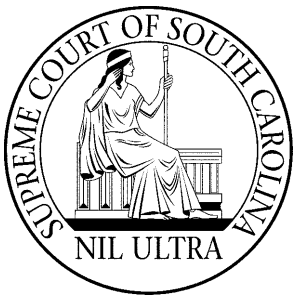

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
March 1, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Randy Wright, Respondent.

Appellate Case No. 2021-000146

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Maite Murphy, Circuit Court Judge

Opinion No. 28136
Heard February 8, 2023 – Filed March 1, 2023

AFFIRMED

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Petitioner.

Appellate Defender Joanna Katherine Delany, of Columbia, for Respondent.

JUSTICE JAMES: A jury found Respondent Randy Wright guilty of assault and battery of a high and aggravated nature. The court of appeals reversed Wright's conviction and remanded for a new trial, holding (1) the trial court erred in denying Wright's request that the jury be individually polled and (2) the trial court's denial of the request was reversible per se. *State v. Wright*, 432 S.C. 365, 370, 373, 852 S.E.2d 468, 471-72 (Ct. App. 2020).

We affirm the court of appeals' well-reasoned opinion, but we are compelled to note several points. First, as we noted in *State v. Linder*, "Polling is a practice whereby the court determines from the jurors individually whether they assented and still assent to the verdict." 276 S.C. 304, 308, 278 S.E.2d 335, 338 (1981) (emphasis added). "Individual" polling requires each juror to be individually questioned as to whether they "assented and still assent to the verdict." *Id.* Individual polling is commonly accomplished by separately asking each juror, "Was this your verdict?" If the answer to that question is "yes," the customary follow-up question is, "Is this still your verdict?"

This takes us to the rule we set forth in *Linder*: "If the request [for individual polling] is made, a poll must be taken." *Id.* at 309, 278 S.E.2d at 338. Our holding in *Linder* is not an empty one, and we agree with the court of appeals that the denial of a defendant's request for individual polling is reversible per se.

Second, while not directly an issue in the case now before us, we conclude a request, if any, for individual polling must be made immediately after the verdict is published. We note the common practice for collective polling to be conducted immediately after the verdict is published; when collective polling is conducted, the request, if any, for individual polling must take place immediately after the collective polling is concluded.

Finally, lest there be any confusion on the point, our decision in *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002), is undisturbed by our affirmation of the court of appeals' holding. In a criminal case, trial counsel does not have an affirmative duty to request the trial court to poll the jury. *Id.* at 196, 569 S.E.2d at 324.

We affirm the court of appeals.

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Darell Oneil Boston, Petitioner.

Appellate Case No. 2021-000549

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 28137
Heard December 13, 2022 – Filed March 1, 2023

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

David Nelson Lyon, of Duff, Freeman, Lyon, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *State v. Boston*, 433 S.C. 177, 857 S.E.2d 27 (Ct. App. 2021). We now dismiss the writ as improvidently granted.[1]

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[1] Counsel for Petitioner handled this appeal as part of the Appellate Practice Project. We applaud the professional ability of counsel and admire his willingness to volunteer his time and efforts in representing Petitioner.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cary G. Ryals, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000570

ON WRIT OF CERTIORARI

Appeal From Berkeley County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5971
Submitted December 1, 2022 – Filed March 1, 2023

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Senior Assistant Deputy Attorney General William M. Blitch, Jr. and Assistant Attorney General Danielle Dixon, of Columbia, for Respondent.

THOMAS, J.: Cary Glenn Ryals argues the post-conviction relief (PCR) court erred in not finding his trial counsel was ineffective for not objecting to Ryals

proceeding to trial dressed in improper prison attire and for not requesting a continuance in order for counsel to provide proper street clothes for Ryals. We reverse and remand for a new trial.

FACTS

In May 2015, a Berkeley County grand jury indicted Ryals on the charge of operating a motor vehicle in violation of the Habitual Traffic Offender (HTO) Act. In June 2015, he proceeded to a jury trial and was found guilty as charged. The trial court sentenced him to five years' imprisonment and revoked his probation regarding a prior unrelated conviction, which resulted in ten years' incarceration. Ryals did not appeal his conviction, sentence, or probation revocation.

On January 28, 2016, Ryals filed a pro se PCR application, in which he alleged his trial counsel did not advise him of his direct appeal rights and was ineffective in failing to (1) investigate his past criminal record, (2) challenge the trial court's jurisdiction over the charge against him, and (3) object to his having to appear at his trial in prison attire. On July 26, 2017, counsel for Ryals filed an amended PCR application to include an allegation of ineffectiveness for the revocation of his probation and requested a hearing on the merits. Following a hearing on December 4, 2017, the PCR court granted Ryals a belated direct appeal but denied PCR on his remaining issues.

