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MAY 24 2019

The Supreme Court of South Carolina

HAYWARD L. ROGERS,

PETITIONER,

S.C. SUPREME COURT

VS.

State of South Carolina,

Respondent.

Appellate Case No. 2019-000429

Motion For Rehearing

The above petition, petitions for rehearing from this court's order of denial dated May 13, 2019, and received by petitioner dated May 16, 2019. The order is in correct and contrary to this court's own law where this court ruled in *Wilson v. State*, 559 S.E.2d 581 (S.C. 2002); *Davis v. State*, 342 S.E.2d 60 (S.C. 1986); *White v. State*, 208 S.E.2d 35 (S.C. 1974); *Austin v. State*, 409 S.E.2d 395 (S.C. 1991).

Final order and Appeal

In denial of petitioner's first PCR, PCR lawyer filed a notice of appeal with the ~~order~~ herein court, even though 11 issues was raised and ruled on by the PCR court in its final order (2004-CP-32-3932), PCR appellate attorney which was also PCR attorney raised only (1) issue to be reviewed by this court, leaving ten (10) issues not reviewed or ruled on by this court. With these issues not ruled on by this court the petitioner cannot exhaust state remedies unless these issues are ruled on by this court, and would be procedurally barred by this court's cause and prejudice which will be nothing less than a gross miscarriage of justice, see *Murray v. Carrier*, 477 U.S. 478 (1986), there is evidence within these unappealable issues that can, and will support the ~~innocence~~ innocence of the petitioner. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

2.

Id. The Supreme Court later found that the facts fit "the very rarest of exceptions" in Washington v. State, 478 S.E.2d 833 (S.C. 1996). In that case, procedural irregularities led to the failure to review an issue of ineffective assistance of counsel determined in the first application. An exception to the rule against successive applications occurs where the applicant has been denied the opportunity to appeal dismissal of his first application, in the instant case the applicant was denied the right to appeal ten issues that was raised and ruled on in his first application's final order but was prevented from raising those issues before the Supreme Court by way of a petition for writ of certiorari with the Supreme Court, 17-27-100 (S.C. 1985); and Austin v. State, 409 S.E.2d 395 (S.C. 1991). The court in "Aice" distinguished this situation from the general rule on the basis that "Austin never received a full 'bite' at the apple. Rogers never received half the 'bite' at the apple as it were, see, 2004-CP32-3932. However, the court refused to allow the applicant in "Aice" to gain more than "one procedural 'bite' at the apple." Aice, 305 S.C. at 459, 409 S.E.2d at 395. The South Carolina Supreme Court held: That when a PCR applicant is denied due process of law in the PCR proceeding, then they are entitled to relief, "independent" of any claim of "ineffective assistance of counsel." Washington v. State, 478 S.E.2d 833 (S.C. 1996) (Taal, writing for the court), especially if applicant can prove he was denied due process of law in the first proceeding due to omission of counsel's errors, may be "sufficient reasons." Therefore, an applicant is entitled to a belated appeal of

3,

his First PCR application if he Requested, but was denied the opportunity for appellate Review of his First application; or if his Right to Review the First application was not knowingly and intelligently waived. *Odom v. State*, 523 S.E.2d 753 (S.C. 1999); ~~the~~ Austin. Procedures for Review are the same as for a belated direct appeal. See S.C.A.C.R. Rule 227 (L-G). The Supreme Court has determined that the Statute of Limitations does not apply to seeking a belated appeal from a PCR application. *Odom*.

This Court's order does not contain fact findings and conclusion of law pursuant to S.C. Code Ann. 17-27-80; and Rule 52 (a), S.C.R.C.P. The ten (10) issues in question was ruled on in the final order, and preserved for this Court's discretionary appeal Review. The applicant did not waive that procedural due process right, where this Court has jurisdiction to hear this appeal by way of a petition for writ of certiorari. Thus, counsel should be sure to raise every issue in the petition for writ of certiorari to prevent procedural default in federal habeas Review. The state will have thirty (30) days to serve a return to the petition. See, S.C.A.C.R. 203 (W)(1)(B), 243 (C), 243 (E), 243 (F), 207 (a)(i)

May 20, 2019

Stephane L. Rogers

CLIENT COPY

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

HAYWARD LEON ROGERS, #278510,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 04-CP-32-3932

ORDER

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on October 27, 2004, and amended on August 21, 2008. The State made its Return on July 18, 2005. An evidentiary hearing was convened in this case on May 18, 2009. The Applicant was present and was represented by Tara Dawn Shurling of the Richland County Bar. The State was represented by A. West Lee, Assistant Attorney General.

