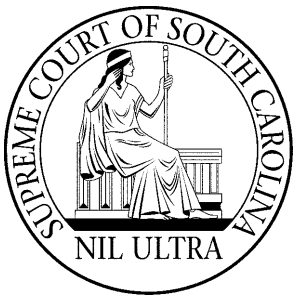

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
October 17, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darrell L. Goss, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002186

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson Jr., Trial Court Judge
Deadra L. Jefferson, Post-Conviction Relief Judge

Opinion No. 27843
Heard June 12, 2018 – Filed October 17, 2018

REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Julie Amanda Coleman, both of Columbia, for Respondent.

JUSTICE JAMES: Darrell L. Goss was convicted of kidnapping, assault and battery with intent to kill (ABWIK), and armed robbery. In this post-conviction

relief (PCR) matter, the PCR court denied relief, and the court of appeals affirmed. *Goss v. State*, Op. No. 2016-UP-382 (S.C. Ct. App. filed July 27, 2016). We granted Goss's petition for a writ of certiorari to review the decision of the court of appeals. We remand to the circuit court for a de novo PCR hearing.

Facts and Procedural History

Goss was charged in connection with the armed robbery of Urban Wear, a clothing store in North Charleston. The store owner, Andy Ayazgok, reported that five unmasked black males entered the store through the main storefront door at about 7:30 p.m., just before closing time, and proceeded to beat him, tie him and his employee up, and flee after stealing merchandise and cash. Of the five assailants, Andy was able to identify only Joy Mack as one of the assailants. Goss and Mack were tried jointly. Andy did not identify Goss as a perpetrator but identified him as having been in the store the week before the robbery.[1]

Sergeant Al Hallman was a member of the crime scene unit that processed the scene and was qualified by the trial court as an expert in fingerprint identification. He testified that when he arrived on the scene, he observed what he described as "wet" prints on the exterior of the glass storefront door; specifically, Sergeant Hallman testified the prints were a "simultaneous impression" of three fingers and a palm. The door from which the prints were lifted was the door through which the perpetrators gained entry and was also the door used by customers. Sergeant Hallman testified the prints were wet from either sweat or some other substance, which indicated to him the prints were fresh. He waited until the prints were dry and lifted them for possible later comparison. Andy testified at trial that he customarily cleaned the inside and outside of the storefront door each morning, and he testified he did so when he opened the store on the morning of the robbery.

Within hours after the robbery, a man named Lorenzo Johnson advised lead detective O.J. Faison that petitioner Goss and his brother, Benjamin Goss, were two of the perpetrators. Detective Faison relayed this information to Sergeant Hallman. Hallman compared the prints he lifted from the storefront door to inked impressions from petitioner Goss; he testified the prints matched. After the prints were matched

[1] Andy's proffered trial testimony detailing his recollection of seeing Goss in the store the week before the robbery was that Goss was shoplifting and Andy ran him off. The trial court granted Goss's motion to exclude these details from Andy's testimony before the jury.

to Goss, law enforcement obtained a warrant to search Goss's residence and any vehicles on the premises. The warrant was executed at approximately 9:30 p.m. the night following the robbery. A .357 Magnum handgun with blood on the barrel was found in a car parked in the yard of the residence occupied by Goss and eight or nine other people, including several black males. DNA testing established the blood was Andy's. Clothing with tags was found in a bedroom in the residence, and Andy identified some of the clothing as being part of the merchandise stolen during the robbery.

Goss's mother, Thomasina Goss, was trial counsel's primary contact prior to trial because trial counsel had known her for many years and because Goss was in jail the entire twenty months before trial. She was the only defense witness called at trial and testified to the following: Goss lived in the house with her and eight other people, she bought the stolen clothing from some unidentified men in the street in front of her house on the same day law enforcement searched her home, she knew the clothes were likely stolen, she had never seen Goss drive or ride in the car in which the bloody gun was found, and everyone who lives in the house uses the bedroom in which the stolen clothing was found. The State impeached her with a shoplifting conviction and two convictions for giving false information to the police.

As noted above, the jury found both Goss and Mack guilty as indicted; the trial court sentenced Goss to three concurrent twenty year sentences. The court of appeals affirmed Goss's convictions in *State v. Goss*, Op. No. 2011-UP-214 (S.C. Ct. App. filed May 17, 2011). Goss subsequently commenced this action for PCR.

Goss testified at the PCR hearing he retained trial counsel two years before trial and was in jail that entire time. He further testified he met with trial counsel only once during that time and claimed that meeting was to discuss a plea offer. Goss claimed he tried to tell trial counsel of his innocence but trial counsel told him not to tell him anything because "whatever you tell me, I'm stuck with." This led to Goss cursing at trial counsel and telling him he did not want trial counsel to represent him. Goss testified he wrote trial counsel a letter apologizing for his conduct and that he did want trial counsel to represent him.