On September 24, 2018, counsel for Ryals filed a petition for a writ of certiorari requesting a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), addressing Ryals' direct appeal issue and asking to be relieved as counsel. The petition also included a request for a writ of certiorari on allegations that Ryals' trial counsel performed deficiently in failing to (1) investigate Ryals' criminal record and (2) object to Ryals having to appear at his trial in prison attire. The case was transferred from the supreme court to this court. On January 27, 2021, this court voted to grant certiorari on the direct appeal issue and the issue of appearing at trial in prison attire. On the same day, the direct appeal issue was dismissed by opinion. The issue of Ryals' prison attire is before us now.

STANDARD OF REVIEW

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP. "This [c]ourt gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

LAW/ANALYSIS

Ryals argues the PCR court should have found his trial counsel was ineffective for failing to (1) object to Ryals proceeding to trial dressed in prison attire and (2) request a continuance to provide proper clothing for Ryals.

When ineffective assistance of counsel is alleged as a ground for relief, a PCR applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland* as the standard for judging ineffectiveness). It is "generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing." *Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001), *abrogated on other grounds by Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019); *see also Estelle v. Williams*, 425 U.S. 501, 512 (1976) (holding an accused may not be compelled to be tried before a jury in identifiable prison clothes); *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967) ("It is inherently unfair to try a defendant for crime while garbed in his jail uniform . . . ."); *Ring v. State*, 450 S.W.2d 85, 88 (Texas Crim. App. 1970) ("(E)very effort should be made to avoid trying an accused while in jail garb."). "Nevertheless, . . . to prevail in [a] PCR action, the *Strickland* analysis applies and [the] petitioner must establish prejudice." *Id.* at 337-38, 548 S.E.2d at 865.

The PCR court acknowledged "[t]rial [c]ounsel may have been deficient in failing to request a continuance . . . until [Ryals] could change into civilian attire"; however, relying on *Humbert*, the court ultimately denied PCR on this issue because it found Ryals failed to establish prejudice in view of the overwhelming evidence against him. *See id.* at 338, 548 S.E.2d at 866 ("Due to the overwhelming evidence against petitioner, there is not a reasonable probability the outcome of his trial would have been different had petitioner not been dressed in his prison jumpsuit.").

However, "the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Rather, in a PCR court's analysis of prejudice, the strength of the State's case "is one significant factor the [PCR] court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether [the petitioner] has met his burden of proving prejudice." *Id.* at 190, 810 S.E.2d at 845. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice":

> the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met.

Id. at 191, 810 S.E.2d at 845.

Here, there was no attempt by the PCR court to balance the impact of Ryals' forced appearance at his trial in prison clothing against the strength of the State's evidence against him.[1] "Ordinarily, the PCR court should make findings of fact on [whether counsel's error prejudiced the petitioner], not [the appellate court]." *Id.* at 195, 810 S.E.2d at 847. Nonetheless, this court is permitted to conduct the prejudice analysis. *See id.* (finding it was not necessary for the appellate court to remand the

[1] The State's evidence consisted of testimony from an employee of the Department of Motor Vehicles (DMV) about Ryals' driving record and the notices sent by the DMV and the police officer who arrested Ryals for operating a motor vehicle in violation of the HTO Act.

issue of prejudice to the PCR court for findings of fact because "we have conducted the prejudice analysis ourselves").

At trial, before Ryals testified, the court asked Ryals outside of the presence of the jury if it needed "to have any cause for concern" if Ryals' leg irons were removed. Ryals responded he would "comply with everything" and wished he "was dressed better than [he was] presently." The jury returned to the courtroom and Ryals' leg irons were removed. Neither Ryals nor his counsel made any objection to his clothing or the shackles.

Ryals' PCR application alleged "failure to object to the improper attire." At the PCR hearing, Ryals testified that in addition to having to wear a prison jumpsuit with the name of the detention center stamped on the back, he "had shackles and handcuffs on" during his trial. The PCR court questioned counsel for the State about Ryals' attire:

> THE COURT: Ms. Coleman, do you know how many – I practiced law for 20 years and been on the bench for 12. I have never as a lawyer or a judge allowed someone to be tried in prison garb. Is there a law that says or is there a case that addresses this issue?
> MS. COLEMAN: Not that I know of, Your Honor. I haven't been able to find anything. And my argument –
> THE COURT: Have you ever done that? Have you seen that?
> MS. COLEMAN: I have not, no. I have never seen that circumstance, but my argument again, that would be that the evidence against him was overwhelming so there would be no prejudice based on that fact.
> THE COURT: Based on what they presented it is not overwhelming.

