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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-000157
Lower Case No. 2017-CP-46-00689

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

vs.

The State ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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Question IV: Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective in his failure to Request a Charge on Circumstantial Evidence when the entire case of the State was based on circumstantial evidence?

Statement of the Case

Procedural History

Frank Larmand was arrested on May 1, 2009.[1] The grand jury for York County indicted him on July 16, 2009 for the charges of lynching second degree, conspiracy, and presenting and pointing a firearm. He was tried before the Honorable William H. Seals, Jr. on a jury on October 20-24, 2009. He, along with his co-defendant, was convicted on all charges. He was sentenced to ten years in prison on the lynching charge. He was given concurrent five year sentences on the charge of conspiracy and presenting and pointing a firearm.

A notice of intent to appeal was filed on October 28, 2009. The South Carolina Court of Appeals reversed his conviction on March 13, 2013, finding that the facts were not sufficient to convict. The South Carolina Supreme Court granted the Petition for Writ of Certiorari filed by the State.

By Order dated December 23, 2015, the South Carolina Supreme Court reversed the Opinion of the Court of Appeal and remanded the case back to the Court of Appeals for consideration of the issues not addressed in the original Opinion. On July 20, 2016, the South Carolina Court of Appeals affirmed the conviction of Mr. Larmand.

Mr. Larmand filed his initial Post Conviction Relief petition on March 6, 2017. An Amended Petition was filed on August 3, 2017, the day of the hearing. The hearing was held before the Honorable R. Lawton McIntosh. In his Order dated September 13, 2017, and filed October 6, 2017, Judge McIntosh denied the Petition. Mr. Larmand filed a Motion to Alter or

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[1] He was originally arrested for lynching second degree, conspiracy, and assault with intent to kill.

Amend the Judgment on October 19, 2017. This Motion was denied by Order dated January 11, 2018. Mr. Larmand filed his Notice of Appeal on January 31, 2018.

Factual History

Kerriann Larmand, the wife of the Defendant Frank Larmand, owned and operated a business in the Charlotte area known as Pop-A-Lock. The business was a basic locksmith business. As part of a franchise operation, the business would also respond to calls to open car doors and other emergency calls. App. at 426 ll 5-9. Mrs. Larmand had reason to believe that someone in the company was stealing calls when a cash customer called for services such as a request to unlock an automobile. As a result, she, with the assistance of her husband, set up a call for service in an attempt to determine who was stealing the calls from her company. App. at 428, ll 12-25 to 429, ll 1-23.

As part of the mystery call, Frank Larmand was to go to the Knights Stadium outside of Charlotte. There he would wait and see who came in response to the mystery call. Prior to leaving Kanapolis, NC, where he lived, he met his brother-in-law, Leo Lemire. He requested Mr. Lemire to join him as another person was needed to receive the call as Mr. Lemire's voice would not be recognized by any employee or former employee of Pop-A-Lock who may be involved. App. at 474, ll 20-475, ll 1-12. Mr. Larmand went to Knights Stadium, and his wife placed the call requesting assistance in unlocking an automobile. The call was placed at 10:14 pm. App. at 431, ll 10-22. Mike Taylor, who at the time was employed by Pop-A-Lock, received the call at 10:18 pm. App. at 431 ll 23-25. Mr. Taylor called Ryan Lochbaum, a former employee who was terminated in October of 2008, at about 10:43. App. at 277, ll 6-8. Mr. Lochbaum testified that Mr. Taylor was simply asking him for directions to Knight Stadium. He had previously told

