

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Georgetown County

Honorable Benjamin H. Culbertson, Circuit Court Judge

JAMES ARTHUR BRYANT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002451

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Did the circuit court judge err by denying Petitioner's state petition for writ of habeas corpus when the petition was not successive, was properly filed with the circuit court as opposed to this Court's original jurisdiction, and where Petitioner was entitled to relief since the evidence at trial was insufficient to support Petitioner's convictions due to a substantial defect in the indictment?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner entered his estranged wife's home without consent during the early morning hours of February 11, 2006 and struck her and her boyfriend, Nelson Heyward, with a stick as they were sleeping. Petitioner's thirteen year old son was also injured during the assault. App. 40, l. 5 – 41, l. 6.

A Georgetown County Grand Jury indicted Petitioner on April 5, 2006 for first degree burglary, kidnapping, and three counts of assault and battery with intent to kill (ABIK). Supp. App. 1-10. His case was called to trial on May 20, 2006 before the Honorable Edward B. Cottingham, and a jury. App. 1. Assistant Solicitors Matthew Modica and Dorie Biagianti Smith represented the state, and Jonathan Eric Fox represented Petitioner. App. 1.

At the beginning of Petitioner's trial, the state moved to amend the first degree burglary indictment because the body of the indictment listed an incorrect statute. Instead of the statute for first degree burglary, S.C. Code Ann. § 16-11-311(A), the indictment listed the statute for second degree burglary, S.C. Code Ann. § 16-11-312(A). The judge granted the motion without objection. App. 35, ll. 6-18. The following colloquy took place between the judge and the parties:

[THE ASSISTANT SOLICITOR]: Your Honor, prior to that we had approached, and I had requested the ability to move to amend Indictment 06-GS-22-277 to correct a section. It says, "312." It should [say] "311." It does say, "burglary, first." On the back of [the indictment], it has 311. It does say, "burglary, first," on the back.

THE COURT: My understanding, Mr. Fox [defense counsel], you don't object to that, it being merely a scrivener's error, he being charged on the face of the indictment and other language with burglary, first degree?

[DEFENSE COUNSEL]: That is correct, Your Honor.

THE COURT: No objection from the defendant?

[DEFENSE COUNSEL]: None, Your Honor.

App. 35, ll. 6-18.

The indictment was amended accordingly. Supp. App. 4.

The body of the first degree burglary indictment alleged only one of the aggravating factors that elevate the burglary of a dwelling to first degree burglary. Supp. App. 4. Specifically, the indictment alleged the aggravating factor found in S.C. Code Ann. § 16-11-311(A)(1)(b), which reads: (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime: (b) *causes physical injury to a person who is not a participant in the crime.*” S.C. Code Ann. § 16-11-311(A)(1)(b) (emphasis added).

The body of the indictment read: “That James Arthur Bryant [Petitioner] did in Georgetown County on or about February 11, 2006, without consent and with intent to commit a crime therein, enter the dwelling of Lasha E. Bryant, located at 12 Avant Court, Georgetown, SC, *causing bodily harm to: Lasha E. Bryant and/or Nelson Heyward, III and/or Tamar Bryant,* in violation of Section 16-11-311(A), South Carolina Code of Laws, 1976, as amended.” Supp. App. 4 (emphasis added).

Despite this language in the indictment, at the conclusion of all the testimony during Petitioner’s trial, the assistant solicitor requested the judge charge *all* the elements or aggravating factors of first degree burglary as opposed to only the single aggravating factor listed in the indictment. The following colloquy took place between the judge and the parties:

[THE ASSISTANT SOLICITOR]: Your Honor, the State would also ask that in regards to burglary, first, that each and every element of burglary, first, all the elements of burglary, first - - -

THE COURT: Don't you think I know what the elements of burglary, first degree, are?

[THE ASSISTANT SOLICITOR]: What I'm saying is up to and including in the nighttime, a dwelling, ah, injuring another party, all those elements.

THE COURT: Yes, sir. I think I'm familiar with all of that but thank you.

[THE ASSISTANT SOLICITOR]: I'm saying *you're going to charge them all*?