The PCR court's order addressed only the issue of trial counsel's failure "to object to the trial proceeding when [Ryals] was wearing his prison clothing and was not provided with civilian attire to wear for trial," and Ryals did not move to alter or amend the order.

Ryals' brief before us now states the argument as: "The PCR court erred in not finding trial counsel ineffective for not objecting to Petitioner Ryals proceeding to trial dressed in improper prison attire and for not requesting a continuance in order for counsel to provide proper street clothes for Ryals." The facts following the issue mention that Ryals had handcuffs and shackles on at trial and the removal of Ryals' leg irons in front of the jury and cites case law pertaining to shackling in court.

This court has held "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is justified by an essential state interest—such as interest in courtroom security—specific to the defendant on trial." *State v. Heyward*, 432 S.C. 296, 324, 852 S.E.2d 452, 466 (Ct. App. 2020) (quoting *Deck v. Missouri*, 544 U.S. 622, 624 (2005)). Thus, the *Heyward* court found the trial court abused its discretion in denying Heyward's request to remove his shackles during jury selection when the record was devoid of any reason why he should have been shackled and there were no concerns of courtroom decorum or security raised. *Id.*

We find Ryals' objection to his "attire" encompasses his handcuffs and shackles. Balancing the impact of Ryals' forced appearance at his trial in prison clothing visible to the jury against the strength of the State's evidence against him, there is a reasonable probability that, but for trial counsel's failure to object to his appearance at this trial in prison clothing, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Thus, we find Ryals' trial counsel was ineffective for not objecting to Ryals proceeding to trial dressed in prison attire and for not requesting a continuance to provide proper clothing for Ryals.

CONCLUSION

Accordingly, the decision of the PCR court is

REVERSED and REMANDED.[2]

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

McEntire Produce, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2019-001933

Appeal From The Administrative Law Court
Harold W. Funderburk, Jr., Administrative Law Judge

Opinion No. 5972
Submitted December 1, 2022 – Filed March 1, 2023

REVERSED

Elisabeth W. Shields and Jason P. Luther, both of the South Carolina Department of Revenue, of Columbia, for Appellant.

Burnet Rhett Maybank, III and James Peter Rourke, both of Nexsen Pruet, LLC, of Columbia, for Respondent.

THOMAS, J.: The South Carolina Department of Revenue (SCDOR) appeals a decision by the Administrative Law Court (ALC) that held purchases by McEntire Produce, Inc. (McEntire) of certain supplies and protective clothing are entitled to the South Carolina partial sales tax exemption under section 12-36-2120(17) of the South Carolina Code (Supp. 2022). SCDOR argues the ALC erred in granting "the machine exemption" and "the pollution control machine exemption," both found in

section 12-36-2120(17), to McEntire's purchases of items that are not "machines." We reverse.

FACTS

McEntire operates a produce processing facility in Columbia, South Carolina. The facility processes lettuce, onions, cabbage, tomatoes, and other vegetables for sale. Its produce processing includes, but is not limited to, washing, cutting, mixing, and packaging the finished produce at the facility. As a manufacturer of fresh produce, McEntire is subject to both federal and state regulation, by the Food and Drug Administration (FDA), the South Carolina Department of Agriculture (SCDA), and the South Carolina Department of Health and Environmental Control (DHEC), with regards to food safety.

On February 7, 2017, SCDOR determined McEntire's purchases of certain supplies and protective clothing were subject to use tax for the tax periods October 1, 2012 through September 30, 2015 (the "audit period") and were not exempt from the use tax under section 12-36-2120(17). As such, SCDOR assessed McEntire $136,250.51 in unpaid taxes on July 19, 2016; however, between the issuance of SCDOR's determination and the hearing before the ALC, the parties agreed to a reduced amount of $126,912.60. McEntire timely protested the proposed assessment due to the parties' disagreement as to whether McEntire's purchase of supplies and protective clothing was exempt from the use tax. On March 7, 2017, McEntire filed a request for a contested case hearing with the ALC to challenge SCDOR's determination.

The ALC held a contested case hearing on November 14 and 15, 2018, and the court issued its final order on September 6, 2019. The court determined the majority of items for which McEntire sought exemptions were exempt from the use tax under section 12-36-2120(17), referred to as the "machine exemption."[1] The ALC further found items designated as protective clothing were also exempt

[1] The exempted items included: cut wheel and disc maintenance tools; maintenance tools; forklift rental, forklift batteries, forklift parts, and forklift repair parts; hand trucks, pallet jacks, and oil lubricant used therein; generator rental; stacking containers; warehouse racks; pallet flow brakes; blower fans; bar code scanners; black ink aerosol cans; mobile computer stands; storage water tanks; cleaning machines; floor treatment chemicals; and floor drain covers.

