EXPLANATION

CASE HISTORY: APPELLANT'S ARREST FOR MURDER AND POSSESSION OF FIREARM OCCURRED ON SAME MORNING OF TRAGEDY, FEBRUARY 14, 1992, AND THE RESULTS OF A JURY TRIAL ON SEPTEMBER 21-22, 1992 WAS GUILTY (92-GS-46-1224). COUNSEL WAS GERALD W. SMITH OF YORK COUNTY PUBLIC DEFENDERS OFFICE, SOLICITOR WAS LARRY GRANT, AND SENTENCING BY THE HONORABLE DON S. RUSHING TO LIFE (20 YEAR) PLUS FIVE CONSECUTIVE YEARS FOR FIREARM'S POSSESSION.

AT TRIAL OTIS J. WHITSTINE'S TESTIMONY SHOWING WITH "THE YORK COUNTY SHERIFF'S DEPARTMENT", AND INVOLVED IN "AN INVESTIGATION" OF INCIDENT ON THE DATE IT OCCURRED. HE WAS ADDRESSED AS "OFFICER". AND "DETECTIVE", AND SHOWN AS THE "AFFIANT", "PROSECUTING OFFICER" OF THE ARREST WARRANT. ALSO SOLE WITNESS OF INDICTMENT FOR MURDER, AND THE ONLY LAW OFFICER TO TESTIFY TALKING WITH OR INTERVIEWING WITNESS THOMAS AUTEN ON THAT MORNING OF OCCURRENCE. SOLICITOR ADDRESSING WITNESS AS "THE EYEWITNESS IDENTIFICATION, AND LINE-UP", AND WARRANT STATES "PROBABLE CAUSE BASED ON WITNESS"

(I) ARGUMENT

SHOULD THE ACTION BE DISMISSED AS SUCCESSIVE, AND UNTIMELY UNDER THE STATUTE OF LIMITATIONS OF S.C. CODE ANN. 17-27-45(A)? (PAGE 4 OF THE ORDER)

APPELLANT RESPECTFULLY CONTENDS THAT THE DETERMINATION IS IMPROPER, BECAUSE THE ISSUES FIT UNDER 17-27-20(A)(1), AND (4):

(1) "THAT THE CONVICTION OR THE SENTENCE WAS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES OR LAWS OF THIS STATE.

(4) THAT THERE EXIST EVIDENCE OF MATERIAL FACTS NOT PREVIOUSLY PRESENTED AND HEARD THAT REQUIRES VACATING THE CONVICTION OR SENTENCE IN THE INTEREST OF JUSTICE.

ALSO THE MOTION FOR AFTER NEWLY DISCOVERED EVIDENCE SUBMITTED PURSUANT TO RULE 60(b) SCACP (SEE PAGE 1 OF THE ORDER) AND THIS ARGUMENT RAISING EVIDENCE OF FRAUD ON THE COURT PRODUCED BY MISREPSENTATION AND PROSECUTORIAL MISCONDUCT. CHEWNING v FORD MOTOR CO. 354 S.C. 72, 550 SE2d 584 (1998) "THERE IS NO STATUTE OF LIMITATIONS WHEN A PARTY SEEKS TO SET ASIDE A JUDGMENT DUE TO FRAUD UPON THE COURT" RULES CIV. PRO. RULE 60(b): HAGY v PRUITT 339 S.C. 425, 529 SE2d 714 (2000) "THE COURT HAS THE INHERANT AUTHORITY TO SET ASIDE A JUDGEMENT ON THE GROUND OF EXTRINSIC FRAUD INSPITE OF ANY FACTALLY APPLICABLE STATUTE OF LIMITATIONS."

