

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

THE HONORABLE MARK HAYES II.,  
Circuit Court Judge

2016-CP-42-2252

RECEIVED

JUL 26 2017

S.C. SUPREME COURT

Johnny Burnside, 271070,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

I hereby appeal the Final Order of Dismissal of the Honorable Mark Hayes, II. dated 7-17-17 and received on 7-21-17.

This 24<sup>th</sup> Day of July, 2017.

Johnny Burnside.

South Carolina Attorney General  
Rasheeda Cleveland, Esq.  
P.O. Box 11549  
Columbia, SC 29211-1549  
(Counsel for Respondent)

Johnny Burnside, 271070  
TCI SA-120  
1578 Clarence Coker Hwy.  
Turbeville, SC 29162  
(Appellant Pro-Se)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

THE HONORABLE MARK HAYES, II.  
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S.C. SUPREME COURT

Johnny Burnside, 271070,

Appellant,

v.

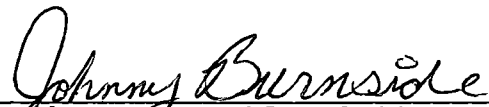
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have Served a copy of my Notice of Appeal on Respondents Counsel of Record: South Carolina Attorney Generals Office Rasheeda Cleveland, Esq., P.O. Box 11549, Columbia, SC 29211-1549, by depositing the same in the United States Mail, Postage Prepaid on this:

This 24<sup>th</sup> Day of July, 2017.

  
\_\_\_\_\_  
Johnny Burnside, 271070  
TCI SA-120  
1578 Clarence Coker Hwy.  
Turbeville, SC 29162  
(Appellant Pro-Se)



3-20 (2010)) was passed.” Applicant asserts that under the reasoning in Easterwood v. Champion<sup>1</sup>, his current application “should not be deemed successive” because the amendment had not become effective at the time Applicant was sentenced. Applicant goes on to argue that his current claim “could not have been adequately raised before now,” and that this argument applies to the statute of limitations as well. Applicant further argues “due to the time of actual discovery by the exercise of due diligence” that his claim could not have been raised in any of his prior actions. In support of his argument, Applicant alleges that the prison library was not update until 2013, and therefore, he was unable to receive notice of the change to the statutory language.

This Court notes the decision in Eastwood addressed the issue of when the one-year limitations period to file a successive habeas petition begins to run.

This Court notes this is Applicant’s third Application for post-conviction relief. Courts disfavor successive applications and place the burden on applicants to establish that a new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Applicant’s current allegations could have been raised in the proceedings based on Applicant’s prior applications for post-conviction relief. Furthermore, Applicant’s application is untimely. Applicant was convicted and sentenced on November 29, 2000. The remittitur from the direct appeal was issued on July 23, 2002. Applicant’s current post-conviction application was filed on June 17, 2016, well beyond the statutory filing period.

Applicant also argues that the trial court had “discretion to either sentence Applicant to either life or mandatory minimum term for thirty years.” In support of this claim, Applicant refers to S.C. Code Ann. § 16-3-20 comparing it with State v. Starns, 521 S.E.2d. 907, 340 S.C.

<sup>1</sup> 213 F.3d 1321 (2000).

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CLERK OF COURT  
SOUTH CAROLINA  
COURTS

312 (2000)(holding that the defendant was entitled to an appearance instruction with respect to one murder, self-defense instruction, and was not entitled to instruction on defense of others, and was not entitled to instruction on parole ineligibility).

This Court notes that “a trial judge is allowed broad discretion in sentencing within statutory limits.” Brooks v. State, 325 S.C. 269, 271–72, 481 S.E.2d 712, 713 (1997) citing; Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995); State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974). At the time of Applicant’s sentencing the statute read as follows: “A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a *mandatory minimum* term of imprisonment for thirty years.” S.C. Code Ann. § 16-3-20. The statute mandates a minimum term of thirty year however; it does not specify a maximum term of years for which a person may be sentenced.

