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January 31, 2018

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

Re: Francis Victor Larmand, Jr. vs. The State, Case No. 2017-CP-46-00689

Dear Ms. Kitchings:

I am enclosing herewith the original Notice of Appeal together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

C. Rauch Wise

CRW/slt
Enclosure

cc Justin Hunter
Hon. R. Lawton McIntosh
Clerk of Court, York County
SC Court Administration

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Lower Case No. 2017-CP-46-00689

Francis Victor Larmand, Jr., # 00337635 ..... Applicant,

vs.

The State ..... Respondent.

NOTICE OF APPEAL

Francis Victor Larmand, Jr. appeals the Order of the Honorable R. Lawton McIntosh dated January 5, 2018, and filed on January 11, 2018, and the Order dated September 13, 2017 and filed on October 6, 2017.

January 31, 2018

C. Rauch Wise
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Greenwood, SC 29646
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S. C. Bar № 06188

Attorney for Applicant

OTHER COUNSEL OF RECORD:

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Columbia SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Lower Case No. 2017-CP-46-00689

Francis Larmand, # 00337635 ..... Applicant,

vs.

The State ..... Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on January 31, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Notice of Appeal in the above case addressed to Justin Hunter, SC Attorney General Office, P.O. Box 11549, Columbia, SC 29211, Hon. R. Lawton McIntosh, P.O. Box 8002, Anderson, SC 29622, Clerk for York County, P.O. Box 649, York, SC 29745, S.C. Court Administration, 1220 Senate Street, Ste. 200, Columbia, SC 29201.

Sandy Traynham

SWORN to and Subscribed
before me this 31 day
of January, 2018

(L.S.)
Notary Public for South Carolina
My Commission expires: 10/7/2018

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP4600689

Francis Victor Larmand Jr		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by: The Court		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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **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

ORDER OF DISMISSAL

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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/R. Lawton McIntosh	2155	09/13/2017
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **October 6, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **October 6, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

STATE OF SOUTH CAROLINA COUNTY OF YORK Francis Victor Larmand, Jr., S.C.D.C. No. 337635, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS OF THE SIXTEENTH JUDICIAL CIRCUIT 2017-CP-46-0689 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed March 8, 2017. Respondent made its Return on or about June 13, 2017. With the consent of the Respondent, Applicant filed an amended PCR application on August 4, 2017. An evidentiary hearing into the matter was convened on August 3, 2017, at the Moss Justice Center in York County, South Carolina. Applicant was present at the hearing and represented by Rauch Wise, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, John Rhea, Esquire (hereinafter "trial counsel" or "Counsel"), also testified. Also testifying were Kerriann Larmand. This Court had before it a copy of Applicant's records from the York County Clerk of Court, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application and amendment, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In July 2009, the York County

Grand Jury indicted Applicant for second degree lynching (2009-GS-46-2833), criminal conspiracy (2009-GS-46-2834), pointing and presenting a firearm (2009-GS-46-2835), and assault with intent to kill (2009-GS-46-2836). John D. Rhea, Esquire represented Applicant. Assistant Solicitors Erin Joyner, Esquire and Jennifer Colton, Esquire prosecuted the case. On October 20-22, 2009, Applicant proceeded to trial before the Honorable William H. Seals, Jr. The jury found Applicant guilty as indicted for second degree lynching, criminal conspiracy, and pointing and presenting a firearm. Judge Seals sentenced Applicant to imprisonment for concurrent terms of ten years for lynching in the second degree, five years for criminal conspiracy, and five years for pointing and presenting a firearm.

Applicant filed a timely notice of appeal. C. Rauch Wise, Esquire, and John D. Rhea, Esquire perfected the appeal. The South Carolina Court of Appeals reversed Applicant's convictions on all charges on March 13, 2013. *State v. Larmand*, 402 S.C. 184, 739 S.E.2d 898 (Ct. App. 2013). The State filed a petition to the South Carolina Supreme Court, which granted a writ of certiorari on June 26, 2014. On December 23, 2015, the Supreme Court reversed the decision of the Court of Appeals and remanded the case to the Court of Appeals because the Court of Appeals did not address all of the arguments on appeal. *State v. Larmand*, 415 S.C. 23, 780 S.E.2d 892 (2015). By an unpublished opinion filed July 20, 2016, the Court of Appeals affirmed Applicant's convictions. *State v. Larmand*, Op. No. 2016-UP-373, (Ct. App. filed July 20, 2016). The remittitur was sent October 21, 2016.

PCR Application

Applicant filed an application for post-conviction relief and an amendment thereto, alleging he was being held unlawfully for the following reasons:

1. Trial Counsel was ineffective in failing to request a jury charge on the issue of circumstantial evidence.

2. Trial Counsel was ineffective in failing to properly prepare for trial
3. Trial Counsel was ineffective in failing to preserve for appellate review the issue of whether the inference charge was a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina.
4. Trial Counsel was ineffective in failing to raise a double jeopardy argument for a conviction of both lynching and conspiracy.
5. Trial counsel erred in failing to object to an improper charge as to self defense
6. Trial counsel failed to ask for lesser included offense of assault and battery or assault and battery of a high and aggravated nature.
7. Trial counsel erred in conducting a joint trial with the co-defendant.

II. APPLICABLE LAW

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

III. 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 Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Trial Counsel was ineffective in failing to request a jury charge on the issue of circumstantial evidence

Applicant alleged that Counsel was ineffective for failing to ask the trial court judge for a jury charge defining circumstantial evidence. Applicant argued that the evidence against him mainly consisted of circumstantial evidence, and Counsel should have requested the trial judge to define circumstantial evidence in a jury charge. Counsel testified that he did not ask for this charge. Counsel testified that defining "circumstantial evidence" to the jury could "cut both ways" as it could possibly help Applicant but could also bolster the State's own circumstantial evidence.

First, this Court finds the instructions given to the jury were proper and not objectionable. When read as a whole, the jury instructions adequately covered the law and the burden of proof required to find Applicant guilty. The trial court is required to charge only the current and correct

law of South Carolina. *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." *State v. Ezell*, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct.App. 1996).

Counsel's failure to request a circumstantial evidence charge was not deficient. The trial court mentioned circumstantial evidence in its jury charge when it stated that "the State may prove the intent element of lynching by positive testimony or evidence or by circumstantial evidence." *See* Tr. 567, ll. 20-22. On three other occasions the trial court explained that conspiracy and intent may be shown by circumstantial evidence in the conduct of the parties and that intent may be shown by acts and conduct from which a jury can naturally and reasonably infer intent. *See* Tr. 569, ll. 7-8; 580, ll. 4-8; 581, ll. 7-11. Counsel's decision not to request the charge was not unreasonable. Since many aspects of this case were circumstantial, this Court agrees with Counsel's testimony that requesting a charge would likely bolster the State's case and possibly give the jury more reasons to convict Applicant.

