

# THE BOOZER LAW FIRM, LLC

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September 14, 2015

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

**RECEIVED**

SEP 17 2015

**S.C. SUPREME COURT**

The Honorable Mary Brown  
Clerk, Berkeley County  
300 California Dr.  
Moncks Corner, SC 29461

**RE: Ronald L. McCauley, #276407, v. State of South Carolina  
2013-CP-08-2091**

Dear Mr. Shearouse and Ms. Brown:

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. McCauley in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. McCauley in this appeal.

Yours very truly,

  
Lance S. Boozer

cc: Rutledge Johnson, AAG  
Office of Appellate Defense  
Ronald L. McCauley, #276407

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2013-CP-08-2091

**RECEIVED**

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**S.C. SUPREME COURT**

Ronald L. McCauley, #276407,.....Petitioner,

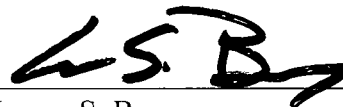
v.

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

**NOTICE OF APPEAL**

The Petitioner appeals the Honorable Roger E. Henderson's Order dated August 28, 2015, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on September 12, 2015. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Booser  
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Tele: 803-608-5543

September 14, 2015

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2013-CP-08-2091

**RECEIVED**

SEP 17 2015

**S.C. SUPREME COURT**

Ronald L. McCauley, #276407,.....Petitioner,

v.

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

**PROOF OF SERVICE**

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 Rutledge Johnson, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 14th day of September, 2015.



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Tele: 803-608-5543

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Ronald L. McCauley, #276407, )

Case No. 2013-CP-08-02091

Applicant, )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 17, 2013. Respondent made a timely Return on or about April 1, 2015. The Court convened an evidentiary hearing into the matter on July 22, 2015, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, David P. Schwacke, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings, and the exhibits introduced at the hearing. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In October 2009, the Berkeley County Grand Jury indicted Applicant for five counts of first degree criminal sexual conduct with a minor (2009-GS-08-2123, -2124, -2127, -2130, -2131); three counts of lewd act on a minor (2009-GS-08-2125, -2128, -2132); and three counts of unlawful conduct toward a child



(2009-GS-08-2126, -2129, -2133). David P. Schwacke, Esquire ("trial counsel"), represented Applicant. The State served Applicant and trial counsel with a notice of intent to seek a life sentence based on Applicant's prior conviction for second degree criminal sexual conduct with a minor.<sup>1</sup> On December 13, 2010, Applicant proceeded to trial before the Honorable Kristi Lea Harrington and a jury. Before trial commenced, the State dismissed two counts of first degree criminal sexual conduct with a minor and one count of lewd act on a minor. On December 15, 2015, the jury found Applicant guilty as indicted of the remaining charges. Judge Harrington sentenced Applicant to life imprisonment without the possibility of parole.

Applicant filed a timely notice of appeal. Breen R. Stevens, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on May 15, 2013. State v. MCAuley, Op. No. 2013-UP-202 (S.C. Ct. App. filed May 15, 2013). The Court of Appeals returned the remittitur to the circuit court on June 3, 2013.

## **II. ALLEGATIONS**

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. Erroneous advice concerning conflicts.
    - i. Trial attorney was prosecutor on past convictions.
    - ii. Trial judge was consultant to prior attorney on prior conviction.
  - b. Failure to notify of plea offers.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The

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<sup>1</sup> See S.C. Code Ann. § 17-25-45.

Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

**A. Ineffective Assistance of Trial Counsel**

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Because Applicant alleges ineffective assistance of trial counsel as a ground for relief, he must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

### I. Potential Conflicts.

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in his performance relating to potential conflicts arising in the prosecution of these charges. Initially, the Court notes the issue of Judge Harrington's disqualification was raised to Judge Harrington and ruled on by her at trial. Accordingly, this issue cannot now be raised on collateral review. See S.C. Code Ann. § 17-27-20(b) (post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.").