THE COURT: The elements of burglary, first degree, here is primarily the nighttime and with intent to commit a felony therein. It will be a deadly weapon. I'm not sure about that but there's enough here, the nighttime standing alone that it's sufficient to make it burglary in the first degree.

[DEFENSE COUNSEL]: **Your Honor, the indictment shows - - - of course, its many different ways you can have a first degree burglary. The indictment says, of course, the elements are without permission and caused bodily injury but they didn't allege nighttime. I know there's testimony about that but the indictment doesn't allege that as - - -**

THE COURT: **Well, I don't think the indictment has to allege that.**

[DEFENSE COUNSEL]: **- - - as an element.**

THE COURT: **The indictment alleged burglary in the first degree, and the jury is entitled to know the elements of it but I'll charge what's appropriate. But, ah, clearly, the indictment puts you and the defendant on notice that he's charged with burglary in the first degree, and being the competent attorney that you are, you know what elements must be proven to make it burglary in the first degree.**

[DEFENSE COUNSEL]: **Yes, sir.**

App. 211, l. 18 – 213, l. 4 (emphasis added).

The judge ultimately instructed the jury as follows regarding the elements of first degree burglary:

Burglary in the first degree is entering a dwelling without permission and with intent to commit a crime therein and that **that entry contained one - - at least one of the six factors.**

Either he was armed with a deadly weapon or caused physical injury to nonparticipants or he threatened the use of a deadly instrument or display[ed] what appears to be a knife or other firearms or the entry occur[red] in the nighttime.

The State doesn't have to prove them all but the entry of a dwelling without consent and with intent to commit a crime therein accompanied by any one of these factors constitutes burglary in the first degree if proven beyond a reasonable doubt.

I go over the factors with you again which makes it - - takes it from second to first degree.

One, if it occurred at night.

Another circumstance depending upon the proof, armed with a deadly weapon or caused physical injury to a nonparticipant or threatened the use of a deadly, and I've said or if it occurs in the night.

Now, the State must prove as [well as] all other things one of these circumstances. Doesn't have to prove them all.

App. 234, ll. 1-23 (emphasis added).

Defense counsel did not object to this instruction.

The jury found Petitioner guilty of first degree burglary, kidnapping, two counts of assault and battery with intent to kill, and one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). App. 288, l. 16 – 289, l. 10. Petitioner was sentenced by Judge Cottingham to twenty five years for first degree burglary, twenty five years concurrent for kidnapping, twenty years concurrent for each count of ABIK, and three years consecutive for ABHAN. The aggregate sentence was twenty eight years' imprisonment. App. 296, ll. 5-22.

On April 1, 2009, after Petitioner's convictions and sentence were affirmed on direct appeal, he filed an application for post-conviction relief (PCR). App. 301. The state filed a return to this application on May 22, 2009. App. 301. An evidentiary hearing was convened on

July 28, 2009 before the Honorable Larry B. Hyman. App. 301. Assistant Attorney General Christina Catoe Bigelow represented the state, and Paul Archer represented Petitioner. App. 301. By order filed August 28, 2009, the court denied Petitioner relief. App. 301-312. Petitioner appealed, and this Court denied the petition for writ of certiorari on April 7, 2011. App. 372.

On June 3, 2011, Petitioner filed a federal petition for writ of habeas corpus. App. 372. The federal district court granted the state's motion for summary judgment by order dated August 20, 2012. This order also denied the granting of a certificate of appealability. Regardless, Petitioner appealed the matter to the United States Court of Appeals for the Fourth Circuit, which dismissed the request on June 18, 2013. App. 373.

On August 27, 2014, Petitioner filed a state petition for writ of habeas corpus with the circuit court raising the claim argued in this petition. App. 313-337. The state filed a return and motion to dismiss on January 26, 2016. App. 371-379. Petitioner filed an answer to Respondent's motion to dismiss on July 19, 2016. App. 382-387. An evidentiary hearing was convened on July 19, 2016 before the Honorable Benjamin H. Culbertson. App. 390. Assistant Attorney General Jessica Kinard represented the state, and James Falk represented Petitioner. App. 390.