officers involved in the case that Mr. Larmand and Mr. Lemire were trying to lure him out to Knight Stadium that evening. App. at 275, ll 5-11.[2] Mr. Lochbaum's claim that he was being "lured" to Knights Stadium is puzzling. If he was not attempting to steal calls from Pop-A-Lock, then he could not be lured to Knight's Stadium by a service call to Pop-A-Lock. When questioned by the officers about the alleged luring to Knight's Stadium, Mr. Lochbaum responded, "Because Mrs. Larmand overheard me talking to the detectives at the bond hearing. Because they asked me specifically who gave me that information, and I told them if I told you that would leave me to be tried." App. at 279, ll 16-19.[3] As he had been terminated several months before, Mr. Lochbaum had no legitimate reason to be responding to a call for Pop-A-Lock. Mr. Lochbaum had also been denied unemployment benefits because of his misconduct while employed by Pop-A-Lock. This upset Mr. Lochbaum. App. at 268, ll 3-15.

After no one from Pop-A-Lock, or anyone trying to steal the service call, came to Knights Stadium, Mr. Larmand decided to go by the residence of Mr. Lochbaum. He went for the purpose of seeing if any employees of Pop-A-Lock were there and to determine if a red car with a Pop-A-Lock sign was at the residence. App. at 480, ll 1- 12. Mrs. Larmand had received reports of a red car with a Pop-A-Lock sign being seen in the Charlotte area. App. at 443, ll 17-25. When Mr. Larmand drove by Mr. Lochbaum's residence, he noticed several people gathered around a van but did not see a red car. He parked his truck past the house and instructed Mr. Lemire to remain in the truck. on App. at 481, ll 12-16. He then walked to the residence of Mr.

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[2] If the plan was to lure Mr. Lochbaum to a secluded area of Knights's Stadium, the new plan to lure him to a better lighted area in front of friends does not make much logical sense.

[3] This statement implies that Mr. Lochbaum had something to hide by being truthful to the officers.

Lochbaum. He stood in the street near the rear of the van for a short period of time until someone acknowledged his presence. He stated that he wished to speak to Mr. Lochbaum. A person notified Mr. Lochbaum that someone was there to see him. App. at 483, ll 12-20. Mr. Lochbaum then asked the others present to leave as he wanted to talk to Mr. Larmand in private. App. at 173, ll 10-14. Mr. Larmand and Mr. Lochbaum then moved slightly down the street in the direction of the houses where his neighbors lived. App. at 181, ll 1-9; 211, ll 1-3; 251, ll 7-9.

Mr. Lochbaum's house is the last house before a large area of empty lots.[4] The area was lit with a street light, the porch light of Mr. Lochbaum's residence and the open door from the garage of Mr. Lochbaum. App. at 342, ll 4-9, 201, ll 10-15. At least three other people were present when Mr. Lochbaum asked to speak to Mr. Larmand in private. App. at 169, ll 21-25 to 170, ll 1-4. The van was pointed into the driveway. Mr. Lochbaum and Mr. Larmand met on the right side of the van. They never moved together toward the left side of the van and the empty lots. App. at 251, ll 7-9. The entire incident occurred near the property line between Mr. Lochbaum's house and Mr. Jesse Harris' house. App. at 211, ll 1-3. This area was better lit than the side of the van toward the empty lots.

At no time did Mr. Larmand strike, hit or threaten to inflict harm upon Mr. Lochbaum or encourage Mr. Lemire to inflict any harm. App. at 263, ll 12-18; 252, ll 18-19; 288, ll 12-14; 289, ll 5-13. After Mr. Lochbaum and Mr. Larmand had spoken for a brief time, Mr. Lemire, who had left the truck after Mr. Larmand left, came at Mr. Lochbaum with a pistol. App. at 251, ll 14-22. Mr. Lochbaum turned to confront Mr. Lemire and grabbed the pistol. In the struggle

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[4] The house and the empty lots beside it can be seen on the Google Earth view for April 10, 2010. This is the date closest to the date of the incident. Visited by this writer on August 9, 2014. This view is virtually identical to the exhibit introduced by the State.

they both fell to the ground. At that point, the neighbors who were with Mr. Lochbaum earlier came and helped subdue Mr. Lemire.[5] When the two fell to the ground, Mr. Lochbaum testified that Mr. Larmand tried to pull him off of Mr. Lemire. App. at 252, ll 18-24. Mr. Lochbaum was successful in obtaining the pistol from Mr. Lemire. At that point, the struggle ended and Mr. Larmand and Mr. Lemire left the area. App. at 255, ll 4-14. Mr. Lochbaum received only a very minor scratch to his hand. App. at 260, ll 16-22.