from the use tax under a provision in section 12-36-2120(17), commonly referred to as the "pollution control machine exemption."[2] Because the ALC held some items were taxable, the ALC remanded the matter to SCDOR, instructing it to calculate the tax and interest due on the items the ALC deemed taxable. SCDOR filed a motion for reconsideration and/or to alter or amend on September 19, 2019. The ALC issued an order on October 16, 2019, denying SCDOR's motion. This appeal followed.[3]

STANDARD OF REVIEW

"Upon exhaustion of his prehearing remedy, a taxpayer may seek relief from the department's determination by requesting a contested case hearing before the Administrative Law Court." S.C. Code Ann. § 12-60-460 (2014). "In an appeal from the decision of an administrative agency, the Administrative Procedures Act [the Act] provides the appropriate standard of review." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). The Act provides the applicable standard:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;

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[2] The exempted protective clothing items included coveralls, eyewear, gloves, aprons, and hairnets.

[3] We find the order on appeal is immediately appealable. *See Torrence v. S.C. Dep't of Corr.*, 433 S.C. 224, 227, 857 S.E.2d 549, 550 (2021) (explaining a remand from the ALC to an agency may be immediately appealed if the remand is "viewed as ministerial").

> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § l-23-610(B) (Supp. 2022).

"The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676. "The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

LAW/ANALYSIS

SCDOR argues the ALC erred in granting the "machine exemption" and the "pollution control machine exemption," both found in section 12-36-2120(17), to McEntire's purchases of items that are not "machines." We agree.

Section 12-36-2120(17), the "machine exemption," currently provides certain items are exempted from sales taxes, including "machines used in manufacturing, processing, agricultural packaging, recycling, compounding, mining, or quarrying tangible personal property for sale."[4] Subsection 17 further provides:

> "Machines" include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which
> (a) are necessary to the operation of the machines and are customarily so used . . . .

[4] This section was updated in 2016, after the audit period in this case, to add the term "agricultural packaging."

South Carolina Code of State Regulations 117-302.5(A) (2012) also explains "[m]achines used in manufacturing, processing, compounding, mining, or quarrying tangible personal property for sale, and the replacement parts and attachments to such machines, are exempt from the sales and use tax under Code Section 12-36-2120(17)." Regulation 117-302.5(B)(1) (2012) states a "machine qualifies for the exemption under Code Section 12-36-2120(17) if the machine is integral and necessary to the manufacturing process and the product being manufactured is being manufactured 'for sale.'" The Regulation adds a machine "includes every mechanical device or combination of mechanical powers, parts, attachments and devices to perform some function and produce a certain effect or result, is integral and necessary to the manufacturing process . . . ." *Id.* It further enunciates a three-part test to determine whether a machine is "integral and necessary" to the manufacturing process:

> (a) The machine is used at a manufacturing facility. . . .
> (b) The machine is used in, and serves as an essential and indispensable component part of the manufacturing process, and is used on an ongoing and continuous basis during the manufacturing process. A machine is not a part of the manufacturing process merely because it is integral and necessary to the manufacturer. For example, machines used for warehouse, distribution, or administrative purposes are integral and necessary to the manufacturer, but not part of the manufacturing process.
> (c) The machine must be substantially "used in manufacturing . . . tangible personal property for sale." The statute does not require that the machine be used exclusively in manufacturing; however, incidental manufacturing use will not qualify for the exemption. For purposes of the exemption, more than one-third of a machine's use in manufacturing is substantial.

Id.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "The legislature's intent should be ascertained primarily from the plain language of the statute." *State v. Landis*, 362 S.C. 97, 102, 606

S.E.2d 503, 505 (Ct. App. 2004). "The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (quoting *John D. Hollingsworth on Wheels, Inc. v. Greenville Cnty. Treasurer*, 276 S.C. 314, 317, 278 S.E.2d 340, 342 (1981)). However, "[i]f a statute is ambiguous, the courts must construe its terms." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 343, 762 S.E.2d 561, 567 (2014). "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002). The interpretation of a statute or construction of a regulation is a question of law for the court. *Hopper v. Terry Hunt Constr.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) (quoting 2 Am. Jur. 2d *Administrative Law* § 245). This court will correct the decision of the ALC if it is affected by an error of law or if substantial evidence does not support the findings of fact. *Blue Moon of Newberry*, 397 S.C. at 260, 725 S.E.2d at 483; *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 741 (Ct. App. 2014).

A. Machine Exemption

SCDOR determined the manufacturing process at issue in this case is the processing of produce and only certain machines involved in the operations fall within the machine exemption as "integral and necessary" to the processing of produce as outlined in Regulation 117- 302.5(B)(l). Thus, SCDOR found the following items were not tax exempt "machines": cut wheel and disc maintenance tools; maintenance tools; forklift rental, forklift batteries, forklift parts, and forklift repair parts; hand trucks, pallet jacks, and oil lubricant used therein; generator rental; stacking containers; warehouse racks; pallet flow brakes; blower fans; bar code scanners; black ink aerosol cans; mobile computer stands; storage water tanks; cleaning machines; floor treatment chemicals; and floor drain covers.