During the hearing, counsel for Petitioner argued his state habeas petition was proper and not successive because the claim raised in his petition is prohibited from review under the Uniform Post-Conviction Procedure Act and thus could not have been raised in a PCR application. The Uniform Post-Conviction Procedure Act does not permit "collateral attack on the ground that the evidence was insufficient to support a conviction," which is precisely what Petitioner alleged in his habeas petition. S.C. Code Ann. § 17-27-20(A)(6).

Counsel further argued that the body of the burglary indictment, which “is the controlling portion” as opposed to the caption or front of the indictment, charges second degree burglary under S.C. Code Ann. § 16-11-312(A). App. 406, ll. 5-23. Petitioner proceeded to trial anticipating to defend a second degree burglary indictment, but instead, on the day of trial the state was permitted to amend the indictment to first degree burglary without ever presenting the enhanced charge to the grand jury. Specifically, counsel argued, “[T]his is indictment by ambush. [Petitioner] was call[ed] into trial and now he’s facing a burglary first indictment and having to prepare himself on the day of trial presumably for a burglary first indictment when there was . . . insufficient notice to him to know what he had to defend himself against.” App. 409, ll. 5-22.

As to relief, counsel requested Petitioner be released from confinement because the defect in the burglary indictment infected the entire trial, and the other indictments, which all stemmed from the alleged burglary. App. 412, ll. 6-13.

Lastly, the court questioned Petitioner about trial counsel’s failure to object to the amendment during trial. Counsel argued trial counsel could not waive any challenge to the indictment without Petitioner’s consent. App. 412, l. 22 – 413, l. 4.

By order dated November 15, 2016, the court denied Petitioner relief. App. 421-427. The court found Petitioner’s current state petition for writ of habeas corpus was successive because it raised claims which could have been raised on direct appeal or during post-conviction relief. App. 425. The court further found Petitioner’s request for relief is barred under McCall v. State, 247 S.C. 15, 18, 145 S.E.2d 419, 419-420 (1965), which holds a writ of habeas corpus “is not available to test the legality of a conviction or sentence where a decision in the prisoner’s favor will leave him in lawful confinement under another existing sentence.” Because any relief

concerning Petitioner's first degree burglary conviction will not result in Petitioner being released from incarceration due to his service on other convictions, the court found Petitioner was not entitled to relief. App. 426. The court stated, "The [c]ourt cannot grant Petitioner's requested habeas relief under McCall, as doing so would have no effect due to the additional prison sentences Petitioner is serving." App. 426.

As to the merits of Petitioner's claim, the court found the first degree burglary indictment returned by the grand jury was sufficient to sustain his conviction. App. 425. The court emphasized that defense counsel did not object when the state moved to amend the indictment at the beginning of Petitioner's trial and that the indictment provided adequate notice. App. 425.

Because the circuit court judge erred by denying Petitioner's state habeas petition where the evidence at trial was insufficient to support Petitioner's convictions due to a substantial defect in the first degree burglary indictment, this petition for writ of certiorari follows.

ARGUMENT

The circuit court judge erred by denying Petitioner's state petition for writ of habeas corpus when the petition was not successive, was properly filed with the circuit court as opposed to this Court's original jurisdiction, and where Petitioner was entitled to relief since the evidence at trial was insufficient to support Petitioner's convictions due to a substantial defect in the indictment.

Petitioner's state petition for writ of habeas corpus was not successive and was properly filed in the circuit court as opposed to this Court's original jurisdiction. The judge erred by failing to grant Petitioner relief when there was insufficient evidence to support Petitioner's convictions due to a substantial defect in the first degree burglary indictment which infected his entire trial. The body of the indictment, which is controlling, alleged second degree burglary and cited the corresponding statute for second degree burglary. See State v. Lark, 64 S.C. 350, 42 S.E.2d 175 (1902). However, on the first day of trial, Petitioner was ambushed when the trial judge permitted the state to amend the indictment to reflect the statute for first degree burglary, S.C. Code Ann. §311(A). Supp. App. 3-4. Additionally, the trial judge ultimately instructed the jury on *all* the aggravating factors that elevate the burglary of a dwelling to first degree burglary even though only one of those factors, physical injury to a person who is not a participant in the crime, was alleged in the indictment. Supp. App. 3-4.

