

(1.)

Rule 243 Certiorari to Review post conviction
Relief Actions, Formly cited as s.c. RA ct. Rule 227

Tony Lamar Cunningham #161005

case NO, 2016-CP-45-0459

The are the grounds on which I base my allegations
that I am being held in custody unlawfully;

(a.) Invalid Guilty plea (b.) void judgement (c.) violations
of United States const. Amend. 14; (d.) violations of
south carolina const. Art. 13, s.c. const. Art. 11

(c.) Explanation Required; The lower court determination
was improper for the following reasons;

I was indicted at the July 2005 term of the clarendon
county Grand jury for Burglary first degree and Grand
Larceny, 2005-AS-14-0188, following a jury trial I was
found Guilty of the charges

A timely notice pursuant to 17-25-45 (A) and (H)
was serve that the state would seek to impose a
sentence of imprisonment for life without the possibility of
parole upon my prior conviction of Burglary first in
williamsburg county on Indictment no; 1989-AS-0207

(2.)

The trial court has proven a prior conviction that the state seeks to use under a sentence enhancement statute, and I intends to prove that it is constitutionally defective or otherwise invalid by a preponderance of the evidence.

Rules of Civ. Proc. Rule 71.1(e)

On June 21, 1989, I pled guilty pursuant to a written plea agreement "Nolle prosequere" [EXHIBITS 1.] indictment [89-GS-45-0205] in exchange for pleas in five other cases, two counts of First degree burglary and Grand Larceny [89-GS-45-206, and 207] and three counts of Second degree burglary and Grand Larceny [89-GS-45-203, 204 and 208] sign by solicitor Shuler and so ordered by the Honorable Carol Connor, I was sentence to fifteen years imprisonment on each indictment to run-concurrently.

[General contract law provides that a contract exists when there is agreement between two or more persons upon sufficient consideration either to do or not to do a particular Act.]

(See) State v. Gates 382 S.E. 2d 886 (1989)

Entered a written plea bargain agreement, where language used in instrument is perfectly plain and capable of legal construction, such language determines farce and effect of instrument.

DOCKET NO. '89-GS-45 205

The State of South Carolina,

County of WILLIAMSBURG

DB Jenkins

COURT OF GENERAL SESSIONS

JUNE TERM 1989

THE STATE

vs.

TONY CUNNINGHAM

Nole prosecute in exchange for pleas in 5 other cases

DAF Fuller

6/21/89

Indictment for

BURGLARY - SECOND DEGREE
& LARCENY

WITNESSES

SHERIFF'S DEPT.

Mike Kirby

Floyd's Grocery

ARREST WARRANT NO. C 256576

3-1-89

ACTION OF GRAND JURY

Blue Bell

6-15-89

Allen N. Smith

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

A CERTIFIED TRUE COPY

Sharon W. Staggers

SHARON W. STAGGERS

CLERK OF COURT

WILLIAMSBURG COUNTY

EXHIBITS 1.

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

INDICTMENT FOR BURGLARY & LARCENY

At a Court of General Sessions, convened on June 19, 1989,
the Grand Jurors of Williamsburg County present upon their oath:

COUNT ONE - BURGLARY - SECOND DEGREE

That one TONY CUNNINGHAM
did in Williamsburg County on or about January 12, 1989,
wilfully and unlawfully enter the ~~dwellin~~/building (strike one) of:
Floyd's Grocery,
without consent and with the intent to commit a crime therein and the
defendant entered or remained therein in the nighttime.

COUNT TWO - LARCENY

That one TONY CUNNINGHAM
did in Williamsburg County on or about January 12, 1989,
privily enter the house of Floyd's Grocery and privily and
/feloniously take and carry away the personal goods of Floyd's Grocery
, of the value of more than Two Hundred Dollars,
described as follows: \$90.00 cash,

with intent to deprive the owner permanently of such property.

Against the peace and dignity of the State and contrary to the statute
in such case as made and provided.

Wade S. Kolb, Jr.
SOLICITOR WADE S. KOLB, JR.

A CERTIFIED TRUE COPY
Sharon W. Staggars
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

GENERAL SESSIONS DOCKET SHEET

STATE VS.

