The Supreme Court of South Carolina

In the Matter of Clyde L. Pennington, Jr., Respondent.

ORDER

On October 13, 2008, respondent was definitely suspended from the practice of law for two (2) years. In the Matter of Pennington, Op. No. 26551 (S.C. Sup. Ct. filed October 13, 2008) (Shearouse Adv. Sh. No. 38 at 28). Accordingly, we hereby appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that W. Reid Cox, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Cox shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Cox may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that W. Reid Cox, Esquire, has been duly appointed by this Court.

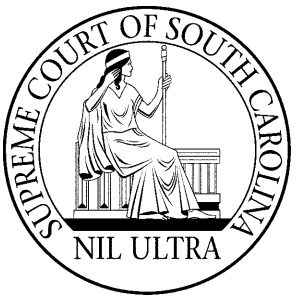
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that W. Reid Cox, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Cox's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

October 21, 2008



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
October 27, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samantha D. Farlow, Respondent.

Opinion No. 26352
Filed June 25, 2007
Rehearing Denied July 19, 2007
Refiled October 27, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jason B. Buffkin, of West Columbia, for Respondent.

PER CURIAM: In contemplation of filing a Petition for Reinstatement, respondent discovered a scrivener's error in the Court's original opinion in this matter. The Court reissues its opinion as follows.

In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE. Respondent requests that if a suspension is imposed, it be made retroactive to the date of her interim suspension. See In the Matter of Farlow, 369 S.C. 48, 631 S.E.2d 75 (2006). We accept the agreement and find a two year suspension from the practice of

law is the appropriate sanction. The suspension shall not be made retroactive to the date of respondent's interim suspension.

FACTS

The facts, as set forth in the agreement, are as follows. Respondent pled guilty to one count of accommodation distribution of marijuana without remuneration, in violation of 21 U.S.C. §§ 841(b)(1)(D) and 841(b)(4), and one count of possession of methylenedioxymethamphetamine hydrochloride, also known as "ecstasy," in violation of 21 U.S.C. § 844(a). Respondent was sentenced to six months' imprisonment on each count, to be served concurrently.[1] It was also ordered that, upon release, respondent be under supervision for one year, six months of which must include participation in the home confinement program with electronic monitoring.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent also admits her misconduct constitutes grounds for discipline under Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, to bring the courts or legal profession into disrepute, or demonstrate an unfitness to practice law) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

[1] At the sentencing hearing, it was also determined respondent had given perjured testimony in the trial of another individual. The acts that gave rise to both the criminal charges against respondent and the finding of perjury occurred prior to respondent's admission to the practice of law.

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for two years. The suspension shall not be made retroactive to the date of respondent's interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court. In addition, as set forth in the agreement, respondent shall, within thirty (30) days of the date of this opinion, pay $861.88 for costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Blaine T. Edwards, Respondent.

Opinion No. 26556
Submitted September 29, 2008 – Filed October 27, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Blaine T. Edwards, of Greenville, pro se.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR.

FACTS

Respondent is licensed to practice law in South Carolina, the United States District Court for the District of South Carolina (USDC), and the United States Bankruptcy Court for the District of South Carolina (Bankruptcy Court). On August 16, 2006, the Court placed respondent on interim suspension. In the Matter of Edwards, 370 S.C. 74, 634 S.E.2d 645 (2006). As a result of his interim

suspension, the USDC automatically suspended respondent on August 29, 2006. See Local Rule 83.I.08 (D.S.C. (RDE Rule II(G)) ("If an attorney admitted to practice before [the USDC] is disbarred or suspended by the Supreme Court of South Carolina, [the USDC] shall immediately order the identical disciplinary actions…."). On September 20, 2006, the Bankruptcy Court suspended respondent as a consequence of his suspension before the USDC. See Local Rule 83.IX.02 ("Pursuant to Bankruptcy Rule 9029m the Bankruptcy Judges of this District are hereby authorized to make such rules of practice and procedure as they may deem appropriate; provided, however, that in promulgating the rules governing the admission or eligibility to practice in the Bankruptcy Court, the Bankruptcy Judges shall require District Court admission ….").

In the meantime, in connection with actions filed by Gary and Dana Henderson and James and Kathryn Henson, the Bankruptcy Court had issued an order requiring respondent to appear to explain his failure to provide competent and diligent representation to the Hendersons and the Hensons, to show cause why his fees should not be disgorged, and to show cause why further sanctions should not be imposed including, but not limited to, suspension from practice before the Bankruptcy Court and/or disgorgement of fees in other cases. See Bankruptcy Court order dated August 25, 2006.

Respondent appeared before the Bankruptcy Court on August 31, 2006 hearing. By order dated September 5, 2006, the Bankruptcy Court found respondent had failed to file documents by the required deadlines which resulted in the dismissal of the Hendersons' and Hensons' bankruptcy petitions and ordered respondent to disgorge his attorney's fees within five (5) days. The judge continued the Rule to Show Cause hearing to consider other sanctions until September 21, 2006.

Respondent did not appear at the Rule to Show Cause hearing. On October 4, 2006, the Bankruptcy Court issued an order again requiring respondent to disgorge the balance of fees received

from the Hendersons and Hensons within ten (10) days.[1] In particular, the court noted:

> [i]nasmuch as [respondent] is presently suspended from practice before this [Bankruptcy] Court, as a consequence of the [August 29, 2006 USDC] suspension, the [Bankruptcy] Court need not take further immediate action regarding his ability to currently practice in this [Bankruptcy] Court, except that [respondent's] suspension from practice before this [Bankruptcy] Court shall continue, regardless of reinstatement by the [USDC], until further order of this [Bankruptcy] Court…Reinstatement to practice before this [Bankruptcy] Court may be conditioned upon his compliance with orders of this [Bankruptcy] Court and such other conditions as this [Bankruptcy] Court may impose.

(Underline added).

The Bankruptcy Court continued the first Rule to Show Cause hearing and issued a second Rule to Show Cause order directing respondent to appear on October 19, 2006 "to show cause why further sanctions should not be imposed or limits placed on his ability to gain reinstatement to practice before this [Bankruptcy] Court based upon his representation of [the Hendersons and Hensons] in these cases and in all other cases filed in this [Bankruptcy] Court in which he failed to file documents on behalf of his clients."

(Underline added).

Respondent appeared for the show cause hearings on October 19, 2006. The Bankruptcy Court's October 24, 2006 order provides:

> [t]he [Bankruptcy] Court orders that [respondent] shall be suspended from practice before this [Bankruptcy] Court,

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[1]Respondent had repaid a portion of the fees to the Henderson and Hensons.

> notwithstanding any intervening reinstatement by other courts within this District, until such time as [respondent] brings a motion for reinstatement to practice….The motion for reinstatement shall be heard by the undersigned as Chief Bankruptcy Judge for this District who may place conditions and limitations on [respondent's] ability to be reinstated to practice before this [Bankruptcy] Court, including, but not limited to [respondent] complying with the orders of this [Bankruptcy] Court disgorging his attorney's fees to his clients, [respondent] demonstrating that he is able to provide competent and diligent representation to clients, and [respondent] attending continuing legal education classes in the area of ethics and bankruptcy.[2]

(Underline added).

The Bankruptcy Court amended its October 4, 2006 order to reflect the additional conditions regarding respondent's suspension before the court. It dissolved the two Rules to Show Cause, but stated the orders concerning disgorgement of fees remained in effect.

On June 9, 2008, ODC filed a certified copy of the Bankruptcy Court's January 4, 2007 Supplemental Order in In re Storay. In that order, the Bankruptcy Court discussed respondent's failure to pursue thirty (30) bankruptcy petitions, the resulting dismissal of twenty-four (24) of the cases, respondent's concession that he had no funds to repay the twenty-four (24) clients' retainers, and his agreement that he should be required to repay the twenty-four (24) clients, with interest, before reinstatement by the Bankruptcy Court. The Bankruptcy Court's order provides:

> It is therefore ordered that [respondent] shall repay to the debtors in the 24 cases which were dismissed as a result of his failure to file schedules and statements all of the fees, including filing fees,

[2] The order specifies that respondent agreed to the terms of the order.

> paid to him by the debtors in those cases. [Respondent] shall also pay interest on those fees from October 16, 2005, until the date of repayment at the rate of eight and one-half percent *per annum*. In the event that [respondent] seeks reinstatement to practice before this [Bankruptcy] Court, he shall first be required to produce satisfactory proof of payment of the fees ordered to be repaid herein. [Respondent] shall also provide twenty-day (20) written, advance notice to the debtors in the 24 dismissed cases of any application seeking reinstatement to practice before this [Bankruptcy] Court so that the debtors may have the opportunity to be heard on the merits of the application. This Order supplements the terms in conditions regarding [respondent's] ability to gain reinstatement to practice before this [Bankruptcy] Court as set forth in In re Henderson, C/A/ No. 05-14925-W, slip or. (Bankr. D.S.C. Oct. 24, 2006).[3]

Bankruptcy Court Supplemental Order dated January 4, 2007.

Pursuant to Rule 29(b), RLDE, the Clerk provided the Office of Disciplinary Counsel (ODC) and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline was not warranted. ODC filed a response stating the Bankruptcy Court's suspension was equivalent to a definite suspension of up to two years under Rule 7(b), RLDE, and, further, that it had no information to indicate that the issuance of the same discipline by the Court would not be warranted. Respondent filed a response stating that Rule 29 is inapplicable because reciprocal discipline only applies when discipline has been issued by a court physically located outside of South Carolina.

[3] The August 25, 2006, September 5, 2006, October 4, 2006, October 24, 2006, and January 1, 2007 Bankruptcy Court orders were issued by John E. Waites, Chief Bankruptcy Judge for the USDC.

LAW

Rule 29(a), RLDE, provides that "[u]pon notification from any source that a lawyer within the jurisdiction of the Commission [on Lawyer Conduct] has been disciplined …in another jurisdiction, disciplinary counsel shall obtain a certified copy of the disciplinary order and file it with …the Supreme Court." After receipt of the certified order "demonstrating that a lawyer admitted to practice in this state has been disciplined…in another jurisdiction," the Court is required to issue a notice to the lawyer and ODC seeking a response concerning whether identical discipline is warranted. Rule 29(b), RLDE.

Rule 29(d), RLDE, further provides that, after the expiration of the time for a response, the Court shall impose identical discipline unless the attorney or ODC demonstrate or the Court finds that "it clearly appears upon the face of the record from which the discipline is predicated" that the identical discipline is improper for one of several stated reasons including: 1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; 2) infirmity of proof of the misconduct; 3) imposition of the same discipline by the Court would result in grave injustice; 4) the established misconduct warrants substantially different discipline in this state; and 5) the reason for the original transfer to incapacity inactive status no longer exists.

Rule 29, RLDE, authorizes this Court to impose reciprocal discipline on a lawyer who was disciplined "in another jurisdiction." Contrary to respondent's assertion, Rule 29 does not require that the other jurisdiction be located outside the borders of this State in order for its provisions to apply. Moreover, on at least one occasion, the Court has imposed reciprocal discipline on a lawyer who was sanctioned by the same Bankruptcy Court which disciplined respondent in the instant matter. In the Matter of Hood, 367 S.C. 29, 625 S.E.2d 210 (2006).

In summary, the Bankruptcy Court's orders: 1) directed that respondent remain suspended, regardless of his reinstatement by the USDC and 2) ordered him to repay all of the fees, including filing fees, (plus interest) paid by the twenty-four (24) bankruptcy clients. See October 24, 2006 Bankruptcy Court order and January 4, 2007 Bankruptcy Court order. The orders further required that, if respondent seeks reinstatement, he must 1) provide proof of restitution to the twenty-four (24) clients, 2) provide twenty (20) days advance notice of his application to seek reinstatement, and 3) appear before the Chief Bankruptcy Judge. See October 24, 2006 and January 4, 2007 Bankruptcy Court orders.

We find that the sanction imposed by the Bankruptcy Court is most similar to a two (2) year definite suspension with the requirement of repayment of unearned attorney's fees or costs under the RLDE. See Rules 7(b) (sanctions) and 33 RLDE (provisions regarding reinstatement following definite suspension from nine months to two years). Further, we find that the same sanction is proper as reciprocal discipline in this matter. See generally In the Matter of Drayton, 359 S.C. 138, 597 S.E.2d 791 (2004) (indefinite suspension appropriate where lawyer failed to refund unearned fee to bankruptcy client, failed to timely withdraw from representation of clients in bankruptcy court, and committed other misconduct); In the Matter of Gaines, 348 S.C. 208, 559 S.E.2d 577 (2002) (Court noted two year suspension would be appropriate for lawyer's lack of diligence in client matters and submission of improper documents to courts, among other misconduct, but disbarred lawyer due to his previous disciplinary history); In the Matter of Strait, 343 S.C. 312, 540 S.E.2d 460 (2000) (six month and one day suspension appropriate for lawyer's failure to diligently represent two domestic clients and failure to submit paperwork for bankruptcy client, resulting in dismissal of case, among other misconduct); In the Matter of Jones, 340 S.C. 388, 532 S.E.2d 281 (2000) (thirty day suspension appropriate where lawyer failed to enter responsive pleading resulting in default judgment and committed other misconduct). Accordingly, we hereby suspend respondent from the practice of law in this state for two (2) years, retroactive to August 16, 2006, the date of his interim suspension. In the Matter of Edwards,

supra. In addition, respondent shall repay the twenty-four bankruptcy clients as ordered by the Bankruptcy Court's orders. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lakefhia McCrea, Petitioner,

v.

