

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Roger Couch, Presiding in Spartanburg County

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Case No. 2011-CP-42-05550

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**RECEIVED**

David Roy Lynch, ..... Appellant,

SEP 03 2015

v.

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

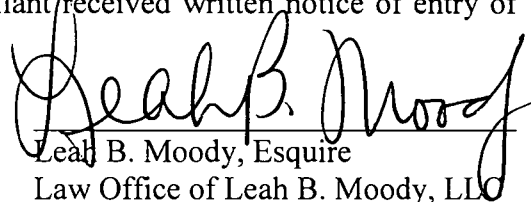
**S.C. SUPREME COURT**

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NOTICE OF APPEAL

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David Roy Lynch appeals the order of the Honorable Roger Couch, dated August 17, 2015 and mailed on August 19, 2015. Appellant received written notice of entry of the final order on August 21, 2015.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

Other Counsel of record:  
Suzanne White, SC Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Roger Couch, Presiding in Spartanburg County

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SEP 03 2015

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Case No. 2011-CP-42-05550

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S.C. SUPREME COURT

David Roy Lynch..... Appellant,

v.

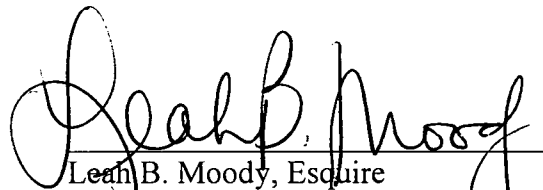
State of South Carolina, . . . . . Respondent.

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on Suzanne White by depositing a copy of it in the United States Mail, postage prepaid, on August 31, 2015 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
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Rock Hill, South Carolina 29731

August 31, 2015  
cc David Roy Lynch  
Suzanne White, Esq.  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 David Roy Lynch, )  
 a/k/a Roy David McDowell, )  
 S.C.D.C. No. 270223, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 IN THE SEVENTH CIRCUIT

2011-CP-42-5550

**ORDER OF DISMISSAL**

CLERK OF COURT  
 SPARTANBURG COUNTY  
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 M. HOPE BLANKLEY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 12, 2011. The Respondent made its return on September 11, 2012. An evidentiary hearing was held on March 25, 2015 at the Spartanburg County Courthouse. The Applicant was present and represented by Leah Moody, Esquire. Suzanne H. White, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Scott D. Robinson, Esquire ("Counsel"). The Court had before it the trial transcript, the Spartanburg County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections. The Applicant was indicted at the August 2005 term of the Spartanburg County Grand Jury for assault and battery with intent to kill (ABWIK) (2005-GS-42-3565) and murder (2005-GS-42-3566) and at the January 2007 term for armed robbery (2006-GS-42-3826). He was represented

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*PI*

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by Scott D. Robinson, Esquire.

After the State called the case to trial, the Applicant was found guilty. On January 10, 2007, the Applicant was sentenced by the Honorable J. Derham Cole to concurrent terms of 20 years for ABWIK, life imprisonment for murder, and 30 years for armed robbery.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Lynch, Op. No. 2011-UP-251 (S.C. Ct. App. Filed May 24, 2011). The Remittitur was sent on June 10, 2011.

### ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
2. Ineffective assistance of appellate counsel.

While the Applicant filed a pro se Amendment to the Application for Post-conviction Relief on December 16, 2013, he did so while represented by counsel. As there is no right to hybrid representation, this Court will not consider any issues raised in this pro se document. See Rule 11(a), SCRCPP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

### 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 and arguments presented at the PCR hearing. This Court has further had the

<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This 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 (2003).

**Ineffective Assistance of Trial Counsel**

The Applicant alleges he received ineffective assistance of trial counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 35 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

A.

The Applicant stated that he did not choose his jury and that Counsel did so. The Applicant stated there was only one black juror and that he wanted Counsel to challenge the composition of the jury. Counsel testified he did not the Applicant making an issue of the racial composition of the jury. Counsel testified the Applicant was present at jury selection and had the opportunity to comment. Regardless, Counsel testified the jury composition in this case was

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*Handwritten initials/signature*

fine.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury composition under Batson.<sup>2</sup> This Court finds the Applicant has failed to present any reasons upon which trial counsel could have based an argument that any of the State's strikes were discriminatory. As such, the Applicant failed to meet his burden of proving that trial counsel was deficient in not making a Batson objection. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application).

**B.**

The Applicant stated Counsel failed to quash his armed robbery indictment. The Applicant stated information on the indictment is inaccurate. The Applicant stated the elements in the armed robbery indictment did not match the elements presented at trial. The Applicant admitted, however, that he was aware he was going to trial on this armed robbery charge. Counsel testified there were no jurisdictional issues with the Applicant's armed robbery indictment.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the armed robbery indictment or filed a motion to quash. This Court has examined the indictment and does not find there were any fatal flaws. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently appries the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). Indictments are not evidentiary or jurisdictional documents – they

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<sup>2</sup> Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

are merely notice documents. Id. at 102, 610 S.E.2d at 500. The armed robbery indictment in this case was clearly sufficient to put the Applicant on notice of the charge he was facing. See State v. Tumbleston, 376 S.C. 90, 95-96, 654 S.E.2d 849, 852 (Ct. App. 2007).

C.

The Applicant stated Counsel should have objected during the State's closing argument because he had a severed trial and the assistant solicitor noted his co-defendant pled guilty. Counsel testified he very seldom objects during closing argument and did not believe the State's closing argument in this case was improper. Counsel testified it would not have made sense to object and interrupt the assistant solicitor with no real basis.