Most of all, Applicant has not shown that the outcome would have been different if the jury had heard the definition of circumstantial evidence, especially considering the fact that 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." *State v. Grippon*, 327 S.C. 79, 84, 489 S.E.2d 462, 464 (1997) ***holding modified by State v. Cherry***, 361 S.C. 588, 606 S.E.2d 475 (2004). Applicant has failed to show how he was prejudiced by Counsel's failure to ask for such a charge. There is not a substantial likelihood that the outcome would have been different when circumstantial evidence is not to be considered any differently than direct evidence. Accordingly, this allegation must be dismissed.

Trial Counsel was ineffective in failing to properly prepare for trial

Codefendant's Medical Condition

Applicant alleged that Counsel was ineffective for failing to obtain testimony from Codefendant Leo Lemire's wife or Lemire's doctor as to Lemire's physical condition. He argued that this testimony would have established that Lemire could not run from the scene as described by the witnesses nor would any rational person have selected him participate in a fight. Applicant testified that victim Ryan Lochbaum testified at trial that Lemire was not using a cane that night, which was inaccurate. Counsel testified that he could not recall if he had Lemire's medical records prior to the trial. He testified that there was a lot of testimony at trial about Lemire's medical condition, and his condition was obvious on sight as Lemire showed the jury his scar from back surgery.

First, the jury could observe during the trial that Lemire was still hindered by his back problems. Additionally, testimony came from Lemire and Applicant concerning Applicant's back issues at the time of the incident. When describing the end of the incident, Applicant testified "And Leo, you know, I helped Leo up, and kind of got him back to the truck." Tr. 389, ll. 15-16. Counsel then asked if Applicant knew that Lemire had back problems prior to the incident to which Applicant replied "Yeah. He had back surgery, like, four or five months prior." Tr. 389, 19-20. Counsel then asked if he and Lemire ran or walked back to their truck after the incident, to which Applicant replied, "We walked at a fast walk, as fast as [Lemire] could hobble." Tr. 390, ll. 3-4. On Applicant's cross-examination, the State emphasized Lemire's back problems, asking "So, if your brother-in-law has to walk so slow, he has to walk so slow because of his back problem, and you parked your car down here. And all this happened within five minutes, he would have been able to walk this distance in five minutes?" Tr. 429, ll. 19-22.

During Lemire's direct examination, his counsel Mr. Leland Greeley asked the following:

> MR. GREELEY: Before we go any further, I want to ask you. You're walking very gingerly up to the witness stand. Why is that?
> LEMIRE: I've got back problems.
> MR. GREELEY: Did you in fact have back problems back on the night of April 30 and the morning of May 1 of this year?
> LEMIRE: Yes sir.

Tr. 447 ll. 20-25. Mr. Greeley then asked Lemire to explain his back problems and Lemire detailed the extent of his injury, when the problems started to occur, and when the surgery took place. *See* Tr. 448, ll. 6-14. Lemire then explained that he was still in pain on the night of the incident and could go without his cane for a few days at a time. *See* Tr. 448 17-18. Lemire even pulled up his shirt and showed his incision scar to the jury, testifying that he was in no condition to physically defend Applicant or fight. Tr. 477-478. Lemire further emphasized on cross-examination that he did not run back to the car, but that he "walked pretty quick, as quick as we could." Tr. 512, l. 23. Counsel pointed out Lemire's condition to the jury during his closing argument, where he argued, "[Lemire] showed you his back. And he's had back problems, and I know you're not one hundred percent when you've got a bad back. He's near crooked. Is that the kind of guy you're going to take with you on your plan to go lynch somebody?" Tr. 252, ll. 13-16.

This Court finds Counsel was not ineffective for failing to enter specific medical records in evidence or elicit additional testimony because it would have been cumulative to other extensive testimony that already established that Lemire had back surgery and could not run quickly at the time of the incident. The question of whether or not Applicant ran or walked back to the car does not negate any element of the lynching crime. As such, Counsel was not deficient for failing to present Lemire's medical evidence. Additionally, introducing Applicant's medical history concerning his back problems would not have changed the outcome of the trial. Whether

or not Lemire ran or walked back to their car is a factual question for the jury, and the jury as presented with both arguments. It was well established that Lemire had previously had back surgery and was not in condition to run, but could hobble or briskly walk back to the car. Applicant cannot show that he was prejudiced by Counsel's performance in this regard. Accordingly, this allegation must be dismissed.

Codefendant's Intoxication

Applicant alleged that Counsel was ineffective for failing to present evidence that Lemire was intoxicated and on pain pills during the night of the incident. He argued that this was evident in the traffic stop video. He argued that this evidence would have explained to a jury why Lermire did not stay in the car as Applicant stated he instructed him to do. Counsel testified that he could not recall if Lemire was intoxicated the night of the incident. He testified that he could have used the evidence to impeach the police officers if they had said that Lemire was not drunk.

This Court finds that Counsel was not ineffective for failing to introduce this evidence. This video was excluded as evidence at trial, and the only way Applicant could have possibly used it was for impeachment purposes and only if the occasion arose. First, this Court finds that Counsel was not deficient because such evidence would have simply impeached a police officer's testimony and would not have negated any elements of lynching or conspiracy. Furthermore, Applicant has failed to show when and where in the trial this impeachment evidence could have been used. Although Counsel testified that he could have used this to impeach a police officer if the officer testified that Lemire was not drunk, such testimony was never produced by a police officer at trial and the possibility to impeach him with Lemire's intoxication never arose. This Court finds that the outcome of the trial would not have changed had Counsel presented evidence that Lemire was intoxicated on the night of the incident.

Accordingly, this allegation must be dismissed.

Pop-A-Lock as a Cash Business

Applicant alleged that Counsel was ineffective for failing to request from Applicant evidence of cash transactions received at calls to unlock vehicles. He argued that his would have shown a motivation for Lochbaum to lie about not making calls to steal business from Applicant's wife. Applicant testified that Lochbaum asserted at trial that he would have no reason to steal a call because Pop-A-Lock does not conduct business in cash. Applicant testified that Counsel should have produced Pop-A-Lock's business records to show that they do operate in cash. Applicant's wife, Kerriann Larmand testified at the hearing that her company, Pop-A-Lock, operated in cash and produced records showing the company's daily activity sheets which include cash transactions. Counsel testified that he could not recall if he was aware of the daily activity sheets prior to trial. He testified that he did not know what Lochbaum's testimony would be prior to trial and testified that he could have used the cash records to impeach Lochbaum's testimony.