Goss testified that if he had been given the opportunity to properly consult with trial counsel before trial, he would have told trial counsel he was at his unborn child's baby shower during the time the robbery was committed. He claimed he would have given trial counsel the names of alibi witnesses. Goss also testified that during jury selection, he gave trial counsel the names of four witnesses he wanted

trial counsel to have testify. These witnesses were Angelique Gadsden (the mother of his unborn child), Sha'ron Goss, Clifford Hartwell, and Benny Goss. Petitioner Goss claimed Sha'ron Goss, Gadsden, and Hartwell were present at trial. During jury qualification, the trial judge called the names of Angelique Gadsden and Clifford Hartwell as potential witnesses, and trial counsel corrected the trial judge's pronunciation of Gadsden's first name.

Goss testified his cousin Sha'ron would have testified that he—Sha'ron—bought the bloody gun the day after the robbery from one of the men selling clothes in the street. Goss testified Angelique Gadsden would have corroborated Thomasina Goss's testimony that she bought the clothes from the men in the street. According to Goss, his brother Clifford Hartwell would also have corroborated this testimony. Goss also testified his brother Benny Goss would have testified at trial that he saw men selling clothes in the street and that Thomasina Goss and Sha'ron Goss bought some.

Sha'ron Goss, Gadsden, and Hartwell were all present at the PCR hearing and were offered as witnesses by PCR counsel. Instead of hearing their testimony, the PCR court decided, with the consent of the State and PCR counsel, to take "judicial notice" that all three would have testified at trial and would have corroborated Thomasina Goss's testimony about buying clothes from the men in the street. Again with the consent of the State and PCR counsel, the PCR court also took judicial notice that Sha'ron Goss would have testified at trial that he bought the bloody gun from one of those men the day after the robbery.[2] Bernard Godfrey (Goss's uncle), Felicia Henderson (Goss's friend), and Lucretia Douglas (Goss's friend) were also present at the PCR hearing and were offered as witnesses. Instead of hearing their testimony, the PCR court, with the consent of the State and PCR counsel, took judicial notice that they and Angelique Gadsden would have testified at trial that Goss was at the baby shower from 7:00 p.m. until 9:00 p.m. the evening of the robbery.[3]

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[2] The record is unclear as to whether Benny Goss was present at the PCR hearing. The PCR court's order does not reflect the PCR court took judicial notice of his purported trial testimony.

[3] Goss himself, not PCR counsel, objected to the PCR court not hearing the witnesses' testimony live. He stated, "I need it on the record for appeal purposes." However, the PCR court admonished Goss that the court taking judicial notice of the

Trial counsel testified Thomasina Goss never told him anything about an alibi defense or alibi witnesses and never told him that she could testify Goss was elsewhere at the time of the robbery. Trial counsel testified that the first time he heard about an alibi was after the case had been tried. The PCR court found trial counsel's testimony to be credible and found Goss's testimony to be not credible.

In its order denying relief, the PCR court found that even if these seven witnesses had testified at trial, their testimony would not have affected the outcome of the trial; in so finding, the PCR court concluded the credibility of these witnesses would have been too suspect in the jury's eyes because the witnesses were friends and family members of Goss. The PCR court concluded trial counsel was not deficient for not presenting an alibi defense or eliciting testimony about Sha'ron buying the gun and putting it in the car. This conclusion was based upon trial counsel's testimony, which the PCR court found credible, that trial counsel did not learn of either the alibi defense or Sha'ron's testimony until after the trial.

After the PCR court denied relief, Goss appealed, and the court of appeals affirmed in an unpublished opinion. *Goss v. State*, Op. No. 2016-UP-382 (S.C. Ct. App. filed July 27, 2016). This Court granted Goss's petition for a writ of certiorari.

Discussion

In a PCR proceeding, the PCR court's factual findings will be upheld if there is any probative evidence in the record to support those findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). The PCR court's evaluation of witness credibility is to be afforded great deference. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Here, the PCR court reached certain factual conclusions that appear to be supported by probative evidence in the record. These conclusions were based primarily upon the PCR court's evaluation of the credibility of Goss and trial counsel. Again, the PCR court found Goss to be not credible and trial counsel to be credible.

Under normal circumstances, we would apply our deferential standard of review to these findings. However, here, several witnesses were present at the PCR hearing and were prepared to testify to certain facts and circumstances. Some of these facts and circumstances were pertinent to evidence Goss claims should have

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testimony was "better than a record" and that Goss should "let [PCR counsel] do his job."

been presented to the trial jury. Some of these facts and circumstances may have been pertinent to the dynamic surrounding trial counsel's alleged deficient failure to interview these individuals and perhaps call them as witnesses at trial. Under ordinary circumstances, once the witnesses testified at the PCR hearing, the PCR court would normally make findings as to their credibility. Obviously, the PCR court's evaluation of witness credibility is a mental process.

It was error for the PCR court to take judicial notice of the witnesses' testimony and then conclude these witnesses would not have been credible to a jury because of their relationships with Goss. We acknowledge PCR counsel did not object to this approach. However, under these unique circumstances, we are compelled to remand the matter to the PCR court for a de novo hearing. When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder chooses to see and hear first-hand. Here, the PCR court's decision to take judicial notice of the substance of witnesses' testimony and then find those witnesses not credible diluted the process to the point where the PCR court's factual findings—and perhaps the legal conclusions arising from those factual findings—were based upon an incomplete consideration of all the evidence.