Jafer Gheraibeh, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 26557
Heard May 29, 2008 – Filed October 27, 2008

REVERSED

Edward L. Graham, of Graham Law Firm, of Florence, for Petitioner.

C. Anthony Harris, Jr., of Harris McLeod & Ruffner, of Cheraw, for Respondent.

CHIEF JUSTICE TOAL: In this case, the trial court denied Petitioner's *Batson* motion finding that Respondent's counsel's exercise of a peremptory strike based on a juror's display of dreadlocks was not racially motivated. The court of appeals affirmed the trial court's decision and this Court granted certiorari. We reverse the decision of the court of appeals

upholding the denial of Petitioner's *Batson* motion and remand the case for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Lakhefia McCrea brought suit seeking compensation for bodily injuries and vehicular damage sustained in an automobile accident in which Respondent Jafer Gheraibeh was the at-fault driver. Following Respondent's strike of three of six potential African-American jurors during jury selection, Petitioner moved for a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that Respondent's strikes of the African-American jurors were racially motivated and therefore impermissible.

At the *Batson* hearing, the trial court asked Respondent his reason for striking a particular African-American juror. Respondent's counsel explained:

> Your Honor, I had some uneasiness about [this particular juror]. He was – I of course have to look at jurors in light of how I think they're going to judge my client as well. I had some uneasiness about him. I don't know if Your Honor recalls or not. He has – he's about the only member of the jury I see out there with very long dreadlocks. That gave me some concern in light of how he may react toward my client. It was – as Your Honor knows, sometimes in selecting a juror there's a sense or – or in deciding whether or not to strike someone there's necessarily a sense of a feel about a juror and – and that gave me some pause . . . was his appearance including – including the dreadlocks.

After hearing counsel's explanation for striking the other two African-American jurors, Petitioner indicated that her main concern was the strike of

the juror with dreadlocks.[1] Specifically, Petitioner argued that Respondent's counsel's "uneasiness" over the display of dreadlocks was not a sufficient basis to exercise a discretionary strike, and that when considered along with Respondent's strike of two other African-American jurors, counsel's "uneasiness" over the juror's dreadlocks amounted to pretext.

The trial judge explained that in ruling on Petitioner's *Batson* motion, he had to evaluate the credibility of the attorneys. Stating that he knew both of the attorneys and was aware of their reputations in the community, the trial judge concluded that while some attorneys he knew might be inclined to exercise a racially-motivated jury strike, he did not believe that Respondent's attorney would engage in such conduct.

The jury returned a verdict in favor of Petitioner for $5,985 in personal injury damages and $5,000 in property damages. The trial court denied Petitioner's post-trial motions for judgment notwithstanding the verdict, a new trial absolute, and a new trial *nisi additur*, and entered judgment on Petitioner's behalf for $6,887.25 after reducing the verdict amount by $4,097.75 for the amount Respondent had previously paid.

Petitioner appealed on multiple grounds and the court of appeals affirmed the trial court's decision. *McCrea v. Gheraibeh*, Op. No. 2006-UP-072 (S.C. Ct. App. filed Feb. 2, 2006). Regarding the trial court's denial of Petitioner's *Batson* motion, the court of appeals held that counsel's concern regarding the juror's appearance and his dreadlocks was a racially-neutral explanation for the strike. *Id.* The court further reasoned that the decision to wear an alternative hairstyle is not specific to any race, and therefore, no discriminatory intent was inherent in counsel's explanation. *Id.*

This Court granted certiorari to review the decision of the court of appeals and Petitioner raises the following issue for review:

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[1] Respondent's counsel explained that the two additional prospective African-American jurors were struck on the respective bases of (1) being retired, and (2) having a criminal domestic violence charge, although the juror was later found not guilty.

Did the court of appeals err in affirming the trial court's denial of Petitioner's *Batson* motion?

LAW/ANALYSIS

Petitioner argues that the trial court erred in denying her *Batson* motion because Respondent's peremptory strike of a juror for wearing dreadlocks was racially motivated. We agree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). Following the United States Supreme Court's decision in *Purkett v. Elem*, 514 U.S. 765 (1995), this Court clarified the three-step method for executing a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996). Under the method articulated in *Adams*, a trial court must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing. 322 S.C. at 124, 470 S.E.2d at 372. At the hearing, the proponent of the strike must offer a facially race-neutral explanation for the strike. Then, in a final step, the burden shifts to the party challenging the strike to show that the explanation is mere pretext. *Id.*

In modifying this Court's previous brand of *Batson* analysis, *Adams* emphasized the lack of any requirement for counsel to present a reasonably specific, legitimate explanation for making the strike in the second step of the analysis. *Id.* at 123, 470 S.E.2d at 371. Rather, following the lead of *Purkett*, this Court declared that the second step of a *Batson* inquiry only required that counsel's explanation be race-neutral in order to ensure that the burden of showing purposeful discrimination remains at all times on the opponent of the strike. *Id.* at 124, 470 S.E.2d at 372.

While we recognize the importance of properly allocating the burden of proof in a *Batson* inquiry, in our view, counsel's explanation that he struck the particular juror based simply on counsel's "uneasiness" over the juror's

dreadlocks was not a race-neutral reason for exercising a peremptory strike. Regardless of their gradual infiltration into mainstream American society, dreadlocks retain their roots as a religious and social symbol of historically black cultures.[2] For this reason, we hold that counsel's explanation that the juror's dreadlocks caused him "uneasiness" was insufficient to satisfy the race-neutral requirement in the second step of the trial court's *Batson* analysis. *See also Payton v. Kearse*, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998) (holding that basing a peremptory strike on a characterization of the juror as a "redneck" is facially discriminatory in violation of *Batson*).

By proceeding with a pretext inquiry under *Batson* without first eliciting a race-neutral reason for the strike from Respondent's counsel, and ultimately dismissing Petitioner's *Batson* motion based solely on the reputation of counsel making the strike, we find that the trial court bypassed an evidentiary requirement that goes to the very heart of a *Batson* inquiry.[3] For this reason, we hold that the trial court erred in denying Petitioner's *Batson* motion.

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[2] For this reason, we would distinguish *Purkett*, which determined that the exercise of a peremptory strike because a juror's "long, unkempt hair" looked "suspicious" was constitutionally permissible. While we agree that the growing of long, unkempt hair is not associated with any race, we find that counsel's specific reference to the juror's hair as "dreadlocks" in conjunction with an otherwise vague explanation for the strike, carries with it an inherently discriminatory intent. *See Purkett*, 514 U.S. at 768 (deeming an explanation for a strike race-neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation").

[3] In this same way, we believe that the dissent's analysis improperly focuses on the issue of pretext in the third step of *Batson* when the real issue, in our view, is Respondent's counsel's failure to first meet the requirement of race-neutrality in the second step of *Batson*.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals affirming the trial court's denial of Petitioner's *Batson* motion and remand the case for a new trial.

BEATTY, J., and Acting Justice J. Michelle Childs, concur. MOORE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE MOORE: I respectfully dissent. I would affirm the trial court's ruling that petitioner failed to meet her burden of showing that trial counsel's reason for striking the juror was pretextual.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the striking of a venire person on the basis of race or gender. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2001), *cert. denied*, 128 S.Ct. 662 (2007). The proper procedure for a Batson hearing is set forth in Evins, at 415, 645 S.E.2d at 909. After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. Id. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. Id. The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike. Id.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001), *cert. denied*, 534 U.S. 977 (2001). Typically, the decisive question is whether the attorney's race-neutral explanation for a peremptory challenge should be believed. Evins, at 415-416, 645 S.E.2d at 909. There is seldom much evidence in the record bearing on the issue, and the trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Id. Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and evaluation of the attorney's mind lies peculiarly within a trial judge's province. Shuler, at 615, 545 S.E.2d at 810 (citing Hernandez v. New York, 500 U.S. 352 (1991). Therefore, those findings are given great deference and will not be set aside unless clearly erroneous. Evins, at 416, 645 S.E.2d at 910.

In my opinion, the court of appeals correctly found that respondent's reason for striking the juror was race-neutral pursuant to Purkett v. Elem, 514 U.S. 765 (1995). In Purkett, the United States Supreme Court found that a

prosecutor's explanation for striking an African-American juror was race-neutral where the prosecutor explained that he struck the juror because he had "long, unkempt hair, a mustache, and a beard." The prosecutor had further explained that he did not "like the way [the juror] looked," and that the mustache and beard looked suspicious to him. Thus, the United States Supreme Court approved the challenge of a prospective African-American juror solely on the basis of his appearance. The United States Supreme Court noted that the growing of long, unkempt hair is not peculiar to any race. Id. at 769.

Furthermore, I believe that the court of appeals properly noted that the decision to wear an alternative hairstyle is not specific to any race. See Hastings v. Cambra, 2000 WL 307473 (N.D. Calif. 2000) (finding that striking a proposed African-American juror because he had dreadlocks is a reasonable and race-neutral reason for the strike); State v. Bolton, 49 P.3d 468 (Kan. 2002) (upholding the trial court's decision finding no purposeful discrimination for striking a prospective African-American juror who wore hair braids). Just as the United States Supreme Court similarly noted in Purkett, the decision to wear one's hair in the dreadlocks hairstyle is not peculiar to any race. In other cultures and more often in the past, the hairstyle has been worn as a religious choice by, for example, Hindus and Rastafarians, and is unrelated to race. In recent years, the wearing of the dreadlocks hairstyle has been practiced by both African-Americans and Caucasians, but more often by African-Americans. I would find that the choice to wear dreadlocks is a choice to wear an alternative hairstyle and is not limited to one particular race and that the trial judge therefore appropriately determined respondent's reason for striking the juror was race-neutral. See Purkett at 769 (a legitimate reason for exercising a challenge is not a reason that makes sense but a reason that does not deny equal protection).

In the instant case, after finding the reason for the strike was race-neutral, the trial judge then properly proceeded to determine whether petitioner could meet the burden of showing the explanation was actually mere pretext. Petitioner argued that having dreadlocks and making respondent's attorney uneasy was not a sufficient basis for a discretionary

strike. The judge found that, based on his evaluation of respondent's attorney's reputation and credibility, petitioner had not met her burden of showing pretext. In my view, petitioner's cursory argument, without more, does not meet her burden of showing that the reason given for the strike was so fundamentally implausible as to constitute mere pretext, and thus, because the trial court's finding is not clearly erroneous, it may not be set aside. See Evins, at 416, 645 S.E.2d at 909 (demeanor of the challenged attorney will be the best and only evidence of discrimination, and the evaluation of the attorney's mind lies peculiarly within a trial judge's provide; therefore, this finding is given great deference and will not be set aside unless clearly erroneous); Shuler, at 615, 545 S.E.2d at 810 (same).

For these reasons, I would affirm the Court of Appeals' decision upholding the trial court's ruling.

PLEICONES, J., concurs

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Onrae Williams, Appellant.

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

Opinion No. 4447
Heard September 18, 2008 – Filed October 22, 2008

AFFIRMED

Mark A. Peper, of Charleston, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Scarlett Wilson, of Charleston, for Respondent.

HUFF, J.: Onrae Williams was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school. Based upon two prior "serious" convictions, the trial court sentenced Williams to life imprisonment without the possibility of parole on both charges. On appeal, Williams asserts error in (1) the trial court's refusal to allow him to impeach the testimony of the confidential informant with evidence of several former convictions that were older than ten years and (2) the trial court's sentencing of him to life without parole (LWOP) in violation of his constitutional protection from cruel and unusual punishment. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case involves a controlled buy set up by the City of Charleston Police Department using a confidential informant (CI). On August 10, 2004, officers met with the CI, searched him to insure he had no contraband on his person, provided him with money, and equipped him with a button camera capable of capturing video. Because there had been numerous complaints about drug activity near Harmon Park, the CI was taken close to that area with a bicycle, which the CI then used to ride into the area. Following along with the videotape of the incident admitted into evidence, Officer Womack indicated where the CI came in contact with someone, and ultimately completed a drug transaction approximately one hundred yards away from Burke High School. Officer Womack testified he maintained a constant visual on the CI during the entire process, as well as a constant audio transmission. When the informant was searched before being let out to make the buy, he had no drugs on him. When he returned, the CI had crack cocaine in his hand.

