THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY

COURT OF COMMON PLEAS

J. Cordell Maddox, Jr. Chief Circuit Court Judge

CASE NO: 2011-CP-04-2060

Johnny L. Burton, #213281.....Appellant,

-VS-

State of South Carolina.....Respondent.

PETITION FOR WRIT OF CERTIORARI

Kaelon E. May
Asst. Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(Attorney For Respondent)

Johnny L. Burton, #213281
Lieber C.I. Ashley A
P.O. Box 205
Ridgeville, S.C. 29472
Pro se

QUESTIONS PRESENTED

(1).DID THE COURT ERR BY RULING THAT THE APPLICANT'S POST CONVICTION RELIEF APPLICATION WAS SUCCESSIVE?

(2). WAS THE APPLICANT's DUE PROCESS RIGHTS VIOLATED UNDER THE 14th. & 16th. U.S. CONSTITUTION AMENDMENTS?

(3). DID THE COURT ERR BY DENYING THE APPLICANT AN EVIDENTIARY HEARING?

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STATEMENT OF CASE

The Appellant was was indicted at the April 1994 term of the Anderson County Grand Jury for Murder, Assault and Battery with Intent To Kill and possession of a Firearm of Knife during Commission of or attempt to Commit a Violent crime (1994-GS-04-0823 / 0825). Robert A. Gamble, Esquire, represented him on the charges. On April 11, 1994, Applicant proceeded to a jury trial before the Honorable H. Dean Hall, where he was found guilty of Murder and Possession of a weapon. Applicant was sentenced to life for murder and five (5) years for the possession charge of a weapon, to be run concurrent.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Burton, Op. No. 96-Mo-013-(S.C.Ct.App. filed January 19, 1996.)

Applicant filed his first application for Post Conviction Relief on October 16, 1995. (1995-CP-04-1732). Respondent made it's return on January 22, 1996, and a Supplemental Return on January 31, 1996. An evidentiary hearing was convened into the matter on January 22, 1997, before the Honorable James E. Lockemy, at whci Applicant was present and represented by counsel Ivan Toney, Esquire. By written order, Judge Lockemy denied and dismissed the application with prejudice. A timely Notice of Appeal was filed and a Petition

for Writ of Certiorari was submitted in the Petitioner's behalf by the South Carolina Office of Appellate Defense. Upon information and belief, the South Carolina Supreme Court denied the Petition.

Petitioner subsequently filed a second application for PCR on April 5, 2005. The state made it's return and Motion to Dismiss on August 4, 2005. A Conditional order of dismissal was Signed by the Honorable J.C. Nicholson on August 19, 2005, conditionally dismissing the application while giving the Petitioner twenty (20) days in which to file his objections to the dismissal. On October 31, 2005, Judge Nicholson signed a final order dismissing Applicant's action with prejudice. A Notice of Appeal was filed and a Petition for Writ of Certiorari was submitted on April 20, 2006. The South Carolina Court of Appeals denied the Petition on August 29, 2007, and after denying the Petition for rehearing, issued the remittitur on April 10, 2008. A third application by the Petitioner was filed on July 5, 2011 in the Anderson County Court of Common Pleas. There after, the State filed a Conditional Order For Dismissal January 19, 2012 that was granted by the Honorable J. Cordell Maddox, Jr. on February 6, 2012. After request by the Petitioner the Court issued additional time March 5, 2012 for the Petitioner to draft a return to the State's Conditional Order of Dismissal on March 5, 2012 due to extensive lock down within the penitentiary. On February 15, 2012 an Objection and Opposition to the Conditional Order for Dismissal was filed. On June 8, 2012 the

Court issued it's Final Order of Dismissal. A timely Notice of Appeal and Writ of Certiorari and Appendix herein follows.

Petitioner's Conviction is Unconstitutional under, State V. Belcher, 385 S.C. 597, 687 S.E.2d 802 (2009).