**I.
PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lexington County Clerk of Court's orders of commitment. The Lexington County Grand Jury indicted the Applicant at the February 1999 term of General Sessions for two counts of Criminal Sexual Conduct in the First Degree (99-GS-32-815; 818), Kidnapping (99-GS-32-813), Assault and Battery with Intent to Kill (99-GS-32-819), and Strong-Armed Robbery (99-GS-32-814). On September 17-21, 2001, the Applicant proceeded to trial by jury, and was represented by William Y. Rast, Jr., Esquire. He was found guilty as charged on all counts. The Honorable Marc H. Westbrook, presiding circuit judge, sentenced the Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. §17-25-45.

A Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected by Wanda H. Haile,¹ Senior Assistant Appellate Defender, with the South Carolina Office of Appellate Defense.² By published opinion, the South Carolina Court of Appeals affirmed the Applicant's convictions and sentences: State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004). Though multiple issues were raised, appellate counsel did not petition for rehearing or seek certiorari to the Supreme Court.

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and *no appeal before Supreme Court*
2. Ineffective assistance of appellate counsel. *no appeal before Supreme Ct.*

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial.

In an Amended Application for Post-Conviction Relief filed August 21, 2008, the Applicant more narrowly defined his allegations in support of his claim that he received ineffective assistance of counsel. In that Application, he alleged:

1. Trial counsel was ineffective for failing to require that a certified interpreter be sworn to take the victim's testimony; *no appeal before Supreme Ct*
2. Trial counsel was ineffective for failing to challenge the sufficiency of the search warrant used to draw the Applicant's blood; *WARRANT IS SEARCH, NO COURT ORDER*
no appeal before Supreme Ct
3. Trial counsel was ineffective for failing to challenge the chain of custody on the Applicant's blood; *no appeal before Supreme Ct.*

¹ Now Wanda H. Carter.

² Now the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

4. Trial counsel was ineffective for failing to use readily available experts, funds for whom had already been obtained by previous defense counsel, in the Applicant's defense at trial. *no appeal before Supreme Ct.*

At the evidentiary hearing convened in this case, the Applicant raised additional allegations of ~~ineffective assistance of counsel.~~ This Court accepts those allegations as amendments to his

Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing.

See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 208 (2006); Rule 15(b), SCRCP. At the hearing, the Applicant specifically alleged:

5. Defense counsel was ineffective for failing to move for a mistrial when he realized that the victim was deaf.
no appeal before Supreme Ct.
6. Defense counsel was ineffective for failing to interview the victim prior to the trial.
no appeal before Supreme Ct.
7. Appellate counsel was ineffective for failing to argue on appeal that the Applicant was entitled to a new trial based on the fact that the Applicant's speedy trial rights were violated.
no appeal before Supreme Ct.
8. Appellate counsel was ineffective for failing to argue on appeal that Judge Westbrook should have recused himself from the trial of this case.
no appeal before Supreme Ct.
9. Appellate counsel was ineffective for failing to argue that the Applicant's motion for a directed verdict was improperly denied by the trial court.
no appeal before Supreme Ct.

III.

EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on May 18, 2009, the Applicant presented his own testimony, as well as testimony from trial counsel William Y. Rast, Jr., Esquire. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the records of the Lexington County Clerk of Court regarding the subject convictions, a copy of the Applicant's records with the South Carolina Department of Corrections, and a copy of the appellate court documents in this case. What follows below are the findings of fact and rulings

of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C.

Code Ann. §17-27-10 *et seq.* (1985).

As a threshold matter, this Court would note that the Applicant was represented by an experienced trial attorney who is generally regarded for his competence. On the facts of this case, however, this Court finds that the combined effect of his errors and omissions was such that the Applicant was deprived of a fair trial. Specifically, this Court finds a reasonable probability that but for counsel's errors and omissions, the outcome of this trial would have been different. For that reason, this Court finds that trial counsel failed to provide the Applicant reasonable, professional assistance of counsel.