Regardless, Applicant's allegation trial counsel failed to raise an objection to Judge Harrington presiding over his trial is without merit. Applicant testified Carter Harrington represented him on his prior second degree criminal sexual conduct with a minor charge. He testified Mr. Harrington called his daughter<sup>2</sup> a lot about the prior case. Applicant testified he found out Judge Harrington would be presiding over his trial a month or two before trial began. He testified he discussed this potential conflict with trial counsel beforehand, but was not sure why it was not brought to Judge Harrington's attention at the beginning of trial. In contrast, trial counsel testified he did not realize Applicant had a concern with Judge Harrington presiding over the trial until after the trial began. Trial counsel testified he had several discussions with Applicant about the different judges that may preside over his trial. He recalled there being no indication Judge Harrington worked on Applicant's previous case. Trial counsel recalled bringing Applicant's concerns to Judge Harrington when Applicant expressed them at trial.

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<sup>2</sup> The Court takes judicial notice of the fact Carter Harrington's daughter is the Honorable Kristi Lea Harrington.



The Court finds trial counsel's testimony on this issue credible and gives it great weight. Conversely, the Court finds Applicant's testimony not credible. The Court finds trial counsel fully advised Applicant that Judge Harrington would preside over his trial. Because Applicant was fully aware Judge Harrington would preside over his trial, his failure to inform trial counsel of any problems he had with her prior to trial waived any complaints he may have now. State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot now complain of an error which his own conduct induced." (citing State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989))). Accordingly, trial counsel was not deficient for failing to object to Judge Harrington presiding over Applicant's trial.

Additionally, Applicant failed to demonstrate he was prejudiced by trial counsel's lack of further objection to Judge Harrington presiding over the trial. There is no requirement a judge be disqualified simply because the judge may have previously represented a defendant on an unrelated matter. See Davis v. Parkview Apartments, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014) (noting that the "judicial canons provide direction as to when disqualification may be necessary, including but not limited to, instances where [...] the judge either worked on the case as a lawyer, a lawyer with whom the judge previously practiced law worked on the case while the judge was associated with the lawyer's firm, or the judge has been a material witness concerning the case"); see also Kilgore v. Maass, 749 P.2d 1201, 1202 (Ore. App. 1988) ("A judge in a criminal case is not required to disqualify himself simply because he may have previously represented the defendant in some unrelated matter."); Cantu v. State, 802 S.W.2d 349, 351 (Tex. App. 1990) ("[J]udges who previously represented the defendant are not disqualified, provided that the prior representation involved a different event and not the one on trial. (citations omitted)). Applicant has presented no credible evidence Judge Harrington had any involvement with his prior case. In fact, the Court is persuaded by Judge Harrington's

statements at trial that she had no familiarity with Applicant or his prior case and did not represent him in that matter. (Dec. 15, 2010 Trial Tr. vol. 3, p. 8, line 19-p. 15, line 10). See Davis, 409 S.C. at 285, 762 S.E.2d at 545 (reviewing courts should accord great weight to a judge's assurance of impartiality (citations omitted)). Furthermore, Applicant has presented no specific evidence of bias or impartiality on Judge Harrington's part. Accordingly, Applicant cannot demonstrate he was prejudiced by trial counsel not objecting to Judge Harrington presiding over his trial.

Applicant's allegation trial counsel failed to move to be relieved because of a conflict of interest is also wholly without merit. Trial counsel testified he was the elected circuit solicitor at the time of Applicant's prior conviction. He testified he had no involvement with the prior case and did not know anything about it. Trial counsel testified he recalled discussing this potential conflict with Applicant and Applicant making no objections. Applicant also recalled discussing this potential conflict, but offered no testimony that he had any opposition to trial counsel's representation.