This Court has reviewed the Applicant’s response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

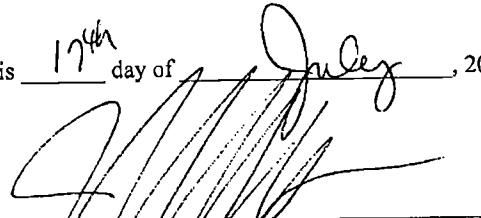
**IT IS THEREFORE ORDERED** that for the reasons set forth in the Court’s Conditional Order of Dismissal, the Application for post-conviction relief is hereby **DENIED** **AND DISMISSED WITH PREJUDICE**.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant’s attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.



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SOCIETY

AND IT IS SO ORDERED this 17<sup>th</sup> day of July, 2017.

  
\_\_\_\_\_  
J. MARK HAYES II  
Chief Administrative Judge  
Seventh Judicial Circuit

Spartanburg, South Carolina.

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
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H. HOPE BLACKLEY

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated L. Q. Murray (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA )  
COUNTY OF Clarendon ) AFFIDAVIT OF PERSONAL SERVICE

On this 2 day of June, 2017, I served the Conditional Order of Dismissal, on Inmate Johnny Burnside, SCDC Inmate #271070, by delivering personally and leaving a copy of the same at Turbeville Correctional Institution. Deponent is not a party to this action.

s/ L. Q. Murray  
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 2nd day of June, 2017  
Whitney Galen (L.S.)  
Notary Public for South Carolina

My Commission Expires: May 21, 2026

CLARENDON COUNTY  
2017 JUL 17 PM 1:08  
M. HOPE BLACKEY

ADMISSION OF SERVICE

Service of a copy of the within Conditional Order of Dismissal is admitted at the South Carolina Department of Corrections (Turbeville Correctional Institution), Turbeville County, SC this 2nd day of June, 2017.

s/ Johnny Burnside  
Inmate  
SCDC Inmate #: 271070

# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483

Phone (864) 596-2591  
Fax (864) 596-2239



**M. Hope Blackley**  
Clerk of Court  
July 17, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Johnny Burside  
#271010  
Applicant

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # 2016CPA-2252

vs  
State  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Final Order Dismissal  
In this action dated 7-17-2017 on 7-17-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Breanna Jerome  
Alicia Oliver  
Johnny Burside

CLERK OF COURT  
SPARTANBURG COUNTY  
2017 JUL 17 PM 2:01  
M. HOPE BLACKLEY

7-17-17  
(Date)

Corrie Self  
(Signature)

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS  
) FOR THE SEVENTH JUDICIAL CIRCUIT

Johnny Burnside # 271070,

)  
) Case No.: 2016-CP-42-2252

Applicant,

)

v.

)

) **CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina,

)

Respondent.

)

)

)

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M. HOPE  
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This matter comes before the Court by way of an application for post-conviction relief filed by Johnny Burnside (Applicant) on June 17, 2016. Respondent made its Return requesting the application be summarily dismissed.

**PROCEDURAL HISTORY**

This Court has before it a copy of the records of the Cherokee County Clerk of Court and the Applicant's records from the South Carolina Department of Corrections. The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the November 2000 term of the Spartanburg County Grand Jury for murder (2000-GS-42-2661). Applicant was represented by Michael David Morin, Esquire. Derrick Balsa, Esquire, of the Seventh Circuit Solicitor's Office prosecuted the case. Applicant proceeded to trial and the jury found Applicant guilty on November 29, 2000. The Honorable J. Derham Cole sentenced Applicant to forty (40) years' imprisonment.

A timely notice of appeal was filed on Applicant's behalf by Robert M. Dudek, Esquire. On June 20, 2002, the South Carolina Court of Appeals affirmed the Applicant's conviction and

sentence. State v. Burnside, Op No. 2002-UP-455 (S.C. Ct. App. 2002). The Remittitur was issued on July 23, 2002.

**2002-CP-42-2613**

Applicant filed his first post-conviction relief application on July 17, 2002 (02-CP-42-2613). Applicant raised the following issues:

1. Ineffective assistance of trial counsel.
  - a. "Trial counsel failed to provide adequate representation."
  - b. "Trial counsel failed to seek-defense of self-defense."
  - c. "Trial counsel unprepared for trial."
  - d. "Trial counsel "refused" lesser included offense."

Respondent filed its return on June 26, 2003 and requested an evidentiary hearing. An evidentiary hearing was convened on May 27, 2004 before the Honorable Roger L. Couch. Michael C. Watkins, Esquire, represented Applicant. Molly Crum, Esquire of the South Carolina Attorney General's Office, represented Respondent. On November 24, 2004 by written order, Judge Couch denied and dismissed the application.

