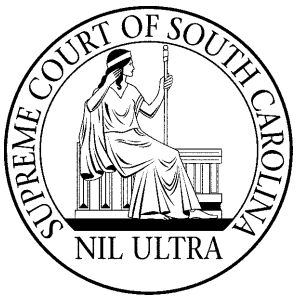

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
January 29, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Archie More Hardin, Respondent.

Appellate Case No. 2018-002035

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Orangeburg County
Maité Murphy, Circuit Court Judge

Opinion No. 27938
Heard January 15, 2020 – Filed January 29, 2020

DISMISSED

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; and Solicitor David Michael Pascoe Jr., of Orangeburg, for Petitioner.

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Lara Mary Caudy, both of Columbia; and Daniel Carson Boles, of Boles Law Firm, LLC, of Charleston, for Respondent.

PER CURIAM: Archie More Hardin was charged with several criminal offenses in connection with the robbery of a T-Mobile store in Orangeburg. After a pre-trial *Neil v. Biggers*[1] hearing, the trial court denied Hardin's motion to exclude the three victims' out-of-court and in-court identifications of him. Hardin was convicted of assault and battery of a high and aggravated nature (ABHAN), possession of a weapon during the commission of a violent crime, armed robbery, and three counts of kidnapping. Hardin appealed his convictions. The court of appeals held the trial court erred in allowing the three victims' identification testimony; however, the court of appeals held the error was harmless and affirmed Hardin's convictions in a published opinion. *State v. Hardin*, 425 S.C. 1, 819 S.E.2d 177 (Ct. App. 2018).

We granted the State's petition for a writ of certiorari.[2] While the State agrees with the court of appeals' decision to uphold Hardin's convictions, the State argues the court of appeals erred in holding the trial court should not have admitted the three victims' identification testimony. Specifically, the State argues the court of appeals misapplied the *Biggers* analysis and the abuse of discretion standard of review concerning the trial court's evidentiary rulings.

We hold the State is not aggrieved by the decision of the court of appeals in this case; therefore, we dismiss the writ of certiorari as improvidently granted. *See* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); *State v. Rearick*, 417 S.C. 391, 398 n.9, 790 S.E.2d 192, 196 n.9 (2016) (alteration in original) ("[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property." (quoting *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997))).

[1] 409 U.S. 188 (1972).

[2] Hardin did not petition for a writ of certiorari until oral argument before this Court. We deny his oral petition.

We express no opinion as to the propriety of the court of appeals' decision.

DISMISSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Henry Dial Jr., Petitioner.

Appellate Case No. 2017-002205

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper Jr., Circuit Court Judge

Opinion No. 27939
Submitted September 16, 2019 – Filed January 29, 2020

REMANDED

John Henry Dial Jr., of Columbia, pro se Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch Jr., and Interim Solicitor Heather S. Weiss, all of Columbia, for Respondent.

JUSTICE FEW: The record in this criminal appeal does not reflect whether the magistrates court obtained a valid waiver of the right to counsel before proceeding to the trial of this unrepresented defendant. We remand to the circuit court for an

evidentiary hearing to determine whether the defendant knowingly and intelligently waived his right to counsel.

I. Facts and Procedural History

John Henry Dial Jr. was charged in magistrates court with three counts of assault and battery in the third degree arising from an incident in which two adults and one minor were sprayed with pepper spray. Dial appeared in court several times before trial, each time without counsel. He pled not guilty and requested a jury trial.

The record on appeal does not include transcripts of Dial's pre-trial appearances. The magistrate states in the return, however, he advised Dial on three separate occasions before trial of his right to be represented by an attorney. Each time, Dial requested to represent himself. The return is silent as to whether the magistrate advised Dial of the dangers of representing himself.

Dial testified in his defense and denied spraying any of the victims with pepper spray. The jury returned a verdict of guilty on two counts of assault and battery in the third degree but found Dial not guilty on the count for spraying the minor. The magistrates court sentenced Dial to sixty days in jail.

Dial retained counsel to appeal his conviction to the circuit court. He argued, among other things, "[Dial] was not represented by counsel and did not waive his right to counsel." At the hearing in the circuit court, Dial's counsel stated, "There is no evidence in the return or in the transcript that the trial judge properly warned [Dial] under *Faretta v. California* of the dangers of proceeding pro se." The circuit court affirmed Dial's conviction.

Dial appealed to the court of appeals. The court of appeals affirmed Dial's conviction in an unpublished opinion pursuant to Rule 220(b), SCACR. *State v. Dial*, Op. No. 2017-UP-339 (S.C. Ct. App. filed Aug. 9, 2017). The opinion included a string cite listing two cases with parenthetical quotes stating a circuit court may not consider issues that were not presented to the magistrate. Though the opinion contained no narrative explanation, it is clear the court of appeals found Dial's argument that he did not waive his right to counsel was not preserved for appellate review.

II. Issue Preservation

It is firmly established law that, ordinarily, an issue must be presented to the trial court or it is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court."). As the court of appeals recognized, this established rule applies in appeals from magistrates court to circuit court. *See State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) ("In criminal appeals from magistrate . . . court, the circuit court . . . reviews for preserved error raised to it by appropriate [objec]tion." (citing *City of Columbia v. Felder*, 274 S.C. 12, 13, 260 S.E.2d 453, 454 (1979))).

