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January 18, 2018

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Keiron Coleman, #359333 v. State of South Carolina
2015-CP-26-07569

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

RECEIVED

JAN 22 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2015-CP-26-7569

Keiron Kyle Coleman #359333,..... Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable William H. Seals, Jr., December, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on December 20, 2017. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

January 18, 2018

Other counsel of record:
Alan Wilson, Attorney General
Joshua L. Thomas, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

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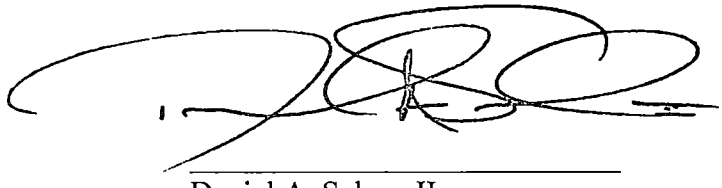
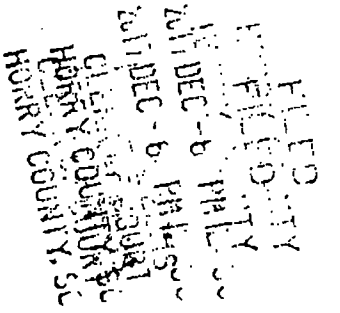
PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 18th day of January 2018.



Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Keiron Kyle Coleman, S.C.D.C. No. 359333,	)	Case No.:2015-CP-26-07569
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	



This matter comes before the Court by way of an application for post-conviction relief filed by Keiron Kyle Coleman ("Applicant") on October 20, 2015. Respondent made its return on or about February 26, 2016. The Court convened an evidentiary hearing into the matter on September 18, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, J.M. Long, III, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2013 term of the Horry County Grand Jury for burglary, first-degree (2013-GS-26-02238). J.M. Long,

III, Esq. represented Applicant. George DeBusk, Jr., and Nancy R. Livesay, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on March 13, 2014. Judge Hyman sentenced Applicant to imprisonment for a term of 25 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Wanda H. Carter, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion and granted Counsel's motion to be relieved. State v. Coleman, Op. No. 2015-UP-386 (S.C. Ct. App. filed July 29, 2015). The Remittitur was issued on August 14, 2015.

Present Application

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

1. Ineffective assistance of counsel, in that:
    a. "Counsel failed to object to prosecutions misconduct-vouching and bolstering of witnesses."
    b. "Counsel's statements prejudiced defendant's defense."
    c. "Counsel failure to request suppression and pretrial hearing."
    d. "Counsel failed to object to" the testimony of State witness Ms. Shakerra Cowan "to see if statements were valid under the Miranda rule."
    e. "Counsel failed to object to trial prejudice statements and abuse of discretion."
2. Ineffective assistance of appellate counsel, in that:
    a. "Appellate counsel failed to argue or assert prosecutorial misconduct."
        i. "Evidence of such misconduct during trial and closing arguments."
    b. "failed to find any issues with merit on trial"
3. Trial court error
4. Prosecutorial misconduct

Applicant, by and through PCR counsel, amended his application on May 22, 2017, to allege he is being held unlawfully for the following reasons:

1. "Trial counsel failed to request a jury instruction for mere presence."
    a. "The evidence and testimony at trial supported a charge of mere presence. The jurors could have acquitted [Applicant] based on a mere presence instruction from the judge and based on [Applicant's] testimony."
    b. "The law to be charged is determined by the evidence presented at trial. Mere presence instructions are required when evidence supports the conclusion that the defendant was merely present at the scene where drugs were found and it was questionable whether the defendant had a right to exercise dominion and control over them." Brunson v. State, 324 S.C. 117, 477 S.E.2d 711 (1996), citing State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)."
    c. "Coleman's testimony at trial was that he remained in the car upon arrival at the Marotte house which is the subject of the charged burglary. Coleman believed that he, Dudley, and Cowan were at the Marotte residence to collect on a debt from an associate of Cowan's. Coleman was unaware that Dudley had committed a burglary until they were apprehended and arrested by police. The jury was free to believe Coleman's testimony which supported a jury instruction of mere presence."
2. "Trial counsel failed to request the appropriate jury instruction on circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013)."
3. "Trial counsel failed to request the lesser included offense of burglary in the second degree."
    a. "'A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater.' Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004), Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), State v. Drafts, 340 S.E.2d 784, 288 S.C. 30 (1986), State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984), State v. Tyson, 283 S.C. 3875, 323 S.E.2d 770 (1984)."
    b. "Coleman's conviction for burglary first degree was based solely on prior convictions for burglary charges which the jurors were free to disregard. The only evidence presented to the jury to establish the prior convictions were records from a court in NJ which were redacted and photocopied. The jurors could have found that these records were not reliable and opted to convict Coleman for burglary second degree, but they were not given this option."

