).

A hearing held pursuant to Batson v. Kentucky is trifurcated. In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006) our supreme court reiterated the proper procedure for conducting a Batson hearing originally set forth in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)[3] (citing Purkett v. Elem, 514 U.S. 765 (1995)). First, when one party strikes a member of a cognizable racial group, the circuit court must hold a Batson hearing if the opposing party requests one. Shuler, 344 S.C. at 615, 545 S.E.2d at 810; Haigler, 334 S.C. at 629, 515 S.E.2d at 90. In order to raise and preserve a Batson issue, the opposing party must move for the hearing after the jury is

[3] In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), the Court adopted the Batson procedure set forth in Purkett v. Elem, 514 U.S. 765 (1995), described herein. In doing so, the following cases cited, to the extent their holdings are inconsistent with this procedure, have been abrogated by Adams: State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995); State v. Dyar, 317 S.C. 77, 452 S.E.2d 603 (1994); State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991); State v. Tomlin, 299 S.C. 294, 384 S.E.2d 707 (1989); State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987).

selected but before it is sworn. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). This hearing must be held out of the presence of the jury panel and the jury venire. Id. Second, the proponent of the strike, to successfully rebut the presumption of a Batson violation, must then offer a facially race-neutral explanation for the strike. Haigler, 334 S.C. at 629, 515 S.E.2d at 90-91. Third, the opponent of the strike must show that the race-neutral explanation given was mere pretext. Id. at 629, 515 S.E.2d at 91; Adams, 322 S.C. at 124, 470 S.E.2d at 372.

A. The Strike & Batson Request

The trial judge must hold a Batson hearing when members of a cognizable racial group are struck and the opposing party requests a hearing. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); Jones, 293 S.C. at 54, 358 S.E.2d at 701. Any person, regardless of race, may set forth a Batson claim. State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995). Both the defendant and the State can make a Batson motion. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998).

Batson requires a hearing to allow a party the opportunity to make a prima facie showing of purposeful discrimination by challenging the other party's use of a peremptory strike, and if such discrimination is found, the proponent of the strike has the opportunity to present a neutral explanation for the strike. Jones, 293 S.C. at 56-57, 358 S.E.2d at 702-03.

B. Explanation for the Strike

The proponent of the strike must offer a facially race-neutral explanation for the strike. Haigler, 334 S.C. at 629, 515 S.E.2d at 90; Adams, 322 S.C. at 124, 470 S.E.2d at 372; State v. Smalls, 336 S.C. 301, 519 S.E.2d 793 (Ct. App. 1999). The explanation need not be clear, reasonably specific, or legitimate; it only needs to be race-neutral. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997). The reason is not required to be persuasive or plausible and may even be silly or superstitious. Purkett, 514 U.S. at 765 (1995); State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997). While merely denying a discriminatory motive is insufficient, the proponent of the

strike need only present race-neutral reasons. Id. at 451-52, 481 S.E.2d at 171-72. At this stage of the inquiry, the issue is the facial validity of the explanation.

> The second step of this process does not demand an explanation that is persuasive, or even plausible. . . . It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Adams, 322 S.C. at 123-24, 470 S.E.2d at 371-72. Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral. Tucker, 334 S.C. at 8, 512 S.E.2d at 102; Payton, 329 S.C. at 51, 495 S.E.2d at 205.

South Carolina rejected the dual motivation doctrine in the Batson context. Payton, 329 S.C. at 59-60, 495 S.E.2d at 210. We adopted the "tainted" approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike. Id.

i. Examples-Valid Reasons for Strike

1. Demeanor can be considered a racially neutral explanation. Counsel may strike venirepersons based on their demeanor and disposition. See

Matthews v. Evatt, 105 F.3d 907 (4th Cir.1997) (holding the State is allowed to consider tone, demeanor, facial expression, and any other race-neutral factors when striking jurors); State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (two black males struck because they were late); State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991) (struck juror had disinterested attitude and demeanor); Smalls, 336 S.C. at 309, 519 S.E.2d at 797 (finding no discriminatory intent inherent in defense counsel's explanation for striking jurors who appeared to counsel as "looking in a 'mean,' 'stern' or 'accusatory' manner"); State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995) (declaring solicitor could strike venireperson because of demeanor observed during qualification; juror appeared to be "slow").

2. Recipient of prior strike. See Sumpter v. State, 312 S.C. 221, 223, 439 S.E.2d 842, 844 (1994) ("we find the solicitor's additional explanation that he struck Mr. Wright because he had struck him earlier in the week is also race neutral").

3. Prior jury service. Recent prior jury service is a facially neutral reason for exercising a peremptory strike. Casey, 325 S.C. at 453, 481 S.E.2d at 172.

4. Prior criminal conviction. A prior criminal conviction is a neutral reason to strike. Casey, 325 S.C. at 453 n. 2, 481 S.E.2d at 172 n. 2; see also Sumpter, 312 S.C. at 223-24, 439 S.E.2d at 844 (ruling solicitor's explanation for striking a black venireperson was racially neutral where prospective juror had a prior DUI involvement).

5. Possible criminal record. State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987).

6. Prior prosecution by that particular Solicitor's office. State v. Dyar, 317 S.C. 77, 452 S.E.2d 603 (1994); Sumpter, 312 S.C. at 223-24, 439 S.E.2d at 844.

7. Acquaintance with the trial judge. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (noting a potential juror's acquaintance with the trial judge is a valid reason for exercising a peremptory strike).

8. Relationship with attorney. An attorney's personal knowledge of and relationship with a prospective juror is a race-neutral reason for exercising a peremptory strike. State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999).