As the court of appeals apparently did not recognize, however, this rule does not apply in all situations. Dial requested to proceed without an attorney. It would be counterintuitive to expect a defendant who requests to go forward unrepresented to challenge the trial court's authority to permit him to do so. Rather, "It is the responsibility of the trial judge to conduct a hearing to determine whether an accused's request to proceed *pro se* is accompanied by a knowing and intelligent waiver of the right to counsel." *State v. Cash*, 304 S.C. 223, 224, 403 S.E.2d 632, 633 (1991).

Nevertheless, in *State v. White*, 305 S.C. 455, 409 S.E.2d 397 (1991), the State argued an unrepresented defendant failed to preserve the voluntariness of his waiver of counsel to the trial court, and "this issue cannot be raised for the first time on appeal." 305 S.C. at 455, 409 S.E.2d at 397. We disagreed, explaining "the first opportunity [the defendant] has had to raise this issue is on appeal." 305 S.C. at 456, 409 S.E.2d at 397. We later stated, "A notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. The *pro se* defendant cannot be expected to raise this issue without the aid of counsel." *State v. Rocheville*, 310 S.C. 20, 25 n.4, 425 S.E.2d 32, 35 n.4 (1993) (citing *Cash*, 304 S.C. at 224, 403 S.E.2d at 633); *see Ex parte Jackson*, 381 S.C. 253, 261 n.3, 672 S.E.2d 585, 589 n.3 (Ct. App. 2009) (quoting *Rocheville* and finding defendant was not required to preserve issue of whether she knowingly and intelligently waived her right to counsel); *see also Brown v. State*, 317 S.C. 270, 273, 453 S.E.2d 251, 253 (1994)

(Finney, J., concurring) (stating, "while this Court will not ordinarily consider the issue whether a defendant has knowingly and voluntarily waived a constitutional right for the first time on appeal, we will continue to entertain the claim when it relates to the issue of waiver of the right to counsel").

Dial was not required to raise to the magistrates court—without the aid of counsel—the validity of his waiver of counsel. The court of appeals erred in misunderstanding that he was.

III. Waiver of Right to Counsel

The Sixth Amendment to the United States Constitution guarantees an accused's right to the assistance of counsel. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 339, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799, 802 (1963). A defendant may waive his right to counsel, but he must do so knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975). For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82). The burden is on the State to demonstrate the validity of a defendant's waiver of his right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424, 439-40 (1977); *see United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995) ("On direct appeal, the government bears the burden of proving the validity of the waiver.").

The record in this case does not contain transcripts of Dial's pre-trial appearances. The only information available in the record regarding what occurred in these pre-trial appearances is the magistrate's return, which is silent as to whether the magistrate advised Dial of the dangers of proceeding without counsel.[1] Thus, the

[1] When a magistrates court prepares a return in a case in which the court conducted a hearing to determine whether a defendant knowingly and voluntarily waived the right to counsel, the court must explain in the return the steps it took to comply with the requirements of *Faretta* and *Prince*, including the court's explanation to the defendant of the dangers of self-representation and the court's findings as to whether the defendant understood those dangers.

record contains no evidence the magistrate explained to Dial the dangers of self-representation.

The State argues it was Dial's burden to provide the Court with an adequate record to review the issue on appeal. We disagree. Dial contends the record does not reflect a valid waiver. If Dial is correct, it would be impossible for Dial to put in the record a transcript of what did not occur. If Dial is incorrect, the State should have put the necessary information in the record to demonstrate what did occur. We are not persuaded Dial failed to preserve his issue by not putting events in the record that Dial contends did not occur.

The State also argues the record indicates Dial had the requisite understanding to properly represent himself. The State makes two points. First, it contends that other facts in the record demonstrate Dial's waiver was knowing and voluntary. *See Watts*, 347 S.C. at 402, 556 S.E.2d at 370 ("If the trial judge fails to address the disadvantages of appearing *pro se*, as required by the second prong of *Faretta* . . . , 'this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.'" (quoting *Prince*, 301 S.C. at 424, 392 S.E.2d at 463)). The State argues he was almost thirty-four years old at the time of trial; there was no indication he had any physical or mental impairment; he was on probation from a prior conviction, indicating he had some exposure to the legal system; and he indicated on several forms that the charges against him were three counts of third degree assault, demonstrating an awareness of the charges against him. We find this evidence insufficient to demonstrate Dial made a knowing and voluntary waiver.

Second, the State argues Dial demonstrated the ability to "fully participate in his trial" by conducting an opening statement, directing and cross-examining witnesses, and objecting to the admission of certain evidence. The State contends this indicates Dial "knew of the significance of the trial and the ability to present a defense." This is not a valid argument. *See State v. Samuel*, 422 S.C. 596, 603, 813 S.E.2d 487, 491 (2018) (stating "whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation" (citing *Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321, 332-33 (1993))); *see also United States v. Williams*, 629 F. App'x 547, 552 (4th Cir. 2015) (stating "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." (citing *Godinez*, 509 U.S. at 400, 113 S. Ct. at 2687, 125 L. Ed. 2d at 332-33)); 21A AM. JUR. 2d *Criminal Law* § 1126 (2016)

("The competency required of a defendant seeking to waive the right to counsel is the competence to waive the right, not the competence to represent oneself. Thus, the trial court may not measure the defendant's competence to waive his or her right to counsel by evaluating the defendant's technical legal knowledge or his or her ability to represent him- or herself." (footnotes omitted)).

