STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-000157

FRANCIS VICTOR LARMAND, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE ISSUES

I. Did the post-conviction relief court properly determine Counsel was not constitutionally ineffective in preparing Petitioner's case for trial because Counsel presented evidence on Petitioner's behalf that rebutted the State's circumstantial evidence and theory that he and Lemire premeditated an assault on Lochbaum?

II. Did the post-conviction relief court properly determine Counsel was not constitutionally ineffective for failing to object to the inference charge because the charge was clear, comprehensible and a proper statement of the law?

III. Did the post-conviction relief court properly determine Counsel was not constitutionally ineffective for failing to raise a double jeopardy argument for the conviction of both conspiracy and lynching because Counsel did object to the State going forward on both charges, but the trial court properly found Petitioner could be found guilty of both conspiracy and the substantive offense?

IV. Did the post-conviction relief court properly determine Counsel was not constitutionally ineffective for failing to request a jury charge on circumstantial evidence because Counsel made a strategic decision not to request such a charge as it could harm Petitioner?

STATEMENT OF THE CASE

Francis Larmand, Jr. (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Petitioner was indicted during the July 2009 term of the York County Grand Jury 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 Petitioner. Assistant Solicitors of the Sixteenth Circuit Solicitor's Office Erin Joyner and Jennifer Colton prosecuted the case. From October 20-22, 2009, Petitioner proceeded to trial before the Honorable William H. Seals, Jr. The jury found Petitioner guilty as indicted for second degree lynching, criminal conspiracy, and pointing and presenting a firearm. Judge Seals sentenced Petitioner 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.

Petitioner filed a timely notice of appeal. C. Rauch Wise, Esquire, and John D. Rhea, Esquire perfected the appeal. On appeal, Petitioner raised the following issues:

1. Did the trial court err in submitting his written charge to the jury when the jury had not requested it and after they had been deliberating for over three hours and forty minutes?
2. Did the trial court err in failing to direct a verdict on the charge of lynching second degree when the State failed to prove either defendant committed an act of violence upon the body of Ryan Lochbaum as alleged in the indictment and required by the statute?
3. Did the trial court err in failing to direct a verdict of not guilty on the charge of lynching second degree because the State failed to prove a premediated purpose or intent to commit an act of violence upon another person?
4. Did the trial court err in failing to direct on the charge of conspiracy on the ground that the State failed to prove any facts that would reasonably support an agreement between Frank Larmand and Leo Lemire to inflict an act of violence upon the person of Ryan Lochbaum or present or point a firearm at the person of Ryan Lochbaum?
5. Did the trial court err in failing to direct on the charge of presenting and pointing a firearm when the State has failed to prove a conspiracy and there was no other evidence sufficient to convict Frank Larmand for presenting and pointing a firearm?
6. Did the trial court err in charging the jury that they may infer that all persons present as members of a mob when an act of violence is committed are guilty as principles?

On March 13, 2013, the South Carolina Court of Appeals reversed Petitioner's convictions on all charges finding the trial court erred in not directing a verdict on the charge of conspiracy because the State failed to prove any facts that would reasonably support an agreement between Petitioner and Lemire to inflict an act of violence or point a firearm at Lochbaum. State v. Larmand, 402 S.C. 184, 739 S.E.2d 898 (Ct. App. 2013). The court of appeals declined to address Petitioner's remaining arguments because "these issues are dispositive of the appeal." Id. at 196.

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 stating the court of appeals should have "considered the evidence in light more favorable to the State, it instead primarily cited to [*Petitioner's*] and *Lemire's* testimony,

including their explanation of their actions." State v. Larmand, 415 S.C. 23, 780 S.E.2d 892 (2015) (emphasis in original). In its opinion, the Supreme Court held the court of appeals minimized the circumstantial evidence the State presented on Petitioner and Lemire's premeditation and proceeded to itemize the following thirteen instances of premeditation presented by the State:

