STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Ricky W. Lowery, #281915,	)	2011-CP-42-2178
Applicant,	)	
	)	
vs.	)	**ORDER**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of Applicant's *pro se* document titled "Motion to Alter or Amend Judgment." The Respondent made its Return to this response on February 5, 2015.

The Order of Dismissal in this matter was signed by me on November 20, 2014. Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's response and objections, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. Therefore, this Court finds that the original Order of Dismissal, which was signed and then filed November 20, 2014, shall stand as it was written.

AND IT IS SO ORDERED this 5 day of March, 2015.

J. Derham Cole
Seventh Judicial Circuit

_____, South Carolina

State of South Carolina County of Spartanburg	In the Court of Common Pleas Seventh Judicial Circuit
Ricky W. Lowery, #281915 Applicant -vs.- State of South Carolina Respondent	2011-CP-42-2178 Motion to Alter or Amend Judgment

Pursuant to rule 59(e) S.C.R.C.P. Applicant hereby moves to alter or amend Judgment of the Court filed November 20, 2014, dismissing 2011-CP-42-2178 claims for post-conviction relief.

Respondent asserts that applicant has not shown why the conditional order of dismissal should not become final. Although the applicant alleges that he has newly discovered evidence, he appears to be attacking the sufficiency of evidence the state has against him. Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the state to offer evidence to prove the offence charged in the warrant or indictment.

State v. Allen, 261 S.C. 448, 200 S.E. 2d. 684, 686 (1973). This is because the guilty plea "admits all matter of facts averments of the accusation," Id. The defendant admits to all circumstances described in the indictment, leaving only the sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E. 2d. 708, 709, (2000).

The body of the indictment to which the applicant was sentenced under is South Carolina Code Ann {16-11-311. Description of offense is as follows:

1. The defendant "enters" the dwelling of Charles Hunt without consent, and with the intent to commit a crime.
2. The defendant did arm himself while inside the residence.
3. The defendant has at least two or more prior convictions for burglary.

When a defendant claims factual innocence in pleading guilty, a court is constitutionally required to establish a sufficient factual basis for the plea. Farmer v. Trent, 531 S. E 2d. 711 (W.Va. 2001), citing North Carolina v. Alford 91. S.C.T. 177 (1970), Wallace v. Turner, 695 F. 2d 595, 546 (11th cir, 1983), U.S. v. Mastrapa 509 F. 3d. 652 w 659 (4th cir, 2007).

I. **"Enter Dwelling"**

When pleading under Alford, the defendant admits to no facts which would meet any of the required "elements of the offense." In entering an Alford Plea, defendant waived trial but did not admit guilt, pursuant to Alford doctrine as established in these cases; applicant did not admit guilt or entering said dwelling or denied guilt. (Applicant submits newly discovered case law not known about or available at time of plea). Shapard v. U.S., 544 U.S. 13(2005), U.S. v. Alston 611 F. 3d. (4th cir, July 2010).

A. When reviewing the record of the transcript on page 6, where solicitor Barnette presents the facts behind these indictments, no where does it state that the applicant "entered this dwelling."

B. When reviewing the supplemental incident report, the only thing said by the officer about this case was that on 8/10/05 I made contact with the victim in this case, he stated that he had no leads or suspects; all other statements referred to the stolen vehicle.

II. **"The defendant armed himself while inside the residences"**

In order for the element of arm with a deadly weapon to apply, they have to prove entering the dwelling by evidence inside or by witness testimony. Applicant was not in possession of a firearm when arrested.

III. **"The applicant has two or more prior convictions for burglary."**

A. Applicant has prior housebreaking charges from 1982. Applicant pled guilty to a negotiated recommendation that the court would run all counts concurrent as one. (Applicant has only one prior conviction to apply, not two or more.)

B. Applicant argues that state erred in charging him with first degree burglary by usage of one prior housebreaking conviction as an element of the crime. When applicant was charged in 1982, under South Carolina annotated section 16-11-320, housebreaking was

not classified as burglary; only 16-11-310 when the legislation passed in 1985. The enactment of South Carolina code annotated section 16-11-311 (2003), which divided the offenses into three degrees of burglary, it changed 16-11-310 into first degree, but 16-11-320 was never classified as burglary; it was classified as a common-law offense.

C. Burglary is classified as a violent and most serious offense if a person has a econd or subsequent conviction for a violent crime and parole eligibility is denied.

D. Applicant has only one violent offense, which is the one first degree he is now charged; applicant's prior housebreaking is not a violent offense under that statute. The state erred in charging applicant with first degree burglary by enacting a most serious violent offense with a common-law offense (one common-law offense).

Applicant asserts that he was prejudiced by the trial judge by allowing impeachment with his prior conviction for housebreaking, because they were was more than ten years old, and no specific facts or circumstances support a finding that the probative value substantially outweighs the pre-judicial effects.

Rule 609 (b) establishes a presumption against admissibility of remote conviction - United States v. Beahm 664 F. 2d 414, 418 (4th cir, 1981), and the state bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption, Id as418. See also Cavender 578 F. 2d A 529. In both Cavender and Beahm the Fourth Circuit reversed the defendant's conviction because the trial failed to state specific facts supporting probative value of prior convictions for impeachment purposes, or show how their probative value substantially outweighed their prejudicial effects. However, no such balance was done in this case, the trial court clearly misapplied another factor – the similarity of the prior crime and the crime in which the defendant was charged. Mitchell v. State 298 S.C. 186, 379 S.E. 2d, 123 (1989) prior crimes cannot be presented to show that the defendant has the propensity to commit the crime charged because the prejudicial value would outweigh the probative value of the evidence.

(To use prior convictions to show nothing more than a disposition to commit a crime would violate the due process clause of the 14th Amendment.)

IV. **"The Court finds current application is successive to applicant's previous application, and that it was outside the Statute of Limitation.**

When a timely appeal or a timely motion for judgment has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion or judgment.

Applicant has contentiously challenged his conviction, when the Notice of Judgment was received, the applicant filed an appeal to the next appropriate court for review.

As a general rule, the service of a notice to appeal in a civil matter acts to automatically stay the matter decided in the order on appeal. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge thereof.

Applicant asserts that the only time that the one year statute of limitation counts is when the entry of judgment is denied until the filing of another petition to the court; that would be the time between each pleading for relief that the time would apply to one year.

For the above reason, the statute of limitation should not apply, and the application is not successive because the newly discovered evidence about the Alford Doctrine has not been heard or ruled on by the court in the order of judgment.

For the forgoing reasons, the applicant respectfully requests this court to alter or amend its order of dismissal or remedy the situation.

(Noting applicant received order on December 19, 2014.)

Respectfully submitted, Ricky W Lowery

Ricky Lowery #281915

Tyger River Correctional Inst. U3-110

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