After leaving the scene Mr. Larmand was stopped by William Watson of the Rock Hill Police Department. Mr. Lemire was arrested that night for presenting and pointing a firearm. Mr. Larmand was briefly questioned and released. App. at 160, ll 1-16. Mr. Larmand was arrested the next day when he came to arrange bail for Mr. Lemire.

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[5] The neighbors testimony was frequently somewhat contradictory. For example, Ronald Lee testified he was with everyone else "a couple of hundred feet" away when the scuffle began. App. at 236, ll 11-14. Mark Whittington testified the distance was about 1,000 feet. App. at 204, ll 11-12. Either way, there was sufficient light for them to see what was happening from either distance.

Question I

Did the Post Conviction Relief judge err in failing to find trial counsel was not ineffective in his failing to properly prepare for trial when the additional evidence would have undermined the theory of the State's case?

In the first issue, Mr. Larmand alleges contends that trial counsel failed to properly prepare for trial. Trial counsel did not properly introduce evidence of the physical condition of Mr. Lemire to refute the State's theory that he and Mr. Larmand had a plan to attack Mr. Lochbaum. The State's theory, albeit established with circumstantial evidence, is that Mr. Larmand and Mr. Lemire planned to attack Mr. Lochbaum either at Knight's Stadium or his residence.[6] Part of the alleged plan, according to the State, was to park the automobile some distance away in order to arrive undetected. Of course, parking the automobile some distance away would necessitate both of the men being able to make a quick retreat to the automobile in the event any problems arose, such as others being present. The testimony from the witnesses was that both Mr. Larmand and Mr. Lemire ran from the scene after the firearm was taken from Mr. Lemire.

At the trial below, Mr. Lemire did testify about his physical condition.[7] App. at 551, l 20 to 552, l 18. The issue was important enough to defense counsel that he attempted to introduce

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[6] At the trial the testimony established that Mr. Lochbaum had previously told officers involved in the case that Mr. Larmand and Mr. Lemire were trying to lure him out to Knight Stadium that evening. App. at 275, ll 5-11. He would have no reason to know or believe that Mr. Larmand and Mr. Lermire had even been to Knights Stadium that night.

[7] Mr. Lermire was called as a witness by counsel for Mr. Larmand. App. at 548 ll 12-13.

the booking report. App. at 552, l 19 to 553, l 9. He placed emphasis on his condition in his closing argument. App. at 616, ll 21-25. However, while other witness were asked about Mr. Lemire's condition, they were all related to Mr. Larmand and the jury could perceive this being biased. No medical doctors testified nor medical records submitted to support his condition. All this information was readily available. Trial counsel testified Mr. Lemire's attorney had obtained the medical records prior to trial.

At the Post Conviction Relief hearing counsel presented numerous medical records detailing Mr. Lemire's medical history. This testimony was also confirmed by Mr. Lemire's sister who testified at the trial, but was not asked at the trial about Mr. Lemire's medical condition. While the jury could observe Mr. Lemire at the trial, this observation was some five months after the incident. The medical history of Mr. Lemire certainly makes the fact that there was a planned attack on Mr. Lochbaum less likely. Under Rule 401 of the South Carolina Rules of Evidence, this medical evidence was certainly relevant and admissible evidence.