The Court finds trial counsel's testimony very credible. He discussed any potential conflict with Applicant and Applicant waived any objection to that conflict. The Court notes this matter was discussed at trial, and Applicant indicated at that time he was aware of the potential conflict he had no objection to trial counsel's representation. (Dec. 15, 2010 Trial Tr. vol 3, p. 7, line 11-p. 8, line 4). Because trial counsel fully advised Applicant of this potential conflict, trial counsel was in no way deficient. Furthermore, Applicant cannot now be heard to complain about trial counsel's representation when he waived any objection to that representation at trial. Stanko, 402 S.C. at 270, 741 S.E.2d at 717.

Regardless, Applicant has also not presented any credible evidence an actual conflict existed in this case. The mere fact trial counsel was the circuit solicitor at the time of



Applicant's conviction does not create a *per se* conflict. See State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007). Because Applicant presented absolutely no evidence trial counsel worked on the previous conviction, he has not demonstrated he was prejudiced by trial counsel's representation.

## **2. Plea Offer**

The Court finds Applicant failed to meet his burden to demonstrate trial counsel ineffective in failing to convey a plea offer. To be successful on an allegation of an un-conveyed plea offer, Applicant must prove: (1) trial counsel's failure to communicate the State's plea offer constituted deficient performance, and (2) Applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted the original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399, 1409 (2012).

Here, the Court finds Applicant failed to demonstrate trial counsel was deficient in failing to convey the State's offer. Applicant testified he was never aware the State made a twenty-five year plea offer. In contrast, trial counsel testified he specifically recalled going over the plea offer with Applicant. He also recalled preparing an acknowledgment for Applicant to sign regarding the case (Resp. Ex. # 1), and that acknowledgment included information about the

State's plea offer. However, Applicant refused to sign the acknowledgment. The Court finds trial counsel's testimony on this issue credible, while also finding Applicant's testimony lacks credibility. Accordingly, the Court finds trial counsel conveyed the State's twenty-five year plea offer to Applicant. Because the plea was conveyed, trial counsel was not deficient.

The Court further notes Applicant's testimony lacked any indication he would have affirmatively accepted the plea offer. Applicant testified he would have taken the plea offer under consideration, but could not definitively say he would have accepted it. Trial counsel testified Applicant never indicated a desire to enter a plea. The Court finds Applicant has not demonstrated a reasonable probability he would have entered into any plea agreement the State offered, even if trial counsel was in some way deficient. Frye, 132 S.Ct. at 1409; Davie, 381 S.C. at 608, 675 S.E.2d at 420.

#### **B. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

#### **IV. CONCLUSION**

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d

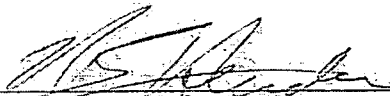


395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 28<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
THE HONORABLE ROGER E. HENDERSON  
Presiding Judge

Chesterfield, South Carolina

STATE OF SOUTH CAROLINA )  
 COUNTY OF BERKELEY )  
 Ronald Lee McCauley, )  
 Plaintiff(s), )  
 -vs- )  
 State of South Carolina, )  
 Defendant(s). )

IN THE COURT OF COMMON PLEAS  
 JUDICIAL CIRCUIT  
 CASE NO.: 2013CP0802091  
 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 Ronald Lee McCauley, 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.

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

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

IT IS SO ORDERED  
 October 17, 2013

*Mary P. Brown/Jur*  
 Circuit Judge     Clerk of Court

Plaintiff Attorney:

Lance Boozer	
Attorney At Law	
1331 Park Street	
Columbia, SC 29201	

Defendant Attorney:

Ashleigh Rayanna Wilson	
PO 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.

2013 OCT 17 PM 4:45  
 MARY P. BROWN  
 CLERK OF COURT  
 BERKELEY COUNTY, SC  
 FILED

**THE BOOZER LAW FIRM, LLC**

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Columbia, SC 29201



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Clerk, Supreme Court of South Carolina  
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