In *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977), we held, in the absence of evidence of a knowing and intelligent waiver of the right to counsel, a defendant is entitled to a remand to the trial court for a factual determination as to whether the waiver was knowingly and intelligently made. 269 S.C. at 109, 236 S.E.2d at 420-21. Similarly, we remand Dial's case to the circuit court for the court to conduct an evidentiary hearing pursuant to *Dixon* to determine whether Dial knowingly and intelligently waived his right to counsel. At this hearing, both the prosecution and the defense are permitted to present evidence on the issue, and if the trial court finds the waiver was not knowing and intelligent, it shall grant the defendant a new trial. 269 S.C. at 109, 236 S.E.2d at 421. Alternatively, if the trial court determines "the waiver was intelligently made, an order dismissing the appeal shall be made by this Court." *Id.*

REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Rose, Petitioner,

v.

South Carolina Department of Probation, Parole and Pardon Services, Respondent.

Appellate Case No. 2018-001641

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 27940
Heard October 29, 2019 – Filed January 29, 2020

REVERSED AND REMANDED

Travis Dayhuff, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Petitioner.

General Counsel Matthew C. Buchanan and Assistant General Counsel Tommy Evans Jr., both of Columbia, for Respondent.

JUSTICE KITTREDGE: For years, the Department of Probation, Parole, and Pardon Services (DPPPS) improperly denied inmates parole based on an incorrect interpretation of the statute setting forth the number of votes required by the parole board. Because DPPPS had a policy of destroying records of parole hearings, it was, to put it mildly, difficult to determine which inmates were wrongly denied parole. Nevertheless, in 2013, following our decision in *Barton v. South Carolina Department of Probation, Parole & Pardon Services*,[1] DPPPS undertook a process to attempt to identify which inmates were improperly denied parole.

Petitioner David Rose was one of the inmates who claimed he was improperly denied parole; in Rose's situation, the parole hearing occurred in 2001. As we will explain, the evidence manifestly establishes that Rose received the requisite number of votes in favor of parole in 2001, but he remains in jail to this day.

Rose persistently sought relief through the years, often in circuit court, where DPPPS contended that Rose must pursue relief through the administrative process rather than through the judicial process. Rose also sought administrative relief throughout the years, to no avail. In one of the numerous circuit court proceedings, counsel for DPPPS acknowledged as "credible" the evidence put forth by Rose as to the requisite number of favorable votes he received at the 2001 parole hearing. Circuit Judge Addy, to his commendable credit, recognized Rose's seemingly-meritorious claim was continually denied in all forums. Judge Addy directed DPPPS to conduct an investigation, at which point Rose again pursued his challenge in the administrative forum. At the agency level, DPPPS denied relief to Rose because the agency records did not establish the actual vote count from the 2001 hearing. As noted, DPPPS had destroyed the very records it claimed were necessary for Rose to prevail.

Following DPPPS's final agency decision, the administrative law court (ALC) granted Rose relief, finding the only evidence as to the parole board's 2001 vote demonstrated Rose was entitled to parole. The court of appeals reversed. We now reverse the court of appeals and find the ALC's decision was supported by substantial evidence.

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[1] 404 S.C. 395, 745 S.E.2d 110 (2013).

I.

The parole board is comprised of seven members who vote on whether an inmate should receive parole. However, only a quorum—four of the seven members—need be present and vote at the hearings of those convicted of violent crimes. *See Garris v. Governing Bd. of S.C. Reins. Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) ("In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies.").

Prior to 1986, to receive parole, an inmate was required to obtain a simple majority vote in his favor. *See* S.C. Code Ann. § 24-21-645 (Supp. 1984). However, in conjunction with the passage of the Omnibus Criminal Justice Improvements Act of 1986, the General Assembly amended section 24-21-645(A) to prescribe "at least two-thirds of the members of the board [] authorize and sign orders authorizing parole for persons convicted of a violent crime." Act No. 462, 1986 S.C. Acts 2955, 2959, 2990–91; *see also* S.C. Code Ann. § 24-21-645(A) (Supp. 2019).

Between 1986 and 2013, DPPPS interpreted section 24-21-645 to require an inmate receive five votes in his favor out of seven possible parole board members' votes—at least two-thirds of the entire parole board—to receive parole, regardless of when the inmate was sentenced, even if it was prior to 1986 when the simple-majority vote requirement was in effect. DPPPS also did not relax the five-vote requirement in the event that less than a full parole board was present and voting on a particular inmate's fate.

However, in the 2013 *Barton* decision, this Court held DPPPS's adherence to the five-vote requirement was contrary to the statute. 404 S.C. at 415–17, 745 S.E.2d at 121–22. In particular, we found DPPPS's retroactive application of the two-thirds vote requirement violated the federal and state *Ex Post Facto* Clauses for those inmates sentenced prior to 1986 when the simple-majority vote requirement was the law. *Id.* at 403–14, 745 S.E.2d at 114–20. Additionally, we interpreted section 24-21-645 as only requiring inmates sentenced after 1986 to receive favorable votes from two-thirds of the parole board members actually present at the hearing. *Id.* at 414–19, 745 S.E.2d at 120–23 (noting that DPPPS's prior interpretation led to absurd results, for under that interpretation, it was possible for

four members of the parole board (a quorum) to be present and unanimously vote to grant the inmate parole, but DPPPS nonetheless deny the inmate parole because he failed to receive five votes in his favor).