At the evidentiary hearing, Applicant proceeded forward primarily on the amended grounds.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony

accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; 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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed

ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 procceding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – Failure to Request Mere Presence Instruction

Applicant alleges counsel was ineffective for failing to request an instruction on mere presence. Mere presence is generally applicable in two circumstances:

> First, in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that a person must personally commit the crime or be present at the scene of the crime intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. Secondly, mere presence is generally an issue where the state attempts to establish the defendant's possession of contraband because the defendant is present where the contraband is found. In such cases, the trial court may be required to charge the jury that the defendant's mere presence mere the contraband does not establish possession.

State v. James, 386 S.C. 650, 653-54, 689 S.E.2d 643, 645 (Ct. App. 2010) (quoting State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996)).

At trial, Judge Hyman charged the jury that:

> . . . mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element but there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act.
>
> Intent means intending the result which actually occurs, not accidentally or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

Tr. 428-29. At the evidentiary hearing, Counsel expressed ambivalence about seeking an expanded instruction on mere presence and testified he did not feel Applicant's case hinged on mere presence.

The Court finds that the record clearly indicates that the Court did so instruct the jury. Applicant consequently cannot show any prejudice and, accordingly, his request for relief as to this allegation is **DENIED**.

IAC Allegation #2 – Failure to Request Logan Charge on Circumstantial Evidence

Applicant also alleges that Counsel failed to request a charge on circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). In State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997), the Supreme Court of South Carolina adopted the reasoning that "if a proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt." Id., 327 S.C. at 83, 489 S.E.2d at 464 (citing Holland v. U.S., 348 U.S. 121 (1954)). Pursuant to that reasoning, the Court recommended a specific jury instruction for circumstantial evidence:

> There are two types of evidence which are general presented during a trial-direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Id., 327 S.C. at 83-84, 429 S.E.2d at 464 (citation omitted). Subsequently, the Supreme Court, in order to eliminate any confusion in circumstantial evidence instructions, affirmed the above language as "the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction." State v. Cherry, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004).

The Supreme Court substantially modified its restrictive ruling in Cherry in State v. Logan. Logan provides that defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for conviction and, thus, Courts must provide the following alternative language in its jury instructions when so requested by a defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id., 405 S.C. at 99, 747 S.E.2d at 452. Though the Court must give the above charge if requested by a defendant, the Grippon instruction remains valid. Id., 405 S.C. at 100, 747 S.E.2d at 452-53.

At trial, Counsel did not request a Logan charge prior to instructions, nor did Counsel object after the instructions. Tr. 342-47, 431. During the charge conference, Judge Hyman indicated he would charge on direct and circumstantial evidence and, further, noted "[t]hat charge has been modified, as you all know, in the last year or so." Tr. 343. Judge Hyman did not further indicate precisely to which modification he was referring. Judge Hyman thereafter instructed the jury on circumstantial evidence with a slightly modified Grippon charge:

> Now, there are two types of evidence which are generally presented during a trial: direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.
>
> The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Tr. 423-24.

At the evidentiary hearing, Counsel testified that he did not ask for a Logan charge either because he simply overlooked it, or because he did not believe the case against Applicant to be a

circumstantial one. Counsel noted that there was direct witness testimony against Applicant. Counsel could not say whether or not a Logan charge would have changed the outcome of the case.