9. Relationship with law enforcement or pro-law enforcement attitude. A potential juror's relationship with a law enforcement official, or a potential juror's pro-law enforcement attitude, is a race-neutral reason for exercising a peremptory strike. Ford, 334 S.C. at 65, 512 S.E.2d at 504; cf. State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991) (noting State's explanation that juror was anti-law enforcement was race-neutral).

10. Knowledge of and association with defendant. State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990).

11. Unemployment is a race-neutral reason for a strike. State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991).

12. Place or type of employment. It is legitimate to strike potential jurors because of their employment. Ford, 334 S.C. at 65, 512 S.E.2d at 504; see also Adams, 322 S.C. at 125, 470 S.E.2d at 372 (finding potential juror's employment as a court reporter is a valid reason for exercising a peremptory strike).

13. "General instability." See State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (indicating that Solicitor's reasons for striking black juror were racially neutral and were not pretext for discrimination where Solicitor stated he struck juror because of her "general instability," in that she had changed employment several times after relatively short periods of employment, was unmarried mother of two-year-old, and was still living at her parents' home, and juror admitted on voir dire that she had seen outspoken advocate of defendant discussing his case on television).

ii. Examples-Invalid Reasons for Strike

1. Desire to seat other venirepersons who have not yet been presented. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (stating black murder defendant who exercised nine of his peremptory strikes to remove white prospective jurors and one peremptory strike to remove black prospective juror from panel failed to satisfy requirement of Batson that he offer race-neutral explanation for his exercise of strikes against two of those white prospective jurors; defendant explained he struck those jurors "to reach some jurors further down the list," but he offered no explanation as to which jurors he was attempting to seat or why other jurors were more desirable than the two in question); State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991) (emphasizing that solicitor failed to articulate racially neutral explanation in his assertion he excluded prospective black juror because he wanted to seat other venirepersons; solicitor gave no reason why it was desirable to have other venirepersons seated, as opposed to the black juror; effect was same as if no reason was given for striking black juror).

2. Generalization about an entire group. See Payton v Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) (ruling that striking white juror because she was a "redneck" was not valid race-neutral reason on its face; thus, strike was facially discriminatory and violated Batson; term "redneck" was racially derogatory term applied exclusively to members of white race, and term stereotyped subgroup of white race without any evidence that each member of group was actually possessed of bias or prejudice).

3. Potential juror who "shucked and jived" to the microphone. See State v. Tomlin, 299 S.C. 294, 299, 384 S.E.2d 707, 710 (1989) ("The trial court failed to inquire into or comment on the prosecutor's explanation that the juror was struck because he 'shucked and jived.' The use of this racial stereotype is evidence of the prosecutor's subjective intent to discriminate and clearly violates the mandates of Batson.").

4. Racial stereotypes. See Tomlin, 299 S.C. at 298-99, 384 S.E.2d at 710 (noting prosecutor stated he struck juror, a forty-three-year-old black woman, because she walked slow, talked low, and might not be able to withstand trial; rather than inquiring into legitimacy of this explanation, trial court suggested

juror had lack of education, was extremely sluggish, and would be a "filler" if seated on the jury; supreme court concluded use of such racial stereotypes violates Batson).

3. Argument of Mere Pretext

Once a race-neutral explanation is given, the opponent of the strike must show the explanation was mere pretext to engage in purposeful racial discrimination. State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999); Adams, 322 S.C. at 124, 470 S.E.2d at 372. Pretext generally will be established by demonstrating that a similarly situated member of another race was seated on the jury. State v. Haigler, 334 S.C. 632, 515 S.E.2d 88 (1999); Adams, 322 S.C. at 123, 470 S.E.2d at 371. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at this third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment. Payton , 329 S.C. at 55, 495 S.E.2d at 208.

The uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race-neutral explanation for the inconsistency. See State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (finding State provided a racially neutral explanation for why Solicitor did not strike juror with similar characteristics to one previously stricken). Under this prong, persuasiveness of the justification becomes relevant. Purkett v. Elem, 514 U.S. 765 (1995). The opponent of the strike carries the burden of persuading the circuit court the challenged party exercised strikes in a discriminatory manner. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91 (stating burden of persuading court a Batson violation has occurred remains at all times on opponent of strike); State v. Smalls, 336 S.C. 301, 308, 519 S.E.2d 793, 796 (Ct. App. 1999) ("At this third step, the burden returns to the party challenging the strike to establish that the explanation is mere pretext."). The ultimate question the trial court resolves under this prong is whether the movant has met his burden in demonstrating purposeful discrimination. State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997)

A racially neutral reason can be negated by showing that the party created a pretext for purposeful discrimination by applying his allegedly racially neutral standard in a discriminatory manner. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997). In State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989), our supreme court found a Batson violation when the State struck three black women because they were patients of a doctor who was a defense witness, but seated a white woman who was a patient of the same doctor. The court held the State's race-neutral reason for striking the three black women was mere pretext in light of the fact that it seated a similarly situated white woman. Id. Similarly, in Easler, the court of appeals found a Batson violation when the defendant struck a black man because of his age, but seated a white man within the same age bracket. 322 S.C. at 348, 471 S.E.2d at 754. This court held the defendant's race-neutral reason for striking the black man was negated by the fact he seated several white venirepersons in the same age bracket. Id.

The determination of whether the minimum quantum of evidence has been produced under this prong is flexible, for the trial court's ruling turns on an examination of the totality of the facts and circumstances in the record, including the credibility and demeanor of the strike's proponent, and the plausibility of a neutral, but otherwise unpersuasive, reason. Casey, 325 S.C. at 452, 481 S.E.2d at 172.