This Court finds that Applicant has failed to show that Counsel was deficient for failing to produce the records of cash transactions at trial. This Court finds that Counsel did not act unreasonably, especially when he could not have predicted or speculated as to what Lochbaum would have testified to at trial. This Court further finds that such evidence would have been cumulative to Mrs. Larmand's testimony at trial where she testified that her business did accept cash. Tr. 326, l. 24- 327, l. 4. Additionally, such evidence would have simply been impeaching and would not have changed the outcome of the trial. Applicant has failed to show that he would have been found not guilty of all charges had he been able to impeach Lochbaum's testimony that Pop-A-Lock did not operate in cash. Whether or not Pop-A-Lock took payments in the form

of cash is a factual question for the jury, and the jury was presented with both arguments from Lochbaum and Mrs. Larmand. Applicant has failed to show that Counsel was ineffective for failing to enter these records, and this allegation must be dismissed.

Mystery Shopper Calls

Applicant alleged that Counsel was ineffective for failing to prepare for trial as Counsel failed to establish evidence from Pop-A-Lock as to how investigations using "mystery shopper calls" were common. Applicant argued that at trial testimony established that he and Lemire were conducting an investigation into someone stealing calls from Pop-A-Lock. He argued that this is a common practice in the business and mandatory for all Pop-A-Lock franchises. Mrs. Larmand presented documentation from Pop-A-Lock's parent company recommending mystery shopper calls for investigation and she testified that it is common for an employee to bring along an acquaintance or a friend.

Counsel testified that he discussed mystery shopper calls extensively with Applicant. He testified that he had phone records and his main defense was to destroy Lochbaum's credibility. He testified that he cross-examined Lochbaum thoroughly about these calls and established that this was a common practice.

This Court finds that Applicant has failed to show that Counsel was deficient for failing to establish that investigating mystery shopper calls was a common practice for locksmith businesses. This Court finds that Counsel presented extensive testimony throughout trial about this practice. Counsel questioned Lochbaum about Mrs. Larmand catching Lochbaum by making a mystery shopper call. Tr. 174, ll. 22-25. Counsel had Lochbaum explain to the jury what a mystery shopper call is and pressed Lochbaum about how he told police that Applicant and Mrs. Larmand were luring him out to Fort Mill the night of the incident. Tr. 175, ll. 2-18.

This Court also finds that Counsel elicited extensive testimony about mystery shopper calls throughout Mrs. Larmand's testimony. At trial, Mrs. Larmand discussed the problem of call interception, gave an extensive tutorial on how locksmith companies investigate these problems through mystery shopper calls, and explained how she set up the mystery shopper call on the night of the incident. Tr. 327-332, 339-340. Furthermore, Mrs. Larmand testified that it is normal for Applicant to conduct these investigations. Tr. 345, ll. 7-10. Counsel also elicited testimony from Applicant that mystery shopper calls are "an industry-recognized mechanism for detecting suspected activity" and his company has "248 stores that do this activity, do the mystery shopping." Tr. 369, ll. 3-6. Thus, Applicant has failed to show that Counsel was deficient as this Court finds Counsel thoroughly established the practice and commonality of mystery shopper calls through several witnesses. Further, Applicant has failed to show that the outcome of his trial would have been different had he presented additional evidence that would have been cumulative to the evidence already established at trial. Accordingly, Applicant has failed to meet his burden of proving that Counsel was ineffective and this allegation must be dismissed.

Applicant's Black Clothing

Applicant alleged that Counsel was ineffective for failing to present evidence at trial that Applicant frequently wore all black clothing. Applicant argued that this evidence could have been used at trial to rebut the State's argument that Applicant and Lemire were wearing all black the night of the incident to be covert. Mrs. Larmand presented pictures of Applicant that depicted him wearing black clothing and she testified that Pop-A-Lock's uniforms were black. Counsel testified that these pictures could have potentially been helpful, but also testified that there was testimony presented at trial that Applicant was wearing all black.

This Court finds that Applicant has failed to show that Counsel was ineffective for failing

to produce evidence at trial that Applicant frequently wore black. This Court finds that Counsel elicited testimony at trial from Applicant himself that he wore all black in the regular course of business because he works on cars. Tr. 365, ll. 19-23. Counsel also elicited testimony from Applicant that it would not be unusual for Applicant to be dressed in black. Tr. 365, l. 24 – 366, l. 1. Lemire testified at trial that he was wearing all black because he usually wears all black and testified that Applicant did not tell him to wear all black. Tr. 458, ll. 6-14. Counsel also argued to the jury that Applicant was wearing all black because that is what he wears as a working man. Tr. 523, l. 10. This Court finds that Counsel elicited testimony and argued to the jury that Applicant was wearing all black as he normally does in the course of business. This Court finds that any pictures would simply be cumulative to the testimony already presented to the jury. Applicant has failed to show that Counsel's performance was deficient in this regard. Additionally, this Court finds that Applicant has failed to show that the outcome of his trial would have been different had Counsel presented the jury with pictures of Applicant wearing black because he had already elicited such testimony. Accordingly, this allegation must be dismissed.

Pop-A-Lock's Business in South Carolina

Applicant alleged that Counsel was ineffective for failing to establish that Pop-A-Lock does business in South Carolina. He argued that this could be used to rebut Lochbaum's testimony that he talked to another employee, Mike Taylor, the night of the incident to give Taylor directions to Fort Mill because Pop-A-Lock does not do business in Fort Mill. Tr. 175, ll. 9-15. Lochbaum testified at trial that he thought he was being lured to Fort Mill because Pop-A-Lock has never done calls in Fort Mill. Tr. 212, 18-24. Mrs. Larmand testified at the PCR hearing that her company did do business in South Carolina.

This Court finds that Applicant has failed to show that Counsel was ineffective for failing to establish that Pop-A-Lock did business in South Carolina. This Court finds that Counsel elicited testimony at trial concerning how Mrs. Larmand set up the mystery shopper call and her company's business in the greater Charlotte area. This Court finds that the testimony that Pop-A-Lock did business in South Carolina would have been simply used to impeach Lochbaum's testimony and would not have changed the outcome of the trial. Applicant has failed to show that he would have been found not guilty on all charges had Counsel rebutted Lochbaum's testimony on this fact. Applicant has failed to show that Counsel was ineffective in this regard and this allegation must be dismissed.

