

# THE BOOZER LAW FIRM, LLC

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**Lance S. Boozer, Esq.\***

\*Also admitted in Florida

807 Gervais Street, Suite 203  
Columbia, SC 29201

Telephone: 803-608-5543  
Fax: 803-926-3463

Email: [lsb@boozerlawfirm.com](mailto:lsb@boozerlawfirm.com)  
Website: [www.boozerlawfirm.com](http://www.boozerlawfirm.com)

June 30, 2015

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

The Honorable Liz Godard  
Clerk of Court  
P.O. Box 583  
Aiken, SC 29802-0583

RECEIVED  
JUL 02 2015  
SC SUPREME COURT

**RE: Timothy Clement, #320509, v. State of South Carolina  
2014-CP-02-803**

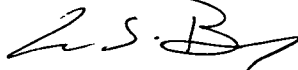
Dear Mr. Shearouse and Ms. Godard:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Clement in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Clement in this appeal.

Yours very truly,



Lance S. Boozer

cc: Daniel Gourley, AAG  
Office of Appellate Defense  
Timothy Clement, #320509

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

**RECEIVED**

The Honorable Tanya A. Gee Circuit Court Judge

JUL 02 2015

**SC SUPREME COURT**

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Case No. 2014-CP-02-803

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Timothy Clement, #320509, .....Petitioner,

v.

State of South Carolina,.....Respondent.

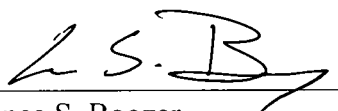
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**NOTICE OF APPEAL**

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The Petitioner appeals the Honorable Tanya A. Gee's Order dated June 25, 2015, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on June 29, 2015. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer  
The Boozer Law Firm, LLC  
807 Gervais Street, Suite 203  
Columbia, SC 29201  
Tele: 803-608-5543

June 30, 2015

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

The Honorable Tanya A. Gee Circuit Court Judge

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**RECEIVED**

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**S.C. Supreme Court**

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Case No. 2014-CP-02-803

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Timothy Clement, #320509, .....Petitioner,

v.

State of South Carolina,.....Respondent.

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**PROOF OF SERVICE**

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I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Daniel Gourley, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 30<sup>th</sup> day of June, 2015.



Lance S. Boozer  
The Boozer Law Firm, LLC  
807 Gervais Street, Suite 203  
Columbia, SC 29201  
Tele: 803-608-5543

STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN )

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

Timothy Clement, # 320509, )

2014-CP-02-00803 )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**RECEIVED**

JUL 02 2015

**ORDER OF DISMISSAL**

**SO SUPREME COURT**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 7, 2014. Respondent filed a return on August 6, 2014. An evidentiary hearing was convened on May 18, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

### PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was true bill indicted at the April 2013 term of the Aiken County Grand Jury for Armed Robbery (2013-GS-02-00567); Kidnapping (2013-GS-02-00556); Carjacking (2013-GS-02-00557); and Burglary – Second Degree (2013-GS-02-00551). DeGrant Gibbons, Esquire, represented Applicant. On June 19, 2013, Applicant pled guilty as indicted before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant without negotiations or recommendations to a twenty-five-year term of imprisonment for Armed Robbery, a twenty five year term of imprisonment for Kidnapping, a twenty-year term of imprisonment for Carjacking, and a fifteen year term of imprisonment for Burglary –

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*L. H. H. H.*  
C.C.P. & G.S.  
*V. H. H. H.*  
Deputy Clerk

Second Degree, with all sentences running concurrently. The Applicant did not appeal his guilty plea or sentence.

### **ALLEGATIONS**

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Counsel failed to object to judge stating offenses were a crime spree.
  - b. Counsel failed to file an appeal.
2. Involuntary Guilty Plea
  - a. Misinformed about parole eligibility of sentence by judge
3. Due Process Violation

This Court finds Applicant failed to present any testimony or evidence in support of his Due Process allegation. Therefore, this allegation is abandoned.

### **SUMMARY OF TESTIMONY PRESENTED**

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from DeGrant Gibbons (hereinafter "Plea Counsel"). This Court also had before it a copy of the plea transcript, the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, and return.

At the start of the evidentiary hearing this Court advised Applicant of the dangers of proceeding with his PCR application. The Applicant stated to this Court that he understood the risks and wanted to proceed with his Application

During the evidentiary hearing, Applicant testified that he met with Plea Counsel one time prior to his guilty plea. Applicant stated the meeting lasted approximately one hour. Applicant recalled reviewing discovery with Plea Counsel. Applicant stated that he did not give Plea Counsel any witnesses or leads to investigate on his behalf. Applicant recalled waiving his constitutional rights during his guilty plea. Applicant recalled the plea court advising him of his parole eligibility during the

guilty plea. However, Applicant stated that he was told by Plea Counsel to answer "yes" to everything the plea judge asked.

Applicant recalled admitting his guilt to the plea court and apologizing to the victims during the plea colloquy. Applicant stated that he felt Plea Counsel should have objected to the Solicitor's characterization of Applicant's various charges as a "crime spree." According to the Applicant, he asked Plea Counsel to file an appeal. Applicant admitted that he initially did not want to go to trial, but felt he should have gone to trial after he received his sentence.

Following Applicant's testimony, Plea Counsel was called to testify on behalf of the State. Plea Counsel stated he has been practicing law since 1991. Plea Counsel stated he reviewed Rule 5 and Brady material with Applicant and discussed with him Applicant's version of the facts. Plea Counsel stated Applicant confessed, and his confession matched up with Plea Counsel's independent investigation. Plea Counsel stated that he discussed parole eligibility with Applicant and advised Applicant that he would be required to serve 85% of his sentence.

