

(b)

The State Of South Carolina

In The Court Of Appeals

Appeal From Sumter County

Court Of Common Pleas

George C. James Jr., Judge

2015-CP-43-1885

RECEIVED
JUN 02 2017
SC Court of Appeals

State Of South Carolina

Respondent.

v.

Larry China

Appellant.

EXPLANATION PURSUANT TO RULE 203(d)(1)(B)(vi) SCACR


Larry China # 175247

B.R.C.I. 4460 Broad River Rd.

Murray # 168

Columbia, S.C. 29210

07/16

F

BACKGROUND

Pursuant to an incident that occurred on June 12, 1989, appellant was arrested and charged on July 6, 1989 with Criminal Sexual Conduct (CSC) first degree. **Exh 1** At the September 1989 term of the Sumter County Grand Jury, appellant was indicted on (CSC). **Exh 2** At the April 1990 term of the Sumter County Grand Jury, the Grand Jury amended Burglary first degree to the September 1989 (CSC) indictment. **Exh 3**

In January 1991, appellant proceeded to trial before the Hon. Dan F. Laney and was represented by Marvin McMillan. After appellant was found guilty on both charges, appellant was sentenced to thirty years for (CSC), and was given a life sentence for Burglary first degree. (to run consecutive)

After a direct appeal State v. China 312 S.C. 335, 440 SE2d 382 (1993), appellant submitted several (PCR) applications including a Federal and State habeas corpus petitions along with other subsequent pleadings.

ON August 14, 2015, appellant filed a habeas corpus petition in circuit court alleging that although conceding to the (CSC) charge, there is insufficient evidence of Burglary first degree, because he never committed Burglary first degree. Therefore, since the evidence substantiates this fact, he now ask to be immediately released from prison. **(see petition p.4,5,6 attached)**

It must be noted that since appellant has served enough time to satisfy the (CSC) sentence, the expulsion of the Burglary conviction and sentence will release appellant from confinement.

On May 16, 2016 appellant responded to the State's motion to dismiss. On November 9, 2016 a hearing was held on the State's motion before the Hon. George C. James Jr. **see transcript attached)**

While waiting on Judge James decision whether to grant a hearing on the merits, appellant on May 3, 2017 filed a motion requesting the court to take Judicial Notice that there is visible daylight between 8:00pm-8:30pm June 12 (on a clear day). This notice is supported by the Official Weather And Atmospheric Report recorded on June 12, 1989 for Sumter S.C. **(see judicial notice w/ report attached)**

On May 8, 2017 the lower court issued an Order of dismissal. The court based it's dismissal solely on the fact that the allegation raised in the habeas corpus petition could have been raised in appellant's previous application for Post Conviction Relief. Thus, appellant is procedurally barred from petitioning the circuit court for writ of habeas corpus. **(see order of dismissal p.6 attached)**

On May 17, 2017 appellant submitted a 59(e) motion. **(see attached)** On the next day on May 18, 2017, the court issued an Order dismissing the 59(e) motion. **(see attached)**

Appellant's Explanation pursuant to Rule 203(d)(1)(B)(vi) SCACR now follows:

EXPLANATION

According to Rule 203(d)(1)(B)(vi) SCACR, if the notice of appeal is from a habeas corpus proceeding and the lower court determined that habeas corpus relief was improper because the issues could have been raised in a timely application under the Post Conviction Relief Act, a written explanation must be submitted to show why this determination was improper. **Rule 203(d)(1)(B)(vi) SCACR**

The S.C. Supreme Court has ruled that the findings of the circuit court will be upheld if there is any evidence to support them. On the contrary, if there is no evidence to support the court's findings, the court's ruling will not be upheld. Mellen v. Lane 377 at 275, 659 SE2d at 243-44 (2008) / Rutland v. State 415 S.C. 570,576, 785 SE2d 350,357, (2016)

On August 14, 2015 appellant submitted a petition for writ of habeas corpus in circuit court alleging that his conviction on Burglary first degree cannot be sustained by the use of insufficiency of evidence. (see petition p.4,5,6 / order of dismissal p.5 attached)

In it's Order of dismissal, the court based it's dismissal solely on the fact that since this issue could have been raised in a Post Conviction Relief application, appellant is now procedurally barred from petitioning the circuit court for writ of habeas corpus. (order of dismissal p.6)

Appellant argues that the court's findings lacks any evidence of support because Statute law §17-27-20(a)(6) specifically states that this section shall not be construed to permit collateral attack on the grounds that the evidence was insufficient to support a conviction. S.C. Code Ann. §17-27-20-(a)(6)

In other words, according to §17-27-20(a)(6), appellant is prohibited from bringing this issue under the (PCR) Act as a matter of law. Therefore, the court's findings on this issue cannot be upheld by an appellate court being that there is no evidence to support the lower court's decision. **Mellen** 377 S.C at 275, 659 SE2d at 243-44 (2008)

In his initial petition, and in his response to the State's motion to dismiss, and at the motion hearing, and in his 59(e) motion, appellant asserted to the court that this issue is not cognizable under the (PCR) Act pursuant to §17-27-20(a)(6). Therefore, for the court to find in it's Order of dismissal that the issue is cognizable under the (PCR) Act when Statute law says that it is not, is a clear misrepresentation of the facts and an error of law. (see petition p.i, p.iii / response p.5 / 59(e) motion p.10-11 / Tr p.10 ln.13-18, p.15 ln.25 thru p.16 ln.1-5)

The lower court's Order of dismissal is further invalid because before the Order of dismissal was issued, appellant submitted a request to the court to take Judicial Notice which was filed May 3, 2017. (see **judicial notice attached**) However, while this motion was pending, the lower court not only invalidly issued an Order of dismissal on May 8, 2017, the court excluded the existence of the Judicial notice from it's Order. (see **order**)

To add insult to injury, the court in it's Order was further misleading by deliberately construing appellant's pending Judicial Notice as simply being a "letter" to the court. (see **order p.1**) This is a clear violation of Rule 201(e)(f) SCRE which **STAYS** any final Order of any proceedings until the motion is addressed and adjudicated. **Rule 201(e)(f) SCRE**

In short, because appellant's request to take Judicial Notice filed May 3, 2017 is still pending, the Order of dismissal dated and filed May 8, 2017 is invalid.

And since appellant has shown the invalidness of the lower court's Order, appellant now turns the court's attention to the merits of this appeal. As mentioned earlier, although appellant concedes to the indictment, conviction and sentence to the (CSC) charge, he does not concede to the indictment and conviction to Burglary first degree, because no Burglary was committed on the day in question and the evidence substantiates this fact.

According to South Carolina law, the underlying element that supports and substantiates the offence of Burglary first degree is 1). entering without consent 2). night time S.C. Code Ann. §16-11-311(A)(3)

According to the police statement given by the victim (Leann Penny), not only did appellant had consent to enter the dwelling, the victim made no attempt to call the police in relation to any imminent threat to her once appellant entered the dwelling. **Exh 4**

At trial, presiding Judge Dan F. Laney informed appellant's trial counsel and the solicitor in chambers that there was no evidence to dispute the element of night time in this case.

However, when establishing whether it was daylight when appellant entered the dwelling, the evidence shows that on the evening of June 12, 1989, two calls was made to the police after the incident. The first call was at 8:30pm and the second call was at 9:35pm. Appellant's (PCR) counsel entered into evidence at the (PCR) hearing that sunset on the day of the incident was officially at 8:33pm. (daylight savings time) **Exh 5 ln.1-25**

And since the first call was at 8:30pm to the police, the 8:30pm call was three minutes before sunset. Appellant's trial counsel (Marvin McMillan) testified at the (PCR) hearing that he never knew about the first call to the police at 8:30pm. **Exh 6 ln.12-24**

Appellant argues that since the first call was at 8:30pm, any reasonable Jurist would conclude that the actual entering into the dwelling occurred several minutes earlier, because one must remember, after appellant entered the dwelling, there was a lengthy dialog between the victim and the appellant, not to mention that a sexual encounter occurred before the 8:30pm call was made to the police. **Exh 4**

Therefore, not only is it clear that appellant entered the dwelling around 8:00pm, it is clear that appellant left the dwelling before the 8:30pm call to the police was made. Because one must expressly assume that when the victim made the 8:30pm call, appellant had already left the dwelling. (**see judicial notice attached which proves it was daylight between 8:00pm-8:30pm on June 12, 1989**)

MOTION HEARING

At the hearing on the State's motion to dismiss, appellant argued that this is a Jurisdictional issue. Not only was there no evidence that he committed a Burglary, appellant also testified inter alia that the court did not have personal nor subject matter jurisdiction to try, convict and sentence him to Burglary first degree. Therefore, he cannot be procedurally barred and meet the habeas criteria at the same time. **Tr p.8 ln.8-15, p.9 ln.1-18, p.11 ln.3-4, 12-13**

Appellant submitted to the court, the September 1989 one count (CSC) indictment and the April 1990 amended indictment that added the Burglary charge. **Exh 2,3, / Tr p.14 ln.10-15, p.15 ln.1-23**

Appellant also proffered the excerpts from his initial (PCR) hearing in which trial counsel testified that after Burglary was amended to the indictment, there was no action taken (legal nor Judicial) in relation to Burglary before trial. **Exh 7**

In other words, there was no arrest warrant, no actual arrest, no bond hearing, no preliminary hearing, no waiver of presentment to the Grand Jury, no motion to quash the indictment pertaining to Burglary before trial. Tr p.9 ln.17-25 thru p.10 ln.1-10

IT MUST BE NOTED that although appellant did not argue the validity of the trial court's Jurisdiction in his initial petition, appellant raised the issue inter alia at the motion hearing. Because issues relating to the court's Jurisdiction can be raised at anytime and can be taken up sua sponte by the court. State v. Parker 334 S.C. 250,254, 543 SE2d 255,257 (2001)

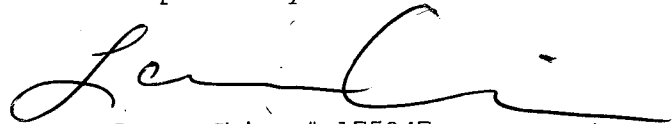
CONCLUSION

In closing, appellant asserts that since the court failed to demonstrate the absence of a genuine issue of material fact, the court is not entitled to issue a dismissal in this matter. Strickland v. Madden 323 S.C. 63, 448 SE2d 588 (1994)

Not only did the court failed to show the absence of a genuine issue, the court prejudiced appellant by making findings and conclusions of law with an invalid Order. To add insult to injury, the court's findings and conclusions is not even supported by any evidence.

Wherefore, appellant Larry China now ask this Honorable court that since he has shown that the lower court's determination is improper, he now ask that he be allowed to proceed with the appeal.

Respectfully submitted,



Larry China # 175247

B.R.C.I. 4460 Broad River Rd.

Murray # 168

Columbia, S.C. 29210

Date

May 30, 2017

RETURN G/S 9-25-89

ARREST WARRANT

A copy of this Arrest Warrant was delivered to the following defendant:

Larry China
4:30 PM
on the 6th day of July, 1989

Signature of Constable or Law Enforcement Officer J.W. Pritchard 89

This warrant is certified for service in
County _____ Municipality _____ (Circle one)

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge _____ (L.S.)

PRELIMINARY HEARING held by

Judge _____

on _____, 19 _____

with _____ Attorney for Defendant

Decision: _____

BAIL

Date Set _____, 19 _____

Judge _____

Amount \$75,000

Surety _____

RETURN WARRANT TO:

No. **C 471661** CASE # 389269
BOOK # 24

STATE OF SOUTH CAROLINA

County _____ Municipality _____ (Circle one)
RECORDED

THE STATE

JUL 14 PM 4:34 against

G.M. FLAYER, JR.
CLERK OF COURT LARRY CHINA
SUMTER COUNTY, S.C.

Address: 21 E. NEWBERRY ST. (MOTHERS ADDRESS)

SUMTER, S.C.

Phone 775-7187 SSN [REDACTED] J.C.

Sex M Race B Height 6-2 Weight 220

DOB 8-27-65 DL NO B.L. - [REDACTED]

Offense CRIMINAL SEXUAL CONDUCT 1ST DEGREE

160

Offense Code

Code (or Ordinance) § 16-3-652

Issuing Judge MARY K. HERBERT [] [] Judge Code

Officer DET. J.W. PRITCHARD

Agency CITY INVESTIGATIONS [] [] [] [] ORI No.

Date of Offense 6-12-89

Date of Disposition _____

Disposition _____

Sentence _____

Co-Defendants _____

WITNESSES:

Name LEANA ROSE PENNY

Address 807 MILLER RD.

SUMTER, S.C. Phone 773-3627

Name _____

Address _____

Phone _____

Name _____

Address _____

Phone _____

Name _____

Address _____

RECEIVED

JUN 02 2017

Name SC Court of Appeals

Address _____

Phone _____

**DEPT. OF
JURORS**

JUN 02

SC Court of Appeals

EXHIBIT 1
PG 1 OF 1

(6)

Doc
7-14-89

DOCKET NO. 89-GS-43 763

The State of South Carolina,

County of SUMTER
Chip McMillan

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 1989

THE STATE

vs.