Trial Counsel was ineffective in failing to preserve for appellate review the issue of whether the inference charge was a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina

Applicant argued that the trial judge improperly charged the jury that they may infer that all persons present as members of the mob when the act of violence is committed are guilty as principles. He argued that this was an improper charge on the facts which is prohibited under the state constitution under Article V, § 21. He further argued that Counsel was ineffective for failing to make a proper objection to this charge and therefore it was not preserved for appellate review.

First, Counsel's performance was not deficient because, as he and Court of Appeals in Lemire's opinion (which the Court of Appeals cited in Larmand's opinion) noted, the language at issue was taken directly from S.C. Code § 16-3-240 (2003). Counsel testified that Lemire's Counsel, Leland Greeley, objected before the jury charge was given that the inference language from the lynching statute was unconstitutional as burden shifting. Tr. 517, ll. 5-11. On appeal, Mr. Greeley argued that the instruction unconstitutionally shifted the burden of proof, was

redundant and confusing in view of other parts of the charge, and amounted to a charge on the facts. The Court of Appeals found no error in Lemire's appeal, holding that the charge was a correct definition of the law when read as a whole. Additionally, the Court refused to agree with Lemire that *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), is controlling, because *Belcher* concerned a permissive inference of malice, which was not an element of lynching. The Court of Appeals also pointed out that trial court instructed the jurors they would first have to find a mob had been formed and Applicant was present as a member of the mob when the victim was attacked before they could find Applicant guilty as a principal as well as an accessory.

This Court finds that Counsel was not ineffective for failing to preserve for appellate review the issue of whether the inference charge was a charge on the facts. The Court of Appeals affirmed Applicant's convictions, finding that the inference given in the jury charge was not improper. The Court of Appeals cited to its decision in Lemire's opinion, finding that the trial court properly overruled Lemire's objection to the jury charge. The Court of Appeals did not make any determination in Applicant's appeal that any issue was not preserved for appeal. Applicant cannot show that he was prejudiced by Counsel's failure to argue that the charge was an improper charge on the facts because the Court of Appeals found that there was no error.

Most importantly, the Court of Appeals cited to Lemire's opinion which held that the trial court properly overruled Mr. Greeley's objection to the jury charge because "the jury charge on inference was a correct interpretation of the applicable statute in effect at the time of the incident and trial." *State v. Lemire*, 406 S.C. 558, 573, 753 S.E.2d 247, 255-56 (Ct. App. 2013). The trial court is required to charge only the current and correct law of South Carolina. *Sheppard*, 357 S.C. at 665, 594 S.E.2d at 472. "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." *Ezell*, 321 S.C. at 425, 468 S.E.2d at 681. As this jury charge has

been determined by the Court of Appeals to be a correct interpretation of the applicable statute, Counsel was not ineffective for failing to argue that it was a charge on the facts. As Applicant has failed to show that Counsel's actions were deficient or that the outcome of his trial would have been different, this allegation must be dismissed.

Trial Counsel was ineffective in failing to raise a double jeopardy argument for a conviction of both lynching and conspiracy

Applicant argues that Counsel was ineffective for failing to raise a double jeopardy argument for a conviction of both lynching and conspiracy. Counsel testified at the PCR hearing that he did raise this motion, asking that the State choose between going forward on lynching or conspiracy and not both because "lynching in and of itself under the statute requires a conspiracy or a tacit agreement, premeditated agreement between the parties to engage in lynching." Tr. 300, ll. 20-22. Although the words "double jeopardy" are not specifically used, it is clear in context that this is exact objection Counsel made at trial. The State argued to the trial court that the conspiracy consists of simply the agreement and that the lynching requires the separate action of the "act of violence."[1] Following the State's argument, the trial court denied Counsel's motion.

Regarding criminal conspiracy, our courts have held that "a conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that is neither criminal nor unlawful." *State v. Gunn*, 313 S.C. 124, 133-34, 437 S.E.2d 75, 80 (1993) (internal citations omitted). Our courts have also been clear that "the gravamen of the offense of conspiracy is the

[1] The code section for second degree lynching, § 16-3-220, (which has since been repealed) read as follows:
"Any act of violence inflicted by a mob upon the body of another person and from which death does not result shall constitute the crime of lynching in the second degree and shall be a felony. Any person found guilty of lynching in the second degree shall be confined at hard labor in the State Penitentiary for a term not exceeding twenty years nor less than three years, at the discretion of the presiding judge."

agreement or combination." *Id.* (internal citations omitted). Lynching requires an act of violence inflicted by a mob. Although it involved drug convictions, the South Carolina Supreme Court in *Harden v. State* is persuasive. There, the issue was whether the petitioner's plea counsel was ineffective for failing to make a double jeopardy objection to the petitioner being convicted for trafficking cocaine based on conspiracy and based on distribution. In finding no error, the Supreme Court held that "[c]onspiracy is a separate offense from the substantive offense, which is the object of the conspiracy. A defendant may be separately indicted and convicted of both the conspiracy, and the substantive offenses committed in the course of the conspiracy." *Harden*, 360 S.C. 405, 410-11, 602 S.E.2d 48, 50 (2004). This Court finds that the trial court could try Applicant for conspiracy and the substantive offense (lynching) committed in the course of the conspiracy. Furthermore, lynching requires an act of violence, which "conspiracy" does not require.

Given the language in *Harden*, Counsel was not ineffective for failing to raise a double jeopardy issue as Applicant can be indicted for and convicted of conspiracy and lynching. Additionally, Applicant cannot show that he was prejudiced by Counsel's failure to make an objection because it is clear from the trial record that Counsel did make such an objection and argued that the cases should be separately tried, however the trial court denied his request. Accordingly, this allegation must be dismissed.

Trial counsel erred in failing to object to an improper charge as to self defense

Applicant alleged that Counsel was ineffective for failing to object to an improper jury charge on self-defense. Applicant argued that at the trial, the trial judge gave a self-defense charge but Counsel failed to object to the trial judge's failure to instruct the jury that the burden was on the State to disprove self-defense.

Counsel testified at the PCR hearing that he did not recall asking the judge for a specific self-defense charge. He testified that this was not important because the defense theory was not that Applicant was acting in self-defense, but rather that there was no premeditation to the conspiracy. Counsel testified that Applicant was not acting in self-defense but pulled Lochbaum off Lemire.