Based upon the foregoing, we **REMAND** this matter to the circuit court for a de novo PCR hearing. It will be incumbent upon Goss to secure the attendance of his witnesses for the de novo hearing, and Goss, trial counsel, and other pertinent witnesses may be presented for testimony by the parties. We emphasize the proceedings will be de novo, and neither party may rely upon testimony presented at the initial hearing which is the subject of this appeal.

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

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Marion County. Effective October 30, 2018, all filings in all common pleas cases commenced or pending in Marion County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Berkeley	Calhoun
Cherokee	Chester	Clarendon	Colleton
Dorchester	Edgefield	Fairfield	Florence
Georgetown	Greenville	Greenwood	Hampton
Horry	Jasper	Kershaw	Lancaster
Laurens	Lee	Lexington	McCormick
Newberry	Oconee	Orangeburg	Pickens
Richland	Saluda	Spartanburg	Sumter
Union	Williamsburg	York	

Marion - Effective October 30, 2018

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
October 12, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John M. McIntyre and Silver Oak Land Management, LLC, Appellants,

v.

Securities Commissioner of South Carolina, Respondent.

Appellate Case No. 2015-001845

Appeal From Richland County
Tanya A. Gee, Circuit Court Judge

Opinion No. 5602
Heard February 6, 2018 – Filed October 17, 2018

REVERSED AND VACATED

Robert V. Mathison, Jr., of Mathison & Mathison, of Hilton Head Island; and Cory E. Manning, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, both for Appellants.

Attorney General Alan McCrory Wilson, Assistant Attorney General Ian Parks Weschler, and Assistant Deputy Attorney General Tracy A. Meyers, all of Columbia, for Respondent.

HILL, J.: John M. McIntyre and Silver Oak Land Management, LLC (collectively Appellants) appeal the order of the circuit court affirming a $540,000 civil penalty imposed upon them by the Securities Commissioner of South Carolina. Because the

Commissioner's administrative enforcement action deprived Appellants procedural due process, we reverse and vacate.

I.

The Attorney General of South Carolina, acting as the Commissioner pursuant to S.C. Code Ann. § 35-1-601 (Supp. 2017), began this administrative enforcement action by serving Appellants with a Cease and Desist order on April 19, 2013, alleging thirty-nine acts of securities fraud related to Appellants' offer, sale, and management of interests in numerous limited liability companies (LLCs). Besides ordering Appellants to cease and desist from violating the S.C. Uniform Securities Act (the Act), the order reserved the right to levy a $10,000 civil penalty for each violation of the Act, as well as the cost of "the investigation and proceedings," unless Appellants chose to let the order become effective "by operation of law," as provided by S.C. Code Ann. § 35-1-604(b) (Supp. 2017), in which case they would have to pay a $50,000 civil penalty.

Appellants chose not to let the order stand and instead requested a hearing. The Commissioner appointed an assistant attorney general as the Hearing Officer. After four days of hearings, the Hearing Officer issued a Report and Recommendation, concluding the LLC investments were not securities and the Cease and Desist order should be dismissed.

The Commissioner disagreed, finding the LLC investments were securities covered by the Act and ordering the Hearing Officer to issue another Report and Recommendation as to whether Appellants had violated the Act.

The Hearing Officer's second Report and Recommendation found Appellants had committed seventy-eight violations of the Act. After reviewing this Report and Recommendation, the Commissioner concurred in its findings but "reiterated" his own findings from the previous order and made new factual findings. The Commissioner reduced the number of violations to fifty-four and imposed the maximum civil penalty of $10,000 for each violation, for a total penalty of $540,000. This order also required Appellants to pay the costs of the investigation and proceedings, and there was no provision allowing Appellants to contest the amount of the costs or be heard in response.

Appellants petitioned the circuit court for review of the Commissioner's decision, contending the administrative proceeding violated their due process rights, the LLC investments were not securities, and substantial evidence did not support the Commissioner's findings. The circuit court affirmed the Commissioner's decision.

II.

Appellants claim the Commissioner denied them procedural due process by not promulgating rules for the hearing procedure. As a result, Appellants had no notice of the availability, order, or scope of opening and closing arguments; the order or burden of proof; the standard for admissibility of evidence; the existence of subpoena rights; or any other fundamental aspects of the hearing. Appellants point to S.C. Code Ann. § 35-1-605(a)(1) (Supp. 2017), which states, "The Securities Commissioner may issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out [the Act] . . . ." Judicial review of the Commissioner's factual findings by the circuit court is discussed in § 35-1-609, but is silent as to our scope of review. Appellants' claims require us to interpret the legislative intent of the Act, and also decide whether the Commissioner's actions violated due process. We may decide these questions of law without deference to the rulings of the Commissioner or the circuit court. *See Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (holding interpretation of statute is a question of law); *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (holding determination of legislative intent is a matter of law).

