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April 18, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED
APR 23 2018
S.C. SUPREME COURT

Re: Johnny Brown 244979, 2016-CP-10-1587

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal and Grant of Appeal pursuant to White v State, in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K. Falk

Thank you for your assistance.

CC:

Megan Harrigan Jameson
Johnny Brown 244979

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 23 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Maite Murphy Circuit Court Judge

Case No.: 2016-CP-10-1587

Johnny Brown #244979.....Petitioner

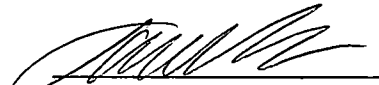
v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

The Petitioner Johnny Brown appeals the Honorable Maite Murphy's April 9, 2018 Order Granting Belated Appellate Review Pursuant to White v State and Denying All Remaining Claims. Undersigned counsel received notice of entry of the order on April 18, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted



James Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402
Attorney for Petitioner

April 18, 2018

Megan Harrigan Jameson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 23 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Maite Murphy., Circuit Judge

Case No.: 2016-CP-10-1587

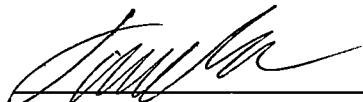
Johnny Brown 244070.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this April 18, 2018.



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Charleston, SC 29402

6760). In 2015, Charleston County Grand Jury later indicted Applicant for third-degree criminal sexual conduct with a minor (2015-GS-10-2362). Assistant Public Defender Charles Cochran of the Charleston County Public Defender's office represented Applicant. Assistant Solicitors Debbie Herring-Lash and Shannon Elliott of the Ninth Circuit Solicitor's Office prosecuted the case.

On April 13, 2015, Applicant appeared in the Charleston County Court of General Session and proceeded to trial before the Honorable Deadra Jefferson, circuit court judge. On April 15, 2015, the jury convicted as indicted on all three offenses. Judge Jefferson sentenced Applicant to life imprisonment for both first-degree criminal sexual conduct with a minor convictions and to fifteen years for the third-degree criminal sexual conduct conviction, with all sentences to be served concurrently.² Applicant did not file a direct appeal.

SUMMARY OF FACTS ADDUCED AT TRIAL

On June 20, 2013, Applicant's cousin lived on Camp Road in Charleston County with her two daughters, a thirteen-year-old daughter and a two-year-old daughter. (Tr. 58-59, 116-20). In the late afternoon, Applicant's cousin left for work, leaving her two daughters at home as she typically did while she worked (Tr. 118-20). While she was gone, Applicant came over to the house. (Tr. 64). Applicant began tickling the girls, starting first with the two-year-old child and eventually tickling the thirteen-year-old child. (Tr. 66-7). Applicant then pushed the thirteen-year-old child's clothing to the side and penetrated her vagina and anus with his penis. (Tr. 68-

² On June 24, 2014, Applicant appeared before the Honorable Roger M. Young, Sr., where he rejected the State's plea offer for a recommended sentence of twenty years imprisonment. Applicant was advised the State would seek life without parole pursuant to S.C. Code § 17-25-45 based on his prior conviction for first-degree criminal sexual conduct with a minor. Thereafter, the State served Applicant with notice of its intent to seek life without parole.

72, 80-82). This was not the first time Applicant had sexually assaulted her—Applicant had annually penetrated her when she was six-years-old. (Tr. 106-08).

When Applicant finished assaulting the thirteen-year-old child, he attempted to pay her twenty dollars, went into the bathroom, and left the house. (Tr. 82). Applicant later sent his other cousin, Solomon, to the home to try to give the thirteen-year-old child some candy, which she refused. (Tr. 82-83). Once Applicant left, the thirteen-year-old child took a shower then gave her two-year-old sister a bath. (Tr. 83). She then began to cry and cried until her mother came home a few hours later. (Tr. 83-84). When her mother arrived home, victim disclosed the abuse to her mother, who took her to the hospital for evaluation. (Tr. 84-88, 123-25).