The Court finds that Counsel's failure to request a Logan charge does not amount to deficient performance, nor can this Court discern any prejudice that would result if it did. First, as a matter of law, the Court cannot reconcile Applicant's proposition that failure to seek a Logan charge constitutes deficient performance with the Supreme Court's preservation of the Grippon charge as valid—if satisfaction with and reliance upon the Grippon charge by trial counsel were a deficiency, then Grippon would, as a practical matter, no longer constitute valid charge. Second, the Court cannot determine what, if any, prejudice Applicant suffered from the lack of the Logan language, given the substantial case against him—after a witness specifically identified his vehicle as suspicious to a law enforcement officer *in person*, Applicant was found in the vehicle with property stolen from a house located on the cul-de-sac in which the vehicle was identified. The driver of the vehicle, a co-conspirator, testified to dropping Applicant off near houses only for him to return with assorted property. Simply put, all of the circumstances were consistent with each other, and pointed conclusively to Applicant's guilt beyond a reasonable doubt. Applicant cannot show any deficiency of counsel or prejudice therefrom by way of this allegation and, accordingly, his request for relief is **DENIED.**

IAC Allegation #3 – Failure to Request Lesser-Included Offense of Burglary, Second Degree

Applicant alleges that Counsel was deficient by failing to request the jury be charged on the lesser-included offense of burglary, second degree. "A trial judge's determination of what law should be charged is made from the evidence presented. A request to charge on a lesser included offense is properly refused when there is no evidence that the defendant committed the

lesser rather than the greater offense." State v. Goldenbaum, 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988) (citations omitted).

At trial, Counsel specifically requested a charge on burglary, second degree as a lesser-included offense, arguing the jury could choose to reject evidence that Applicant had two prior burglary convictions. Tr. 343-44. After some argument before the Court, Counsel and Applicant conferred:

> MR. LONG: Your Honor, after speaking with my client, he says he agrees that possibly if there's convictions been introduced into evidence, there is no reason to request second degree. So we prefer the all or nothing on first.

Tr. 346, ll. 21-25. Judge Hyman charged the jury only on burglary, first degree. Tr. 424-27.

At the evidentiary hearing, Counsel testified that he initially asked for the lesser-included charge but, after speaking with Applicant in the courtroom, Applicant decided to go all-or-nothing. Counsel testified the decision was a calculated gamble against the possibility of conviction-by-compromise. Counsel testified the choice to go all-or-nothing on burglary, first degree was Applicant's decision.

The Court finds no deficiency on the part of counsel nor prejudice therefrom. The trial transcript and Counsel's testimony show the choice to proceed without further demand for an instruction as to burglary, second degree was clearly Applicant's decision. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

IAC Allegation #4 – Failure to Object to Testimony of Nancy Sue Ross

Applicant testified at the evidentiary hearing that Counsel was ineffective by failing to object to the testimony of witness Nancy Sue Ross on grounds that her report to law enforcement was racially motivated. There is no evidence in the record before this Court to show any racial prejudice on the part of the witness, nor would it be relevant to her competence to testify. See

Rule 601, SCRE ("Every person is competent to be a witness except as otherwise provided by statute or these rules."). Accordingly, the Court finds no deficiency of counsel or prejudice therefrom, and Applicant's request for relief by way of this allegation is **DENIED**.

IAC Allegation #5 – Praise of Law Enforcement, Prosecution in Closing

Applicant testified at the evidentiary hearing that Counsel was ineffective due to his compliments offered in closing argument regarding law enforcement and the prosecution. To wit:

> And police officers, God bless them, I respect and admire the job they do. I don't expect them to do anything beyond what any of us could do, because we're all human, we all make mistakes, we all have opinions, perceptions, things of that nature. And I understand all that. But police officers, and as I'm afraid I would be, become a little calloused, become a little prejudiced.
>
> . . .
>
> I don't have an opportunity to speak to you again, because we have put testimony up in the defense case. That means we lose the last argument. The State is permitted to make the last argument. And I respect and admire both of these prosecutors. They do a good job. They are effective in the courtroom. They know how to handle cases. They know how to try cases. They know how to make closing arguments. So a lot of things I have dealt with in my closing argument, they have the last word on that. I simply ask you to keep an open mind throughout this entire process until the case is yours for your deliberation.

