

STATE OF SOUTH CAROLINA  
COUNTY OF WILLIAMSBURG

POLY CAMAR CUNNINGHAM  
161005  
APPLICANT

VS.

STATE OF SOUTH CAROLINA  
RESPONDENT

IN THE COURT OF  
COMMON PLEAS  
THIRD JUDICIAL  
CIRCUIT

2014-CP-45-189

FINAL ORDER

COMES NOW, THE ABOVE NAME APPLICANT  
WHO ASK THIS COURT TO ACKNOWLEDGE HIS  
FINAL ORDER TO RESPONDENT ORDER OF  
DISMISSAL

(1.)

## ARGUMENT

TRIAL COURSE WERE INEFFECTIVE FOR FAILING TO MOVE THE COURT FOR DISMISSAL OF THE CHARGE OF SECOND DEGREE BURGLARY ON THE GROUNDS THAT THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER A CONVICTION OR IMPOSE SENTENCE FOR THAT OFFENSE BECAUSE THE INDICTMENT CHARGING THE APPLICANT WITH SECOND DEGREE BURGLARY DID NOT CONTAIN THE ESSENTIAL ELEMENTS TO CHARGE THAT OFFENSE, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

U.S.C.A. CONST. AMEND. 14 AND 6

BACK DURING THE TIME OF THE APPLICANT'S ARREST IN 1989, WHILE SERVING THE SENTENCE FOR "SECOND DEGREE BURGLARY", IT WAS SOUTH CAROLINA'S LAW THAT: A TRIAL COURT ACQUIRES SUBJECT MATTER JURISDICTION TO HEAR A CRIMINAL CASE BY WAY OF A LEGALLY SUFFICIENT INDICTMENT OR A VALID WAIVER THEREOF. STATE V. JOHNSTON, 333 S.E. 459, 510 S.E. 2D 423 (1999)

THE TEST OF SUFFICIENCY OF THE INDICTMENT IS WHETHER OR NOT IT CONTAINS THE NECESSARY ELEMENTS OF THE OFFENSE INTENDED TO BE CHARGED AND SUFFICIENTLY APPRISES THE DEFENDANT OF WHAT HE MUST BE PREPARED TO DEFEND. STATE J. TABURY, 262 S.E. 140-41, 202 SE, 2d 852-52 (1974).

THE SCOPE OF THE JURISDICTION CONFERRED BY AN INDICTMENT IS LIMITED TO THE CHARGED OFFENSE AND ANY LESSER-INCLUDED OFFENSES. STATE J. GUNN, 313 S.C. 129, 437, SE. 2d 75 (1993). THEREFORE, IF THE INDICTMENT FAILS TO ALLEGE THE NECESSARY ELEMENTS OF THE OFFENSE CHARGED AS IS THE CASE HERE, THE INDICTMENT IS NOT SUFFICIENT, AND THE TRIAL COURT LACKS AUTHORITY TO ENTER A CONVICTION OR IMPOSE SENTENCE FOR A CRIME. STATE J. BEACHUM, 288 S.C. 325, 342, SE. 2d 597 (1986).

3.

ISSUES RELATING TO THE SUFFICIENCY OF THE INDICTMENT, AS THEY WERE WHEN THIS INCIDENT OCCURRED, ARE CHALLENGES TO SUBJECT MATTER JURISDICTION AND MAY BE RAISED AT ANY TIME. (SEE.) STATE V. FUNDERBURK, 259, S.C. 256, 191 S.E. 2D 520 (1992).

IN THE INSTANT CASE, THE INDICTMENT FAILS TO ALLEGES THE NECESSARY ELEMENTS OF SECOND DEGREE BURGLARY. SECOND DEGREE BURGLARY IS DEFINED, AS A PERSON IS GUILTY OF BURGLARY IN THE SECOND DEGREE IF THE PERSON ENTERS A BUILDING WITHOUT CONSENT AND WITH INTENT TO COMMIT A CRIME THEREIN, AND EITHER THE ENTERING OR REMAINING OCCURS IN THE NIGHTTIME. (SEE.) WEINHAUER V. STATE 334, S.C. 327, 513 S.E. 2D 840 (1999)

BURGLARY IN THE SECOND DEGREE IS A FELONY PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN FIFTEEN YEARS.

IN APPLICANT'S CASE THE INDICTMENT IS WRITTEN AS IF IT'S A "THIRD DEGREE BURGLARY".

"THIRD DEGREE BURGLARY" A PERSON IS GUILTY OF BURGLARY IN THE THIRD DEGREE IF THE PERSON ENTERS A BUILDING WITHOUT CONSENT AND WITH INTENT TO COMMIT A CRIME THEREIN.

RELIANCE UPON A CAPTION, AS BEING DONE HERE, TO BOLSTER A FATAALLY DEFICIENT MANDATE THAT, FOR MOST OFFENSES, (SECOND DEGREE BURGLARY). A DEFENDANT MAY ONLY BE REQUIRED TO ANSWER AN INDICTMENT OF THE GRAND JURY. S.C. CONST. ART. 1 § 11: CF.