Cunningham Tony

INDICTMENT / CRIMINAL DOCKET NUMBER

89 GS 450205

Rte. 2 Box 224

WARRANT / TICKET NO. C-256576

Lake City SC 29056

WARRANT / TICKET NO.

DEFENSE ATTORNEY

EM PD AP UK

WARRANT / TICKET NO.

DATE OF BIRTH

[Redacted]

RACE

W B O

SEX

M F

S.S.

[Redacted]

WARRANT / TICKET NO.

DRIVERS LICENSE

MA

STATE

DATE OF ARREST

03/01/89

WARRANT / TICKET NO.

INDICTMENT PREFILED

MO DAY YEAR

COUNTS OFF. CODE

Burglary 2nd & Grand Larceny

TRUE BILLED

06/15/89

OFFENSE CHARGED

COUNTS OFF. CODE

NO BILL

MO DAY YEAR

COUNTS OFF. CODE

WAIVER

MO DAY YEAR

COUNTS OFF. CODE

DISPOSITION:

DATE

06/21/89

- 1. PLEA 2. TRIAL (G) 3. TRIAL (NG) 4. [X] NOL PROS 5. PROS ENDED 6. JUD. DISM. 7. REMAND 8. OTHER

JUDGE: CODE

24 Connor, Carol

COURT REPORTER:

Margaret Sullivan

SENTENCE:

OFFENSE OF CONVICTION

COUNTS OFF. CODE

01 084 Burglary 2nd & Grand Larceny

(OFFENSE)

SENTENCE:

DRUG FINE:

[Empty]

OFFENSE OF CONVICTION

COUNTS OFF. CODE

(OFFENSE)

SENTENCE:

DRUG FINE:

[Empty]

OFFENSE OF CONVICTION

COUNTS OFF. CODE

(OFFENSE)

SENTENCE:

DRUG FINE:

[Empty]

OFFENSE OF CONVICTION

COUNTS OFF. CODE

(OFFENSE)

SENTENCE:

DRUG FINE:

[Empty]

I CERTIFIED TRUE COPY

[Signature]

HARON W. STAGGERS

CLERK OF COURT

STAMSBURG COUNTY

FOR REMARKS USE REVERSE SIDE (COURT USE ONLY)

DOCKET NO. 89-GS-45-207

The State of South Carolina,

County of WILLIAMSBURG

AB Jurisdiction

COURT OF GENERAL SESSIONS

JUNE TERM 1989

THE STATE

vs.

TONY CUNNINGHAM

Indictment for

BURGLARY - FIRST DEGREE
& LARCENY

WITNESSES

SHERIFF'S DEPT.

Mike Kirby

Jeffery W. Brown

ARREST WARRANT NO. C 256577

3-1-89

ACTION OF GRAND JURY

True Bill
6-15-89
Allen Nesbitt

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

A CERTIFIED TRUE COPY

Sharon W. Stiggers

SHARON W. STAGGERS

CLERK OF COURT

WILLIAMSBURG COUNTY

[EXHIBITS 2.]

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

INDICTMENT FOR BURGLARY & LARCENY

At a Court of General Sessions, convened on June 19, 1989,
the Grand Jurors of Williamsburg County present upon their oath:

COUNT ONE - BURGLARY - FIRST DEGREE

That one TONY CUNNINGHAM
did in Williamsburg County on or about February 20, 1989,
wilfully and unlawfully enter the dwelling/~~building~~ (strike one) of:
Jeffery W. Brown,
without consent and with the intent to commit a crime therein and the
defendant entered or remained therein in the nighttime.

COUNT TWO - LARCENY

That one TONY CUNNINGHAM
did in Williamsburg County on or about February 20, 1989,
feloniously take and carry away the personal goods of Jeffery W. Brown,
of the value of more than Two Hundred Dollars,
described as follows: one (1) Sylvania VCR, one (1) Marlin 30/30 Rifle
with Bushnell Sports Scope ~~and one (1) Davis Mark III .308 caliber rifle valued at \$600.00~~
with intent to deprive the owner permanently of such property. *M.D.S.*

Against the peace and dignity of the State and contrary to the statute
in such case as made and provided.