This Court finds that Counsel was not ineffective for failing to object to the trial judge's jury charge on self-defense that failed to instruct the jury that the burden was on the State to disprove self-defense. The trial court is required to charge only the current and correct law of South Carolina. *Sheppard,* 357 S.C. at 665, 594 S.E.2d at 472. "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." *Ezell*, 321 S.C. at 425, 468 S.E.2d at 681. No case law exists that requires a trial judge to instruct the jury that the burden is on the State to disprove self-defense. Our Courts have only held that a judge has to give that specific language when the defense makes a request. The South Carolina Supreme Court has held "when self-defense is properly submitted to the jury, the defendant is entitled to a charge, **if requested**, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002) (emphasis added). This Court finds that Counsel's failure to object was not deficient. This Court finds the charge was proper and sufficiently covered the law on self-defense. This Court finds Applicant has failed to show that he was prejudiced because an objection would not have been sustained as Counsel did not request the specific language be added to the charge.

Even if this Court were to address *arguendo* whether Counsel should have requested this language, this Court finds Counsel provided credible testimony that it was not his strategy or defense theory to argue that Larmand was acting in self-defense. Counsel provided credible

testimony that his defense theory was that there was no premeditation to the conspiracy and lynching, and thus the self-defense charge would not have aided Applicant's defense. As the charge was a correct interpretation of the law and because Counsel's strategy did not involve self-defense, this Court finds that Applicant has failed to show that Counsel was ineffective for failing to object to the self-defense jury charge. Accordingly, this allegation must be dismissed.

Trial counsel failed to ask for lesser included offense of assault and battery or assault and battery of a high and aggravated nature

Applicant alleged that Counsel was deficient as he should have requested the lesser included offense of assault and battery and assault and battery of a high and aggravated nature (ABHAN). He argued that the lesser included offense would support a conviction if the jury believed this applicant participated in the assault but did so without pre-planning as required by the lynching statute.

This Court finds that Applicant has failed to show that Counsel was ineffective in this regard. Our courts have explicitly held that ABHAN is not a lesser included offense of second-degree lynching. In *Knox v. State* (overruled on other grounds)[2], the Supreme Court held:

> The test for determining when a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense. ABHAN is therefore a lesser included offense of second degree lynching only if second degree lynching contains all the elements of ABHAN.
>
> Second degree lynching is defined as "any act of violence inflicted by a mob upon the body of another person and from which death does not result." S.C. Code Ann. § 16–3–220 (1985). A mob is "the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." S.C. Code Ann. § 16–3–230 (1985).
>
> ABHAN is an unlawful act of violent injury to another person accompanied by circumstances of aggravation. *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997). "Circumstances of aggravation" is an element of ABHAN not

[2] *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) held that *Knox* and other cases were "overruled to the extent they combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction." This Court finds that *Knox* has not been overturned in its analysis of ABHAN as a lesser included offense of second degree lynching.

> included in second degree lynching.
>
> The State argues, however, that second degree lynching does include two circumstances of aggravation that may establish ABHAN, the intent to commit a felony or the infliction of serious injury. See *State v. Frazier*, 302 S.C. 500, 397 S.E.2d 93 (1990). This argument is without merit. A lesser offense is included in the greater only if each of its elements is always a necessary element of the greater offense. *State v. Easler, supra.* Since there are other circumstances of aggravation to establish ABHAN that are not included in the definition of second degree lynching, ABHAN is not a lesser included offense.

Knox v. State, 340 S.C. 81, 84–85, 530 S.E.2d 887, 888–89 (2000) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

This Court finds that Counsel was not ineffective for failing to request ABHAN as a lesser included offense as the case law is clear that such a charge is not a lesser included offense of second degree lynching. Accordingly this allegation must be dismissed.

Furthermore, Counsel was not ineffective for failing to request the lesser included offense of assault and battery. First, this Court finds that assault and battery is not a lesser included offense of second degree lynching. This area of the law is unsettled and our courts have never held assault and battery to be a lesser included of second degree lynching (or its current name, assault and battery by a mob, § 16-3-210). S.C. Code § 16-3-600(E)(3) lists the charges for which assault and battery in the third degree is a lesser included offense, which includes assault and battery second degree, assault and battery first degree, ABHAN, and attempted murder. As second degree lynching and assault and battery by a mob are not delineated where four charges are, it was not unreasonable for Counsel to fail to ask for this charge as a lesser included offense.

Second, this Court finds that the assault and battery in the third degree would not fit the elements test to be a lesser included of second degree lynching As stated above, the test for determining when a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense. Assault and battery is therefore a lesser included offense of second degree lynching only if second degree lynching contains all the elements of

assault and battery. Assault and battery in the third degree is an unlawful injury. S.C. Code § 16-3-600(E)(1). A simple assault and battery at common law is an unlawful act of violent injury to the person of another, unaccompanied by any circumstances of aggravation. *State v. DeBerry*, 250 S.C. 314, 157 S.E.2d 637 (1967). Second degree lynching is "any act of violence inflicted by a mob upon the body of another person and from which death does not result." S.C. Code Ann. § 16–3–220 (1985). Second degree lynching requires an act of violence, whereas assault and battery in the third degree requires an unlawful injury and simple assault and battery requires an unlawful act of violent injury. Furthermore, second degree lynching requires the act to be committed by a mob where assault and battery in the third degree and simple assault and battery do not. If the State fails to meet its burden of proving the act of violence or the infliction by a mob, assault and battery does not logically flow as a lesser included but Applicant would simply be acquitted of lynching. This Court finds that Counsel was not deficient as he did not act unreasonably in failing to request the lesser included offense of assault and battery in the third degree or simple assault and battery. Furthermore, Applicant has failed to show that the outcome of his trial would have been different had Counsel requested these charges. Accordingly, this allegation must be dismissed.

Trial counsel erred in conducting a joint trial with the co-defendant

Applicant alleged that Counsel was ineffective for conducting a joint trial with Lemire. Applicant argued that prior to trial, the State advised Counsel that the two cases would have to be tried separately unless both defendants consented. Applicant argued that Counsel should have urged Applicant to have a separate trial as Applicant did not use a gun and did not initiate the attack on the victim. Applicant further argued that being tried alone would have increased the chances of a successful defense.

Counsel testified at the PCR hearing that he was concerned about Applicant being tried

alone. He testified that his main concern was that he was worried that the State would be able to enter Lemire's gun into evidence at Applicant's trial to show the conspiracy. He testified that he was also concerned about Applicant being tried alone because Lemire's counsel could have advised Lemire to testify against Applicant. Counsel testified that he discussed this with Applicant.