During closing argument, the assistant solicitor discussed the theory of accomplice liability and noted "Antwon Salters pled guilty." (Trial transcript, p.329). This Court notes several witnesses testified about Salters throughout the trial and the trial judge charged the jury on the theory of accomplice liability. Further, the assistant solicitor is permitted to comment upon the trial testimony. See State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (finding a solicitor's argument must stay within the record and its reasonable inferences); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (noting a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony). The Applicant failed to demonstrate trial counsel erred in not objecting to this statement in closing argument.

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D.

The Applicant stated Counsel failed to object to the malice jury charge. Counsel testified the trial judge issued proper charges according to the law at the time and that there was no basis to object to the jury charges.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the malice jury charge. The gravamen of the Applicant's complaint appears to be that the malice instruction in his case contained a statement about an inference of malice arising from the use of a deadly weapon. (Trial transcript, p.363). In 2009, the South Carolina Supreme Court found such a charge was improper. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court notes, however, that the Applicant's trial pre-dated Belcher and that case specifically prohibited PCR applicants from asserting this issue as a claim in a PCR action for cases tried prior to Belcher. Id. at 612, 685 S.E.2d at 810. As the malice jury charge was proper at the time of the Applicant's trial, trial counsel was not deficient in failing to make an objection.

E.

This Court finds in regards to the allegations of ineffective assistance of counsel, Counsel's testimony was credible, while the Applicant's testimony was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness. Counsel testified the defense theory was always that of "mere presence" and this Court finds that theory was well-executed at the Applicant's trial.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier 351 S.C.

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at 389, 570 S.E.2d at 174.

**All Other Allegations**

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

**CONCLUSION**

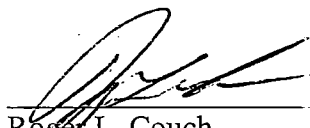
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**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 Respondent.

**AND IT IS SO ORDERED** this 17<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
Roger L. Couch  
Presiding Judge

CLERK OF COURT  
SPARTANBURG COUNTY  
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M. HOPE BLACKLEY

**M. HOPE BLACKLEY**  
Clerk of Court, Spartanburg County  
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**Leah B. Moody**  
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CFS 2011-5550

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Fax: (803) 329-1344

August 26, 2015

Mr. Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

**RECEIVED**

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**S.C. SUPREME COURT**

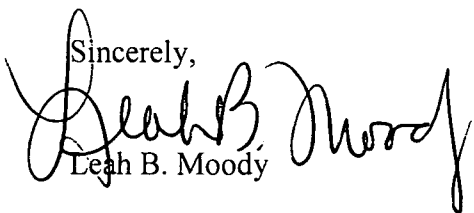
RE: David Roy Lynch, 270223 v. State of South Carolina  
Case No.: 2011CP-42-05550

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent David Roy Lynch, in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,

  
Leah B. Moody

Enclosure

cc David Roy Lynch  
Suzanne White, Esquire  
Sharon Graham, SCCID  
Hope Blackley, Clerk of Court, Spartanburg County

# Law Office of Leah B. Moody, LLC

235 East Main Street  
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August 26, 2015

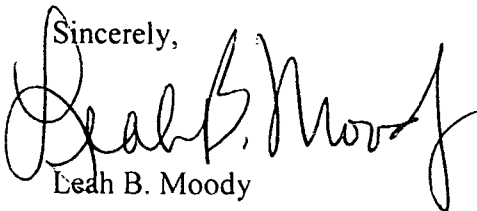
The Honorable Hope Blackley  
Spartanburg County Clerk of Court  
Post Office 3483  
Spartanburg, South Carolina 29304

RE: David Roy Lynch, a/k/a Roy David McDowell v. South Carolina  
Case No.: 2011-CP-42-05550

Dear Ms. Blackley:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

LBM/ts

Enclosures

cc David Roy Lynch  
Suzanne White, Assistant Attorney General  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Sharon Graham, SCCID

## Law Office of Leah B. Moody, LLC

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Post Office Box 1015  
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August 26, 2015

Suzanne White, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

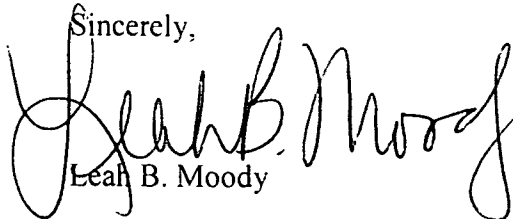
RE: David Roy Lynch, 270223 v. State of South Carolina  
C.A. No.: 2011-CP-42-05550

Dear Ms. White:

The Spartanburg County Court of Common Pleas appointed my office to represent David Roy Lynch in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

LBM/ts

Enclosures

cc David Roy Lynch  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon Graham, SCCID

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August 26, 2015

Ms. Sharon A. Graham  
SC Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11433  
Columbia, South Carolina 29211-1433

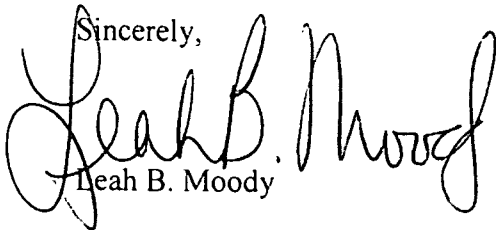
RE: David Roy Lynch v. State of South Carolina  
Case No.: 2011-CP-42-05550

Dear Ms. Graham:

The York County Court of Common Pleas appointed my office to represent David Roy Lynch in his Post-Conviction Relief action. Please find enclosed the Notice of Appeal and Proof of Service in the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,

  
Leah B. Moody

Enclosures

cc David Roy Lynch  
Suzanne White, Esquire  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County



Law Office of Leah B. Moody, LLC  
Post Office Box 1015  
Rock Hill, South Carolina 29730

TO:

The Honorable Daniel F. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

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