LARRY CHINA

**Indictment for Criminal
Sexual Conduct First Degree**

EXHIBIT 2
PG 1 of 1

WITNESSES

Sumter PD
Tommy Fields
Jimmy Pritchard
Harry James
Elizabeth James
Ronette Hazelton
Leana Rose Penny
Walt Moore
Roberta Mackitt
Dr. Kenneth Mackitt
Ruth Mackitt
Carolyn Prebich

SLC 2
Harvey Green
Ken Penn
Mike Avery
EPI
Hal Redmond

ARREST WARRANT NO. C 471661

7-6-89

ACTION OF GRAND JURY

Irrel Bill

W. H. [Signature] 10-2-89
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

Enlow

CERTIFIED TRUE COPY
OF ORIGINAL FILE
Barbara Shaper
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

AMENDED
DOCKET NO.

89
89-GS-43 - 763

WITNESSES

SUMTER PD/SLED/FBI

Tommy Fields	Nancy Green
Jimmy Pritchard	Ken Bogan
Perry James	Mike Avery
Cleveland Pinkney	Hal Dedmond

Lena Rose Penny

Walter Moore

Rebecca Nesbitt
Dr. Kenneth Mylander

Beth Matous
Carolyn Prebish

ARREST WARRANT NO. C 471661

7-6-90

ACTION OF GRAND JURY

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

The State of South Carolina,

County of SUMTER

1/19/1990

COURT OF GENERAL SESSIONS

APRIL TERM 1990

THE STATE

vs.

LARRY CHINA

Indictment for

BURGLARY - FIRST DEGREE & CRIMINAL
SEXUAL CONDUCT - FIRST DEGREE

CERTIFIED TRUE COPY
OF ORIGINAL FILE

Barbara Stager
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

EXHIBIT 3
PG 1 of 1

Kelley

3

Page 3

Pritchard: Okay, he just asked you if anybody was home.

Leana: Yeah, and I said no.

Pritchard: Okay, go ahead and tell me what happened after that okay?

Leana: You want me to tell you when he put me on the couch and stuff like that?

Pritchard: Okay, just take it in order, you was talking to him and he was in the car.

Leana: I was talking to him and he was still in the car and he drove back in the

Pritchard: He drove around the corner?

Leana: No, there's the house right there, so like coming in, where you can park your car, he pulled, like, in, then I said you got a nice car and he said thank you.

Pritchard: Okay, he pulled up in the driveway?

Leana: Yeah, pulled up, yeah, that's what I mean, pulled up in the driveway. So I was just talking to him.

Pritchard: Okay, tell me what the car looked like.

Leana: Cream color

(telephone call interrupts)

Pritchard: Okay, we're back recording now after a brief interruption. Okay, Leana, you said he pulled up in the driveway, so go from there.

Leana: He pulled up in the driveway and he said he had a package for Trish, I think he said Trish. He said he had a package, he didn't show me nothing, no, he just said it out his mouth and I believed him you know. So and then after he talked he told me that, he said he was gonna park around the corner and walk back. And then he come on in the house. I thought he was gonna give me the package and walk out, you know, but he didn't.

*rebecca
reshit*

enter

Pritchard: Okay, where were you when he walked on in the house?

Leana: Eating.

Pritchard: You were sitting there eating.

Leana: On the love seat.

Pritchard: Alright, and tell me what happened next.

Leana: He asked me was anybody here and I said no sir, you know I didn't say no sir, I said no. And then he went to the

EXHIBIT 4
PG 1 of 2

Page 4

Leana: Continued - hall, turned on the hall light. He asked me can I check that and I said yeah, you know, yeah. And there was the dog room, she had three puppies but one, she had four puppies but one died, now she got three little poodles. So I didn't know what was coming up. I locked up and he was locking the doors and then I realized

Pritchard: He locked the doors?

Leana: He locked it, he locked the top and bottom and then I realized he had something up his sleeve, like funny business, and I got scared.

Pritchard: Okay, tell me what he looked like, describe him to me.

Leana: He was tall, he had earring, a diamond earring, not big but little, and he had a yellow shirt like knit sleeves.

Pritchard: The sleeves were knit, the rest of it was solid, like regular cloth?

Leana: I think the front of it was knit too

Pritchard: Okay, was it a pullover shirt, like a T-shirt?

Leana: Pull over. and I think he had on brown slacks and the belt, I think it was the same color as the pants and the belt buckle was shiny, like yours. I didn't pay no attention to his shoes.

Pritchard: Okay and he was a black

Leana: Black guy, black male and heavy set, he was drinking whiskey, I could smell it on his breath. I told him please do not kiss me

Pritchard: You don't like that smell?

Leana: No sir. He kissed me on the forehead, he said I'm sorry.

Pritchard: Okay, wait a minute, you skipping over some stuff now. I know you don't want to talk about it but we gonna have to talk about it okay?

Leana: Okay

Pritchard: Okay, take your time now and tell me about what happened next.

Leana: Okay. I was eating on the table, the love seat and he was to the hallway and turned on the hallway light and asked me could he check

Pritchard: To see if anybody was home?

Leana: To see if anybody was home, nobody was there. So I got up and I went around the coffee table and he came on and I didn't realize what he was doing.

EXHIBIT 4

PG 2 of 2

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1 GLAD TO.

2 MR. MILES: JUDGE, I CAN TESTIFY THEY'RE --
3 HAVING BEEN IN POLITICS -- I ASSURE THEY'RE NEVER IN ERROR
4 AND THEN ALSO IS AN INCIDENT FILE RECORD WHICH HAS BEEN
5 CERTIFIED ON THE BOTTOM BECAUSE IT'S NOT THE ORIGINAL AND
6 THE STATE HAS A COPY OF THAT, TOO.

7 THE COURT: AS TO THE RISING AND SETTING OF THE
8 SUN, I CAN TAKE JUDICIAL NOTICE OF THAT ASSUMING WE CAN ALL
9 AGREE THAT THE DATE ON THAT IS CORRECT.

10 MR. MILES: 8:33 IS WHAT THIS SAYS AND IT'S ON
11 THE DATE AND THIS IS A COPY OF THE REPORT FROM THE CITY
12 POLICE. I GOT THOSE BY SUBPOENA.

13 BY MR. MILES:

14 Q MR. MCMILLAN, WHAT TIME DOES IT SAY MS. PENNY -- THAT
15 CALL FIRST CAME IN ABOUT MS. PENNY?

16 A HOLD ON NOW. I GOT TO READ SOMEBODY ELSE'S COMPUTER
17 PRINTOUT HERE.

EXHIBIT 5

PG 1 of 1

18 Q ALL RIGHT.

19 A TIME RECEIVED -- MILITARY TIME -- IT LOOKS LIKE 21:35
20 WHICH WOULD BE 9:35 P.M.

21 Q ALL RIGHT, SIR. NOW, THE SUN SET THAT DAY ACCORDING
22 TO THE SUMTER DAILY ITEM AT 8:33?

23 A RIGHT, P.M. WELL, THERE YOU GO. THERE IS AN HOUR
24 BETWEEN IT.

25 Q I THOUGHT YOU'D OBSERVE THAT BUT YOU WOULD AGREE WITH

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1 ME, WOULD YOU NOT, THAT IT DOESN'T GET DARK UNTIL THE SUN
2 SETS, WON'T YOU? CAN YOU BUY THAT?

3 A WELL, IT GETS DARK AT MY HOUSE WHEN THE SUN GOES
4 DOWN. I'M NOT TRYING TO BE CUTE WITH YOU, MR. MILES; BUT I
5 MEAN, I DON'T KNOW. THERE IS DIFFERENT DEGREES OF
6 DARKNESS. I MEAN, IT'S DARKER ON A CLOUDY NIGHT THAN A NON
7 CLOUDY. IT'S DARKER ON NON FULL MOON BUT IT'S STILL DARK.

8 Q MY POINT IS YOU DID NOTHING AT ALL TO DETERMINE
9 WHETHER IT WAS CLOUDY, WHETHER IT WAS FAIR, WHETHER IT WAS
10 RAINING. I MEAN, YOU DIDN'T MAKE ANY INQUIRY AS TO WHAT
11 NIGHTTIME WOULD HAVE BEEN ON THAT DAY, DID YOU?

12 A WELL, NIGHTTIME IS NIGHTTIME. MR. MILES, I MAY HAVE
13 KNOWN THAT THE CALL CAME IN AT 9:35 AND THIS CALL CAME IN
14 AT 8:30 BUT I CAN'T SAY. I DON'T WANT TO SOUND OVERLY
15 DEFENSIVE HERE BUT NIGHTTIME IS NIGHTTIME AND I DON'T SEE
16 ANYTHING TO TELL ME THAT THIS DIDN'T HAPPEN ANY OTHER TIME
17 OTHER THAN NIGHTTIME.

18 Q THAT'S THE FIRST TIME THOUGH THAT YOU'VE EVER SEEN
19 THAT REPORT FROM THE CITY POLICE THAT I JUST SHOWED YOU.

20 A RIGHT.

21 Q AND AS FAR AS YOU'RE ---

22 A AS FAR AS I CAN REMEMBER.

23 Q IF YOU HAVE SEEN IT YOU DON'T RECALL IT?

24 A I DON'T RECALL IT.

25 Q ALL RIGHT. NOW, AT THE TIME THAT YOU UNDERTOOK TO

EXHIBIT 6

PG 1 of 1

Stop

874

1 FILE -- OF THE REPORT ON THE CHARGE OF BURGLARY OR WHERE HE
2 WAS EVER -- BOND WAS EVER POSTED OR ANYTHING ELSE WAS DONE
3 IN REFERENCE TO THAT CHARGE?

4 A I BELIEVE LARRY WAS OUT ON BOND WHEN I GOT THE CASE.
5 WHETHER OR NOT AFTER HE WAS INDICTED FOR THE ADDITIONAL
6 CHARGE OF BURGLARY, HE WAS BROUGHT BACK BEFORE A CIRCUIT
7 COURT JUDGE FOR ADDITIONAL BOND, I DON'T KNOW. I CAN
8 ASSURE YOU I WOULD NOT HAVE BROUGHT HIM BACK TO REQUIRE HIS
9 BOND TO BE HIGHER.

10 Q BUT THE QUESTION I GOT IS IN YOUR RECORDS,
11 MR. MCMILLAN, DO YOU HAVE ANYTHING IN THERE THAT INDICATES
12 THAT ANYTHING WAS DONE IN REFERENCE TO THE CHARGE OF
13 BURGLARY EXCEPT HE WAS TRIED FOR IT?

14 A I'VE GOT A COPY OF THE INDICTMENT.

15 Q FROM THE GRAND JURY?

16 A CORRECT.

EXHIBIT 7
pg 1 of 2

17 Q AFTER THAT INDICTMENT WAS HE EVER BROUGHT BEFORE
18 ANYONE THAT YOU'RE AWARE OF?

19 A I DID NOT INITIATE ANY ACTION TO BRING HIM BEFORE
20 ANYONE TO ---

21 Q ALL RIGHT.

22 MS. TIFFIN: LET HIM FINISH HIS ANSWER, JUDGE.

23 THE WITNESS: NO. TO ANSWER YOUR QUESTION, TO MY
24 KNOWLEDGE AND I COULD BE WRONG. IT'S BEEN FOUR YEARS. I
25 DON'T REMEMBER AT THIS POINT ANY OTHER PROCEEDING LIKE A

875

1 FORMAL ARRAIGNMENT OR ADDITIONAL BOND HEARING AS A RESULT
2 OF BURGLARY CHARGE.

3 Q DID YOU EVER FILE -- YOU NOW HAVE YOUR FILE.

4 A YES.

5 Q DO YOU HAVE A MOTION IN THERE WHERE YOU FILED TO
6 QUASH THE INDICTMENT?

7 A LET ME GET MY MOTIONS FILE HERE. (PAUSE) I DON'T
8 SEE A MOTION TO QUASH AN INDICTMENT LISTED. I'M SPEAKING
9 SLOWLY BECAUSE I'M READING ONE MORE TIME. GOT EVERY OTHER
10 KIND OF MOTION IN THE WORLD IN HERE. I DON'T SEE ONE,
11 MR. MILES.

12 Q MR. MCMILLAN, DID YOU SEE THE INDICTMENT BEFORE THE
13 TRIAL?

14 A I'M SURE I DID.

15 Q DID THEY GIVE YOU A COPY OF IT? DO YOU REMEMBER WHEN
16 YOU SAW IT?

17 A NO, I DON'T.

EXHIBIT 7
pg 2 of 2

18 Q ALL RIGHT. IN LOOKING THE INDICTMENT I UNDERSTAND
19 SHOULD HAVE BEEN SPECIFIC IN NAME AND ADDRESS AND TIME AND
20 THAT SORT OF THING, SHOULD IT NOT?

21 A LIKE THE DATE WHEN SOMETHING OCCURRED AND WHERE IT
22 OCCURRED?

23 Q YES, SIR, AND A DESCRIPTION OF THE RESIDENCE WHERE IT
24 OCCURRED AND THE BUILDING WHERE IT OCCURRED. ISN'T THAT A
25 REQUIREMENT?

FORM LASER BOND A-PI 10/11/78 11-11-78 11-11-78

COPIED

6

STATE OF SOUTH CAROLINA)
 COUNTY OF SUMTER)
)
 Larry China #175247,)
)
 Petitioner,)
)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

RECORDED
 IN THE COURT OF COMMON PLEAS
 2015 AUG 14 AM 11:29

JAMES C. CAMPBELL
 Case No.
 CLERK OF COURT
 SUMTER COUNTY, S.C.

2015-CP-43-1885

PETITION FOR
 WRIT OF HABEAS CORPUS

The Petitioner, Larry China #175247, respectfully moves this Honorable Court to convene an evidentiary hearing and to grant the writ of habeas corpus on the issues presented in the petition for WRIT OF HABEAS CORPUS pursuant to South Carolina Code of Law § 17-17-10, 17-17-30.