FACTS: THE RECORD FAILS TO SHOW ANY INITIAL DIRECT EXAMINING OF OFFICER WHITSTINE AS TO TALKING WITH OR INTERVIEWING WITNESS AUTEN ON THAT MORNING OF THE TRAGEDY. AFTER WHICH HE IS SHOWN "TWICE" BEING UNCERTAIN OF TALKING WITH WITNESS ON THAT MORNING BUT CERTAIN HE HAD TALKED WITH WITNESS AT WITNESS'S "RESIDENCE" ON THAT AFTERNOON IN PRESENTING OF A PHOTO LINE UP. WHICH IS THE ONLY EVIDENCE OF OFFICER'S INVOLVEMENT IN THE INVESTIGATION, AND EXTRINSIC FRAUD SHOWN BY COUNSEL'S USE OF LEADING QUESTIONS AND THE OFFICER'S ANSWER OF TALKING WITH WITNESS ON THAT MORNING "DOING INTERVIEWS". ALSO COUNSEL LEADING TO ESTABLISH AN ALLEGED TIME FRAME THE ALLEGED INTERVIEW OCCURRED. WHERE WITNESS AUTEN'S TESTIMONY OF OFFICER WHITSTINE HAVING TO INTRODUCE AND IDENTIFY HIMSELF UPON ARRIVAL AT THE RESIDENCE SUPPORTS THIS WAS THE FIRST TIME THAT THEY EVER MET, AND LACK OF PROBABLE CAUSE

THERE IS NO LAWFUL PHYSICAL EVIDENCE TO SUPPORT WITNESS AUTEN OR ANY WITNESS HAD BEEN INTERVIEWED ON THAT MORNING FOR PROBABLE CAUSE IN OBTAINING WARRANT. FOR THE RECORD FAILS TO SHOW A COPY OF ANY NOTE(S) WRITTEN THAT MORNING OF AN OFFICER TALKING WITH WITNESS

AND THE ONLY COPY OF AN INCIDENT REPORT ENTERED SHOWS FROM THE "YORK COUNTY SHERIFF'S DEPARTMENT." IT ALSO SHOWS WITNESS AUTEN AS THE REPORT'S "COMPLAINTANT" THOUGH FAILING TO SHOW THE REPORTING OFFICERS' NAME, AND APPELLANT ASKED FAMILY MEMBER TO OBTAIN ALL COPIES OF NOTES AND OF INCIDENT REPORTS THE SHERIFF'S DEPARTMENT HAD ON FILE OF THE OCCURRENCE. NO COPIES OF NOTES OBTAINED, AND THE ONLY COPY OF A INCIDENT REPORT OBTAINABLE WAS OF THE SAME REPORT THAT ITS COPY WAS ENTERED INTO RECORD. THIS COPY COPY SHOWING "SMITH T.B." AS THE REPORT'S REPORTING OFFICER, AND THERE IS NO EVIDENCE OF HIS INVOLVEMENT IN THE INVESTIGATION AT ANYTIME. FOR THE ONLY TIME THAT HIS NAME IS MENTIONED IN THE TRIAL/ON RECORD IS IT BEING CALLED ON FIRST DAY, AND HE WAS NOT PRESENT THROUGHOUT THE PROCEEDINGS. OUTSIDE OF THIS THE REPORT IS SHOWN FABRICATED BY ITS PRESENTMENTS TO THAT OF WITNESS'S TESTIMONY, AND HIS LACK OF TESTIMONY. FURTHER MISCONDUCT BY COUNSEL IS SHOWN IN ATTEMPTING TO LEAD WITNESS AUTEN INTO CORROBORATING THE REPORT'S PRESENTMENTS OF THE SUSPECT'S "HEIGHT 509" AND "WEIGHT 160" WHERE WITNESS PREVIOUSLY TESTIFIED "5'10" TO 6 FOOT" AND "170, 180 POUNDS." WHICH ALSO SHOWS COUNSEL'S KNOWLEDGE OF THE REPORT, FAILURE TO PRESENT IT IN-COURT, AND ENSURE OFFICER SMITH'S PRESENCE TO TESTIFY AS TO ITS CONSTRUCTION. WHICH IS SIGNIFICANT SINCE WITNESS AUTEN WAS THE CHIEF WITNESS.