In deciding whether the opponent of a strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent. Haigler, 334 S.C. at 629, 515 S.E.2d at 91. A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. Id.

4. After Batson Motion is Granted

If the trial judge finds the opposing party has established a prima facie case of purposeful discrimination and that the proponent of the strike has failed to give race-neutral reasons for the contested strikes, the process of selecting a jury shall start over. See State v. Jones, 293 S.C. 54, 358 S.E.2d

701 (1987). Thus, if the trial court finds "a juror has been struck in violation of Batson, our supreme court has mandated that the circuit court strike the entire jury and begin the jury selection process de novo." State v. Heyward, 357 S.C. 577, 580-81, 594 S.E.2d 168, 169 (Ct. App. 2004). The quashed jury will then reenter the jury venire, and jury selection will begin anew from the jury venire. Jones, 293 S.C. at 58 n.3, 358 S.E.2d at 704 n.3.

Once a juror has been unconstitutionally struck, the jury selection process relative to that juror is tainted. State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005). If the trial court chooses to reseat the improperly struck juror, the striking party may not use a peremptory strike to remove that juror from the panel a second time. Id. Therefore, during the subsequent jury selection, the trial judge may prohibit the party who violated Batson from striking a juror who was improperly struck during the previous jury selection. Id.; State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995).

5. The Factual Record

Initially, we dispose of a procedural matter raised by Defendants. The trial court heard the parties' Batson motions with only ten jurors seated on the panel. Prior to ruling on the Batson motions, the trial court sought the addition of twenty-five potential jurors to the venire, because the number of available individuals had been exhausted. Defendants maintain the trial court should not have heard the Batson motions because a full jury had not been seated. However, Defendants did not preserve this contention with a contemporaneous objection. It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). Moreover, Defendants proffered and argued their own Batson motion, apparently acquiescing to the procedure, despite the deficit in the number of jurors. A party cannot argue one theory at trial and a different theory on appeal. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). On the merits, Defendants rely on procedure set forth in State v Jones to invalidate the trial court's conduct of the Batson hearing. 293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987) ("In order to raise and preserve a Batson issue, the defendant must move for a hearing after the jury is selected but before it is sworn."). We determine the gravamen of the Jones holding is the

preservation of a Batson issue before the jury is sworn. In that regard, the trial court followed the proper procedure in conducting the Batson hearing.

The State asserted Defendants exercised nine of their sixteen peremptory challenges to strike white veniremen in violation of Batson v. Kentucky. The trial court found the State identified a racially cognizable group and the burden shifted to Defendants to provide racially neutral justifications for striking the nine potential jurors.

Defendants explained two of the challenged veniremen had possible connections with another lawsuit in which defense counsel was involved. They struck four other jurors on the basis of relationship, personal knowledge, demeanor, or recent criminal victimization.

Defendants challenged 1) juror 19 because he was self-employed and defense counsel was concerned about self-employed individuals being able to sit and fairly adjudicate a case; 2) juror 50 because he was a newspaper editor and might have knowledge about the case as a newspaper editor or might be writing a story about the case; and 3) juror 131 because she worked for the Department of Motor Vehicles and had interaction with law enforcement. It was defense counsel's policy to strike all State government employees.

The State declared Defendants' reasons for striking jurors 19, 50, and 131 were mere pretext, averring that 1) juror 39 was, like juror 19, self-employed, but was, nevertheless, seated on the jury; 2) no evidence existed that juror 50 "either wrote an opinion with regard to this case, a story related to this case, or is in any way familiar with the facts of the case"; and 3) the "notion of striking every SCDOT employee" was "simply a pretextual reason for striking" juror 131.

In its Batson motion, the defense claimed four of the State's five strikes were from a racially cognizable group. The trial court agreed and instructed the State to present racially neutral justifications. The State offered the following reasons for the disputed strikes: 1) juror 22 lived with a cousin of a defendant; 2) juror 64 knew the parents of a defendant; 3) juror 123 had been arrested multiple times; and 4) juror 111 told the court he was related to one of the victims.

Defendants disputed the State's reasons as pretextual, complaining: 1) "I would like to know how they know number 22 lived with the Defendants' cousin?"; 2) "number 64 did not say he knew anybody and was related or could not be fair and impartial, but he went to high school with [counsel for State]"; 3) number 123's arrest record was not a conviction and "I'd like to see the rap sheet."; and 4) number 111 is "related to one of the dead guys in this case . . . I can't imagine a better juror for them."

The trial court held:

> The court has considered the strikes made by the Defense, and with regard, and I'll put the reasons on the record later on, but with regard to the strikes made by the Defendant the court finds that the Defendant has given an [sic] racially neutral explanation for striking jurors number [140, 16, 3, 139, 28, 106]. However, I find that the explanation given for striking jurors number 19, 50, and 131 are not racially neutral and for that reason the entire jury panel will be struck, and the jury will be selected again, and the Defense will not be allowed to strike jurors number 19, 50, and 131. With regard to the Defense motion regarding the State's strikes, that being jurors number 22, 64, 123, and 111, I find that the State has given a racially neutral explanation and am denying the Defense motion for striking the jury panel on the basis of Batson. Let me give just a little bit about my thinking and the reasons for these ruling [sic] because they somewhat overlap. In my view, personal acquaintance with a juror by the party striking that juror, and knowing how that party thinks and behaves is a legitimate reason, and that was the reason that I am allowing the strike of number 16, because Defense had personal knowledge of that individual. Number 3, personal knowledge of Ms. [ ], . . . one hundred six, . . . the same reason I am

> allowing the strikes by the state of number 64 and 111. Both of them with personal knowledge . . .So I think that's [sic] there is personal knowledge that somebody—not only personal knowledge, personal acquaintance with, and knowing how that person thinks is a legitimate reason.