ARGUMENT

In the case at bar Petitioner alleges that his Application for Post Conviction relief in the current case was affixed and properly filed pursuant to S.C. Code Ann § 17-27-20-160 on new rule State vs. Belcher, 358 S.C. 597 (2009); which the Belcher / New Rule did not come out until after Petitioner's first Application for P.C.R. so Petitioner could not have raised it in his first Application for P.C.R. As this court has ruled that successive applications are disfavored yet this Court has ruled that there are (2) two exceptions: (1). when the applicant was denied his right to appeal the denial of his first P.C.R. application, see: Austin v. State 409 S.E.2d 395,396 (1991) (per curiam). Also see Aice v. State, 409 S.E. 2d at 395 (1991) The Court explained that every PCR Applicant is entitled to a full adjudication on the merits of his first PCR application, or "one bite at the apple", which includes his right to appeal the denial of his first application. The second exception, is where there has been a change in law, or new rule, or if the Applicant contends that there is evidence of material facts not previously presented and heard that requires a vacation of the conviction or sentence, the application must be filed within one year after the date of the **actual discovery** of the facts by the applicant, [or] after the date when the facts could have been ascertained by the excercise of Due diligence, thus what is known as the

"discovery rule". The Petitioner herein filed the application and supporting memorandum of law see: hereto attached Appendix pg. 1-13. within one year of [his] actual discovery of Belcher, supra, decision c.f. Tilly v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (forth PCR Application challenging guilty plea as involuntary on the grounds that Applicant did know he was not parole eligible, not successive when Applicant could not have raised claim in previous application because he did not know he was parole eligible); also see Coats v. State 575 S.E.2d 557 (2003).

The issue raised herein is clear appropriate for PCR and an evidentiary hearing should have been ordered; because S.C. Code Ann. §17-27-20(a) states any person convicted or sentenced for a crime who claims that; S.C. Code Ann. § 17-27-20(a) 1, that the conviction or sentence was in violation of United States Constitution or the Constitution of the State, § 17-27-20(a);(4), that there exist evidence of material facts, not previously presented and heard, requires vacation of the conviction or sentence in the interest of justice.

The Belcher, supra, decision is a "new rule" of law and the Petitioner is challenging the "new rule" as a "watershed" of Teague v. Lane, 489 U.S. 288 (1989), which has two limited exceptions. In order for a new rule to meet the accuracy requirement of the Teague, exceptions "is not enough... to

say that [the] rule is aimed at improving the accuracy of the trial, Sawyer, 497 U.S. at 242 or that the rule is directed toward the enhancement of the reliability and accuracy in some sense. Id 497 U.S. at 243. Instead the question is whether the new rule remedy " an impermissible large risk of an inaccurate conviction". Summerlin, 124 S.Ct. 2519; yet, this court in Belcher would generally "not apply to cases being reviewed on Post Conviction. This assertion is a denial of equal protection, as the Belcher, decision over ruled 25 twenty five cited cases from 1894 to 2006, inwhich did not have Direct Appeals pending. Therefore, Petitioner's case falls within the class of cases that were considered from 1894 to 2006 and should be equally considered and the law applied equally. See In re Winship 397 U.S. 358, 364, 90 S.Ct 1068, 1972, 25 L.Ed 2d 368 (1970).

In order to establish a claim of unconstitutional selective application of law, see: Duke Power v. Bell, 155 S.C. 299, 152 S.E. 865 (1930); see also: Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), It is required not only that the law is not applied equally to others persons in the same class similarly situated, Whaley v. Dorchester Co. Zoning Bd of Appl., 337 S.C. 568, 524 S.E.2d 405 (1999), but also the selective application of the law was deliberately based upon an impermissible application upon the application. See: Robin v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978), No State shall deny anyperson within it's jurisdiction the equal

protection of laws. U.S. Const. Amend. XIV § 1. Equal protection requires all persons to be treated alike under like circumstances and conditions both in privileges conferred and legal; liabilities imposed. GTE Sprint Comm Corp. v. Public Service Comm., 288 S.C. 174, 341 S.E.2d 129 (1986). It is that inwhich Petitioner asserts that the Belcher decision over ruled (25) twentyfive cases from 1894 to 2006 that did not have Direct Appeals pending.

A stringent review of the twenty five cases that Belcher, over ruled must have been considered retroactively, since the over ruled cases did not have Direct Appeals pending and ranged from 1894 to 2006, and therefore the failure to consider Appellant's case against the backdrop of these over ruled cases in retrospect to the Belcher decision clearly results in a denial of equal protection.

