

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

HONORABLE EUGENE C. GRIFFITH, JR.

2017-CP-04-01786

BILLY RAY SMITH, SCDC# 274409

APPELLANT,

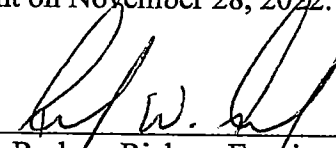
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Billy Ray Smith appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Eugene C. Griffith, Jr., Circuit Judge on August 14, 2019 an Order issued on November 17, 2022 and filed on November 21, 2022. The Appellant received notice of the judgment on November 28, 2022.



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STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS)
FOR THE TENTH JUDICIAL CIRCUIT)

Billy Ray Smith, #274409,)

Case No. 2017-CP-04-01786)

Applicant,)

v.)

ORDER OF DISMISSAL)
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State of South Carolina,)

Respondent.)

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Richard S. Richey
CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief filed by Billy Ray Smith ("Applicant") on August 28, 2017. The State ("Respondent") served its return to the application on November 29, 2017. An evidentiary hearing in this matter was held before the undersigned at the Anderson County Courthouse on August 14, 2019. Applicant was present and was represented by Rodney Wade Richey. Taylor Zane Smith of the South Carolina Attorney General's Office represented Respondent. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief, and denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is presently imprisoned in the South Carolina Department of Corrections. The crimes at issue in this case concern Applicant's shooting Sandra Smith ("the victim"), his wife at the time, in the head on April 22, 2014. Trial Tran. 76. In July of 2014, the Anderson County Grand Jury indicted Applicant for attempted murder (2014-GS-04-1278), possession of a firearm during the commission of a violent crime (2014-GS-04-1278), and obstruction of justice (2014-GS-04-1276). In September of 2015, the Grand Jury indicted him for unlawful possession of a

pistol (2015-GS-04-1382). On November 16-18, 2015, Applicant proceeded to a jury trial with the Honorable R. Scott Sprouse ("the trial court") presiding. Herverly B. O. Young ("trial counsel") represented Applicant at that trial. At the conclusion of trial, the jury found Applicant guilty as indicted on all charges. The trial court sentenced Applicant as follows: for attempted murder, to imprisonment for twenty years; for possession of a weapon during the commission of a violent crime, to imprisonment for five years; for unlawful possession of a pistol, to imprisonment for five years; and for obstruction of justice, to imprisonment for five years; with all sentences running concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender David Alexander ("appellate counsel") of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Appellate counsel filed a petition to be relieved as counsel, and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing that the trial court erred in giving a jury instruction on voluntary intoxication that constituted an improper comment upon the facts. Applicant filed a pro se Anders brief, arguing: (1) that he would be denied the constitutionally effective assistance of counsel if appellate counsel's petition to be relieved were granted; and (2) that the trial court erred in denying the defense's motion for a directed verdict. The South Carolina Court of Appeals granted appellate counsel's petition to be relieved and dismissed the appeal. State v. Smith, Op. No. 2017-UP-257 (Ct. App. filed June 28, 2017) (per curiam). The remittitur was issued on July 14, 2017.

CURRENT PROCEEDING

In his pro se application, filed on August 28, 2017, Applicant raises multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective for not adequately investigating as witnesses David Hogg and Nathan Smith ("Nathan"); (2) trial counsel was



constitutionally ineffective for not requesting a jury instruction on first-degree assault and battery as the lesser-included offense of attempted murder; (3) trial counsel was constitutionally ineffective for not objecting to the jury instruction that malice may be inferred; and (4) appellate counsel was constitutionally ineffective for not arguing on appeal that the trial court erred in denying the defense's motion for a directed verdict as to attempted murder.

