

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

**RECEIVED**

AUG 21 2017

S.C. SUPREME COURT

August 14 2017

RE: EXPLANATION BRIEF

South Carolina Supreme Court  
The Honorable Daniel E. Shearouse, Clerk of Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

Sir, I hope this finds you well and good spirits. I have been in contact with the S.C. Legislative Office about the 2010 change in S.C. Code Ann. § 16-3-20 Specifically the ( 30 years to life) amendment. At the time I was tried and sentenced, S.C. Code stated (November 29 2000), .... Manadatory Minimum Term **for** thirty years. and in 2010, the change reflected (Thirty years to life. The intent for that change was in 2010 to give the trial Court the discretion to give a criminal defendant, who was convicted for murder to give that defendant a greater **numerical** sentence than thirty years.

In All the sentence does not comport with S.C. Law and an Illegal sentence is challengable at any time. I have also sent a copy of this corospondence to the Respondent's Counsel of Record. I want to Thank you for your Thoughtful Consideration in this consideration of this appeal. Thank you and God Bless...

With Kind Regards...I Am.

Sincerely, yours,

Johnny Burnside,

CC: V/G/G  
D/E/S  
L/P/O  
File

ENCLOSURES  
Explanation Brief/ w Proof

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

The Honorable J. Mark Hayes, II

2016-CP-42-2252

Appellant Case No. 2017-001592

**RECEIVED**

AUG 21 2017

S.C. SUPREME COURT

Johnny Burnside, 271070,

APPELLANT,

-vs-

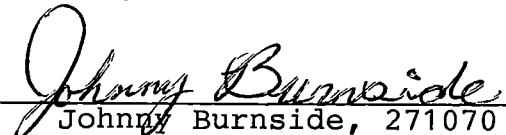
State of South Carolina,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served my Explanation Brief on Respondent's Counsel of record, South Carolina Attorney General's Office, Mrs. Valarie G. Giovanoli, Esq., Post Office 11549, Columbia, SC 29211-1549 by depositing the same in the United States Mail, Postage Prepaid and addressed as followed:

This 14<sup>th</sup> Day of August 2017.

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

**ADDRESSED TO:**

South Carolina Attorney General's Office  
Mrs. Valarie G. Giovanoli, Esq.  
Post Office Box 11549  
Columbia, SC 29211-1549  
(COUNSEL FOR RESPONDENT)

**RECEIVED**

**AUG 21 2017**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY

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Appellant Case No. 2017-001592

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Johnny Burnside, 271070,

APPELLANT,

vs.

State of South Carolina,

RESPONDENT.

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EXPLANATION BRIEF  
SCACR 243 (c)

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Johnny Burnside, 271070  
TCI SA-120  
1578 Clarence Coker Hwy.  
Turbeville, SC 29162  
(APPELLANT PRO-SE)

S.C. Attorney General's Office  
Mrs. Valarie G. Giovanoli,  
Post Office Box 11549  
Columbia, SC 29211-1549  
(COUNSEL FOR RESPONDENT)

### SUBJECT MATTER JURISDICTION

The Applicant would contend that the Court did have Subject Matter Jurisdiction. However, the Applicant's 40 year sentence is clearly in error, and an Unreasonable Application of South Carolina, or, Contrary to clearly established State law.

### SUCCESSIVENESS/ STATUTE OF LIMITATIONS

Applicant is presently confined in the South Carolina Department of Corrections hereafter referred to as "SCDC" pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at November 2000 term of the Spartanburg County Grand Jury for murder (2000-GS-42-2661). Applicant was represented by Michael David Morin, Esquire. Derrick Bulsa, Esquire, or 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 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. 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. On June 27 2004, the Court denied and dismissed the Application. It is noted that the Court

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, upon discovery that Counsel from the First Post-Conviction Hearing did not file the Notice of Appeal asfter being Instructed to do so. Applicant filed his second application for Post-Conviction relief.

Applicant raised the sole issue of:

1. Denial of right to appeal post-conviction relief hearing decision pursuant to Austin

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 the 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.

**C/A No. 9:11-033540JFA-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 Judgement 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 judgement 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.

However, S.C. Code Ann. was amended bringing to the forefront and highlighting the Statutory language in S.C. Code Ann. § 16-3-20 (2010) amendment [ A person who is convicted of or pleads guilty to murder must be punished by death, or by a Mandatory Minimum Term for thirty years to life. (2010). This Language which highlights that now as of the day of this enactment, that a person convicted of murder can receive 30 years to life. If that was the intent prior to this 2010 enactment there would be no need for this amendment.

However, Applicant here was tried, convicted and sentenced On November 29 2000 (Some 10 years before this bill was passed). SCDC's prison Law library was updated with West Law System (March 13 2013. However, the updates were not readily available. Therefore under the reasoning in Easterwood v. Champion \_\_\_\_ F.3d \_\_\_\_\_. This Action should not be deemed successive because this amendment had not become effective, exposing Applicant to the new Language of 30 years to life. The Applicant on or about after SCDC Law Library was adequately updated allowing Applicant to be given Notice that the Statutory Language before would not have allowed the Court to sentence him to 40 years due to ~~the previous version, which was applicable at the time Applicant~~ was convicted and sentenced. Which Applicable Statute read [by imprisonment for life, or by a Mandatory Minimum Term for thirty years. Easterwood v. Champion \_\_\_\_ F.3d. \_\_\_\_\_. In Short, Due to the time of actual Discovery by the exercise of Due Diligence,

This claim could not have been adequately raised before now. This argument would likewise apply as it relates to the Statute of Limitation argument.