II.

In 1978, Rose was sentenced to prison. Ten years later, Rose was granted parole. While on parole, Rose did not commit any additional crimes. He moved to Florida, secured employment and supported his family. However, Rose eventually failed to report to his parole officer, and, thus, in 2000, his parole was revoked and he was returned to prison.

One year later, Rose sought parole again before six out of the seven parole board members. Immediately following the hearing, a DPPPS employee allegedly informed Rose, his cousin Carlos Bell, and Rose's counsel that Rose's request for parole had been denied because he had received only four votes in his favor out of the six members voting that day.[2]

Over the next twelve years, Rose repeatedly attempted to seek administrative and judicial relief, claiming he had received four out of six possible votes in favor of parole and therefore met the requirements of section 24-21-645. Each time, after being shunted from one forum to the next, Rose was told his case had to be dismissed on jurisdictional grounds because he had filed his claim in the wrong place.

Rose persevered, and following our decision in *Barton*, he filed yet another action in circuit court claiming DPPPS had unlawfully denied him parole because he had received the correct number of votes in his 2001 parole hearing. Once again, Rose was told he had filed in the wrong forum. However, in his order dismissing the case, Judge Addy ordered DPPPS to conduct an investigation into the 2001 vote count pursuant to *Barton*.

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[2] As discussed, this was the period in which DPPPS required an inmate to receive five votes in his favor, regardless of how many parole board members were present and voting. Of course, four votes out of six is both a simple majority (under the pre-1986 version of section 24-21-645 that Rose was initially sentenced under) and a two-thirds majority (under the current version of section 24-21-645).

Larry Patton, an employee of DPPPS, conducted the investigation. Patton reviewed Rose's and Bell's sworn statements,[3] both claiming to have been present when a DPPPS employee informed them Rose received four out of six votes in favor of parole. Patton also reviewed a hearing ledger which indicated Rose's 2001 petition for parole had been rejected but, importantly, did not indicate a vote count associated with the rejection. Because DPPPS had destroyed all of its other records prior to the *Barton* investigation, Patton was unable to review any other material related to the 2001 parole hearing aside from those two statements and the hearing ledger.

Following Patton's investigation, DPPPS made a final agency decision that Rose was not entitled to receive parole under the *Barton* case because there was insufficient evidence of the 2001 vote count. Specifically, the final order stated, "Unfortunately, *we* have been unable to locate *any information* from your parole hearing as *records have been destroyed* given your hearing was almost fourteen years ago. Therefore, it is the Department's position that *without any other evidence of the vote count* . . . the Department cannot release you to parole." (Emphasis added.) Ironically, in the most recent circuit court proceeding, DPPPS had not only admitted there was other evidence of the vote count via the Bell affidavit submitted by Rose, counsel for the agency informed Judge Addy that the affidavit was "credible."

Rose appealed to the ALC. The ALC reversed DPPPS's decision, finding there was no evidence whatsoever in the agency record to support DPPPS's decision that Rose did not receive four out of six votes in favor of parole. Rather, the ALC determined the *only* evidence in the record indicated Rose did, in fact, receive four votes in favor of parole.

DPPPS appealed the ALC's decision, and the court of appeals reversed in an unpublished opinion. *Rose v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, Op. No. 2018-UP-087 (S.C. Ct. App. filed June 13, 2018). The court of appeals held, "[T]he ALC's determination that Rose received four votes in favor of parole is not supported by substantial evidence because, based on the record as a whole, reasonable minds would not find Bell's affidavit to be adequate evidence that Rose received four votes."

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[3] Bell submitted an affidavit, and Rose testified in a prior lawsuit against DPPPS.

We granted Rose's petition for a writ of certiorari to review the court of appeals' decision.

III.

Rose argues the court of appeals erred in reversing the ALC because it applied an improper standard of review. Specifically, Rose claims the only evidence considered by DPPPS in its investigation of the vote count are Rose's and Bell's sworn statements. Given the fact that there is no evidence to the contrary, Rose contends the ALC's finding that Rose received four votes was supported by substantial evidence. We agree.

In an appeal to this Court from a final agency decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. *Barton*, 404 S.C. at 400, 745 S.E.2d at 113; *see also Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008) (citing S.C. Code Ann. § 1-23-610(C) (Supp. 2007)).

> This Court will only reverse the decision of an ALC if that decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) [] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Barton, 404 S.C. at 401, 745 S.E.2d at 113 (quoting S.C. Code Ann. § 1-23-610(B) (Supp. 2012)). "The Court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact." *Id*. (internal alteration marks omitted) (quoting S.C. Code Ann. § 1-23-610(B)). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only

find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Id*.

In this case, the ALC's decision was supported by substantial evidence. The only evidence considered by DPPPS was Rose's and Bell's sworn statements and a hearing ledger which said "rejected" with no further information. Of the evidence considered by DPPPS, only Rose's and Bell's sworn statements provided any evidence of the vote count, and both men indicated Rose had received sufficient votes to be granted parole. The position advanced in the sworn statements has remained constant in the years since the 2001 parole hearing. Moreover, DPPPS admitted in circuit court that Bell's statement was "credible." Beyond this, DPPPS admitted it incorrectly calculated the votes necessary to receive parole prior to the *Barton* case and, therefore, had routinely denied parole to otherwise eligible inmates between 1986 and 2013. Against this actual evidence, DPPPS apparently believes it may simply claim that because it does not have any evidence of the vote count *in its own records*—which it destroyed prior to Patton's investigation, and which, by its own admission, would not have included the vote count anyway—it can nonetheless somehow claim it properly denied Rose parole in 2001.