(SEE) WEINHAUER, U. STATE, 513 SE. 2D 840 S.C. (1999) PROSECUTOR'S AMENDMENT OF INDICTMENT CHARGING DEFENDANT WITH SECOND DEGREE BURGLARY TO STATE THAT BURGLARY OCCURRED AT NIGHTTIME CHANGED THE CLASSIFICATION OF THE OFFENSE FROM NON-VIOLATE TO VIOLATE, AND THUS, TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO CONDUCT AND SENTENCE DEFENDANT UNDER AMENDED INDICTMENT THAT HAD NOT BEEN PRESENTED TO GRAND JURY, CODE 1976 § 16-1-60, 16-11-312(A,B)

PURSUANT TO S.C. CODE ANN 17-19-100 (1985) IF (a.) THERE BE ANY DEFECT IN FORM IN ANY INDICTMENTS OR (b.) ON THE TRIAL OF ANY CASE THERE SHALL APPEAR TO BE ANY VARIANCE BETWEEN THE ALLEGATIONS OF THE INDICTMENT AND THE EVIDENCE OFFERED IN PROOF THEREOF, THE COURT BEFORE WHICH THE TRIAL SHALL BE HAD MAY AMEND THE INDICTMENT, (ACCORDING TO THE PROOF, IF THE AMENDMENT BE BECAUSE OF A VARIANCE). IF SUCH AMENDMENT DOES NOT CHANGE THE NATURE OF THE OFFENSE CHARGED.

(SEE) STATE V. SOWELL 85 S.C. 272, 67, S.E. 2D 316 (1910)

IN SOWELL THE INDICTMENT STATED THAT THE OFFENSE HAD BEEN COMMITTED IN THE "DAYTIME". AT TRIAL, THE INDICTMENT WAS AMENDED TO STATE THAT THE OFFENSE WAS COMMITTED IN THE "NIGHTTIME". THE COURT HELD THAT THE AMENDMENT WAS IMPROPER BECAUSE IT CHANGED THE NATURE OF THE OFFENSE. IF THIS INFORMATION IS NEITHER MATERIAL TO THE CHARGED CONDUCT NOR NECESSARY FOR PREPARATION OF THE DEFENSE.

THUS, THE TRIAL COURT DID NOT HAVE JURISDICTION TO ACCEPT APPLICANT'S GUILTY PLEA TO SECOND DEGREE BURGLARY.

(SEE) BROWNING U. STATE 320 S.C. AT 368 465 S.E. 2D AT 359 ACCORDINGLY, THE AMENDMENT DEPRIVED THE COURT OF SUBJECT MATTER JURISDICTION OVER THE BURGLARY CHARGE, AND CIRCUIT COURT THUS LACKED JURISDICTION TO ACCEPT DEFENDANT'S GUILTY PLEA TO SECOND DEGREE BURGLARY COUNTS: INDICTMENTS ALLEGED ONLY THE ELEMENTS OF THIRD DEGREE BURGLARY, AND STATED NO CIRCUMSTANCES OF AGGRADATION. CODE (1976) 16-11-312 (B) 16-11-311(A.) THUS, VIOLATED SECTION 17-19-100.

STATE V. TABORY 262 S.C. 136 141 202 S.E. 852 854 (1974) HOLDING THE STATE "MAY NOT SUPPORT A CONVICTION FOR AN OFFENSE INTENDED TO BE CHARGED BY RELYING UPON A CAPTION TO THE EXCLUSION OF THE LANGUAGE CONTAINED IN THE BODY OF THE INDICTMENT."

(SEE) BROWN V. STATE 343 S.C. 342 350 540 SE. 2d 846 850 (2001) (VACATING CONVICTIONS FOR LACK OF SUBJECT MATTER JURISDICTION WHERE "THE INDICTMENTS ON THEIR FACE FAILED TO CONTAIN A NECESSARY ELEMENT OF THE OFFENSE,")

TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO MOVE FOR DISMISSAL OF SECOND DEGREE BURGLARY BECAUSE INDICTMENT FAILED TO STATE OR CONTAIN THE NECESSARY ELEMENTS OF THE OFFENSE INTENDED TO BE CHARGED. A VIOLATION OF APPLICANTS UNITED STATES CONST. AMEND. 6, 14, A VIOLATION OF APPLICANT DUE PROCESS OF LAW. IN GENTRY 363 S.C. 43, 610 SE. 2d 494 (2005) THE SOUTH CAROLINA SUPREME COURT RULED THAT AN INDICTMENT IS A "NOTICE DOCUMENT" AND ANY DEFECTS IN AN INDICTMENT DOES NOT DEPRIVE A COURT OF GENERAL SESSIONS SUBJECT MATTER JURISDICTION OVER A CRIMINAL CASE, HOWEVER, THE APPLICANT'S ARGUMENT IS THAT HAD TRIAL COUNSEL LODGED AN ARGUMENT AT THE TIME OF TRIAL THAT THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS ALLEGED SECOND DEGREE BURGLARY CHARGE,

THE TRIAL COURT WOULD HAVE HAD NO OTHER ALTERNATIVE BUT TO HAVE DISMISSED THE SECOND DEGREE BURGLARY CHARGE AGAINST THE APPLICANT.