At the hospital, the thirteen-year-old child was evaluated by Katherine Fabrizio (Fabrizio), a nurse practitioner and pediatric sexual assault nurse examiner (PSANE). (Tr. 152-55). Fabrizio started her examination of the thirteen-year-old child between 11:00 p.m. and 12:00 a.m. on the day of the assault. (Tr. 159). Fabrizio described the child's demeanor as "very quiet, very tearful, very much in shock." (Tr. 159). Fabrizio collected swabs from the child's mouth, vagina, and rectum, as well as collected fingernail scrapings. (Tr. 161). Fabrizio did not observe any trauma to the child's vaginal or anal area. (Tr. 172-173). The collected swabs were sent to the laboratory for analysis, where the vaginal swab tested positive for gonorrhea. (Tr. 176-79, 293-95, 308-10). A urine sample taken from Applicant also tested positive for gonorrhea. (Tr. 301-04, 308-10). Additional testing also detected semen on the vaginal swabs, although a DNA profile was not able to be developed from the swab. (Tr. 278, 286-90).

The thirteen-year-old child's mother also took her to Lowcountry Children's Center, where she again disclosed her sexual assault to a forensic interviewer. (Tr. 126, 240-241). She also disclosed her sexual assault to the nurse at her school. (Tr. 312-14).

Applicant, who was a registered sex offender based on a prior conviction for first-degree criminal sexual conduct with a minor, was required to wear an ankle monitor that tracked his location at all times with GPS data. (Tr. 219). This GPS data established Applicant was at the thirteen-year-old child's home during the times she reported her sexual assault. (Tr. 251-55).

ALLEGATIONS RAISED

In his application and amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for failing to object to testimony of State's witness Katherine Fabrizio, including
 - a. testimony was beyond the scope of permissible non-expert testimony
 - b. testimony amounting to bolstering and a violation of the Confrontation Clause
2. Ineffective assistance of counsel for failing to move for a curative instruction following bolstering testimony from Katherine Fabrizio
3. Ineffective assistance of counsel for failing to perfect a direct appeal

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called his trial counsel, Charles Cochran (counsel), to testify. Counsel testified he has been practicing law since 2008 and was appointed to represent Applicant while employed at the Charleston County Public Defender's Office. Counsel testified he was appointed shortly after Applicant's arrest and represented him for approximately two years. He testified he tried to meet with Applicant at least once every sixty days.

He testified the allegations as presented by the State were that Applicant had orally and annually penetrated his thirteen-year-old second cousin. He testified the evidence including the following: Applicant and the thirteen-year-old child both testified positive for gonorrhea; the thirteen-year-old child's disclosure to her mother within hours of the assault; the thirteen-year-old child's disclosure to a forensic interviewer and a school nurse; semen was found on the vaginal swabs taken from the thirteen-year-old child; and GPS tracking data established Applicant was at the thirteen-year-old child's home during the times she reported her abuse. Counsel testified he received discovery from the State and reviewed the discovery with Applicant. He testified he and Applicant discussed the elements of the indicted offenses and what the State would be required to prove at trial. Counsel testified Applicant was charged with first-degree criminal sexual conduct with a minor based on his prior conviction for first-degree criminal sexual conduct with a minor. He testified the defense strategy was to vigorously challenge the State's evidence and make the State meet its burden of proof. He elaborated there were not any affirmative defenses. He testified he met with Applicant's family members, including his sister with whom he met extensively and who offered to be a character witness on her brother's behalf.

Counsel testified he neglected to object to the testimony of PSANE Fabrizio when the State failed to qualify her as an expert witness. He was unsure why the State failed to tender Fabrizio as an expert and he was also unclear as to why he did not object, but speculated it was a mere oversight on his part. He testified he does believe Fabrizio would have been properly qualified as an expert witness had the State tendered her as an expert and he would not have objected to her qualifications as an expert in pediatric sexual assault examination based on her

qualifications, which include: a Bachelor's of Science Degree from UNC-Chapel Hill, a Master's Degree from MUSC School of Nursing, a year-and-a-half post-Master's work at Emory University, a certification as a family nurse practitioner, twenty-five years as a nurse practitioner working with abused children (sexual abuse, physical abuse, medical neglect, exposure to domestic violence and substance abuse), and six months of intensive training to becoming a PSANE (including passing a specialized examination). He testified because the State failed to introduce Fabrizio as an expert witness, it is possible the State did not give any heightened attention to her testimony, which juries commonly do.