(jurors' names redacted).

Adhering to the trifurcated Batson procedure, the trial court found Defendants peremptorily challenged members of a racially cognizable group, and, upon the motion of counsel, conducted a hearing outside the jury's presence. The court required Defendants to proffer racially neutral explanations for the preemptory strikes. After Defendants' explanations, the State argued Defendants' reasons for striking jurors 19, 50, and 131 were mere pretext for engaging in racial discriminatory exclusions. The trial court granted the State's Batson motion, finding the State established a prima facie case of purposeful discrimination and Defendants failed to give race-neutral reasons for the contested strikes.

While the trial court did not specifically articulate reasoning for finding Defendants' explanations were not racially neutral, the record contains sufficient justification to conclude there was no abuse of discretion. Defendants struck white juror 19 because he was self-employed and the defense did not want self-employed persons on the jury. However, Defendants seated juror 39, a black woman who, like juror 19, was self-employed. See State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989) (race-neutral reason for striking the three black women was mere pretext in light of the fact that similarly situated white woman was seated). Juror 50 was challenged because he was a newspaper editor and might be writing a story about the crime or might know something about the case as a newspaper editor. Although juror 50's employment qualified as racially neutral, the speculation that he might be impartial because of familiarity with the case was inconsistent with his failure to respond to questioning about familiarity with the case on voir dire. See Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) (a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike).

Defendants struck juror 131, a state employee with the SCDOT, maintaining she had contact with law enforcement and it was their practice to strike all State employees. This generalization about an entire group, without any evidence that every employee of SCDOT is actually biased, is prejudiced, or has a relationship with law enforcement or a pro-law enforcement attitude, was not a valid reason for striking juror 131. See Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) (strike because juror was member of generalized group without any evidence that each member of group was actually possessed of bias or prejudice not valid race-neutral reason); State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999).

Following our supreme court's mandate in State v. Heyward, the trial court quashed the entire jury panel, returned the jurors names to the jury venire, and began the jury selection process anew. 357 S.C. 577, 580-81, 594 S.E.2d 168, 169 (Ct. App. 2004); State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). In addition, the trial court prohibited Defendants, who violated Batson, from striking any juror during the subsequent jury selection who was improperly challenged during the previous jury selection. See State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005); State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995). Subsequently, jurors 50 and 131 were seated on the jury chosen to hear the case.

We hold the trial court properly followed the Batson protocol established in State v. Adams and reiterated in State v. Rayfield, thereby ensuring that ultimately the State, as opponent of the disputed strikes, carried the burden of persuading the court Defendants exercised the strikes in a discriminatory manner.

II. Speedy Trial

Defendant Jason Edwards argues his right to a speedy trial was violated under the United States and South Carolina constitutions and, therefore, the trial court erred in failing to dismiss the criminal charges against him. We disagree.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. "Any person charged with

an offense shall enjoy the right to a speedy and public trial by an impartial jury." S.C. Const. art. I, § 14.

The Sixth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and the South Carolina Constitution guarantee an accused the right to a speedy trial. State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700, (Ct. App. 2000), aff'd 348 S.C. 32, 558 S.E.2d 527 (2002); State v. Brazell, 325 S.C. 65, 480 S.E.2d 64, (1997); State v. Chapman, 289 S.C. 42, 344 S.E.2d 611 (1986). "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed." Dickey v. Florida, 398 U.S. 30, 37 (1970). The determination of whether or not an accused has been denied his constitutional right to a speedy trial depends on the circumstances of each case. Brazell, 325 S.C. at 75, 480 S.E.2d at 70; State v. Monroe, 262 S.C. 346, 204 S.E.2d 433 (1974). "A speedy trial does not mean an immediate one . . . it simply means a trial without unreasonable and unnecessary delay." State v. Dukes, 256 S.C. 218, 222, 182 S.E.2d 286, 288 (1971).

In Barker v. Wingo, 407 U.S. 514, 521 (1972), the United States Supreme Court observed that the right to a speedy trial is a vague concept, making it difficult to pinpoint the moment a defendant is denied the right. Therefore, the Court identified four factors to be used in determining whether a defendant has been denied the right to a speedy trial: 1) the length of the delay; 2) the reason the State asserts to justify the delay; 3) when and how the defendant asserted his right to a speedy trial; and 4) prejudice to the defendant. Id. at 530-32; see also Brazell, 325 S.C. at 75, 480 S.E.2d at 70; State v. Foster, 260 S.C. 511, 514, 197 S.E.2d 280, 281 (1973). Courts must engage in a balancing test with these "related factors," which "must be considered together with such other circumstances as may be relevant." Barker, 407 U.S. at 533. South Carolina has recognized these factors and adopted this balancing approach to the speedy trial analysis. Brazell, 325 S.C. at 75, 480 S.E.2d at 70; Chapman, 289 S.C. at 44, 344 S.E.2d at 612.

The first factor, length of delay, acts as a threshold requirement. Barker, 407 U.S. at 530. Until there is some delay which is presumptively prejudicial, it is not necessary to inquire into the other factors. Id. See

Foster, 260 S.C. at 514, 197 S.E.2d at 281(explaining that the length of delay is merely a triggering mechanism which brings additional factors into consideration); State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984) (affirming a trial judge's denial of a speedy trial motion where there was no detriment other than the incarceration); Brazell, 325 S.C. at 69, 480 S.E.2d at 73 (holding there was no violation of the right to a speedy trial where lack of prejudice negated the long delay and, in the context of pre-indictment delay, the defendant has the burden to show the delay caused substantial actual prejudice to his right to a fair trial).