The Petitioner brings forth this WRIT OF HABEAS CORPUS to protect his rights to be free from a conviction based upon insufficient evidence to sustain each and every element of the charged offense. The insufficient evidence permeated Petitioner's entire judicial proceedings such that Petitioner's only means to right this wrong is through HABEAS CORPUS.

RECEIVED
 JUN 02 2017
 SC Court of Appeals

ATTACHMENT
 TO
 Explanation.

UNAVAILABILITY OF DIRECT APPEAL

As a threshold matter, the state habeas corpus is the only available avenue and the appropriate mechanism by which this petitioner can have this current issue adjudicated under South Carolina law and legal jurisprudence.

This STATE HABEAS CORPUS is not being instituted as a substitution for the appeal process established by the South Carolina legal jurisprudence. The Petitioner's constitutional issue that the evidence adduced at trial shows that no rational trier of facts could have found proof of guilt beyond a reasonable doubt is not reviewable upon direct appeal.

South Carolina Appellate Court Rule 201 defines who may appeal and what may be appealed. Subsection (b) of South Carolina Appellate Rule 201 specifically sets the parameters that "only a party of aggrieved by an order, judgment, sentence or decision may appeal." This is significant because there is no actual written order, judgment, sentence or decision issued by Judge Dan F. Laney, Jr. which specifically adjudicates insufficient evidence to sustain the conviction of Petitioner's trial. Because there is no written order, judgment, sentence or decision on this specific issue, the appeal mechanism is barred and unavailable to Petitioner China. (See: Brunson v. American Koyo Bearin, 367 S.C. 161, 623 S.E.2d 870 (S.C. App. 2005). "South Carolina adheres to the final judgment rule which provides that, an appeal lies only from a final judgment." SEE also: Fulmer v. Cain, 380 S.C. 466, 670 S.E.2d 652 (S.C. 2008) and State v. Isaac, 747 S.E.2d 677 (S.C. 2013).

UNAVAILABILITY OF POST-CONVICTION PROCEDURE ACT

As a threshold matter, the state habeas corpus is the only available avenue and the appropriate mechanism by which the Petitioner Larry China #175247 can have his current issue adjudicated under South Carolina law and legal jurisprudence. This state habeas corpus is not being instituted as a substitution for post-conviction relief as established by the UNIFORM POST-CONVICTION PROCEDURE ACT.

The Petitioner's constitutional issue that the evidence adduced at trial shows that no rational trier of facts could have found proof of guilt beyond a reasonable doubt is not cognizant under the mandated parameters of the Uniform Post-Conviction Procedure Act unavailable to Petitioner China.

The Uniform Post-Conviction Procedure Act defines who may utilize its mechanism and under which specific circumstances the mechanism trigger. (See: Generally South Carolina Codes of Law §17-27-20). The Petitioner, China, is specifically challenging the insufficiency of the evidence upon which his convictions rest. The Post-Conviction Procedure Act 17-27-20 (a)(6) specifically says "That this section 'shall' not be construed to permit collateral attack on the grounds that the evidence was insufficient to support a conviction."

This subsection of the Post-Conviction Procedure Act creates a bar which prohibits the Petitioner from bringing this issue under the Uniform Post-Conviction Procedure Act as a matter of law. So clearly, as a matter of law and as a matter of fact, the Uniform Post-Conviction Procedure Act is not and will not ever be available to an individual who alleges insufficient evidence to sustain a conviction in South Carolina as the ACT is presently written.

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U.S. Const. Amend. 14

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STATEMENT OF THE CASE

The Petitioner is presently confined within The South Carolina Department of Corrections pursuant to an 'Order of Commitment' by the Clerk of Court for Sumter County, S.C. The Petitioner was indicted at the September 1989 term of the Sumter County Grand Jury for Criminal Sexual Conduct and again at the April 1990 term of the Sumter County Grand Jury for both, Criminal Sexual Conduct First (1st) Degree and Burglary First (1st) degree. The Petitioner was represented by: Marvin E. McMillian, Esq. and Douglas Strickler, Esq. Petitioner proceeded to a Jury Trial before the Honorable: Dan F. Laney, Jr., on January 31, 1991. The Petitioner was sentenced to Life imprisonment for the Burglary First (1st) Degree and Thirty (30) years imprisonment for CSC First (1st) Degree.

A Timely 'Notice of Appeal' was filed and an Appeal was perfected. Petitioners conviction and sentencing was AFFIRMED. State V. China, 312 S.C. 335, 440 S.E.2d 382 (Ct. App. 1993).

Petitioner then filed his 'first' application for Post-Conviction Relief on April 11, 1994 (C/A No. 194-CP-43-0467). The State made it's return on September 12, 1994. An Evidentiary Hearing was convened on August 28/29, 1995 before the Honorable Thomas W. Cooper, Jr. Judge Cooper 'DENIED' and 'DISMISSED' the application with prejudice in a written 'ORDER' dated January 31, 1997. Petitioners 'MOTION TO ALTER OR AMEND' was 'DENIED' on March 15, 1997. Petitioner made a petition for 'WRIT OF CERTIORARI' to The South Carolina Supreme Court. the petition was 'DENIED' on June 19, 1998 and the remitter was sent

on July 7, 1998.

Petitioner filed a PCR Application on September 29, 1998 (C/A No. 1998-CP-43-0946). An Evidentiary Hearing was held on July 15, 1999 to determine whether the petitioner should be granted another PCR Hearing. No full hearing was held into the matter of the issues before the Honorable: Thomas W. Cooper, Jr. By written 'ORDER' dated April 22, 2000, Judge Cooper 'DISMISSED' the application with prejudice as successive and barred by the one (1) year 'Statute of Limitations'. A Johnsons Petition for Writ of Certiorari was filed. The South Carolina Supreme Court 'DISMISSED' the petition on May 15, 2002 and the remitter was sent on May 31, 2002.

On June 13, 2002, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, for the District of South Carolina (C/A No. 6:02-1927-20AK). Respondents made their move for Summary Judgement on July 26, 2002. In a written 'ORDER' dated February 27, 2003 the Honorable: Henry M. Herlong, Jr 'GRANTED' the Respondents motion for Summary Judgement and 'DISMISSED' the petition.

Petitioner filed a WRIT of MANDAMUS September 11, 2003 (C/A No. 2003-CP-43-0645). Respondents made it's return and "MOTION TO DISMISS" on May 11, 2004. An Evidentiary Hearing was convened on June 7, 2004 before the Honorable: Howard P. King. Judge KING 'DENIED' and 'DISMISSED' the action in a written 'ORDER' dated August 9, 2004. Petitioner filed an Appeal, but, the matter was 'DISMISSED' on July 12, 2005 and the remitter sent on July 28, 2005.

On May 3, 2007, Petitioner filed a petition for writ of habeas corpus (C/A No. 2007-CP-43-0931). Respondent made its Return and Motion to Dismiss on November 26, 2007. A conditional Order of Dismissal was issued on November 29, 2007 and filed December 11, 2007 by the Honorable Clifton Newman. A Final Order of Dismissal was signed by the Honorable George C. James Jr. on January 27, 2008 and filed January 28, 2008. On February 5, 2008, Judge James entered a "New Order of Dismissal" acknowledging letters from the Petitioner dated January 23, 2008 and January 25, 2008. On July 17, 2008 Judge James denied Petitioner's pro se motion.

On April 16, 2014, the Petitioner filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the Supreme Court and was denied on June 26, 2014. Petitioner then filed a federal writ of habeas corpus for a second or successive petition on May 18, 2015 and was denied on June 15, 2015.

This writ of HABEAS CORPUS with INITIAL BRIEF NOW FOLLOWS.

QUESTIONS PRESENTED

1) Did the State mislead the grand jury by submitting insufficient evidence to obtain an indictment for burglary 1st degree?

2) Whether the Petitioner's convictions rest on and were obtained by insufficient evidence?

3) Whether the Petitioner's convictions and sentence can be sustained because of the use of insufficient evidence in light of State v. Bostic?

ARGUMENT IN SUPPORT OF ISSUES 1-3

The Petitioner, Larry China #175247, makes his arguments on two major facts that are supported by the record Fact Number 1: That the grand jury was misled into indicting the Petitioner on a charge of burglary 1st degree with the aggravating factors entering without consent, and nighttime as fact-offense elements that were not present. See: S.C. Code Ann. §16-11-311(A)(1)(2) and (3). Let us note that the State's witness (victim), Ms. Leana Penny let Mr. China into the residence (This was not a break-in) and allowed Mr. China to search the residence (Gave him permission to do so) to see if anyone else was in the residence, and Ms. Penny never asked the Petitioner to leave. "Therefore," the entering without consent was insufficient evidence to submit to the grand jury and the petit jury at trial pursuant to State v. Bostic, 708 S.E.2d 774. A case should be submitted to the jury when the evidence is circumstantial if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. Fact Number 2: The record reflects that (2) phone calls were made from the residence of Ms. Penny's to the police about this alleged incident, one call came in at 8:30 and another call came in at 9:35. Let us note that the only phone call submitted as evidence of burglary 1st degree was the 9:35 call as a fact offense element of this statute (§16-11-311(A)(1)(2)(3)). This was done to mislead the grand jury on the aggravating circumstances to get an indictment of burglary 1st degree, which this aggravating circumstance was never present rendering this element insufficient evidence to submit to the grand jury and the petit jury at trial. State v. Bostic, 708 S.E.2d 774. The S.C. Court of Appeals held: That the evidence "must"

constitute "positive proof of facts" and circumstances which reasonably tend to prove guilt in order to be sufficient to submit the charge to the jury. Here, there could never be any proof of facts where the fact-offense elements submitted to the grand jury and petit jury at trial were never present. Because the aggravating circumstance is the "essence" of first degree burglary, the charge of burglary 1st degree to the jury was insufficient for consideration of the Petitioner's guilt of burglary 1st degree pursuant to State v. Bostic, 708 S.E.2d 774 in this instant case. Also see: S.C. Const. Art. 1, Sect. 11, U.S. Const. Amend. 5. The clearly established constitutional rights of the accused. The Petitioner, Larry China, #175247, asserts that his petition for a writ of habeas corpus contains constitutional deprivations of his Fifth (5) Amendment, Sixth (6) Amendment, and Fourteenth (14) Amendment rights that warrants the issuance of the writ, and his petition contains an adequate statement of the facts thereof, to make possible preliminary, an intelligent judgement on the merits of his claims within his petition. Crosby v. State, 126 S.E.2d 843. The Petitioner has exhausted all available post-conviction relief remedies, as well as other remedies such as federal habeas corpus. The Petitioner sets out the facts of his claims and makes a prima facie showing that entitles Petitioner to relief. Welch v. MacDougall, 143 S.E.2d 455. Petitioner China's petition for habeas corpus on itself supports the requested relief, thus, making it an appropriate petition. Hunter v. State, 477 S.E.2d 203. Habeas corpus is available to the Petitioner, because other remedies such as post-conviction relief are inadequate and unavailable as defined by: South Carolina Codes of Laws § 17-27-20(A)(6), that specifically says "That this section 'shall' not be construed to permit coll-

ateral attack on the grounds that the evidence was insufficient to support a conviction and direct appeal is unavailable, because there is no actual written order, judgment, sentence, or decision issued by Judge Laney, Jr., which specifically adjudicates insufficient evidence to sustain the conviction of Petitioner China's trial. So direct appeal is barred to Petitioner China. See: South Carolina Appellate Court Rule 201, subsection (b); S.C. Const. Art. 1, Sect. 18; Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); Gibson v. State, 495 S.E.2d 426 (S.C. 1998). The Petitioner's constitutional rights have been violated, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice, as well as public interest in these matters. Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (S.C. 1990).