> (1) Respondent and Lemire lived approximately one-and-a-half hours away from [the victim's] house; (2) [Petitioner] and Lemire arrived at [the victim's] neighborhood late at night, unannounced; (3) [Petitioner] and Lemire wore all-black clothing; (4) [Petitioner] and Lemire parked their vehicle over one-quarter mile away from [the victim's] house, facing the sole entrance and exit to the neighborhood, despite ample street parking near [the victim's] house; (5) [Petitioner] and Lemire approached [the victim's] house on foot, rather than conducting a 'drive by' to look for incriminiating evidence of [the victim's] involvement in the scheme to defraud Pop-A-Lock, such as the magnetic sign on [the victim's] vehicle; (6) [Petitioner] was 'edgy' and 'agitated' when he approached [the victim's] house, and stood and stared silently at [the victim] and his neighbors; (7) [Petitioner] broke off arguing with and pushing [the victim] to observe Lemire's approach from the adjoining vacant darkened lot; (8) Lemire approached [Petitioner] and [the victim] a mere one minute after Whittington, Fivecoat, and Lee departed, despite parking at least one-quarter mile away; (9) Lemire approached from a vacant darkened lot rather than from the lit street or sidewalk; (10) upon his approach, Lemire immediately pointed the gun at [the victim] and drew the hammer of the gun back; (11) Lemire told [the victim], 'This is what you get when you fuck with my family," and later during the altercation refused to let go of his gun because [the victim] was 'f'ing with [his] family;" (12) [Petitioner] never confronted Lemire or tried to get him to lower the weapon or return to their vehicle; (13) [Petitioner] and Lemire drove away together at a high rate of speed without illuminating their vehicle's headlights.

Id. at 31-32.

The Supreme Court then 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 made the additional findings on the two remaining issues as directed by the Supreme Court. The court of appeals found the trial court's submission of the written charge to the jury was not reversible error and

the trial court was proper in charging the jury it may infer all persons who were present as members of a mob when an act of violence was committed are guilty as principals. State v. Larmand, Op. No. 2016-UP-373, (Ct. App. filed July 20, 2016). Petitioner's convictions were affirmed by the court of appeals. Id. The remittitur was sent October 21, 2016.

Thereafter, Petitioner filed an application for post-conviction relief on March 8, 2017, 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.

Respondent made its Return on June 13, 2017. Petitioner, with Respondent's consent, filed an amended application on August 4, 2017 with the following allegations:

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.

On August 4, 2017, an evidentiary hearing was held before the Honorable R. Lawton McIntosh at the Moss Justice Center in York County. Petitioner was represented by C. Rauch Wise, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter. At the evidentiary hearing, Petitioner testified on his own behalf. Trial counsel John Rhea, Esquire, ("Counsel") also testified. By order filed October 6, 2017, Judge McIntosh denied Petitioner's application in its entirety. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

On April 30, 2009, Officer William Watson ("Officer Watson") of the Rock Hill Police Department responded to a call about a fight involving a gun in a near-by subdivision, with a BOLO for a dark SUV fleeing the scene. As he approached the subdivision, he saw a dark Toyota 4Runner traveling away from the subdivision at approximately sixty miles per hour in a twenty-five mile per hour zone, and he stopped it believing it could be the SUV in the BOLO. Petitioner was driving the vehicle, and Leo Lemire, Petitioner's co-defendant, was the passenger, and both were wearing dark shirts and dark pants. After talking to them, Officer Watson arrested Lemire for pointing and presenting a firearm, and allowed Petitioner to leave at that time. (App. 155-156.)

The victim, Ryan Lochbaum ("Lochbaum"), worked for Petitioner's business, Pop-A-Lock, until October, 2008, but only met Lemire once. Lochbaum never invited Petitioner or Lemire to his home in Rock Hill, and to his knowledge, neither individual had ever been there prior to the incident. (App. 244.)

On April 30, 2009, Lochbaum had a birthday party for his son, and that night he and some of his neighbors continued to socialize in his driveway. Around midnight, a neighbor, Mark Whittington ("Whittington"), told Lochbaum a man, subsequently identified as Petitioner, was standing in front of his home and wanted to talk to him. Lochbaum testified during the trial he was shocked to see Petitioner, and when he realized Petitioner was upset, he asked his neighbors for some privacy and they walked away. (App. 246.)

Lochbaum and Petitioner began having a heated discussion. At some point, Petitioner broke eye contact and looked off to the side. When Lochbaum looked in the same direction, he

saw Lemire approaching him at a fast pace, carrying a "very large handgun."[1] Lochbaum testified at trial Lemire got within fifteen feet of him, extended his arm, pointed the gun at him, stated "this is what you get when you f**k with my family," and cocked the gun. When Lemire got closer, Lochbaum grabbed the gun, and as they struggled on the ground for the gun, Petitioner put Lochbaum in a choke hold from behind. (App. 252-253.)