In making its decision that these items were tax-exempt machines, the ALC applied the "Integrated Plant Concept," which it stated finds machinery that performs an essential or indispensable function in the taxpayer's manufacturing operations, regardless of whether it actually causes a physical change, is eligible for the exemption. The ALC cited *Niagara Mohawk Power Corporation v. Wanamaker*, 144 N.Y.S.2d 458, 461-62 (N.Y. App. Div. 1955) for the test. The

Niagara court concluded the purchase or use of coal and ash handling equipment was not taxable because the equipment was as essential to production as the generator itself. *Id.* The court further determined the buildings at a steam station were not taxable because they housed and steadied the machinery that was essential to production. *Id.* The court stated "[t]he important thing is that all parts of the plant contribute, continuously and vitally, to production, and they are all integrated and harmonized." *Id.*

SCDOR agrees our courts have recognized that South Carolina uses an integrated plant theory for the purpose of applying the machine exemption. However, SCDOR asserts our integrated plant theory is a limited one and the court erred in relying on the *Niagara* case because New York's integrated plant theory is much broader. Thus, SCDOR maintains the ALC incorrectly expanded what it means to be "used in processing." SCDOR states Regulation 117-302.5 provides that to be an exempt machine, the item must: (1) be "[a] machine, which includes every mechanical device or combination of mechanical powers, parts, attachments and devices that perform some function and produce a certain effect or result"; (2) which "is integral and necessary"; (3) to processing "tangible personal property for sale." In this case, it argued the machine exemption exempts only those machines that are integral and necessary to the sorting, cutting, washing, and packaging of produce.

The ALC disagreed with SCDOR and found "that given McEntire's highly regulated business as a fresh produce processor, the machinery and equipment used both before and after the actual production line processing of the fresh produce are integral and necessary not only to the overall manufacturing process, but also to the health and safety functions imbedded within the manufacturing of fresh produce." Further, "[w]ithout the processes that occur in the climate-controlled [] areas of the plant, [McEntire] would be unable to safely and efficiently produce a finished product for sale and distribution." Thus, "[t]hese processes contribute continuously and vitally to the plant's overall production and are also integrated and harmonized into the activities that occur directly in the production line, as conceived in the Integrated Plant Concept." Having concluded McEntire's manufacturing operations consisted of more than the simple production line manufacturing occurring in the cutting room, the ALC then had to determine whether the supplies at issue fell within the definition of "machine" so as to qualify as tax exempt under section 12-36-2120(17).

In *Hercules Contractors & Engineers, Inc. v. South Carolina Tax Commission*, 280 S.C. 426, 429-30, 313 S.E.2d 300, 302-03 (Ct. App. 1984), this court found the evidence clearly supported the holding of the trial court that a facility that treated waste of a plant produced in connection with its manufacture of textile products for sale operated as one single entity and that entity was a "machine." The court also found various "vats or basins," as well as certain railings, walkways and ladders, and tanks, troughs and pipes, were all "integral and necessary to the operation of the system as a whole." *Id.* at 430, 313 S.E.2d at 303. Further, it noted railings, walkways, and ladders were required by state and federal law and were necessary to the overall function of the system. *Id.* Thus, all materials used in the facility's construction were tax exempt. *Id.* at 429, 313 S.E.2d at 302.

SCDOR asserts *Hercules* is distinguishable, because in that case, this court determined the entire treatment facility was a machine, whereas here, McEntire's whole facility is not a machine. It asserts none of the items the ALC found were exempt under the machine exemption are integrated into McEntire's facility or have anything to do with exempt machines within McEntire's facility. SCDOR also argues the ALC erred by broadening the term "machine" beyond its plain meaning in the machine exemption. SCDOR asserts a machine is defined by Regulation 117-302.5(B)(1) as "every mechanical device or combination of mechanical powers, parts, attachments and devices to perform some function and produce a certain effect or result . . . ." SCDOR states Regulation 117-302.5 limits the term machine to "only those items that are integral and necessary to the functioning of an exempt machine, and solely for this reasoning are such items integral and necessary to the manufacturing process."

The machine exemption regulation does not define the terms "integral" and "necessary." Those are commonly defined as "essential to completeness" and "an indispensable item." *Merriam-Webster Collegiate Dictionary* 607 & 776 (10th ed. 1993). The regulation also does not define "essential" or "indispensable," but the common dictionary definitions for both terms provide that something is essential or indispensable if it is "of the utmost importance" or "absolutely necessary." *Merriam-Webster Collegiate Dictionary* 396 & 593 (10th ed. 1993). Further, "processing" is not defined in the regulation. The word "process" is defined as "to subject to a special process or treatment (as in the course of manufacture)." *Merriam-Webster Collegiate Dictionary* 929 (10th ed. 1993).