Our supreme court has twice confronted an administrative agency's failure to enact procedural rules for hearings. In the first case, *Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987), the issue was whether the South Carolina Procurement Review Panel's failure to adopt hearing rules and procedures violated a bid protestor's rights of due process as guaranteed by Article I, section 3 of the South Carolina Constitution. *Tall Tower*, 294 S.C. at 232, 363 S.E.2d at 686. The bid protestor asserted that because S.C. Code Ann. § 11-35-4410(5) (1986) stated "the [p]anel shall establish its own rules and procedures for the conduct of its business, including the holding of necessary hearings," the Panel's failure to do so violated its due process rights. *Id*. Our supreme court disagreed, noting the bid protestor could show no substantial prejudice from the Panel's actual conduct of the hearing. *Id*. at 294 S.C. at 232–33, 363 S.E.2d at 686–87.

The issue arose a second time in *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001), but in a markedly different context. It was another bid dispute amidst the Procurement Code, but this time the disappointed bidder claimed its right to due process guaranteed by Article I, section 22 was violated because the Legislature—not the agency—had failed to establish procedures for hearings before the Chief Procurement Officer (CPO). *Unisys Corp.*, 346 S.C. at 173–74, 551 S.E.2d at 272. The supreme court again disagreed, holding due process was satisfied because appeal of the CPO's decisions was heard de novo by the

Procurement Review Panel. *Id*. at 174-75, 551 S.E.2d at 272. The supreme court reasoned because the procedure set forth by the Review Panel established adequate due process, there could be no substantial prejudice. *Id*. at 175, 551 S.E.2d at 272.

As mentioned, *Unisys* found the lack of procedural safeguards at an administrative hearing was cured by the availability of de novo review by the Procurement Review Panel. *Id*. at 175, 551 S.E.2d at 272. Two features of the Act prevent this cure from working here. First, rather than de novo review, judicial review of the Commissioner's ruling is made using the substantial evidence standard, and—importantly—the factual findings of the Commissioner are "conclusive" if supported by competent, material, and substantial evidence. S.C. Code Ann. § 35-1-609 (Supp. 2017).

Second, as the Act was administered here by the Commissioner, the Hearing Officer's ruling was merely advisory and intermediate. It is unclear what statutory authority empowers the Commissioner to conduct a review of the Hearing Officer's ruling, but it is clear Appellants had no opportunity to present evidence at this stage or otherwise be heard. This diluted whatever fairness and impartiality the procedure before the Hearing Officer may have had. Unlike *Unisys*, where the internal appeal to the Panel expanded the bidder's due process and cured its earlier curtailment, the Commissioner's review diminished Appellants' right to be heard. By silently reserving the right to not only reject the Hearing Officer's factual findings and rulings but to make its own findings without notice, hearing, or any further opportunity for input, the Commissioner undermined its own ad hoc procedure. A party is not entitled to a hearing at each stage of agency review, but a meaningful hearing must occur at some stage. *See Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68–69, 492 S.E.2d 62, 71–72 (1997).

Section 35-1-605(a)(1) directs that the Commissioner provide rules for hearings "to carry out" its authority under the Act. But there is more: the rules must be made after "notice and comment," a requirement critically absent from the statutory language in play in *Tall Tower* and *Unisys*. *Id*. Aware that it had exempted the Securities Act from the Administrative Procedures Act (APA), *see* S.C. Code Ann. §§ 35-1-601, 609 (Supp. 2017), and, consequently, the APA's requirement that notice and comment occur before an agency's rules can become law, the Legislature required that notice and comment precede the Commissioner's rulemaking to remove any temptation of the Executive Branch to amass underground regulations. *See* § 35-1-605(a)(1).

Rather than complying with the Legislative directive, the Commissioner chose not to promulgate any rules regulating the conduct of or procedure appropriate for

administrative hearings. This leaves the Commissioner with the awkward argument that because § 35-1-605(a)(1) uses the word "may," it is not required to adopt any rules of procedure at all.

We find this position curious, and one that cannot survive scrutiny. That scrutiny occurs within the framework of the due process guarantees of South Carolina Constitution Article I, § 3 and § 22. We will take up § 22 first, as it applies specifically to agency actions.

A. S.C. Constitution Article I, Section 22

In 1966, the Legislature appointed a commission chaired by then Senator (later Governor) John C. West to study and propose amendments to the South Carolina Constitution. Among its recommendations, the West Committee recognized the creeping rise of the administrative state, noting agency decisions often "are more significant than laws enacted by the General Assembly or decisions made by the courts." *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895*, at 21 (1969). The West Committee registered its agreement "with many other constitutional study groups throughout the country that judicial and quasi-judicial decisions of administrative agencies should be consistent with due process of law and complete fairness to the citizen." *Id*. The language it drafted "as a safeguard for the protection of liberty and property of citizens," *id*. at 20, was adopted and ratified in 1970 as our current Article I, section 22:

> 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.

This section is "an additional guarantee of important due process rights." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998).

The West Committee was prophetic. Today, citizens increasingly encounter "the leviathan known as administrative agency rule-making—the so-called Fourth Branch of government." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 455–56, 790 S.E.2d 763, 773 (2016) (Kittredge, J., concurring).

