Keiron Coleman SCDC# 359333
MCI
386 ReDemption way
MCCormick, Sc 29899

Dear Mr Shearouse,

My Case is now pending the S.C. Supreme Court for appeal ive Sent you a copy of the order by Daniel A. Selwa II my issue is concerning my request for Counsel to file a motion 59(e) on Allegation #- failure to request mere presence instruction. which i wrote mr Selwa because the courts finding of the facts were not decided on the grounds on why PCR hearings are Conducted. My Claim was against trial Counsel and his failure which by counsel's own testimony dose not cure his failure to why he did not request the mere presence instruction when their is evidence that my testimony meet the two requirements that mere presence falls under which i do and my testimony at trial supported me and qualified me for Branson v State 324 S.C. 117, 477 S.E.2d 718 (1996) this was over looked by the court as far as who my Claim was directed to.

The courts finding that Counsel being uncertain about seeing an expanded instruction was never discussed for Counsel to say whether or not the case hinged on mere presence because prior to the Court mentioning mere presence in his hands of one hands of all Charge there was no conversation on mere presence which i highlighted Counsel's answer dose not cure his failure in any way and the court tried to compensate for Counsel's failure by suggesting the courts improper instruction on mere presence was suppose to cure Counsel's failure which the court mentioned a portion of mere presence in his hands of one hands of all Charge which i highlighted and sent a copy of the trial transcript to show you not only was the mere presence was not planned but it was incomplete in the law where the jury would have known the entire [redacted] meaning but instead they heard "mere [redacted] presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting. And this was the error,

See next page

This is the instruction given in State v Stokes 339 S.C. 154, 165, 528 SE2d, 430, 434-35 (Ct App 2000) Generally, a mere presence "Charge" is appropriate under "two" circumstances. (1) If there is a doubt over whether the defendant is guilty as an accomplice to a crime, the trial court maybe required to instruct the jury that mere presence at the scene is insufficient to find the defendant guilty as an aider or abetter. (2) In cases where the defendant is charged with possession of contraband as a result of being present where contraband was found the court may be required to "Charge" the jury that the defendant can not be found guilty of possession of contraband by being merely present near it. There is no testimony in my trial transcript that there is any mention by counsel regarding mere presence the portion that the court calls below the rule of instructions and i cant understand why the PCR court denied my claim without considering the fact that trial counsel answer dose not excuse what he failed to do as far as requesting a mere presence instruction for the court to use what the trial judge did to justify the means when the allegation had nothing to do with

See Back Page

What the judge did which was improper
The facts must support a jury instruction for
it to be proper. State v Queen 264 S.C. 515, 521
216 S.E.2d 182, 185, (1975) further South Carolina
"law" "dictates" that jury instructions when
analyzed "must be considered in their entirety".
PCR is based on counsel's error not the courts
but when you have both where counsel failed
to show just cause and the courts instruction
was wrong and the court denies your claim
and the 59(e) motion would make the court
rule on Counsel's failure which was the purpose
for PCR and if i dont raise this new and have
him rule on all the facts i may lose these
points on the next appeal Mr Selva should
have filed a 59(e) upon my request instead
of the "I told you so" remarks when i have
all the grounds for a 59(e) motion when in all
fairness the case should have been reversed
as in Brunson v State im asking that my
motion be given and that counsel's reason
for rejecting my request be placed on the
record and that if this is out your power
that you forword my information to some one
that can correct this. Thank you

RECEIVED
JAN 22 [illegible]
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

DANIEL A. SELWA, II
Attorney at Law, L.L.C.

LITIGATION OFFICE
516 29th AVENUE NORTH
MYRTLE BEACH, S.C. 29577
OFFICE: (843) 492-5449
FAX: (843) 353-0683
MOBILE: (843) 450-7566

REAL ESTATE OFFICE
302 MAIN STREET
N. MYRTLE BEACH, S.C. 29582
OFFICE: (843) 281-2156
FAX: (843) 281-2159
SELWA@SCLAWYERS.NET

WWW.SCLAWYERS.NET

January 5, 2018

McCormick Correctional Institute
Keiron Coleman, SCDC#: 359333
386 Redemption Way
McCormick, SC 29899

Re: *Keiron Coleman vs. State of S. C.*
2015-CP-26-07569

Dear Mr. Coleman:

I am in receipt of your letters. I do not handle the matter any further than filing the appeal and handing it over to the appellate division of the office of indigent defense.

When we receive the signed order, we will file the appeal. There is no necessity to file a Rule 59(e) motion prior to an appeal and it would delay that process. Appellate defense will reach out to you in regards to your appeal.

In regards to your request to address each of the issues not specifically mentioned in the proposed order I recall going over in detail with you each issue you brought forth and explaining my thoughts on each one. A lot of the issues, if you recall, were issues that are well established in law and are not issues that need clarification. For example, the issue of opening the door when the suppressed video/audio evidence would not have otherwise been introduced. The Judge would not need to rule on this because it is well established and understood that there is nothing to address if one opens the door to introduce the previously suppressed evidence. In addition, as we discussed prior to the hearing, we wanted to focus on the issues I presented to you that had the strongest possibility to prevail. I did not want to overburden the Judge with issues, which I believed based on my experience, that were not viable claims or issues that had any merit.

On the issue of the balancing test, wherein you cited State v. Spears. I did not find any prejudicial statements worthy of an objection under that theory. That test was not something that applies as you are suggesting. Regarding number four, failing to object to testimony of Nancy Sue Ross. The only thing Mr. Long could have done was to cross-examine her and he did. Her

The issues are highlighted in yellow

testimony was part of the case and would not have been excluded. This is a moot issue. Number five, closing statement of Mr. Long. His statement was to build up the prosecutor in order to support a point he was making. This is within his discretion in representing you as a professionally licensed attorney. It is not prejudicial because he was adding credibility in the their job to support other contentions regarding your innocence. Mr. DeBusk can also make argument in closing which is different from what they can present in their case in chief. Number seven, failure to impeach Ms. Cowan on intoxication (cigarette packet issue). The officers at the scene did not make any note of intoxication and therefore there was nothing to suggest she was under the influence. The presence of drugs is not enough to attack her credibility for those purposes without anything more. I did not find any valid objections that were not made. We have address number eight; video suppression, at length and there is nothing you can do to attack that. We addressed and presented evidence and argument on all other issues.

Hopefully, the denial will be overturned on appeal. I wish you luck in the future but at this point, my representation of you is done, as there is nothing else I can do for you. It was nice to meet you and I hope things work out for you.

Sincerely,

Daniel A. Selwa, II

The issue is highlighted in yellow

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

The issue is highlighted in yellow

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 proceeding 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:

(3)

plan or common scheme is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt, by competent evidence, the theory of the hand of one is the hand of all. A principal in a crime is one who either actually commits the crime or who is present, aiding, abetting, or assisting in the commission of the crime. When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits a crime. All are guilty. The hand of one is the hand of all. Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime. However, 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