First, the circuit court judge correctly found the court had jurisdiction to hear the matter. App. 416, ll. 16-20. During the evidentiary hearing, the assistant attorney general argued "that *any* State Habeas Petition *must* be filed in the original jurisdiction of the South Carolina Supreme Court," and, consequently, the circuit court judge did not have jurisdiction over the matter. App. 399, ll. 16-21. However, this Court has repeatedly made clear that it will not entertain matters in

its original jurisdiction when the matter can be entertained in the circuit court. In Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991), this Court stated, “Although Article V, § 5 of the South Carolina Constitution vests this Court with the authority to issue extraordinary writs and entertain actions in its original jurisdiction, this Court’s primary function is to act as an appellate court to review appeals from the trial courts. In Rule 229, SCACR, this Court has indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State. *Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction.*” Id. at 116, 406 S.E.2d at 357 (emphasis added). Consequently, the circuit court clearly had jurisdiction to hear Petitioner’s petition for writ of habeas corpus.

Second, the judge erred by finding Petitioner’s state habeas petition was successive because it presented claims which could have been raised on direct appeal or through post-conviction relief (PCR). App. 425. Petitioner could not have raised his challenge to the sufficiency of the indictment on direct appeal because trial counsel did not object to the pretrial amendment nor did he object when the trial judge instructed the jury on all of the aggravating factors that elevate a burglary of a dwelling to first degree burglary. See Supp. App. 3-4. Moreover, Petitioner’s claim could not have been raised in a prior PCR application because the claim raised in his habeas petition is prohibited from review under the Uniform Post-Conviction Procedure Act. The Uniform Post-Conviction Procedure Act does not permit “collateral attack on the ground that the evidence was insufficient to support a conviction,” which is precisely what Petitioner alleged in his habeas petition. S.C. Code Ann. § 17-27-20(A)(6). Consequently, Petitioner’s habeas petition was not successive and the court erred by finding so.

In State v. Gentry, this Court held that an “indictment is a notice document” and a challenge to the sufficiency of an indictment must be made before the jury is sworn overruling years of prior precedent. 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). The Court clarified confusion that had arisen in past jurisprudence between the sufficiency of an indictment and the subject matter jurisdiction of the trial court. Citing United States v. Cotton, 535 U.S. 625 (2002), this Court held that a defective indictment does not deprive a court of jurisdiction, and concluded that circuit courts obviously have jurisdiction to try criminal matters. Id. at 99-101, 610 S.E.2d at 498-499.

To determine the sufficiency of an indictment, the trial judge should determine “whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.” Id. at 102-103, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003), *overruled on other grounds by Gentry*, 363 S.C. at 105, 610 S.E.2d at 501).

“The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.” State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 312 (Ct. App. 2002), *overruled on other grounds by Gentry*, 363 S.C. at 105, 610 S.E.2d at 501, (citing Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995)).

“An indictment may be amended provided such amendment does not change the nature of the offense charged.” *Id.* at 109, 572 S.E.2d at 312 (citing *State v. Lynch*, 344 S.C. 635, 545 S.E.2d 511(2001), *overruled on other grounds by Gentry*, 363 S.C. at 106, 610 S.E.2d at 501).

In *Lynch*, the defendant was indicted for first degree burglary, with the aggravating factor being that the burglary occurred in the nighttime. At the outset of trial, the state moved to amend the indictment to strike out the words “in the hours during darkness” and to replace that phrase with “caused physical injury.” The trial court allowed the amendment. *Lynch*, 344 S.C. at 638, 545 S.E.2d at 513. On appeal, *Lynch* argued that an aggravating factor is a required element of first degree burglary, and the aggravating factor upon which his burglary conviction was based had never been presented to the grand jury. *Id.* at 639, 545 S.E.2d at 513. This Court agreed. This Court held the aggravating factor is “the essence” of first degree burglary and by changing the aggravating factor from entering during the darkness to causing physical injury, the amendment to the indictment substituted an entirely different offense for the one charged. The amendment was a material change which modified what *Lynch* was called upon to answer. *Id.* at 640-641, 545 S.E.2d at 514.