The mode of procedure the Legislature prescribed in § 35-1-605(a)(1) mandated that notice and comment precede the Commissioner's adoption of rules. The Legislature's use of the word "may" in this context did not render the Commissioner's obligation optional. The plain meaning of § 35-1-605(a)(1) is that the Commissioner did not have to implement the Act at all, but if he chose to "carry out" the grant of power delegated to him by the Legislature, he would have to do so by the promulgation of rules that had been exposed to the light of public notice and comment. Otherwise, the government would be depriving a person of his property by a "mode of procedure" not authorized or "prescribed" by the Legislature. Worse, here the Commissioner deprived Appellants of significant property without *any* prescribed mode of procedure, an affront to the most basic conceptions of the rule of law. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *46 ("All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term 'prescribed.'").

The Commissioner stresses that "may" is permissive rather than mandatory, an argument foreclosed both by the context in which "may" appears and the very next command of our constitution, Article I, § 23.

We must construe statutory words in context. "May" often denotes the permissive, but not always. *Robertson v. South Carolina*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981) (holding that in deciding "whether 'may' is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling"); *see also United Hosp. Center, Inc. v. Richardson*, 757 F.2d 1445, 1453 (4th Cir. 1985) ("While the term 'may' in a statute or agency regulation dealing with agency power is generally construed as permissive rather than mandatory," the construction depends on whether context reveals the legislature intended "to confer a discretionary power or to impose an imperative duty.") (citations omitted). For example, we doubt the Commissioner would argue "may" is permissive when it appears in § 35-1-603(c) (Supp. 2017), which states: "[t]he Securities Commissioner may not be required to post a bond in an action or proceeding under this chapter."

The Commissioner's argument that "may" as used in § 35-1-605(a)(1) is permissive is also answered by Article I, § 23 which provides: "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms." S.C. Const. art. I, § 23. Taking § 22 and § 23 of Article I together, we hold that while § 35-1-605(a)(1) gave the Commissioner the discretion to implement or not implement an administrative enforcement scheme for violations of the Act, that discretion does not extend to conducting administrative hearings without first adopting procedural rules for the hearings after notice and comment.

Accordingly, viewing the word "may" in context, we hold the legislature intended the Commissioner to promulgate rules (i.e., a "mode of procedure"), after notice and comment, before holding administrative hearings. *See 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) (holding an agency violated procedural due process guaranteed by Article I, § 22 when it "summarily abandoned the [hearing] procedure," did not inform parties of the alternative procedure it planned to use, and did not inform parties of issues to be considered at the proceeding).

As to procedural due process principles concerning notice and hearing, our supreme court has held the contours of Article I, § 22 trace those of our general state due process clause, Article I, § 3, and federal due process. *See S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010). It is to those principles we now turn.

B. General Procedural Due Process

As our supreme court has held, "[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). The level of process due is "flexible" dependent upon the demands of the situation. *Id*. at. 172, 656 S.E.2d at 350. We do not interpret this to mean, as the Commissioner does, that this flexibility is so pliable that a government agency can refuse to announce the rules of procedure it intends to use at a substantive hearing where a citizen's property may be confiscated and his liberty imperiled. Although there are no technical requirements for procedural due process, certain elements must be present, including: "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; (4) the right to confront and cross-examine witnesses." *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).

Procedural due process insists upon fair play. *See Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009) ("Due process is violated when a party is denied fundamental fairness."). The flexibility the cases refer to are a recognition of the many ways—large and small—a government can deprive a person of his property interests. The extent of the procedural protections due process requires corresponds to the extent of the potential deprivation. Accordingly, "due process may require a trial-type hearing in fact-specific, adjudicatory decisions of an administrative body," but discretionary decisions involving potentially minor or limited incursions of property rights call for only limited procedural safeguards. *Kurschner*, 376 S.C. at 172, 656 S.E.2d at 350. In determining the process due, we

must consider: (1) the private interest affected by the proceeding; (2) the risk of erroneous deprivation of that interest as a result of the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the State's interest, including the burden of additional or substitute procedural requirements. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

Appellants' private interests were gravely affected by the proceedings. The Commissioner imposed a civil penalty of $540,000, an eye-popping amount that would bankrupt all but the wealthiest of citizens. Appellants' risk was not just monetary—each willful violation of the Act is a crime punishable by up to ten years in prison and a $50,000 fine. S.C. Code Ann. § 35-1-508(a). Nor was the risk of criminal exposure fanciful: by the time of the administrative hearing, Appellants' conduct had been referred to the criminal division of the South Carolina Attorney General's Office. The Attorney General later indicted Appellant McIntyre for one count of violating § 35-1-508(a) and three counts of Breach of Trust with Fraudulent Intent related to his management of the LLCs. In 2016, McIntyre pled guilty to two counts of Breach of Trust with Fraudulent Intent, was sentenced to concurrent terms of ten years imprisonment suspended upon five years of probation, and ordered to pay restitution and perform community service.