**2006-CP-42-2237**

On July 12, 2006, Applicant filed his second application for post-conviction relief. Applicant raised the following issue:

1. Denial of right to appeal post-conviction relief hearing decision pursuant to Austin<sup>1</sup>.

Respondent filed its Return on October 24, 2006. On April 19, 2007, Judge Couch heard arguments on the application but no testimony was taken. By written order, Judge Couch dismissed the application.

On March 5, 2008, Eleanor Duffy Cleary, Esquire, of South Carolina Commission on Indigent Defense, filed a petition for writ of certiorari in the Supreme Court of South Carolina

<sup>1</sup> Austin v. State. 305 S.C. 453, 409 S.E.2d 395 (1991).

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pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The remittitur was issued on December 19, 2008.

**C/A No. 9:11-03354-JFA-BM**

Applicant filed a pro se Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina under 28 U.S.C. § 2254 on December 15, 2011. (C/A No. 9:11-03354-JFA-BM). Applicant set forth the following grounds for relief:

1. Sixth Amendment violation by trial counsel's failure to request a lesser-included charge of involuntary manslaughter.
2. Trial judge refused to charge self-defense.

Respondent filed its Return and Motion for Summary Judgment on April 6, 2012. On September 28, 2012, the Honorable Bristow Marchant, United States Magistrate Judge issued the Report and Recommendation that Respondent's motion for summary judgment be granted and that the petition be dismissed with prejudice. Burnside v. Warden, 9:11-03354-JFA-BM. On March 8, 2013, the Honorable Joseph F. Anderson, Jr., United States District Judge adopted the Report and Recommendation of the Magistrate and granted Respondent's motion for summary judgement and denied the Applicant's petition. Burnside v. Warden, 9:11-03354-JFA-BM.

**CURRENT APPLICATION**

In his third and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Subject Matter Jurisdiction:

- a. "The Court was without jurisdiction to sentence me to a mandatory 40 years when statute for murder §16-3-20 at the time of my crime and sentencing carry a 30 years or life sentence. Not the 30 years to life as the statute §16-3-20 reads as of 2010."

Before this Court are the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior post-conviction relief records,



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Applicant's federal habeas corpus records, Applicant's direct appeal, and the records for this post-conviction relief action.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### **Statute of Limitations**

The Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

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

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Applicant was convicted of the offense he challenges in this application on November 29, 2000. Remittitur from the direct appeal was issued on July 23, 2002. This application was filed on June 17, 2016, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

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### Successive

The Court also finds the Application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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

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

Applicant's current allegations could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any

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sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him.

Thus, Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

### **Subject matter jurisdiction**

The Court also finds that Applicant's claim that the trial court lacked subject matter jurisdiction is without merit. "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Evans v. State, 363 S.C. 495, 507, 611 S.E.2d 510, 517 (2005). Applicant alleges that the trial court lacked jurisdiction to sentence him to a mandatory term of forty years imprisonment. In criminal cases, "the trial court acquires subject matter jurisdiction by way of way of a valid indictment." Id. The indictment is a notice document that is required by our state constitution and statutes. Id. Applicant's indictments are facially valid and proper, therefore, establishing the subject matter jurisdiction of the circuit court to hear Applicant's criminal case.

With regards to the issue of sentencing, in South Carolina a trial judge has "a broad" discretion in sentencing within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). Applicant was sentenced to a term of forty years for murder pursuant to S.C. Code of Laws § 16-3-20. At the time of Applicant's sentencing the statute read as follows: "A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years." S.C. Code Ann. § 16-3-20. The statute currently reads: "a person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life." Id. Respondent submits that the trial judge sentenced applicant within the

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S.A. HOPKINS  
CLERK OF COURTS  
PROBATION DEPARTMENT

statutory limits because the statute mandates a mandatory minimum but the trial judge maintains discretion to impose a harsher sentence.

A review of the applicant's records indicates that there is no basis for Applicant's claim that the trial court lacked subject matter jurisdiction. Therefore, this Court summarily dismisses Applicant's claim with prejudice.