### MANDATORY MINIMUM TERM

#### Courts Discretion

The Court does have discretion to either sentence Applicant to either Life or Mandatory Minimum Term for thirty years. Specifically [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 compare: State v. Starns 531 S.E.2d. 907.

The State in their Return and in the Conditional Order or Dismissal has tried to assert that the term "Mandatory Minimum Term" means that the Court had as of the time Applicant was convicted and sentenced the discretion to give a defendant from 30 years and up as it relates to sentencing. However, it is abundantly clear what "Mandatory Minimum Term" for thirty years means in this context as it relates to S.C. Code Ann. § 16-3-20. "Mandatory Minimum Term means that a convict is to serve 30 years day for day essentially. i.e. without the application of Goodtime , Work Credits, Educational or any other credits that would reduce a convicts time below the 30 years day for day. Sellers v. SCDC ID.

Looking at Black's Law Dictionary Tenth Edition.

**Mandatory Sentencing:** A Statutory **Specified** penalty that automatically follows a conviction for the offense, often with a Minimum Mandatory term- also termed determinate sentencing, Fixed Sentence

**Determinate Sentence:** 1. a jail term of a **specified** duration  
2. a jail term of a relatively long duration, usu more than a year, often after a conviction of a serious crime such as a violent felony or drug felony also termed **definite sentence definitive sentence, fixed sentence. Flat sentence. Straight sentence.**

**Fixed Sentence:** 1. see determinate sentence. 2. see Mandatory Sentence.

**Mandatory Sentence (1926):** A sentence set by law with no **discretion for the judge to**

Mandatory Sentence (Cont.)

[Individualize punishment also termed Mandatory penalty, Mandatory punishment, fixed sentence.]

Lastly, The Statute applicable to applicant states clearly and unambiguously, [Mandatory Minimum term of Thirty years, or life. (In Part). If the Court had the discretion to depart upwards from 30 years, the Statute would have said 30 years to life. However, at the time Applicant was tried and sentenced (November 29 2000) the Statute read (...Life, or by a Mandatory Minimum term for thirty years. Afterwards, some 9 years later The South Carolina Legislature amended S.C. Code Ann. § 16-3-20 to read: (...punished by death, or by a Mandatory minimum term for thirty years to life. If before the Court had that discretion this amendment was totally worthless and meaningless.

To the contrary, S.C. Code Ann. § 16-3-20 at the time of applicant charge, trial conviction and sentence specifically November 29 2000, the statute reflected (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 for thirty years. As discussed above Mandatory Minimum Term for thirty years means 30 years day for day or a specified term of 30 years without the application of goodtime, work credits or educational credits that would otherwise reduce the term of incarceration of the Mandatory Minimum term for thirty years.

**STATE V. SIDELL 205 S.E.2d. 2**

The Applicant would contend the State v. Sidell Supra is inapplicable here because Sidell was convicted of voluntary manslaughter and received a sentence that comported with South Carolina Law. Understanding that the Court did have discretion in Sidell Supra. In Applicant's case the Court likewise had discretion to either give Applicant either Life or Mandatory Minimum Term for thirty years (i.e. 30 years day for day).

### EX POST FACTO

To allow this sentence to stand would create an Ex Post Facto violation of sorts because it comports with South Carolina Law that was enacted some 9 years after Applicant's conviction and sentence, and Applicant is harmed by an additional 10 years<sup>2</sup> day for day due to the violation. As outlined in Respondent's "Return and Motion to Dismiss" bottom of page 6 of 8, where Respondent acknowledged by virtue of their response as to the law that would have been applicable to Applicant and to allow this to stand would cause the applicant to serve 10 years day for day longer than the sentence prescribes. Teague v. Lane Supra In effect, Applicant would be subjected to a law that was not enacted until well after his conviction and sentence compare Varner 423 S.E.2d. \_\_\_\_.

### CONCLUSION

Because of the situation stated herein, The Applicant Prays that this Court modify his sentence to comport with South Carolina Law, Because the Court did not give Applicant Life, to Modify Applicant's sentence to Mandatory Minimum Term for thirty years, Or any other remedy that this Court deems just and proper.

Respectfully, Submitting,

Johnny Burnside

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<sup>2</sup> see Strickland v. Washington 466 US 668  
Glover v. United States 531 US 198  
Prou v. United States 199 F.3d. 37  
United States v. Conley 349 F.3d. 837  
Jones v. United States 224 F.3d. 1251

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MAILROOM  
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South Carolina SUPREME COURT  
THE HONORABLE DANIEL E. SHEAROUSE  
CLERK OF COURT  
POST OFFICE BOX 11330  
Columbia S.C 29211