Considering the record as a whole, we find the decision of the ALC is manifestly supported by substantial evidence. *See Sanders*, 379 S.C. at 417, 665 S.E.2d at 234 ("In determining whether the [ALC]'s decision was supported by substantial evidence, this court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALJ reached.").[4]

Because there is substantial evidence showing Rose received four out of six votes

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[4] DPPPS also argues the ALC improperly shifted the burden to DPPPS. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met." (quoting 73A C.J.S. *Public Administrative Law and Procedure* § 128 at 35 (1983)). We disagree. The fact that the ALC did not accept DPPPS's summary rejection of Rose's claim in no manner reflects burden shifting. Rose met his burden of proof by submitting his and Bell's sworn statements for DPPPS's review, which the ALC found credible.

in his 2001 parole hearing, he has received both a simple-majority vote (required by the prior version of section 24-21-645) and a two-thirds majority vote of the parole board members present at the hearing (required by the current version of the statute). Thus, under either version of the statute, Rose received enough votes to be granted parole in 2001.[5]

Accordingly, because Rose has demonstrated that he was granted parole in 2001, yet remains in prison to this day, we reverse the decision of the court of appeals and remand to DPPPS to determine Rose's parole conditions.[6]

REVERSED AND REMANDED.

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

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[5] DPPPS also claimed the ALC did not have the authority to grant the relief requested by Rose in that the ALC, by ruling in Rose's favor, effectively granted Rose parole. *See* S.C. Code Ann. § 24-21-640 (Supp. 2019) (delegating solely to the parole board the responsibility of determining if and when a prisoner meets the prerequisites for parole eligibility). The ALC rejected this argument, finding it did "not grant or deny [Rose] parole [itself], but rather require[d DPPPS] to carry out the result of a vote the [parole b]oard already made." We agree. *See Al-Shabazz v. State*, 338 S.C. 354, 376–77, 527 S.E.2d 742, 754 (2000) (finding the ALC has the authority to review non-collateral and administrative agency decisions); *see also Barton*, 404 S.C. at 400, 745 S.E.2d at 113 (upholding the ALC's authority to review DPPPS's decisions on the two-thirds requirement set forth in section 24-21-645); *cf. State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989) (finding the question of parole eligibility is separate from the court's authority to sentence an offender).

[6] We note it is undisputed Rose has been a model prisoner, incurring no disciplinary infractions while imprisoned.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth and Angela Hensley, on behalf of their minor child BLH, and all other similarly situated children, Petitioners,

v.

South Carolina Department of Social Services, Respondent.

Appellate Case No. 2018-001351

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 27941
Heard October 29, 2019 – Filed January 29, 2020

VACATED AND DISMISSED

Timothy Ryan Langley and Charles J. Hodge, Hodge & Langley Law Firm, PC; and James Fletcher Thompson, James Fletcher Thompson, LLC; all of Spartanburg, for Petitioner.

Andrew F. Lindemann and Joel Steve Hughes, Lindemann, Davis & Hughes, PA, of Columbia, for Respondent.

JUSTICE FEW: Kenneth and Angela Hensley filed this lawsuit against the South Carolina Department of Social Services on behalf of their adopted minor child BLH and a class of approximately 4000 similarly situated adopted children. The central allegation of the lawsuit is that DSS breached an Adoption Subsidy Agreement with the parents of each member of the class by reducing each parent's adoption subsidy by $20 a month, beginning in 2002. The circuit court issued an order finding the Hensleys satisfied the requirements of Rule 23(a) of the South Carolina Rules of Civil Procedure, and certifying the proposed class. The court of appeals reversed. We find the circuit court's order is not immediately appealable. We vacate the court of appeals' opinion and dismiss the appeal.

I. Facts and Procedural History

BLH was born on February 20, 1997. DSS placed her in foster care with the Hensleys in April 1997. The Hensleys received a foster care maintenance subsidy of $675 per month from DSS through the federal Adoption Assistance and Child Welfare Act of 1980. *See* 42 U.S.C.A. §§ 670-679c (2011 & Supp. 2019). The Hensleys adopted BLH in 1999. DSS then entered into an Adoption Subsidy Agreement with the Hensleys pursuant to 42 U.S.C.A. § 673(a)(1)(A), which requires the State to "enter into adoption assistance agreements . . . with the adoptive parents of children with special needs." *See also* S.C. Code Ann. §§ 20-7-1900 to -1970 (Supp. 2002) ("South Carolina Adoption Supplemental Benefits Act" (currently codified at S.C. Code Ann. §§ 63-9-1700 to -1810 (2010))); S.C. Code Ann. § 20-7-1950(A) (Supp. 2002) ("When the department determines that a child is eligible for supplemental benefits, a written agreement must be executed between the parents and the department." (currently codified at S.C. Code Ann. § 63-9-1770(A))). The agreement—entered on a form prepared by DSS—required DSS to make a "monthly cash payment" to the Hensleys of $675. The agreement stated it was made "for the purpose of facilitating the legal adoption of" BLH "and to aid the adoptive parents in providing proper care for this child." By its terms, the contract was to be "renewed annually by the adoptive parents and DSS," and the "parents may appeal DSS's decision to reduce, change, or terminate any adoption subsidy."