At the evidentiary hearing before this Court, Applicant, through counsel, clarified that he would proceed upon only two claims: (1) that trial counsel was constitutionally ineffective for not conducting an adequate investigation and (2) that trial counsel was constitutionally ineffective for not properly advising Applicant regarding a plea offer. This Court finds that Applicant has abandoned and waived all claims other than these two, and will only address those two claims in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Anderson County Clerk of Court for Applicant's convictions and sentences; Applicant's records from the Department of Corrections; Applicant's direct appeal records, including the notice of appeal, appellate counsel's Anders brief, Applicant's pro se Anders brief, the record on appeal, the supplemental transcript, the Court of Appeals' dispositive opinion, and the remittitur; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that trial counsel was constitutionally ineffective for not conducting an adequate investigation

Applicant testified before this Court at the evidentiary hearing. He testified that he was intoxicated at the time of the crime and that he told trial counsel that the shooting was an accident.



He testified that he was guilty of having a gun around the victim but not of murder. He testified that there would have been no way that he would have been found guilty if the witnesses' statements had been introduced or admitted at trial. He testified that he tried to get trial counsel to meet him at the jail to go over the discovery and asked for a competency evaluation.

On cross-examination, Applicant testified that trial counsel did not meet with him many times. He testified that he would have been acquitted if his son had told the truth. He gave his version of the facts of the shooting. He testified that the shooting was accidental. He testified that trial counsel discussed with him the possibility of relying upon the defense of accident at trial. He testified that he wanted trial counsel to meet with David Hogg, Chris Guthrie, and his brother Nathan.

Nathan testified before this Court at the evidentiary hearing. He testified that he did not see his brother on the day of the shooting, but did talk to him on the phone for thirty minutes before the shooting occurred. He testified that Applicant asked him what a Smith and Wesson .22 caliber revolver was worth. He testified that he told Applicant that he could not say without seeing the gun, but estimated that it would have been worth at least \$200. He testified that Applicant said that he had a chance to buy one for the victim to carry for self-protection. He testified that he did not think that there had been any animosity between Applicant and the victim because he could hear them laughing together. He testified that Applicant made a joke about the victim's cheating on him. He testified that both Applicant and the victim had been intoxicated with alcohol and a prescription medication. He testified that trial counsel did not talk with him. He testified that he only knows about the things he overheard on his phone call with Applicant before the shooting. He testified that his wife had said that Applicant and the victim had been having a good day.

On cross-examination, Nathan admitted that he had spoken on Applicant's behalf during sentencing at trial. He testified that his phone call with Applicant had occurred at approximately 8:00 p.m. on the night of the shooting. He testified that trial counsel never contacted him. He testified that he found out about Applicant's trial date from Applicant. He testified that he was at the sentencing hearing because Applicant had asked him to attend.

Trial counsel testified before this Court. He testified that Applicant's case did not go to trial until about eighteen months after the shooting, which gave him plenty of time to meet with Applicant; in fact, he testified, he met with Applicant quite a few times. He testified that Applicant told him that he could not read or write, so trial counsel read things to him. He testified that Applicant sent letters to him by dictating to other inmates, so trial counsel received letters from Applicant in different handwritings. He testified that Applicant even had someone send a motion to have trial counsel relieved to him. He testified that, when he questioned Applicant about the motion, Applicant denied knowing what it said and denied that he wanted to have trial counsel relieved. He testified that he made a point to go to the jail to show CDs and videos to Applicant, and to read the discovery to him, so that other inmates would not get involved. He testified that he used an investigator, who also went to the jail to talk with Applicant. He testified that he went over all of the discovery with Applicant; the only things that Applicant did not see were some photographs, but Applicant chose not to see those. He testified that he gave a copy of all of the discovery to Applicant. He testified that he knew that Applicant had limited education, but he never had any indication during his meetings with Applicant that Applicant was unable to understand the proceedings. He testified that Applicant was able to discuss the facts of the case and asked intelligent questions of him. He felt that Applicant's prior criminal record had given Applicant some experience with the process.



