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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.

APPENDIX
VOLUME III

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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

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEA
COUNTY OF YORK	)	
Francis Larmand, № 00337635	)	
	)	
Petitioner,	)	Rule 59
	)	Motion to Alter or Amend Judgment
-vs-	)	
	)	2017-CP-46-00689
The State,	)	
	)	
Respondent.	)	

Frances Larmand, through his undersigned attorney, hereby moves the Court to Alter or Amend the Judgment filed in this matter on October 6, 2017, based upon the following grounds:

1. The Court failed to consider that as this was a completely circumstantial evidence case the jury needed more guidance than to simply tell the jury a basic definition of circumstantial evidence. Neither this Court, nor trial counsel, ever explained how a basic circumstantial evidence charge would in fact have any potential to hard the case of the applicant. The Court failed to consider that 14 justices of the appellate courts of our State, reached contradictory results in this case and those justices, unlike the jury, were familiar with the basic definition of circumstantial evidence.

2. The Court failed to consider that the sole evidence of any medical problems of Leo Lemire came from Mr. Lemire. No other witness was asked about his medical condition. The medical reports together with the testimony of other family members would have conclusively established that Mr. Lemire had in fact had a serious back operation. The jury obviously rejected Mr. Lemire's testimony and any courtroom observations they may have seen. In fact, if the jury

believed, as they apparently did, he was faking his appearance in court, then the prejudice from trial counsel's failure produce medical evidence of the surgery is enhanced. They would have been highly unlikely to have rejected his testimony if the medical records had also been presented as well as the testimony of the doctor who performed the surgery.

3. The Court failed to consider that Leo Lemire's intoxication could have been explored, based upon the video, either through examination of Mr. Lemire or through the testimony of the original arresting officer. The purpose of the video was to show that there was credible testimony as to his intoxication that was given on the night of his arrest. If either the officer or Mr. Lemire had denied Mr. Lemire was intoxicated, then the video could have been used to impeach the testimony of each. The Court further erred in concluding that there was no error because the officer was not asked about the intoxication. The point of the video is to show that such testimony did in fact exist and that trial counsel was ineffective in failing to ask the officer on cross examination about the intoxication of Mr. Lemire. The intoxication of Mr. Lemire makes his failure to stay in the automobile as instructed by Mr. Larmand much more likely than if he were sober

4. The Court erred in finding that the failure to show the amount of cash the business did was not prejudicial. The Applicant has not argued that trial counsel should have anticipated the testimony of Ryan Lochbaum would be that Pop-A-Lock did not do substantial cash business. Trial counsel is not required to have anticipated that such an easily disprove false statement would come from Mr. Lochbaum. But once the false statement was made, trial counsel was under an obligation to refute the false statement. A simple request to the wife of the applicant to obtain the records would have proven the statement was false. As testified to at the hearing, the

records could easily have been obtained overnight and demonstrated that Mr. Lochbaum was not truthful.

5. The Court erred in failing to explain why *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) are not applicable to this case. Both cases unequivocally held that an inference charge is a charge on the facts and a violation of Article V, § 21 of the Constitution of the State of South Carolina. The cases were cited in the proposed order of the Applicant, but this Court did not cite the cases and therefore did not explain why those two cases are not applicable to this inference charge in this case. The Court also failed to recognize that *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009) was not decided on State Constitutional grounds and therefore has no application to the issues raised in this application. Simply citing the case at the trial did not preserve the constitutional issue for appellate review. The Court failed to consider that the South Caroline Court of Appeals in *State v. Lemire*, 406 S.C. 558, 573, 753 S.E.2d 247, 255 (Ct. App. 2013) said "As to Lemire's arguments that the charge was redundant, confusing, and tantamount to a charge on the facts, these concerns were neither raised to nor ruled upon by the trial court and are therefore not preserved for appeal." As the *Lemire* decision was used in the unpublished remand opinion in this case, the constitutional issue was not ruled upon by the Court of Appeals as it was not argued below. The issue is in fact before this Court in this application and must be ruled upon. The cases cited above show that charging an inference is in fact a charge on the facts in violation of our state constitution.

6. The Court erred in failing to recognize that by not asking that the charges be dismissed on double jeopardy grounds the issue of double jeopardy was not preserved for review by the

appellate courts. This Court should recognize that when the South Carolina Court of Appeals found the constitutional issues of a charge on the facts was not preserved, then the double jeopardy issue is not preserved as trial counsel never made reference to the constitutional provision. The Court should further reconsider this matter as the lynching statute is in fact simply a conspiracy to do an assault. The law does not require each person participating in the lynching to have actually acted to cause any injury. The crime of lynching occurs when there is an agreement to commit the assault and the assault by at least one person so agreeing occurs. The Court failed to recognize that this is simply the basic definition of a conspiracy. As under the facts of this case the crime of conspiracy does not require the proof of a different fact from the crime of lynching, then the two are in fact identical and therefore violates the double jeopardy provision of the state and federal constitutions.

The Court erred in citing *State v. Harden,* 360 S.C. 405, 602 S.E.2d 48 (2004) as the *Harden* case involved a substantive crime of distribution, which requires no conspiracy, and the additional charge of conspiracy. The substantives crimes of a conspiracy have long been held not to be subject to double jeopardy. This case is for all practical purpose the same as *Rutledge v. United States*, 517 U.S. 292 (1996) which this Court failed to distinguish or explain why it is not applicable to this cases. *Rutledge* involved a charge of Continuing Criminal Enterprise, which, as in this case, is a conspiracy and a general conspiracy charge. *Rutledge* stands for the proposition that the two crimes in this case violate double jeopardy. This Court has not explained why this case is not bound by the precedent established in the United States Supreme Court case.

7. As to the failure to request a proper self defense charge this Court correctly stated that a trial court is only required to charge the current and correct law of the State of South Carolina.

The Court, however, failed to explain or discuss the fact that at the time of this trial informing a jury that the state has the obligation to disprove self defense once it is raised was the correct and current law in the State of South Carolina. Had the jury understood that the State had the burden of disproving self defense, and they found the State had not disproved the self defense, then they would have been required to acquit all defendants. The failure to give a proper charge was error that was prejudicial to Mr. Larmand.

For the foregoing reasons, this Court should rehear this matter and enter an order granting the Post Conviction Relief petition of the Applicant.

October 16, 2017

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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
~~Thirteenth~~ TENTH Judicial Circuit

Anderson, South Carolina

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

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