Teague, set forth (2) two limited exceptions at which a new rule may apply retroactively on collateral review, (1). If the new rule forbids criminal punishment of certain primary conduct, or (2). if the new rule improves the accuracy of convictions or a fair proceeding. See: Burch v. CorCoran, 273 F.3d 577 at 585 (4th Cir.) citing Teague v. Lane, 489 U.S. at 311.

The holding of Belcher is not primarily a new rule, but rather a old rule dictated by existing precedent. See: Snadstrom v. Montana, supra, which was clearly established U.S. precedent, also compare Yates v. Evate, 500 U.S. 391, therefore it is not a new rule but an "extension" of a old

existing rule and precedent.

The instant application and challenged to the Belcher, Supra, decision could not have been raised in Appellant's original application for PCR, and since the application raises a issue of National Importance and is a case of "First impression", the instant application should not have been dismissed as excessive, but rather competent counsel should have been appointed and an Evidenciary Hearing convened in this instant.

Appellant asserts his conviction is unconstitutional and warrants review under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

CONCLUSION

For the reasons stated, Appellant ask this court to grant the Petition For Writ of Certiorari; or in the alternative remand this case back to the circuit court for an evidentiary hearing.

Respectfully Submitted,

/S/_____.

Johnny L. Burton, 213281
Lieber C.I. Ashley A
P.O. Box 205
Ridgeville, S.C. 29472

Dated: _____2012

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY

COURT OF COMMON PLEAS

J. Cordell Maddox, Jr. Chief Circuit Court Judge

CASE NO: 2011-CP-04-2060

Johnny L. Burton,#213281.....Appellant,

-VS-

State of South Carolina.....Respondent.

A P P E N D I X

Office of attorney General

Kaelon E. May, Asst. Att. General

P.O. Box 11549

Columbia, S.C. 29211

Johnny L. Burton,#213281

Lieber C.I. Inst. Ashley

P.O. Box 205

Ridgeville, S.C. 29472

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Copy

1.

FORM 5

STATE OF SOUTH CAROLINA)
)
County of ANDERSON)

IN THE COURT OF COMMON PLEAS

Johnny L. Burton #213281
Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Corr. Inst. P.O. Box 205, 136 Wilborn Ave. Ridgeville, SC. 29472

2. Name and location of Court which imposed sentence Anderson County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) none

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 94-Gs-04-825 (murder)

(b) 94-Gs-04-823 (assault & batter with intent and

(c) possession of firearm during commission of violent crime

5. The date upon which sentence was imposed and the terms of the sentence:

(a) April 11, 1994

(b) same as above

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty jury trial

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii.

iii.

(b) the result in each such Court to which you appealed:

i. denied

ii.

iii.

(c) the date of each such result:

i. January 19, 1996

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Burton, Op.No. 96-MO-013

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) n/a

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Petitioner's conviction is unconstitutional under..

(b) State v. Belcher 385 S.C. 597, 685 S.E.2d 802 (2009)

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) [illegible]

(b) See attached memorandum in support of application

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? yes

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Post Conviction Relief

ii. 28 USC §2254

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Anderson County Court of Common Pleas

ii. District Court of South Carolina

iii. _____

iv. _____

(c) the disposition thereof:

i. denied relief

ii. denied relief

iii. _____

iv. _____

(d) the date of each such disposition:

i. January 22, 1997

ii. unknown

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. unknown

ii. unknown

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

no

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) first filing under new rule

(b)

(c)

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea?

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Robert A. Gamble, esq.

ii. Robert M. Dudek, esq.

iii.

(b) the proceedings at which each such attorney represented you:

i. trail and sentencing

ii. direct appeal

iii.

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

Johnny Lee Burton #213281 -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

MEMORANDUM IN SUPPORT OF

APPLICATION FOR POST CONVICTION RELIEF

PURSUANT TO S.C.CODE ANN.

§§ 17-27-20 THROUGH 160

Johnny Lee Burton
SCDC# 213281
Lieber Corr. Inst.
P.O. Box 205
136 Wilborn Ave.
Ridgeville, SC. 29472

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	

Johnny Lee Burton #213281	)	
Petitioner,	)	**MEMORANDUM IN SUPPORT OF**
-v-	)	**APPLICATION FOR POST CONVICTION**
State of South Carolina	)	**RELIEF PURSUANT TO S.C.CODE ANN.**
Respondent,	)	**§§ 17-27-20 THROUGH 160**
	)	

COMES NOW, Johnny Lee Burton, pro-se, herein after Petitioner respectfully seeking relief in this Honorable Court pursuant to S.C. Code Ann. §17-27-20 through §17-27-160.