Wade S. Kolb, Jr.
SOLICITOR WADE S. KOLB, JR.

A CERTIFIED TRUE COPY
Sharon W. Staggars
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

[EXHIBITS 2.]

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

COURT OF GENERAL SESSIONS

The State -vs- Tony Cunningham, Defendant
Indictment Number: 89-GS-45- 207
Court Reporter: Margaret Sullivan

GUILTY PLEA

The defendant is put to the bar and arraigned and, upon his/her arraignment, pleads guilty as charged to Burglary 1st degree and Grand larceny -

Attest:

Carolyn F. Williams Tony Cunningham
Carolyn F. Williams, Clerk of Court Signature of Defendant
6-19-89

SENTENCE

The defendant is committed to the State Department of Corrections/County for a term of 15 months/years and/or to pay a fine of \$ _____; provided upon the service of _____ months/years and/or payment of \$ _____, plus pay/waive costs and assessments as applicable*, the balance suspended with probation for _____ months/years.

Restitution For physical injury \$ _____
Yes/No property damage \$ _____
to be paid _____

Other conditions Recommend drug treatment as part of sentence.
Credit for time served in jail.

Date 6/21/89
Carol Connor
Carol Connor
Presiding Judge, Third Judicial Circuit

Fine \$ _____
*Cost and Assessments
Non-waivable \$ _____
Not Waived \$ _____
TOTAL COSTS AND ASSESSMENTS \$ _____
TOTAL AMOUNT DUE \$ _____

A CERTIFIED TRUE COPY
Sharon W. Staggers
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

Carolyn F. Williams
Clerk of Court

**Pay to Victim's Compensation if subrogated.

DOCKET NO. 89-GS-45-208

The State of South Carolina,

County of WILLIAMSBURG

W.D. Johnson

COURT OF GENERAL SESSIONS

JUNE _____ TERM L989

THE STATE

VS.

TONY CUNNINGHAM

Indictment for

BURGLARY - SECOND DEGREE
& LARCENY

WITNESSES

SHERIFF'S DEPT.

Mike Kirby

Coker's Grocery

ARREST WARRANT NO. C 256575

3-1-89

ACTION OF GRAND JURY

Thos. Bell

6-15-89

Allen Smith

Foreman of Grand Jury

VERDICT

A CERTIFIED TRUE COPY

Sharon W. Staggers
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

[EXHIBITS 3.]

STATE OF SOUTH CAROLINA)

COUNTY OF WILLIAMSBURG)

INDICTMENT FOR BURGLARY & LARCENY

At a Court of General Sessions, convened on June 19, 1989,
the Grand Jurors of Williamsburg County present upon their oath:

COUNT ONE - BURGLARY - SECOND DEGREE

That one TONY CUNNINGHAM
did in Williamsburg County on or about February 26, 1989,
wilfully and unlawfully enter the ~~dwelling~~ building (strike one) of:
Coker's Grocery,
without consent and with the intent to commit a crime therein and the
defendant _____

COUNT TWO - LARCENY

INVALID.

That one TONY CUNNINGHAM
did in Williamsburg County on or about February 26, 1989,
feloniously take and carry away the personal goods of Coker's Grocery
, of the value of more than Two Hundred Dollars,
described as follows: money and merchandise valued at a total of \$587.00
with intent to deprive the owner permanently of such property.

Against the peace and dignity of the State and contrary to the statute
in such case as made and provided.

Waide S. Kolb, Jr.
SOLICITOR WAIDE S. KOLB, JR.

A CERTIFIED TRUE COPY

Sharon W. Stagers

SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

[EXHIBITS 3.]

STATE OF SOUTH CAROLINA

COUNTY OF Williamsburg

AFFIDAVIT

Personally appeared before me, judge of the Court, one Micheal Kirby, who being duly sworn, deposes and says that Tony Cunningham (name of defendant) did within this County and State on Feb. 26 19 89, violate the criminal laws of the State of South Carolina [or ordinance of the municipality of Kingstree, S.C.] in the following particulars:

DESCRIPTION OF OFFENSE

Tony Cunningham did violate Section 16-11-312 & Common Law of the criminal code of laws by burglary 2nd degree and grand larceny.