REASONS FOR GRANTING THE WRIT

The Petitioner has exhausted all available post-conviction relief remedies, as well as other remedies, such as federal habeas corpus. The act is inadequate and unavailable to Petitioner by the rule governing S.C. Code Ann. 17-27-10. The Petitioner's only means of getting his constitutional claims adjudicated on is by state habeas corpus. Petitioner China claims that his Fifth (5), Sixth (6), and Fourteenth (14) Amendment rights were violated by the use of insufficient evidence and that the evidence adduced at trial was insufficient to sustain his convictions and sentences, as it was fundamental error that goes directly to the foundation of the Petitioner's convictions and sentences, which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice (Simpson v. State, 329 S.C. 43, 46, 495 S.E. 2d 429, 431 (1998)), and habeas corpus is Petitioner China's only avenue for relief, which continues to be available as a constitutional remedy. Gibson v. State, 329 S.C. at 42, 495 S.E.2d at 428. Butler v. State, 324 S.E.2d 813, 106 S.Ct. at 869. Simply put, this action has merits and calls for an evidentiary hearing on them and should not be summarily dismissed. To do so would be to deny Petitioner China the fundamental right to have his claims heard and adjudicated upon their legal and constitutional merits. Further, the Petitioner has set forth in his petition constitutional claims that more than well meet the standard delineated in Butler v. State, [SIC] and do very well indeed, which in the setting, constitute a denial of fundamental fairness shocking to the universal sense of justice, as well as public interest in such matters. Gibson, Supra; Butler, Supra. To bar this case would

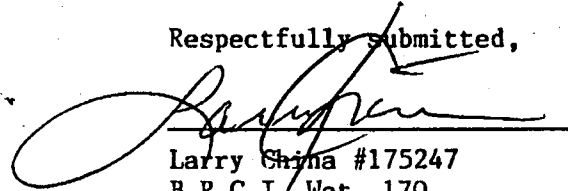
continue to uphold a mockery of the justice system, and a fundamental miscarriage of justice and fairness shocking to the universal sense of justice, which has proceeded to exist for years. U.S. Const. Amends. Five (5), Six (6), and Fourteen (14). This action must be heard as the following: "A STATE HABEAS CORPUS" pursuant to S.C. Code Ann. §17-17-10 et. seq. and S.C. Const. Art. 1 § 18. Gibson, 329 S.C. at 41, 495 S.E.2d at 428 or in the "ORIGINAL JURISDICTION" of the Supreme Court pursuant to S.C. Const. Art. 5 § 5. Gibson, Supra; Butler, Supra. To not hear this case without review, would result in a gross miscarriage of justice. Butler v. State, 334 S.C. 813, 106 S.Ct. at 869. The evidence was insufficient to submit to the jury on the issue of Petitioner's guilt of burglary first degree. S.C. Code Ann. § 16-11-311(A)(1)(2)(3). State v. Bostick, 392 S.C. 134, 708 S.E.2d 774. As well as being insufficient to sustain Petitioner China's convictions and sentences as a matter of law, this error in law made Petitioner China's trial so egregiously unfair as to deny him a fair trial. Therefore, we must honor the mandatory constitutional rights of an accused established by our legislature many years ago; to do otherwise would result in an abandonment of the requirement to even have an indictment or a written waiver thereof. The resources of our judicial branch are better served by requiring compliance on the front end with this clear, unambiguous, and long-standing constitutional prerequisite to any criminal proceeding. State v. Bullock, 574 S.E.2d 17 (N.C. App. 2002); State v. Pressler, 176 N.E.2d 308 (Ohio App. 1960); and see eg. Ex Parte Cole v. State, 842 So.2d 605 (Ala. 2002). The grand jury exists not merely to investigate and accuse, but as a curb on the unbridled power of the sovereign and to issue valid indictments; to do

otherwise results in a denial of an accused's long-standing constitutional rights and would vanish the Constitution altogether, as well as the Fifth (5) Amendment Grand Jury Clause.

CONCLUSION

For the legal reasons and principles cited in this state habeas corpus petition, with initial brief, the conviction(s) and sentence(s) should be vacated.

Respectfully submitted,



Larry China #175247
B.R.C.I. Wat. 170
4460 Broad River Rd.
Columbia, S.C. 29210

Date: July 27, 2015
Columbia, South Carolina

RECORDED

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

2015 AUG 14) AM 11:29 THE COURT OF COMMON PLEAS

Larry China #175247,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No.: 2015-CP-43-1885

Petitioner,

v.

State of South Carolina,

Respondent.

**AFFIDAVIT OF
LARRY CHINA #175247**

I, Larry China #175247, do hereby swear, attest, depose and say the truth to the following:

1) That the State submitted insufficient evidence to the grand jury to obtain an indictment for burglary 1st degree.

2) That this insufficient evidence permeated the Petitioner's entire judicial proceedings that the Petitioner's only means to right this wrong is through habeas corpus.

3) That the S.C. Attorney General's Office refused to answer the Petitioner's SCRCIVP Rule 36 request for admissions.

4) That this insufficient evidence violated the Petitioner's rights to due process of law (5th), (6th), & (14th) Amendments of the U.S. Constitution.

5) That this substantive due process violation was fundamental as it goes directly to the foundation of the Petitioner's convictions and sentences and "must" be vacated as a matter of law.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 21st DAY OF July 2015

Susan H. Dye
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: March 5, 2018

S/ [Signature]
Larry China #175247
B.R.C.I. Wat. 170
4460 Broad River Rd.
Columbia, S.C. 29210

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER) 2015 AUG 14 AM 11:29) IN THE COURT OF COMMON PLEAS

Larry China #175247,)
JAMES C. CAMPBELL)
CLERK OF COURT) Case No.: 2015-CP-43-1785
SUMTER COUNTY, S.C.)

Petitioner,)

v.)

*State of South Carolina,)

Respondent.)

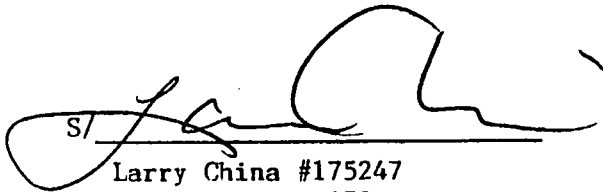
CERTIFICATE OF SERVICE

I, the undersigned Petitioner, do hereby certify on this 27 day of July 2015, that I served the following/foregoing [attached documents]: PETITION FOR WRIT OF HABEAS CORPUS AND AFFIDAVIT OF LARRY CHINA, as well as a CERTIFICATE OF SERVICE in this matter by depositing a true copy of it in the United States Mail, postage prepaid on July 27, 2015, addressed to the following indicated below:

1) Alan Wilson
Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

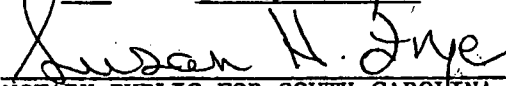
2) 3rd Circuit Solicitor
C. Kelly Jackson
141 N. Main St.
Sumter, S.C. 29150

3) Clerk of Court
Sumter County
13 East Canal St.
Sumter, S.C. 29150


SI _____
Larry China #175247

B.R.C.I. Wat. 170
4460 Broad River Rd.p
Columbia, S.C. 29210

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 27 DAY OF July 2015.


NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: _____ My Commission Expires:
March 5, 2018

5

STATE OF SOUTH CAROLINA) In The Court Of Common Pleas
 COUNTY OF SUMTER) Case # 2015-CP-43-1885
 Larry China # 175247)
 Petitioner.

RECEIVED

JUN 02 2017

SC Court of Appeals

v.)
) Petitioner's Response
 STATE OF SOUTH CAROLINA) To Respondent's
 Respondent.) Motion To Dismiss
 _____)

Petitioner above named submitted a petition for Writ Of Habeas Corpus that was filed August 14, 2015. The respondent subsequently submitted it's Return And Motion To Dismiss dated January 27, 2016.

By Order of the Honorable George C. James Jr. dated May 5, 2016, petitioner is now before this court to respond to the respondent's motion to dismiss. In this response, the petitioner will show not only that the respondent's position is not supported by the record, the respondent failed to demonstrate the absence of a genuine issue of material fact. Strickland v. Madden 323 S.C. 63, 448 SE2d 581 (1994)

Furthermore, this response will also show that petitioner is not relying on mere allegations in this response to withstand a summary dismissal, but will set forth specific facts and evidence showing that there is a genuine issue for a hearing. Id.

ATTACHMENT
 TO
 Explanation

ARGUMENT

As stated in his petition for writ of habeas corpus, petitioner asserts that the petition is the only avenue available and is the appropriate mechanism by which his current issues can be adjudicated under South Carolina law and legal jurisprudence. (see petition pg.iii)

Petitioner asserts that his conviction on Burglary 1st degree was obtained unconstitutionally in violation of his Due Process Right to a fair trial, being that there was no evidence to support the indictment and conviction on the offence of Burglary 1st degree. S.C. Code Ann. §16-11-311

On July 6, 1989 petitioner was arrested and charged with Criminal Sexual Conduct (CSC) 1st degree. **Exhibit 1**

At the September 1989 term of the Sumter County Grand Jury, petitioner was indicted on Criminal Sexual Conduct (CSC) 1st degree. **Exhibit 2** However, at the April 1990 term of the Sumter County Grand Jury, the Grand Jury amended the September 1989 Grand Jury indictment to include Burglary 1st degree. **Exhibit 3.**

It must be noted that petitioner was never arrested or charged with Burglary 1st degree. The second Grand Jury amended Burglary 1st degree to the (CSC) indictment using the (CSC) arrest number and the (CSC)'s docket number on the new indictment. **Exhibit 3**

It must be also noted that questions about the Burglary indictment appears to be belated at this point in the pleadings. However, since the indictment affects the court's jurisdiction over petitioner's Burglary conviction and sentence, questions about whether the indictment is flawed is a subject matter jurisdiction issue, and can be raised at anytime.

After petitioner was found guilty by a jury of his peers, petitioner was convicted of Criminal Sexual Conduct (CSC) 1st degree and sentenced to 30 years. Petitioner was also convicted of Burglary 1st degree and was sentenced to life imprisonment. (to run consecutive)

Although petitioner concedes to the charge, indictment, conviction and sentence to (CSC), he does not concede to the indictment and conviction to Burglary because there is no, and never was evidence to support the indictment and conviction on Burglary 1st degree. (see petition pg.5-7)

According to South Carolina law, the underlying element that supports and substantiates the offence of Burglary 1st degree is 1). Entering Without Consent 2). Night Time. S.C. Code Ann. §16-11-311 (A)(1)(2)(3)

According to the police statement by the victim (Leana Penny), the petitioner had consent to enter the dwelling. Exhibit 4 Furthermore, when establishing the time of day the incident occurred, evidence shows that the initial call to the police was actually at 8:30pm not 9:35pm which was the time given to the Grand Jury and the trial jury to establish night time. Exhibit 5,6

The Grand Jury and the trial jury was never privy to the statement the victim gave to the police following the incident. They were also not privy to the fact that there was TWO calls to the police about the incident. The first call was at 8:30pm, and the second call was at 9:35pm. The Grand Jury and the trial jury was only given information about the 9:35pm call. Exhibit 5,6

Petitioner's (PCR) counsel (Mr.Miles) entered into evidence at the (PCR) hearing that sunset on the day of the incident was officially at 8:33pm. (day light savings time) Exhibit 5 ln.1-25. And since the first call was at 8:30pm to the police, the 8:30pm call was 3 minutes before sunset which negates the element of night time.

Petitioner's trial counsel (Mr McMillan) testified at the (PCR) hearing that he never knew about the first call to the police at 8:30pm. He only knew about the second call at 9:35pm Exhibit 6 In:12-24

Therefore if petitioner's very own trial counsel was unaware of the 8:30pm call to the police, then it is most certain that the trial jury who convicted petitioner did not have access to this information also.

Petitioner further argues that since the first call was at 8:30pm (3 minutes before sunset), any reasonable jurist would conclude that the actual entering into the dwelling occurred several minutes earlier because one must remember, after petitioner entered the dwelling, there was a lengthy dialog between the victim and the petitioner along with the fact that a criminal sexual act occurred before the 8:30pm call was even made to the police. Thus it is clear that it was day light when petitioner entered the dwelling. Therefore, the element of night time is not warranted. Exhibit 4

AVAILABILITY OF HABEAS CORPUS IN CIRCUIT COURT

The availability of State habeas corpus has been limited by the (PCR) Act. The Act supersedes and encompasses the common law practice of habeas corpus. However, habeas corpus remains available as an extraordinary constitutional remedy in narrow circumstances. Gibson v. State 495 SE2d 426,428 (1998)

In a petition for habeas corpus, the petitioner must allege: 1). That petitioner has exhausted all other remedies 2). Set out a constitutional claim that meets the Butler standard 3). Show why (PCR) is unavailable or inadequate.

The statement of the facts of petitioner's petition for habeas corpus underscores the fact that petitioner has exhausted all other available remedies. (see petition pg.1-3)

And since this is an issue pertaining to insufficiency of evidence, Statute law §17-27-20(a)(6) specifically states that this section shall not be construed to permit collateral attack on the grounds that the evidence was insufficient to support a conviction. S.C. Code Ann. §17-27-20(a)(6)

According to §17-27-20(a)(6), not only has petitioner showed that he could not have raised this issue in his previous (PCR) proceeding, (PCR) is an inadequate procedural avenue. In other words, petitioner is prohibited from bringing this issue under the (PCR) Act as a matter of law. (see petition pg.iii)

And being that petitioner was denied a Due Process Right to a fair trial, by not having the evidence to convict him of Burglary 1st degree, petitioner has met the constitutional claim delineated in Butler. Which also states that a petitioner must show the denial of fundamental fairness shocking to the universal sense of justice. (see petition pg.8-10) / Butler v. State 397 SE2d 87 (1990)

CONCLUSION

A moving party who fails to demonstrate the absence of a genuine issue of material facts in support of his motion is not entitled to a summary dismissal, even though his adversary does not come forward with controverting materials. Strickland v. Madden 323 S.C. 63, 448 SE2d 588 (1994)

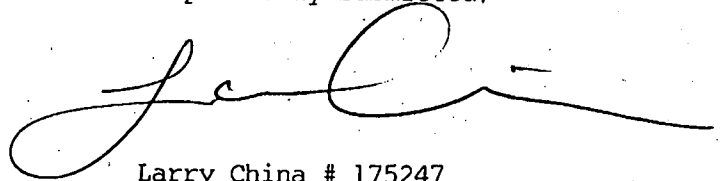
Not only did the respondent's motion to dismiss fail to show the absence of a genuine issue of material fact, the respondent in their motion simply argued that petitioner's petition for writ of habeas corpus was procedurally barred in circuit court, and cited truncated case law to support why the petition should be raised in the Original Jurisdiction of the S.C. Supreme court.

The respondent's motion is not only baseless, it's a rubber stamped motion frequently used by the respondent in litigation when an inmate seeks habeas corpus relief in circuit court. (see respondent's motion pg.5-7)

Not only has petitioner shown in this response that he has a genuine issue of material fact, he has shown that it would be a gross miscarriage of justice to not grant a hearing on the merits pursuant to Butler.