PHOTO LINE-UP: UNDER INITIAL DIRECT EXAMINING OF WITNESS AUTEN HIS TESTIMONY SHOWING HE GAVE OFFICER WHITSTINE THE NUMBER THAT WAS "BESIDE OF THE INDIVIDUAL'S PICTURE" IN THE LINE UP AND THE MISCONDUCT BY SOLICITOR AND ALSO COUNSEL IS SHOWN IN ONLY EXAMINING OFFICER WHITSTINE AS TO WHICH ONE OF THE NUMBERS WITNESS ALLEGEDLY GAVE HIM. AND FAILING TO COORODORATE THE NUMBER BY EXAMING WITNESS

UNDER INITIAL DIRECT EXAMINING OF OFFICER WHITSTINE HIS TESTIMONY SHOWING HAVING HAD THE LIST OF "NAMES OF THE PEOPLE IN THE SIX PICTURES OF LINE-UP, AND "HAD PREPARED" THE LINE-UP "PRIOR" TO MEETING WITH WITNESS ALLEN ALSO SHOWING A DETECTIVE JETER HAD MADE THE LINE-UP'S "RECORD" THOUGH THE ONLY EVIDENCE OF THE DETECTIVES INVOLVEMENT IS PREPARING THE LINE-UP WITH "PHOTOGRAPHS", AND PLACING APPELLANT'S PHOTO AS "NO. 3" IN THE RECORD. THERE IS NO TESTIMONY BY DETECTIVE OF HAVING THE LIST OF NAMES AND PREPARING THE OTHER NUMBERS TO THE OTHER INDIVIDUALS PHOTOS. THE MISCONDUCT FURTHER SHOWN BY COUNSEL IN FAILING TO CROSS EXAMINE AS TO HAVING THE LIST OF NAMES, PREPARING THE LINE UP, AND AGAIN USE OF LEADING QUESTIONS WHICH WOULD APPEAR THE OFFICER HAD NOTHING TO DO WITH AND ALSO NO KNOWLEDGE OF PREPARING THE LINE-UP.

FURTHER SHOWING OF MISCONDUCT BY COUNSEL AND SOLICITOR IS PERMITTING OFFICER WHITSTINE TO MAKE A INADMISSIABLE IDENTIFICATION UNDER DIRECT EXAMINING ON THE NEXT DAY BEFORE THE JURY. THE IDENTIFICATION INADMISSIABLE BECAUSE OF OFFICER'S TESTIMONY SHOWING <u>ALONE</u> WITH WITNESS DURING VIEWING OF LINE-UP, AND IT BASED ON LINE-UP. FOR APPELLANT CONTENDS NEVER MEETING OFFICER OR SEEING HIM PRIOR TO THE TRIAL, AND THE RECORD FAILS TO SHOW ANY EVIDENCE/TESTIMONY OFFICER HAD MET OR SEEN APPELLANT. HIS NOT KNOWING APPELLANT IS SHOWN IN HIS ANSWER OF "NO SIR" TO RECROSS EXAMINING OF (Q) "AND YOU DIDN'T KNOW NO. 3 FROM ADAM'S HOUSE CAT OF YOUR OWN KNOWLEDGE, DID YOU SIR?" <u>U.S. v WADE</u> 87 S.CT. 1926 (1987) "ABSENCE OF COUNSEL AT PRE-TRIAL LINE UP RENDERS COURT ROOM IDENTIFICATION INADMISSIBLE UNLESS COURT ROOM IDENTIFICATION IS BASED ON OBSERVATION OF SUSPECT OTHER THAN LINE UP": RULE 801(c) SCRE "ONE OF IDENTIFICATION OF A PERSON

MADE AFTER PERCEIVING THE PERSON"; USC AMEND V I (20) "AN OUT OF COURT IDENTIFICATION OF AN ACCUSED AT A POLICE LINE-UP IS A CRITICAL STAGE AT WHICH THE ACCUSED HAS A CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL" STATE V LYONS 251 S.C. 549, 164 SE2d 445

THE MISCONDUCT BY COUNSEL FURTHER SHOWN IN CROSS EXAMINING OF THE OFFICER. BECAUSE OF FURTHER FAILURE TO QUESTION ABOUT HIS HAVING THE LIST OF NAMES, PREPARING LINE-UP, AND USE OF LEADING QUESTIONS THAT WOULD HAVE FALSELY IMPRESSED UPON THE JURY THE IDENTIFICATION WAS RELIABLE. IN OFFICER HAD NO ROLE OR KNOWLEDGE OF LINE UPS PREPARATON.