IV. RELEVANT FACTS

The South Carolina Court of Appeals' decision in this case contains an excellent summary of the facts, see State v. Rogers, supra. For the purposes of evaluating this action, this Court incorporates that factual summary by reference. In addition, this Court notes the following relevant facts.

The Applicant was charged with sexually assaulting the victim, Ethel Tillman, a fifty-seven year old woman, on September 28, 1998. The evidence presented by the State supported the following view of the facts. The victim was walking away from a video poker establishment when the Applicant came up to her. The Applicant forced her behind a nearby building and forced her to have vaginal and oral intercourse with him. She fought him off and he ran away with her purse.

After the incident, the victim was taken to a hospital and treated for her injuries. Notably, her treating physician did not find any physical evidence that she had been sexually assaulted. See Trial Tr. p. 804, line 22-p. 805, line 3. Three days after the incident, investigator

Wendy Frazier interviewed her. During this meeting, Investigator Frazier returned the purse and clothing worn by the victim the night of the incident. Investigator Frazier went to the victim's home six days after this interview to take possession of those items again.

~~The victim gave a composite sketch of the assailant a week after the assault.~~ Police officer Jason Amodio took the sketch to local businesses and ultimately showed it to a man named Harley Hancock (known as "Pop"). After speaking with Pop, Officer Amodio and other police officers waited for a man, who would turn out to be the Applicant, to arrive at Pop's house. Shortly thereafter, the Applicant arrived at Pop's home and was arrested.

The Applicant's fingerprints were then compared with latent fingerprints taken from items that were inside the victim's purse. SLED agent Ted Shealy testified that a latent print that matched the Applicant's fingerprint was found on a pay stub with the victim's name on it in the purse. Furthermore, a blood stain on the victim's sweater, which had been returned to her and then picked back up by Investigator Frazier, was tested by SLED.³ SLED agent Gray Amick testified that this stain contained a mixture of the Applicant's and the victim's blood. See Trial Tr. p. 767, line 5- p. 768, line 21.

Of particular import at trial, and to this Court, was the victim's ability to testify. The victim became deaf at a very young age and never learned sign language. Instead, the victim communicated by a unique combination of hand gestures and speaking. At trial, the assistant solicitor was permitted to lead the victim throughout the course of her testimony. When defense counsel attempted to cross-examine her, the trial court appointed the victim's son to be her

³ This stain was initially found to be insufficient to test under the RFLP DNA testing procedures that SLED used at the time of the incident. However, while the case was pending, a new type of DNA testing—polymerase chain reaction testing ("PCR testing")—was adopted by SLED. It was under PCR testing that SLED was able to determine that the blood on the sweater was a mixture of the Applicant's blood and the victim's blood.

interpreter. Defense counsel's numerous failures with regard to this damaging testimony will be addressed below.

V.
STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel 1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and 2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy

or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the South

Carolina Supreme Court found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Defense Counsel's Failure to Take Adequate Measures Prior to, and During, the Victim's Testimony

The Applicant alleges that defense counsel was ineffective for failing to take numerous actions with regard to the victim's testimony, including: (1) failing to interview the victim prior to the trial; (2) failing to request that a qualified interpreter be appointed, prior to trial, to interpret the victim's testimony; and (3) failing to move for a mistrial once defense counsel discovered that the victim's impediment was far more severe than had been disclosed pretrial. The Applicant contends that he was prejudiced by defense counsel's failure to take any of these actions. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

At the PCR hearing defense counsel testified that prior to trial he had been informed by the assistant solicitor prosecuting the case that the victim's possible impediment to testifying was that she had trouble speaking. Importantly, defense counsel was not told that the victim had trouble *hearing*. Defense counsel testified that he had asked the assistant solicitor about having an interpreter for the victim's testimony at trial, but he was reassured on numerous occasions that the victim would be capable of testifying at trial. However, defense counsel did not take any action, prior to the start of trial, to ascertain for himself the extent of the victim's impediment. Furthermore, defense counsel did not move to have an interpreter appointed.

At trial, it became abundantly clear that the victim was having great difficulty testifying.