Testimony was presented at the Post Conviction Relief hearing that Mr. Larmand frequently wore all black or clothing that was black except for a logo. Kerriann Larmand, the wife of Mr. Larmand, presented pictures that went back several years in which Mr. Larmand was dressed in black. The uniform of the company he owned was black with a logo. App. at __(35, l 20 to 37, l 34. No such testimony was presented at the trial. The State exploited the fact that Mr. Larmand and Mr. Lemire wore black. The South Carolina Supreme Court in reversing the Court of Appeals, made reference to the fact that both were wearing black. "Specifically, the State demonstrated: . . . . (3) Respondent and Lemire wore all-black clothing;" *State v. Larmand*, 415 S.C. 23, 31–32, 780 S.E.2d 892, 896 (2015), reh'g granted (Dec. 23, 2015), reh'g denied (Feb. 11,

2016) The testimony at the Post Conviction relief hearing was relevant because it made the fact that they were both wearing black, as they normally do, less relevant.

Mr. Larmand also presented evidence at the PCR hearing that Mr. Lemire was very intoxicated on the night of this incident. The video of the scene is substantial evidence that Mr. Lemire was intoxicated. When Mr. Lemire is talking to the officer he admits to having 6 to 8 beers. Pet. Ex 9.(Video at scene at 20:38). The officer also commented on Mr. Lemire's drinking. Pet. Ex. 9 (Video at scene at 29:32). This testimony would have easily explained to a jury why Mr. Lemire did not stay in the car as Mr. Larmand stated he instructed him to do. At the PCR hearing, no valid explanation was given for the failure to introduce this relevant testimony. While the video at trial was excluded as evidence, such a ruling would not have prevented the video from being used for impeachment purposes if the need arose. Trial counsel could have asked the officer about Mr. Lemire's condition and Mr. Lemire himself. If they admitted what was on the video, obviously the video would not be needed. If either denied it, then they could have been impeached by that video. The video is simply proof of Mr. Lemire's intoxicated condition.

The Petitioner further established at the hearing, through documents and testimony, that Pop-A-Lock did a substantial cash business. Mr. Lochbaum had testified at the trial the company did not do much cash business, and therefore, there would have been no reason for a person to steal a call. Tr. at 170, ll 11-20. Mrs. Larmand testified that this information could have been obtained overnight if so requested. The document produced at the PCR hearing certainly established that a substantial amount of cash is involved in the business. Unchallenged, the testimony of Mr. Lochbaum has credibility. Testimony from a former employee of the company

also established that the company had a policy of conducting on occasions a mystery caller program to determine if calls are being intercepted. He also verified called were made in South Carolina. This evidence would have seriously undercut Mr. Lochbaum's testimony that he would have had no reason to intercept a Pop-A-Lock call.

Having established that counsel was ineffective in failing to produce this relevant evidence, the Post Conviction Relief judge erred in finding the failure to produce this evidence was not prejudicial. This was a close case. Nine judges of our Court of Appeals, honestly trying to seek justice, determined that the facts were not sufficient to convict. Five justices of our Supreme Court, also honestly trying to seek justice, determined the facts were sufficient to convict. This Court even said concerning the evidence presented by the defense "Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations." *Id* 32, 780 S.E.2d at 896.[8]

The numerous questions from the jury also showed the jury struggled with the facts. At one point they asked if they could find one guilty and the other not guilty. App. at 147 Court's Exhibit 1. They also very strangely announced at one point the had reached a verdict as to three charges but not as to the others. App. at 149 Court's exhibit 3. Obviously such a verdict is legally impossible. This confusion simply supports that the evidence was not overwhelming and any error could not have been harmless. As the United States Supreme Court has said:

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would

[8] The Court did not explain how a plausible explanation in a circumstantial evidence case does not mean that the State has failed to prove the case beyond a reasonable doubt.

> not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.
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> *Glasser v. United States*, 315 U.S. 60, 67 (1942).

This Court has said "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. 378, 385, 629 S.E.2d 353, 357 (2006), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *See, also Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). In the present case, the evidence is not left to speculation. Testimony and documents of what could have been produced were presented to the Post Conviction Relief judge. The PCR judge did not find the evidence was not credible or unbelievable. He simply concluded they would not have changed the outcome of the trial. This was error as a matter of law. Credible evidence of this nature could easily have changed the outcome of this close case.