DIRECTED VERDICT: COUNSEL MOVED FOR THE VERDICT (IN-PART) "BECAUSE OF THE NATURE OF THE TESTIMONY BY THE PEOPLE AS TO IDENTITY":

JOEL G. SMITH-TO "SAW NOTHING AND HEARD NOTHING" RELEASED FIRST DAY

DANNY H. WILSON- "NO SIR MY ATTENTION WAS RIVETED ON HIS WEAPON, AND I DIDN'T LOOK AT HIS FACE THAT WELL" ALSO RELEASED

SIDNEY BALLANGER III- GOT "A GENERAL FEATURES LOOK AT INDIVIDUAL"

WITNESS AUTEN- "NO SIR. WHAT I'M TELLING YOU IS THE PERSON I IDENTIFIED IN THE LINE-UP WAS THE PERSON I SAW IN THE PARKING LOT" AND "IF THIS MAN IS THE MAN I IDENTIFIED ON THE PHOTOGRAPH THEN (HE IS) INDEED THE SAME PERSON"

APPELLANT RESPECTFULLY CONTENDS GIVEN THE FOREGOING IDENTIFICATIONS THE VERDICT WAS PRODUCED BY FRAUD ON THE COURT IN THE USE OF OFFICER WHITSTINE'S IDENTIFICATION IN THE COURT RULING THAT:

THE TESTIMONY IN THE CASE IS THAT THE DEFENDANT WAS IDENTIFIED AS BEING THE PERSON AT THE SCENE. THAT HE WAS IN POSSESSION OF A WEAPON, THAT GUNSHOTS WERE HEARD, AND VERY SHORTLY IN SECONDS THEREAFTER THE VICTIM'S BODY WAS FOUND. SHE WAS DEAD, OF COURSE THE STATEMENTS MADE BY THE OFFICER-ALL OF THOSE, AND THE USE OF A

DEADLY WEAPON. YOU DON'T HAVE TO FIND THE WEAPON IF THERE'S TESTIMONY OF USE OF A WEAPON"

U.S. v McDONALD 161 F3d 4 (TABLE) CA 4 (N.C. 1998) "A DECISION PRODUCED BY FRAUD ON THE COURT IS NOT IN ESSENCE A DECISION AT ALL AND NEVER BECOMES FINAL" SEE WRIGHT v MILLER FEDERAL PRACTICE AND PROCEDURE 2870 AT 409 (1995).

II ARGUMENT

SUBJECT MATTER JURISDICTION

SHOULD THE ACTION BE DISMISSED A SUCCESSIVE, AND UNTIMELY UNDER THE STATUTE OF LIMITATIONS OF S.C. CODE ANN. 17-27-45 (A)?

APPELLANT RESPECTFULLY CONTENDS THAT THE DETERMINATION IS IMPROPER BECAUSE THE ARGUMENT FITS UNDER S.C. CODE ANN. 17-27-20 (A) (2): "THAT THE COURT WAS WITHOUT JURISDICTION TO IMPOSE SENTENCE," AND CARTER v STATE 329 S.C. 355, 499 SE2d 773 (1998) "ISSUES RELATED TO SUBJECT MATTER JURISDICTION MAY BE RAISED AT ANY TIME INCLUDING FOR THE FIRST TIME ON APPEAL IN THIS COURT" Id. 329 S.C. 355: "THE JURISDICTION OF A COURT OVER SUBJECT MATTER OF A PROCEEDING IS DETERMINED BY THE CONSTITUTION, THE LAWS OF THE STATE, AND IS FUNDAMENTAL LACK OF SUBJECT MATTER JURISDICTION MAY NOT BE WAIVED EVEN BY CONSENT OF PARTIES, AND SHOULD BE TAKEN NOTICE BY THIS COURT" ANDERSON v ANDERSON 299 S.C. 110, 115, SE2d 897 (1989)