Officer Hurteau, who was present with Officer Womack at the controlled buy, also testified as the video of the incident was played to the jury. He testified the CI was not working off charges, but was a paid informant. Officer Hurteau pointed out on the video an individual on a fence who was talking on a cell phone and yelled out "Onrae," and that one could then observe Williams walking up from the fence area. He then noted where

the CI hands Williams money. Williams is off the camera for a moment and then reappears, approaching the CI, at which point Williams is referred to as "On." Williams is seen holding something in his hand, which he places in the CI's hand, and then walks away. When the CI returned to Officer Hurteau's location, he handed him two, off-white rock-like substances. Officer Jenkins, who was also present in the area, testified he was on perimeter duty during the controlled buy and he observed Williams with another man near the fence as the CI approached the area. After reviewing the video of the incident, Officers Hurteau and Womack, as well as Officer Jenkins, "all immediately without hesitation recognized him and said that was Onrae Williams."

The CI also testified to the events of that day. As with Officers Womack and Hurteau, he followed along with the videotape of the event, identifying Onrae Williams on the tape and noting the completion of the transaction where Williams handed him drugs in exchange for money. He testified that after Williams handed him the drugs, he got back on the bicycle and rode back to the police officers and gave them the drugs. The CI confirmed that the officers searched him before the transaction, as well as upon his return. Subsequent analysis of the item showed it to be .3 grams of crack cocaine.

At the start of the case, Williams made an in limine motion seeking to admit evidence of several prior convictions of the CI that were greater than ten years old. Specifically, Williams sought to introduce evidence of the CI's 1988 conviction for armed robbery, for which he was released from prison on August 1, 1996, as well as several forgeries and a larceny that occurred around 1981 and 1982. Williams argued the CI's credibility was key to the trial as the video was not completely clear, and that under Rule 609(b), SCRE, the jury should have this information in the interest of justice. Williams also noted the CI had a 2002 conviction for receiving stolen goods, showing the CI has continued to break the law. Finally, Williams maintained that the matter had been pending for about a year, and had the State tried the case within the first six months, the armed robbery conviction would have fallen within the ten year limit under the rule. He argued it was the State's delay in bringing the case that caused the ten-year period to expire between

the time of his arrest and the trial, as his arrest occurred in January 2005, a time within the ten-year period. Williams acknowledged, however, that he had not made a motion for a speedy trial.

The trial court noted Williams would be able to challenge the CI's credibility with the prior conviction for receiving stolen goods. It found no reason under the facts of this case to extend the time limit for the other convictions beyond the cut-off date under the rule, but stated it would rule on the matter after Williams proffered the evidence.

During the CI's direct examination, he admitted to having a 2002 conviction for receiving stolen goods. During the CI's cross-examination, counsel questioned why the CI would become a confidential informant. The CI stated it was "[t]o try to keep 'em from hurting people," and that it was not always about the money he received. Counsel then asked the CI about his conviction for receiving stolen goods and asked whether that did not hurt people as well. Counsel continued with this line of questioning, asking how long the CI had been working as a confidential informant at which point the following colloquy occurred:

> [Counsel]: But it had nothing to do with the money?
>
> [CI]: No, it ain't about the money. I had money, you know. It was about the drug deals. I figure it's about time to make a change now. I've done spent half of my life in the penitentiary.
>
> [Counsel]: You've spent half your life in prison?
>
> [CI]: Yeah.
>
> [Counsel]: And now you've turned your life around?
>
> [CI]: Trying to.
>
> [Counsel]: It was time to make a change?

[CI]: It was time to make a change, for sure.

[Counsel]: You're an honest man now?

[CI]: I ain't going to say honest because I trip up sometimes.

Thereafter, defense counsel asserted the CI opened the door to testimony concerning his older prior convictions when he stated he had spent half of his life in the penitentiary. The court noted Williams had already received a benefit by that answer to the question, and still found no exceptional circumstances in light of the CI's testimony that would warrant allowing convictions outside the time limit, but allowed counsel to proffer the evidence. Outside the jury's hearing, the CI admitted he had a 1988 conviction for armed robbery for which he served time and was released in August 1996. He further acknowledged a 1982 larceny conviction resulting in a two-year sentence, suspended to six months, as well as some forgeries and a housebreaking conviction in 1982 for which he received a ten-year sentence. The solicitor objected to introduction of the prior convictions, arguing it was not probative, it was unduly prejudicial, and defense counsel had already accomplished his goals through the testimony he elicited from the CI. The trial court ruled the circumstances did not warrant allowing the older prior convictions, and the issue was resolved by the CI's answers on cross-examination.

The jury found Williams guilty of the distribution and proximity charges. The solicitor stated Williams had several previous convictions, including a 2000 possession with intent to distribute cocaine and a proximity charge, as well as a possession of crack charge, and in 2003 had distribution of marijuana, distribution of cocaine, proximity, and possession of cocaine charges. The court noted Williams had at least two previous serious offenses such that this offense would qualify as a third. Defense counsel agreed and further stated he did not believe the court had "much discretion" as far as sentencing, but placed an objection on the record to a life without parole sentence. Counsel maintained such a sentence would constitute cruel and unusual punishment as this was a drug crime and not a violent crime. He argued, in this case, life without parole would be excessive, unduly severe,

and would violate the due process clause. The court sentenced Williams to life without parole on both offenses. This appeal followed.

LAW/ANALYSIS

A. Prior remote convictions

Williams first contends the trial court erred by refusing to allow evidence of the CI's former convictions for armed robbery, larceny, forgery and housebreaking. He argues the trial court erred in failing to admit this evidence because (1) the CI opened the door to the evidence by stating he spent half his life in prison and (2) the court failed to apply the proper balancing test in ruling Williams could not challenge the CI's credibility pursuant to Rule 609, SCRE. We find no reversible error.

The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000). Further, any error in the trial court's failure to conduct the proper balancing test in determining whether remote convictions are admissible may be harmless. State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). To constitute error, the trial court's ruling to admit or exclude evidence must affect a substantial right. Id.; Rule 103(a), SCRE. Error is considered harmless where it could not reasonably have affected the outcome of the trial. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." Id. (citations omitted). In determining whether error is harmless, the circumstances of each individual case are to be considered. Id.; Johnson, 363 S.C. at 60, 609 S.E.2d at 524.

Even assuming arguendo that the trial court failed to apply the proper balancing test or that the court erred in refusing to admit the evidence based on the CI's opening door, we find any such error would be harmless. Here, contrary to Williams' assertion, the CI was not the only witness for the State who could identify him and place him at the scene. Officer Hurteau testified, while following the videotape, that you could hear an individual at the scene yelling out the name "Onrae," and at a later point on the tape noted Williams is referred to as "On." He further indicated you could observe Williams on the videotape and also could see Williams holding a small substance in his hand, which he places in the CI's hand. Officer Jenkins, who was on perimeter duty during the controlled buy, testified he observed Williams with another man near the fence as the CI approached the area. Officer Womack testified he maintained a constant visual on the CI during the entire process, and that the CI was searched before being let out to make the buy and had no drugs on him, but had crack cocaine in his hand when he returned. Finally, after reviewing the video of the incident, Officer Hurteau testified he and Officer Womack, as well as Officer Jenkins, all immediately and without hesitation recognized Onrae Williams as the individual who sold the drugs to the CI.[1]

Further, the CI was already impeached with admission of his conviction of receiving stolen goods, a crime the CI acknowledged before the jury was a crime of dishonesty. The CI's credibility was clearly called into question by this, along with his admission he had spent half of his life in the penitentiary and his refusal to characterize himself as honest. See State v. Cooper, 312 S.C. 90, 92, 439 S.E.2d 276, 277 (1994) (holding any error in excluding evidence of witness' prior bad acts harmless, where witness was thoroughly impeached by admission of numerous previous convictions and acknowledgment his testimony was given for favorable treatment on pending charges), *overruled in part on other grounds by* Franklin v. Catoe, 346 S.C. 563, 575, 552 S.E.2d 718, 725 (2001); State v. Tillman, 304 S.C. 512, 520, 405 S.E.2d 607, 612 (Ct. App. 1991) (finding, where witness was thoroughly impeached by admission of numerous prior convictions and his

[1] We note our review of the video exhibit supports the officers' testimony.

acknowledgment that he was testifying under an agreement to receive favorable treatment on some outstanding charges, any error in excluding evidence of a particular crime he might have committed was harmless).

Aside from the CI's testimony, there is evidence of record placing Williams at the scene and identifying him as the individual engaged in the drug transaction with the CI. There is also evidence showing the CI, while under constant visual, returned with drugs that he did not have when he left the officers. Given all this evidence, along with the fact that the CI was thoroughly impeached by evidence of his crime of dishonesty and his admissions he had spent half of his life in jail and that he would not characterize himself as honest, we find exclusion of the CI's remote convictions could not reasonably have affected the result of the trial. Considering the circumstances of this case, we therefore conclude any possible error in the exclusion of the evidence is harmless.

B. LWOP sentence

Williams next contends the trial court erred in sentencing him to life in prison without parole in violation of his constitutional protection from cruel and unusual punishment. He asserts, under State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), cert. denied, 128 S.Ct. 1872 (2008), the two principles to consider in determining whether a punishment is cruel and unusual are (1) the evolving standards of decency that mark the progress of a maturing society and (2) the proportionality between the punishment and the offense. He argues an LWOP sentence for distribution of less than half a gram of a controlled substance is inconsistent with evolving standards of contemporary values. Williams further asserts an LWOP sentence under the recidivist statute is grossly disproportionate to the punishment deserved for distribution of less than half a gram of cocaine, especially where the first conviction used to qualify him for LWOP was committed as a juvenile. We disagree.

Section 17-25-45(B) of the South Carolina Code requires that "upon a conviction for a serious offense . . . a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two

or more prior convictions for: (1) a serious offense." S.C. Code Ann. § 17-25-45(B) (2003).

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIII. The cruel and unusual punishment clause requires that the duration of a sentence not be grossly disproportionate with the severity of the crime. State v. McKnight, 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003).

Most recently, our courts have recognized that "what constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by 'evolving standards of decency that mark the progress of a maturing society.'" State v. Pittman, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007), cert. denied, 128 S.Ct. 1872 (2008) (quoting State v. Standard, 351 S.C. 199, 204, 569 S.E.2d 325, 328 (2002)). In implementing this test, the court looks to objective evidence of how our society views a particular punishment today. State v. Wilson, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). Legislation enacted by the country's legislatures is the "clearest and most reliable objective evidence of contemporary values." Pittman, 373 S.C. at 563, 647 S.E.2d at 162. "[T]he Constitution requires the court's own judgment to be brought to bear on the issue by 'asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.'" Id. at 563, 647 S.E.2d at 163 (quoting Atkins v. Virginia, 536 U.S. 304, 313 (2002)). It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it. Wilson, 306 S.C. at 510, 413 S.E.2d at 26.

Additionally, the "'proportionality' bedrock of Eighth Amendment jurisprudence" is equally important a principle as the "evolving standards of decency," and "'it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Pittman, 373 S.C. at 564-65, 647 S.E.2d at 163 (quoting Atkins, 536 U.S. at 311). In order to establish that evolving standards of decency preclude his punishment, appellant bears the "'heavy burden' of showing that our culture and laws emphatically and

well nigh universally reject it." Id. at 565, 647 S.E.2d at 164 (quoting Harris v. Wright, 93 F.3d 581, 583 (1996)).

In State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002), our supreme court found, based upon sentences imposed in other cases, that lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment, and that an enhanced sentence based upon a prior "most serious" conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment. Id. at 205-06, 569 S.E.2d at 329. Accordingly, Standard's sentence of LWOP based on a previous "most serious" armed robbery conviction when he was seventeen and his subsequent "most serious" conviction of burglary in the first degree did not violate the Eighth Amendment.

Our courts have also determined stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment. See State v. Brown, 303 S.C. 169, 172, 399 S.E.2d 593, 594 (1991) (holding sentence of 25 years without parole upon conviction of trafficking in cocaine was not cruel and unusual punishment); State v. Kiser, 288 S.C. 441, 443-44, 343 S.E.2d 292, 293 (1986) (holding mandatory minimum sentence of 25 years in prison for trafficking in marijuana was not grossly out of proportion with severity of crime and, therefore, complied with cruel and unusual punishment clause). Additionally, in considering the implications of drugs on our society today, the United States Supreme Court has noted as follows:

> Possession, use, and distribution of illegal drugs represent "one of the greatest problems affecting the health and welfare of our population." Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.
>
> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three

> ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence.

Harmelin v. Michigan, 501 U.S. 957, 1002-03 (1991) (citations omitted). Finally, the United States Supreme Court has also held a state is justified in punishing a recidivist more severely than it does a first offender. Riggs v. California, 119 S.Ct. 890, 891 (1999). Under recidivist sentencing schemes, the enhanced punishment imposed for a present offense is not to be viewed as an additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one. Id.

In light of our court's decisions in finding sentences of LWOP imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment and that an enhanced sentence based upon a prior "most serious" conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment, that stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment, and in consideration of the implications of drugs on our society today as noted by the United States Supreme Court in Harmelin, combined with the United States Supreme Court's determination that a State is justified in punishing a recidivist more severely than it does a first offender, we find Williams has failed to meet his burden of establishing evolving standards of decency preclude his punishment, or that his sentence is disproportionate to the crime.

For the foregoing reasons, Williams' convictions and sentences are **AFFIRMED**.