A person's right to a speedy trial arises when he becomes the accused. Id., at 75, 480 S.E.2d at 70 (citing United States v. MacDonald, 456 U.S. at 6 (1982); see also United States v. Marion, 404 U.S. 307, 313 (1971) (holding Sixth Amendment speedy trial provision does not provide defendant protection until he or she is indicted). In Chapman, 289 S.C. at 44, 344 S.E.2d at 612-13, our supreme court additionally considered the purpose of the speedy trial guarantee in determining when a defendant's right to a speedy trial began to run.

> The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the due process clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but never the less substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Jonais's and Maceo's arrest warrants were issued on June 22, 2002. Jason's arrest warrant was issued on October 31, 2002, and all Defendants were indicted on October 11, 2004. Defendants' trial began January 30, 2006. The time from Defendants' arrests to trial was approximately three years and seven months. However, the duration from the time of Defendants' indictments to trial was approximately fifteen months. Jason submitted a

motion and supporting memorandum to dismiss his criminal charges based on lack of a speedy trial. The trial court denied the motion to dismiss, explaining its reasoning pursuant to Barker v. Wingo and State v. Brazell:

1) Length of delay.

> I'll be very frank with you, I am troubled by the fact that the delay in this case was three years and seven months since the time of the incident until the matter is brought to trial, and that does cause me a great deal of consternation, and it's something that I debated long and hard on, but when I reviewed the other three factors I have concluded that that is not sufficient reason to dismiss the case under the right for a speedy trial.

2) State's reasons for delay.

> The record is very vague as to the reasons for the delay . . . none of the dates are in the record that show what the reasons for the delay were. It's my view that the moving party bears the burden of pushing and submitting to the Court the length of time, and the unreasonableness of the delay as much as the State must present the reasonableness of the delay.

3) When and how Defendant asserted the right.

> The only thing in the record is that the Defendant filed a motion for speedy trial and served it on the Solicitor, but there is nothing to show that any effort was ever made to bring the motion to the Court's attention, to schedule the motion, or to make a motion for bond reduction or anything else that would have gotten this matter before the Court before today. . . .

4) Prejudice to Defendant.

> In Barker v. Wingo the interests identified as being protected were to prevent pre-trial incarceration, again it seems like to me if that is a concern to the Defendant a motion could have been made to reduce the bond, or make some adjustment in the bond, nothing was done.
>
> To minimize anxiety and concern of the accused, there is really nothing in the record to show that that is a concern, and finally to limit the possibility that the Defense would be impaired, and that's the prejudice issue.
>
> I would find, based on the record before me there is no showing of prejudice. . . .

Defense counsel raised three issues alleging prejudice by the delay of Defendants' trial.

1) Toxicology reports indicated alcohol and cocaine in the victims' blood. Defense counsel complained the technicians who issued the reports were no longer available to testify.

2) Defense counsel claimed prejudice by the absence of the testimony from a deceased investigator who had taken a witness's statement.

3) A witness had moved out of state during the delay. Defendants contended the unavailability of the witness affected Defendants' ability to impeach.

The trial court indicated the contents of the toxicology report would be admissible and the unavailability of laboratory witnesses was not prejudicial. Moreover, an expert, other than one who conducted the toxicology tests, if

qualified, could render an opinion regarding the results of those tests. The court ruled there was no showing that the statement of the witness to the deceased investigator would be used or that the witness would actually testify or need to be impeached. Furthermore, the trial court noted nothing in the record suggested what the out-of-state witness's testimony would be; therefore, it could have benefited either side. Under those circumstances, prejudice to Defendant had not been demonstrated.

The trial court conducted a lengthy review of the constitutional considerations at stake in the speedy trial issue. We discern no abuse of discretion in its ruling.

III. Delayed Indictments

Defendant Jason Edwards additionally premises his motion to dismiss on the trial courts ruling concerning Rule 3, SCRCrimP. Specifically, Defendant alleges the State violated Rule 3 by allowing over 800 days to elapse between the issue of the arrest warrant and the indictment. We disagree.

Rule 3(c), SCRCrimP, states:

> Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the Clerk of Court, assigned a criminal case number, and presented to the Grand Jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such action with the Clerk of Court.

In State v. Culbreath, 282 S.C. 38, 316 S.E.2d 681 (1984) the South Carolina Supreme Court interpreted the rule requiring solicitors to act on a warrant within ninety days of its issue. The court agreed with and affirmed the trial court's holding that such a rule was administrative not jurisdictional.

Id. Furthermore, the court stated a solicitor's delay does not within itself invalidate a warrant or prevent subsequent prosecution. Id. at 40, 31 S.E.2d at 681.

Here, the trial court clarified:

> It's my view that Rule Three is a procedural rule. It deals with when the Magistrate must send the warrants over to the Clerk's office, when the Clerk's office must send the warrants to the Solicitor's office, and when the Solicitor is to present them to the Grand Jury. My view of that is that it is strictly procedural; that it is not substantive, it does not infer any substantive rights, and that is does not affect the jurisdiction of this Court nor the charges if the Rule is not followed.

The trial court's analysis is consistent with South Carolina precedent interpreting Rule 3 SCRCrimP.

CONCLUSION

We hold the trial court properly adhered to the procedure set forth in State v. Adams in addressing the Batson motions raised in this case. We rule the Barker v. Wingo factors relevant to the speedy trial issue were thoroughly considered and analyzed. In addition, we conclude the trial court did not err in finding the effect of Rule 3, SCRCrimP is administrative rather than substantive.