Tr. 399, 406. At the evidentiary hearing, Counsel testified to the oath of civility to which attorneys in South Carolina are bound. Counsel further testified that his instances of self-deprecation and due regard to the State were intended to empower the jury

The Court finds no deficiency or prejudice therefrom by Counsel's statements. The record shows that Counsel's kind regards for law enforcement served as preface for his subsequent argument that they were "calloused" in their investigation. Counsel's civility with respect to opposing counsel similarly prefaced an admonition to the jury to "keep an open mind"

throughout the State's closing, in recognition that the prosecution would receive the final say. Counsel conceded no facts. The trial transcript and Counsel's testimony show that these remarks were made with regard to affirmative, valid trial strategy, which this Court will not second-guess. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Applicant has cannot to meet his burden of proving either prong of Strickland and, accordingly, his request for relief as to this allegation is **DENIED**.

IAC Allegation #6 – Failure to Object to Testimony of Shakerra Cowan

Applicant testified at the evidentiary hearing that Counsel was ineffective by failing to object to the testimony of witness and co-conspirator Shakerra Cowan on grounds that her testimony was the result of a violation of her rights under Miranda v. Arizona, 384 U.S. 436 (1966). This allegation is patently without merit as a matter of law. Applicant has no standing to invoke any of Ms. Cowan's own rights against her decision to testify. Accordingly, the Court finds no deficiency of counsel or prejudice therefrom, and Applicant's request for relief by way of this allegation is **DENIED**.

IAC Allegation #7 – Failure to Impeach Shakerra Cowan on Drug Possession

Applicant testified at the evidentiary hearing that Counsel was ineffective by failing to impeach witness Shakerra Cowan with the discovery of drugs during the search of the vehicle. At trial, Horry County Police Department Officer Natalie Boyd testified to the discovery of certain items during the search of the vehicle in which Applicant and his associates were apprehended:

> Q. Okay. And if you don't mind, tell the jury what you found from searching the car.
>
> A. I found on the passenger – on the front passenger floorboard, I found two jewelry boxes. One was a black box with a white skull on it, and the other was a white jewelry box with flowers on it, and they both contained miscellaneous

jewelry in them. *I also found two plastic baggies with a green, leafy substance in them.* And in the – in the glove box, I found more jewelry items and a blue Sony camera.

. . .

Q. What other items did you remove from the car?

A. A blue Sony camera and *two plastic baggies with green leafy type substance in them.*

. . .

Q. Okay. And at any point, did you remove anything that did belong to the driver from the car?

A. Yes, I did. It was a pack of Newport – it was Newport cigarette box, which was empty and – other than, as far as cigarettes go, and it had an item in it.

Tr. 251-53 (emphasis added). Boyd did not further elaborate on what "item" was discovered in the otherwise empty Newport packaging. On cross-examination, Counsel elicited testimony from Cowan to indicate she smoked marijuana earlier on the day in question. Tr. 307-08.

At the evidentiary hearing, Applicant argued the above testimony suggested drug possession on the part of the driver, Ms. Cowan, and that Counsel should have impeached her on her drug possession. Counsel testified that Ms. Cowan was maybe caught with some marijuana, but that he did not feel it was relevant.

The Court finds that Counsel achieved whatever limited impeachment value may have existed by virtue of Cowan's marijuana possession and use through his cross-examination of the witness. Accordingly, the Court finds no deficiency of counsel nor prejudice therefrom and Applicant's request for relief as to this allegation is **DENIED.**

IAC Allegation #8 – Failure to Suppress Video Statement

Applicant testified at the evidentiary hearing that Counsel was deficient by his failure to object to and suppress the introduction of video-recorded statements he made during his arrest.

At trial, when the State initially moved the dash-cam video into evidence, Counsel objected "on general principle." Tr. 148. When the State sought to publish the video, the jury was excused to take a break and Counsel engaged in a more thorough explanation of matters outside their presence:

> **MR. LONG:** As Mr. DeBusk told you, it's five CDs long. I think we're going to start at the point where the officer's car was parked in front of the Ross residence and the suspect vehicle drives by, the low-speed chase or following, the stop, and the identity when he pulls the occupants out of the vehicle and gets their identity.
>
> Following that, there is some audio interrogation that occurs. And this, of course, is pre-Miranda so the solicitor and I have agreed that basically once the officer gets them out of the car and determines their identity, we're going to turn the speakers off on the video, continue to watch the video, but we will not have any possibility of interrogation or interview.