Lochbaum's neighbors ran back and tried to get Petitioner off Lochbaum and the gun away from Lemire. During the struggle with Lemire, Lochbaum sustained injuries to his knuckles and hands from being dragged across the pavement. Lochbaum and the neighbors eventually got the gun away from Lemire, and he and fled the scene. (App. 255.)

Whittington testified at trial he lived about five homes down from Lochbaum, and on the night of April 30, 2009, he, Ronald Edward Lee ("Edward"), and Michael Devin Fivecoat ("Fivecoat") were standing in the driveway of Lochbaum's home. Around midnight, he noticed a man he had never seen before standing in front of Lochbaum's driveway. He stated the man, identified during the trial as Petitioner, wore a black shirt and black pants, and appeared to be "kind of edgy." After Lochbaum and Petitioner started talking, Whittington, Edward, and Fivecoat walked down the street, but Whittington thought there might be trouble and observed Lochbaum and Petitioner from a distance because "[i]t's not normal for somebody to come up dressed in dark clothes in the middle of the night just to talk to somebody." (App. 174.)

As Lochbaum and Petitioner continued to talk, Whittington saw a second man, later identified as Lemire, suddenly emerge from the darkness and run toward Lochbaum with his hand up. Whittington, Fivecoat, and Edward immediately ran back to help Lochbaum, and saw Lochbaum trying to disarm Lemire. Whittington testified Lemire was on the ground, Lochbaum

[1] The gun was subsequently identified as a .45 caliber revolver.

was on top of Lemire, and Petitioner had Lochbaum in a choke hold. Whittington grabbed Petitioner around the waist, and pulled him off Lochbaum while the other men got the gun away from Lemire. Petitioner and Lemire then ran down the street and Whittington called the police as he chased them. Petitioner and Lemire sped away in their vehicle, which was parked about a half a mile down the road from Lochbaum's home. (App. 175-195.) Fivecoat and Edward also testified at trial and their testimony corroborated the testimony provided by Whittington and Lochbaum. (App. 326-334, 357-364.)

Jesse Harris ("Harris") testified at trial he lived next door to Lochbaum in April, 2009. Around midnight he looked out his window and saw Lochbaum arguing with a man he identified during the trial as Petitioner. After he saw Petitioner push Lochbaum, told his wife to call the police, and ran outside to help. By the time he got outside, the men were behind Lochbaum's van where he could not see them, but he heard a loud voice say, "this is what you get when you f**k with my family." When he got around the van, Harris realized a third person, identified as Lemire, was involved in the scuffle, and Petitioner had Lochbaum in a choke hold. Harris initially attempted to put Petitioner in a choke hold to get him off Lochbaum, but he let go when he realized a gun was involved. (App. 210-211.)

Harris testified Lemire held the gun around the handle and the trigger, and Lochbaum was trying to push the gun away. Harris saw the hammer was back on the gun, so he stuck a finger in between the hammer and the gun to prevent it from going off, and used the other hand to try to pull the gun away. He testified the hammer closed on his finger at some point, leaving a bruise or blister on his finger. When he demanded Lemire let go of the gun, Lemire repeatedly yelled, "f-you, he's f'ing with my family, he's f'ing with my family." The other neighbors arrived on scene, and Harris told Whittington to get Petitioner off of Lochbaum, who could not

breathe because of Petitioner's choke hold, was purple in the face, and appeared to be dying. He further testified Lemire did not let go of the gun until he kicked him twice in the groin. (App. 213- 218.)

Detective Leslie Herring ("Detective Herring") of the Rock Hill Police Department talked to Lochbaum during the course of his investigation. Louchbaum told him he thought Petitioner had tried to set him up to go to Knights Stadium. As a result of his investigation, he issued additional warrants against Lemire, and issued warrants against Petitioner. Herring testified Petitioner's hometown of Kannapolis, North Carolina, is at least an hour drive away from Rock Hill. (App. 391-394).

After the State rested, Petitioner moved for a directed verdict on the charge of pointing and presenting a firearm and second degree lynching. The circuit court denied Petitioner's motion on the firearm charge because the acts and declarations of any conspirator in furtherance of the conspiracy are deemed to be the acts and declarations of every other conspirator. (App. 402-407.) The circuit court also denied Petitioner's second motion stating, "[c]learly this is an issue for the jury to consider." (App. 407-412.)