HEARN, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Amos Lamont Mattison, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 4448
Heard September 18, 2008 – Filed October 22, 2008

AFFIRMED

Deputy Chief Appellate Defender Robert M. Dudek, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J.

Zelenka, of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

HUFF, J.: Amos Lamont Mattison was convicted of murder, assault and battery with intent to kill (ABIK), and possession of a weapon during the commission of a violent crime. The trial court sentenced Mattison to life imprisonment without parole on the murder charge, one year consecutive on the weapon charge, and twenty years concurrent on the ABIK charge. Mattison appeals, asserting the trial court erred in refusing to instruct the jury that prior knowledge a crime was to be committed is insufficient to establish guilt and that mere association with a person who commits a crime is insufficient to establish guilt. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case involves the shooting injury of Jose Garcia and shooting deaths of his brother, Roberto Garcia, and their cousin, Jorge Lemus. The State set forth the theory that in August 2003, Mattison schemed with Britney Ervin to lure Jose, Roberto, and Jorge to a remote location to murder them and steal an automobile. Evidence presented at trial through direct testimony and statements given to the police included differing versions of what occurred that day.

Jose testified that on the morning of August 23, 2003, his cousin Jorge awoke him and told him someone wanted to buy Jose's Chevy Impala car. Thereafter, a black, skinny man, whom Jose later identified as Ervin, came to his home and Jose told him the amount of money he wanted for the car. Ervin left, and came back five to ten minutes later requesting to test drive the car. Jose and Ervin left in the car, and as they approached a corner, Jose saw Mattison wave at them, but they did not pick up Mattison at that time. Jose and Ervin then returned to Jose's home, and then Ervin left. About five minutes later, Ervin returned, wanting to make a deal. He indicated he had to go to his grandfather's house to get money. Jose and Ervin drove off to get the money, and Roberto and Jorge followed them in a Honda Passport automobile in order to bring Jose back home after he sold the car. As they

drove they saw Mattison at the same location as before, and Jose and Ervin stopped and picked up Mattison. Mattison and Ervin talked and appeared to know each other. They directed Jose down a dirt road, and although he hesitated to drive down it, he did so at the forceful insistence of Ervin.

Mattison and Ervin exited the car and walked around the house. They were gone about ten minutes. Mattison returned to the car and began talking to Jose. Mattison told Jose he did not want to go back around the house because Ervin's grandfather did not like him. After waiting approximately fifteen minutes, Jose was about to leave, but Ervin came back from around the house and told Jose his grandfather was going to give him the money. Ervin said he needed help with a tire, and Roberto went around the house with Ervin to assist him. Jorge exited the Honda and approached Jose to ask what was happening. Jose then heard a gunshot. Jose and Mattison exited the Impala. Mattison told Jose that Ervin's grandfather was crazy and he was shooting. Jose, Jorge and Mattison then went around the house, where Jose observed Ervin with a gun in his hand, coming toward the three men. When Jorge saw Ervin with the gun, he ran. As Ervin chased Jorge, Mattison told Jose not to worry because he had a gun too, and he was going to help them. Mattison then pulled out a handgun. Ervin caught Jorge and brought him back. The four then continued toward the back of the house, with Jose and Jorge in front followed by Ervin and then Mattison. As they approached a building behind the house, Jose asked where his brother was. Ervin put a gun to Jose's head and told him to keep walking.

As they reached the corner, Jose heard his brother moaning and then saw him face down on the ground. Jose told Mattison and Ervin to just take the cars and let him get his brother to a hospital. Ervin then pointed the gun at Jose. As Ervin raised the gun to shoot Jose, Jorge jumped on top of Ervin and Jose then jumped in, and a struggle ensued over Ervin's gun. Jose looked up and saw Mattison standing in the same corner as before with his gun in his hands. During the struggle over the gun with Ervin it fired, but did not hit Jose. Ervin was trying to shoot Jose, and Ervin told Mattison, more than once, to shoot Jose. Jose then heard a gunshot from Mattison's direction and felt his shirt fly. He turned and looked at Mattison, and saw him run. Jose noticed Jorge was getting weaker and saw him fall to the ground. After

Ervin saw Mattison run away, he asked Jose to let go of the gun and stated he would do the same. Jose did not, but eventually obtained control over the gun and Ervin then ran. As Jose left to seek help, he noticed both the Chevy and the Honda were gone.

Jose suffered a bullet graze injury to his shoulder during the struggle. Roberto and Jorge were transported to the hospital where both were eventually pronounced dead. Roberto died from a gunshot wound to the abdomen and another to the pelvis. Jorge died from a gunshot wound to the head. The two bullets recovered from Roberto were fired from the caliber nine millimeter Luger gun that Jose had taken from Ervin in the struggle. The bullet recovered from Jorge was a thirty-two caliber, fired from a different gun which was never found by the authorities.

Jose gave a statement to police describing his assailants as a fat guy and a skinny guy. He identified Ervin, the one he described as skinny, from a photographic line-up after Ervin was arrested driving Jose's Chevy Impala. Jose made an in-court identification of Mattison as the other man who rode in the back of his car and ultimately shot in his direction. When asked if, seeing Mattison in the court room he would describe him as "the fat guy," Jose stated he would, noting that he had been wearing a loose shirt and that is why he described him as fat.

After his arrest, Ervin gave two statements to the authorities. In his first, Ervin claimed Mattison asked him to help set up some Mexicans so he could rob them for their drugs. He claimed Mattison told him to act like he wanted to purchase their car, and threatened Ervin to get his cooperation. Ervin claimed after he directed them to his grandfather's shop, Mattison told him to go to the back with him. There, Mattison pointed a twenty-two caliber pistol at Ervin and told him to get the Mexicans. Mattison gave Ervin a nine millimeter gun to use. Mattison told Ervin to shoot the Mexicans, but he refused. Mattison took the nine millimeter gun from Ervin and shot the Mexicans. When Mattison started firing, Ervin ran. Ervin's second statement indicated it was given to correct his first statement as to "how the shooting went down." There, Ervin stated that Mattison stayed with two of the Mexicans at the car while he walked to the shop with a short Mexican.

Ervin pulled out the nine millimeter gun, the Mexican tried to run, and he then shot him in the chest. Ervin then walked up to him and shot him in the neck. He did this because Mattison had told him the Mexicans had drugs in the house, and Mattison planned to kill them to steal the drugs. As Ervin walked back to the others, Mattison had the twenty-two caliber gun pulled on the Mexicans. Ervin pointed the nine millimeter at them and directed them to the back of the shop where he planned to kill them. One of them saw the man Ervin had shot and began fighting Ervin. The other one struggled with Ervin over the gun and the gun discharged. When that happened, Mattison fired his gun. One of the Mexicans got control over Ervin's pistol and Ervin ran.

At trial, Ervin denied telling the authorities much of what was in his two statements. He also gave a different version of events, claiming that Mattison brought some Mexicans to his home that day to see if Ervin wanted to buy a car. Ervin agreed to buy it, but it had a dent in the trunk and Mattison told him he knew where he could find another trunk. Ervin, Mattison, and one of the Mexicans then followed behind two other Mexicans in the Honda to Ervin's grandfather's property. According to Ervin's trial testimony, Mattison asked Ervin to help him rob the Mexicans. Mattison then took one of the Mexicans with him to the back of the shop. Ervin heard some gun shots, and the other Mexicans ran up to him and asked what was happening. Ervin told them he did not know. Mattison ran back to the front, and Ervin then jumped in the Chevy and left.

Mattison did not testify at his trial. A statement Mattison made was, however, read into the record. Mattison claimed in his statement that Ervin brought a Mexican to his house trying to buy Mattison's car in exchange for drugs. Mattison stated he wanted money, not drugs. Ervin indicated they would have to get the money from Ervin's grandfather. Mattison rode with Ervin and the Mexican in a black car while a short, black man named Chuck or Bud followed in a gray car with two other Mexicans. Ervin and the Mexican exited the car and went around the house, while the Mexicans from the gray car were with Mattison and Chuck remained in the gray car. Mattison heard a "pop, pop," and said "let's go," but the Mexican refused because of his brother. They then ran to the back of the house. Mattison

heard "pop, pop" again, and he then took off running the other way. As he ran up the driveway, he saw Ervin drive off in the black car.

After the State rested, the trial court granted Mattison's directed verdict motions on the charge of possession of a weapon during the commission of a violent crime as related to the murder of Roberto, as well as on the charge of grand larceny of the Honda Passport. At the close of the evidence, Mattison handed the court his requests to charge. The trial court indicated it would cover the requests, but not exactly the way Mattison had asked. When asked whether the charge would include "prior knowledge is not sufficient, mere association," the court indicated it would not charge that. Counsel took exception to the court's refusal to so charge. The jury found Mattison guilty of the murder of Jorge and possession of a weapon during the commission of violent crime as related to Jorge, as well as the assault and battery with intent to kill Jose. On the charge of the murder of Roberto, the jury was unable to reach a verdict, and the trial court declared a mistrial. This appeal followed.

LAW/ANALYSIS

Mattison contends the trial court erred in refusing to charge the jury on prior knowledge and mere association. He asserts he was entitled to a charge that prior knowledge a crime is going to be committed, without more, is insufficient to establish guilt. He maintains there is evidence of record from Jose that Mattison was with him at the car when the shooting began and that Mattison wanted to leave immediately, but Jose was concerned about his brother. Further, according to Mattison's statement, upon hearing the shots, he "took off running the other way." Mattison contends it was important for the jury to understand that if it found Mattison was present at the scene, that his knowledge Ervin was going to commit a crime, without more, was insufficient to make him guilty of those crimes. He further asserts it was important for the jury to understand that mere association with the perpetrator of the crime is also insufficient to prove guilt.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Generally, a trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. Id. A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007).

Mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy. State v. Barroso, 328 S.C. 268, 272, 493 S.E.2d 854, 856 (1997). Additionally, "[m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007). "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" Id.

Mattison points to the Thompson case for the proposition that prior knowledge that a crime is going to be committed, without more, is insufficient to constitute guilt. However, the issue in Thompson was not whether the court failed to properly charge the jury, but whether Thompson was entitled to a directed verdict because the State failed to present any direct or substantial circumstantial evidence to show that Thompson was guilty of first degree burglary or attempted armed robbery, either as a principal or as an accomplice. Further, this court noted in Thompson that while mere presence and prior knowledge, without more, are insufficient to establish guilt, presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime will constitute guilt as a principal. Thompson, 374 S.C. at 262, 647 S.E.2d at 705.

In State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998), our supreme court held a charge to be sufficient, though the trial court failed to charge mere association. The court ruled that the trial court's charge was not misleading, it clearly explained the prosecution had to prove every element of the crime such that mere presence was not enough to sustain a conviction, and the trial judge extensively instructed the jury on the requisite criminal intent for each of the charged crimes. Id. at 77, 502 S.E.2d at 76-77.

In the present case, the record shows the trial court charged the jury as follows:

> Ladies and Gentlemen, a principal in a crime is one who either in person perpetrates the crime or who being present aides and abets and assists the commission of that crime. I charge you, Ladies and Gentlemen, that mere presence at the scene of a crime is not sufficient to convict.
>
> However, when one does an act in the presence of or with the assistance of another, the act is done by both. Where two or more acted with a common design or intent is present at the commission of a crime, it does not matter by who (sic) the crime is committed, for all are guilty.
>
> Intent, however, Ladies and Gentlemen, is a necessary element of the offense. There must have been a common design or attempt to commit the crime. The crime must have been committed pursuant to the person aiding and abetting by some overt act. Now, presence at the commission of a crime means to be sufficiently near so as to be able to aid and abet in its commission.
>
> Stated somewhat differently, Ladies and Gentlemen, is several, two or more persons pursuit (sic) to a common design to commit an unlawful act, set out together and each takes a part agreed upon or assigned to him to commit the act or which to watch at a proper distance at stations to prevent an appearance or surprise or

> to encourage the commission of unlawful act or to assist, if necessary, escape of those immediately engaged in the commission of the unlawful act, under any or all of these circumstances, if the unlawful act is committed, the act is one, the act of one is the act of all and all would be guilty.
>
> In other words, if several persons agree or conspire to commit a crime, each of those persons are criminally responsible for the acts of his confederates of which are done in the presence of the common purpose for which they combined. The common purpose may have not included or involved killing anyone.
>
> But if in executing the common design and purpose, a common homicide is committed by one of the confederates and you, the jury, determine from all the evidence beyond a reasonable doubt that the homicide was a probable and natural consequence of the acts which was done in pursuit to the common design, then Ladies and Gentlemen, all who are present either actually or constructively and participated in the unlawful common design would be guilty.

The charge to the jury included a detailed instruction on aiding, abetting, and assisting in the commission of a crime through some overt act, and clearly indicated that mere presence alone was insufficient to sustain a conviction. The charge noted that there must be a common design to commit an unlawful act, and that one present must aid, abet or assist in the commission of that crime in order to be found guilty. It explained the prosecution had to prove every element of the crime such that mere presence was not enough to sustain a conviction. Implicit in the charge given to the jury was that mere knowledge a crime was going to occur, or mere association with one who commits a crime is insufficient to constitute guilt, but that Mattison must have, while present at the commission of the crime, aided, abetted, or assisted in the commission of the crime pursuant to a common design or purpose before a conviction could be had. Accordingly, the trial court's jury charge on the whole was proper.