Accordingly, the trial court's rulings on the Batson issues and Defendant's Motion to Dismiss are

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Iva, By and Through
Its Zoning Administrator, Respondent,

v.

Annette Holley and Anne
Holley-Barnes, Appellants.

Appeal From Anderson County
Ellis B. Drew, Jr., Master-In-Equity

Opinion No. 4262
Heard April 10, 2007 – Filed June 21, 2007

AFFIRMED

C. Rauch Wise, of Greenwood, for Appellants.

Mary C. McCormac, of Clemson, for Respondent.

GOOLSBY, J.: Annette Holley and Anne Holley-Barnes (collectively the Holleys) appeal an order in which the master-in-equity found the

enforcement of a zoning ordinance against them did not violate the Equal Protection Clause. We affirm.

FACTS

In 1986, the Town of Iva (the Town) adopted a zoning ordinance that included an "RS" classification intended to provide "homogeneous and aesthetically harmonious development of single-family dwellings on lots having an area of 10,000 square feet or more." One permitted use in the RS area was "[d]etached single-family dwellings, excluding mobile homes." After enactment of the ordinance, however, city officials did not regularly enforce the portion of the ordinance not allowing mobile homes in the RS zone even after appellant Annette Holley complained in 1999 during a town council meeting that mobile homes had been placed in areas that were not zoned for them.

On July 1, 2002, the Town's newly elected mayor and council members were sworn into office. Since then, the Town has prohibited mobile homes in RS areas that were not in place before the new administration took office. The decision to enforce the prohibition against mobile homes in RS areas was made without a public vote or public notice, and the Town apparently failed to notify Anderson County, the governmental entity responsible for issuing permits to move mobile homes.

On January 15, 2003, Holley's daughter, appellant Anne Holley-Barnes, obtained a permit from Anderson County to move her mobile home onto Holley's property at 400 Betsy Street. 400 Betsy Street is in an RS zone of the Town. In preparation for the move, Holley-Barnes paid a deposit to the Town for sewer and water connections. After the mobile home was moved onto the lot, both a Town police officer and a Town council member informed Holley-Barnes the mobile home was located on property not zoned for mobile homes and she would not be allowed to complete the installation. The Holleys refused to remove the mobile home from the property and continued with the remaining preparations. On January 20, 2003, the mayor and town council notified Holley-Barnes by letter to "cease and desist from continuing any further actions to install a mobile home on the property."

Although the Town sent the Holleys several more letters informing them of the zoning ordinance violation and their rights to appeal the zoning enforcement, the Holleys persisted in their refusal to remove the mobile home from 400 Betsy Street.

On October 9, 2003, the Town filed a complaint against the Holleys for violating the zoning ordinance. The Holleys answered, asserting the Town was selectively enforcing the zoning ordinance in violation of the Equal Protection Clause.[1] At trial, the town clerk and treasurer acknowledged that, since the adoption of the ordinance in 1986, many mobile homes, including one in which the mayor resided, had been moved into the RS zone. Two witnesses who had both previously served as mayor and as council members testified that, while they were in office, the Town had never enforced the zoning ordinance as to mobile homes. Both witnesses left their offices in 2002.

The master found the Holleys did not demonstrate the Town did not treat them differently from the way it treated other similarly situated persons, namely those desiring to place mobile homes in RS areas after July 1, 2002, when the members of the current administration took office. Furthermore, the master found the Holleys were in knowing violation of the zoning ordinance since January 15, 2003, and ordered them to remove the mobile home within ninety days. The master declined to assess any fines against the Holleys unless the mobile home was not removed in the time specified, in which case they would be fined $500.00 per day. This appeal followed.

LAW/ANALYSIS

On appeal, the Holleys contend the master erred in failing to find the Town, in enforcing the zoning ordinance against them, denied them equal protection under the law. We disagree.

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[1] The pleadings indicate the Holleys unsuccessfully sought to have the Town rezone the property at 400 Betsy Street; however, it was unclear whether the Holleys sought judicial review of the Town's decision.

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws."[2] This clause requires that "the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose."[3] It does not dictate that people in different circumstances cannot be treated differently under the law.[4] Rather, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[5]

One seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced.[6] "[E]ven assuming [a governmental entity] is not enforcing [an] ordinance equally, the

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[2] U.S. Const. amend. XIV, § 1.

[3] Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995).

[4] Id.

[5] Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[6] See Snowden v. Hughes, 321 U.S. 1, 8 (1944) ("[A] discriminatory purpose is not presumed."); State v. Solomon, 245 S.C. 550, 574, 141 S.E.2d 818, 831 (1965) (noting evidence of unequal enforcement "was insufficient to show discriminatory enforcement in violation of the Equal Protection Clause [because] [t]here was a total absence of testimony to show an arbitrary and purposeful discrimination in the administration of the statute necessary to sustain the claim").

fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation."[7]

In the present case, we agree with the master that the Holleys failed to establish the Town had a discriminatory purpose in enforcing the zoning ordinance against them. In their brief, the Holleys noted there had been a feud between Annette Holley and the Town since 1999, when Holley began appearing at council meetings to complain about mobile homes installed in violation of the ordinance[8]; however, the record shows the Town has enforced the ordinance against all others attempting to move mobile homes into RS areas since July 1, 2002, even those who sought to replace mobiles homes that were installed in such areas before enactment of the ordinance.

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[7] Denene, Inc. v. City of Charleston, 359 S.C. 85, 96, 596 S.E.2d 917, 922 (2004); see also Oyler v. Boles, 368 U.S. 448, 456 (1962) (holding "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," absent allegations that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). We note the Holleys have not alleged they are members of a protected class, defined by the South Carolina Supreme Court as a class "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Denene, Inc., 359 S.C. at 94, 96, 596 S.E.2d at 921-22 (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)).