Kerriann Larmand ("Kerriann"), Petitioner's wife, testified at trial Pop-A-Lock employed Lochbaum for almost three years before she fired him in October, 2008. On April 30, 2009, she set up a "mystery shopper call," a technique used to catch individuals who try to illegally intercept their customers before their authorized employee can respond to a call. Her records indicated Pop-A-Lock received a call requesting assistance at Knights Stadium at 10:14 p.m. that night, and one of her employees, Mike Taylor, accepted the job at 10:18 p.m., and then called Lochbaum at 10:40 p.m. Petitioner and Lemire waited at Knights Stadium, but neither Mike Taylor nor Lochbaum showed up at the stadium. (App. 427-435.)

Petitioner testified at trial he sometimes helped his wife with the Pop-A-Lock business, and around the time of this incident, there were concerns about non-employees intercepting Pop-A-Lock calls and taking their business before they could respond, and with non-employees using Pop-A-Lock magnets on their cars to take their business. (App. 473.) He stated he asked Lemire to accompany him on the sting that night, but he did not know Lemire had a gun with him, and they never conspired or agreed to do anything to Lochbaum. (App. 480-481.)

When no one responded to the mystery call at Knights Stadium, Petitioner decided to drive to Lochbaum's home in Rock Hill to see if any Pop-A-Lock employees, or a vehicle with a Pop-A-Lock magnet on it, were there, so he called his wife to get the address and directions. He then drove approximately twenty-five minutes to Lochbaum's home, and saw three men standing outside Lochbaum's van in the driveway. He did not see any Pop-A-Lock employees or magnets on cars at Lochbaum's home, but drove past Lochbaum's home and parked up the street, out of sight. He stated he told Lemire he wanted to talk to Lochbaum, and to stay in the truck. (App. 479-482).

Petitioner testified he and Lochbaum exchanged words, and he was walking back to his vehicle when he heard Lemire say, "don't f**k with my family." He saw Lemire and Lochbaum struggling for the gun, and the neighbors running back. He stated he jumped into the pile because there were two guys on Lemire, and he put one hand on the gun to make sure the barrel faced across the street, and one arm around Lochbaum to try and pull him off Lemire. (App. 488-489.) Petitioner stated he helped Lemire up when the struggle was over, they walked back to their vehicle, and drove away. (App. 492.)

On cross-examination, Petitioner again admitted he did not see any Pop-A-Lock magnets and could not identify any Pop-A-Lock employees at Lochbaum's home when he drove by. He

said he wanted to talk with Lochbaum anyway, and parked down the street because he did not want Lemire to get involved. He admitted he walked up and immediately accused Lochbaum of misconduct in front of the group of people there, but stated he never heard or saw Lemire coming behind him. (App. 504 -506.)

Lemire testified Petitioner asked him to help him with a "sting" at Knights Stadium. He had the gun on him at the time, and put it under the seat in Petitioner's vehicle, but said he never told Petitioner he had it. He testified they only talked about family on the way to South Carolina, and never discussed Lochbaum. (App. 550-558.) When they left the parking lot, he agreed to go with Petitioner to Lochbaum's home to see if there were any Pop-A-Lock signs on any car at Lochbaum's home, or if any Pop-A-Lock employees were there, and he stayed in the vehicle when Petitioner went to talk to Lochbaum. He said he heard a loud voice that was not Petitioner's and some swearing, so he grabbed his gun and walked toward the home. (App. 564-570.)

As Lemire approached the home, he saw Petitioner walking up the street toward the vehicle, with Lochbaum walking behind him. He testified he then saw people running up behind Lochbaum and Petitioner from the yard, so he walked up, told Lochbaum "don't F with my family," and held the gun up in the air. He claimed he never pointed the gun at Lochbaum, except maybe when he was raising it up in the air. (App. 572-574.)

After the defense rested, Petitioner renewed his previous motion for a directed verdict, which the circuit court again denied. Lemire did not move for a directed verdict. (App. 621.) The jury convicted Petitioner and Lemire on all charges, and after the jury rendered its verdict, Petitioner asked the court to set the verdict aside based on jury charge issues raised during trial. The circuit court denied the motion, and sentenced Petitioner and Lemire to ten years

incarceration on the second degree lynching conviction, with five year concurrent terms on the criminal conspiracy and firearm convictions. (App. 701-707.)