For the foregoing reasons, we find no error in the trial court's charge to the jury. Mattison's convictions are therefore

AFFIRMED.

HEARN, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Respondent,

v.

Greenville County, a Political Subdivision of South Carolina, Phyllis Henderson, Scott Case, Eric Bedingfield, Dozier Brooks, Joseph Dill, Cort Flint, Lottie Gibson, Judy Gilstrap, Mark Kingsbury, Xanthene Norris, Stephen Selby, and Robert Taylor, Appellants.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4449
Heard September 17, 2008 – Filed October 22, 2008

VACATED AND DISMISSED

Boyd B. Nicholson, Jr. and Joel M. Bondurant, both of Greenville, for Appellants.

James G. Carpenter, of Greenville, for Respondent.

PIEPER, J.: Greenville County appeals the trial court's order striking down a portion of the previous county procurement code for being inconsistent with Section 11-35-50 of the South Carolina Code (2007). We vacate the trial court's order and dismiss this case as moot.

FACTS

The relevant facts of this case are largely undisputed. The trial court consolidated four cases by Edward A. Sloan (Sloan) challenging procurements made by Greenville County (County) between August 2002 and March 2004, which utilized the competitive sealed proposal (Proposal) procurement method rather than the competitive sealed bidding (Bidding) method. The gravamen of Sloan's action was to declare sections of the former Greenville County Procurement Code (GCPC) unlawful for allowing the determination to use Proposals as an alternative to the preferred procurement method of Bidding without memorializing or justifying the decision in writing, regardless of whether the GCPC includes such a writing requirement.

The previous GCPC provided in part as follows:

> § 7-304 Methods of Source Selection.
>
> Unless otherwise required by law, all County contracts shall be awarded by competitive sealed bidding, pursuant to § 7-305 (Competitive Sealed Bidding), except as provided herein:
>
> . . . .
>
> (2) Section 7-307 (Competitive Sealed Proposals).
>
> . . . .
>
> § 7-305 Competitive Sealed Bidding.

(1) Conditions for Use. Contracts amounting to $25,000 or more shall be awarded by competitive bidding except as otherwise provided in § 7-304 (Methods of Source Selection).

. . . .

§ 7-307 Competitive Sealed Proposals.

(1) Conditions for use. When the Purchasing Manager determines that the use of competitive sealed bidding is either not practicable or not advantageous to the County, a contract may be entered into by use of the competitive sealed proposals method.

Unlike the South Carolina Procurement Code or the South Carolina Local Model Procurement Code, the GCPC did not require the procurement officer's determination to use Proposals rather than Bidding to be in writing.

Section 11-35-50 of the South Carolina Code (2007) states in part as follows:

> Political subdivisions required to develop and adopt procurement laws.
>
> All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The Budget and Control Board, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall create a task force to draft model ordinances, regulations, and manuals for consideration by the political subdivisions . . . .

S.C. Code Ann. § 11-35-50 (2007).

On November 18, 2004, the parties stipulated to consolidation of all four claims to be decided on the following two issues:

(1) Whether the County's Procurement Code requires a written determination in order for the County to use the [Proposal] procurement method, and by extension, whether the lack of a written determination for these projects in which the County used the [Proposal] method violated the County's procurement Code; and

(2) If the County's Procurement Code does not require a written determination in order to use the [Proposal] procurement method, does it violate State law, and in particular, South Carolina Code Ann. § 11-35-50?

After the trial court hearing on December 3, 2004, but before the order was issued on January 8, 2007, the County amended the GCPC on October 17, 2006. The new GCPC section titled "Methods of Source Selection" now reads in part as follows:

> Unless otherwise required by law, all County contracts amounting to $25,000 or more shall be awarded by competitive sealed bidding, pursuant to § 3-202 (Competitive Sealed Bidding), or by competitive sealed proposals, pursuant to § 3-204 (Competitive Sealed Proposals), whichever is determined to be more advantageous to the County . . . .

As such, the amended GCPC differs from the previous version because, among other things, it now has two equally preferred methods of procurement for source selection, Bidding and Proposals.

On January 8, 2007, the trial court found that the claims were moot on the basis that all of the contracts involved were either completed or cancelled; however, citing the public interest exception to the mootness doctrine, the trial court proceeded to rule on whether the former GCPC embodied sound principles of appropriately competitive procurement by not requiring a determination to be in writing before using the Proposal method rather than the preferred method of Bidding. The court concluded that the former version of the GCPC did not "embody sound principles of appropriately competitive" procurement because it failed to require a determination in

writing before the use of Proposals rather than the preferred method of Bidding. This appeal followed.

ISSUES ON APPEAL

I. Did the Greenville County Procurement Code violate § 11-35-50 when the GCPC's sealed proposal method of procurement set forth a procedure that even the plaintiff acknowledged was appropriately competitive, but did not require a written determination to document why this method was chosen?

II. Whether the trial court was correct to decide the issue above "for future guidance" under the public importance exception to mootness, when the preference for sealed bids that necessarily forms the basis of the written determination requirement no longer exists?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001) (internal citation omitted). To make this determination, an appellate court must look to the essential character of the cause of action. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action. Low Country Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 406, 656 S.E.2d 775, 779 (Ct. App. 2008). The issue of statutory interpretation is a question of law for the court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). We are free to decide questions of law with no deference to the trial court. Id.

DISCUSSION

We first address the issue of mootness since this issue necessarily affects our disposition of this case.

The court does not concern itself with moot or speculative questions. Sloan v. South Carolina Dep't of Transp., Op. No. 26534 (S.C. Filed Aug. 25, 2008) (Shearouse Adv. Sh. No. 33 at 43). An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Id. Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief. Id.

However, there are three exceptions to the mootness doctrine. Id. at 568, 549 S.E.2d at 596. First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. Id.; see also Sloan v. South Carolina Dep't of Transp., 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (emphasis added). Application of the public interest exception requires the question at issue to be (1) of "public importance," and (2) of "imperative and manifest urgency." See Sloan v. Greenville County, 361 S.C. 568, 570-71, 606 S.E.2d 464, 465-66 (2004). Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Curtis, 345 S.C. at 568, 549 S.E.2d at 596; accord Sloan, 365 S.C. at 303, 618 S.E.2d at 878. The utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically

invoked.[1] Compare, e.g., Sloan v. Greenville County, 356 S.C. 531, 553-55, 590 S.E.2d 338, 350-51, with Sloan, 361 S.C. at 571-72, 606 S.E.2d at 468; cf. 1A C.J.S. Actions §78 (2008).

Neither party has challenged the court's preliminary conclusion that these cases are moot since the contracts were already completed or cancelled.[2] Therefore that conclusion, right or wrong, is the law of the case. See Sloan, 365 S.C. at 307, 618 S.E.2d at 880 ("[A]n unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct.") (quoting Town of Mt. Pleasant v. Jones, 335 S.C. 295, 298-99, 516 S.E.2d 468, 470 (Ct. App. 1999)). Thus, the next question before us is whether this case is suitable for discretionary review of the issue presented under the public interest exception to the mootness doctrine.[3]

County contends that since the GCPC no longer contains the preference for sealed bids that necessarily formed the basis of the trial court's order, the trial court erred in determining that the case should be decided under the public interest exception to mootness. We agree.

The trial court found the case moot for the initial reason that the contracts at issue had already been performed or cancelled; it then found the public interest exception applied to that point of mootness. However, the court did not fully address the public interest exception of the mootness doctrine to the suit after the change in the GCPC was brought to its attention; specifically, the trial court failed to address whether the suit remained one of "imperative and manifest urgency" after passage of the amended ordinance. See Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) ("[T]he issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters

[1] Sloan conceded at oral argument that application of an exception to the mootness doctrine is discretionary rather than mandatory by an appellate court.

[2] Both parties agree in their briefs that the four cases at issue were moot at the time of the final hearing.

[3] The public interest exception was the only exception asserted to the trial court.

of important public interest.' This evaluation must be made based on the facts of each individual situation.") (internal citation omitted). Here, after opining in a footnote that its analysis of the "public importance" exception would not change due to passage of the amended ordinance, the trial court "[found] it necessary to go ahead and rule on the issue of whether such a determination must be in writing under the former version of the code." (emphasis added). Therefore, the second prong of the public interest exception was never satisfied; the trial court failed to consider the impact of the amended ordinance on the suit through the lens of "imperative and manifest urgency," and erred in utilizing that exception to review the issue presented under the previous ordinance.[4]

Sloan also argues there is an imperative and manifest urgency compelling this court to find § 11-35-50 requires a written determination whenever a political subdivision selects the Proposal method over Bidding, regardless of whether the political subdivision designates the two methods as equally preferable, in order for the procurement to be "appropriately competitive." As previously indicated, although the trial court briefly acknowledged this supplementary argument in a footnote of its opinion, it specifically refused to rule upon the issue in regard to the amended version of the GCPC. We find the record before us insufficiently developed to exercise our discretion under a mootness exception to address Sloan's ancillary

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[4] Additionally, we note our supreme court has provided some judicial guidance as to the meaning of § 11-35-50 in Glasscock Co. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004). Id. at 490, 604 S.E.2d at 721 (stating § 11-35-50 does not mandate or require local governments to adopt specific methods of procurement or the process by which to apply them, and that it "clearly was intended to afford local governments needed flexibility to determine what is 'appropriately competitive' in light of the public business they must transact."); see also Sloan, 361 S.C. at 571-72, 606 S.E.2d at 466 (holding there is no imperative or manifest urgency in obtaining an advisory opinion on the application of an obsolete procurement ordinance to completed projects when the ordinance was subsequently altered addressing the existing controversy, and when judicial guidance on the matter already exists). **Because this finding is not dispositive of our decision herein, we need not reach this issue.**

argument regarding co-preferred methods of procurement. Moreover, we take judicial notice of our own docket and note that this very issue is currently on appeal in Sloan v. Greenville Hospital System, et al., Case Nos. 03-CP-23-3785, 04-CP-23-5223, and 05-CP-23-0586 (appeal filed June 12, 2008). Sloan acknowledges this fact in his appellate brief. In that case, one of the main issues litigated and ruled upon was whether a written determination is required to select Proposals over Bidding when both are co-preferred procurement methods; as such, that case, as opposed to this case, is arguably more suitable for review and adjudication of the issue.

CONCLUSION

Due to the significant change in the ordinance, we find it unnecessary to decide the issue presented to the trial court of whether the County's former procurement code was valid; passing judgment upon this matter would only result in an advisory opinion on the application of an obsolete procurement ordinance to completed or cancelled contracts. We also decline to address Sloan's alternate argument under the amended ordinance since the trial court never addressed the effect of the amended ordinance.

Accordingly, the trial court's order is vacated and the case is dismissed as moot.

VACATED AND DISMISSED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Coastal Conservation League, **Appellant,**

v.

South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, **Respondents.**

South Carolina Coastal Conservation League, **Appellant,**

v.

South Carolina Department of Health and Environmental Control, South Carolina Department of Transportation, and South Carolina State Ports Authority, **Respondents.**

Appeal From The Administrative Law Court
John D. Geathers, Administrative Law Judge

Opinion No. 4450
Heard October 21, 2008 - Filed October 23, 2008

AFFIRMED

J. Blanding Holman, IV and W. Jefferson Leath, both of Charleston, for Appellant.

Sara P. Bazemore and Carlisle Roberts, Jr., both of Columbia, and Evander Whitehead, of North Charleston, for Respondent South Carolina Department of Health and Environmental Control.

Deborah B. Durden, of Columbia, for Respondent South Carolina Department of Transportation.

Mitchell Willoughby and Randolph R. Lowell, both of Columbia, and Philip L. Lawrence, of Charleston, for Respondent South Carolina State Ports Authority.

ANDERSON, J.: The South Carolina Coastal Conservation League ("Coastal") appeals the decision of the Administrative Law Court ("ALC") to grant orders of dismissal in contested case hearings regarding the bestowal of permits to the South Carolina State Ports Authority ("SPA") and the South

Carolina Department of Transportation ("DOT) and the issuance of orders of dismissal denying Coastal's motions for reconsideration. Coastal contends the ALC judge erred by (1) misinterpreting the pertinent appeals period for agency decisions, (2) failing to properly invoke jurisdiction over the matter, (3) ignoring issues of waiver, estoppel, and equitable tolling, (4) violating due process rights through a mistaken statutory interpretation, and (5) abusing the court's discretion by denying the motions for reconsideration. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The South Carolina State Ports Authority and the South Carolina Department of Transportation each filed permit applications with the South Carolina Department of Health and Environmental Control ("DHEC") regarding a proposed project to develop the area around the former Charleston Naval Base. The goal of the project was the construction of a 300-acre marine container terminal. Additionally, in order to provide access to the facility, the DOT intended to construct an access road linking the terminal with Interstate 26.

