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SC Court of Appeals

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Administrative Law Judge S. Phillip Lenski

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Opinion No. 2015-UP-517 (S.C. Ct. App. filed Nov. 12, 2015)  
ALC Case No. 14-ALJ-04-0355-AP  
Appellate Case No. 2014-002040

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KEVIN L. FOWLER, # 222318,

RESPONDENT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

APPELLANT.

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**PETITION FOR REHEARING  
AND  
SUGGESTION FOR REHEARING *EN BANC***

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On November 12, 2015, this Court affirmed the Administrative Law Judge's conclusion that the South Carolina Department of Corrections had improperly calculated Respondent's sentence. Specifically, this Court found that Appellant's distribution of heroin conviction was not a "no parole" offense in light of the 2010 amendments to S.C. Code 44-53-370(b)(1). See Fowler v. South Carolina Dep't of Corr., Op. No. 2015-UP-517 (S.C. Ct. App. filed Nov. 12, 2015). Notably, this appeal was decided alongside a companion case, Bolin v. South Carolina Dep't of Corr., Op. No. 5361 (S.C. Ct. App. filed Nov. 12, 2015)

(Shearouse Adv. Sh. No. 44 at 75), due to the similarity of the issues involved.<sup>1</sup> In fact, these two cases were decided on the same day and by the same panel of judges. Today, SCDC is filing a Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Bolin case. Pursuant to Rule 221, SCACR, the Department of Corrections respectfully requests that this Court reconsider its decision in this case as well in light of the facts overlooked and misapprehended.

Initially, however, for the same reasons set forth in the Bolin Petition for Rehearing, SCDC would respectfully suggest that this Court rehear this matter *en banc*. According to our calculations, this Court's Opinion in Bolin will have an impact on almost 900 inmates in South Carolina. If this Court's Opinion stands, nearly 200 drug offenders will be due for immediate release into our communities. Nearly 700 inmates' records would have to be updated to move their projected release dates forward. Additionally, it is our understanding from the South Carolina Department of Probation, Pardon, and Parole Services that hundreds of offenders who are currently participating in community supervision programs may be impacted by this Court's Opinion in Bolin. In light of the large number of offenders potentially affected by Bolin, and considering the resulting impact upon our communities, SCDC believes this is an issue of "exceptional importance" under Rule 219(a) and we are therefore suggesting that this Court rehear this case *en banc* alongside Bolin.

Regardless, to the extent this Court's decision in this case was influenced by the same misapprehension of the facts discussed in Bolin – that is, that SCDC was giving the special class of offenders created by the amendments to S.C. Code 44-53-370(b)(1) and S.C. Code 44-53-375(B) only one parole hearing and then requiring them to serve eighty-five percent of their sentences before providing them another opportunity for parole – SCDC

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<sup>1</sup> Although the Bolin case involved the amendments to S.C. Code 44-53-375(B), the language amending S.C. Code 44-53-370(b)(1) is essentially the same as the language amending 44-53-375(B).

would request that this Court consider the correct facts as set forth in the Petition for Rehearing in Bolin. The correct facts are that SCDC does not, in fact, give this special class of offenders only one chance at parole; instead, this class of offenders has always been given yearly parole hearings. To the extent this companion case was decided under the same misapprehension of facts, SCDC respectfully requests that this Court grant rehearing and reconsider the ultimate outcome of the case with the correct factual backdrop.

Additionally, this Court should grant rehearing because this Court's Opinion overlooks the statutory construction principles indicating that when two statutes can be reconciled, they should be construed in such a way that both statutes remain functional. See, e.g., Beaufort County v. S.C. State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."); Richardson v. City of Columbia, 340 S.C. 515, 520, 532 S.E.2d 10, 12 (Ct. App. 2000) ("When two statutes can be reconciled, the court must construe the statutes in such a way that both remain functional. The more recent statute takes precedence over the earlier statute only if there is a conflict between the two statutes.") (internal citations omitted).

In SCDC's view, and as was explained fully in SCDC's Brief, there is simply not a conflict between the 2010 amendments and the other statutes. Although the 2010 amendments to S.C. Code § 44-53-370 and 44-53-375(B) created a new, special class of offenders, they did not alter the requirement that this class of offenders serve eighty-five percent of the sentence pursuant to S.C. Code § 24-13-150(A), if a particular offender is not granted parole at some point during incarceration. This Court's Opinion is flawed because it failed to make any attempt to reconcile the statutes and instead simply ignored the case law

requiring reconciliation. Significantly, SCDC's interpretation fully comports with the stated legislative intent for the 2010 amendments.

Finally, this Court's interpretation of amended section 44-53-370(b)(1) is further problematic because it renders the provision specifically referencing "community supervision" completely superfluous. Only offenders serving sentences for "no parole" offenses are required to participate in community supervision, and the provisions governing the community supervision program specifically require service of eighty-five percent of the sentence before participation. See S.C. Code § 24-21-560(A); Barton v. SCDPPPS, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) ("This Court will not construe a statute in a way which leads to an absurd result or renders in meaningless."). SCDC respectfully disagrees with this Court's conclusion set forth in the Bolin companion case that the 2010 amendments were intended to allow non-eighty-five-percent offenders to participate in community supervision.

**CONCLUSION**

For the reasons set forth above, Respondent asks that this Court rehear the matter *en banc* due to the exceptional importance of the issue in South Carolina. Furthermore, even if this Court declines to rehear the matter *en banc*, Respondent asks that this Court reconsider the case and reverse the ultimate outcome, taking into account the correct factual background and the legal principles that were overlooked in the Opinion.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT  
OF CORRECTIONS**

BY:   
**CHRISTINA CATOE BIGELOW**

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**ATTORNEY FOR RESPONDENT**

November 30, 2015

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

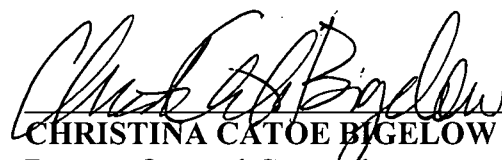
APPELLANT.

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**PROOF OF SERVICE**

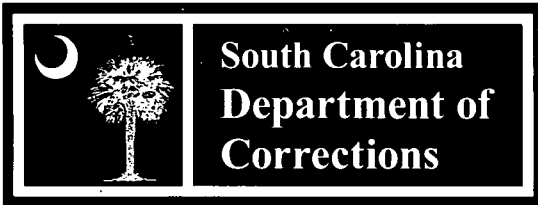
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The undersigned hereby certifies that SCDC's **Petition for Rehearing and Suggestion for Rehearing *En Banc*** in the above-referenced matter has been served upon counsel for Respondent via U.S. Mail, addressed as follows: **Tommy A. Thomas, Post Office Box 88, Irmo, South Carolina, 29063**, this 30<sup>th</sup> day of November, 2015.



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South Carolina  
Department of  
Corrections

OFFICE OF GENERAL COUNSEL

NIKKI R. HALEY, Governor  
BRYAN P. STIRLING, Director

November 30, 2015

The Honorable Jenny A. Kitchings  
Clerk of Court, S.C. Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

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SC Court of Appeals

RE: Kevin L. Fowler, # 222318, v. South Carolina Department of Corrections  
Appellate Case No. 2014-002040

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of SCDC's **Petition for Rehearing and Suggestion for Rehearing *En Banc*** in the above referenced matter, along with Proof of Service.

Thank you for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

Christina Catoe Bigelow  
Deputy General Counsel  
South Carolina Department of Corrections

cc: Tommy A. Thomas, Esquire  
Post Office Box 88  
Irmo, South Carolina 29063