

STATE OF SOUTH CAROLINA  
 COUNTY OF RICHLAND  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4001951

Marion E Crocker Jr

South Carolina Department Of Health

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case. *The motion for summary judgment is granted. Formal order is attached.*  
 Additional Information for the Clerk :

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Reford Judge Code 2164 Date Nov 17, 2016

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 21 day of NOV, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Gerald F. Smith

Eugene Hamilton Matthews

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W McBride



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 FILED  
 CLERK OF COURT

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

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Marion E Crocker Jr

South Carolina Department Of Health

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

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Circuit Court Judge \_\_\_\_\_ Judge Code 2164 Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the 7 day of NOV, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 23 day of NOV, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Gerald F. Smith

Eugene Hamilton Matthews

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McBride



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C. P. & C.S.  
RICHLAND COUNTY  
FILED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Marion E. Crocker, Jr.,

Plaintiff,

v.

South Carolina Department of Health and  
Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-01951

**ORDER GRANTING  
MOTION FOR SUMMARY JUDGMENT OF THE  
SOUTH CAROLINA DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL CONTROL**

RICHLAND COUNTY  
FILED  
2016 NOV 21 PM 12:47  
JANETTE M. MORRIS  
C.C.P. & G.S.

This matter came before this Court on October 26, 2016 for a hearing on the Motion for Summary Judgment of the Defendant South Carolina Department of Health and Environmental Control (“DHEC”), under Rule 56, SCRPC. The Motion argued that Plaintiff’s claim<sup>1</sup> – which is brought under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.* – is barred by the applicable Statute of Limitations. At argument, the parties also disputed whether the South Carolina Human Affairs Law provided a private right of action against a state agency under S.C. Code Ann. § 1-13-90(c).

For the reasons stated below, the Motion is GRANTED, and Plaintiff’s claims are dismissed with prejudice.

**FACTUAL RECORD**

1. Plaintiff is a former employee of DHEC.
2. In September 2012, DHEC posted the position of Agency Chief Information Officer for which Plaintiff applied. Another DHEC employee, Dakin MacPhail, received a

<sup>1</sup> Plaintiff originally brought a second claim for “retaliation.” At the hearing, Plaintiff voluntarily dismissed the claim with prejudice. Even if he had not, the claim would be dismissed for the same reasons articulated in this Order.

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courtesy interview, even though he did not meet the technical minimum qualifications for the position.

3. A three-member panel conducted interviews of the candidates, including Plaintiff, and recommended the top three (3) applicants to Ms. Barbara Derrick, DHEC's then Director of Administration. Plaintiff was not one of the top three applicants, but Dakin MacPhail was.

4. Although MacPhail did not technically meet the minimum qualifications of the position, Ms. Derrick chose him because he performed best in his interview. At the time of the selection, Dakin MacPhail was 45 years old, and Plaintiff was 55 years old.

5. On August 7, 2013, Plaintiff submitted a Charge of Discrimination to the South Carolina Human Affairs Commission ("SHAC"), alleging that DHEC discriminated against him on the basis of his age by denying him the promotion, and noting that MacPhail "did not meet minimum hiring requirements for the advertised position was selected."

6. On July 1, 2015, the EEOC found that "there is reasonable cause to believe [Plaintiff] was denied a promotion to Agency Chief Information Officer[] because of his age." DHEC vehemently disagreed with the EEOC's finding, and so notified the EEOC. Thereafter, the EEOC engaged in legally-required "conciliation" efforts between the parties that ultimately failed.

7. On February 11, 2016, the EEOC issued a "Notice of Conciliation Failure" to the parties. On the same date, the EEOC also issued a "Notice of Right to Sue" to the Plaintiff. Under the heading applicable to the federal Age Discrimination in Employment Act ("ADEA"), the notice state as follows:

"[y]ou may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**, or your right to sue based on this charge will be

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lost. (The time limit for filing suit based on a claim under state law may be different.)

(emphasis in the original).

8. On March 28, 2016, Plaintiff filed this action in the Court of Common Pleas of Richland County. He brought the action against DHEC, stated under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.*, alleging that DHEC discriminated against him because of his age “when he was denied the position of Agency Chief Information Officer.” He was allegedly denied this position on or about January 31, 2013.