Wherefore, petitioner Larry China now ask this Honorable court to deny the respondent's motion to dismiss and grant petitioner a hearing on the merits of his petition for writ of habeas corpus.

Respectfully submitted,



Larry China # 175247

B.R.C.I. 4460 Broad River Rd.

Monticello # 134

Columbia, S.C. 29210

Date

May 16, 2016

6

1 STATE OF SOUTH CAROLINA
2 COUNTY OF SUMTER

CIRCUIT COURT
2015-CP-43-01885

4 LARRY CHINA,
Plaintiff,
5 -vs-
6 THE STATE OF SC,
Defendant.

TRANSCRIPT OF RECORD

RECEIVED

JUN 02 2017

SC Court of Appeals

8
9 Heard on Wednesday, November 9, 2016
10 Columbia, South Carolina

11
12 BEFORE:

13 THE HONORABLE GEORGE C. JAMES

14 ATTACHMENT
15 TO

16 APPEARANCES:

17 Counsel on Behalf of the Plaintiff:
18 Appearing pro se

Explanation

19 Counsel on Behalf of the Defendant,
20 State of SC:
Julie A. Coleman, Esq.

21
22 Cheri L. Young, RPR
23 Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29804
25

1 ON WEDNESDAY, NOVEMBER 9, 2016 AT 3:00 P.M.:

2 THE COURT: Let me put a few things on the
3 record before we begin.

4 Mr. China, you're here today. This is a
5 matter dealing with your petition for writ of
6 habeas corpus. And this is a Sumter County case.
7 Obviously we are here in Richland County. I am the
8 judge who has granted your motion to reconsider my
9 ruling to dismiss your petition, and you cited
10 several procedural matters.

11 I think Ms. Coleman might be able to explain
12 this further, but in any event I granted your
13 motion for reconsideration on my order of
14 dismissal. My main question to you is -- I am the
15 proper judge to hear it -- do you agree to having
16 this heard today in Richland County?

17 MR. CHINA: Yes, sir.

18 THE COURT: Ms. Coleman, does the State?

19 MS. COLEMAN: Yes, sir.

20 THE COURT: So both sides waive venue.

21 What I'm going to do before I hear you, since
22 this is a new hearing on the State's motion to
23 dismiss, I'm going to hear her motion and I'll
24 allow you to speak and then we'll have some back
25 and forth. Okay?

1 MR. CHINA: All right, sir.

2 THE COURT: Yes, ma'am?

3 MS. COLEMAN: Thank you, Your Honor.

4 And I have several copies of the documents
5 from this case if you'd like me to hand them up to
6 you.

7 THE COURT: Okay. Does Mr. China have
8 those?

9 MS. COLEMAN: I sent you these in the mail
10 and you should have them anyway. Okay.

11 And I'm giving you a copy of the petition,
12 his indictments, the return, the order to dismiss,
13 and then the motion to reconsider, and your order
14 granting it.

15 THE COURT: Okay.

16 MS. COLEMAN: And would you like me to give
17 some background procedural history --

18 THE COURT: Yes.

19 MS. COLEMAN: -- or just general --

20 THE COURT: Beginning with the indictment in
21 1990.

22 MS. COLEMAN: Sure. The Applicant is
23 presently confined in the South Carolina Department
24 of Corrections pursuant to orders of commitment of
25 the Clerk of Court for Sumter County. Applicant

1 was indicted at the April 1990 term of the Sumter
2 County Grand Jury for burglary first degree and
3 criminal sexual conduct first degree.

4 He was represented by Marvin E. McMillan,
5 Esquire, and Douglas Strickland, Esquire.

6 THE COURT: Let's stop right there. This
7 young man is Mr. McMillan's son, so I'm going to
8 ask him to step out of the courtroom.

9 MS. COLEMAN: Okay.

10 THE COURT: He's not permitted to participate
11 in this. Okay?

12 MS. COLEMAN: Thank you, Your Honor.

13 THE COURT: But I'm disclosing that. He
14 knows nothing about this case. And I'll --
15 Mr. China, do you have a problem with me going
16 forward?

17 MR. CHINA: No, sir.

18 THE COURT: All right.

19 MS. COLEMAN: Thank you.

20 THE COURT: Go ahead.

21 MS. COLEMAN: Applicant proceeded to a jury
22 trial before the Honorable Dan F. Laney, Jr. On
23 January 31st, 1991, Applicant was sentenced to life
24 imprisonment for burglary first degree and 30 years
25 imprisonment for CSC first degree.

1 A notice of appeal was filed. An appeal was
2 perfected. Applicant's conviction and the sentence
3 were affirmed.

4 Applicant subsequently filed multiple
5 applications for post-conviction relief; the first
6 of which he alleged ineffective assistance of
7 counsel, insufficient indictment and ineffective
8 assistance of appellate counsel.

9 THE COURT. Okay. Those are all in the
10 return?

11 MS. COLEMAN: Yes.

12 THE COURT: His next -- you don't need to go
13 into specific grounds, but his next PCR
14 application -- well, that PCR application was
15 dismissed after a hearing?

16 MS. COLEMAN: Yes.

17 THE COURT: Okay. And then he filed another
18 in 1998, and then a petition for writ of habeas
19 corpus in 2002, a writ of mandamus in 2003 or
20 petition for writ of mandamus. In 2007 filed a
21 petition for habeas corpus, and then another
22 petition for writ of habeas corpus in 2009, a
23 federal writ of habeas corpus in 2015.

24 MS. COLEMAN: Yes, sir.

25 THE COURT: Is that correct?

1 MS. COLEMAN: Yes. That's correct.

2 THE COURT: All of those were dismissed by
3 the pertinent court --

4 MS. COLEMAN: Yes.

5 THE COURT: -- and around those times?

6 Okay. You can continue.

7 MS. COLEMAN: And we're here today on a
8 petition for state habeas corpus that he filed on
9 August 14th, 2015. And at this time the State
10 moves to dismiss -- we filed our return and motion
11 to dismiss previously, and I'm just going to echo
12 the arguments that are in that return. So if you'd
13 like to look at that, I'll be reading from that.

14 My first argument is that this Court doesn't
15 have jurisdiction to hear the petition for state
16 habeas corpus because this is in the original
17 jurisdiction of the Supreme Court of South
18 Carolina.

19 THE COURT: Don't we hear them all the time,
20 though? I mean, it's not exclusive original
21 jurisdiction.

22 MS. COLEMAN: No. And it's not fair for me
23 to say that none of them can be heard in the
24 circuit, but Keeler versus Mauney, I think is how
25 you pronounce that, holds that a person is

1 procedurally barred from petitioning the circuit
2 court for a writ of habeas corpus where the matter
3 alleged is one which could have been raised in a
4 PCR application. And, further, if that person is
5 barred from hearing it in the circuit court, then
6 it needs to be filed in the original jurisdiction
7 of the Supreme Court.

8 THE COURT: And he's procedurally barred,
9 why?

10 MS. COLEMAN: The State alleges that he's
11 barred because the issues that he's raised in his
12 petition are questioning his indictment and the
13 evidence that was used to indict him in these
14 convictions. These are issues that could have been
15 raised in post-conviction relief and were raised in
16 post-conviction relief. I would also argue he's
17 barred by res judicata because these issues were
18 heard in his first application for PCR that was
19 denied.

20 As we noted, he has had five PCR
21 applications, three appeals on those, one federal
22 habeas and at least two state habeases.

23 THE COURT: Okay. Mr. China, your position?

24 MR. CHINA: Yes, sir.

25 First of all, Your Honor, I would like to ask

1 the Court not to entertain the argument of the
2 State because in their motion to return they did
3 not argue res judicata. Now she's going out of the
4 scope of what the return says.

5 THE COURT: Okay.

6 MR. CHINA: Okay. And I would like to begin
7 with a very brief history, Your Honor.

8 On July 6 of 1989, I was arrested and charged
9 with criminal sexual conduct. In September of the
10 same year, I was indicted for the CSC. In April of
11 1990 while I was out on bond for the CSC, I learned
12 that the State added a first degree burglary charge
13 to the CSC indictment.

14 A habeas corpus is warranted in this matter,
15 Your Honor, because not only is there no evidence
16 that I committed a burglary, you cannot put two
17 separate offenses in a single-count indictment
18 unless one is a lesser-included offense of the
19 other.

20 THE COURT: So how many counts were in your
21 indictment?

22 MR. CHINA: Two.

23 THE COURT: Two? One for CSC and one for
24 burglary?

25 MR. CHINA: Yes, sir.

1 THE COURT: Okay. And you say that's not
2 legal?

3 MR. CHINA: No, sir.

4 THE COURT: And explain to me -- explain that
5 to me, please.

6 MR. CHINA: Because burglary's not a lesser-
7 included offense of a CSC, neither is CSC a lesser-
8 included offense of a burglary.

9 THE COURT: Okay.

10 MR. CHINA: And unless they are lesser-
11 included offenses of each other, then it can be in
12 the same indictment.

13 THE COURT: All right.

14 MR. CHINA: Therefore, the Court was barred
15 of jurisdiction to try me on the charge of
16 burglary. They were barred of personal and subject
17 matter jurisdiction to try me on a charge of
18 burglary.

19 And to add insult to injury, Your Honor,
20 counsel testified at the PCR hearing that he did
21 nothing in regards to the burglary charge being
22 added to the CSC indictment. And I have excerpts
23 of that testimony for both you and the State if you
24 all would like to see it.

25 THE COURT: Can you hand it to the officer

1 and she'll bring it up?

2 MR. CHINA: (Complying.)

3 (Documents handed to the Court.)

4 MR. CHINA: There was nothing done in regard
5 to that charge being added to the CSC indictment.
6 There was no arraignment, no bond. There was no
7 waiver of presentment before the grand jury, nor
8 was there a motion -- the highlighted portions,
9 Your Honor -- nor was there no motion filed to
10 quash the burglary charge from the indictment.

11 Shall I continue?

12 THE COURT: Yes, sir.

13 MR. CHINA: Further, Your Honor, I meet the
14 criteria for habeas corpus because PCR is
15 inadequate and unavailable as a matter of law.
16 Section 17-27-20(a)(6) prohibits anyone from
17 raising the issue of insufficient evidence under
18 the PCR Act. All available remedies have been
19 exhausted as can be seen in the State's motion,
20 first five pages of the State's motion. Under
21 Butler I was denied fundamental fairness, shocking
22 to universal sense of justice and --

23 THE COURT: Was that solely because of the
24 two-count indictment?

25 MR. CHINA: Well, not only that because there

1 was no evidence of burglary at all.

2 THE COURT: Okay.

3 MR. CHINA: There was no -- there was never a
4 burglary committed.

5 THE COURT: All right. Was that -- I've got
6 your appellate court case up on my computer. Was
7 the issue of whether or not there was evidence of
8 burglary, was that an appellate issue that you know
9 of?

10 MR. CHINA: No, sir. It wasn't.

11 THE COURT: Okay. All right. Go ahead.

12 MR. CHINA: Further, Your Honor, the State's
13 argument is solely based on the fact that I am
14 procedurally barred and that I have to file a
15 habeas in the original jurisdiction of the Supreme
16 Court. I don't understand how I can be
17 procedurally barred when I meet the criteria for
18 habeas. I can't be procedurally barred and meet
19 the criteria at the same time, Your Honor. Even if
20 I give the State the benefit of the doubt, it's a
21 jurisdictional issue. The Court did not have
22 personal nor subject matter jurisdiction to try me
23 on a charge of burglary.

24 And in conclusion, finally, Your Honor, the
25 State did fail to show an absence of a genuine

1 issue of material fact in their motion and the
2 party which fails to do so, they're not entitled to
3 a summary dismissal. And I believe I have genuine
4 issues for a hearing.

5 THE COURT: All right. Thank you,
6 Mr. China. Ms. Coleman, your response?

7 MS. COLEMAN: Yes, Your Honor.

8 THE COURT: Why -- can a burglary count be
9 included in a CSC count? I mean, excuse me. Can a
10 burglary count be included in an indictment that
11 has a CSC count?

12 MS. COLEMAN: I'm not prepared to argue that
13 one way or the other.

14 THE COURT: I mean, we see multi-count
15 indictments every day.

16 MS. COLEMAN: Right. And I would argue that
17 this stems from the same fact pattern. It's the
18 same incident as where the CSC charge came from so
19 in theory the grand jury reviewed the evidence
20 pertaining to both indictments. So I think to get
21 into the merits I think that they would be
22 allowed. The State would argue that.

23 In response to his argument that he has
24 exhausted all remedies, I would say that he has
25 not. There -- PCR remedies are still available to

1 him even though he has filed multiple, five
2 applications. The State would submit that PCR is
3 not rendered unavailable or inadequate merely
4 because a petition might be dismissed. He still
5 has the remedy available to him to file another
6 petition, have it reviewed and then --

7 THE COURT: Well, what other PCR issues would
8 there be to resolve?

9 MS. COLEMAN: Well, and our argument is that
10 he could not raise this issue on another PCR
11 because it's already been heard before. He could
12 present newly-discovered evidence or any other kind
13 of relief that he seeks that are allowed under the
14 Post-Conviction Relief Act.

15 THE COURT: He says -- does that address his
16 argument that he can't be procedurally barred if
17 this is a proper petition for writ of habeas
18 corpus?