While Appellants had the opportunity to cross-examine adverse witnesses and present favorable ones, without notice of set procedural rules the exercise before the Hearing Officer was riddled with procedural irregularities and plagued by a lack of order creating an intolerable risk of erroneous deprivation. No one knew what the applicable burden of proof was until after the hearing, when the Hearing Officer issued his first recommendation. *See Santosky v. Kramer*, 455 U.S. 745, 757 (1982) ("Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance."). Without knowledge of the burden of proof at the outset, Appellants were left to guess what or how much evidence to present, if any. It is hard to imagine how the opportunity to be heard can be meaningful if one does not know what to say.

An administrative agency need not adhere to strict rules of evidence when acting in a judicial capacity, but "the substantial rights of the party must be preserved." *City of Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). Appellants objected to much of the Commission's evidence, on grounds including relevance, hearsay, and authentication. The parties and the Hearing Officer spent considerable time debating whether the rules of civil procedure, or evidence, or any rules at all applied. There was also substantial befuddlement over whether the parties—or the Hearing Officer for that matter—had subpoena power. Although

Appellants successfully subpoenaed witnesses, no party to a proceeding carrying such high stakes should be forced to prepare their case amidst the suspense that they may not have the ability to compel the attendance of witnesses. Without rules, especially as to evidence, there were no assurances as to the reliability of the evidence considered by the Hearing Officer, aggravating the risk Appellants would be wrongfully deprived of their property. *See Mathews*, 424 U.S. at 334–35. This risk was made more acute by the lack of de novo judicial review and the conclusiveness the standard of review assigns the Commissioner's factual findings.

As a result of this haphazard process, the risk Appellants would be erroneously deprived of their property was substantial. *Id.* at 335. The value of adopting actual procedural rules was high. *Id*. The burden on the Commissioner of adopting formal procedural rules is insignificant, for if it is unreasonable to burden the Executive Branch with conducting public notice and comment mandated by the Legislature then we are in more trouble than we know. After all, "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943).

C. Substantial Prejudice/Harmless Error

The Commissioner maintains any due process violation was harmless because Appellants presented a full defense during four days of hearings. *See Tall Tower*, 294 S.C. at 233, 363 S.E.2d at 687 ("A demonstration of substantial prejudice is required to establish a due process claim.").

A "harmless error" analysis, however, is impossible and unnecessary to undertake where the structure of the proceeding under review was fundamentally unsound. *See La Salle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009). In *LaSalle Bank*, the court held conducting a foreclosure hearing without a judge present amounted to a structural defect that violated procedural due process so critically it could not be harmless. *Id.*; *see also Garris*, 333 S.C. at 447–48, 511 S.E.2d at 56 (finding the conduct and structure of an agency hearing "was so inherently flawed that it is not subject to harmless error analysis").

While here the Hearing Officer was present, neither he nor the parties were provided with notice of or access to any procedural rules governing the proceeding. The lack of any formal procedural architecture fated the process as arbitrary and so affected fundamental fairness that to deem it harmless would only add insult to the injury to the rule of law. *See Groning v. The Union Ins. Co*., 10 S.C. L. 537, 537–38 (S.C. Const. App. 1819) ("The only security which the citizens of any country can have for their property, or even for their lives, is derived from the promulgation and

certainty of the laws. One of the most distinguishing features in the administration of the Emperor *Caligula*, whose name is proverbial for his tyranny, was, that he caused his edicts to be suspended so high that they could not be read by his subjects."); 1 WILLIAM BLACKSTONE, COMMENTARIES *137–38 ("[J]ustice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament . . . . Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding cannot be altered but by parliament: for, if once those outworks were demolished, there would be no inlet to all manner of innovation in the body of the law itself."). If unchecked administrative rule-making is a leviathan, we are not sure what to call an agency's decision to adjudicate vast private property rights without posting any prescribed rules despite legislative direction, but we cannot call such a creature harmless.

Because Appellants were denied procedural due process, we reverse the order of the circuit court and vacate the civil penalty. In light of this disposition, we need not address Appellants' remaining issues. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

REVERSED AND VACATED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Alan White, Appellant.

Appellate Case No. 2016-000616

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Published Opinion No. 5603
Submitted May 1, 2018 – Filed October 17, 2018

REVERSED

Appellate Defender Laura Ruth Baer, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

THOMAS, J.: David Alan White appeals his convictions of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. On appeal, White argues the trial court erred by (1) indicating he could not pursue both the defense of accident and self-defense, (2) excluding and limiting his testimony about Joseph Johnson's statements, (3)

denying his request for a jury instruction on self-defense, and (4) denying his request for a lesser-included instruction on second-degree assault and battery. We reverse.

FACTS AND PROCEDURAL HISTORY

On the night of November 27, 2013, Johnson cut White's hair. Sometime later, White cut Johnson's throat.

White and Johnson were both guests at a friend's backyard gathering. Seven witnesses testified to the events surrounding the incident. Some recalled White and Johnson joking with each other and did not know what caused White to cut Johnson's throat. Others recalled tense interactions between the two.

