

THE



LAW FIRM, LLC

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AUG 03 2016

August 1, 2016

S.C. SUPREME COURT

Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

Re: Kevin Backus vs. State of South Carolina  
C/A No: 2013-CP-21-02535

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Backus in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,

Jonathan D. Waller

Cc: J. Croom Hunter, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM FLORENCE COUNTY  
Jocelyn Newman, Circuit Court Judge

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2013-CP-21-2535

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**RECEIVED**

AUG 03 2016

**S.C. SUPREME COURT**

Kevin Backus, #296578,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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NOTICE OF APPEAL

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Kevin Backus, #296578, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed July 22, 2016 issued by the Honorable Jocelyn Newman, Presiding Judge, Twelfth Judicial Circuit.



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Jonathan D. Waller

Giese Law Firm  
SC Bar No.: 76290  
1315 Blanding Street  
Columbia, SC 29201  
803-708-6767 (phone)  
803-708-6769 (fax)  
jonathanwallerlaw@gmail.com  
ATTORNEY FOR PETITIONER

This 1 day of August, 2016.

Other Counsel of Record:  
J. Croom Hunter, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM FLORENCE COUNTY  
Jocelyn Newman, Circuit Court Judge

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2013-CP-21-2535

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**RECEIVED**

AUG 03 2016

**S.C. SUPREME COURT**

Kevin Backus, #296578,

Appellant,

v.

STATE OF SOUTH CAROLINA,

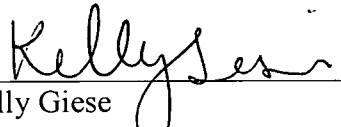
Respondent.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Croom Hunter, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 1<sup>st</sup> day of August 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.

  
\_\_\_\_\_  
Kelly Giese

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2013CP2102535

FILED

Kevin Backus

2016 JUL 25 PM 3: 55

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

CORRIE REEL-SHEARIN  
CCCP & GS  
FLORENCE COUNTY, SC

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other: \_\_\_\_\_

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

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

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

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

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|--|--|--|
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |

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

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

Circuit Court Judge

Judge Code

7/25/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on July 25, 2016, and a copy mailed first class or placed in the appropriate attorney's box on July 26, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED COPY  
CLERK OF COURT  
FLORENCE COUNTY, SC

Jonathan D Waller 1315 Blanding Street Columbia, SC  
29201

John Croom Colvin Hunter PO Box 607 Lancaster, SC  
29721

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ATTORNEY(S) FOR THE PLAINTIFF(S)

---

ATTORNEY(S) FOR THE DEFENDANT(S)

*Connie Reel-Shearin*

---

Court Reporter

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Connie Reel-Shearin - Clerk of Court

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS )  
TWELFTH JUDICIAL CIRCUIT )

Kevin Backus, #296578, )

Civil Action No: 2013-CP-21-2535 )

Applicant, )

**ORDER OF DISMISSAL**

v. )

State of South Carolina, )

Respondent. )

2016 JUL 22 PM 3:06  
CONNIE REED, STENOGRAPHER  
CCCP & GS  
FLORENCE COUNTY, SC

FILED

This matter comes before the Court by way of the Applicant's Post-Conviction Relief application filed September 26, 2013. Respondent filed its Return on May 6, 2014. An evidentiary hearing into the matter was convened on June 1, 2016 at the Florence County Courthouse. Jonathan D. Waller, Esquire, represented Applicant. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. This Court had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, and the guilty plea transcript.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2012, the Florence County Grand Jury indicted Applicant for trafficking in cocaine base, possession with intent to distribute marijuana, and possession with intent to distribute cocaine base within proximity of a school (collectively 2012-GS-21-1102). In January 2013, the Florence County Grand Jury indicted

TRUE COPY  
*Connie Reed*  
CCCP & GS  
FLORENCE COUNTY, SC

applicant for second degree assault and battery and threatening the life of a public official (collectively, 2012-GS-21-81). Marshall S. Weaver, Esquire, represented Applicant on the charges. On April 32, 2013, Applicant entered a negotiated sentence to distribution of cocaine base, second degree assault and battery, and threatening the life of a public official. The Honorable William H. Seals, Jr., imposed the negotiated sentence of concurrent terms of eleven (11) years for distribution of cocaine base, three (3) years for second degree assault and battery, and five (5) years for threatening the life of a public official. Applicant did not appeal his guilty plea or sentence.

### SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified he was unhappy with Attorney Weaver's representation. Additionally, he testified he wanted to plead guilty, but Weaver advised him that he thought Applicant had a good chance to win at trial. Applicant testified Weaver encouraged him to go to trial, but he always wanted to plead guilty.

On cross-examination, Applicant acknowledged he was unhappy with his sentence, but he admitted he liked Weaver. Applicant further acknowledged that he knew he was pleading to a negotiated sentence of eleven years, which is what he wanted to do. When asked what his actual allegation against Weaver was, Applicant responded vaguely that he felt like Weaver was "working with the State," but he could not give any specific allegations of how he felt Weaver's performance was deficient.

At the conclusion of Applicant's case, Respondent moved pursuant to Rule 41(b), SCRCP, for an involuntary dismissal that based upon the facts presented, Applicant had shown no right to relief.



## 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. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

### RULE 41(b)

Rule 41(b), SCRCP, states that, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

#### *Ineffective Assistance of Counsel*

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their 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)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "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 the attorney 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 counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The 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 reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for 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, 59 (1985).

This Court finds that Applicant failed to set forth even a *prima facie* case for relief. Applicant's testimony indicated that he never wanted to proceed to trial, and he always wanted to plead guilty. Upon cross-examination by Respondent, Applicant could not articulate any grounds for which he was seeking post-conviction relief other than he felt his attorney was "working with the State." Applicant's own testimony indicated that he received the resolution he was looking for by pleading guilty, despite Counsel's alleged efforts to have Applicant proceed to trial. Where Hill requires an Applicant to show that but for plea counsel's errors, he would have proceeded to trial,



Applicant's testimony indicated the opposite; he wanted to plead guilty, and he pled guilty. Put simply, Applicant's testimony failed to set forth any specific allegations of ineffective assistance of counsel for this Court to make such a finding, and as such, Respondent's motion to dismiss is granted.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes 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.

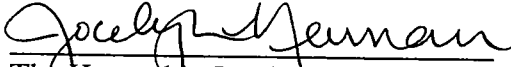
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.



**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED!**

  
The Honorable Jocelyn Newman  
Presiding Circuit Court Judge  
Twelfth Judicial Circuit

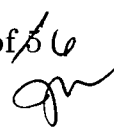
July 18, 2016

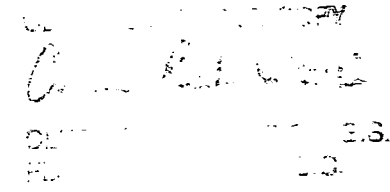
Columbia, South Carolina

FILED

2016 JUL 22 PM 3:04

CONNIE REEL-SHEARIN  
COP & GS  
FLORENCE COUNTY, SC





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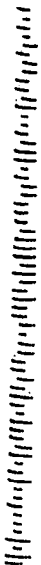
GIESE

LAW FIRM, LLC

1315 Glanding Street  
Columbia, SC 29201

Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

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