This Court finds that Applicant has failed to show that Counsel was ineffective for agreeing to have Applicant's cases jointly tried with Lemire. This Court finds that Counsel provided credible testimony showing a strategic decision to avoid an individual trial that presented many issues that could negatively affect Applicant, such as Counsel's concern that Lemire could testify against Applicant and that the State could try to introduce Lemire's gun at Applicant's trial without Lemire present to show a conspiracy. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

Furthermore, Applicant has failed to show that he was prejudiced by Counsel agreeing to a joint trial. Our courts' case law on severance motions is analogous and persuasive. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." *State v. Spears*, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) (citing *State v. Walker*, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005)). In *Spears*, the

South Carolina Court of Appeals held that the defendant was not prejudiced by a joint trial with his co-defendant where the evidence against both defendants for armed robbery and kidnapping was interconnected and no specific trial right was prejudiced by the joinder of these trials. The same argument applies to this case because the facts of the cases were the same, the evidence presented was connected, and neither codefendant's case prejudiced the other's case in any way. Applicant has failed to show any particular trial rights that were compromised by a joint trial and has failed to articulate specific reasons how the outcome of his trial would have been different had Counsel not consented to the cases being tried together. An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. *People v. Greenberger*, 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61, 86 (1997). As Applicant has failed to show that Counsel was ineffective, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial

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

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

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

R. LAWTON MCINTOSH
Presiding Judge
Sixteenth Judicial Circuit

Anderson, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP4600689

Francis Victor Larmand Jr		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by: The Court		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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/R. Lawton McIntosh	2155	01/05/2018
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **January 11, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **January 11, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS OF THE SIXTEENTH JUDICIAL CIRCUIT
Francis Victor Larmand, Jr., S.C.D.C. No. 337635, Applicant, v. State of South Carolina, Respondent.	2017-CP-46-0689 **ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT**

This matter comes before the Court by way of an application for post-conviction relief filed March 8, 2017. After an evidentiary hearing, this Court issued an Order of Dismissal filed October 6, 2017. Applicant filed a Motion to Alter or Amend Judgment on October 19, 2017. For the reasons below, this Court denies and dismisses the motion.

Circumstantial Evidence Charge

This Court finds that Counsel was not ineffective for failing to request a jury charge on the issue of circumstantial evidence. This Court affirms its ruling for the reasons stated in the Order of Dismissal. This case contained direct and circumstantial evidence, and this Court agrees with Counsel that a circumstantial evidence charge could "cut both ways" as it may help Applicant but may also give the jury more reasons to convict Applicant. This Court continues to find that the instructions given to the jury were proper and, when read as a whole, the jury instructions adequately covered the law and the burden of proof required to find Applicant guilty. Further, Applicant has failed to show that he was prejudiced by Counsel's failure to request a charge on circumstantial evidence, especially considering the fact that 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." *State v. Grippon*, 327 S.C. 79, 84, 489 S.E.2d 462, 464 (1997) ***holding modified by State v. Cherry***, 361 S.C. 588, 606 S.E.2d 475 (2004). Applicant has failed to show how he was prejudiced by Counsel's failure to ask for such a charge aside from asserting that the case was mainly circumstantial. This Court denies Applicant's Motion on this ground.

Leo Lemire's Medical Records

This Court finds that Counsel was not ineffective for failing to enter in evidence Codefendant Leo Lemire's medical reports and for failing to elicit testimony from other witnesses' concerning Mr. Lemire's back problems. This Court affirms its ruling for the reasons stated in the Order of Dismissal. First, this Court is not convinced that the jury believed Mr. Lemire was "faking" his back injury, especially considering the fact that Mr. Lemire pulled up his shirt and showed his incision scar to the jury in open court. Transcript 477-478. The jury could observe Mr. Lemire's back issues at trial as he walked "gingerly" up to the witness stand and as he testified that he had back problems at the time of the incident. Transcript 447-448. Mr. Lemire gave detailed testimony about his back injury and surgery Transcript 447. He further testified about how he was still in pain on the night of the incident and was in no condition to physically defend his brother. Transcript 447-448, 478.

Applicant's trial testimony detailed Mr. Lemire's back injury and the fact that he could not run the night in question. Transcript 389, 390, 428-430. The State even questioned Applicant about how Mr. Lemire had to walk slowly because of his back injury. Transcript 429-430. Counsel argued about Mr. Lemire's bad back during his closing argument. Transcript 525.

This Court finds Counsel was not ineffective for failing to elicit additional testimony or enter into evidence Mr. Lemire's medical records to corroborate Mr. Lemire's and Applicant's testimony concerning Mr. Lemire's back surgery. This Court finds it was well-established

though extensive testimony and argument that Mr. Lemire had back surgery and could not run on the night in question. As this Court held in its Order, the jury can still find Applicant guilty of every element of the crimes with which he was charged even if Mr. Lemire's medical records are entered into evidence. Mr. Lemire's conduct was a factual question for the jury and it was presented with considerable testimony detailing Mr. Lemire's back injury. The trial record showed that there seemed to be no dispute concerning Mr. Lemire's back injury, as even the solicitor elicited testimony about how Mr. Lemire had a back injury. This Court finds that Counsel was not ineffective for adding cumulative testimony or medical records as it was well-established at trial that Mr. Lemire had previously had back surgery and was not in condition to run, but could hobble or briskly walk back to the car at the night of the incident. This Court denies Applicant's Motion on this ground.

Leo Lemire's Intoxication

This Court finds that Counsel was not ineffective for failing to present evidence that Mr. Lemire was intoxicated and on pain pills during the night of the incident. This Court affirms its ruling for the reasons stated in the Order of Dismissal. Applicant argued that Counsel should have asked the police officer on cross-examination whether Mr. Lemire was intoxicated when they pulled the car over after incident. He argued that if Counsel had asked this to the officer and the officer said Mr. Lemire did not appear intoxicated, then the video could have been used to impeach him. This Court finds Counsel was not deficient for failing to explore Mr. Lemire's possible intoxication. Counsel testified that he could not recall whether Mr. Lemire was intoxicated. The trial record shows a complete lack of any indication that Mr. Lemire was intoxicated that night, including from Mr. Lemire's counsel, leading this Court to find that Counsel likely was never presented with the existence of this information from Mr. Lemire nor

was he aware that Mr. Lemire was intoxicated. This Court also finds that whether or not Mr. Lemire was intoxicated and therefore did not stay in the vehicle when instructed by Applicant would not exonerate Applicant and would not change the outcome of the trial. Such information would not negate any element of the crimes with which Applicant was charged. This Court denies Applicant's Motion on this ground.