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. 174, 810 S.E.2d 836. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe,

372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption 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. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The post-conviction relief court properly determined Counsel was not constitutionally ineffective in preparing Petitioner's case for trial because Counsel presented evidence on Petitioner's behalf that rebutted the State's circumstantial evidence and theory that he and Lemire premeditated an assault on Lochbaum.

Petitioner asserts Counsel was ineffective in preparing his case for trial, however, Counsel presented evidence to the trial court on Lemire's medical history relating to his back, the frequency Petitioner dressed in all black, the intoxication of Lemire on the night of the incident, and that Pop-A-Lock was a cash business. The evidence presented by Counsel during their case-in-chief provided the jury with a reasonable explanation for the circumstantial evidence presented by the State, thus rebutting their theory the incident was a premeditated attack, and further showed Lemire was not capable of a physical altercation due to his medical issues. Petitioner has failed to show how Counsel was deficient or how he was prejudiced by Counsel's representation as Counsel presented evidence to the jury on his behalf that mitigated the State's case. The post-conviction relief court properly found Counsel was not ineffective in his representation for the reasons set forth below and this Court should deny certiorari.

A. Lemire's Medical Issues

Petitioner asserts Counsel failed to properly prepare for trial because Counsel did not introduce medical records relating to back issues Lemire suffered from at the time of the incident However, the post-conviction relief court properly found Petitioner failed to establish any constitutional ineffectiveness of Counsel for failing to introduce Lemire's medical records or elicit additional testimony at trial because such evidence and testimony would have been cumulative to Lemire's testimony.

Petitioner claims Counsel should have introduced Lemire's medical records during the trial in order to rebut the State's theory that he and Lemire planned to attack the victim. However, during the post-conviction relief hearing, Counsel testified the jury could observe Lemire's physical condition as he approached the witness stand and he was able to bring out Lemire's medical issues during direct examination. Specifically, during direct examination Lemire stated:

> Mr. Rhea: Before we go any further, I want to ask you. You're walking very gingerly up to the witness stand. Why is that?
> Mr. Lemire: I've got back problems.
> Mr. Rhea: How did your back problems occur?
> Mr. Lemire: Well, like I said, doing furniture for going on twenty years now, it's been beat up. So, I think it was December I had back surgery. I had a disc explode and a piece of a disc embedded in my spinal cord. So they had to go in and move the nerves to pull the piece of disc out from my spinal cord. And I've got some nerve damage left over from the surgery.
> Mr. Rhea: When approximately was that surgery?
> Mr. Lemire: December 20, of '08.

(App. 425-426.)

Additionally, Counsel had Lemire show the jury his scar and testify that his surgery occurred about four and a half months prior to the incident. (App. 455-456.) Lemire also testified that he was still having trouble with his back, still having pain, and currently under a

doctor's care. (App. 457-458.) Counsel also asked other witnesses about Lemire's condition and their testimony supported Lemire's statements on his physical condition. Based on the testimony elicited by Counsel during the trial, the post-conviction relief court properly found Counsel was not ineffective for failing to enter specific medical records into evidence because the jury was properly provided the information on Lemire's physical condition through his presence at the trial, his testimony, and testimony of others who corroborated his physical condition.

Petitioner asserts Lemire's medical records were relevant and admissible and Counsel's failure to admit the records into evidence was deficient. Petitioner asserts as a result of Counsel's deficiency, he was prejudiced because he believes the outcome of the trial would have been different had the jury been able to consider Lemire's medical records. However, Petitioner has failed to show how the medical records would have provided the jury with information that was not already provided through extensive testimony from numerous witnesses, including Lemire, and the jury's ability to observe Lemire's physical condition at trial. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (citing Strickland v. Washington, 466 U.S. 668 (1984)). "When counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011). Here, Petitioner has failed to overcome this presumption because, as the lower court found, the medical records were cumulative to the testimony provided to the jury and Petitioner's assertion that the evidence was relevant and admissible does not overcome the presumption

afforded to Counsel in Strickland. Therefore, the post-conviction relief court properly denied Petitioner relief on this ground.