9. Notably, Plaintiff did **not** bring any claim against DHEC under ADEA, as referenced in the Notice of Right to Sue.

10. DHEC timely answered Plaintiff's Complaint and asserted several defenses, including a defense based on the Statute of Limitations contained in the South Carolina Human Affairs Law. Specifically, S.C. Code § 1-13-90(d)(6) states as follows:

If a charge filed with the commission by a complainant pursuant to this chapter is dismissed by the commission, or if within one hundred eighty days from the filing of the charge the commission has not filed an action under this chapter or entered into a conciliation agreement to which the complainant is a party, the complainant may bring an action in equity against the respondent in circuit court. **The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier,** except that this period may be extended by written consent of the respondent.

(emphasis added).

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OPINION

I. THERE IS NO PRIVATE RIGHT OF ACTION UNDER S.C. CODE § 1-13-90(C).

There is only one way for a Plaintiff to file a private civil action in this Court under the "SCHAL," and that avenue is solely provided by S.C. Code Ann. § 1-13-90(d)(6). There is no other authority within the entirety of the SCHAL's statutory scheme that permits a person to bring a private right of action.

S.C. Code Ann. § 1-13-90 provides two statutory schemes for enforcing the provisions of the SCHAL:

- S.C. Code Ann. § 1-13-90(c) provides the statutory procedure for "complaints asserting expressly or in substance a violation [of the SCHAL] by a state agency or department or local subdivisions of a state agency or department."
- S.C. Code Ann. § 1-13-90(d) provides the statutory procedure for "complaints asserting expressly or in substance a violation of [the SCHAL] by employers, employment agencies or labor organizations, including municipalities, counties, special purpose districts, school districts, and local governments, but not including employers, employment agencies or labor organizations covered by § 1-13-90(c)."

DHEC is undoubtedly an agency of the State of South Carolina, and it appears that Plaintiff may only proceed under S.C. Code Ann. § 1-13-90(c) the procedure shall be as follows

Most notably, under S.C. Code Ann. § 1-13-90(c), there is no private right of action.<sup>2</sup>

Rather, the only "hearing" conducted under S.C. Code Ann. § 1-13-90(c) is one conducted

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<sup>2</sup> It is not unique, or even unusual, for a statutory scheme not to provide a plaintiff with a private right of action. For instance, under the anti-retaliation provisions of the state's Occupational Safety and Health code, S.C. Code Ann. § 41-15-520, some complaints may only be filed in civil court by the Director of the S.C. Department of Labor, Licensing & Regulation ("LLR") ("If upon such investigation the director determines the provisions of Section 41-15-510 have been violated, he shall institute an action in the appropriate court of common pleas against such person. In any such action the court of common pleas shall have jurisdiction for cause shown to restrain violations of Section 41-15-510 and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.").

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before SHAC, not the Court, and must be ordered by one of the Commission's supervisory commission members. S.C. Code Ann. § 1-13-90(c)(5).

Because there is no private right of action under S.C. Code § 1-13-90(c), Plaintiff cannot rely on it to bring a private right of action against DHEC. For that reason alone, his claim must be dismissed with prejudice.

**II. PLAINTIFF'S REMAINING CLAIM UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.**

Even if Plaintiff claims to proceed under S.C. Code § 1-13-90(d) instead of S.C. Code § 1-13-90(c), his claim under S.C. Code § 1-13-90(d) is barred by the applicable statute of limitations.

"The cardinal rule of statutory construction is to ascertain the intent to the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (internal citations omitted). Where a statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

The Statute of Limitations that applies to a claim under S.C. Code § 1-13-90(d) of the South Carolina Human Affairs Law is plain, unambiguous, and conveys a clear, definite meaning. The statute in question states that:

The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier...

S.C. Code § 1-13-90(d)(6). The meaning of the limitation is clear. If a plaintiff wishes to bring a civil action in circuit court under the South Carolina Human Affairs Law under S.C. Code § 1-

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13-90(d), he or she must do so:

- Within one year for the date of the alleged violation, OR
- Within one hundred twenty (120) days from the date the complainant's charge is dismissed,
- Whichever occurs earlier.