The medical records introduced as exhibits are certainly compelling evidence that Mr. Lemire was not able to run or even be very mobile at the time of this incident. The assistant solicitor in her closing made an issue about Mr. Lemire not being as feeble as he claimed. App. at 564, ll 18-22. While the jury may be free to reject this new evidence, Mr. Larmand is entitled to have his attorney present all credible evidence to the jury. This evidence could have had a substantial affect on the outcome of the trial. The evidence would certainly help refute the closing argument of the Assistant Solicitor. This new evidence could easily have been the "slight impetus" which could have caused the jury to reach the opposite decision.

The evidence as to Mr. Larmand frequently wearing black also is evidence that could have been the "slight impetus" that could have tilted the scales. The testimony of Mrs. Larmand with

the pictures and exhibits established that wearing black would not have been unusual for Mr. Larmand. This evidence could have changed the result of the trial.

Also, the Petitioner did establish competent evidence that Mr. Lemire was very intoxicated on the evening of this incident. The failure to produce this testimony was prejudicial to Mr. Larmand. Mr. Larmand contended that Mr. Lemire appeared unexpectedly at the scene. The State contended that the entire event was preplanned. Mr. Lemire being intoxicated gives an explanation as to why Mr. Lemire did not remain in the automobile.

Testimony which contradicted Mr. Lochbaum's assertion that the company did little, if any, cash business would have impeached the testimony of Mr. Lochbaum and caused the jury to question the testimony of Mr. Lochbaum as to his being involved in stealing a call. It also gave credibility to the trial testimony of Mrs. Larmand as to the need of the company to do periodic mystery called programs to protect their business.

Question II

The Post Conviction Relief judge erred in failing to find trial counsel was ineffective in his failure to object to the inference charge on the lynching charge as being a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina.

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. The Court of Appeals declined to review this issue because it was not properly preserved. At the Post Conviction Relief hearing counsel submitted to the Post Conviction Relief judge two cases which hold that a charge to a jury citing an inference is an improper charge on the facts and is, therefore, unconstitutional under our State constitution.

Yarborough v. Southern Ry, 78 S.C. 103, 58 S.E. 936 (1907); *Atlanta & Air Line Ry.,* 87 S.C. 190, 69 S.E. 208 (1910). The lower Court Order dismissing the Petition does not mention either case.

These two cases hold that an inference charge is a violation of the State Constitution as a charge on the facts. Trial counsel did not mention either case to the trial judge. Nor did trial counsel even make a motion at trial pursuant to the specific South Carolina constitutional provision. Arguably, *State v. Adams,* 291 S.C. 132, 352 S.E.2d 483 (1987) is support for the proposition that an inference charge is proper. *Adams* cites neither of the two older cases mentioned here nor the constitutional provision cited here. In support of an inference charge *Adams* cited *State v. Hudson,* 277 S.C. 200, 284 S.E.2d 773 (1981). But *Hudson* does not support such a charge. All *Hudson* holds is that if a defendant is exercising dominion and control over the premises then the case should be submitted to the jury. This Court in *Hudson* said, "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge which may be sufficient to carry the case to the jury." *Id.* at 203, 284 S.E.2d at 775. This Court in *Hudson* made no reference to a jury charge. The opinion merely reflects the obvious - that a jury may infer possession from those facts. Thus, *Adams* is hardly strong support for the proposition that a jury can be told to infer anything from the State proving certain facts.