DHEC issued public notice of the pendency of the applications and conducted hearings to receive comments from concerned citizens and interested parties regarding the permits. The South Carolina Coastal Conservation League participated in these hearings and provided comments to DHEC expressing concernment over the potential negative effects that might flow from the construction. Although Coastal filed comments with DHEC objecting to the permits, the record contains no evidence Coastal filed a request for notification from DHEC when a decision was reached on each of the applications.

After conducting an evaluation of the proposal with consideration given to all information received from the public hearings, including the comments from Coastal, DHEC department staff granted all necessary permits requested for the project. DHEC issued a permit to the SPA on October 30, 2006, and sent a copy through certified mail the following day, October 31, 2006. Based on an error in the original permit, a revised permit was sent to the SPA on November 2, 2006. On November 13, 2006, DHEC mailed a permit to the

DOT via certified mail. Both permits consisted of a critical area permit, a coastal zone consistency certification, and a Section 401 water quality certification.

In response to the issuance of these permits, multiple requests for a final review before the South Carolina Board of Health and Environmental Control ("DHEC Board") were filed. The SPA filed for review of its permit on November 13, 2006. Coastal filed a request regarding the SPA permit on November 20, 2006, and a motion to intervene in the SPA's request on December 6, 2006. Additionally, Coastal filed a request for review concerning the DOT permit on November 30, 2006.

The DHEC Board scheduled a final hearing to address the two permits for January 11, 2007. On the day of the hearing, the SPA and DHEC staff announced an agreement had been reached regarding the SPA's permit. The DHEC Board continued with the hearing in order to address Coastal's concerns and ignored objections from the SPA and DHEC staff that Coastal's requests for hearings were not timely filed. In its order dated February 8, 2007, the DHEC Board issued the final agency decision granting the permits with only minor revisions to the DOT permit and with the agreed-upon changes to the SPA permit.

Based on the decision of the DHEC Board, Coastal requested contested case hearings with the Administrative Law Court on March 9, 2007, for the SPA and DOT permits. The ALC judge granted the SPA's motion to intervene with the consent of all parties. Subsequently, the SPA filed motions to dismiss in both cases on the grounds that the ALC lacked jurisdiction to decide the matters due to Coastal's failure to timely file for review before the DHEC Board. On July 2, the ALC judge conducted a hearing on the motions for dismissal.

On September 4, 2007, the ALC judge issued an order dismissing both cases. In reaching this decision, the ALC judge concluded:

> S.C. Code Ann. § 44-1-60(E) clearly provides the exclusive mechanism for review under the facts and circumstances presented in this case. The fifteen-day

> time period within which to file a request for final review begins upon mailing the notice of the staff decision to the applicant. It is undisputed that the League failed to file a request for final review with the Board within the statutory time frame. The arguments offered by the League to excuse this failure to timely file are unavailing. Therefore, this Court lacks jurisdiction over this matter, and this case must be dismissed.

Following the issuance of the order, Coastal filed a motion for reconsideration with the ALC on September 18, 2007. The motion was denied as untimely. Coastal filed a second motion for reconsideration requesting a review of the original ALC order and the first order for reconsideration. On October 1, 2007, Coastal filed a notice of appeal with the Court of Appeals. Based on the pending appeal, the ALC issued an order declining to rule on the second motion for reconsideration and to make any additional rulings on the controversy.

ISSUES

1. Did Coastal's dual requests for final review before the DHEC Board, which were not filed within fifteen days from the date notice was mailed to the permit applicants, prevent the Administrative Law Court from conducting a contested case hearing on the matter?

2. Did principles of waiver, estoppel, and equitable tolling entitle Coastal to a contested case hearing before the Administrative Law Court regardless of the timeliness of the request for final review?

3. Did the Administrative Law Court deny Coastal due process rights through its application of Section 44-1-60?

4. Did the Administrative Law Court abuse its discretion by striking Coastal's Motion for Reconsideration as untimely?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) articulates the standard for judicial review of cases decided by the ALC. See S.C. Code Ann. § 1-23-610(B)-(C) (Supp. 2007); Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, ___, 663 S.E.2d 497, 500-501 (Ct. App. 2008) ("Judicial review of the ALC judge's order is governed by section 1-23-610(C) . . . ."). Section 1-23-610(C) of the South Carolina Code illuminates:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal 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 has been prejudiced because of the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provision;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(C).

In similitude to the standard established by the APA and codified in Section 1-23-380(A)(5) for review of decisions of the Worker's Compensation Commission and other administrative agencies, the applicable measure of review is the substantial evidence rule. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007); see Hernandez-Zuniga v. Tickle, 374 S.C. 235, 242, 647 S.E.2d 691, 694 (Ct. App. 2007); Hall v. United Rentals, Inc., 371 S.C. 69, 78-79, 636 S.E.2d 876, 881 (Ct. App. 2006) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004)). Decisions of the ALC judge should not be overturned by the reviewing court unless they are unsupported by substantial evidence or controlled by some error of law. Olson, 379 S.C. at ___, 663 S.E.2d at 501 ("[T]his court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion."); see S.C. Code Ann. § 1-23-610(C); see, e.g., Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); Hall, 371 S.C. at 79, 636 S.E.2d at 882; Smith v. NCCI, Inc., 369 S.C. 236, 246, 631 S.E.2d 268, 273-274 (Ct. App. 2006); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369 (Ct. App. 2005).

The decision must be affirmed if supported by substantial evidence in the record. See Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008); Houston v. Deloach & Deloach, 378 S.C. 543, 550, 663 S.E.2d 85, 88 (Ct. App. 2008); McGriff v. Worsley Cos., Inc., 376 S.C. 103, 109, 654 S.E.2d 856, 859 (Ct. App. 2007). However, the reviewing court may reverse or modify the decision of the ALC judge if the finding, conclusion, or decision reached is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" or is affected by an error of law. Olson, 379 S.C. at ___, 663 S.E.2d at 501; S.C. Code Ann. § 1-23-610(C)(d)-(e); see also SGM-Moonglo, Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) ("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.").

Substantial evidence is evidence that, when viewing the record as a whole, would allow reasonable minds to reach the same conclusion the ALC arrived at in justifying its decision. Olson, 379 S.C. at ___, 663 S.E.2d at 501; see Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 605, 550 S.E.2d 287, 294 (2001); Jones v. Harold Arnold's Sentry Buick, Pontiac, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008); McGriff, 376 S.C. at 109, 654 S.E.2d at 859; Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). Substantial evidence is more than a mere scintilla of evidence. Whitworth, 377 S.C. at 640, 661 S.E.2d at 335; Miller by Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-325 (1994); Laws v. Richland County Sch. Dist. No. 1, 270 S.C. 492, 495-496, 243 S.E.2d 192, 193 (1978); Kimmer v. Murata of America, Inc., 372 S.C. 39, 44, 640 S.E.2d 507, 509 (Ct. App. 2006). " 'Quantitatively, substantial evidence is something less than the weight of the evidence.' " Smith, 369 S.C. at 247, 631 S.E.2d at 274 (quoting Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 284, 385 (1987)); see Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984); Ellis v. Spartan Mills, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Olson, 379 S.C. at ___, 663 S.E.2d at 501 (citing DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004); accord Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999); Bass, 365 S.C. at 468, 617 S.E.2d at 376.

This Court, although not bound by the decision, will ordinarily defer to the opinion of a state agency as to the interpretation of a statute it is charged with the duty of enforcing. Thompson ex rel. Harvey v. Cisson Constr. Co., 377 S.C. 137, 159, 659 S.E.2d 171, 182 (Ct. App. 2008); Hardee v. McDowell, 372 S.C. 413, 417, 642 S.E.2d 632, 634 (Ct. App. 2007); Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007). "[T]he construction of a statute by an agency charged with its administration will be accorded the most respectful deference and will not be overruled absent compelling reasons." Pressley v. REA Const. Co., Inc., 374 S.C. 283, 288, 648 S.E.2d

301, 303 (Ct. App. 2007); accord Bursey v. S.C. Dep't of Health & Envtl. Control, 369 S.C. 176, 186-187, 631 S.E.2d 899, 905 (2006); Barton v. Higgs, 372 S.C. 109, 117, 641 S.E.2d 39, 44 (Ct. App. 2007).

LAW/ANALYSIS

The essence of the controversy in the case at bar revolves around the appellate process for administrative disputes. Coastal primarily alleges the ALC judge erred in finding Coastal's request for final review before the DHEC Board to be untimely, precluding the ALC from hearing the matter. Before addressing the immediate imbroglio, we must examine the administrative review process as prescribed by the State's legislature.

I. Mandatory Review Process Enacted by Act No. 387

To bestow panoramic application of the law extant in regard to the mandated review process and to edify and inculcate the cognoscenti of administrative law jurisprudence in South Carolina, we review with specificity the law enacted by the General Assembly of the State in Act Number 387, effective July 1, 2006.

In Section 53 of the Act, the state legislature succinctly expressed the overriding purpose of the law:

> This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.

Act No. 387, § 53, 2006 S.C. Acts & Joint Resolutions. By enacting this legislation, the General Assembly remodeled the appellate process for administrative agencies in the state and amended several statutes addressing the direction and flow of appeals.

Under the new appellate procedure, if a party wishes to challenge the issuance of a permit by the South Carolina Department of Health and

Environmental Control, the aggrieved party first must comply with the relief process established by the Act and codified in Section 44-1-60 of the South Carolina Code. When an applicant applies for a permit with DHEC, the initial determination of whether to issue or deny is a staff decision. S.C. Code Ann. § 44-1-60(C) (Supp. 2007). After the staff members involved reach a consensus, DHEC releases a department decision either issuing or denying the permit. S.C. Code Ann. § 44-1-60(D) (Supp. 2007).

A party wishing to challenge the department decision must file a written request for final review before the Board of Health and Environmental Control within "fifteen days after notice of the department decision has been mailed to the applicant[.]" S.C. Code Ann. § 44-1-60(E) (Supp. 2007). If a request for final review is not made, the department decision becomes the final agency decision. Id. If a request is timely filed, the DHEC Board will either conduct a final review conference within sixty days or allow the time period to elapse. S.C. Code Ann. § 44-1-60(F) (Supp. 2007). If the time period expires without a hearing, the department decision becomes the final agency decision. Id. If a review conference is held, the conclusion reached by the DHEC Board becomes final. Id.

Within thirty days of the deadline for the final review conference if no hearing is conducted or within thirty days after the receipt of the final agency decision, a party wishing to further challenge the permit must file a request for a contested case hearing with the ALC. Id. An ALC judge will hear the contested case and issue a written order on the matter. S.C. Code Ann. § 1-23-600(A) (Supp. 2007).

"A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." S.C. Code Ann. § 1-23-380(A). To initiate judicial review, the appellant must file a notice of appeal within thirty days of the final decision of the administrative agency. Id. A party appealing the final decision of the ALC judge in cases involving DHEC is entitled to an appeal to the Court of Appeals as a matter of right. S.C. Code Ann. § 1-23-610(B). If either party wishes further review following a decision by the Court of Appeals, contested administrative cases are subject to a petition for

certiorari to the South Carolina Supreme Court. S.C. Code Ann. § 1-23-390 (Supp. 2007).

II. Timeliness of Coastal's Request for Final Review before the DHEC Board

The dispute between Coastal, DHEC, the SPA, and the DOT centers on the proper interpretation of Section 44-1-60. Coastal avers the ALC judge committed reversible error by finding the time period to file a review request with the DHEC Board runs from the time the staff decision is mailed to the permit applicant. Coastal argues the fifteen-day limit does not begin to run until receipt of actual notice. We disagree. In reaching our conclusion, we address three primary areas relating to the controversy: (1) statutory interpretation of Section 44-1-60(E); (2) notice and compliance with filing deadlines in regard to the SPA permit and the DOT permit; and (3) the jurisdiction of both the DHEC Board and the ALC.

A. Interpretation of Section 44-1-60(E)

i. Rules of Statutory Construction

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007); Dreher, 370 S.C. at 80, 634 S.E.2d at 648; Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998); Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 597. 654 S.E.2d 284, 289 (Ct. App. 2007); Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct. App. 2006); Bass, 365 S.C. at 469, 617 S.E.2d at 377. In South Carolina, the court's foremost duty is to determine the intent of the General Assembly. Peake, 375 S.C. at 598, 654 S.E.2d at 289 (citing Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002)). All rules of statutory constructions are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501

S.E.2d 725, 729 (1998); Thompson ex rel. Harvey, 377 S.C. at 156, 659 S.E.2d at 180-181; Bass, 365 S.C. at 469, 617 S.E.2d at 377; State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999).

The first inquiry in deciphering the legislature's intent should begin by determining whether the statute's meaning is clear on its face. Peake, 375 S.C. at 597, 654 S.E.2d at 289 (citing Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); Eagle Container Co., L.L.C. v. County of Newberry, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Ct. App. 2005)). The legislative intent should be derived primarily from the plain language of the statute. Bass, 365 S.C. at 470, 617 S.E.2d at 377 (citing State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996)); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); see also Peake, 375 S.C. at 597-598, 654 S.E.2d at 289 ("With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.") The statute's text is the best evidence of legislative intent or will. Peake, 375 S.C. at 598, 654 S.E.2d at 289 (citing Jones, 364 S.C. at 231, 612 S.E.2d at 724 (citing Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001))).