This issue presented, statement of facts and citations of authorities relied on will show unto this Honorable Court his entitlement to the requested relief sought herein.

Respectfully Submitted,

/s/ Johnny Lee Burton

Johnny Lee Burton

ISSUE (A) IS PETITIONER'S CONVICTION UNCONSTITUTIONAL UNDER STATE V. BELCHER?

FACTS

Petitioner asserts his conviction is unconstitutional and warrants review under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

In the instant case Petitioner's sole defense was that he acted in self-defense. During closing argument the Solicitor argued the following to the jury:

> In other words, it's not enough to come to into court and say, gee, I took a firearm and I pointed it at somebody and I shot three times, but I didn't mean to kill them. I shouldn't be found guilty of murder, because that is so reckless, when you take a firearm and aim at somebody and shoot three times, that you may infer the malice from the use of that deadly weapon. [Tr.p.304, L.13-19].

Thereafter, trial counsel argued the following:

> He learned at the fair from the argument that Shedrick Gaines had with Jonathan Boston, that a black nine millimeter pistol was shown. It was shown to him from the hands of Shedrick Gaines. So, he knew from that that there was some times Shedrick Gaines was armed. [Tr.p.310, L.16-20].

After closing arguments the trial court charged the jury on mailce murder and in doing so charged the jury the following:

> The Law says if one intentionally kills another with a deadly weapon, the inference of malice may arise. [Tr.p.332, L.22-23].
>
> To infer malice from the use of a dangerous instrumentality, such as a weapon, the conduct must either be intentional. [Tr.p.333, L.3-5].

Directly after this instruction the Trial Court charged the jury with the four elements of self-defense.

In Belcher the Court held: "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries [shall] not be charged that malice may be inferred from the use of a deadly weapon." Id at 810.

Although, our Supreme Court stated that "[o]ur ruling will not apply to convictions challenged on post conviction relief." citing generally Teague v. Lane, 489 U.S. 288 (1989). Petitioner asserts that under Teague "[n]ew rules of constitutional criminal procedures are generally not applied retroactively on collateral review. There are however, two (2) limited exceptions in which a new rule may apply retroactively on collateral review: (1). if the new rule forbids criminal punishment of certain primary conduct, or (2) if the new rule improves the accuracy of convictions and alters our understanding of the bedrock elements necessary for a fair proceeding, thus making it a "watershed rule" of criminal procedure. Teague v. Lane, 489 U.S. at 311, 109 S.Ct. 1060.

In Belcher the decision listed **25** known cases between **1894** and **2006** that Belcher overrules. The Justices noted the decision

applies to cases pending on appeal or not yet final. However **none** of the 25 cited cases [have an appeal **pending**], pointed out Mr. Mark Plowden, a spokesman for the Attorney General's Office.

Considering the decision in Belcher overruled 25 cases between **1894** and **2006** that **did not** have appeals pending, Petitioner believes his case would satisfy the criteria for consideration under the Belcher decision based on the facts of his case.

Petitioner asserts that this is not primarily a "new rule", but it is also an "old rule" dictated by existing precedent. See Sandtrom v. Montana, 442 U.S. 510 (1979), which was clearly established federal law at the time Petitioner's conviction became final. Further in support in Yates v. Evatt, 500 U.S. 391 wherein South Carolina applied federal law to a state court conviction. Id

In the instant case the instructions were clearly unconstitutional in that Petitioner's case does involve the necessary facts warranting self-defense, therefore the prosecution's burden was substantially lightened by the trial court's instructions that malice being inferred from the use of a deadly weapon.

There is a reasonable probability that jurist of reason could have interpreted this instruction as directing the jury to find that Petitioner entertained actual malice under the State's intent to kill theory solely on the basis that he employed a deadly weapon.

CONCLUSION

WHEREFORE, Petitioner is informed and believes the instant application raises sufficient questions of law and fact that require an evidentiary hearing in the instant matter.