In June 2002, the acting director of DSS notified foster and adoptive parents by letter that DSS would reduce all federally funded monthly foster care maintenance and

adoption subsidies by $20. In 2004, DSS restored the $20 for foster care maintenance subsidies but not for adoption subsidies.

In 2011, the Hensleys filed a class action lawsuit in state court against DSS and its director alleging a violation of the Contract Clause (art. I, § 10) of the United States Constitution and civil rights violations under 42 U.S.C.A. § 1983 (2012). The defendants removed the case to federal court. The Hensleys dismissed their claims against DSS itself but added several former directors as defendants. The district court granted the Hensleys' motion for class certification, denied the remaining defendants' motion for summary judgment on the basis of qualified immunity, and denied the Hensleys' cross motion for summary judgment.

The Fourth Circuit reversed the denial of the defendants' motion for summary judgment. *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). The court found that when DSS reduced foster care maintenance subsidies in 2002, it was required by federal law to also reduce adoption subsidies. 722 F.3d at 183 (citing 42 U.S.C.A. § 673(a)(3) (providing that "in no case may the amount of the adoption assistance payment . . . exceed the foster care maintenance payment . . . if the child with respect to whom the adoption assistance payment is made had been in a foster family home")). On this basis, the court found "the Hensleys cannot establish that the Directors violated the Hensleys' rights under the Act and therefore the Directors are entitled to qualified immunity." 722 F.3d at 183. The Fourth Circuit "remand[ed] the case for entry of a judgment consistent with this opinion." 722 F.3d at 184.

While the federal case was on appeal at the Fourth Circuit, on April 1, 2013, the Hensleys filed this breach of contract action in state court in Spartanburg County. They claimed DSS breached the Adoption Subsidy Agreement by reducing the monthly cash payments in 2002, and by not increasing the payment for adoptive parents in 2004 when DSS restored the foster care maintenance subsidy to the original level. As with the first action, the Hensleys brought the claim as a class action. The circuit court held a hearing on class certification and DSS's motion for summary judgment. The court granted the motion for class certification in an order filed May 29, 2014, and then filed an amended order on September 16, 2014, certifying the proposed class. The court denied DSS's motion for summary judgment.

In the September 2014 order, the circuit court required "Defendant shall serve on each class member a Notice of Class Action." The court later granted DSS's Rule

59(e), SCRCP, motion to amend its order only on the question of who must provide notice to the class. In an order filed April 30, 2015, the court ordered the Hensleys to prepare a proposed notice and submit it to the circuit court for approval.

DSS appealed the September 2014 order before the circuit court ruled on DSS's Rule 59(e) motion. The court of appeals stayed the appeal until the Rule 59(e) motion was resolved. After the circuit court granted the motion in part on April 30, the court of appeals proceeded to hear the appeal. The court of appeals found the order granting class certification was immediately appealable and reversed on the basis the Hensleys did not satisfy the commonality requirement of Rule 23(a). *Hensley ex rel. BLH v. S.C. Dep't of Soc. Servs.*, 423 S.C. 422, 430-31, 814 S.E.2d 638, 642-43 (Ct. App. 2018). We granted the Hensleys' petition for a writ of certiorari.

II. Immediate Appealability

As the court of appeals correctly recognized, class certification orders are ordinarily not immediately appealable. 423 S.C. at 428, 814 S.E.2d at 641 (quoting *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008)); *see also Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) (rejecting the argument "class certification is a decision on the merits and affects substantial rights, therefore, appealable by virtue of S.C. Code [Ann.] § 14-3-330 (1976)"). To find the order immediately appealable in this case, the court of appeals relied on a narrow point of law from *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004), which we will discuss below. The court of appeals stated "this case involves the disclosure of personal and potentially sensitive information for which there would be 'no appellate remedy . . . likely to repair any damage done by an improper disclosure.' Therefore, we hold this case is properly before the appellate court." 423 S.C. at 429, 814 S.E.2d at 642 (citation omitted).

The factual basis for the court of appeals' holding is that there may be adopted children in the class whose parents made a conscious decision not to tell them they are adopted. The court reasoned that when notice of the class is given to these parents—or to their child if she has reached majority—the child will learn she is adopted. 423 S.C. at 429, 814 S.E.2d at 642. As the court of appeals recognized, the law protects the confidentiality of this information. *See* S.C. Code Ann. § 63-9-780(A)-(C) (2010 & Supp. 2019) (providing all adoption proceedings and proceedings regarding supplemental benefits to adoptive parents are confidential and must be closed, the related court records are confidential and must be sealed, and the

related DSS records are confidential and are not subject to inspection, the only exception being "upon court order for good cause shown").