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that such probable cause is based on the following facts:

On the twenty-sixth day of February 1989 at about 1:00A.M. at Coker's Groc. at Moore's Crossroads in Williamsburg County one Tony Cunningham did break into the above place of business by chipping out a stone block in the side of the building and once inside did take and carry away money and merchandise in the amount of \$587.00. Burglary 2nd degree and grand larceny is in violation of the South Carolina code of laws.

266575

Sworn to and Subscribed before me,

This 28th day of February, 19 89

[Signature] (L.S.)
Signature of Acting Judge

[Signature]
Signature of Affiant

Address WCS

Phone. 354 9686

Address P.O. Box 673

Kingstree, S.C.

Phone: 354-9602

STATE OF SOUTH CAROLINA **ARREST WARRANT**

COUNTY OF Williamsburg

[or MUNICIPALITY OF Kingstree, S.C.]

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE, COUNTY OR MUNICIPALITY, OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that Tony Cunningham (name of defendant) did on February 26, 19 89, violate the criminal laws of the State of South Carolina [or ordinance of the municipality of Kingstree, S.C.] as set forth below:

DESCRIPTION OF OFFENSE

Burglary 2nd Degree and Grand Larceny

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

A CERTIFIED TRUE COPY

[Signature]
SHARON W. STAGGERS
CLERK OF COURT

Done at Kingstree, S.C.
on February 28, 19 89

[Signature] (L.S.)
Signature of Judge

STATE VS.

GENERAL SESSIONS DOCKET SHEET

INDICTMENT / CRIMINAL DOCKET NUMBER

Cunningham, Tony

89GS450208

LAST FIRST MIDDLE

CONTINGENT DOCKET (1) OR PTI (2)

Rte 3, Box 224

STREET ADDRESS

WARRANT / TICKET NO. C-256575

Lake City SC 29560

CITY STATE ZIP CODE

WARRANT / TICKET NO.

DEFENSE ATTORNEY

JENKINSON, G B.

LAST FIRST MIDDLE

EM AP N UK

WARRANT / TICKET NO.

DATE OF BIRTH

[Redacted] RACE [X] SEX [X]

W B O M F

S.S. #

WARRANT / TICKET NO.

DRIVERS LICENSE

VA STATE

DATE OF ARREST

03/01/89

WARRANT / TICKET NO.

INDICTMENT REFILED

MO DAY YEAR

COUNTS OFF. CODE 01 085

Burglary - 2nd + Grand Larceny

TRUE BILLED

06/15/89

OFFENSE CHARGED

COUNTS OFF. CODE

NO BILL

MO DAY YEAR

COUNTS OFF. CODE

WAIVER

MO DAY YEAR

COUNTS OFF. CODE

A CERTIFIED TRUE COPY

Sharon W. Staggars
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

DISPOSITION:

DATE 06/31/89

1. [X] PLEA 2. TRIAL (G) 3. TRIAL (NG) 4. NOL PROS 5. PROS. ENDED 6. JUD. DISM. 7. REMAND 8. OTHER

JUDGE: CODE

34 Carol Connor

COURT REPORTER:

Margaret Sullivan

SENTENCE:

OFFENSE OF CONVICTION COUNTS OFF. CODE 01 085

Burglary - 2nd + Grand Larceny (OFFENSE)

SENTENCE:

Fifteen (15) yrs.

DRUG FINE:

[Redacted]

SAME AS 89-207

OFFENSE OF CONVICTION

COUNTS OFF. CODE

(OFFENSE)

SENTENCE:

DRUG FINE:

[Redacted]

COUNTS OFF. CODE

EXHIBITS 3J

(3)

*** (see) Thrift v. State 440 S.E. 2d 341 (1994)

"appropriate plea procedures"

Today the complexity of cases dictates that a reliable record exist containing the specific terms of any plea agreement, we hold, therefore, that effective with this decision, all plea agreements must be on the record and must recite the scope of offense and individual involved in the agreement.

We also hold that prospectively for all plea agreements entered after the filing of this opinion, we will limit our review of a plea agreement only to those terms which are fully set forth in the record.