SCDOR argues to be exempt under the machine exemption, a machine does not have to be used directly in the production line but it must be integral and necessary to processing produce. Thus, a machine at McEntire's plant qualifies for the machine exemption only when it is absolutely necessary to the actual processing of fresh produce. As a result, SCDOR maintains activities that occur prior to and after the sorting, cutting, washing, and packaging of produce (i.e., air quality control, storage, material handling) are not absolutely necessary and are not considered a part of the processing of fresh produce and the associated machines or items do not qualify for the machine exemption to the use tax.

Further, SCDOR argues the fact the legislature added "agricultural packaging" as an exempt use in 2016,[5] after the audit period in this case, is not an indication that it had intended such a use to be included in the previous version of the machine exemption. It states that the addition indicates those activities were not exempt prior to the 2016 statutory change and the purpose of the amendment was to make agricultural packaging an exempt use, not to clarify any legislative intent on the exempt uses previously codified. Accordingly, it states the ALC erred in considering the amendment in its decision.

We consider each of the specific items at issue:

1. Fork lifts, pallet jacks, and lubricants:

SCDOR argues forklifts (along with their respective parts and batteries), pallet jacks, and hand trucks are not machines used in the processing of produce. McEntire asserted they are machines used in the processing of produce to move heavy produce from place to place and to certain lines of production within the facility. However, Regulation 117-302.5(B)(4)(a) provides "[w]arehouse machinery used only for warehouse purposes, loading and unloading, storing, transporting raw materials and finished products" are not tax exempt. Thus, these items are not tax exempt.

McEntire also asserted the forklifts were used directly in the food processing to dump produce onto the conveyor system, which moves the raw produce into the processing area. However, Regulation 117-302.5(B)(4)(a) also provides conveyance machines are tax exempt if they "are used substantially

[5] 2016 S.C. Acts No. 256 § 427 (effective July 1, 2016).

to feed raw material into or onto the first processing machine in the manufacturing process area *in addition* to being used in loading, unloading, storing, and transporting raw materials from the warehouse to the manufacturing area, or transporting finished products from the manufacturing area to the warehouse." (Emphasis added). Thus, because the forklifts feed the bin dumping conveyance system and not the first processing machine, they are not tax-exempt conveyance machines.

2. Bar code scanners, black ink aerosol cans, and mobile computer stands:

SCDOR argues record-keeping items, like bar code scanners, black ink aerosol cans, and mobile computer stands, that are used for tracking produce are not machines and, as such, cannot qualify for the machine exemption. McEntire disagrees and states that while the computer stands are not required by law, the checkpoints where the stands are used are required by law. However, Regulation 117-302.5(B)(9) provides: "[a]dministrative machines, furniture, equipment, and supplies, such as office computers used for . . . recordkeeping . . . are not machines used in the process of manufacturing tangible personal property for sale and are not exempt from the tax." Thus, these items are not tax exempt.

3. Floor drain covers:

SCDOR argues floor drain covers that keep debris and produce from entering McEntire's floor drain system are not machines for purposes of the machine exemption. McEntire argues they are integral and necessary to processing produce because they prevent pollution of the waste water and, as such, are exempt. Because drain covers are a "mechanical device or combination of mechanical powers, parts, attachments and devices to perform some function" as provided in Regulation 117-302.5(B)(1), we find they are not tax exempt.

4. Warehouse racks, pallet flow brakes, stacking containers, and blower fans:

SCDOR argues warehouse racks, pallet flow brakes, stacking containers, and blower fans are used for storage/temperature control and are not

machines used in the processing of produce. McEntire argues Regulation 117-302.5(C)(24) finds as exempt: "Machines used to condition air (including humidification systems) for quality control during the manufacturing process of tangible personal property made from natural fibers and synthetic materials." However, Regulation 117-302.5(B)(7) states that machines used for storage, including racks used to store raw materials or finished goods, are not exempt from sales tax as machines used in manufacturing tangible personal property for sale. Thus, these items are not tax exempt.

SCDOR also argues blower fans used to control the temperature where the produce is being processed are tax-exempt but machines used outside of the manufacturing process are taxable. Thus, to prove the blower fans are substantially used in processing, McEntire had to show "more than one-third of the machine's use" was in processing fresh produce per Regulation 117-302.5(B)(1)(c). McEntire did not provide evidence as to where the blower fans are used except to say they are used in mulitple areas. Thus, blower fans are not tax exempt.