Trial counsel testified that he personally talked to some witnesses and had the investigator meet with others. He testified that the investigator attempted to speak or spoke to the victim, the daughter and son of Applicant and the victim, and Hogg and Guthrie, whom he described as the son's friends. He testified that he did not call Hogg as a witness at trial because, although Hogg had given a statement to law enforcement officers, Hogg was not able to speak directly to anything that happened during the incident and did not have anything to add to the case. He did not call Guthrie as a witness because Guthrie had lived near Applicant, but had not been present on the day or the shooting. He testified that Guthrie had spoken about an incident when he and others had been working on a boat and Applicant came over, having been drinking alcohol. He did not think that Guthrie had anything to add to the case based on what had been in his statement, and he noted that Guthrie kept dodging whenever trial counsel's investigator tried to talk to him. He testified that he did not remember discussing the facts of the case with Nathan personally, but he did remember talking to Nathan and Nathan's wife about Applicant and the status of the case. He testified that his investigator spoke with Nathan and confirmed that Applicant had asked Nathan earlier on the day of the shooting about the price of a gun. Nathan was present at trial, but trial counsel decided not to call him as a witness because there was a gap in time between Applicant's phone call to Nathan and the shooting itself.

Trial testified that he talked with people at Walmart and Rite Aid in order to get records. He testified that the history of abuse between Applicant and the victim was a mutual one. He testified that the prosecution's case had been that Applicant and the victim had been drinking, that Applicant was mean when he was intoxicated, that Applicant became angry about something, that Applicant shot the victim, and that Applicant tried to stage the shooting as an accident while leaving the victim in the house to die. He testified that Applicant had given three different

statements about the event. He testified that Applicant took the gun with him when he left the house after the shooting, and that gun was eventually found under a couch cushion at Applicant's son's house. He testified that Applicant told him that the shooting had been an accident and that he had not been trying to kill anyone. He testified that there were no witnesses to the shooting except Applicant and the victim. He testified that Applicant told him that he would be acquitted because the victim would testify at trial that the shooting had been an accident. He testified that the victim did not do as Applicant said. He testified that he talked to Applicant's and the victim's daughter, who had talked to the victim after the victim was released from the hospital, and that the victim had made it clear that she would not testify that the shooting had been an accident. He testified that he told this to Applicant, but that Applicant did not accept it as true. He testified that the victim had even attended Applicant's bond hearing and made a statement that indicated that she would not be on the side of the defense, but that Applicant remained convinced that the victim would be a defense witness.

All defendants have a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). A post-conviction relief applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that his lawyer was constitutionally ineffective, he must prove that the conduct of her lawyer "so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in Strickland. First, the applicant must prove that the performance of his lawyer was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland).



Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Id. (citations omitted). The "preeminent authority for all" courts when they are considering an applicant's claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting Strickland). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. "The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (quotation omitted).

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Second, the deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for [the lawyer’s] unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “Representation is an art, and an act or omission that is unprofessional in one case may be sound of even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.” Hill v. Lockhart, 474 U.S. 52, 58 (1985) (quotation omitted).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether a lawyer’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel’s performance with respect to his pre-trial investigation. A defense attorney “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. Thus, “[a] criminal defense attorney has

the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney’s decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel’s judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). “A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014) (quoting Strickland). The only specific thing Applicant alleged that trial counsel should have done was to interview or speak with three people: (1) Nathan, (2) Hogg, and (3) Guthrie. Nathan’s testimony that trial counsel did not speak with him is not credible in light of trial counsel’s credible testimony that he did speak with Nathan and Nathan’s wife. Admittedly, trial counsel testified that he probably did not speak about the facts of the case with Nathan; however, trial counsel said that his investigator did so. Trial counsel’s credible testimony that he considered calling Nathan as a witness at trial but then decided not to do so proves that he was familiar with the investigator’s summary of Nathan’s statement. Trial counsel credibly testified that he decided that Nathan had no personal knowledge of the shooting itself and would not have been able to provide testimony helpful to the defense; that was a reasonable conclusion. Trial counsel’s testimony that his investigator spoke to Hogg is credible, and proves that he considered Hogg’s statement. He credibly testified that he did not call Hogg as a witness because Hogg had no personal knowledge of the shooting and trial counsel felt that Hogg had nothing to add to the defense; that too was a reasonable conclusion. Trial counsel’s testimony that Guthrie tried to avoid