Clear and unambiguous statutes require no statutory construction and should be applied by the court according to their literal meaning. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); Grinnell Corp. v. Wood, 378 S.C. 458, 467, 663 S.E.2d 61, 66 (Ct. App. 2008); White v. State, 375 S.C. 1, 8, 649 S.E.2d 172, 176 (Ct. App. 2007) (citing Univ. of S. Cal. v. Moran, 365 S.C. 270, 276, 617 S.E.2d 135, 138 (Ct. App. 2005)). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. State v. Sweat, ___ S.C. ___, 665 S.E.2d 645, 650 (Ct. App. 2008) (citing Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762,

763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002)); Grinnell Corp., 378 S.C. at 468, 663 S.E.2d at 66. Under the "plain meaning rule," it is not the court's place to change the meaning of a clear and unambiguous statute. Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)); Grinnell, 378 S.C. at 468, 663 S.E.2d 66.

"The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense." Pee v. AVM, Inc., 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001); accord Purdy v. Moise, 223 S.C. 298, 304, 75 S.E.2d 605, 608 (1953); Powers v. Fid. & Deposit Co. of Md., 180 S.C. 501, 509, 186 S.E. 523, 527 (1936). If the General Assembly declined to define a term within the statute, the Court should construe the word in accordance with its usual and customary meaning. Pee, 344 S.C. at 168, 543 S.E.2d at 235 (citing Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994)). "[W]here a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); accord Allen v. Columbia Fin. Mgmt., Ltd., 297 S.C. 481, 488, 377 S.E.2d 352, 356 (Ct. App. 1988); Smalls v. Weed, 293 S.C. 364, 370, 360 S.E.2d 531, 534 (Ct. App. 1987).

"The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) (citing Jackson v. Charleston County Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861(1994)); accord Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); White, 375 S.C. at 7, 649 S.E.2d at 175. There is a basic presumption the legislature has knowledge of preceding legislation when enacting subsequent statutes on related matters. City of Camden v. Fairfield Elec. Co-op., Inc., 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007) (citing State v. McKnight, 352 S.C. 635, 648, 576 S.E.2d 168, 174 (2003); Berkebile v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993)); Arnold v. Ass'n of Citadel Men, 337 S.C. 265, 273,

523 S.E.2d 757, 761 (1999); Scott v. State, 334 S.C. 248, 253, 513 S.E.2d 100, 103 (1999). Additionally, the legislature is presumed to be aware of judicial decisions interpreting statutes. State v. Corey D., 339 S.C. 107, 112, 529 S.E.2d 20, 23 (2000); State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000).

" 'Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.' " Sweat, ____ S.C. at ____, 665 S.E.2d at 649 (quoting S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989)). "The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts." Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 337, 312 S.E.2d 716, 720 (Ct. App. 1984).

Generally, specific laws will prevail over general laws, and the most recent legislation will take precedence over earlier enactments. I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000); Lloyd v. Lloyd, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988); Duke Power Co. v. S.C. Pub. Serv. Comm'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985). When reasonably possible, statutes in apparent conflict should be interpreted to allow both to stand. Nat'l Adver. Co., Inc. v. Mount Pleasant Bd. of Adjustment, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994); Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992); Powell v. Red Carpet Lounge, 280 S.C. 142, 145, 311 S.E.2d 719, 721 (1984); see also Florence County v. Moore, 344 S.C. 596, 545 S.E.2d 507 (2001) ("Our goal in construing statutes is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd."). "If, however, the statutes are incapable of any reasonable reconcilement, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy." Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co., 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988). "[T]he Last Legislative Expression Rule requires that in instances where it is not possible to harmonize two section of a statute, the later legislation supersedes the earlier enactment." Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993); accord Ramsey v. County of McCormick, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991).

Later legislation will supersede earlier laws dealing with the identical subject matter. Whiteside v. Cherokee County Sch. Dist. No. One., 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993); Duke Power Co., 284 S.C. at 88, 326 S.E.2d at 399.

Courts will reject statutory interpretations that lead to absurd results clearly unintended by the legislature or that defeat the plain legislative intent. Peake, 375 S.C. at 599, 654 S.E.2d at 289; Jones, 364 S.C. at, 232, 612 S.E.2d at 724 (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). Furthermore, the appellate court must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile. Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008); Ellison v. Frigidaire Home Prods., 371 S.C. 159, 164, 638 S.E.2d 664, 666 (2006); Duke Power Co. v. Laurens Elec. Co-op, Inc.,, 344 S.C. 101, 106, 543 S.E.2d 560, 563 (Ct. App. 2000); see State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, we must presume that it intended by its actions to accomplish something and not to do a futile thing.") The real purpose and intent of the lawmakers will prevail over the literal import of the words. Floyd, 367 S.C. at 260, 626 S.E.2d at 10; Bass, 365 S.C. at 471, 617 S.E.2d at 378 (citing Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)).

ii. Applying the Rules to the Statute

The process through which a party requests a final review before the DHEC Board is contained in Section 44-1-60(E). The statute reads:

> Notice of the department decision must be sent to the applicant, permittee, licensee, and **affected persons who have asked to be notified by certified mail**, return receipt requested. The department decision becomes the final agency decision **fifteen days after notice of the department decision has been mailed to the applicant**, unless a written request for final

> review is filed with the department by the applicant, permittee, licensee, or affected person.

S.C. Code Ann. § 44-1-60(E) (emphasis added).

The language in Section 44-1-60(E) is clear and unambiguous, yielding only one possible interpretation. Under the phrasing of the statute, the following parties are entitled to notice of the DHEC decision: (1) the applicant for the permit; (2) the permittee; (3) the licensee; and (4) affected parties who request notification of the decision. After issuance of the staff determination, appealing parties must file within "fifteen days after notice of the department decision has been mailed to the applicant." S.C. Code Ann. § 44-1-60(E).

The General Assembly's intent in implementing this legislation is clear from the wording of the Act itself: "to provide a uniform procedure for contested cases and appeals from administrative agencies." Act No. 387, § 53, 2006 S.C. Acts & Joint Resolutions. Luculently, the legislature intended to establish a homogenous appeals process for administrative actions. Furthermore, the terminology of the statute is definite, incontrovertible, and irrefragable.

The legislature chose for the fifteen-day filing period to begin running from the date the department decision was mailed to the applicant. Additionally, in a subsequent section of the same statute, the General Assembly instructs: "Within thirty days **after the receipt of the decision** an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing . . . ." S.C. Code Ann. § 44-1-60(F)(2) (emphasis added). Incontrovertibly, the legislature was able to differentiate the differences between a time period running from mailing of notice and from receipt of notice. The General Assembly elected for the pertinent time period in this case to run from the date notice was mailed, and this Court cannot impose a judgment that would result in a discrepant result.

The ALC agreed with this interpretation. The ALC judge, in the Order of Dismissal for each of the permits, explicated:

> S.C. Code Ann. § 44-1-60(E) clearly provides the exclusive mechanism for review under the facts and circumstances presented in this case. The fifteen-day time period within which to file a request for final review begins upon mailing the notice of the staff decision to the applicant.

Coastal professes the time period for filing a review request properly runs from the time notice is actually received. Coastal primarily relies on the decision of the South Carolina Supreme Court in Hamm v. South Carolina Public Service Commission, 287 S.C. 180, 336 S.E.2d 470 (1985), to support this conclusion.

In Hamm, the key issue was whether a party timely filed for judicial review under the Administrative Procedures Act. The Public Service Commission granted the South Carolina Electric and Gas Company's application for increased utility rates after conducting an agency hearing. Hamm, 287 S.C. at 181, 336 S.E.2d at 471. Steven Hamm, the State Consumer Advocate, filed a petition for rehearing but was denied by the commission. Id. Notice of the denial order was mailed to an individual no longer employed at Hamm's office and the letter was misplaced. Id. Hamm did not receive actual notice until several days later when he discovered the decision and obtained written notice directly from the Public Service Commission's office. Id. Hamm filed his appeal within thirty days of receiving written notice but not within thirty days of the date of the agency decision as required by the statute. Id. The Public Service Commission sought dismissal of the appeal on the grounds it was not timely filed under the Administrative Procedures Act. Id. Under the relevant language of Section 1-23-380(b) (Supp. 1984) (later amended by Act No. 387, 2006 S.C. Acts & Joint Resolutions), an appeal must be commenced within thirty days after the agency decision was reached. Id. In affirming the grant of appeal by the trial court, the Supreme Court held:

> While a literal reading of Section 1-23-380(b) suggests the thirty days to appeal runs from the time the decision is made, we believe the statute must be

> read to allow a party thirty days after *notice* of a decision to bring an appeal.
>
> However clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature. State, ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). If time to appeal ran from the date a decision was actually made, an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run. Such a result could not have been intended by the legislature. We hold that under Section 1-23-380(b), a party has thirty days after receiving written notice to appeal an agency decision.

Hamm, 287 S.C. at 181, 336 S.E.2d at 471; see also Cox v. County of Florence, 337 S.C. 340, 344, 523 S.E.2d 776, 778 (1999) ("In Hamm [. . .], we construed this provision to allow a party thirty days after **written notice** of a decision to bring an appeal, rather than [thirty] days after a decision is made in which to file an appeal." (emphasis in original)).

While Hamm protects against an ambiguity in a statute that could potentially allow an agency to knowingly withhold notice of a decision in order to allow an inequitable expiration of the filing period, the case at bar is distinguishable. The relevant statutes for each case are inherently different in their construction. Section 44-1-60(E) specifically creates a vehicle for all interested parties to receive notice. Affected parties can guard against the dangers addressed in Hamm by requesting notification of the decision from the agency itself. S.C. Code Ann. § 44-1-60(E). The statutory language in Section 44-1-60(E) does not suffer from the same uncertainty affecting the statute in Hamm and is therefore discernible. Presumably, the General Assembly was aware of the decision in Hamm and the effects of prior legislation when it drafted Section 44-1-60. Hamm is not controlling in the case sub judice.

Coastal's interpretation of the statute, along with the conclusion of the DHEC Board to hold the final review hearing, is inconsonant with the common-sense reading of the statute. The ALC judge's interpretation of Section 44-1-60(E) was correct and consistent with the intent of the legislature. This Court must harmonize the expressed purpose of legislation and the clear and unambiguous terms employed in the statute. Applying Section 44-1-60(E), the time period for filing a request for final review begins to run from the date the DHEC staff decision is mailed to the applicant, not from the date actual notice is received.

iii. Coastal's Compliance with Statutory Filing Deadlines

Applying the apropos interpretation of Section 44-1-60(E), we examine whether Coastal met the filing requirements for review before the DHEC Board. After analyzing the facts as they relate to each of the permit applications, we find Coastal did not meet the statutory filing deadlines.

The SPA permit was issued and mailed to the applicant, the SPA, on October 31 and was revised and re-mailed on November 2. **Coastal failed to request notification of the staff decision as delineated in Section 44-1-60(E).** On November 20, Coastal filed a request for review before the DHEC Board. Coastal failed to properly file an appeal within the fifteen-day filing period. Concomitantly, Coastal did not comply with statutory requirements and was not entitled to a hearing before the DHEC Board.

DHEC issued and sent via certified mail the DOT permit on November 13. No requests for notification of the agency decision were filed with the agency. On November 30, Coastal entered an appeal of the issuance of the permit. However, this appeal was not filed within the allotted time frame. Coastal was not entitled to a hearing addressing the DOT permit.

B. Additional Notice Arguments

Coastal maintains notice of the issuance of the permits was required by South Carolina Regulation 61-101.G.1 irrespective of the notification request necessary under the statutory scheme. See 25A S.C. Code Ann. Regs. 61-101.G.1 (Supp. 2007). The ALC found Coastal was only entitled to

notification under the guidelines of Section 44-1-60 because the language of the regulation specifically limits its applicability. Additionally, the ALC judge concluded the statute superseded the regulation, making the additional notice provision inapposite. We agree with the adjudication of the ALC judge.

In addition to a critical area permit and a coastal zone consistency certification, the SPA permit and DOT permit both contain a Section 401 water quality certification. Typically, when a water quality certification is involved, Regulation 61-101 applies. This regulation instructs:

> The Department shall issue a notice of proposed decisions on application for certification, including any proposed conditions. Such notice shall advise of availability of the staff assessment and related file information. Such notice shall be mailed to:
>
> (a) the applicant;
>
> (b) agencies having jurisdiction or interest over the disposal site or activity site;
>
> (c) owners or residents of property adjoining the area of the proposed activity; and
>
> **(d) those persons providing comment in response to the initial notice of application.**

25A S.C. Code Ann. Regs. 61-101.G.1 (emphasis added). Coastal posits this regulation entitled it to notice because Coastal sent comment letters to DHEC during the initial permitting process. This assertion is erroneous.