According to Plea Counsel, he and Applicant both agreed that success at trial was not likely. Plea Counsel characterized the State's evidence against Applicant as overwhelming. Plea Counsel stated that he does not remember Applicant ever requesting be filed, and counsel testified that if applicant had requested an appeal, then counsel would have filed a notice of appeal. Plea Counsel stated that in his opinion there was no basis for an appeal, and he noted that there were no objections made during the plea.

#### **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 hearing. 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. Specifically, this Court finds Plea Counsel's testimony credible while Applicant's testimony is not credible. 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).

### **INEFFECTIVE ASSISTANCE OF PLEA COUNSEL**

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of Plea Counsel is alleged as a ground for relief, the Applicant must prove that "Plea 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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that Plea 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 (1985). 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 Plea Counsel. First, the Applicant must prove that Plea 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, Plea Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for Plea 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. With respect to guilty Plea Counsel, the Applicant must show that there is a

reasonable probability that, but for Plea Counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

*Plea Counsel was not in effective for failing to object to when the solicitor described the offenses as a crime spree.<sup>1</sup>*

Applicant argues that Plea Counsel for should have objected to the solicitor's characterization of Applicant's charges as a "crime spree." I disagree. During the plea, Deputy Solicitor Weeks characterized Applicant's various charges as a crime spree. Applicant's charges stemmed from incidents that occurred on December 20, 2012 and December 2, 2012. On those dates, Applicant broke into Victim Holly's house twice and robbed, kidnapped, and car jacked Victim Morelli.<sup>2</sup> I find that three independent sets of charges in a two-day span is properly characterized as a crime spree. Accordingly, this Court finds Plea Counsel's decision not to object was reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Plea Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel's performance. This Court notes Applicant knowingly and intelligently pled guilty to kidnapping, carjacking, burglary-second degree violent, burglary-second degree (non-violent), and armed robbery.

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<sup>1</sup> This Court notes, Applicant alleges the trial judge characterized Applicant's various charges as a crime spree. However, the *Solicitor* actually characterized Applicant's various charges as a "crime spree."

<sup>2</sup> Applicant pled guilty to charges occurring on December 20, 2012 which included kidnapping, armed robbery, and carjacking of victim Morelli. (Pl. tr. p. 15 lines 2-6). Applicant further pled guilty to charges occurring on December 20, 2012, which included burglary-second degree (violent) of Victim Holly. (Pl. tr. p. 15). Additionally, Applicant pled guilty to charges occurring on December 21, 2012, which included burglary - second degree (non-violent) of Victim Holly. (Pl. tr. p. 17 lines 4-10).

*Plea Counsel was not ineffective for failing to file an appeal.*

Applicant next argues that Plea Counsel was ineffective for failing to file an appeal is meritless. Plea Counsel stated that he could not specifically recall whether Applicant requested an appeal. However, Plea Counsel stated if Applicant had requested an Appeal then he would have filed a notice of appeal. I find that the Applicant's testimony that he had requested an appeal was not credible. Accordingly, the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms.

#### **ALL OTHER ALLEGATIONS**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### **CONCLUSION**

Based on the foregoing, I find that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by Plea Counsel of written notice of entry of judgment 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 Plea Counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review,

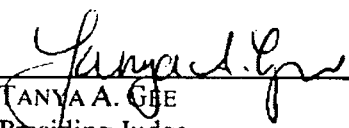
post-conviction relief Plea Counsel must serve and file a Notice of Appeal on the Applicant's behalf.  
Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25<sup>th</sup> day of June, 2015.

Columbia, South Carolina

  
\_\_\_\_\_  
TANYA A. GIE  
Presiding Judge  
Second Judicial Circuit

STATE OF SOUTH CAROLINA )  
 COUNTY OF AIKEN )  
 Timothy Clement, )  
 Plaintiff(s), )  
 -vs- )  
 South Carolina State Of, )  
 Defendant(s).

IN THE COURT OF COMMON PLEAS  
 SECOND JUDICIAL CIRCUIT  
 CASE NO.: 2014CP0200803  
 APPOINTMENT OF COUNSEL OR GAL  
 (Select one.)

ORDER  
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case     Adoption     Juvenile  
 SVP case     Custody and/or Visitation     Abuse and Neglect  
 Minor Name Change     Other: Post Convict Rel 500

It appears Timothy Clement, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.  
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:  
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.  
 court appointed counsel has obtained, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.  
 Other: .

Therefore, it is ordered that Lance Boozer hereby is appointed as (Select one.)

counsel     lead counsel (if capital PCR case)     guardian ad litem  
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

STATE OF SOUTH CAROLINA  
 COUNTY OF AIKEN  
 I, Liz Godard, Clerk of Court of Common Pleas and General Sessions, County of Aiken, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of original documents which have been filed in my office.

(If Death Penalty PCR Case) It is further ordered that Timothy Clement #320509, Esquire, is hereby appointed as second counsel in this capital PCR case.

APR 14 2014

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED  
 April 14, 2014

Liz Godard  
 C.C.P. & G.S., Aiken County, S.C.

Deputy Clerk

Circuit Judge     Clerk of Court

Plaintiff Attorney:

Lance Boozer	Timothy Clement #320509
1331 Park Street	Q1 B 204 PCI
Columbia SC 29201	430 Oaklawn Road
	Pelzer SC 29669

Defendant Attorney:

Daniel Francis Gourley II	
P.O Box 11549	
Columbia SC 29211	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at [www.sccid.sc.gov](http://www.sccid.sc.gov), and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

FILED 4-14-14

CP20 (08/08)  
 SCCA/267 (03/07)

Liz Godard  
 C.C.P. & G.S.

8:30am  
 Deputy Clerk

**THE BOOZER LAW FIRM, LLC**

807 Gervais Street, Suite 203  
Columbia, SC 29201

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
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