19 I'm going to ask him in a minute to explain
20 that again, but -- is that what you're saying,
21 Mr. China, that you can't be procedurally barred
22 because you do have a valid writ of habeas corpus
23 issue?

24 MR. CHINA: Yes, sir.

25 THE COURT: And that is the burglary count

1 included within the CSC indictment?

2 MR. CHINA: No, that's two offenses, two
3 separate offenses in a one-count indictment and
4 they cannot be unless one of them's a
5 lesser-included offense of the other.

6 THE COURT: How are you saying it was a
7 one-count indictment? You got burglary first
8 degree. It's got burglary first degree. Then it
9 says count two, criminal sexual conduct.

10 MR. CHINA: Your Honor, I have here, Your
11 Honor, where it says count one, criminal sexual
12 conduct when I was indicted in September of 1989.
13 That was the only charge that I was ever arrested
14 for. I was never arrested for any other charge.
15 And there's only one count number at the top of the
16 indictment. 89-GS-43-763, it's a one-count
17 indictment but --

18 THE COURT: Can you hand that to the
19 officer?

20 MR. CHINA: -- it has two separate offenses.

21 THE COURT: Can I have those?

22 MR. CHINA: Can I have a copy?

23 THE COURT: Can I read it and give it back to
24 you?

25 MR. CHINA: Yes, sir.

1 (Document handed to the Court)

2 THE COURT: Okay.

3 This is a September 25, 1989, indictment.

4 But what you also handed up was, or Ms. Coleman
5 handed up was an indictment from April 9, 1990,
6 that they resubmitted it to the grand jury and you
7 were indicted on both. Have you seen that?

8 MR. CHINA: Yes, sir. I've seen that.

9 THE COURT: All right. I'll hand this back
10 to you. Anything else --

11 MR. CHINA: It's a one-count indictment, but
12 I only was arrested for one charge and it's only --
13 it's only one number on this indictment and that
14 makes it a one-count indictment.

15 THE COURT: And one number being where it
16 says count --

17 MR. CHINA: If there had been another number
18 down below 89-GS-43-763, if that had been a 764
19 below there, then that would've been a two-count
20 indictment, but this is only a one-count
21 indictment.

22 THE COURT: All right. I understand.
23 Anything else, Mr. China?

24 MR. CHINA: Yes, sir.

25 There's no other PCR avenues or remedies

1 available because the issue of insufficiency of
2 evidence cannot be raised under the PCR Act
3 according to statutory law, 17-27-20(a)6 which
4 prohibits anyone from raising the issue of
5 insufficient evidence under the PCR Act.

6 THE COURT: Okay. Anything else,
7 Ms. Coleman?

8 MS. COLEMAN: No, nothing further. Thank
9 you.

10 THE COURT: All right. Mr. China, anything
11 else you want to tell me?

12 MR. CHINA: No, sir.

13 THE COURT: All right. Thank y'all. I'll
14 read this material over very carefully and issue my
15 ruling. Okay?

16 MS. COLEMAN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 Ms. Coleman, what I'd like for you to do is
19 to e-mail your return to me in Word form.

20 MS. COLEMAN: Sure.

21 THE COURT: And I'll be able to -- never
22 mind. I've got the rest of it. That's all I want.

23 MS. COLEMAN: Okay. Thank you.

24 THE COURT: Thank you, all.

25 END OF CASE: 3:15 P.M.

CERTIFICATE OF REPORTER

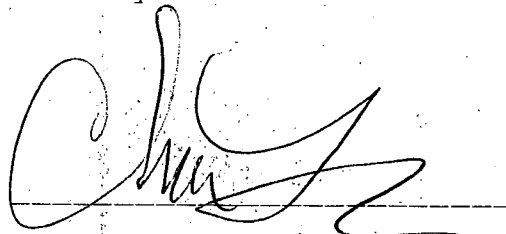
STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation; further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, on the 9th day of November, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

I have hereunder set my hand this 24th day of January, 2017.



Cheri L. Young, RPR
Official Court Reporter

5
Please file stamp the extra cover page and place in the self-addressed stamped envelope provided.

STATE OF SOUTH CAROLINA)	In The Court Of Common Pleas
COUNTY OF SUMTER)	Case # 2015-CP-43-1885
Larry China # 175247)	
Petitioner.)	
)	
V.)	
)	Petitioner's Request
State Of South Carolina)	To Take
Respondent.)	Judicial Notice
_____)	

2017 MAY -3 PM 3:12
 JAMES C. CAMPBELL
 CLERK OF COURT
 SUMTER COUNTY, S.C.
 RECORDED

Pursuant to Rule 201 SCRE, petitioner is now before this court to take Judicial Notice that between 8:00pm-8:30pm June 12, 1989 there was visible daylight to the human eyes.

For the court to take Judicial Notice of this fact, this fact may be of such common knowledge that it is accepted by the general public without qualification or contention. It's accuracy may also be ascertained by reference to ready available sources of indisputable reliability. S.C. Dept. Of Social Serv. v. Janice C. 383 S.C. 221,227, 678 SE2d 463,467 (2004)

Thus said, this Judicial Notice is supported by the "Official Weather And Atmospheric Report" recorded on June 12, 1989 for Sumter, South Carolina to confirm the atmospheric condition on the day in question. (see Report attached)

ATTACHMENT
TO
Explanation

RECEIVED
 JUN 02 2017
 SC Court of Appeals

BACKGROUND

Pursuant to an incident that occurred on June 12, 1989 petitioner was arrested and charged on July 6, 1989 with Criminal Sexual Conduct (CSC) first degree. **Resp Exh1** At the September 1989 term of the Sumter County Grand Jury, petitioner was indicted on Criminal Sexual Conduct. **Resp Exh2** At the April 1990 term of the Sumter County Grand Jury, the Grand Jury amended Burglary first degree to the September 1989 Criminal Sexual Conduct indictment. **Resp Exh3**

In January 1991, petitioner proceeded to trial before the Hon. Dan F. Laney and was represented by Marvin McMillan. After petitioner was found guilty on both charges, petitioner was sentenced to thirty years for Criminal Sexual Conduct and was given a Life sentence for Burglary first degree. (to run consecutive)

After a direct appeal, State v. China 312 S.C. 335, 440 SE2d 382 (1993), petitioner submitted several (PCR) applications including a Federal and State Habeas Corpus petitions along with other subsequent pleadings.

On August 14, 2015 petitioner filed this current habeas corpus petition alleging that although conceding to the Criminal Sexual Conduct charge, he did not commit Burglary first degree. Therefore, since the evidence substantiates this fact, he now ask to be immediately released from prison. It must be noted that since petitioner has served enough time to satisfy the (CSC) sentence, the expulsion of the Burglary conviction and sentence will release petitioner from confinement.

On January 27, 2016 the State filed a motion to dismiss. After petitioner responded to the motion to dismiss (see Response attached w/ Exhibits), a hearing was held on November 9, 2016 on the State's motion before the Hon. George C. James Jr. At the conclusion of the hearing, the matter is now pending awaiting Judge James decision whether to grant a hearing on the merits.

Since a Judicial Notice can be taken by the court at any stage of the proceedings pursuant to Rule 201(F), petitioner's Judicial Notice to the court now follows:

JUDICIAL NOTICE

According to South Carolina law, one of the underlying elements that supports and substantiates the offense of Burglary first degree is "Night Time" S.C. Code Ann. §16-11-311(A)(3)

At trial, presiding Judge Dan F. Laney informed petitioner's counsel and the solicitor in chambers that there was no evidence to dispute the element of Night time.

However, the evidence shows that on the evening of June 12, 1989 two calls was made to the police after the incident. The first call was at 8:30pm and the second call was at 9:35pm. Petitioner's (PCR) counsel entered into evidence at the (PCR) hearing that sunset on the day of the incident was officially at 8:33pm. (day light savings time) Resp Exh5 ln.1-25 / Report p.2
Of 3

And since the first call was at 8:30pm to the police, the 8:30pm call was three minutes before sunset. Petitioner's trial counsel Marvin McMillan testified at the (PCR) hearing that he never knew about the first call to the police at 8:30pm. Resp Exh6 ln.12-24

The purpose of this work is for the court to take Judicial Notice that there was visible daylight between 8:00pm-8:30pm June 12, 1989. The reason why this 8:00pm-8:30pm time period is crucial is because when the 8:30pm call was made, petitioner had already left the dwelling. Therefore, if petitioner had left the dwelling when the 8:30pm call was made to the police, it's axiomatic that he entered the dwelling several minutes before the 8:30PM call was made.

Because one must remember, after petitioner entered the dwelling, there was a lengthy dialog between the victim and petitioner before the sexual encounter even occurred. Resp Exh4, not to mention the amount of time it took to commit the actual assault. All of which took place before the 8:30pm call was made to the police.

Therefore, any reasonable jurist would conclude that the entering of the dwelling occurred several minutes before the 8:30pm call was made to the police. This is why the 8:00pm-8:30pm time period is crucial. If the court would take Judicial Notice that there was visible daylight between 8:00-8:30pm June 12, 1989, this would negate the element of "Night Time."

To support the fact that there was visible daylight between 8:00-8:30pm, the "Official Weather And Atmospheric Report" of June 12, 1989 states that not only did the sun set at 8:33pm in Sumter **Report p.2 Of 3**, there was no clouds nor rain fall on that day. **Report p.1 of 3** Furthermore, the report also states that there was 15 hours and 21 minutes of visible daylight after the sun rose at 6:09am that day. **Report p.2 of 3** This simply means that there was visible daylight up until 9:30pm on June 12 1989.

Petitioner asserts that since he claims that he did not commit Burglary first degree, it is imperative that this Judicial Notice be taken by the court, simply because Night Time is an element of Burglary first degree, and the fact that the "Official Weather And Atmospheric Report Of June 12, 1989 for Sumter, S.C. disproves the element of Night Time in this case. **see Report attached**

It must be further noted that since there was a second call made to the police at 9:35pm, this proves that patrol officer (Patricia Hall) arrived at the victim's residence after 9:35pm. This also proves that officer Hall arrived at the residence after dark. **see Report attached**

To collaborate officer Hall's time of arrival at the residence, Detective Cleveland Pinkney who was summoned to the victim's residence by officer Hall proclaimed that after arriving at the residence around 9:45pm, he collected evidence and accompanied officer Hall and the victim to the hospital.

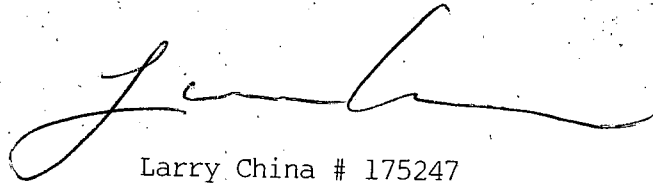
To use officer Hall's and Detective Pinkney's arrival at the residence as a reference to determine whether it was daylight when petitioner entered the dwelling is futile, being that they arrived at the residence well after dark.

Petitioner finally asserts that a Judicial Notice fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the court. (2) capable of accurate and ready determination by resort of sources whose accuracy cannot reasonably be questioned. **Rule 201(C) SCRE**

Therefore, based on the "Official Weather And Atmospheric Report" recorded on June 12, 1989 for Sumter, S.C., petitioner has made a prima facie showing that it was visible daylight between 8:00pm-8:30pm June 12, 1989.

Wherefore, petitioner Larry China now ask this Honorable court to take Judicial Notice that it was visible daylight between 8:00pm-8:30pm June 12, 1989

Respectfully submitted,



Larry China # 175247

B.R.C.I. 4460 Broad River Rd.

Murray # 168

Columbia, S.C. 29210

Date

May 1, 2017

Sumter, SC

Sumter Municipal

© 2:52 PM EDT on April 26, 2017 (GMT -0400)

Weather History for KSMS - June, 1989

June

12

1989

View

Monday, June 12, 1989

Daily Weekly Monthly Custom

	Actual	Average	Record
Temperature			
Mean Temperature	76 °F		
Max Temperature	88 °F	88 °F	100 °F (2015)
Min Temperature	65 °F	63 °F	68 °F (2011)
Moisture			
Dew Point			
Average Humidity			
Maximum Humidity			
Minimum Humidity			
Precipitation			
Precipitation	0.00 in		- ()
Wind			
Wind Speed			- ()
Max Wind Speed			

Actual

Average

Record

Max Gust Speed

Averages and records for this station are not official NWS values.

T = Trace of Precipitation, MM = Missing Value

Source: NWS Daily Summary

Search for Another Location

Airport or City:

KSMS

Submit

Trip Planner

Search our weather history database for the weather conditions in past years. The results will help you decide how hot, cold, wet, or windy it might be!

Date:

June

12

Submit

Astronomy

Jun. 12, 1989

Rise

Set

Actual Time

6:09 AM EDT

8:33 PM EDT

Civil Twilight

5:40 AM EDT

9:02 PM EDT

Nautical Twilight

5:04 AM EDT

9:38 PM EDT

Astronomical Twilight

4:25 AM EDT

10:17 PM EDT

Moon

2:38 PM EDT (6/12)

1:51 AM EDT (6/12)

Length of Visible Light

15h 21m

Length of Day

14h 23m

Waxing Gibbous, 63% of the Moon is Illuminated

Jun 12	Jun 19	Jun 26	Jul 3	Jul 10
Waxing Gibbous	Full	Last Quarter	New	First Quarter

5

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) FOR THE THIRD JUDICIAL CIRCUIT

RECORDED

2017 MAY -8 PM 3:46

RECEIVED

JUN 02 2017

Larry China, #175247,

2015-CP-43-1885

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

SC Court of Appeals

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

CERTIFIED TRUE COPY OF ORIGINAL FILED

ATTACHMENT TO

DEPUTY CLERK OF COURT SUMTER COUNTY SOUTH CAROLINA

Explanation

This matter comes before the Court by way of a document filed August 14, 2015, and captioned "Petition for Writ of Habeas Corpus." The Respondent submitted a Return and Motion to Dismiss. The court convened a hearing on the motion to dismiss on November 9, 2016 in Richland County. The State was represented by Julie A. Coleman, and the Applicant represented himself.