Respectfully Submitted,

/s/ Johnny Lee Burton

Johnny Lee Burton

19. State clearly the relief you seek in filing this application:

vacate sentence and conviction and remand for new trial or in the alternative conduct and evidentiary hearing in the instant matter to determine whether Petitioner is entitled to relief under State v. Belcher

20. Are you now under sentence from any other court that you have not challenged?

no

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Dorchester)

I, Johnny Lee Burton, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Johnny L Burton

SWORN to and subscribed before me this 24th day of June, 2011.

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Johnny Lee Burton, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Johnny L Burton
Applicant

SWORN or affirmed to and subscribed before me this 24th day of June, 2011.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2013

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
Johnny L. Burton, #213281, Applicant, v. State of South Carolina, Respondent.	)	**2011-CP-04-2060** **RETURN AND MOTION TO DISMISS**

In response to the post-conviction relief application filed on July 5, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. The Applicant was indicted at the April 1994 term of the Anderson County Grand Jury for Murder, Assault and Battery with Intent to Kill and Possession of a Firearm of Knife During Commission of or Attempt to Commit a Violent Crime (1994-GS-04-0823/0825). Robert A. Gamble, Esquire, represented him on the charges. On April 11, 1994, Applicant proceeded to jury trial before the Honorable H. Dean Hall, where he was found guilty of Murder and Possession of a Weapon. Applicant was sentenced to concurrent life imprisonment for murder and five (5) years for the Possession of a Weapon charge.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Burton, Op. No. 96-MO-013 (S.C. Ct. App. filed January 19, 1996.)

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Applicant subsequently filed a second application for PCR on April 5, 2005. The State made its Return and Motion to Dismiss on August 4, 2005. A Conditional Order of Dismissal was signed by the Honorable J.C. Nicholson on August 19, 2005, conditionally dismissing the application while giving Applicant twenty (20) days in which to file his objections to the dismissal. On October 31, 2005, Judge Nicholson signed a Final Order dismissing Applicant's action with prejudice. A Notice of Appeal was filed and a Petition for Writ of Certiorari was submitted April 20, 2006. The South Carolina Court of Appeals denied the Petition on August 29, 2007, and after denying the Petition for Rehearing, issued the Remittitur on April 10, 2008.

Attached herewith and incorporated herein are the records of the Anderson County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the records from Applicant's previous PCR actions. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Petitioner's conviction is unconstitutional under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

Respondent submits this court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

Additionally, the Respondent submits that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to –160. S.C. Code Ann. §17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on April 11, 1994, and Applicant's direct appeal was resolved in 1996. This Application was filed on July 5, 2011, which was over a decade after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

Further, Respondent submits Applicant's allegations regarding the retroactive application of State v. Belcher fails on the merits. The case of State v. Belcher was decided by the South Carolina Supreme Court on October 12, 2009, some fifteen (15) years after the Applicant was convicted in 1994. Belcher "represents a clear break from our modern precedent" approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six (26) cases decided over the course of more than 100 years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Applicant's case was, at the time of his trial, the sanctioned charge on the law. In Belcher, the Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher at 612, 685 S.E.2d at 810. The opinion expressly stated that "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 613, 685 S.E.2d at 810.

In his supporting memorandum, Applicant conceded the opinion set forth in Belcher explicitly stated that it was not to be applied retroactively or to convictions challenged on post conviction relief. Applicant argues, however, that the ruling should be applied retroactively to his PCR application anyway as an "old rule dictated by existing precedent." Respondent submits that the South Carolina Supreme Court's intention is clearly shown through the language of the Belcher opinion in limiting the ruling to not be applicable on post-conviction relief, and Applicant's

assertions to the contrary are erroneous and without merit. Therefore, Respondent submits this application is both procedurally barred, as well as without merit. Accordingly, Respondent respectfully requests this Court summarily dismiss the action.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

Respectfully submitted,

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By: _____
Attorneys for the Respondents

Columbia, South Carolina
January 18, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
	)	
	)	2011-CP-04-2060
	)	
JOHNNY L. BURTON, #213281	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Johnny L. Burton, #213281
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

DATED this 18th day of January, 2012.

Lena Pelishenko

Lena Pelishenko, Legal Assistant
For Respondent