5. Water storage tanks:

SCDOR argues water storage tanks are not machines used in the processing of produce. McEntire asserts Regulation 117-302.5(C)(8) holds that "[t]anks which are a part of the chain of processing operations" are exempt. However, Regulation 117-302.5(B)(7)(b) provides that machines used for storage are taxable, including "[s]torage tanks used to store raw materials, gasses, or water." McEntire did not present evidence the tanks are used during processing. Thus, they are not tax exempt.

6. Cleaning machines and floor treatment chemicals:

SCDOR argues cleaning machines (foamers) and floor treatment chemicals are not machines used in the processing of produce. McEntire did not provide evidence regarding the specific processing equipment it cleans with foamers or whether cleaning is necessary to ensure the functioning of the equipment. Regulation 117-302.5(B)(5)(a)(i) provides for a chemical to be exempt, it must be used on an exempt machine on an ongoing and continuous basis and be essential to the functioning of the exempt machine.

Because there was no testimony the chemicals were used on any exempt machines, they are not tax exempt. Regulation 117-302.5(B)(5)(b) also provides chemicals used to clean floors and walls and non-exempt machines, like storage tanks, are not tax exempt. Thus, the floor treatment chemicals are not tax exempt.

7. General maintenance tools:

SCDOR argues the general maintenance tools used to maintain, repair, install, and uninstall equipment are not used on an ongoing and continuous basis and, thus, do not qualify for the machine exemption. Regulation 117-302.5(B)(1)(b) provides a machine is integral and necessary to the manufacturing process if it is "used on an ongoing and continuous basis during the manufacturing process." The evidence demonstrates McEntire uses its maintenance tools on an "as needed" basis. Thus, they are not tax exempt.

8. Generator rentals:

Finally, SCDOR also argues the generator rentals are not used on an ongoing and continuous basis and, thus, do not qualify for the exemption. McEntire asserted the generators are used to speed up the ripening process and change the colors of the tomatoes and they are not used year-round because some crops do not need ripening. Because they are not used on an ongoing and continuous basis, they are not tax exempt. *See* Regulation 117-302.5(B)(1)(b) (providing a machine is integral and necessary to the manufacturing process if it is "used on an ongoing and continuous basis during the manufacturing process").

While we note the decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law, this court generally gives deference to an agency's interpretation of its own statutes and regulations. *See Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676 ("The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law."); *Blue Moon of Newberry*, 397 S.C. at 260-61, 725 S.E.2d at 483 ("Although our review of these questions is de novo, we will generally give deference to an agency's interpretation of its own regulation."); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436,

440, 581 S.E.2d 836, 838 (2003) (recognizing this court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 (alteration by court) (quoting *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002)); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[T]he deference doctrine[,] properly stated[,] provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons."); *Marchant v. Hamilton*, 279 S.C. 497, 500, 309 S.E.2d 781, 783 (Ct. App. 1983) ("Administrative interpretations of statutes, consistently followed by the agencies charged with their administration and not expressly changed by Congress, are entitled to great weight."). A tax exemption statute is strictly construed against the taxpayer claiming the exemption. *TNS Mills, Inc.*, 331 S.C. at 620, 503 S.E.2d at 476. "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Se. Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)).

We find SCDOR's interpretation that each of the items at issue are not tax exempt under the machine exception to be supported by the statue and regulations it is charged with administering. Thus, the ALC erred in broadening the machine exemption beyond the statute's plain meaning. *See Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 ("Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." (quoting *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011))).

B. Machine Exemption and Pollution Control Machine Exemption

SCDOR also found items designated as "protective clothing" (coveralls, eyewear, gloves, aprons, and hairnets) were not exempt from the use tax under the machine exemption or a provision in section 12-36-2120(17), commonly referred to as the "pollution control machine exemption."

Section 12-36-2120(17)(b) provides:

> "Machines" include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which . . . (b) are necessary to comply with the order of an agency of the United States or of this [s]tate for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section.

Regulation 117-302.5(B)(10) (2012) provides:

> Protective clothing worn by an employee working in the area in which the manufacturing process occurs does not qualify as a machine and is not exempt from the tax as a machine used in manufacturing tangible personal property for sale under Section 12-36-2120(17). However, "clothing and other attire required for working in a Class 100 or better as defined in Federal Standard 209E clean room environment" is exempt under the provisions of Section 12-36-2120(54).

The pollution control regulation, Regulation 117-302.6 (2012), states in relevant part:

> Code Section 12-36-2120(17) exempts from the sales or use tax the gross proceeds of the sale of machines used in mining, quarrying, compounding, processing and manufacturing of tangible personal property and the term "machine" includes parts of such machines, attachments and replacements therefor which are used or manufactured for use on or in the operation of such machines and which are necessary to the operation of such machines and which are customarily so used[.]
> . . .