In *Guthrie*, the defendant was indicted for first degree burglary based on the aggravating factor of unlawfully entering a dwelling during the nighttime hours. At the beginning of *Guthrie*’s trial, the state moved to amend the indictment to include as an additional aggravating factor *Guthrie*’s conviction of two or more prior burglaries. *Id.* at 106, 572 S.E.2d at 311. This Court held the amendment changed the nature of the offense charged and emphasized that because the two aggravating factors are distinct from one another, the proof required for each aggravating factor is materially different from the other. The Court concluded, “The amendment was a material change which modified what *Guthrie* was called upon to answer. It was

impossible for Guthrie to prepare a defense to the additional factor regarding two or more prior convictions where the aggravating circumstance was not added until trial.” Id. at 111-112, 572 S.E.2d at 314.

Both Lynch and Guthrie were overruled by Gentry to the extent they held a defective indictment deprives the circuit court of subject matter jurisdiction. However, Petitioner does not argue the trial court did not have subject matter jurisdiction due to the amendment to the first degree burglary indictment or the improper jury instruction which charged aggravating factors not contained in the indictment. Instead, his claim is that there was insufficient evidence to sustain his convictions due to the defective first degree burglary indictment which infected his entire jury trial.

Here, the amendment to the indictment was a material change to what Petitioner was called upon to answer and changed the nature of the offense charged. The body of the indictment alleged second degree burglary and cited to the statute for second degree burglary. However, the state was permitted to amend the indictment at the start of trial to allege first degree burglary, an enhanced charge with different elements that was never presented to the grand jury. This resulted in an “amendment ambush” just as trial commenced. See Guthrie, 352 S.C. at 112, 572 S.E.2d at 314.

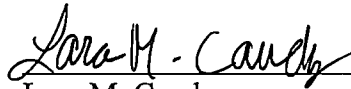
Moreover, the trial judge charged the jury with *all* of the aggravating factors that elevate the burglary of a dwelling to first degree burglary even though only one factor, physical injury to a nonparticipant, was alleged in the indictment. Just as this Court held in Guthrie, the addition of these aggravating circumstances, which were never presented to the grand jury, materially changed the nature of the offense charged and modified what Guthrie was called upon to answer, thereby depriving Petitioner of the proper notice required under Gentry.

The circuit court judge erred by denying Petitioner a writ of habeas corpus when the amendment to the indictment, which changed the offense charged from second degree burglary to first degree burglary, on top of the improper jury instruction on *all* the aggravating factors found in S.C. Code Ann. § 311(A), which were never presented to the grand jury, materially changed the nature of the offense charged and lead to insufficient evidence to sustain Petitioner's convictions. Respectfully, this Court should reverse the ruling of the circuit court and grant Petitioner relief.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented. In the event this Court dispenses with further briefing, Petitioner respectfully requests this Court reverse the ruling of the circuit court and grant Petitioner relief.

Respectfully submitted,

_____

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
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JAMES ARTHUR BRYANT,

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V.

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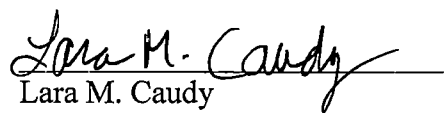
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Arthur Bryant states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's evidentiary hearing, which was held before the Honorable Benjamin H. Culbertson on July 18, 2016. In her opinion, seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for James Arthur Bryant.

Respectfully Submitted,

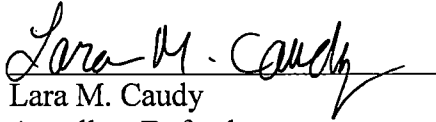

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


Lara M. Caudy
Appellate Defender

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This 4th day of July, 2017.

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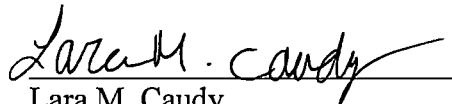
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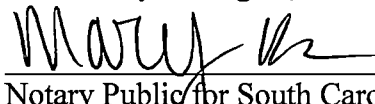
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case have been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix have been served upon James Arthur Bryant, #315781, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 4th day of August, 2017.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of August, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.