{Conclusion and signature on the following page}

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M. HOPE BLACKLEY



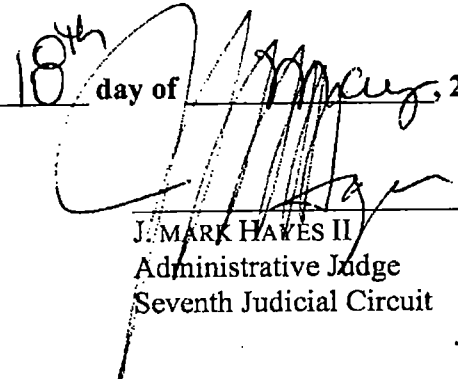
**CONCLUSION**

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Valerie Giovanoli, Esquire  
Rasheeda Cleveland, Esquire  
PCR Division – 7<sup>th</sup> Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 18<sup>th</sup> day of May, 2017

  
J. MARK HAYES II  
Administrative Judge  
Seventh Judicial Circuit

M. HOPE BLACKLEY  
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Spartanburg, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Johnny Burnside # 271070,	)	Case No.: 2016-CP-42-2252
	)	
Applicant,	)	
	)	
v.	)	<b>RETURN AND MOTION TO DISMISS</b>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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 M. HOPE BLACKLEY

In response to the application for post-conviction relief filed by Johnny Burnside (Applicant) on June 17, 2016, Respondent would show this Court:

**I.**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the November 2000 term of the Spartanburg County Grand Jury for murder (2000-GS-42-2661). Applicant was represented by Michael David Morin, Esquire. Derrick Balsa, Esquire, of the Seventh Circuit Solicitor's Office prosecuted the case. Applicant proceeded to trial and the jury found Applicant guilty on November 29, 2000. The Honorable J. Derham Cole sentenced Applicant to forty (40) years' imprisonment.

A timely notice of appeal was filed on Applicant's behalf by Robert M. Dudek, Esquire. On June 20, 2012, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Burnside, Op No. 2002-UP-455 (S.C. Ct. App. 2002). The Remittitur was issued on July 23, 2002.

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Applicant filed his first post-conviction relief application on July 17, 2002. Applicant raised the following issues:

1. Ineffective assistance of trial counsel:
  - a. "Trial counsel failed to provide adequate representation."
  - b. "Trial counsel failed to seek-defense of self-defense."
  - c. "Trial counsel unprepared for trial."
  - d. "Trial counsel "refused" lesser included offense."

Respondent filed its return on June 26, 2003 and requested an evidentiary hearing. An evidentiary hearing was convened on May 27, 2004 before the Honorable Roger L. Couch. Michael C. Watkins, Esquire, represented Applicant. Molly Crum, Esquire of the South Carolina Attorney General's Office, represented Respondent. On November 24, 2004 by written order Judge Couch denied and dismissed the application.

2006-CP-42-2237

On July 12, 2006, Applicant filed his second application for post-conviction relief. Applicant raised the following issue:

1. Denial of right to appeal post-conviction relief hearing decision pursuant to Austin<sup>1</sup>.

Respondent filed its Return on October 24, 2006. On April 19, 2007, Judge Couch heard arguments on the application but no testimony was taken. By written order, Judge Couch dismissed the application.

On March 5, 2008, Eleanor Duffy Cleary, Esquire, of South Carolina Commission on Indigent Defense, filed a petition for writ of certiorari in the Supreme Court of South Carolina pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The remittitur was issued on December 19, 2008.

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<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

**C/A No. 9:11-03354-JFA-BM**

Applicant filed a pro se Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina under 28 U.S.C. § 2254 on December 15, 2011. (C/A No. 9:11-03354-JFA-BM). Applicant set forth the following grounds for relief:

1. Sixth Amendment violation by trial counsel's failure to request a lesser-included charge of involuntary manslaughter.
2. Trial judge refused to charge self-defense.

Respondent filed its Return and Motion for Summary Judgment on April 6, 2012. On September 28, 2012, the Honorable Bristow Marchant, United States Magistrate Judge issued the Report and Recommendation that Respondent's motion for summary judgment be granted and the Applicant's petition be dismissed with prejudice. Burnside v. Warden, 9:11-03354-JFA-BM. On March 8, 2013, the Honorable Joseph F. Anderson, Jr., United States District Judge adopted the Report and Recommendation of the Magistrate and granted Respondent's motion for summary judgement and denied the Applicant's petition. Burnside v. Warden, 9:11-03354-JFA-BM.

