

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY

2016-CP-42-02252

The Honorable J. Mark Hayes, II

Appellant Case No. 2017-001999

Johnny Burnside,

APPELLANT,

vs.

State of South Carolina,

RESPONDENT.

EXPLANATION BRIEF
SCACR 243 (c)

Johnny Burnside, 271070
TCI SA-109
1578 Clarence Coker Hwy.
Turbeville, SC 29162
(APPELLANT PRO-SE)

South Carolina Attorney General
Mrs. Valarie G. Giovanoli, Esq.
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, Judge Clerk Trial Court, Spartanburg County, South Carolina. The hearing was held and the Applicant's application was denied and dismissed.

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. 9:11-03354JFA-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 years² 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

² 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

STATE OF SOUTH CAROLINA)
)
County of Clarendon)
) AFFIDAVIT OF: JOHNNY BURNSIDE

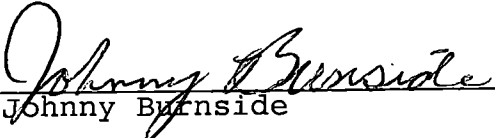
The Following is true and accurate and is of my own personal knowledge.

01. Affivant is a citizen of the United States.
02. Affivant was at the time of conviction/ Sentence a Resident of Spartanburg, South Carolina.
03. Affivant is currently confined within the South Carolina Department of Corrections.
04. Affivant is housed at Turbeville Correctional Institution in Clarendon County in the State of South Carolina.
05. Affivant was Indicted in Spartanburg County, South Carolina for murder (2000-GS-42-2661) at the November 2000 term of Grand Jury Session.
06. Affivant stood trial in Spartanburg County, South Carolina and was convicted and sentenced on November 29 2000.
07. Affivant was sentenced to (40) years For Murder S.C. Code Ann. § 16-3-20, on November 29 2000.
08. At the time of Affivants crime, South Carolina Code Ann. § 16-23-20 Stated in Part "Mandatory Minimum Term of Imprisonment For Thirty Years."
09. Prior to the 2010 Amendment, South Carolina's Legislative Intent of S.C. Code Ann. § 16-3-20, as of November 29 2000 is that the Court had the discretion to sentence a criminal Defendant to either Death, or, Life, or, Mandatory Minimum Term of Imprisonment for ~~Thirty~~ ^{thirty} years.
10. In 2010, South Carolina Code was amended to reflect S.C. Code Ann. § 16-3-20 "(30) years to life."
11. In 2010, S.C. Legislature amended § 16-3-20 "Thirty Years to life for the explicit purpose of allowing the trial Court the discretion to sentence a criminal defendant to a numerically greater sentence than 30 years i.e. 30 years on up to a Life sentence. Thereby giving the Court the ability to sentence a criminal defendant a sentence greater numerically greater than 30 years.
12. The S.C. Legialative Intent for the term "Mandatory Minimum Term of Imprisonment " means Thirty years "Day for Day" Without the application of Goodtime, Work Credits, or Eduational Credits.

13. Websters Dictionary defines, and South Carolina Legislature Intended the term as mentioned in S.C. Code Ann. § 16-3-20, as of November 29 2000, the Term **For** (For Thirty Years) means: [A Specific Time (For: (Prep) Used to indicate amount Extent, or Duration walked for miles (b) Used to indicate a Specific time: (A date for two Oclock.)

The Affivant declares the following to be true and accurate and of my own personal knowledge under the penalty of purjury.

This 19th Day of October 2017.


Johnny Burnside

STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY

2016-CP-42-02252

The Honorable J. Mark Hayes, II

Appellant Case No. 2017-001999

RECEIVED

OCT 24 2017

S.C. SUPREME COU.

Johnny Burnside,

APPELLANT,

vs.

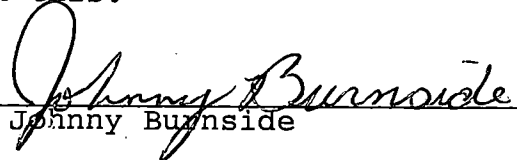
State of South Carolina,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served a copy of my Explanation Brief (SCACR 243 (c) and Affidavit on Respondent's Counsel of Record: South Carolina Attorney General's Office, Mrs. Valarie Garcia Giovanoli, Esq. Post Office Box 11549, Columbia, SC 29211-1549 by depositing the same in the United States Mail, Postage Prepaid and addressed as mentioned above on this:

This 19th Day of October 2017.


Johnny Burnside

RECEIVED

OCT 19 2017

**MAILROOM
TURBEVILLE CI**

ORANGEVILLE, SC 29162
MAIL ROOM
1576 CLARENCE COCKER HWY.
TURKEY CREEK, SC 29162

57-109

UNITED STATES POSTAGE
PITNEY BOWES
02 1P \$ 001.40⁰
0000880246 OCT 19 2017
MAILED FROM ZIP CODE 29162

SC Supreme Court
1231 Corvais st.
~~Post Office~~
Columbia SC 29201

RECEIVED

OCT 19 2017

MAIL ROOM
ORANGEVILLE, SC