The legal basis for the court of appeals' holding comes from *Doe v. Howe*. In that case, our court of appeals allowed an immediate appeal of a pretrial order denying permission to a plaintiff to proceed anonymously in a civil case involving allegations the plaintiff was the victim of sexual assault as a child. The *Doe* court focused on the nature of the specific information the plaintiff sought to keep confidential, 362 S.C. at 217-19, 607 S.E.2d at 356-57, and in particular the "social stigmatization" and "embarrassment and humiliation" the plaintiff "understandably seeks to avoid," 362 S.C. at 219, 607 S.E.2d at 357. The *Doe* court turned to federal precedent on the narrow question before it—whether a pretrial order denying a plaintiff permission to proceed anonymously is immediately appealable. 362 S.C. at 216, 607 S.E.2d at 356-57 (citing *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)). Based on the specific facts of the case (the plaintiff was a child sexual assault victim), and the narrow issue the court faced (the plaintiff sought to pursue the case anonymously), the *Doe* court found the order immediately appealable.

We disagree with the court of appeals that *Doe* supports an immediate appeal in this case. First, *Doe* is the only case in the jurisprudence of this State in which the need to preserve confidential information was the basis on which an immediate appeal of an otherwise unappealable order was permitted. *Cf. Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 8, 630 S.E.2d 464, 467-68, 469 (2006) (finding an order appealable because it was a final order, but discussing the immediate appealability of interlocutory orders disclosing confidential information). The issue in *Doe* was narrow. The *Doe* court relied on similarly narrow precedent—federal decisions on the identical issue. There is little in *Doe*, or in the federal precedent on which it relies, that suggests its reasoning should extend beyond the narrow question of whether a plaintiff may immediately appeal a pretrial order denying the plaintiff the right to proceed anonymously to avoid public disclosure of the fact he was sexually assaulted as a child.

DSS argues the immediate appealability of the class certification order is also supported by *Ex parte Capital U-Drive-It*. The court of appeals relied on the case. 423 S.C. at 429, 814 S.E.2d at 642. In *Ex parte Capital U-Drive-It*, the plaintiff brought a civil embezzlement action in circuit court against a recent family court litigant. 369 S.C. at 4, 630 S.E.2d at 466. In the course of discovery in the circuit court action, the plaintiff sought to unseal the family court record so it could "review

and copy all information in the file pertaining to [the civil defendant]'s financial affairs." 369 S.C. at 4-5, 630 S.E.2d at 466. The circuit court plaintiff filed the motion to unseal the record in family court. *Id.* The family court granted the motion to unseal the record and permitted the circuit court plaintiff to inspect it. 369 S.C. at 5, 630 S.E.2d at 466. We found the family court order was appealable because "it is a final order issued by the family court which stands separate and apart from the civil lawsuit." 369 S.C. at 6, 630 S.E.2d at 467.[1] Because our decision in *Ex parte Capital U-Drive-It* turned on the fact it was an appeal from a final order, it does not support the immediate appeal of any interlocutory order.

Whether this Court should extend the reasoning of *Doe* to allow immediate appeals of orders other than those denying a child sexual assault victim's request to proceed anonymously in a civil lawsuit is an important question. For the reasons we will

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[1] We addressed two additional points that were not necessary to our decision. First, we stated,

> the order issued by the family court unsealing the record determined a substantial matter forming the whole or part of the family court proceeding in which [the civil plaintiff] sought access to the record of the . . . divorce. No further action is required in the family court to determine the parties' rights; therefore, the order is immediately appealable under Section 14-3-330(1).

369 S.C. at 7-8, 630 S.E.2d at 468. Second, we addressed the question of whether the disclosure of confidential information by itself rendered the order immediately appealable. We stated,

> we agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure.

369 S.C. at 8, 630 S.E.2d at 468.

explain, however, we decline to address the question until the actual danger of disclosure of confidential information is squarely before the Court.

This is, in fact, the second reason we disagree with the court of appeals and find the class certification order in this case is not immediately appealable. Neither the parties, the circuit court, the court of appeals, nor this Court has any certainty of whether a disclosure of confidential information is even at stake in this case. The amended class certification order requires the Hensleys to prepare a notice for the circuit court's approval that will protect the confidentiality concerns raised by DSS. Until the circuit court has a chance to evaluate the proposed notice and hear from the parties as to how confidential information will be protected—or how it may be compromised—nobody knows whether any confidential information is actually put at risk in this case.

The third reason we disagree with the court of appeals—on immediate appealability—relates to the requirements a class action plaintiff must satisfy to establish commonality under Rule 23(a). The circuit court identified two issues common to all class members,[2] and found "South Carolina has no predominance . . . requirement." The court of appeals reversed, however, on the basis that there is some predominance-related requirement in Rule 23(a), which it found the Hensleys did not meet. *See* 423 S.C. at 431, 814 S.E.2d at 643 (identifying four issues that "will require individualized inquiry" and holding "the necessity of such individualized inquiries 'negates the benefits of a class action suit'[3]").

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[2] The circuit court found two common questions: whether (1) DSS's 2002 decision to reduce adoption subsidies, or (2) DSS's 2004 decision not to raise the adoption subsidy to its original level, breached the written terms of the Adoption Subsidy Agreement or its implied covenant of good faith and fair dealing.