We find Regulation 61-101.G.1 to be inapplicable in the case at bar because it is expressly preempted by Act Number 387. The operative language of the legislation elucidates: ". . . **to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling**." Act No. 387, § 53, 2006 S.C. Acts & Joint

Resolutions (emphasis added). The General Assembly indubitably and unequivocally enunciated when a conflict between Section 44-1-60 and any prior statute or regulation arises, Section 44-1-60 is controlling. Under the manifest guidance of the legislature, we cannot adopt an interpretation allowing a regulation to override the apprehensible notice provision contained in the statute.

Irrespective of Coastal's submission of comment letters on each the permits, which would arguably entitle it to notice under the regulation, Coastal still had a duty to request notification of the department decision from DHEC. See S.C. Code Ann. § 44-1-60. Coastal cannot fail to comply with the statutory requirements enacted by the General Assembly while arguing for the application of conflicting regulations. This position is untenable.

Pellucidly, administrative agencies are authorized to promulgate regulations, but these regulations cannot conflict with or alter the statute conferring authority. See Fisher v. J.H. Sheridan Co., Inc., 182 S.C. 316, 326, 189 S.E. 356, 369 (1936). "The Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority, especially to make rules and regulations as to the enforcement of law; and such rules when promulgated are valid, if they are not in conflict with, or do not change in any way the statute conferring authority." Fisher, 182 S.C. at 326, 189 S.E. at 369; accord State v. Brown, 274 S.C. 592, 595, 266 S.E.2d 415, 416-417 (1980); Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 355, 126 S.E.2d 15, 19-20 (1962); S.C. State Highway Dep't v. Harbin, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). In McNickel's, Inc. v. S.C. Dep't of Revenue, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998), the South Carolina Supreme Court annunciated:

> While the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board "to fill up the details" by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. Heyward v. South Carolina Tax Comm'n,

> 240 S.C. 347, 126 S.E.2d 15 (1962). An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. Hunter & Walden Co. v. South Carolina State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978). Although a regulation has the force of law, it must fall when it alters or adds to a statute. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). A rule may only implement the law. Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943).

Section 44-1-60 provides a distinct notice provision authorizing four different parties to receive notification of a DHEC department decision: (1) the applicant; (2) the permittee; (3) the licensee; and (4) affected parties requesting notification. S.C. Code Ann. § 44-1-60(E). Regulation 60-101.G.1 expands notification requirements to include the following groups: (1) agencies having jurisdiction or interest in the site; (2) adjoining property owners and residents; and (3) parties providing comments. The regulation alters and adds to the notice requirements mandated by Section 44-1-60. When there is a conflict between a statute and a regulation implementing the statute, the statute is controlling. See McNickel's, 331 S.C. at 634, 503 S.E.2d at 725; Act No. 387, § 53, 2006 S.C. Acts & Joint Resolutions. In the case sub judice, because the notice provision of Section 44-1-60(E) is irreconcilable with the requirement of Regulation 60-101.G.1, the statutory language prevails. Coastal's theory of entitlement to notification under the regulation is unsound and unavailing.

C. Jurisdiction

Coastal claims the DHEC Board and the ALC both had proper jurisdiction to hear the controversy. We disagree.

On the issue of jurisdiction, the ALC judge expounded:

> Counsel for the SPA, DOT, DHEC, and [Coastal] all affirmatively acknowledged that the timely filing of a

> request for final review with the Board is a jurisdictional prerequisite to challenging a DHEC decision. Thus, because [Coastal] failed to file its request for final review within fifteen days of the Permit[s] being mailed to [the applicants, the SPA and the DOT,] the Board did not have jurisdiction over [Coastal's] challenge to the Permit[s], and neither does this Court.

Compliance with statutory time periods for filing appeals is a prerequisite for an appellate entity to have jurisdiction to hear an appeal. See Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 334, 372 S.E.2d 584, 586-587 (1988), overruled on other grounds by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995); see also Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) ("This Court has consistently stated that service of Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served."). In Botany Bay Marina, Inc. v. Townsend, 296 S.C. at 334, 372 S.E.2d at 586-587, the South Carolina Supreme Court observed:

> In Town & County Civic Organization v. Winston-Salem Zoning Board of Adjustment, 83 N.C. App. 516, 350 S.E.2d 893 (1986), the North Carolina Court of Appeals held that the Board's thirty day appeal period rule was binding and the plaintiff's failure to effect a timely appeal extinguished subject matter jurisdiction. 350 S.E.2d at 895. Likewise, respondent's failure to appeal the Charleston County Board of Adjustment's decision to grant the zoning permits within fifteen days divested the Board of Adjustment of jurisdiction. Id.

While the applicable statutes and rules implicated in Botany Bay are distinguishable from the mandated time period enacted by Section 44-1-60(E) relevant to this case, the Supreme Court instructed compliance with appeals filing deadlines grants jurisdiction to an appellate court while noncompliance

divests jurisdiction. "Service of the notice of intent to appeal is a jurisdictional requirement, and [an appeals court] has no authority to extend or expand the time in which the notice of intent to appeal must be served." Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (citing Stroup v. Duke Power Co., 216 S.C. 79, 56 S.E.2d 745 (1949); Wade v. Gore, 154 S.C. 262, 151 S.E.2d 470 (1930); Rennecker v. Warren, 20 S.C. 581 (1884)).

In the instant case, Coastal failed to comply with the filing deadlines for requesting a review before the DHEC Board. See S.C. Code Ann. § 44-1-60(E). The DHEC Board had no authority to extend or expand the period in which appeals requests could be timely filed and was limited to the fifteen-day filing window enacted by the General Assembly. Based on Coastal's failure to comply with the mandatory appeals term, the DHEC Board lacked jurisdiction and could not validly exercise dominion over the matter without erroneously extending the span in which appeals could be filed. Because the appeal was untimely and the DHEC Board lacked jurisdiction, the ALC could not invoke jurisdiction to hear the matter. At the motion hearing in front of the ALC judge, Coastal's counsel corroborated a timely-filed request for final review before the DHEC Board is necessary for the ALC to exercise jurisdiction:

> The Court: Do you agree that complying with [Section 44-1-60(E)] is a prerequisite to being able to later file a contested case before this Court?
>
> Counsel: Under the statute yes, sir.
>
> The Court: Okay. So, in essence, the Court's jurisdiction is not an exhaustion problem. Of course, jurisdiction is tied to [Section 44-1-60(E)]. In essence, you can't make the argument that well, that's internal workings of [DHEC]. We're just going to see what happens, and wait until the process works itself out.
>
> Counsel: Absolutely.

> The Court: And then when it does, I don't like the results, so now I'm going to go and attempt to challenge it before the ALC.
>
> Counsel: Right. There's not going to be sandbagging.

This exchange confirms the understanding of the parties that proper invocation of the DHEC Board's authority to conduct the hearing was necessary before a party could challenge a decision of that entity. Because jurisdiction was not properly invoked in this case, no challenge could be made.

In Piana v. Piana, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961), the South Carolina Supreme Court analyzed jurisdiction:

> Further to be kept in mind is the distinction between jurisdiction and the exercise of jurisdiction. "The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction of the person and the subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." 21 C.J.S., Courts, § 26. As pointed out in Jackson City Bank & Trust Co. v. Frederick, 271 Mich. 538, 260 N.W. 908, 909: "There is a side difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal."

The definition of jurisdiction in Piana is applicable here. The present case is illustrative of a situation where there is a want of jurisdiction to the extent that the courts involved had no authority to render a decision in the matter. Neither the DHEC Board nor the ALC had jurisdiction due to Coastal's

failure to timely file an appeal under the requirements of Section 44-1-60(E). Based on this conclusion, the ALC judge was correct in granting the SPA's motion for dismissal of the contested case.

III. Effect of Waiver, Estoppel, and Equitable Tolling on Coastal's Failure to File a Timely Request for Final Review

Coastal opines issues of waiver, estoppel, and equitable tolling require reversal of the ruling of the ALC. We find that these issues are not preserved for review before this Court.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the Court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). An issue cannot be raised for the first time on appeal. Doe v. Roe, 379 S.C. 291, ___, 665 S.E.2d 182, 185 (Ct. App. 2008); Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006); Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct. App. 2001). The issue must have been raised to and ruled upon by the trial judge to be preserved for review. Pye v. Est. of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); Singleton v. Sherer, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct. App. 2008); see also Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("An appellate court will not consider issues on appeal which have not been preserved for appellate review."). To preserve an issue for appeal, it must be: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). Without an initial ruling by the trial judge, a reviewing court would have no foundation on which to evaluate whether an error has been committed. Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008); Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004). If an issue could have been initially presented to the trial court, a party cannot raise that issue for the first time in a post-trial motion. Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (citing generally C.A.H. v. L.H., 315 S.C. 389, 434

S.E.2d 268 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)).

A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) (citing generally C.A.H., 315 S.C. at 392, 434 S.E.2d at 270); Patterson, 318 S.C. at 185, 456 S.E.2d at 437; Hickman, 301 S.C. at 456, 392 S.E.2d at 482); see also McMillan v. S.C. Dep't of Agric., 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005) (issue not preserved "because it cannot be raised for the first time in a motion to alter or amend."), cert. granted (Feb. 14, 2007). "[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." RRR, Inc. v. Toggas, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008) (citing Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)).

The issues of waiver, estoppel, and equitable tolling were not initially raised to and ruled upon by the ALC. Coastal failed to present these theories in prior motions or at the hearing concerning the SPA's motions for dismissal. Coastal initially raised these issues in its motions for reconsideration even though they could have previously been brought to the attention of the judge. Furthermore, the ALC judge never specifically ruled on the matter. Therefore, because Coastal neglected to bring these arguments to the attention of the ALC judge even though the opportunity existed, the issues are not preserved and cannot be addressed by this Court. The ALC judge concluded:

> The final order was filed and mailed to the parties on September 4, 2007, and received by the parties on September 5, 2007. Under ALC Rule 29(D)(1), a party has ten days from notice of an order to file a motion for reconsideration. Thus, the motion was due on September 17, 2007, since the last day of the ten-day period ran on Saturday, September 15, 2007. Under ALC Rule 3(A) regarding Computation of Time, the period thus ran on the following Monday.

> **IT IS THEREFORE ORDERED** that the South Carolina State Ports Authority's **Motion to Strike** is **GRANTED**, and this matter is hereby **DISMISSED** for lack of jurisdiction.

We agree with the ruling of the ALC.

IV. Due Process Considerations

Coastal asseverates the ALC judge's interpretation and application of Section 44-1-60 resulted in a denial of due process and a violation of principles of fairness. We disagree.

The Constitution of the United States of America and the Constitution of the State of South Carolina guarantee due process rights to all parties. See U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 & § 22. The State Constitution provides:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const. art. I, § 3.

The State Constitution additionally assures:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General

> Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22. The State Supreme Court has interpreted this provision to provide "persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved." Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (citing Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)); accord Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

"Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)); accord Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 353, 354 (2008) ("The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.") An interested party must be given notice "reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (2002) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Murdock v. Murdock, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999)). " 'To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process.' " Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 131-132, 530 S.E.2d 643, 650 (Ct. App. 2000) (quoting Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other

grounds by Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)).

In response to the SPA's motions to dismiss the contested case hearings before the ALC, Coastal filed a response maintaining it would be denied due process of law if the contested case hearings were not held. The ALC judge denied the motions and, in the Order of Dismissal, held:

> The League received the notice due to it when (1) public notice of SPA's permit application was provided; and (2) the General Assembly enacted the requirement in Section 44-1-60(E) that affected persons must affirmatively request to be notified of the staff decision on the permit application when it is issued. See Smothers v. United States Fid. & Guar. Co., 322 S.C. 207, 210-211, 470 S.E.2d 858, 860 (1996) ("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.")

We agree with the ALC judge. While Coastal has a constitutional right to due process of law, including a right to notice and a meaningful opportunity to be heard, Coastal failed to take the necessary steps outlined in the statutory procedure of Section 44-1-60 to protect these rights. See S.C. Code Ann. § 44-1-60(E). A party "cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it." Zaman v. S.C. State Bd. of Med. Exam'rs, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991).

Coastal received public notice of the pending permit applications and participated in public hearings. Additionally, Coastal expressed concern to DHEC in comment letters. However, Coastal failed to comply with the established administrative procedures that would have entitled it to mailed notification from DHEC when the approved permits were mailed to the SPA and the DOT. Through Section 44-1-60(E), the General Assembly provided Coastal with the means to receive notice, but Coastal declined to avail itself

of the statutorily-mandated protocol. Coastal's due process rights were not violated by the ALC judge's interpretation of the statute.

V. Abuse of Discretion Regarding the Timeliness of Coastal's Motions for Reconsideration

Coastal asserts the ALC judge erred in denying its motions for reconsideration of the dismissal orders. We agree with the merits of the ALC judge's decision to dismiss both contested cases. Based on our ruling in this matter, it is unnecessary for this Court to further address the issue of abuse of discretion. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding courts need not address remaining exceptions when the resolution of a prior issue is dispositive of the case).

CONCLUSION

Based on the foregoing analysis and reasons, the orders issued by the administrative law judge are

AFFIRMED.

KONDUROS, J., and CURETON, A.J., concurring.