[EXHIBITS. 2] indictment [89-AS-0207] S.C. Code Ann. 16-11-311, First degree burglary is the requirements and advice pursuant to the written plea agreement.

Plea agreements are governed to some extent by principles of contract law, subject to considerations of constitutionally due process.

[EXHIBITS. 3] Indictment [89-AS-0208] second degree burglary, S.C. Code Ann. 16-11-312(B) 1976, failed to state an aggravating circumstance a material element of the crime charged, such conviction violates principles of [Due process] because the trial court has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which I [petitioner]

(4)

was charged, violates u.s. constitutional Amend. 14, Due process requires that a criminal defendant be properly served with a valid indictment, and s.c. constitutional ~~Article~~ 1³ Due process, equal protection of the Law and s.c. const. Art. 1¹¹

*** (see) 3-south carolina jur. burglary 8 update sept. 2017, s.c. code Ann. 16-11-312(B) second degree Elements 8.

IF the structure is a [Building] within the meaning of the new burglary statute (2.) and not a [Dwelling] as defined by section 16-11-10 of the south carolina code, then of the aggravating facts required for first degree burglary must be presented in order for the crime to be second degree. [The Entering or remaining in the NIGHTTIME]

*** (see) Guthrie v. State 572 S.E. 2d 309

Headnote: Generally, an indictment is required to perform two functions, (1.) it should inform the accused of the charges against him by listing the [Elements] of the offense charged (2.) it should be sufficiently specific to protect the accused against doubt jeopardy.

Indictment [89-65-0208] s.c. code Ann. 16-11-312(B) Failed to contain necessary elements of second degree burglary;

(5.)

and circuit court thus lacked jurisdiction to accept my guilty plea to second degree count; Indictment alleged only the elements of Third degree burglary, and state no circumstances of aggravation. (compare) S.C. code Ann. 16-11-312(B) S.C. code Ann. 16-11-313(A) 1976

Indictment [89-65-0208] S.C. code Ann. 16-11-312(B) statutory assertion of [Personal jurisdiction] is inconsistent with due process U.S. constitutional Amendment 14; and S.C. const. Article 1 § 3 S.C. const. Art. III.

Due process of law guarantees and safeguards me such constitutional requirement as adequate notice, *Ex Parte Young*.

(see) *Ware v. Ware* 743 S.E. 2d 817 (2013)

Invalidity of Judgement

For purposes of applying rules authorizing a trial court to grant a party Relief from a void judgement is on that, from its inception is a complete nullity and is without legal effect; the definition of [Void] under the rule only encompasses judgements from courts which failed to provide proper [Due process] or judgements from courts which lacked subject matter jurisdiction or personal jurisdiction, U.S. const. Amend. 14; Civ. proe. Rule 60(b)(4)

(6)

I was sentenced to 15 years on this particular indictment [89-AS-0208] s.c. code Ann. 16-11-312(B) second degree burglary that failed to present a necessary element as required by the statute, it alleged only the elements of third degree burglary s.c. code Ann. 16-11-313, (compare.)

*** (see) Burglary in the third degree only the non-consensual entry of a [Building] with intent to commit a crime, [statutory penalty not more than Five years First offense.] There need be no aggravating circumstances.

*** Trial court exceeded the maximum allowable statutory penalty on this particular indictment [89-AS-0208] second degree burglary, s.c. code Ann. 16-11-312(B)

The judgement of conviction is greater than the permissible statutory penalty for the crime.

The judgement of the sentencing court is void.

*** (see) Moore v. state 255 S.E. 2d 448 (1979)

The effect of this stated in 21 Am. Jur. 2d criminal law section 535.

A judgement by a court in a criminal case must conform strictly to the statute, and any variations from its provisions either in the character or the extent of punishment inflicted, render the judgement void, A statute which creates an offense and prescribes a special form of punishment excludes any different or additional punishment.

(7.)

*** (see) Plea bargain illegal sentence, 87 A.L.R. 4th 384. Guilty plea as effected by fact that sentence contempered by plea bargain is subsequently detemined to be illegal or unauthorized;

A courts authority to impose a sentence is defined and constrained by statute (1.) A sentence that does not conform to statutory sentencing provisions, either in the character or the extent of punishment impose (2.) is void (3.) A sentence for an offense other than that with which the accused was charged is also unauthorized and therefore void (5.) the court should correct the sentence at any time.