S.C. Code § 1-13-90(d)(6). In the instant case, Plaintiff complains about his non-selection for a promotion at DHEC, which occurred in January 2013, and under the plain language of the statute, the Statute of Limitations on Plaintiff's claim ran in **January 2014**. For this reason alone, any claim made under S.C. Code Ann. § 1-13-90(d) must be dismissed. *Harrison-Jenkins v. Med. Univ. of S. Carolina*, 2012 WL 1533046, at \*4 (D.S.C. Apr. 9, 2012), *R&R adopted*, 2012 WL 1534711 (D.S.C. May 1, 2012), *aff'd sub nom. Harrison-Jenkins v. Med. Univ. of S. Carolina*, 479 F. App'x 449 (4th Cir. 2012);

**III. PLAINTIFF'S ARGUMENTS IGNORE THE DIFFERENCES BETWEEN A CLAIM UNDER THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) AND A CLAIM UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW, S.C. CODE ANN. § 1-13-10, ET SEQ.**

The Notice of Right to Sue clearly applies, by its own terms, only to claims brought under the federal law and not the SCHAL. *Brown v. Lexington Cty. Health Servs. Dist., Inc.*, 2013 WL 5467623, at \*5 (D.S.C. July 11, 2013), *R&R adopted*, 2013 WL 5467626 (D.S.C. Sept. 27, 2013) (South Carolina's doctrine of equitable tolling does not rescue a plaintiff's claim under the South Carolina Human Affairs Law where she waited until after the EEOC issued a right-to-sue letter before filing her state law claims).

In this case, the Notice of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but has no bearing on the right of a plaintiff to file a civil

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action under the South Carolina Human Affairs Law.<sup>3</sup>

Plaintiff has also argued that he should be permitted to file a SCHAL claim pursuant to the EEOC's Notice of Right to Sue because "[n]either Mr. Crocker, the plaintiff herein, nor DHEC objected" when the South Carolina Human Affairs Commission waived deferral of Plaintiff's charge of discrimination, and declared that it "will not be involved in the investigation or resolution of this Charge." This argument is without merit. First, Plaintiff makes no effort to identify a reason that DHEC must object to SHAC's decision to waive participation in the investigation and resolution of Plaintiff's charge. Indeed, if Plaintiff wished to preserve SHAC's opportunity to institute proceedings under S.C. Code § 1-13-90(c), Plaintiff should have voiced his concerns when SHAC declared that it "will not be involved in the investigation or resolution of this Charge." Second, if he wished to attempt to file a lawsuit against DHEC under S.C. Code § 1-13-90(d)(6), Plaintiff could and should have done so by filing a claim within one year of the alleged violation, especially if SHAC did not participate in the claim's investigation or dismissal.

In short, the EEOC's Notice of Right to Sue governs when a plaintiff may file a lawsuit under federal law. In this case, the Notice of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but has no bearing on the right of a plaintiff to file a civil action under the SCHAL.

IV. PLAINTIFF WRONGLY ARGUES THAT DHEC ENTERED INTO A CONCILIATION AGREEMENT WITH THE EEOC AND PLAINTIFF.

Plaintiff argued that the "Commission's delegate, EEOC, DHEC, and Mr. Crocker **did** enter into a conciliation agreement" (emphasis in original), and that as a consequence, the Statute

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<sup>3</sup> "There is no basis under South Carolina law to attribute a dismissal by the EEOC to SHAC, because South Carolina requires that the dismissal be by its own agency". *Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4<sup>th</sup> Cir. 2010) *abrogated on other grounds by Vance v. Ball State Univ.*, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013) (emphasis in the original).

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of Limitations was tolled. Quite simply, there is no evidence anywhere in the record that DHEC entered into a conciliation agreement with Plaintiff. For this reason alone, the argument has no merit.

V. PLAINTIFF'S ARGUMENT THAT A PLAIN READING OF S.C. CODE § 1-13-90(D)(6) LEADS TO ABSURD RESULTS IS UNAVAILING.

Plaintiff argues that a plain reading of S.C. Code § 1-13-90(d)(6) would necessarily leave a plaintiff with only five days to file a complaint, which he described as an “absurd” result. The argument is not accurate, and in any event, is unavailing.

Plaintiff's argument fails for the following reasons:

- If a complainant wishes to file a lawsuit, and SHAC has not filed an action, entered into a conciliation agreement to which the complainant is a party, or dismissed the charge within 180 days after he filed the charge, the would-be plaintiff need only file his lawsuit as directed by the statute within one year of filing the charge.
- If SHAC dismisses the charge prior to the 180-day period, the would-be plaintiff may still file a lawsuit, but his limitations period is shortened to 120 days following SHAC's dismissal.

Further, Plaintiff makes no effort to square his “absurdity” argument with the ruling in *Harrison-Jenkins v. Med. Univ. of S. Carolina*, 2012 WL 1533046, at \*4 (D.S.C. Apr. 9, 2012), *R&R adopted*, 2012 WL 1534711 (D.S.C. May 1, 2012), *aff'd sub nom. Harrison-Jenkins v. Med. Univ. of S. Carolina*, 479 F. App'x 449 (4<sup>th</sup> Cir. 2012), which clearly adopts and enforces the limitations provisions of S.C. Code § 1-13-90(d)(6) to SCHAL claims.

