STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM SUMTER COUNTY

COURT OF COMMON PLEAS

GEORGE C. JAMES JR., JUDGE



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2015-CP-43-1885

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STATE OF SOUTH CAROLINA — RESPONDENT.

V.

LARRY CHINA — APPELLANT.

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# INITIAL BRIEF OF APPELLANT

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Larry China # 175247

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

Murray # 168

Columbia, S.C. 29210

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## STATEMENT OF THE CASE

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. **(Arrest Warrant)** At the September 1989 term of the Sumter County Grand Jury, appellant was indicted on (CSC). **(Indictment)** At the April 1990 term of the Sumter County Grand Jury, the Grand Jury amended Burglary first degree to the September 1989 (CSC) indictment. **(Indictment)**

In January 1991, appellant proceeded to trial before the Hon. Dan F. Laney and was represented by Marvin McMillan. After appellant was found guilty of both charges, appellant was sentenced to 30 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 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. **(Petition p.4,5,6)**

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. **(Response)** On November 9, 2016 a hearing was held on the State's motion before the Hon. George C. James Jr. **(Transcript)**

At the hearing, the State's sole argument was that appellant could have raised the issue in his previous application for Post Conviction Relief. And since he failed to do so, appellant is now barred from petitioning for a writ of habeas corpus in circuit court. **(Transcript p.7)**

While waiting on Judge James's 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 was visible daylight between 8:00pm-8:30pm June 12, 1989. This notice is supported by the Official Weather And Atmospheric Report recorded on June 12, 1989 for Sumter S.C. **(Judicial Notice w/ Report)**

On May 8, 2017 (without addressing the request to take judicial notice), 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. **(Order Of Dismissal p.6)**

On May 17, 2017 appellant submitted a 59(e) motion. **(59(e) Motion)** On the next day on May 18, 2017, the lower court issued an Order dismissing the 59(e) motion. **(59(e) Order)** On May 31, 2017 appellant submitted a notice of appeal and an explanation pursuant to Rule 203(d)(1)(B)(vi) SCACR to the S.C. Court Of Appeals.

Appellant's Initial Brief Now Follows:

**ARGUMENT**

1.

APPELLANT'S CONVICTION AND SENTENCE CANNOT BE SUSTAINED BY THE USE OF INSUFFICIENT EVIDENCE.

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As mentioned earlier, although appellant 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**

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 after appellant entered the dwelling. **(Victim's Police Statement)**

At trial, Judge Dan F. Laney informed appellant's 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, 2 calls was made to the police after the incident. The first call was at 8:30pm and the second call was at 9:35pm. **(PCR Transcript Excerpts)** 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). **(PCR Transcript Excerpts)**

And since the first call was at 8:30pm to the police, the 8:30 call was 3 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. **(PCR Transcript Excerpts)**

Before the habeas corpus proceeding became final in the lower court, appellant requested the lower court to take judicial notice that there was visible daylight between 8:00pm-8:30pm June 12, 1989. **(Judicial Notice w/ Report)**

The reason why this 8:00pm-8:30pm time period is crucial is because when the 8:30pm call was made, appellant had already left the dwelling. Therefore, if appellant had left the dwelling when the 8:30pm call was made to the police, it's axiomatic that appellant entered the dwelling several minutes before the 8:30pm call was made.

Because one must remember, after appellant entered the dwelling, there was a lengthy dialog between the victim and appellant before the sexual assault even occurred **(Victim's Police Statement)**, 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 expressly conclude that appelant entered the dwelling approximately around 8:00pm. This is why the 8;00pm-8:30pm time period is crucial. However, the lower court never addressed nor Adjudicated appellant's request to take judicial notice. **(Order p.1)**

Appellant asserts that if the lower court had taken judicial notice that it was visible daylight between 8:00pm-8:30pm June 12, 1989, this would have negated the element of night time and would have given validity to appellant's claim that a Burglary was not committed in this matter. It would have also showed a genuine issue for a hearing on the merits.

The request to take judicial notice is supported by the Official Weather And Atmospheric Report of June 12, 1989 which states that not only did the sun set at 8:33pm in Sumter **(Report p.2)**, there was no clouds nor rain fall on that day. **(Report p.1)** 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)** This simply means that there was visible daylight up until 9:30pm on June 12, 1989

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

2.

WHEN THE GRAND JURY AMENDED BURGLARY FIRST DEGREE TO THE ONE COUNT (CSC) INDICTMENT, THE TRIAL COURT NEVER OBTAINED PERSONAL AND SUBJECT MATTER JURISDICTION TO TRY, CONVICT AND SENTENCE APPELLANT ON BURGLARY FIRST DEGREE

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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 appellant's initial (PCR) hearing, appellant'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 waver of presentment to the Grand Jury pertaining to the Burglary first degree charge before trial. **(PCR Transcript Excerpts)** The record further shows that trial counsel made no attempt to file a motion to quash the Burglary charge from the indictment. **(PCR Transcript Excerpts)**

Therefore, it is a prima facie showing that the trial court never obtained personal jurisdiction over appellant relating to Burglary. **State v. Adams 580 SE2d at 792 (2003) / (Transcript p.9,11)**

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 afterwards. **State v. Gentry 363 S.C. 93,101, 610 SE2d 494,499 (2005)**

However, in the instant case, appellant 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.