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speaking to trial counsel's investigator and had not been a witness to the shooting is credible, and proves that trial counsel considered whether Guthrie had anything to add to the defense. His decision that Guthrie's testimony would not be helpful was reasonable under the circumstances.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different if trial counsel had called Nathan, Hogg, or Guthrie as witnesses. A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. Applicant did not produce testimony from Hogg or Guthrie for this Court's consideration, so this Court must find that Applicant has failed to meet his burden with respect to them. Applicant did present testimony from Nathan; however, Nathan's testimony before this Court confirmed the reasonableness in trial counsel's decision not to call Nathan as a witness at trial. Nathan was not a witness to the shooting and could

only say that he had heard both Applicant and the victim sounding over the phone some time before the shooting occurred as if they were in good spirits. If one accepts Nathan's testimony and Applicant's statement to law enforcement officers as true, Nathan's call with Applicant took place at about 8:00 p.m. and the shooting took place at about 9:30 p.m. Trial Tran. 29. The jury heard the victim's testimony about the shooting, which would have been devastating to the defense even if the jury had heard Nathan's testimony. Trial Tran. 273-78. Furthermore, Applicant's multiple explanations for the shooting were quite harmful to Applicant's defense. Trial Tran. 92-93, 100, 110, 113, 120-21, 125, 144, 157, 159-60, 163, 167, 204-06, 218-22.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for conducting an inadequate pre-trial investigation because Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his investigation and because Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel called Nathan, Hogg, or Guthrie as witnesses at trial. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not properly advising Applicant regarding a plea offer.

Applicant testified before this Court that trial counsel led him to believe that he had a 50% chance of being acquitted at trial and that he would probably be acquitted. He testified that he received a plea offer for twenty years in prison suspended upon the service of eight years' imprisonment and five years of probation based on the investigation that trial counsel had done, and based on the position that trial counsel had taken on Applicant's chance of success. He testified that he and trial counsel talked about the offer once or twice and that he would have accepted the offer if he had known that the witness testimony was going to be so unfavorable.

Trial counsel testified that the solicitor initially refused to make an offer of fewer than twelve to fifteen years, but eventually offered an eight-year sentence with probation. He testified that he advised Applicant that a jury could go either way on the case. He testified that Applicant told him that the shooting had been an accident, that he had not been trying to kill anyone, and that he wanted a plea offer with a sentence that would allow him to be released from prison before he died. He testified that Applicant wanted a jury trial based on all of those considerations. He testified that he, and Applicant's own daughter, tried to talk Applicant into taking the plea offer, but that Applicant refused to do so and wanted a trial.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to his communications to Applicant about the plea offers. "[A] defendant has the right to effective assistance of counsel during the plea bargaining process." Bell v. State, 410 S.C. 436, 440-41, 765 S.E.2d 4, 6 (Ct. App. 2014) (quoting Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. A defense attorney "has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Id. (quoting Missouri v. Frye, 566 U.S. 134 (2012)). Applicant has not proven that there was any plea offer that trial counsel did not communicate to Applicant. On the contrary, it appears that trial counsel communicated all offers that were extended. Applicant admits that he turned down a plea offer, and alleges that he did so based upon advice from trial counsel that Applicant would probably be acquitted at trial. Trial counsel testified that he tried to convince Applicant to take the plea deal because he did not believe that the evidence at trial would be favorable for the defense, and that even Applicant's own daughter tried to convince Applicant to plead guilty; and trial counsel testified that his efforts in that regard were not successful because Applicant felt confident that the victim would testify

favorably towards the defense at trial, with Applicant disregarding trial counsel's advice that the victim would not do so. This Court finds that Applicant's testimony that trial counsel painted a positive picture of Applicant's chance of success at trial is not credible. Trial counsel's testimony that he advised Applicant to plead guilty is credible. Applicant's decision to reject the plea offer was based upon his own estimation of his chance of success at trial, which discounted trial counsel's advice to the contrary.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective in his communications to Applicant about plea offers because Applicant has not proven that trial counsel's performance was deficient in any way and has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds that Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17th day of November, 2022.


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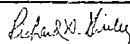
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York, South Carolina


Eugene C. Griffith, Jr.
Presiding Judge

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