Pop-A-Lock as a Cash Business

This Court finds that Counsel was not ineffective for failing to request from Applicant evidence of cash transactions received at calls to unlock vehicles. This Court affirms its ruling for the reasons stated in the Order of Dismissal. This Court continues to find that utilizing Pop-A-Lock's records showing that the company does business in cash would not change the outcome of the trial. Refuting Mr. Lochbaum's statement with actual records, as opposed to refuting it by testimony, would not exonerate Applicant or call for a new trial.

Most importantly, Counsel did elicit testimony from Mrs. Larmand, the owner of the Pop-A-Lock franchise, where she said that the workers who are on call for her company do accept cash. Counsel asked her:

> Counsel: Do y'all accept cash, credit card or checks?
> Mrs. Larmand: Yes.
> Counsel: Any of the above?
> Mrs. Larmand: Any of the above, yes.
> Counsel: At Pop-A-Lock, that's the way y'all do it. Right?
> Mrs. Larmand: Yes.

Trial Transcript 326, l. 24 - 327, l. 4. This Court finds that such testimony, coming from the owner of the franchise herself, effectively refuted Mr. Lochbaum's statement. This Court finds that the outcome of the trial would not have been different had Counsel entered the specific

business records because Counsel presented the exact same information through the owner of the business. This Court denies Applicant's Motion on this ground.

Inference Charge

This Court finds that Counsel was not ineffective for failing to preserve for appellate review the issue of whether the inference charge was a charge on the facts. The language at issue is "it is permissible to infer that all persons present as members of a mob when an act of violence is committed have aided and abetted the crime and are actually guilty as principals." Transcript 567. This Court affirms its ruling for the reasons stated in the Order of Dismissal.

This Court has considered the holdings in *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Atlanta & Air Line Ry.*, 87 S.C. 190, 69 S.E. 208 (1910) and finds those civil cases involved jury instructions relieving the plaintiff of having to prove negligence or to infer consent and are inapposite. This criminal case involves a statutorily-created permissive inference that, in turn, requires the jury to make additional findings before it may make an inference, if it ever does, as properly recognized by the Court of Appeals. Further, S.C. Const. art. V, § 21 provides that "Judges shall not charge juries in respect to matters of fact, but shall declare the law." The charge at issue is one on the law.

This Court finds that the permissive inference contained in the lynching statute which was read during the jury charge is not unconstitutional. An instruction is unconstitutional only if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Francis v.*

Franklin, 471 U.S. 307, 314, 105 S. Ct. 1965, 1971, 85 L. Ed. 2d 344 (1985). "[Mandatory] presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense." *Id.* "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved...A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.* (internal citations omitted). Here, the jury instruction based on the statute did not create a mandatory presumption but created a permissible inference. This permissible inference is not unconstitutional and does not require jurors to reach a certain conclusion. It does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved, such as the facts of whether someone was a member of a mob and was present as a member of the mob when an act of violence was committed.

Most importantly, even though the issue of whether the charge was tantamount to a charge on the facts was not preserved in Lemire's direct appeal opinion, the Court of Appeals still analyzed the jury charge at issue and found "the jury charge on inference was a correct interpretation of the applicable statute in effect at the time of the incident and trial." *State v. Lemire*, 406 S.C. 558, 573, 753 S.E.2d 247, 255-56 (Ct. App. 2013). This opinion was cited in Applicant's appeal and remains the law of the case. This Court agrees with the Court of Appeals and finds that the jury instructions adequately covered the law and did not improperly relieve the State of its burden of persuasion on an element of lynching. Because the jury instructions were not unconstitutional, this Court finds that Counsel was not ineffective for failing to preserve for

appeal whether the instruction was a charge on the facts. This Court denies Applicant's Motion on this ground.

Double Jeopardy

This Court finds that Counsel was not ineffective for failing to raise a double jeopardy argument for a conviction of both second-degree lynching and conspiracy. This Court affirms its ruling for the reasons stated in the Order of Dismissal. This Court again finds that although the words "double jeopardy" were not used, Counsel did make the appropriate motion that the State and trial judge appeared to understand to be a double jeopardy motion, as Counsel argued that the State must choose between proceeding on a lynching charge or a conspiracy charge because of the agreement required in lynching. Counsel stated:

> Thank you, Your Honor. Your Honor, on the indictment against Mr. Larmand for criminal conspiracy it states for the purpose of committing the crime of lynching and/or pointing or presenting a firearm.
>
> Your Honor, I would submit at this juncture that the State needs to make an election between those two matters. Lynching in and of itself under the statute requires a conspiracy or a tacit agreement, premeditated agreement between the parties to engage in lynching.

Trial Transcript, p. 300, ll. 14-22.

The trial judge overruled this objection. Thus, as Counsel did make this motion and it was ruled upon by the trial court, Counsel was not ineffective and relief on this ground is denied.

Regardless, this Court finds that the two charges are not similar so as to violate double jeopardy. This Court has examined *Rutledge v. United States*, 517 U.S. 292 (1996) and finds it is not applicable to Applicant's case. The United States Supreme Court in *Rutledge* found that the double jeopardy clause was violated when a defendant was convicted of the federal charge of conspiracy (21 U.S.C. § 846) and the federal charge of continuing criminal enterprise (21 U.S.C.

§ 848) because continuing criminal enterprise "requires proof of a conspiracy that would also violate § 846." *Rutledge*, 517 U.S. at 300.

In this case, Applicant was properly tried for conspiracy and second-degree lynching. Pursuant to S.C. Code § 16-17-410, conspiracy is defined as a "[c]ombination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." "The gravamen or gist of the offense of conspiracy is the **agreement.**" *State v. Harris*, 342 S.C. 191, 198, 535 S.E.2d 652, 655 (Ct. App. 2000), aff'd, 351 S.C. 643, 572 S.E.2d 267 (2002) (emphasis added). Second-degree lynching, on the other hand, is defined as "[a]ny act of violence inflicted by a mob upon the body of another person and from which death does not result." S.C. Code § 16-3-220 (since repealed). A "mob" is defined "as the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." S.C. Code § 16-3-230 (since repealed).

This Court finds that the main difference between proving conspiracy and second-degree lynching is the "agreement" required to prove conspiracy that is not required to prove second-degree lynching. To prove Applicant committed second-degree lynching in this case, the State only had to prove that Applicant and Mr. Lemire both committed an act of violence on the victim while they both had the intent – not mutual or agreed-upon intent – to commit an act of violence on the victim. Simply put, the "assemblage" in second-degree lynching is not a combined "agreement" as required in a conspiracy. Second-degree lynching requires the members of the mob to have the "premeditated purpose and the premeditated intent of committing an act of violence on another," but does not require an "agreement" between the two members as is required to prove a conspiracy. Each member of the mob can have his own individual intent,

independent from the intent of the other members of the mob when the acts of violence are committed. The intent can be mutual, but this is not a requirement to prove second-degree lynching.