THE APPLICANT'S ARGUMENT IS THAT, OF COURSE INDICTMENT 89-GS-45-208 WAS NOT USE TO ENHANCE HIS CURRENT SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, BUT IN ESSENCE IT WAS USE TO ENHANCE BECAUSE APPLICANT PLEA DEAL WAS A "PACKAGE DEAL", RUN CURRENTLY TO FIFTEEN YEARS, INDICTMENT 89-GS-45-208 BEING INSUFFICIENT INDICTMENT VIOLATE SECTION, 17-19-100, WHICH MAKES APPLICANT'S GUILTY PLEA ILLEGAL, A VIOLATION OF APPLICANT'S UNITED STATES CONST. AMEND 14, PROVISION CONCERNING PROSECUTION AND DUE PROCESS OF LAW, AND INEFFECTIVE ASSISTANCE OF COUNSEL.

COUNSEL HAS A DUTY TO CONDUCT ADEQUATE INVESTIGATION IN A CASE STRICKLAND V. WASHINGTON 466 U.S. 668 (1984) COUNSEL'S DEFICIENT PERFORMANCE VIOLATED APPLICANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEETH AMEND TO THE UNITED STATES CONST.

9.

THE APPLICANT BELIEVES THAT HE HAS MET BOTH PRONGS OF THE STRICKLAND TEST AND ASK THAT THIS PLEA AGREEMENT BE DISMISSED AND HE BE RESENTENCED WITHOUT THE USE OF THIS FIRST DEGREE BURGLARY CHARGE TO ENHANCE THE SENTENCE, BEING THAT APPLICANT PLEAD TO ALL FIVE INDICTMENT AS A WHOLE CONCURRENTLY. TO 15 YEARS BECAUSE IT IS CLEAR THAT THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE SECOND DEGREE BURGLARY CHARGE DURING THE TIME IN QUESTION.

THE APPLICANTS REQUEST THAT THE ISSUES CONTAINED IN THE FOREGOING PAGES BE HEARD IN CONJUNCTION WITH ISSUES RAISED IN HIS ORIGINAL APPLICATION FOR POST-CONVICTION RELIEF.

THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER A CONVICTION OR IMPOSE SENTENCE FOR SECOND DEGREE BURGLARY BECAUSE OF THE DEFECTS IN THE INDICTMENT AND THE APPLICANT IS STILL SUFFERING FROM THE EFFECTS OF HIS INVALID PLEA AGREEMENT AND CONVICTION (1.) ENHANCE HIS SENTENCE TO LIFE WITHOUT PAROLE (2.) REDUCE PRISON PRIVILEGES; AND (3.) REDUCE HIS POSSIBILITY OF PAROLE. APPLICANT ASK THAT AN EVIDENTIARY HEARING BE CONVENED TO DETERMINE WHETHER HE HAS BEEN PREJUDICED.

(SEE) McDUFFIE V. STATE 276 S.C. 277 S.E. 2D 545

THE SUPREME COURT, NESS J. HELD THAT WHERE AN APPLICATION FOR POST-CONVICTION RELIEF ALLEGES IN HIS APPLICATION THAT RESULTS STILL PERSIST EVEN THOUGH SENTENCE HAS BEEN FULLY SERVED HE IS ENTITLED TO AN EVIDENTIARY HEARING.



STATE OF SOUTH CAROLINA  
COUNTY OF WILLIAMSBURG

IN THE COURT OF  
COMMON PLEAS, THIRD  
JUDICIAL CIRCUIT.

PONG LAMAR CUNNINGHAM  
161005  
APPLICANT,

14-CP-45-189

v.

STATE OF SOUTH CAROLINA  
RESPONDENT,

AFFIDAVIT OF SERVICE

THIS APPLICANT CERTIFY ON THIS DAY HE  
HAS SERVED A COPY OF THE FINAL ORDER ON  
RESPONDENT BY DELIVERING A COPY OF SAME  
TO THE MCCORMICK CORP. INST. MAILROOM,  
WITH SUFFICIENT POST PREPAID AND ADDRESSED  
AS FOLLO.

ALLEN WILSON  
SOUTH CAROLINA ATTORNEY GENERAL  
POST OFFICE BOX 11549  
COLUMBIA S.C. 29211-1549

SWORN TO AND SUBSCRIBED BEFORE ME THIS  
8th DAY OF October 2015

Michael Camare  
NOTARY PUBLIC OF SOUTH CAROLINA  
My COMMISSION EXPIRES July 9, 2025