IN APPELLANT'S CASE THE INDICTMENT FOR MURDER (S.C. CODE 16-3-10, CDR CODE 116) IS SUBJECT OF THE ARGUMENT. FOR THERE WAS NO PRESENTMEN OF INDICTMENT FOR FIREARM'S POSSESSION "COUNT-TWO" OF INDICTMENT, WHICH IS SUPPORTED BY THE MURDER INDICTMENT BEING THE ONLY INDICTMENT INTRODUCED IN COURT BY SOLICITOR. ALSO THERE WAS NO

WAIVERS EXECUTED NOR WAS A BOND OR PRELIMINARY HEARING HELD AND A PLEA OF NOT GUILTY WAS ENTERED AT TRIAL.

THIS ARGUMENT IS RAISED FOR THE INDICTMENT[1] FAILS TO BE FORMALLY STAMPED "TRUE BILL" OR "NO BILL". UNDER STATE v GRIM 341 S.C. 63 (S.C. 2000) THE CASE WAS REMANDED FOR A HEARING TO DETERMINE THAT THE ROBBERY INDICTMENT WAS TRUE BILLED SUCH THAT TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO ACCEPT GUILTY PLEA, AND RELYING ON PRINGLE (287 S.C. 409, 339 SE2d 127) THE COURT OF APPEALS HAS HELD AN INDICTMENT PROPER EVEN THOUGH IT WAS NOT STAMPED "TRUE BILL" WHERE THERE IS EVIDENCE IN FORM OF SWORN TESTIMONY FROM THE GRAND JURY'S DOCKET COORDINATOR, A COURT REPORTER, AND A LEGAL SECRETARY THAT THE INDICTMENT WAS INFACT TRUE BILLED. ALIKE IN STATE v BULTRON 318 S.C. 323, 329, 457 SE2d 616 (CT. APP. 1993): STATE v EVANS 307 S.C. 477, 415 SE2d 816 (1992) HOLDS, "A VALID INDICTMENT OR WAIVER OF PRESENTMENT PREREQUISITE FOR CIRCUIT COURT'S SUBJECT MATTER JURISDICTION." WHEREAS IN APPELLANT'S CASE THE RECORD FAILS TO SHOW ANY TESTIMONY AS TO THE INDICTMENT BEING TRUE BILLED, AND[2] THE FOREMAN INITIALING THE INDICTMENT "T. BILL" A FACIAL IRREGULARITY. BECAUSE UNDER WEST'S SOUTH CAROLINA DIGEST 14 "INDICTMENT AND INFORMATION" SEC. 111 AN "TRUE BILL" IS OF THE "FORMAL REQUISITIES" FOR INDICTMENTS. ALSO SEE S.C. CODE ANN 17-19-130; 17-19-10: ANDERSON v STATE 338 S.C. 629, 529 SE2d 348 (CT APP 2000) "A FACIAL IRREGULARITY DOES NOT RENDER AN INDICTMENT INVALID WHERE INDICTMENT IS IN WRITING AN PUBLISHED BY THE CLERK". UNDER Id PRINGLE 287 S.C. 409 [4]. THE SIGNATURE OF GRAND JURY FOREMAN DID NOT APPEAR ON INDICTMENT FORM DID NOT RENDER INDICTMENT INVALID STAMPED APPLICATION OF "TRUE BILL" APPEARED ON INDICTMENT AND FOREMAN TESTIFIED

THAT REGULAR PROCEDURE WAS TO HAVE CLERK PUBLISH INDICTMENT IN OPEN COURT AFTER GRAND JURY RETURNED "TRUE BILL". WHEREAS IN APPELLANT'S CASE THE INDICTMENT FAILS TO BE IN WRITING, AND THE RECORD FAILS TO SHOW INDICTMENT PUBLISHED BY CLERK IN COURT.

CONCLUSION

APPELLANT CERTIFYS THE FOREGOING TO BE TRUE AND TO THE BEST OF HIS KNOWLEDGE

Jeffrey Lynn Chronister

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JEFFREY LYNN CHRONISTER #189824
KIRKLAND C.I., B-II, #60
4344 BROAD RIVER ROAD
COLUMBIA, S.C., 29210