B. Petitioner's Black Clothing

Petitioner alleges Counsel was ineffective for failing to present evidence at trial that Petitioner frequently wore all black clothing. Petitioner argues such evidence would have made the fact that both Petitioner and Lemire were wearing all black on the night of the incident "less relevant." However, as the post-conviction court properly found Counsel was not ineffective because evidence was presented at trial of the frequency with which Petitioner wears all black.

During the post-conviction relief hearing, Counsel properly elicited testimony from Petitioner and Lemire regarding the frequency they wear all black clothing and also argued to the jury that Petitioner wears black because that is what he wears as a working man. (App. 342-343, 436, 501, 508.)

Petitioner points to this Court's reference to Petitioner and Lemire wearing all black when it reversed the court of appeals decision in this case to illustrate the argument that Petitioner wearing all black was a critical issue in the trial and Counsel should have presented pictures in support of his claim that he frequently wore all black. In its opinion, this Court summarized all of the circumstantial evidence the State presented during trial and Petitioner wearing all black was only one of the thirteen instances of premeditation this Court itemized in its opinion. State v. Larmand, 415 S.C. 23, 780 S.E.2d 892 (2015).

Petitioner fails to point out the other twelve grounds presented by the State at trial that the jury was able to consider in evaluating Petitioner's guilt outside of the frequency with which he tends to wear all black. Petitioner fails to show how Counsel's failure to present photographic evidence of Petitioner wearing all black in the past would have changed the outcome of the trial.

The post-conviction relief court properly found Counsel's performance was not deficient because, not only did Counsel provide testimony through Petitioner that he frequently wears all black, but such evidence would have been cumulative to that testimony properly elicited by Counsel during trial. Petitioner fails to meet his burden as set forth in Strickland and the post-conviction court properly denied relief on this ground.

C. Lemire's Intoxication

Petitioner alleges Counsel was ineffective for failing to present evidence that Lemire was intoxicated on the night of the incident. However, the post-conviction relief court properly found Counsel was not ineffective for failing to introduce evidence of Lemire's intoxication because the evidence Petitioner alleges Counsel should have introduced is a video, which was excluded as evidence at trial. The only way Petitioner could have possibly used it was for impeachment purposes – if such an occasion arose.

The video evidence Petitioner argues Counsel should have introduced is from the scene on the night of the incident. This video would have simply impeached a police officer's testimony and would not have negated any elements of lynching or conspiracy. Petitioner has failed to show when and where in the trial this impeachment evidence could have been used. Counsel testified that he could have used the video to impeach a police officer if the officer testified that Lemire was not drunk, however, no such testimony was ever produced by a police officer at trial, so Counsel never had an occasion to impeach him with the video. The post-conviction relief court properly found the outcome of the trial would not have changed had Counsel presented evidence that Lemire was intoxicated on the night of the incident. Petitioner's assertions and speculations about what could have happened on impeachment fails to overcome the burden set forth in Strickland.

D. Pop-A-Lock was a Cash Business

Petitioner alleges Counsel was ineffective for failing to request financial transaction records from Petitioner to show the cash transactions Pop-A-Lock conducted in order to refute the victim's testimony that Pop-A-Lock did not do much cash business. Petitioner believes such evidence would have discredited the victim's testimony that there was no reason to steal a call since Pop-A-Lock did not do much cash business. However, the post-conviction court properly found Petitioner failed to prove Counsel was constitutionally ineffective for failing to provide records of cash transactions conducted by Pop-A-Lock at trial because such evidence would have been cumulative to the testimony properly elicited from Petitioner's wife during trial.

Petitioner's wife, Kerriann Larmand, testified at the post-conviction relief 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 the victim's testimony would be prior to trial and testified that he could have used the cash records to impeach Lochbaum's testimony.

The post-conviction relief court properly found Petitioner failed to show Counsel was deficient for failing to produce the records of cash transactions at trial. The court found Counsel did not act unreasonably, especially when he could not have predicted or speculated as to what the victim 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. (App. 282.) Additionally, such evidence would have only be able to be used for impeachment and would not have changed the outcome of the trial. Petitioner has failed to show that he would have been found not guilty of all charges had he been able to impeach the victim'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 the victim and Mrs. Larmand. Petitioner has failed to meet their burden to show how Counsel was ineffective for failing to enter these records.