On direct examination, and over defense counsel's repeated objections, the assistant solicitor was permitted to lead the victim with virtually every question.⁴ Furthermore, on cross-examination, ~~defense counsel was having so much difficulty questioning the victim that her son was appointed~~ to serve as her interpreter. Defense counsel testified that this resulted in a constructive denial of his ability to cross-examine the victim. However, at no point in time prior to or during direct examination did defense counsel ask that an interpreter be sworn to assist with the victim's testimony.⁵ Furthermore, defense counsel never moved for a mistrial based on the State's misrepresentations concerning the degree of the victim's impairment, and their erroneous assurances that the victim was capable of testifying without the assistance of an interpreter.⁶ This Court finds that defense counsel committed error in failing to take any of these actions.

⁴ For example, the following testimony was permitted regarding the initial assault:

Q: ... He grabbed you by the back of the neck?
A: (Witness nods.) (Indicating affirmative response.) And threw.
Q: He pushed you down?
A: (Witness nods.) (Indicating affirmative response.) In the wall.
Q: In the wall. And it cut your head?
A: (Answer unintelligible.)
Q: The tree and the ground?
A: (Answer unintelligible.)

...
Q: He pushed you into the ground?
A: (Witness nods.) (Indicating affirmative response.)
Q: Then you got back up?
A: (Witness nods.) (Indicating affirmative response.)
Q: And he pushed you into the wall?
A: (Witness nods.) (Indicating affirmative response.)

Trial Tr. p. 162, line 22-p. 163, line 22.

⁵ On appeal, appellate counsel argued that the trial court erred in not appointing an interpreter during direct examination. The Court of Appeals found that the issue was not preserved because defense counsel never made an objection. See *State v. Rogers, supra*, at 183, 603 S.E.2d at 913.

⁶ While the problems would obviously not be readily apparent until the victim actually testified, this Court would note that the victim's sister, Ann Bryant, testified that the victim was deaf immediately prior to the victim's testimony. See Trial Tr. p. 113, line 20-p. 115, line 24.

An interpreter for a deaf witness must not be a family member of that witness, unless the trial court finds that the use of the family member as a qualified interpreter "is in the best interest of the individual and is in the best interests of justice." S.C. Code Ann. §15-27-15. Had defense counsel requested a qualified interpreter in advance, the parties would have had the opportunity to locate a qualified interpreter who was not related to the victim. Counsel's failure to adequately deal with this issue pretrial resulted in the Court's authorization of the use of the victim's son as an interpreter in the midst of this trial. The use of the son as an interpreter, and all the inherent risks of bias attendant that decision, could therefore have been avoided.

"A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Id.

The record before this Court demonstrates that defense counsel took little to no affirmative action to ensure that his client's ability to effectively challenge the victim's testimony would be preserved. While defense counsel asked the assistant solicitor about having an interpreter appointed, he did not request permission to personally interview the victim or make a motion to appoint an interpreter as a precaution. Such a motion would have resulted in a pretrial hearing at which the Court, and defense counsel, could have explored the need for an interpreter by questioning the victim. Given her testimony at trial, this Court believes such a hearing would clearly have resulted in a pretrial ruling that a qualified interpreter was needed to insure that reliable testimony could be obtained. Furthermore, when it became abundantly evident during this trial that an interpreter would be needed to properly take the victim's

testimony, defense counsel did not ask that an interpreter be sworn. Finally, defense counsel did not move for a mistrial when he realized that the assistant solicitor's repeated assurances that the victim could testify were not accurate and had been misleading.⁷ As noted *supra*, a mistrial is an extreme remedy. Where, however, defense counsel discovered in the midst of the Applicant's trial that the prosecution had misrepresented the victim's level of impairment, a mistrial was the only viable remedy. Defense counsel admitted that he did not take these actions and testified that he believed that the Applicant did not receive a fair trial because of the numerous problems with the victim's testimony. This Court finds that defense counsel's repeated failure to take any preventative or corrective action to ensure that his client's right to a fair trial was preserved was error.