The Applicant's convictions, detailed below, arise out of an incident that occurred on June 12, 1989. By letter to the court dated May 1, 2017, the Applicant submitted a document entitled "Official Weather and Atmospheric Report" that purports to detail the weather conditions, time of sunrise, time of sunset, etc. for June 12, 1989.

Though the undersigned is now an associate justice on the Supreme Court of South Carolina, he has continuing jurisdiction over this matter at the circuit court level by order of Chief Justice Donald W. Beatty.

PROCEDURAL HISTORY

The records before this court establish that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Sumter County. The Applicant was indicted at the April 1990 term of the Sumter

County Grand Jury for Burglary – First Degree and Criminal Sexual Conduct (“CSC”) – First Degree (1990-GS-43-0763). He was represented by Marvin E. McMillan, Esquire, and Douglas Stricker, Esquire. Applicant proceeded to a jury trial before the Honorable Dan F. Laney, Jr. On January 31, 1991, the Applicant was sentenced to life imprisonment for Burglary – First Degree and to thirty (30) years imprisonment for CSC – First Degree.

A notice of appeal was filed and an appeal perfected. Applicant’s conviction and sentence were affirmed. State v. China, 312 S.C. 335, 440 S.E.2d 382 (Ct. App. 1993).

Thereafter, Applicant filed his first application for post-conviction relief (PCR) on April 11, 1994 (C.A. No. 1994-CP-43-0467). The State made its Return on September 12, 1994. An evidentiary hearing was convened on August 28-29, 1995, before the Honorable Thomas W. Cooper, Jr. Applicant pursued the following claims for relief:

1. Ineffective assistance of counsel.
 - a. Failure to investigate, failure to make motions during trial, and withdrew request for jury charges.
 - b. Failure to object to closing arguments by solicitor.
 - c. Failure to put victim’s mental capacity in issue.
 - d. Failed to request charge on lesser-included offense of assault.
2. Insufficient indictment.
3. Ineffective assistance of appellate counsel.

Judge Cooper denied and dismissed the application with prejudice in a written order dated January 31, 1997. Applicant’s Motion to Alter or Amend was denied on March 15, 1997. Applicant made a Petition for Writ of Certiorari to the South Carolina Supreme Court. The petition was denied on June 19, 1998, and the remittitur was sent on July 7, 1998.

Applicant filed a PCR application on September 29, 1998 (C.A. No. 1998-CP-43-0946).

Applicant alleged:

1. Denial of due process and equal protection.
2. Ineffective assistance of counsel.
3. Ineffective assistance of prior PCR counsel.

4. Ineffective assistance of prior PCR appellate counsel.

An evidentiary hearing was convened on July 15, 1999, before the Honorable Thomas W. Cooper, Jr. By written order dated April 22, 2000, Judge Cooper dismissed the application with prejudice as successive and barred by the one-year statute of limitations. A Johnson petition for writ of certiorari was filed. The South Carolina Supreme Court dismissed the petition on May 15, 2002, and the remittitur was sent on May 31, 2002.

On May 14, 2002, Applicant filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina (C.A. No. 6:02-1927-20AK). Applicant set forth several grounds for relief

1. Trial court error:
 - a. Allowed the State to impeach him for prior bad acts.
 - b. Refused to allow in camera meeting to determine competency of State's witnesses.
 - c. Admitting genetic testing testimony.
 - d. Violated the confrontation clause by not allowing defendant to recross-examine a witness.
2. Ineffective assistance of counsel:
 - a. Failure to object to:
 - i. Chain of custody of blood samples.
 - ii. Judge's charge on first degree burglary.
 - iii. Burden-shifting argument by the State.

Respondents made their move for summary judgment on July 26, 2002. In a written order dated February 27, 2003, the Honorable Henry M. Herlong, Jr., granted the Respondents' motion for summary judgment and dismissed the petition.

Applicant filed a "Writ of Mandamus September 11, 2003 (C.A. No. 2003-CP-43-0645). Respondent made its Return and Motion to Dismiss on May 11, 2004. An evidentiary hearing was convened on June 7, 2004, before the Honorable Howard P. King. Judge King denied and dismissed the action in a written order dated August 9, 2004. Applicant filed an appeal, but the matter was dismissed on July 12, 2005, and the remittitur was sent on July 28, 2005.

On May 3, 2007, Applicant filed a "Petition for Writ of Habeas Corpus" (C.A. No. 2007-CP-43-0931). Applicant alleged:

1. "Prosecutorial misconduct."
2. "Hearsay Rule Violation / 6th and 14th Amend."
3. "Procedural Due Process violation."
4. "Confrontation clause violation."

Respondent made its Return and Motion to Dismiss on November 26, 2007. A Conditional Order of Dismissal was issued on November 29, 2007, and filed December 11, 2007, by the Honorable Clifton Newman. A Final Order of Dismissal was signed by the Honorable George C. James, Jr., on January 27, 2008, and filed January 28, 2008. On February 5, 2008, Judge James entered a new order of dismissal acknowledging letters from Applicant, dated January 23, 2008, and January 25, 2008. On July 17, 2008, Judge James denied Applicant's pro se motion. No appeal was taken.

Applicant filed a document captioned "Petition for Writ of State Habeas Corpus" filed on July 15, 2009 (C.A. No. 2009-CP-43-1579). Applicant alleged:

1. "Violation of Due Process clause of the 5th and 14th Amendments to the United States Constitution."
2. "Violation of the Sixth Amendment based on conduct never proved to a jury beyond a reasonable doubt."
3. "The provisions of the Sentencing Reform Act of 1984 (SRA) 18 of the United States Code; Rule 32 (c)(1) federal Rule of Criminal Procedure; and Rule 52(a), SCRCP were unconstitutionally applied in this case."
4. "Petitioner as-applied, challenges the Guidelines enhancements that, based on fact-finding by a Judge alone, raised his sentence above the range legally mandated for sentence enhancement purposes, determined by reference to the Jury verdict."
5. "The sentence received exceeds the maximum authorized by law."

Respondent made its Return and Motion to Dismiss on November 16, 2009. An Order of Dismissal was issued on November 30, 2009, and filed December 3, 2009, by the Honorable R. Ferrell Cothran, Jr. No appeal was taken.

On May 18, 2015, Applicant filed a second or successive Federal Habeas Corpus Petition. By Order filed June 15, 2015, the United States Court of Appeals for the Fourth Circuit denied Applicant's motion for the district court to consider a second or successive application.

In his current Petition for State Habeas Corpus, Applicant alleges the following grounds for relief:

1. "Did the State mislead the grand jury by submitting insufficient evidence to obtain an indictment for burglary 1st degree?"
2. "Whether the Petitioner's convictions rest on and were obtained by insufficient evidence?"
3. "Whether the Petitioner's convictions and sentence can be sustained because of the use of insufficient evidence in light of *State v. Bostic*?"

FINDINGS OF FACT AND CONCLUSION OF LAW

"A habeas corpus petition must support the requested relief." *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citations omitted). Although the allegations in the petition are to be treated as true, the Petitioner must make out a *prima facie* case showing he is entitled to relief and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. *Id.* at 40, 495 S.E.2d at 427-28.

To warrant a hearing, the petition must include the two allegations described below. First, the petition must allege the petitioner has exhausted all available post-conviction relief (PCR) remedies. *Simpson v. State*, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); *Gibson*, 329 S.C. at 42, 495 S.E.2d at 428. "Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review." *Gibson*, 329 S.C. at 42, 495 S.E.2d at 428. Second, the petition must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. *Id.* PCR is not rendered "unavailable or inadequate" merely because the petitioner's application might be dismissed as



procedurally barred.

In fact, any matter that is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -120 (2003), “must be raised in PCR application, and may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts.” Al-Shabazz v. State, 338 S.C. 354, 365, 527 S.E.2d 742, 748 (2000); Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998). The Uniform Post Conviction Procedure Act (the Act) is “broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention.” Gibson, 329 S.C. at 41, 495 S.E.2d at 428. A petitioner may even allege constitutional violations in PCR proceedings, unless the issue could have been raised by the petitioner on direct appeal. Id.

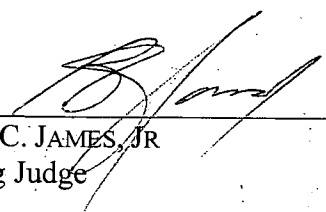
Thus, “[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application.” Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998). “Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court.” Id.

This Court finds that the claims made in the Petition for Writ of Habeas Corpus could have been raised in a post-conviction relief application. Additionally, Petitioner cannot file a petition in the circuit court, but must instead file in the original jurisdiction of the Supreme Court. Therefore, these claims cannot be raised in a Petition of Habeas Corpus in the Circuit Courts of South Carolina. Accordingly, the Petition should be summarily dismissed.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus is hereby denied and dismissed with prejudice.

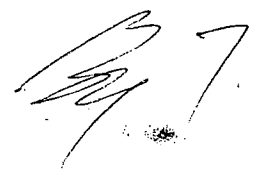
A handwritten signature in black ink, appearing to be the initials 'BAC' or similar, located in the bottom right corner of the page.

AND IT IS SO ORDERED this 8 day of May, 2017.



GEORGE C. JAMES, JR
Presiding Judge

Sumter, South Carolina



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Please file stamp the extra cover page and place in the self-addressed stamped enveloped provided.

STATE OF SOUTH CAROLINA
COUNTY OF Sumter
Larry China # 175247
Petitioner.

RECORDED)

2017 MAY 17 PM 2:32)

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

In The Court Of Common Pleas
Case # 2015-CP-43-1885

v.)

State Of South Carolina)
Respondent.)

Motion To
Alter Or Amend
Judgment Pursuant To
Rule 59(e) SCRPC

Pursuant to the final Order of the Hon. George C. James Jr. filed on May 8, 2017 and received by petitioner on May 12, 2017, petitioner is now before the court asking that this court to Alter Or Amend it's Judgment pursuant to Rule 59(e) SCRPC.

This Rule 59(e) motion is before the court because not only is the Order invalid, the Order failed to make specific findings of fact and state expressly it's conclusions of law relating to the issues presented. Petitioner is now before this court to reiterate the issues this court failed to addressed.

And because the issues and attached exhibits contained in this motion was expressly averred by petitioner to the court in prior proceedings with the court, this motion to Alter Or Amend Judgment is warranted in this matter.

ATTACHMENT
TO
Explanation

RECEIVED

JUN 02 2017

SC Court of Appeals

ISSUES BEFORE THE COURT

QUESTION # 1 pg 5

CAN PETITIONER'S CONVICTION AND SENTENCE BE SUSTAINED BY THE USE OF INSUFFICIENT EVIDENCE?

QUESTION # 2 pg 6

WHEN THE GRAND JURY AMENDED BURGLARY FIRST DEGREE TO THE ONE COUNT (CSC) INDICTMENT, DID THE TRIAL COURT OBTAINED PERSONAL AND SUBJECT MATTER JURISDICTION TO TRY, CONVICT AND SENTENCE PETITIONER ON BURGLARY FIRST DEGREE?

QUESTION # 3 pg 9

WAS IT DUPLICITOUS TO AMEND BURGLARY FIRST DEGREE TO THE ONE COUNT (CSC) INDICTMENT?

QUESTION # 4 pg 10

CAN THE LOWER COURT'S FACT FINDING AND CONCLUSION OF LAW BE UPHELD BY THE APPELLATE COURT WHEN THERE IS NO EVIDENCE TO SUPPORT THE LOWER COURT'S FINDINGS?

QUESTION # 5 pg 11

IS THE LOWER COURT'S ORDER OF DISMISSAL INVALID BECAUSE OF A PENDING MOTION THAT WAS NOT ADDRESSED NOR ADJUDICATED BEFORE THE ORDER OF DISMISSAL WAS ISSUED?

ATTACHMENTS IN SUPPORT OF THIS MOTION

7-EXHIBITS

MOTION HEARING TRANSCRIPT

REQUEST FOR JUDICIAL NOTICE FILED May 3, 2017

ORDER OF DISMISSAL FILED May 8, 2017

PROCEDURAL HISTORY

Pursuant to an incident that occurred on June 12, 1989, petitioner was arrested and charged on July 6, 1989 with Criminal Sexual Conduct (CSC) first degree. **Exh 1** At the September 1989 term of the Sumter County Grand Jury, petitioner was indicted on (CSC). **Exh 2** At the April 1990 term of the Sumter County Grand Jury, the Grand Jury amended Burglary first degree to the September 1989 (CSC) indictment. **Exh 3**

In January 1991, petitioner proceeded to trial before the Hon. Dan F. Laney and was represented by Marvin McMillan. After petitioner was found guilty on both charges, petitioner was sentenced to thirty years for (CSC) and was given a life sentence for Burglary first degree. (to run consecutive)

After a direct appeal, State v. China 312 S.C. 335, 440 SE2d 382 (1993), petitioner submitted several (PCR) applications including a Federal and State habeas corpus petitions along with other subsequent pleadings.