E. No Prejudice suffered by Petitioner

Petitioner argues Counsel was constitutionally ineffective for failing to introduce the evidence regarding Lemire's medical issues, the frequency Petitioner wears black clothing, Lemire's intoxication on the night of the incident, and Pop-A-Lock's cash business. However, Petitioner has failed to meet the burden set forth in Strickland to establish Counsel was constitutionally ineffective or show how he was prejudiced by Counsel's representation. The record is clear Counsel presented evidence in each of these areas and the post-conviction relief court properly found Counsel was not constitutionally ineffective. Petitioner was properly denied relief to by the post-conviction relief court on these grounds, and this Court should deny certiorari.

II. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to object to the inference charge because the charge was clear, comprehensible and a proper statement of the law.

Petitioner alleges Counsel was ineffective for failing to object to the inference charge during the trial, which failed to preserve the issue for appellate review. Petitioner argues the South Carolina Court of Appeals declined to review this issue because it was not properly preserved. Petitioner claims the jury charge was an improper charge on the facts, which is prohibited under the state constitution under Article V, § 21. However, the post-conviction relief court properly found Counsel was not ineffective for failing to preserve this issue for appellate review because the jury instruction provided by the trial court was a correct interpretation of the

applicable statute in effect at the time of trial. Even if Counsel had objected and preserved this issue for appeal, the outcome of Petitioner's case would not have been affected because Petitioner's claim the jury instruction was improper is meritless. The post-conviction court properly denied relief to Petitioner on this claim and this Court should deny certiorari.

During the trial, Counsel did not object to the jury charge, which prevented this issue from being reviewed on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) (citing Wilder Corp v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)). However, during the trial, Lemire's counsel, Leland Greeley, did raise an objection to the jury charge, which Counsel did not join, stating the instruction was unconstitutional as burden shifting under the United States Constitution and the South Carolina Constitution. (App. 495.) On appeal, Greeley argued the jury charge 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. However, the court of appeals noted the language at issue was taken directly from S.C. Code § 16-3-240 (2003). The court of appeals also 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 properly instructed the jurors they would first have to find a mob had been formed and Petitioner was present as a member of the mob when the victim was attacked before they could find Petitioner guilty as a principal as well as an accessory.

Additionally, the court of appeals cited to Lemire's opinion, which held the trial court properly overruled 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. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989). "[T]he test is what a reasonable juror would have understood the charge as meaning." Id. Although Petitioner notes the charge since this trial has changed, Counsel cannot be found deficient for failing to make an objection that was not meritorious at the time of the trial. "Counsel is not required to be clairvoyant or foresee changes in the law subsequent to Petitioner's trial[.]" State v. Bowman, 422 S.C. 19, 809 S.E.2d 232 (2018).

Petitioner's claim the jury instructions provided by the trial court were hopelessly confusing is meritless. The trial court's instruction on the permissive inference of §16-3-240 merely explained the legal conclusion the jury could find if certain facts were established. See State v. Dickey, 380 S.C. 384, 669 S.E.2d 917, 927 (Ct. App. 2008) ("A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge on the facts, nor a mandate to the jury to assume the truth of the facts stated."). The instruction at issue properly and clearly instructed the jury they could legally hold persons liable as principals if they found the evidence showed those persons assembled as a mob with the

premeditated intent to commit an act of violence, and those persons were present when the act of violence was committed.

Finally, any alleged error in the trial court's jury instructions was harmless. See Belcher, 685 S.E.2d at 809 ("Errors, including erroneous jury instructions, are subject to harmless error analysis"). For purposes of §16-3-240, the State presented ample evidence Petitioner and Lemire were more than merely present at the scene. The record shows they assembled as a mob for purposes of §16-3-230, and committed an act of violence on Lochbaum for purposes of §16-3-220. In light of the overwhelming evidence of Larmand and Lemire's guilt, any error in charging the applicable statutory law was harmless beyond a reasonable doubt. Therefore, the post-conviction relief court properly denied Petitioner relief on this claim and this Court should deny certiorari.

III. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to raise a double jeopardy argument for the conviction of both conspiracy and lynching because Counsel did object to the State going forward on both charges, but the trial court properly found Petitioner could be found guilty of both conspiracy and the substantive offense.