[3] The court of appeals indicates it is quoting *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986), but it appears to be quoting *Gardner v. S.C. Department of Revenue*, 353 S.C. 1, 22, 577 S.E.2d 190, 201 (2003). The court of appeals' reliance on *McGann* on this point is important, however, because *McGann* was the first class action case addressed by our appellate courts after Rule 23(a) was adopted in 1985. In *McGann*, Judge Goolsby of the court of appeals quoted and relied on Dean Lightsey and Professor Flanagan's discussion of commonality and predominance in their 1985 treatise published simultaneously to the promulgation of our Rules of Civil Procedure. 287 S.C. at 566-71, 340 S.E.2d at 156-59. *See*

Under Rule 23(b)(3) of the Federal Rules of Civil Procedure—which South Carolina specifically did not adopt as a part of our Rule 23—a district court may not certify the type of class action we address here unless "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." This provision requires the court to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.

Though our Rule 23 does not specifically require the common issues "predominate," there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote. The court of appeals' recognition of this requirement has support in academic sources and in our precedent.

> The commonality requirement [of Rule 23(a), SCRCP,] is a condition of class action status, but the existence of common questions alone is not sufficient . . . . [T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation. Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the existence of common questions, and then whether they are sufficient[ly] central to justify the class action.

Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985); *see also Gardner*, 353 S.C. at 22, 577 S.E.2d at 201 (reversing the circuit court's certification of a class because "the factual differences . . . are the crux of a predominant legal issue," and stating, "A representative class cannot exist where the court must investigate each plaintiff's . . . claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates

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Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 198-99, 201-02 (1st ed. 1985).

the benefits of a class action suit"); *McGann*, 287 S.C. at 568, 340 S.E.2d at 158 (stating "commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event" (quoting Lightsey & Flanagan, *supra* at 198)).

In this case, the circuit court correctly identified two issues common to the claims of all class members. However, the court has not yet determined which issues might need individualized trials or hearings. There are several potentially significant issues that may require individual treatment. For example, DSS contends each class member was required to appeal DSS's decision to reduce the monthly cash payments through the administrative appeals process. *See Stinney v. Sumter Sch. Dist. 17*, 391 S.C. 547, 550 n.1, 707 S.E.2d 397, 398 n.1 (2011) ("exhaustion of administrative remedies . . . applies when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim based upon a statutory violation for which the legislature has provided an administrative remedy"); S.C. Code Ann. § 20-7-1960 (Supp. 2002) ("A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations." (currently codified at S.C. Code Ann. § 63-9-1790 (2010)); S.C. Code Ann. Regs. 114-100 to -190 (2012 & Supp. 2019) (generally discussing the DSS decision-making process); *id.* at 114-110 ("allow[ing] an individual to contest an adverse action taken by [DSS] and to have his or her objections to the adverse action heard by an impartial hearing officer or committee"). The court of appeals agreed with DSS that this question "will require individualized inquiry." 423 S.C. at 431, 814 S.E.2d at 643.

The exhaustion of administrative remedies question DSS raises is not whether the Hensleys or any particular class member's parents completed the administrative appeals process. That would be a question addressed to the merits. Rather, DSS raises the question of what process—if any—the circuit court must go through to answer that merits question. If the requirement to exhaust administrative remedies does not apply in this case, then the court would have to go through no individualized process. If the requirement does apply, however, the circuit court may have to conduct individual trials or hearings. The circuit court did not address this question, and the question is not before this Court at this time. The answer to the question will nevertheless affect whether this case is appropriate for class treatment.

The court of appeals identified other issues that may require individualized trials or hearings. *See id.* (identifying the following issues—"whether each set of adoptive parents accepted or consented to the reduction in payments, . . . entered into renewal agreements, or at any pertinent time terminated their agreements"—that "will require individualized inquiry"). DSS raises the additional question of whether the calculation of damages requires significant individual treatment, or—as the Hensleys contend—the damages can be calculated by simple formula. All of these questions relate directly to whether the circuit court will ultimately permit this lawsuit to be maintained as a class action. *See Salmonsen*, 377 S.C. at 454, 661 S.E.2d at 88 ("class certification may be altered at any time prior to a decision on the merits").

III. Conclusion

We find under the circumstances of this case that the class certification order is not immediately appealable. We vacate the opinion of the court of appeals and dismiss this appeal.

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

The Supreme Court of South Carolina

In the Matter of Charles E. Houston, Jr., Petitioner

Appellate Case No. 2019-000411

ORDER

By opinion dated March 30, 2016, this Court suspended Petitioner from the practice of law for nine months. *In re Houston*, 415 S.C. 594, 784 S.E.2d 238 (2016). Petitioner filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. Following a hearing, the Committee on Character and Fitness recommended the Court reinstate Petitioner to the practice of law with certain conditions.

We find Petitioner has met the requirements of Rule 33(f), RLDE, Rule 413, SCACR. Accordingly, we grant Petitioner's petition and reinstate him to the practice of law in this state with the following conditions should Petitioner choose to open his own practice:

(1) Petitioner shall employ an accountant to handle all business and client accounts;

(2) Petitioner shall select a mentor who is a member in good standing of the South Carolina Bar and regularly consult with the mentor for the first two years of his reinstatement;

(3) the mentor shall report to the Commission on Lawyer Conduct (the Commission) concerning Petitioner's efforts to comply with the Rules of Professional Conduct and the Appellate Court Rules as well as Petitioner's firm organizational structure and systems, including calendaring, record keeping, and compliance techniques and practices;

(4) the mentor shall report to the Commission on a quarterly basis for the first year of Petitioner's reinstatement and a semi-annual basis for the second year of Petitioner's reinstatement.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

January 22, 2020