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VI. PLAINTIFF HAS MADE NO SHOWING THAT HE IS ENTITLED TO EQUITABLE TOLLING OF THE LIMITATIONS PERIOD.

Plaintiff's argument that he is entitled to "equitable tolling" of the limitations misinterprets the law of equitable tolling and ignores previous rulings on that subject, including those involving S.C. Code § 1-13-90(d)(6).

As an initial matter, the party claiming that a statute of limitations should be subject to equitable tolling "bears the burden of establishing sufficient facts to justify its use...[and equitable tolling] should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115-117, 687 S.E.2d 29, 32-33 (2009).

The cases cited by Plaintiff all reference an affirmative act by the defendant that made "sparing" use of the equitable tolling doctrine appropriate. In *Hopkins v. Floyd's Wholesale*, 299 S.C. 127, 382 S.E.2d 907 (1989), the court tolled the running of the statute of limitations for the time when the employer induced the employee to believe his claim would be taken care of without filing a workers' compensation claim. Likewise, in *Hooper*, the defendant's failure to properly list its registered agent for service with the Secretary of State as required by state law hindered Hooper's pursuit of service. 386 S.C. at 117-18, 687 S.E.2d at 33-34.

Contrarily, Plaintiff fails to point to any "act" by DHEC of this kind. Instead, Plaintiff faults DHEC for:

- Participating "fully in the lengthy administrative process" compelled by the EEOC.
- "[N]ever intimating [presumably, to Plaintiff] that it intended to rely on an obscure and inapplicable time limit [presumably, the plain and clear language of S.C. Code Ann. § 1-13-90(d)(6)]..."
- "[N]ever suggest[ing] to Crocker that it would disregard EEOC's regulation Notice of Right to Sue..."

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These “reasons” are thoroughly unavailing. First, DHEC had no choice but to participate in the EEOC’s administrative process, and certainly could not refuse to do so.

Second, DHEC is not – and could not be – required to notify Plaintiff of its intent to defend itself against a lawsuit that Plaintiff might file in the future, including the assertion of a clearly stated “statute of limitations.”

Third, Plaintiff is the only party in this case that has apparently ignored the provisions of the EEOC’s Notice of Right to Sue. By its own terms, the Notice governs when a plaintiff may file a lawsuit under federal law. *Whitten*, 601 F.3d at 241. In this case, the Notice of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but has no bearing on the right of a plaintiff to file a civil action under the SCHAL.

Finally, Plaintiff fails to address the fact that his argument concerning equitable tolling has already been tried and rejected. In *Brown v. Lexington Cty. Health Servs. Dist., Inc., supra*, the plaintiff explicitly argued that the limitations period under S.C. Code Ann. § 1-13-90(d)(6) “should be equitably tolled because she reasonably waited until after the EEOC issued a right-to-sue letter before filing the instant lawsuit.” 2013 WL 5467623, at \*5. However, the court rejected the argument, rightly noting that “South Carolina’s doctrine of equitable tolling does not rescue a plaintiff in such circumstances.” *Id.*

**VII. THERE IS NOTHING PARTICULARLY “NOVEL” ABOUT PLAINTIFF’S ALLEGATIONS OR ARGUMENTS.**

As set forth in *Brown*, there is nothing particularly new or even remarkable about Plaintiff’s allegations or arguments. Resolution of the dispositive motion requires nothing more than a review of the exhibits at hand, the arguments of the parties, and the applicable law. There is also nothing particularly uncommon about (1) the absence of a private right of action, (2) a

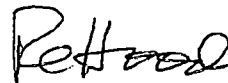
plaintiff's failing to abide by a limitations period, or (3) a plaintiff's failing to file a proper claim under the terms of a Notice of Right to Sue. For these reasons, there is no cause to delay further the resolution of this case.

CONCLUSION

For the reasons stated above, Plaintiff's lawsuit must be dismissed because (1) there is no private right of action under S.C. Code Ann. § 1-13-90(c), and (2) under S.C. Code Ann. § 1-13-90(d), his claim is barred by the applicable Statute of Limitations.

For this reason, I hereby GRANT the motion of DHEC and DISMISS this lawsuit with prejudice, with each side to bear its own costs and fees.

AND IT IS SO ORDERED.



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The Honorable Robert E. Hood  
Presiding Judge  
Fifth Judicial Circuit

NOV 16, 2016  
Columbia, South Carolina

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