When questioned as to why he did not object to Fabrizio's testimony regarding the thirteen-year-old child's demeanor during her examination, Counsel testified he did object to this line of questioning based on bolstering. See Tr. P. 159-160. He testified he did not ask for a curative instruction when his objection was sustained and that he possibly could have asked the court to give a curative instruction. However, he testified he did not want to highlight this testimony again to the jury and that he believes curative instructions in this type of situation are of limited futility based on his experience. Counsel testified he also believes this testimony was not intended to bolster the victim's testimony or vouch for her credibility, but rather was Fabrizio explaining why she accepted non-verbal responses from the thirteen-year-old child. Moreover, he testified the child has already testified and exhibited this demeanor on the stand, so the testimony was not highly probative to any issue and likely did not have any impact. When questioned as to why he did not object when Fabrizio testified regarding sexual assault studies as bolstering and in violation of the Confrontation Clause, Counsel testified he vigorously challenged Fabrizio on these studies during his cross-examination. When questioned why he did

not object to Fabrizio's testimony that the thirteen-year-old child tested positive for gonorrhea, Counsel testified he strategically did not object to this testimony because he wanted to elicit testimony from her on cross-examination that gonorrhea was rampant in the Charleston area. He also noted this information came in through other witnesses, so any objection would not have had an impact on the case.

Counsel testified he does not recall if he ever discussed appellate rights with Applicant or whether Applicant wanted him to file an appeal following his convictions. He testified he is sure Applicant wanted to appeal his conviction and life sentence and it was a complete oversight on his part for failing to file an appeal on Applicant's behalf.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence

required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel'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.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant is entitled to a belated review of direct appeal issues pursuant to White, but has failed to carry his burden in regards to his remaining allegations of ineffective assistance of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

Allegation: counsel was ineffective for failing to object to testimony of State's witness Fabrizio

Applicant asserts counsel was ineffective for failing to object to testimony of the PSANE nurse presented by the State, Katherine Fabrizio. Specifically, Applicant contends portions of Fabrizio's testimony went beyond the scope of permissible from a non-expert witness. Additionally, Applicant contends Fabrizio's testimony regarding studies and literature she relied upon in her field was inadmissible hearsay and violated the conformation clause. This Court

finds Applicant has failed to establish his requisite burden of proof as to these allegations pertaining to Fabrizio's testimony, which must be denied and dismissed with prejudice.

As to Applicant's first allegation that Fabrizio's testimony went beyond the scope of permissible for non-expert witnesses, this Court finds Applicant cannot establish any resulting prejudice for several reasons. First, this Court finds Fabrizio would have been qualified as an expert witness had counsel objected.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-46, 699 S.E.2d at 175. "The qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert's testimony is admissible where "it is relevant and based on some factual

predicate in the record”). Before admitting expert testimony, the trial court must find (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) (“Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.”).

A witness can properly be qualified as an expert where “the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) (“The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.”). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the

jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008).

From its review of the record, it appears to this Court that the State merely forgot to formally tender Fabrizio as an expert witness, as the State put Fabrizio's qualifications on the record as traditionally precedes tendering an expert witness. See Tr. 152-154. This also happened at another portion of the trial, counsel objected to the expert testimony, and the expert was quickly tendered and accepted as an expert. See Tr. 277. Although counsel did not object to Fabrizio's testimony before she was tendered as an expert as he did later in the trial with another witness, it is clear from the record that Fabrizio would have been qualified as an expert witness based on her training, education, and experience, which includes: a Bachelor's of Science Degree from UNC-Chapel Hill, a Master's Degree from MUSC School of Nursing, a year-and-a-half post-Master's work at Emory University, a certification as a family nurse practitioner, twenty-five years as a nurse practitioner working with abused children (sexual abuse, physical abuse, medical neglect, exposure to domestic violence and substance abuse), and six months of intensive training to becoming a PSANE (including passing a specialized examination). Counsel testified he would not have objected to Fabrizio's as an expert in pediatric sexual assault examination based on the information provided above. Therefore, Applicant cannot establish any requisite prejudice from counsel's failure to object to Fabrizio's testimony when such testimony would ultimately have been properly admitted as expert testimony.