> The term "machine" as defined in Section 12-36-2120(17) shall include machines, their parts and attachments, when the same are necessary to comply with the order of an agency of the United States or of this state for the prevention or abatement of pollution that is caused or threatened by any machines used in the mining, quarrying, compounding, processing and manufacturing of tangible personal property.

The ALC concluded protective clothing falls within the parameters of clause A of the machine exemption as a "machine" because it is "necessary and integral" to McEntire's manufacturing process. To prove that protective clothing falls within clause B, the pollution control exemption of section 12-36-2120(17), the ALC held McEntire must show: "(1) the operation of at least one machine used in the manufacturing process causes or threatens to cause pollution of air, water, or noise; (2) a [s]tate or federal agency requires that the pollution be prevented or abated; and (3) [] the protective clothing is used to prevent or abate the pollution."

The ALC noted the word "pollution" is not defined in section 12-36-2120(17) but "'contamination' fits within the ordinary and dictionary definitions of pollution in the context of food." The court found "pollution" is "defined by Black's Law Dictionary as, '[t]he presence of harmful substances (either physical or gaseous), noise or energy (radiation) within a certain area, that causes harm to the surroundings, altering the natural environment around which it has been excreted.'" The court also noted "Wikipedia defines 'pollution' as 'the introduction of contaminants into the natural environment that cause adverse change.'" Also, "Dictionary.com defines 'pollution' as '1. the act of polluting or the state of being polluted, 2. The introduction of harmful substances or products into the environment.'"

The court found Dr. David Gombas, McEntire's expert witness, defined "pollution" as "any contaminant that may be injurious to the intended consumer." In the context of food safety, Dr. Gombas testified "the terms 'pollution' and 'contaminant' are synonymous and used interchangeably throughout the food manufacturing industry." Dr. Gombas also testified "protective clothing is a necessary protection against contamination or pollution . . . in any fresh cut or fresh produce handling facility; likewise, any ready-to-eat food processing facility." The court found "when asked whether the major foodborne illnesses associated with fresh produce

(E. coli, Listeria, and Salmonella) constitute 'pollution' as defined by Black's Law Dictionary, Wikipedia, and dictionary.com, Dr. Gombas answered in the affirmative and confirmed that all three of the harmful substances meet the various definitions of pollution." Further, the court noted a publication by the World Health Organization states "foodborne illnesses are caused by bacteria, viruses, parasites, or chemical substances that enter the human body through contaminated food (i.e. fruits and vegetables contaminated with feces) or water."

The court also noted McEntire was "regulated under the FDA's 21 C.F.R. §§ 110 and 117, which establish the requirements of a food safety plan and the performance of hazard analyses and lay out the preventive controls that must be instituted in order to mitigate hazards in food processing." Dr. Gombas testified "if a manufacturer does not abide by these regulations, for example if McEntire could not afford or did not provide protective clothing to prevent contamination, then the manufacturer would be operating in violation of the law." The ALC then found protective clothing, including coveralls, eyewear, gloves, aprons, and hairnets, fell within the pollution control machine exemption under the Integrated Plant Concept as within the scope of McEntire's manufacture of fresh produce because it is mandated by the FDA and the SCDA and "is used for health and safety reasons to protect the product, the consumer, and the general public from foodborne illness."

However, Regulation 117-302(B)(10) provides: "Protective clothing worn by an employee working in the area in which the manufacturing process occurs does not qualify as a machine and is not exempt from the tax as a machine used in manufacturing tangible personal property for sale under Section 12-36-2120(17)." Thus, because protective clothing is not considered a machine for purposes of the machine exemption, we find protective clothing is not exempt from use tax as a machine used in processing or manufacturing.

The Regulation does provide there is an exception for "clothing and other attire required for working in a Class 100 or better as defined in Federal Standard 209E clean room environment." However, the ALC found it could not conclude, based on the limited amount of testimony provided, that McEntire's purchases of protective clothing during the audit period should be exempt from tax based on the Class 100 or better Clean Room Exemption. The SCDOR auditor testified she denied McEntire the pollution control exemption under the class 100 because it did not provide her with adequate evidence that it met the standard.

We find SCDOR's interpretation that protective clothing is not tax exempt under the machine exemption or the pollution control machine exemption is supported by the statute and regulations it is charged with administering. Thus, the ALC erred in broadening the exemptions beyond the statute's plain meaning. *See Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 ("Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." (quoting *Epstein*, 393 S.C. at 285, 711 S.E.2d at 917)).

CONCLUSION

Accordingly, the order of the ALC is

REVERSED.[6]

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

[6] We decide this case without oral argument pursuant to Rule 215, SCACR.