Appellant 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 there of. **State v. Parker 344 S.C. 250,254, 543 SE2d 255,257 (2001)**

Appellant argues that since the Burglary amendment to the indictment was not proper and the fact that 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 S.C. at 254, 543 SE2d at 257 / (PCR Trancript Excerpts)**

**Motion To Dismiss 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 trial 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. **(Transcript p.8,9,11)**

Also at the motion hearing, appellant submitted to the court the September 1989 one count (CSC) indictment and the April 1990 amended indictment that added the Burglary charge. **(Indictments / Transcript p.14-15)**

In addition to his testimony and submitting his indictments, appellant proffered transcript excerpts from his initial (PCR) hearing that reveals trial counsel's testimony admitting that after the Burglary was amended to the (CSC) indictment, there was no action taken (legal nor judicial) in relation to Burglary first degree before trial. **(PCR Transcript Excerpts / Transcript p.9-10)**

**IT MUST BE NOTED** that although appellant did not argue the validity of the trial court's jurisdiction in the initial habeas petition, appellant 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 344 S.C. 250,254, 543 SE2d 255,257 (2001)**

3.

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

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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 can be proved by the same evidence or nature, it was proper to amend Burglary first degree to the (CSC) indictment. **Transcript p.12)**

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 the 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 appellant 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.

4.

THE LOWER COURT'S FACT FINDING AND CONCLUSION OF LAW CANNOT BE UPHELD BY THE APPELLATE COURT BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE LOWER COURT'S FINDINGS

The S.C. Supreme Court has ruled that 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 S.C. 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 alleging that his conviction on Burglary first degree cannot be sustained by the use of insufficient evidence. **(Order Of Dismissal p.5)**

In it's Order of dismissal, the lower 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 barred from raising the issue in a habeas corpus petition in circuit court. **(Order Of Dismissal p.6)**

Appellant argues that the lower 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), 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 v. Lane 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 lower court that this issue is not cognizable under the (PCR) Act pursuant to §17-27-20(a)(6).

Therefore, for the lower 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. **(Petition p.i,iii / Response p.5 / 59(e) Motion p.10-11 / Transcript p.10,15-16)**

5.

5.

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

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Appellant 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, appellant submitted a request to the court to take judicial notice which was filed May 3, 2017. **(Judicial Notice w/ Report)** However, while this motion was pending, the lower 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. **(Order Of Dismissal)**

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

In other words, since appellant's request to take judicial notice was submitted before the proceeding in the lower court became final, the court was in error for issuing it's final order before it addressed appellant's motion. **Law Firm Of Paul L. Erickson PA v. Boykin 375 S.C. 204,214, 651 SE2d 606,611 (2007)**

Appellant asserts that the final Order would have been proper if the request for judicial notice was addressed prior to the issuing of the final Order. But in this case, the motion was not addressed nor adjudicated prior to the court's issuance of it's final order. In short, because appellant's request to take judicial notice filed May 3, 2017 was not addressed **(Judicial Notice w/ Report)**, the lower court's Order of dismissal dated and filed May 8, 2017 is invalid and must be vacated. **(Order Of Dismissal)**

## CONCLUSION

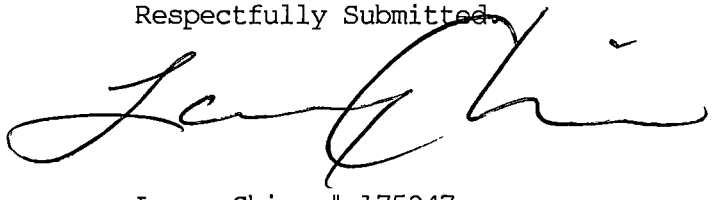
Not only has appellant shown specific facts showing there is a genuine issue for trial **Regions Bank v. Schmauch 354 S.C. at 660, 582 SE2d at 438 (2003)**, the respondent failed to demonstrate the absence of a genuine issue of material fact.

If the moving party who seeks summary judgment fails to show the absence of a genuine issue of material fact, they are not entitled to a summary dismissal. **Strickland v. Madden 323 S.C. 63, 448 SE2d 588 (1994)**

Appellant finally asserts that not only did the court made a fact finding and conclusion of law with an invalid Order, the court's findings is not supported by any evidence of probative value.

**Wherefore,** Appellant Larry China now ask this Honorable court to vacate the lower's court's Order Of Dismissal to Remand for a habeas corpus hearing on the merits. And on it's own motion take judicial notice that it was visible daylight between 8:00pm-8:30pm June 12, 1989

Respectfully Submitted,



Date June 26, 2017

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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PROOF OF SERVICE

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I certify that I have served the Initial Brief Of Appellant on the State Of South Carolina addressed to their attorney of record, The S.C. Attorney General's Office P.O. Box 11549 Columbia, S.C. 29211 by depositing a copy of it in the United States mail postage prepaid.

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Date June 26, 2017

The Hon. Jenny A. kitchings
Clerk, S.C. Court Of Appeals
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RE: filing Of Initial Brief And Designation Of Matter
Larry China v. State Of South Carolina
Case # 2015-CP-43-1885

Dear Mrs. Kitchings;

On June 2, 2017 your office received my notice of appeal w/ an explanation pursuant to Rule 203(d)(1)(B)(vi) SCACR. Enclosed is one original copy of the Initial Brief and the Designation Of Matter, with proof of service for each.

Also enclosed is an extra cover page of the Initial Brief to be filed stamped and returned in the self- addressed stamped envelope provided.

Sincerely,

Larry China # 175247

CC: Office Of the Attorney General

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