[8] The animosity continued after Holley-Barnes moved her mobile home onto the Betsy Street property. After the Town asked Holley to remove the mobile home from her property but before it filed suit against her, Holley placed an outhouse on her property and spray-painted references to the Town on it. In addition, according to the Holleys' attorney, Holley placed a pile of manure on a lot she owned that was located across the street from the mayor's residence as well as a junk car that was also spray-painted with notations that appeared to be references to the mayor and the Town.

Moreover, we do not agree with the Holleys that the "class of one" concept discussed by the United States Supreme Court in Village of Willowbrook v. Olech[9] supports their claim of an equal protection violation. Willowbrook concerned a dismissal of a complaint "for failure to state a cognizable claim under the Equal Protection Clause."[10] The present case, however, involves a merits hearing at which the Town demonstrated to the satisfaction of the hearing tribunal that the efforts of the current council members to enforce the ordinance against those seeking to move mobile homes onto properties in RS areas after July 1, 2002, would further the stated purpose of the ordinance of "provid[ing] a homogeneous and aesthetically harmonious development of single-family dwellings on lots having an area of 10,000 square feet or more."[11] Moreover, consistent enforcement of the prohibition against mobile homes in RS areas, regardless of when such enforcement has begun, will eventually result in phasing out all mobile homes in those locations because of the relatively temporary nature of this type of dwelling.

Because the Town has enforced the ordinance against all others attempting to move mobile homes onto property in the RS areas after the new

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[9] 528 U.S. 562 (2000).

[10] Id. at 563. In her complaint, the plaintiff in Willowbrook alleged "the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply" but "required only a 15-foot easement from other similarly situated property owners" and "the Village's demand was 'irrational and wholly arbitrary.' " Id. at 565.

[11] See Denene, 359 S.C. at 91, 596 S.E.2d at 920 ("If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used."); City of Beaufort v. Holcombe, 369 S.C. 643, 648, 632 S.E.2d 894, 897 (Ct. App. 2006) (applying the "rational basis" test based on a determination that the class at issue in the case was not a suspect class).

Town administration took office and because the enforcement was rationally related to a legitimate governmental objective, we affirm the master's determination that the application of the zoning ordinance against the Holleys did not violate the Equal Protection Clause.

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Lee Williams, Appellant,

v.

Betty R. Williams, by her personal representatives, Renitia W. Anderson and Wanda H. Sturkey, Respondents.

Appeal From Lexington County
Kellum W. Allen, Family Court Judge

Opinion No. 4263
Heard April 10, 2007 – Filed June 21, 2007

REVERSED AND REMANDED

Jan L. Warner, of Columbia, for Appellant.

Stevens Bultman Elliott, of Columbia, for Respondents.

GOOLSBY, J: In this family court proceeding, James Lee Williams (Husband) appeals the dismissal of his claim for equitable distribution and

the dismissal of Respondents Renetia W. Anderson and Wanda H. Sturkey as defendants in their individual capacities. We reverse and remand.

FACTS

Husband married Betty R. Williams (Wife) in 1981. Both had been married before. Before the marriage, Husband owned as his separate property a lot and residence located at 237 Lowry Road in Lexington, South Carolina. Husband had purchased this property with a Veterans Administration loan in his name.

During the early years of their marriage, Husband drank to excess regularly. Around 1982, Husband was committed to the South Carolina Department of Mental Health for treatment of various problems, most of which concerned his drinking.

Husband maintained that, because of his memory deficits and vulnerability, he thereafter depended on Wife to handle his financial dealings. Regardless of whether this assertion is correct, it appears undisputed that most of his income was deposited into a joint account on which Wife could write checks.

Apparently with the consent of both Husband and Wife, Respondent Anderson, one of Wife's daughters from a prior marriage, moved with her family into the residence on the Lowry Road property with the understanding that she pay rent. Husband and Wife then moved into a mobile home on the same lot. Thereafter, according to Husband, Respondent Sturkey, another of Wife's daughters from her prior marriage, moved her mobile home to the Lowry Road property on the condition that she also pay rent.

In 2003, Husband, while measuring the residence so he could have aluminum siding installed, was verbally accosted by Anderson, who asserted she now owned the residence and he could not have anything to do with it. Husband then went to the Lexington County Registrar of Deeds and located two deeds, one dated July 1, 1983, and the other dated January 26, 1995. In the first deed, Husband purportedly conveyed the Lowry Road property to

Wife. In the second deed, Wife in turn transferred the property to Anderson and Sturkey. According to Husband, further investigation revealed that neither Anderson nor Sturkey paid rent and both had misappropriated money from the joint checking account.

Husband commenced this action against Wife, Anderson, and Sturkey on July 11, 2003. In his pleadings, Husband alleged he "did not recall signing" the 1983 deed and "believe[d] he was tricked into signing said document." Husband requested, among other relief, an equitable division of the assets of the marriage, including the Lowry Road property and rental income from Anderson and Sturkey. On September 10, 2003, counsel for Wife,[1] Sturkey, and Anderson filed responsive pleadings contending, among other defenses, the action should be dismissed because Husband failed to allege sufficient facts to support an action for fraud.

A final hearing in the matter took place on August 29 and 30, 2005. By order dated October 13, 2005, the family court, although finding the action was for equitable division and declining to dismiss the case for lack of subject matter jurisdiction, granted the motion to dismiss insofar as it concerned the Lowry Road property on the ground that Husband's allegations concerning this asset did not include the requisite elements of a cause of action for fraud. In addition, the family court dismissed Sturkey and Anderson as defendants in their individual capacities.[2] Following the denial of his motion to reconsider, Husband filed this appeal.