The Applicant was prejudiced by defense counsel's numerous failures.⁸ This Court does not agree with the State's contention that the evidence against the Applicant was overwhelming.⁹ As noted above, the standard of proof in Post-Conviction Relief actions is whether or not there is a reasonable probability that the result at trial would have been *different*. Importantly, the Applicant does not have to show that there is a reasonable probability that he would have been *acquitted* of any criminal wrong doing had defense counsel taken the appropriate actions. Given the vague nature of the victim's communication with regard to this incident, the jury could easily have found the known facts supported a far less serious view of the Applicant's culpability.

⁷ Defense counsel testified that he did not believe that he had been intentionally misled by the assistant solicitor. However, the fact remains that what he had been assured would occur by the assistant solicitor did not actually occur, and defense counsel should have taken immediate action to correct the problem. He did not do so.

⁸ Initially, this Court is uncertain whether the factors present in this case warrant the standard harmless error inquiry because this is not a case where, for example, there is a particular piece of evidence which was admitted in violation of the Confrontation Clause. In this case, the Applicant asserts that the problems with the victim's testimony amounted to a constructive denial of the ability to cross-examine the victim, which resulted in an error "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1985). See also United States v. Cronin, 466 U.S. 648 (1984). For the sake of argument, this Court will assume that the Applicant must show that he was prejudiced by defense counsel's errors.

⁹ This Court would also note that at no point did the Court of Appeals find that the evidence against the Applicant was overwhelming. See State v. Rogers, *supra*.

At trial, the State admitted evidence that the Applicant's blood was found on the victim's sweater. The State also admitted evidence that the Applicant's fingerprint was found on a document inside the victim's purse. Finally, the victim also sustained an injury to her forehead. However, while this evidence could be considered as establishing that the Applicant was present at the time of the assault, none of these facts *prove* that: (1) the victim was sexually assaulted; (2) the victim was kidnapped; or (3) the Applicant committed an ABWIK against the victim. This same evidence, without the uncorroborated claims of the victim, could be evidence of a simple assault and a purse snatching. Likewise, this evidence might be viewed as circumstantial evidence of a strong-armed robbery.¹⁰ The only direct evidence that the Applicant committed the particular crimes he was tried for was the highly questionable testimony of the victim. By defense counsel's inaction, the Applicant was deprived of his opportunity to effectively cross-examine the victim regarding her testimony on these crucial issues. Had the Applicant been provided the opportunity to cross-examine the victim about her testimony, instead of permitting the assistant solicitor's leading questions to be, in effect, her *only* testimony on the record, there is a reasonable likelihood that the result at trial would have been different. Additionally, given the circumstances in this case, especially the assistant solicitor's pretrial assurances to defense counsel that the victim would be able to testify without an interpreter, this Court finds that a mistrial would have been warranted. Consequently, the Applicant is entitled to a new trial.

¹⁰ While the Applicant was not charged with either purse snatching or strong-armed robbery, defense counsel would have been free to argue that there were other less serious crimes the State had elected not to charge which equally fit the evidence.

B. All Other Allegations

As to any and all other allegations presented at the evidentiary hearing convened in this case, this Court finds that there was insufficient evidence introduced to support granting the requested relief. Accordingly, those allegations are denied and dismissed.

**VII.
CONCLUSION**

This Application for Post-Conviction Relief is hereby granted. The Applicant's convictions and sentences are vacated, and the Applicant's case is remanded to the Lexington County Court of General Sessions for a new trial.

IT IS SO ORDERED.

Roger M. Young
Presiding Circuit Judge
Eleventh Judicial Circuit

This ____ day of _____, 2009.

_____, South Carolina.

The Supreme Court of South Carolina

HAYWARD L. ROGERS,

Petitioner,

VS.

State of South Carolina,

Respondent.

Proof of Service

I, The undersigned hereby do Certify That on This date
I Served upon The opposing part a Copy of The petition
For Rehearing by placing a Copy of The Same in The U.S.
mail postage prepaid.

May 20, 2019

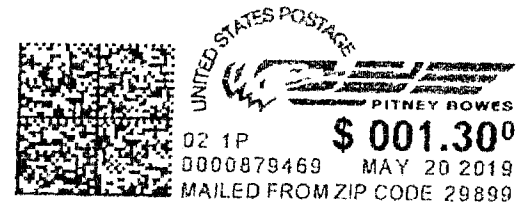
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S.C. SUPREME COURT

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South Carolina Supreme Court
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