On August 14, 2015 petitioner filed this current habeas corpus petition alleging that although conceding to the (CSC) charge, he did not commit Burglary first degree. Therefore, since the evidence substantiates this fact, he now ask to be immediately released from prison.

It must be noted that since petitioner has served enough time to satisfy the (CSC) sentence, the expulsion of the Burglary conviction and sentence will release petitioner from confinement.

On May 16, 2016 petitioner responded to the State's motion to dismiss. On November 9, 2016 a hearing was held on the State's motion before the Hon. George C. James Jr.

On May 3, 2017 petitioner filed a motion requesting the court to take
Judicial Notice of the amount of visible daylight available at the time
petitioner entered the dwelling. This notice is supported by the Official
Weather And Atmospheric Report recorded on June 12, 1989 for Sumter S.C. (**see
Judicial Notice attached**)

On May 8, 2017 Judge James issued an Order Of Dismissal. In his
dismissal, Judge James not only excluded the fact that petitioner submitted a
response to the State's motion to dismiss, the Order also excluded the fact
that petitioner currently has a motion pending requesting the court to take
Judicial Notice. **Order p.1**

Petitioner's 59(e) motion now follows:

QUESTION # 1

CAN PETITIONER'S CONVICTION AND SENTENCE BE SUSTAINED BY THE USE OF INSUFFICIENT EVIDENCE?

As mentioned earlier, although petitioner concedes to the (CSC) charge, indictment, conviction and sentence, he does not concede to the indictment and conviction to Burglary first degree because no Burglary was committed on the day in questioned and the evidence substantiates this fact.

According to South Carolina law, the underlying element that supports and substantiates the offence of Burglary first degree is 1). entering without consent 2). Night Time. **S.C. Code Ann. §16-11-311(A)(3)**

According to the police statement given by the victim (Leann Penny), not only did petitioner had consent to enter the dwelling, the victim made no attempt to call the police in relation to any imminent threat to her after petitioner entered the dwelling. **Exh 4**

At trial, presiding Judge Dan F. Laney informed petitioner's trial counsel and the solicitor in chambers that there was no evidence to dispute the element of Night Time in this case.

However, when establishing whether it was daylight when petitioner entered the dwelling, the evidence shows that on the evening of June 12, 1989, two calls was made to the police after the incident. The first call was at 8:30pm and the second call was at 9:35pm. Petitioner's (PCR) counsel entered into evidence at the (PCR) hearing that sunset on the day of the incident was officially at 8:33pm (daylight savings time). **Exh 5 ln.1-25**

And since the first call was at 8:30pm to the police, the 8:30pm call was three minutes before sunset. Petitioner's trial counsel (Marvin McMillan) testified at the (PCR) hearing that he never knew about the first call to the police at 8:30pm. **Exh 6 ln.12-24**

Petitioner argues that since the first call was at 8:30pm, any reasonable Jurist would conclude that the actual entering into the dwelling occurred several minutes earlier because one must remember, after petitioner entered the dwelling, there was a lengthy dialog between the victim and the petitioner, not to mention that a sexual encounter occurred before the 8:30pm call was made to the police. Exh 4

Therefore, not only is it clear that petitioner entered the dwelling around 8:00pm, it is clear that petitioner left the dwelling before the 8:30pm call to the police was made. Because one must expressly assume that when the victim made the 8:30pm call, petitioner had already left the dwelling. (see Judicial Notice attached which proves that it was daylight between 8:00pm-8:30pm on June 12 1989).

Petitioner has shown that since the evidence to prove the element of Burglary first degree does not exist, petitioner's conviction and sentence on Burglary cannot be sustained under the circumstances.

QUESTION # 2

WHEN THE GRAND JURY AMENDED BURGLARY FIRST DEGREE TO THE ONE COUNT (CSC) INDICTMENT, DID THE TRIAL COURT OBTAINED PERSONAL AND SUBJECT MATTER JURISDICTION TO TRY, CONVICT AND SENTENCE PETITIONER ON BURGLARY FIRST DEGREE?

It is established law that a court may not act against a party without personal Jurisdiction. Green Tree Servicing LLC v. Adams 375 S.C. 583, 654 SE2d 100 (2007). Generally, the trial court acquires Jurisdiction of the person when the party charged is arrested.....State v. Adams 580 SE2d 785,792 (2003)

At petitioner's initial (PCR) hearing, petitioner's trial counsel testified that after the Burglary first degree was amended to the (CSC) indictment, there was no legal nor Judicial action taken in reference to Burglary first degree before trial.

In other words, there was no arrest warrant, no actual arrest, no Bond hearing, no preliminary hearing, no waiver of presentment to the Grand Jury pertaining to the Burglary first degree charge before trial. Exh 7 p.1 ln.17-25 p.2 ln.1-2 The record further shows that trial counsel made no attempt to file a motion to quash the Burglary charge from the indictment. Exh 7 p.2 ln.5-11

Therefore it is a prima facie showing that the trial court never obtained personal Jurisdiction over petitioner relating to Burglary. State v. Adams 580 SE2d at 792 (2003) / Tr.p.9 ln.14-18 p.11 ln.19-23

The S.C. Supreme court has ruled that if an indictment is challenged as insufficient or defective, a defendant must raise that issue before the Jury is sworn and not after wards. State v. Gentry 363 S.C. 93,101, 610 SE2d 494,499 (2005)

However, in the instant case, petitioner argues that since the trial court never obtained personal Jurisdiction over him in reference to Burglary first degree to begin with, his conviction and sentence on that charge is invalid regardless whether there was a timely challenge to the indictment or not.

Petitioner now turns the court's attention to the issue of Subject Matter Jurisdiction. The trial court acquires subject matter jurisdiction to hear criminal cases by way of a legally sufficient indictment or a valid waiver thereof. State v. Parker 344 S.C. 250,254, 543 SE2d 255,257 (2001)

Petitioner argues that since there was no waiver of presentment to the Grand Jury on the offence of Burglary first degree, the trial court never obtained Jurisdiction over the subject matter. Parker 344 at 254, 543 SE2d at 257 / Exh 7 p.1 ln.17-25 p.2 ln.1-2

At the hearing on the State's motion to dismiss, petitioner argued that this is a Jurisdictional issue. Not only was there no evidence that he committed a Burglary, petitioner also testified inter alia that the court did not have personal nor subject matter jurisdiction to try, convict and sentence him to Burglary first degree. Therefore, he cannot be procedurally barred and meet the habeas criteria at the same time. Tr.p.8 ln.8-15 p.9 ln1-18 p.11 ln.3-4, 12-23

Petitioner submitted to the court the September 1989 one count (CSC) indictment and the April 1990 amended indictment that added the burglary charge. Exh 2,3 / Tr.p.14 ln.10-15 p.15 ln.1-23 Petitioner also proffered the excerpts from his initial (PCR) hearing in which trial counsel testified that after the Burglary was amended to the indictment, there was no action taken (legal nor Judicial) in relation to Burglary first degree before trial. Exh 7 / Tr.p.9 ln.17-25 p.10 ln.1-10

It must be noted that although petitioner did not argue the validity of the trial court's Jurisdiction in his initial pleading, petitioner raised the issue inter alia at the State's motion to dismiss hearing. Because issues relating to the court's Jurisdiction can be raised at any time and can be taken up sua sponte by the court. State v. Parker 334 S.C. 250,254, 543 SE2d 255,257 (2001)

QUESTION # 3

WAS IT DUPLICITOUS TO AMEND BURGLARY FIRST DEGREE TO THE ONE COUNT (CSC) INDICTMENT?

Duplicity is defined as joining in a single count of two or more distinct and separate offences. U.S. v Hawkes 753 F.2d 355,357 (4th cir 1985)

In the instant case, the State argued at the motion to dismiss hearing that since the (CSC) offence and Burglary first degree can be proved by the same factual situation and are proved by the same evidence or nature, it was proper to amend burglary first degree to the (CSC) indictment. **Tr.p.12 In.16-22**

In conjunction with the State's argument, appellate courts have ruled that charges can be joined in the same count indictment and tried together where they arise out of a single chain of circumstances, are proved by the same evidence or nature, and no real Right of defendant has been prejudiced. State v. Tucker 324 S.C. 155,164, 478 SE2d 260,265 (1996)

However, where separate evidence is required to prove two charges arising from the same factual situation, such charges are separate offences that require different proof and may support separate verdicts. Hawkes 753 F.2d at 358

Therefore, in the instant case, it was duplicitous to amend Burglary first degree to the (CSC) indictment because not only is Burglary first degree a separate distinct offence than that of (CSC), it requires it's own separate evidence to prove the element of Burglary first degree arising from the same factual situation. Hawkes at 358

It must be noted that the amended charge of Burglary first degree would have been proper if there is evidence that petitioner entered the dwelling via Burglary first degree to commit the (CSC) offence. However, the evidence shows otherwise. Therefore since there was no Burglary committed before or after the (CSC) offence was committed, it was duplicitous to amend Burglary to the one count (CSC) indictment.

QUESTION # 4

CAN THE LOWER COURT'S FACT FINDING AND CONCLUSION OF LAW BE UPHELD BY THE APPELLATE COURT WHEN THERE IS NO EVIDENCE TO SUPPORT THE LOWER COURT'S FINDINGS?

The S.C. Supreme Court has ruled that the findings of the circuit court will be upheld if there is any evidence to support them. On the contrary, if there is no evidence to support the court's findings, the court's ruling will not be upheld. Rutland v. State 415 S.C. 570,576, 785 SE2d 350,357 (2016)

On August 14, 2015 petitioner submitted a petition for writ of habeas corpus alleging that his conviction on Burglary first degree cannot be sustained by the use of insufficiency of evidence. **Order Of Dismissal p.5**

In it's Order Of Dismissal, this court based it's dismissal solely on the fact that since this issue could have been raised in a Post Conviction Relief Application, petitioner is now barred from raising the issue in a habeas corpus petition. **Order Of Dismissal p.6**

Petitioner argues that the court's findings is clearly void of any evidence to support it because Statute law §17-27-20(a)(6) specifically states that this section shall not be construed to permit collateral attack on the grounds that the evidence was insufficient to support a conviction. **S.C. Code Ann. §17-27-20(a)(6)**

According to §17-27-20(a)(6), petitioner is prohibited from bringing this issue under the (PCR) Act as a matter of law. Therefore, the court's findings on this issue cannot be upheld by an appellate court being that there is no evidence to support the lower court's decision.

QUESTION # 5

IS THE LOWER COURT'S ORDER OF DISMISSAL INVALID BECAUSE OF A PENDING MOTION THAT WAS NOT ADDRESSED NOR ADJUDICATED BEFORE THE ORDER OF DISMISSAL WAS ISSUED?

Petitioner asserts that not only can a Judicial Notice be taken at any stage of the proceedings **Rule 201(f) SCRE**, a party is entitled to be heard upon requesting the court to take Judicial Notice. **Rule 201(e) SCRE**

In the instant case, petitioner submitted a request to the court to take Judicial Notice which was filed May 3, 2017 (**see Judicial Notice attached**). However, while this motion was pending, the circuit court not only issued an Order Of Dismissal on May 8, 2017, the court excluded the filing of the Judicial Notice from it's Order. (**see Order Of Dismissal**)

To add insult to injury, the court was further misleading in it's Order by deliberately construing petitioner's pending motion as simply being a "letter" to the court. (**see Order p.1**). This clearly is a violation of Rule 201(e)(f) SCRE which stays any final Order of the court until the motion is addressed and adjudicated.

In short, because petitioner's request to take Judicial Notice filed May 3, 2017 is still pending, the Order Of Dismissal dated and filed May 8, 2017 is invalid and must be vacated.

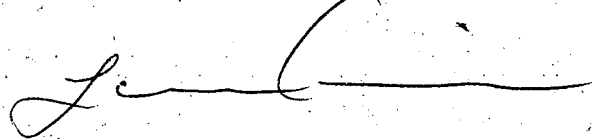
CONCLUSION

In closing, petitioner asserts that since the court failed to demonstrate the absence of a genuine issue of material fact, the court is not entitled to issue a dismissal in this matter. Strickland v. Madden 323 S.C. 63, 448 SE2d 588 (1994)

Not only did the court failed to show the absence of a genuine issue, the court prejudiced petitioner by making findings of fact and conclusions of law with an invalid Order. To add insult to injury, the court's findings and conclusions is not even supported by any evidence.

Wherefore, petitioner Larry china now ask this Honorable court to vacate it's May 8, 2017 Order Of Dismissal to allow a hearing on the merits pertaining to the afore mentioned issue of Burglary first degree.

Respectfully submitted,



Date May 15, 2017

Larry China # 175247

B.R.C.I. 4460 Broad River Rd.

Murray # 168

Columbia, S.C. 29210

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STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2017 MAY 18 10:19:59

Larry China, #175247,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

2015-CP-43-1885

Petitioner,

v.

State of South Carolina,

Respondent.

**ORDER DENYING PETITIONER'S MAY 15,
2017 RULE 59 (E) MOTION**

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Sherry H. Hart
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This court dismissed the petitioner's petition for writ of habeas corpus by order filed May 8, 2017. The petitioner has moved for reconsideration by motion dated May 15, 2017. The motion for reconsideration is denied.

May 18, 2017

George C. James, Jr.
George C. James, Jr., Presiding Judge

RECEIVED

JUN 02 2017

SC Court of Appeals

ATTACHMENT
TO
EXPLANATION