In the present case the inference charge comes from the statute.[9] Whether the inference is created by the legislature or the judiciary is of no importance. Neither branch of government can violate the Constitution of our State. The *Adams* decision is the more recent, but this Court

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[9] The statute has since been amended to eliminate this inference. *See* S.C. Code § 16-3-210.

should note the lack of analysis in the Opinion in reference to the older Opinions. In fact, the Opinion does not even discuss the constitutional issue. The two older Opinions are much more logical than the more recent Opinion. Those Opinions squarely address the issue of whether an inference charge is proper under the State Constitution. This Court should follow the established law that a charge on an inference is not proper and reverse the Order of the Post Conviction Relief judge and grant Mr. Larmand a new trial.

This is not the only aspect of this argument that this Court should consider. The charge in this case is hopelessly confusing. The trial court, in keeping with the Statute, said "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 principle . . . ." App. at 673, ll 5-8. The trial court defined "mob" as "an assemblage of two or more persons for the premeditated intent of committing an act of violence upon another person." App. at 673, ll 1-3. To tell a jury they may infer a member of the mob has aided and abetted the commission of the crime is confusing not only to lawyers and judges but to the jury. The use of "inference" adds nothing to the definition of "mob," except to confuse the jury. The jury had the right to assume a judge would not charge them a meaningless statement. In addition, the trial Court told the jury "If, then upon the whole case you have a reasonable doubt as to the guilt or innocence of the defendants they are entitled to that reasonable doubt." Tr. at 667, ll 9-11. But when the judge tells the jury from one fact they can infer guilt of both defendants, then the charge on inference becomes even more confusing. How can a jury equate an inference of guilt from one fact with an obligation to resolve all doubts in favor of the defendants? In addition, if one is a member of a mob there is nothing to infer. By definition they are guilty of lynching. When this inference

charge is given in conjunction with a "mere presence" charge, the confusion is even more apparent. As this Court has said " A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Here the ambiguity is such that this Court cannot say that the jury decided the facts of this case based upon a clear understanding of the relevant applicable law.

As noted earlier, this was a close case. The jury deliberated for approximately five hours and 20 minutes. The judge gave an "Allen" charge. App. at 672, l 18 to 674. The "slight impetus" needed to tilt the scales requires this issue be found to be prejudicial to the Petitioner. When a case is close, the prejudice to the Petitioner is easier to find. This Court should reverse the decision of the lower court and grant Mr. Larmand a new trial.

Question III

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective in his failure to raise double jeopardy argument as to the conviction for both conspiracy and lynching when both charges involved the same facts?

Mr. Larmand contends that trial counsel was ineffective in failing to raise a double jeopardy argument for a conviction of both lynching and conspiracy. Trial counsel testified that such an objection was not raised and he acknowledged that perhaps such an objection should have been raised. App. at 73, l 20 to 74, l 10. The lynching statute contains all the elements of a conspiracy. Each involve a preconceived plan to attack and inflict serious bodily harm on another. Under *Blockburger v. United States,* 284 U. S. 299 (1932) the conspiracy and the

lynching charges do not contain a fact that is not contained in the other.[10] *See, also, United States. v. Dixon*, 509 U.S. 688 (1993)(holding the same facts give rise to double jeopardy). This case is also controlled by *Rutledge v. United States*, 517 U.S. 292 (1996). The case involved a conviction for a Continuing Criminal Enterprise (CCE) and Conspiracy. The United States Supreme Court, in holding that the two convictions violated the Double jeopardy clause, said:

> In this case it is perfectly clear that the CCE offense requires proof of a number of elements that need not be established in a conspiracy case. The *Blockburger* test requires us to consider whether the converse is also true - whether the § 846 conspiracy offense requires proof of any element that is not a part of the CCE offense. *Id.* at 298.

The Court ruled that the "in concert" portion of the CCE offense was the same facts as the "conspiracy" portion of the conspiracy count. The Court then held the two convictions violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States of America. The Court focused upon the facts that were necessary to prove the elements of the crime and not what the elements had been named by Congress. The same is applicable to this case. While a conspiracy need not include a lynching, a lynching will always include the elements of a conspiracy. By definition, a lynching is a conspiracy to do harm. Simply put, one cannot conspire to commit lynching as a lynching is a conspiracy with an overt act. Trial counsel should have raised an objection to this double jeopardy violation.