White testified he did not mean to injure Johnson and did not aim for Johnson's throat. As White was explaining the conversation he and Johnson had while Johnson cut his hair, the State objected on the basis of hearsay. During an *in camera* hearing, White testified Johnson told him he used to make shanks in prison. White also testified Johnson told him he had a gun and knife underneath his moped seat. The trial court ruled the shank statement was not admissible because it was a prior act and not relevant to self-defense or accident. However, the trial court allowed White to use the statement to impeach Johnson's earlier testimony that he did not make shanks in prison. The trial court excluded the statement regarding the weapons, finding it was irrelevant and hearsay.

When White resumed his testimony, he indicated he decided to leave Washington's house and, as he was walking, someone punched him on the side of his head. White stated he had one hand in his pocket and quickly spun around after he was punched. White then noticed Johnson was injured. White explained why he wanted to leave Washington's house: "Because the way things were going in that backyard . . . it could have been worse than what happened" and he "didn't feel comfortable anymore." White clarified he did not mean to swing the knife and did not intend to stab Johnson.

White stated he "didn't feel threatened but [he] knew [he] had a lot of head injuries in [his] past that [he] thought could have triggered something." White explained the head injuries he suffered in the past: (1) he was hit on the side of his head with a mug and had to get stitches, (2) he was hit by a window pane and had to get

stitches, and (3) he had a brain aneurysm. White testified he did not run because he "was more scared than anything" and "did not know" if he could get away safely. He did not believe he could get away because he felt threatened by his conversation with Johnson. White indicated his intent in swinging his arm toward Johnson was to protect himself. White explained why he swung the knife: "Because I got hit; it was a reaction. I didn't realize that I even had the knife like that in my hand in my pocket. I just spin around real quick. I didn't know it was him behind me that close or whatever when I swung my arm." Later, White testified he knew it was Johnson who hit him. White stated he was fearful of Johnson.

White requested the trial court charge the jury on the defenses of self-defense and accident and the lesser-included offenses of ABHAN, first-degree assault and battery, and second-degree assault and battery. The trial court charged accident, ABHAN, and first-degree assault and battery but refused to charge self-defense and second-degree assault and battery. The jury found White guilty of ABHAN and possession of a weapon during the commission of a violent crime. The trial court sentenced him consecutively to five years' imprisonment for the weapons conviction and ten years' imprisonment for the ABHAN conviction. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court only reviews errors of law and is clearly bound by the trial court's factual findings unless the findings are clearly erroneous." *State v. Dickey*, 394 S.C. 491, 498–99, 716 S.E.2d 97, 100 (2011).

JOHNSON'S STATEMENTS

White argues the trial court erred in excluding Johnson's statement about weapons on his moped and limiting Johnson's statement about shanks because the testimony was relevant to self-defense and was not hearsay. We agree the trial court should have admitted White's testimony regarding the weapons on Johnson's moped.[1]

[1] We find White's argument regarding the shank statement is not properly before this court because the trial court allowed White to testify about the statement. White does not point to any prejudice from the limitation or make any argument other than the testimony should have been admitted for a different reason. We

First, we find the statement was relevant to White's claim of self-defense. "Evidence which is not relevant is not admissible." Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991). We agree with White's argument that the statement was relevant to explain why he believed he was in imminent danger and if that belief was reasonable. *See State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (explaining two of the elements of self-defense are whether "the defendant . . . actually believed he was in imminent danger" and whether "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief"). At trial, White testified he became uncomfortable and felt threatened throughout the night, in part because of Johnson's statement, and decided to leave. White indicated he did not believe he could safely leave after he was punched because of Johnson's statement and the possibility that Johnson may have had access to a weapon.

We disagree with the State's position that the statement was not relevant because White testified he did not know if Johnson was armed or whether it was Johnson who punched him. Although White did at times testify he did not know who hit him, he also testified he knew it was Johnson who hit him. Furthermore, although White admitted he did not know whether Johnson was armed and never testified he saw Johnson with a weapon, Johnson testified he accessed his moped directly before the incident. Therefore, it would be a jury question whether White intended to stab Johnson in self-defense and whether that was reasonable. In *State v. Washington*, this court rejected a defendant's argument that evidence a victim actually had weapons in the trunk of his car was relevant to show the defendant reasonably believed he was in imminent danger. 367 S.C. 76, 81–82, 623 S.E.2d 836, 839 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 120, 665 S.E.2d 602 (2008). This court held the trial court did not err in excluding the testimony because the defendant had (1) no knowledge the victim had weapons in the trunk of his car on the day of incident, (2) no reason to believe the victim previously stored weapons in the trunk of his car, and (3) no reason to believe the victim accessed his trunk before he was stabbed. *See id.* White's case is factually distinct from *Washington*.

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make no determination regarding whether the admission for impeachment purposes was proper.

Unlike in *Washington*, White testified Johnson said he kept a gun and a knife on his moped, and Johnson accessed his moped before the incident. Because White had reason to believe Johnson stored weapons on his moped and accessed his moped prior to the stabbing, we find Johnson's statement was relevant to White's self-defense claim.