Tr. 164. The audio was muted during the agreed upon portion of the tape during which Applicant made his statements. Tr. 167-68.

Applicant later took the stand in his own defense and testified that he went to the neighborhood in order to collect money for Shakerra Cowan and/or Dudley Jordan. Tr. 377. Applicant denied collecting money for himself. Id. The State thereafter confronted Applicant with his prior inconsistent statement from the video, where Applicant told law enforcement he was in the neighborhood to collect money for himself. Id. Counsel objected. Tr. 377-78. The State then published, over Counsel's objection, the previously silenced portion of the video containing Applicant's statement. Tr. 378-79. Confronted with the inconsistent statement, Applicant testified that his statement to law enforcement was a lie "to protect all of us." Tr. 380. The State continued to grill Applicant on his statements to law enforcement, prompting additional objection from Counsel that the statements were made in a pre-Miranda, custodial interrogation. Tr. 381-82. The Court permitted the questioning on the basis that even a pre-

Miranda statement could be used for impeachment purposes, and cited to Oregon v. Elstad, 470 U.S. 298 (1985). Tr. 382. The prosecution followed up and offered two additional cases in support: State v. Brown, 296 S.C. 191, 371 S.E.2d 523 (1988); and Oregon v. House, 420 U.S. 714 (1975). Tr. 383.

The Court finds no deficiency on the part of Counsel or prejudice therefrom. Counsel promptly raised to the Court the issues about which Applicant complains and the Court properly dispensed with those objections in light of clear case law on point. Given Applicant's testimony, the statements were admissible for impeachment purposes. Applicant cannot meet his burden of proving either prong of Strickland by way of this allegation and, accordingly, his request for relief is **DENIED**.

B. Ineffective Assistance of Appellate Counsel

Applicant originally alleged that appellate counsel was ineffective. This allegation was not included in the amendment filed May 22, 2017, and no evidence of was introduced at the evidentiary hearing to support it. Upon motion by Respondent, this Court granted a directed verdict to Respondent at the close of Applicant's case at the hearing. Accordingly, any request for relief by way of this allegation was, and is, **DENIED.**

C. Prosecutorial Misconduct

Applicant originally alleged prosecutorial misconduct. At the evidentiary hearing, Applicant testified to his belief that the State misrepresented in its opening statement what testimony would be forthcoming, and then misrepresented in its closing argument the testimony that was presented. Upon review of the trial transcript, the Court finds no merit to these allegations; the opening and closing statements by the prosecution were well within the bounds of accuracy and fairness in light of the evidence introduced at trial. Furthermore, both the trial

judge and Counsel instructed the jury that the opening and closing statements did not constitute evidence, and that the jury was only to consider the testimony presented from the witness stand, any exhibits presented during the trial of the case and made part of the record, and any stipulations or agreements of counsel. Accordingly, Applicant's request for relief by way of these allegations is **DENIED**.

[*Conclusion and signature on following page*]

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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), SCRCP 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. Your 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 must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 13 **day of** Nov. **, 2017.**

WILLIAM H. SEALS JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

Keiron Coleman, #359333) CASE NO.
☐ Plaintiff) 2015-CP-26-7569

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET

State Of South Carolina)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Daniel A. Selwa, II, Bar No. 71976 Address: 516 29th Ave N. Myrtle Beach, SC 29577 phone: fax: e-mail: other:	Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Johnny E. James Jr. November 9, 2017
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

FILED
DEC -6 PM
CLERK OF COURT
HORRY COUNTY, SC

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

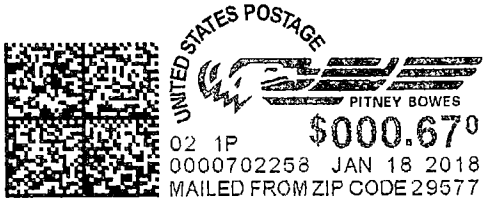
Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

516 29th Avenue North
Myrtle Beach, SC 29577



Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

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