Trial counsel was ineffective in failing to raise this issue. The question is was the Petitioner prejudiced? At first blush, as the sentences were to run concurrent, the Petitioner has

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[10] The Courts have frequently referred to *Blockburger* as being a "same elements" test. This is not correct. The word "element" in only contained in the opinion one time. The decision refers to each crime as containing a fact that the other does not.

suffered no prejudice. In *Rutledge* the United States Supreme Court had no problem finding a violation even though the sentences were to run concurrently, except for the $50.00 fine on each count which ran consecutively. In addition, this Court is not in a position to determine upon which charge the State would have preceded upon had the State been required to elect based on double jeopardy at the time of trial. That is the function of the Solicitor's Office. As the sole responsibility is upon the Solicitor's Office to decide which charges to prosecute, this Court should be required to find the Petitioner has been prejudiced and a new trial ordered.

Question IV

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective in his failure to Request a Charge on Circumstantial Evidence when the entire case of the State was based on circumstantial evidence?

Mr. Larmand has further argued trial counsel was ineffective in failing to ask for a jury charge as to circumstantial evidence. The case presented by the State was entirely circumstantial. Neither Mr. Larmand nor Mr. Lemire ever made any incriminating statements indicating that they planned to drive to the residence of Mr. Lochbaum and inflict serious bodily injury upon him. No third party ever testified that they heard of such plans.

As mentioned above, the facts in this case are very close as the leading jurist in our State disagree as to the conclusions to be drawn from the facts. If any case ever cried out to have a proper charge to the jury this is one. Trial counsel failed to request a simple circumstantial evidence charge that would have aided the jury in how to interpret the facts in a pure circumstantial evidence case. While the trial Court used the phrase "circumstantial evidence" on several occasions, the phrase was never defined for them. The Court did not even give the

charge that suspicious circumstances is not sufficient to convict. *State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009). As this Court has said:

> While direct and circumstantial evidence carry the same value, a jury cannot accurately analyze these two types of evidence using identical approaches.
>
> * * *
>
> Unlike direct evidence, evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence. . Analysis of circumstantial evidence is plainly a more intellectual process. " *State v. Logan,* 405 S.C. 83, 97-98, 747 S.E.2nd 444, 451 (2013)(internal citations omitted)

In this case the jury was never provided with any information as to how to consider circumstantial evidence. As noted above, they were never even told what circumstantial evidence is much less how to consider it or apply it. Trial counsel was ineffective when he failed to even ask for circumstantial evidence to be defined and how it is to be used by the jury. Even the most basic instruction would have been helpful to Mr. Larmand in this extremely close case. The failure to request a circumstantial evidence charge is prejudicial to Mr. Larmand. When the failure to request such a charge is coupled with the failure to present documents and testimony as to the Petitioner's physical condition, the intoxication of Mr. Lemire, the habit of wearing black, and the amount of cash transactions, which refuted the testimony of Mr. Lochbaum, the prejudiced is enhanced. The Petitioner is entitled to relief on this ground.

CONCLUSION

Based upon the above reasons, this Court should grant the Petition for Writ of Certiorari of Francis Larmand and reverse the Order of the lower court and grant Mr. Larmand a new trial in this matter.

July 31, 2018

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AUG 06 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-000157
Lower Case No. 2017-CP-46-00689

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

vs.

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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 Petitioner in the above entitled case. That on Aug 1, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Write of Certiorari and Appendix in the above case addressed to Janell Gregory, Office of the Attorney General, P.O. Box 115549, Columbia, SC, 29211.

Sandy Traynham

SWORN to and Subscribed
before me this 1st day
of August, 2018

(L.S.)
Notary Public for South Carolina
My Commission expires: 12/7/2019