Second, we find White's testimony about Johnson's statement was not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted." *State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). We find the statement was not introduced to prove the truth of the matter asserted, i.e. that Johnson actually had a gun and knife on his moped. Instead, White offered the statement to show *he believed* Johnson had weapons on his moped. *See State v. Griffin*, 277 S.C. 193, 198, 285 S.E.2d 631, 634 (1981) (finding a trial court erred in not allowing a defendant to testify a friend told him the deceased owned a firearm because the testimony was offered "to show he believed the deceased owned a firearm, not to prove the deceased in fact owned a gun"), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).[2] It was relevant White thought Johnson was armed or could be armed, not whether Johnson was actually armed. Johnson's statement was, therefore, admissible to explain to the jury why White believed he was in imminent danger and to help it evaluate whether such a belief was reasonable. Therefore, we find the trial court abused its discretion in excluding the statement because it was relevant and not hearsay. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of

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[2] Other jurisdictions have similarly held statements were not hearsay when they were offered to show the effect of the statement on the listener's state of mind when the listener's state of mind was relevant to the case. *See People v. Kline*, 414 N.E.2d 141, 144 (Ill. App. Ct. 1980) ("If the out-of-court statements are offered to prove the resultant effect of those words on the listener's state of mind, then the speaking of the words is independently relevant regardless of the truth of their content and the statements are admissible as non-hearsay."); *Sullivan v. Popoff*, 360 P.3d 625, 633 (Or. Ct. App. 2015) (De Muniz, S.J., concurring) ("[A]n out-of-court statement may be offered to show that the making of that statement had some effect on the person who heard the statement if that person's state of mind is relevant to an issue in the case.").

the trial court and will not be reversed absent an abuse of discretion.").

SELF-DEFENSE

White argues the trial court erred in limiting him to pursuing either self-defense or accident because South Carolina case law allows both defenses if there is evidence in the record to support them. White contends the trial court erred in refusing to charge self-defense because there was evidence to support the charge and the trial court improperly weighed the evidence. We agree.

"[An appellate court] will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion." *State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). "When reviewing the [trial] court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608–09 (Ct. App. 2012). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). "If there is any evidence to support a jury charge, the trial [court] should grant the request." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

"Upon request, a defendant is entitled to a jury instruction on self-defense if he has produced evidence tending to show the four elements of that defense." *Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988). The four elements of self-defense are as follows:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding

> the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Davis, 282 S.C. at 46, 317 S.E.2d at 453.

In this case, the trial court believed White did not have a valid self-defense case because he testified he stabbed Johnson unintentionally. The trial court went further to state that "accident and self-defense pretty well can't co-exist" and asked White which he would like to pursue. The trial court subsequently denied White's request to charge self-defense. While it is true accident and self-defense "are often mutually exclusive," a trial court should charge both when there is evidence in the record to support both charges. *See Williams*, 400 S.C. at 317, 733 S.E.2d at 610. In *Williams*, the defendant's "testimony at trial vacillated as to whether he acted intentionally or unintentionally when he shot the victim" which created a jury question "as to whether [he] shot the victim accidentally." *Id.* at 316–17, 733 S.E.2d at 610. Here, there was evidence White unintentionally stabbed Johnson and also evidence he intentionally stabbed Johnson.

Viewing the evidence in the light most favorable to White, we find there was some evidence to support each element of self-defense. *See id.* at 314, 733 S.E.2d at 608–09 ("When reviewing the [trial] court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant."). As to the first element, White's testimony he was attempting to leave Washington's house when he was punched in the head from behind shows he was not at fault in bringing on the difficulty. As to the second element, White testified he felt threatened by his conversation with Johnson, and he "was more scared than anything" after he was hit. We note at times White's testimony was contradictory regarding whether he felt threatened and whether he knew it was Johnson who hit him. However, we find there was some evidence White believed he was in imminent danger, and therefore, it was a jury question as to whether White actually believed he was in imminent danger. Likewise, it was a jury question whether White's belief was reasonable under the third element of self-defense. We note Johnson's statement that he kept a gun and knife on his moped and the fact that Johnson accessed the moped before the incident are evidence the jury could consider to find White's belief was reasonable. Finally, White's testimony he previously suffered multiple head injuries, had a brain aneurysm, and did not know if he could safely escape was some evidence tending to show he had no other probable means of avoiding the danger. Therefore, we find the trial court

abused its discretion in refusing to charge self-defense where there was at least some evidence to support each element of self-defense and a jury could have believed White acted in self-defense when he stabbed Johnson. *See State v. Day*, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000) ("If there is *any evidence* in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial [court's] refusal to do so is reversible error." (emphasis added) (quoting *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984)).

CONCLUSION

Therefore, we find the trial court abused its discretion in excluding White's testimony regarding Johnson's statement and refusing to charge the jury on self-defense.[3] Accordingly, White's convictions for ABHAN and possession of a weapon during the commission of a violent crime are

REVERSED.[4]

SHORT and HILL, JJ., concur.

[3] Because the self-defense issue is dispositive, we decline to address White's remaining argument regarding the trial court's refusal to charge the jury on the lesser-included offense of second-degree assault and battery. *See Hughes v. State*, 367 S.C. 389, 408–09, 626 S.E.2d 805, 815 (2006) (noting an appellate court need not reach remaining issues on appeal when a decision on another issue is dispositive).

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