Moreover, Applicant cannot establish any resulting prejudice from Fabrizio's testimony based on the overwhelming evidence of his guilt, including voluminous evidence wholly independent from Fabrizio's testimony, including: Applicant and the thirteen-year-old child both

testified positive for gonorrhea; the thirteen-year-old child's disclosure to her mother within hours of the assault; the thirteen-year-old child disclosures to a forensic interviewer and a school nurse; semen was found on the vaginal swabs taken from the thirteen-year-old child; and GPS tracking data established Applicant was at the thirteen-year-old child's home during the times she reported her abuse. Based on the overwhelming evidence in this case establishing Applicant's guilt as to the indicted offenses, this Court finds Applicant cannot establish the result of his proceeding would have been different absent Fabrizio's testimony.

As to Applicant's second allegation that Fabrizio's testimony regarding studies and literature she relied upon in her field was inadmissible hearsay and violated the conformation clause, this Court similarly finds Applicant cannot establish any requisite prejudice. As discussed previously, this Court finds Fabrizio would have been properly admitted as an expert in pediatric sexual assault examination. Therefore, as a properly admitted expert witness, Fabrizio would have been permitted to testify about studies and literature she relied upon pursuant to Rules 703 and 705, SCRE. Additionally, as discussed above, there is a multitude of evidence establishing Applicant's guilt, and therefore, there is no reasonable likelihood any perceived deficiencies pertaining to Fabrizio's testimony had any impact on the verdict. Therefore, this Court finds these allegations must be denied and dismissed with prejudice.

Allegation: counsel was ineffective for failing to move for a curative instruction following bolstering testimony of Fabrizio

Applicant asserts counsel was ineffective for failing to move for a curative instruction after the trial court sustained his objection to Fabrizio's testimony on the basis of bolstering. The specific testimony pertained to the demeanor of the thirteen-year-old child during her

examination, where Fabrizio described the child as “very quiet, very tearful, very much in shock.” See Tr. P. 159-160.

Counsel testified he did object to this line of questioning based on bolstering, which was sustained by the trial court, but that he did not ask for a curative instruction as he did not want to highlight this testimony again to the jury and that he believes curative instructions in this type of situation are of limited futility based on his experience. Counsel testified he also believes this testimony was not intended to bolster the victim’s testimony or vouch for her credibility, but rather was Fabrizio explaining why she accepted non-verbal responses from the thirteen-year-old child. Moreover, he testified the child has already testified and exhibited this demeanor on the stand, so the testimony was not highly probative to any issue and likely did not have any impact. This Court agrees and finds Applicant has failed to establish any resulting deficiency or prejudice. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation: counsel was ineffective for failing to file a direct appeal

Applicant asserts counsel was ineffective for failing file a direct appeal on his behalf and asserts he wanted to appeal his convictions and life sentence. In response to this allegation, counsel testified he believes Applicant wanted an appeal filed on his behalf following his trial and it was merely an oversight on his behalf that an appeal was not filed.

“Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). “To

waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel, 390 S.C. at 271, 701 S.E.2d at 740 (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted).

In the present case, there is no evidence that Applicant made a knowing and intelligent decision not to pursue a direct appeal. Therefore, since Applicant did not knowingly and intelligently waive his right to appeal, he is entitled to a belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

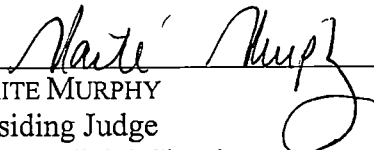
Based on all the foregoing, this Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal and, as such, he may petition the Supreme Court of South Carolina pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). See also Davis v. State, 388 S.C. 390, 342 S.E.2d 60 (1986) (setting forth procedures for a White appeal, prohibiting other forms of relief on this basis). Additionally, this Court finds and concludes Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application on the remaining issues.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Applicant is granted belated appellate review of direct appeal issues pursuant to White v. State;
2. All other allegations for post-conviction relief are be denied and dismissed with prejudice; and
3. Applicant Johnny Brown shall remain in the custody of the State.

AND IT IS SO ORDERED this 9th day of April, 2018.



MAITE MURPHY
Presiding Judge
Ninth Judicial Circuit

St. George, South Carolina