**II.**

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

**1. Subject Matter Jurisdiction:**

- a. "The Court was without jurisdiction to sentence me to a mandatory 40 years when statute for murder §16-3-20 at the time of my crime and sentencing carry [sic] a 30 years or life sentence. Not the 30 years to life as the statute §16-3-20 reads as of 2010."

Attached and incorporated herein are the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior post-conviction relief records, Applicant's federal habeas corpus records, Applicant's direct appeal

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M. HOPE BLANLEY

records, and the records for this post-conviction relief action. Respondent reserves the right to amend this Return.

### III.

Respondent submits that this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

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

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

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

Applicant was convicted of the offense he challenges in this application on November 29, 2000. Remittitur from the direct appeal was issued on July 23, 2002. This application was filed on June 17, 2016, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

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JAMES BLAOKIN

#### IV.

The application should be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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

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

Applicant's current allegations could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications

for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant's previous PCR application.

V.

Respondent submits that Applicant's claim that the trial court lacked subject matter jurisdiction is without merit. "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Evans v. State, 363 S.C. 495, 507, 611 S.E.2d 510, 517 (2005). Applicant alleges that the trial court lacked jurisdiction to sentence him to a mandatory term of forty years imprisonment. In criminal cases, "the trial court acquires subject matter jurisdiction by way of way of a valid indictment." Id. The indictment is a notice document that is required by our state constitution and statutes. Id. Applicant's indictments are facially valid and proper, therefore, establishing the subject matter jurisdiction of the circuit court to hear Applicant's criminal case.

With regards to the issue of sentencing, in South Carolina a trial judge has "a broad" discretion in sentencing within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). Applicant was sentenced to a term of forty years for murder pursuant to S.C. Code of Laws § 16-3-20. At the time of Applicant's sentencing the statute read as follows: "A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years." S.C. Code Ann. § 16-3-20. The statute currently reads: "a person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life." Id. Respondent submits that the trial judge sentenced applicant within the statutory limits

because the statute mandates a mandatory minimum but the trial judge maintains discretion to impose a harsher sentence.

A review of the applicant's records indicates that there is no basis for Applicant's claim that the trial court lacked subject matter jurisdiction. Therefore, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70(c) on the basis that there is no genuine issue of material fact and the application should be dismissed as a matter of law.

**VI.**

Respondent denies each allegation not expressly admitted, qualified, or explained.

**VII.**

**WHEREFORE**, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired, is successive, and there are no genuine issues of material fact that would necessitate a new trial.

{ signature on the following page }

2017 MAY 18 PM 4:22  
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
JOHNNY BURNSIDE, #271070, )  
 )  
Applicant, )  
 )  
vs )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2016-CP-42-2252

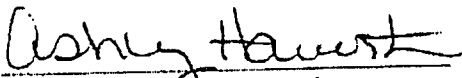
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Johnny Burnside, #271070  
Turbeville Correction Institution  
PO Box 252  
Turbeville, SC 29162**

DATED this 16<sup>TH</sup> day of May, 2017.

2017 MAY 18 PM 4:23  
M. HOPE BLACKLEY

  
Ashley Haworth, Paralegal  
For Respondent

# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483



Phone (864) 596-2591  
Fax (864) 596-2239

**M. Hope Blackley**

**Clerk of Court**

May 19, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7<sup>TH</sup> JUDICIAL CIRCUIT

Johnny Beerside  
Applicant # 271070

CASE # 2016 CP 42-2252

vs  
Steel  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the

Confidential Dec. Dismissal

In this action dated 5-18 2017 on 5-19-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ashley Hannah  
Alicia Deane  
Johnny Beerside

5-19-17  
(Date)

Cecilia Suf  
(Signature)

Jonny Burnside, 271070  
TCI SA-120  
1578 Clarence Coker Hwy.  
Turbeville, SC 29162

COLUMBIA SC 290

25 JUL 2017 PM 3 L



LEGAL MAIL

South Carolina Supreme Court  
Daniel E. Shearouse, Clerk of Court  
P.O. Box 11330  
Columbia, SC 29211

29211-133030