A demonstrative example of this can be shown using the following scenario: Two defendants approach the victim, but the two had not made any agreement with each other about what either person intended to do once they reached the victim. One defendant confronts the victim and gets in an altercation with victim for messing with his company. The other defendant then approaches the altercation and commits an act of violence on the victim for messing with his family. In this scenario, both defendants have committed second-degree lynching because each person committed an act of violence on the victim and as an assemblage of two people and each had their own premeditated purpose and intent of doing so – even though neither individual had formed an agreement with the other about hurting the victim. Both defendants in this scenario have not committed conspiracy because no combination or agreement had been made between the two to commit this act of violence.

In this case, the State presented evidence that Applicant and Mr. Lemire both committed an act of violence on the victim while they both had the intent to commit an act of violence on the victim, and also presented evidence that Applicant and Mr. Lemire had conspired to commit second-degree lynching. The jury could find Applicant guilty or not guilty of either crime or both crimes. In summary, for double jeopardy purposes the United States Supreme Court has held "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). Conspiracy requires proof of an agreement between two or more persons that second-degree lynching does not require. Second-

degree lynching requires proof of an act of violence that conspiracy does not require. (See also *State v. Gosnell*, 341 S.C. 627, 636, 535 S.E.2d 453, 458 (Ct. App. 2000) ("The overt acts committed in furtherance of the conspiracy are not elements of the crime. Under South Carolina law, a conspiracy does not require overt acts.") For these reasons, this Court denies Applicant's motion and finds that no double jeopardy violation occurred when Applicant was found guilty of conspiracy and second-degree lynching. This Court denies Applicant's Motion on this ground.

Self-Defense Charge

Applicant alleged Counsel was ineffective for failing to object to an improper jury charge on self-defense. This Court affirms its ruling for the reasons stated in the Order of Dismissal. Counsel was not deficient for failing to object to the jury charge because the charge was not improper. The fact that the trial court did not charge that the State has the burden of disproving self-defense does not make the charge improper. This Court reiterates its holding that the trial court's obligation to inform a jury that the State has the burden of disproving self-defense only arises when trial counsel requests the instruction. See *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002). (holding when self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt).

This Court again finds that Counsel was not deficient for failing to request the specific jury charge because he provided credible testimony at the PCR hearing that it was not his defense strategy or his defense theory to argue that Applicant acted in self-defense. Counsel specifically testified that Applicant was not acting in self-defense. He testified that his entire defense theory, as evidenced throughout the trial record, rested on the theory that Applicant had no premeditated agreement with Mr. Lemire to commit the crimes alleged. This Court finds it

was not unreasonable for Counsel to fail to ask for this specific self-defense language when he was not pursuing that defense theory. The record further reflects that during the jury charge conference, the only discussion of self-defense was from Mr. Lemire's counsel arguing that Mr. Lemire acted in self-defense or defense of Applicant. This Court denies Applicant's Motion on this ground.

IT IS THEREFORE ORDERED THAT:

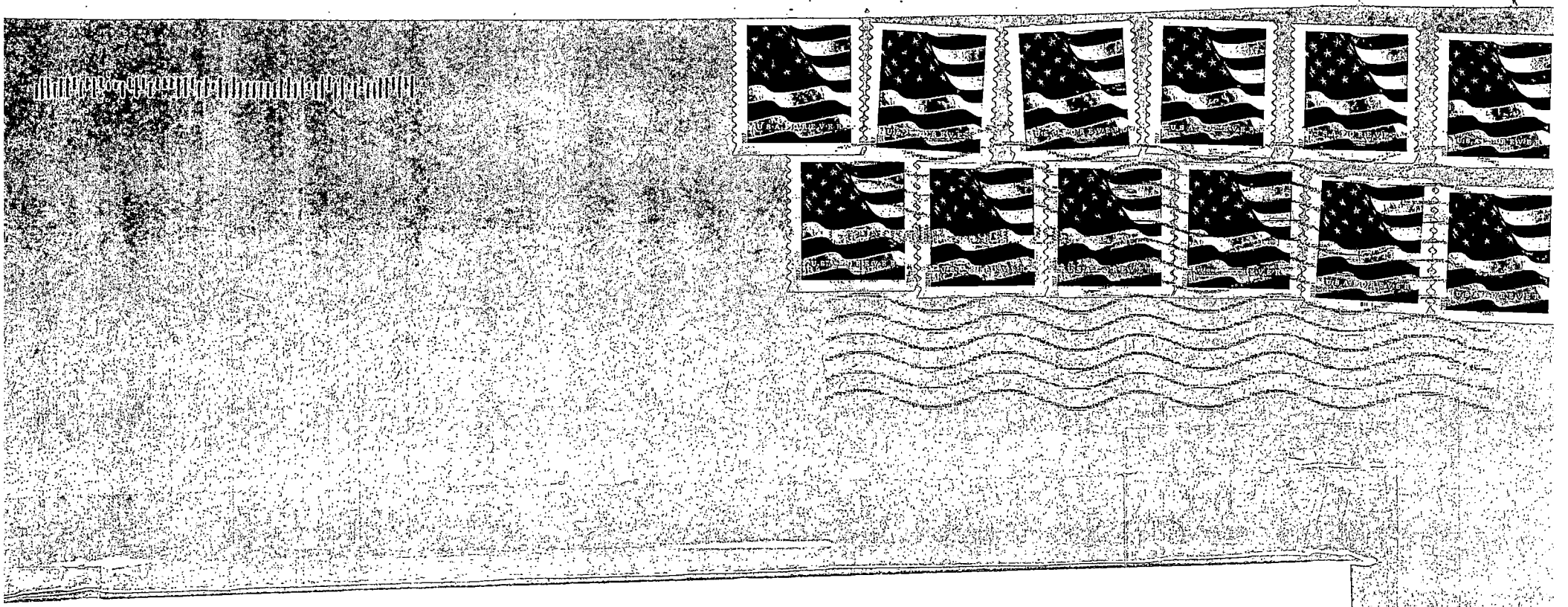
1. Applicant's Rule 59 Motion to Alter or Amend Judgment is denied; and

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5th day of January, 2018.

R. LAWTON MCINTOSH
Presiding Judge
~~Sixteenth~~ Tenth Judicial Circuit

Anderson, South Carolina



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