Petitioner argues Counsel was ineffective for failing to raise a double jeopardy argument for a conviction of both lynching and conspiracy. However, the post-conviction relief court properly found Counsel was not deficient for failing to object, because Counsel did make a motion to the trial court asking the State to choose whether they would go forward on conspiracy or lynching. The State argued conspiracy consists of simply the agreement and the lynching requires a separate action. The trial court appropriately ruled with the State and allowed their case to go forward on both charges. Since Counsel did raise the argument, although he did not use the term "double jeopardy," he cannot be found deficient just because the trial court did not rule in Petitioner's favor. The post-conviction court properly denied relief to Petitioner on this

ground and this Court should deny certiorari.

Counsel testified at the post-conviction relief 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." (App. 256.) 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."[2] Following the State's argument, the trial court denied Counsel's motion.

"The double jeopardy clause of the United States and South Carolina Constitutions protect against multiple punishments for the same offense." Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004) (citing State v. Nelson, 336 S.C. 186, 519 S.E2d 786 (1999)). "A threshold inquiry in this case is whether the same act is involved in different charges." Id. at 410 (citing Blockburger v. United States, 284 U.S. 299 (1932)). In Harden, this Court held, "[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. at 410-11, 602 S.E.2d at 50. Based on this decision, the trial court properly allowed the State to pursue both the conspiracy charge and the lynching charge because the lynching was the substantive offense committed in the course of the conspiracy. Furthermore, lynching requires an act of violence,

[2] 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."

which "conspiracy" does not require.

Even though Counsel did not use the words "double jeopardy" in his motion, it is clear from the record Counsel was challenging the State's ability to seek convictions against Petitioner for both conspiracy and lynching. Even if this Court does not find Counsel raised the issue of double jeopardy during the trial, Petitioner fails to meet his burden on this claim because he cannot establish prejudice. Petitioner was not prejudiced because, as this Court stated in Harden, Petitioner can be properly convicted of both conspiracy and lynching. The post-conviction court properly denied Petitioner relief on this claim and this Court should deny certiorari.

IV. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to request a jury charge on circumstantial evidence because Counsel made a strategic decision not to request such a charge as it could harm Petitioner.

Petitioner alleges Counsel was ineffective for failing to ask the trial court judge for a jury charge defining circumstantial evidence. Petitioner argues the case presented by the State was entirely circumstantial and such a charge would have aided the jury in how to interpret the facts in a pure circumstantial evidence case. However, the post-conviction relief court properly found Counsel was not deficient for failing to request the charge on circumstantial evidence because, Counsel made a valid strategic decision to not request such a charge as it could harm Petitioner and bolster the State's case.

During the post-conviction relief hearing, Counsel testified that he did not ask for a charge on circumstantial evidence because it could hurt Petitioner's case. Counsel testified that defining "circumstantial evidence" to the jury could "cut both ways" as it could possibly help Petitioner but could also bolster the State's own circumstantial evidence. (App. 80.)

Here, the trial court mentioned circumstantial evidence in its jury charge when it stated, "the State may prove the intent element of lynching by positive testimony or evidence or by

circumstantial evidence." (App. 673.) 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. (App. 675, 686, 687.) Counsel's decision not to request the charge was not unreasonable and Counsel's testimony supports a valid trial strategy that he did not request the instruction because the charge would likely bolster the State's case and possibly give the jury more reasons to convict Petitioner. Strickland requires trial counsel be given leeway to make reasonable strategic decisions. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. 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).

Finally, Petitioner fails to meet his burden to show how the outcome of the trial would have been different had a circumstantial evidence charge been given to the jury, especially considering the fact 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). Petitioner 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.

Ultimately, Counsel's decision not to request a jury charge on circumstantial evidence was a valid trial strategy since such an instruction could have bolstered the State's case. Petitioner has also failed to show how a specific instruction on circumstantial evidence would have affected the outcome of the trial, especially since the jury was instructed on circumstantial evidence numerous times by the court as it provided the charges for specific criminal offenses the jury was to consider in this case. The post-conviction relief court properly denied relief to Petitioner on this claim and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Nov. 30, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-000157

FRANCIS VICTOR LARMAND, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

This 30th day of November, 2018

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

November 30. 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Francis Victor Larmand, Jr. v. State of South Carolina**
Appellate Case No. 2018-000157
Lower Court Case No. 2017-CP-46-0689

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/cc
Enclosures

cc: C. Rauch Wise, Esquire (2 copies)