*** (see) state v. White, 188 W. Va. 534, 425 S.E. 210 (1992)

Therefore, courts cannot set punishments that are inconsistent with the statutory penalties consequently this court has held; A recognized corollary to the principle that a guilty plea must be shown to have been intelligently and voluntarily entered is the rule that if the plea is based on a plea agreement which is not fulfilled or is unfulfillible, then the guilty plea cannot stand.

** [see] state v. Baker Feb. 11. 2015, 769 S.E. 2d 860

Fairness and due process requires that a criminal defendant receive sufficient notice of the charges against him to able him to prepare a defendant. [per Beatty]

(8.)

statute of limitation

s.c. code Ann. 17-27-45 (A). The reasonable time requirement does not apply to motions for Relief from Void judgement is independent of statute or rules fixing periods of time within which applications to Vacate judgement should be Made, 47 Am. jur. 2d judgement 767-68 (1995.)

** (see) Rule permitting independent action applies where judgement is void, and when defendant is not properly served, court has no jurisdiction over him and all proceeding based on pretended service are void. Momani v. Surdan (1988) 373 S.E. 2d 691

There is no statute of limitation when a party seeks to set aside a "judgement" due to Fraud upon the court. Chewing v. Ford Motors Co. S.E. 2003 S.E. 2d 605 SERCP 60 (b)(4)(5)

SUCCESSIVE

April 2014 application I inadequately raised in my second application by challenging the courts subject matter jurisdiction to hear my case when actually I should have challenge the trial courts authority for sentencing exceeding statutory Maximum penalty, because it did not involve question of trial courts subject matter jurisdiction.

(9)

*** (see) state v. Johnston 510 S.E. 2d 423 S.E. (1999)

After granting defendant's petition for writ of certiorari, the supreme court Toal, J held that (1) challenge to sentencing exceeding statutory maximum did not involve question to trial courts subject matter jurisdiction.

Res judicata

Indictment [09-05-0208] second degree burglary S.C. code Ann. 16-11-312 (B.) rendered without subject matter jurisdiction or personal jurisdiction or otherwise lacking [Due Process], or produced through fraud or collusion is not entitled to full faith and credit. const. Art. 4th Widenhouse v. Colson 405 S.C. 55, 747 S.E. 188 Aug. 7, 2013

Indictment [09-05-0208] second degree burglary, S.C. code Ann. 16-11-312 (B.) 1976, failure to specify any aggravating circumstances as the statute requires, was insufficient to allege offense of second degree burglary -

As a general rule, the sentence imposed by a court is not subject to appellate review; however, in cases in which it is alleged that a sentencing court has imposed a penalty beyond the statutory limits or for impermissible reasons appellate review is warranted, W. Virginia v. McClain 561 S.E. 2d 783

(10)

Trial court committed an error of law by excessive sentencing on indictment [89-95-0208] second degree burglary, S.C. code Ann. 16-11-312(B) that failed to allege a aggravating circumstances, which is a Third degree burglary, S.C. code Ann. 16-11-313(A), statute that the court sentence me to 15 years, which is an illegal sentence constitute breach of contract, and violates my substantial Rights, it violates my Fourteenth Amendment to the United States constitution and South Carolina state constitution Article 1st 3 Due process, se. const. Art. 1st 111
*** (see) 41 Am. jur. 2d indictment & information 256 2005 [A material variance that violates a defendant's substantial right to be tried only on charges presented in an indictment constitutes fatal (ERROR) and warrants a reversal on an appeal of a judgement of conviction of the offense not charged in the indictment.]

(11.)

Conclusion

pursuant to s.c. code Ann, 17-27-80) Where an applicant alleges facts that would establish an except to either the statute of limitation or the prohibition against successive PCR application and those facts are not conclusively refuted by the record before the PCR court, a question of facts is raised which can only be resolved by a hearing.

Mc Coy v. state 401 S.C. 363 369 737 S.E. 2d
623, 626 (2013.)