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[1] Wife died on September 4, 2003, and her estate was later substituted as a party Defendant through her personal representative.

[2] In the appealed order, the family court granted Husband his personal property that was located at the Lowry Road property and a cemetery plot in West Columbia, South Carolina. The court also dismissed Husband's claim for damages on the ground that it lacked statutory authority.

LAW/ANALYSIS

On appeal, Husband contends that, because the family court had subject matter jurisdiction to apportion property owned by third parties, it erred in dismissing his complaint for failure to state facts sufficient to constitute a cause of action for fraud and in dismissing Anderson and Sturkey as individual defendants in this action. We agree.[3]

South Carolina Code section 20-7-473 defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held."[4] As noted by the supreme court in Sexton v. Sexton, "[t]his section specifically provides for the possibility that marital property could be titled in a third party."[5]

In the present case, neither Husband nor Wife has held legal title to the disputed property since 1995. Nevertheless, under Sexton, the family court in this case had subject matter jurisdiction to determine if the Lowry Road property was marital property as defined in section 20-7-473 and to join Anderson and Sturkey as defendants in their individual capacities based their position as record owners of the property under the 1995 deed.

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[3] Husband does not appeal the dismissal of his claim for damages; therefore, we do not consider whether he can proceed on his claims concerning rent payments, funds allegedly misappropriated by Anderson and Sturkey, or damages allegedly caused by Sturkey in placing a right-of-way on the Lowry Road property.

[4] S.C. Code Ann. § 20-7-473 (Supp. 2006) (emphasis added).

[5] Sexton v. Sexton, 298 S.C. 359, 361, 380 S.E.2d 832, 834 (1989); see also S.C. Code Ann. 20-7-420(19) (1985) (granting the family court jurisdiction to "bring in and make parties to any proceedings pending in the court any person or persons . . . whose presence to the proceedings may be found necessary to complete determination of the issues therein . . . .").

In our view, the complaint adequately alleges the Lowry Road property was subject to equitable division. Whether Husband knowingly deeded the property to Wife in 1983 or she deceived him into transferring it to her, the conveyance of the property from Husband to Wife during the parties' marriage would have been sufficient reason to classify it as marital property, but for Wife's purported conveyance to Anderson and Sturkey.[6]

Furthermore, because Anderson and Sturkey hold title to the property, we agree with Husband they should not have been dismissed as defendants to this lawsuit. As the supreme court held in Sexton,

> [W]hen property is alleged to be marital property, but is owned by a third party, the Family Court has the subject matter jurisdiction to join all persons with a possible interest in the property as parties to the action and to determine if the property constitutes marital property as defined in § 20-7-473. If it is determined that the property is marital property, then the Family Court has the authority to determine the parties' equitable rights therein.[7]

As evident in the above-quoted passage, to join a third party in an action for equitable distribution, a litigant needs only to make allegations to support a contention that property titled in the third party's name is actually marital property. Moreover, the language in this passage indicates that, if the requisite allegation is made, the party seeking equitable division is entitled at least to a determination by the family court as to whether the property in

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[6] See S.C. Code Ann. § 20-7-473(1) (Supp. 2006) (exempting "property acquired by either party by . . . gift" from inclusion in the marital estate, but noting the gift must be "from a party other than the spouse").

[7] Sexton, 298 S.C. at 361-62, 380 S.E.2d at 834 (emphasis added).

question is in fact a marital asset.[8] In the present case, the complaint alleges facts that, if substantiated at trial, would support a finding that Wife "acquired" the Lowry Road property during the parties' marriage. We therefore hold the family court prematurely dismissed Husband's claim for equitable distribution of the Lowry Road property.

In determining that Husband was entitled to have the family court determine whether or not the Lowry Road property was a marital asset, we are mindful of the caveat in Panhorst v. Panhorst, wherein this court cautioned that section 20-7-473, in specifying "that the marital estate must be identified as of a fixed date," . . . has the effect of "foreclos[ing] spouses from litigating every expenditure or transfer of property during the marriage" and preventing marital litigants from "resurrecting" foolish, selfish, or unprofitable transactions "to gain an advantage in the equitable distribution."[9] We note, however, that in Panhorst this court also recognized that cases involving "fraudulent transfers or dissipation of marital assets in contemplation of the breakdown of the marriage" are distinguishable.[10] Moreover, in following the supreme court's directive in Sexton, we hold that a party seeking equitable division of an asset need only set forth allegations to support a finding that the asset is marital property in order to have the family court make this threshold determination.[11]

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[8] As noted in Sexton, "[i]f the property is found to be marital property, the Court has the authority to apportion it among the parties. In contrast, if it is not marital property, the owners of the property may be dismissed as parties." Id. at 361, 380 S.E.2d at 834.

[9] Panhorst v. Panhorst, 301 S.C. 100, 105, 390 S.E.2d 376, 379 (Ct. App. 1990).

[10] Id. at 105, 390 S.E.2d at 379.

[11] It is for this reason that we reject Respondents' argument that Husband's action, insofar as it concerned the Lowry Road property, was incorrectly filed in the family court.

Based on the foregoing, we hold Husband is entitled to have the family court determine whether the Lowry Road property is a marital asset and, if so, to have the court determine the rights of all parties claiming an interest to it. For this reason, we also hold Anderson and Sturkey should remain parties to this action pending further determination by the family court as to the marital nature of the property.

REVERSED AND REMANDED.

HEARN, C.J., and STILWELL, J., concur.