

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL AVERY HUMPHREY,

APPELLANT.

Appellate Case No. 2011-191566

**APPELLANT'S PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC**

Michael A. Humphrey
226 Barr St
Leesville, SC 29070
(803) 609 3279

Appellant Pro Se

RECEIVED
JUN 06 2013

SC Court of Appeals

NOW COMES APPELLANT MICHAEL A. HUMPHREY, pro se¹ pursuant to Rules 219 and 240, SCACR, and other applicable appellate court rules, petitioning the Court for a Rehearing and Rehearing En Banc in the above-captioned case.

The grounds for this Petition are as follows:

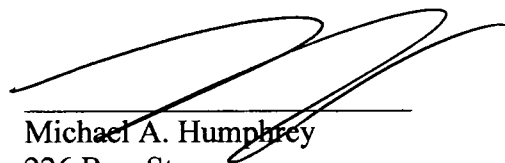
1. The Court overlooked a significant issue involving subject matter jurisdiction. Subject matter jurisdiction was not raised by the Appellant's attorney. However, the record in the case clearly suggests a subject matter jurisdiction issue. As the court is aware, subject matter jurisdiction may be raised at any time, even on appeal (see accompanying Memorandum). Therefore, Appellant now asserts that the trial court did not have subject matter jurisdiction to try the criminal case because the indictment presented for trial was null and void because it was not amended in accordance with the appropriate statutory provision (see Memorandum). The legal arguments in support of this position are included in the accompanying Memorandum.
2. On May 22, 2013, our state Supreme Court decided the case of *State v. Samuels*, 27255 (S.C. 5-22-2013, which is the same date the court decided the case at bar. *Samuels* deals with the issue of a duplicitous indictments. For the reasons outlined in the accompanying Memorandum, Appellant asserts that he was tried on a void, duplicitous indictment, which deprived the trial court of subject matter jurisdiction to try the Appellant.
3. Both issues raised above involve questions of exceptional importance, and based upon the legal arguments in the accompanying Memorandum, this Honorable Court

¹ The circumstances forced the Appellant to proceed pro se in that counsel would not agree to file a Petition for Rehearing En Banc. Simultaneous with the filing of this Petition, Petitioner is filing a Motion to Relieve his counsel, and until he retains counsel, will proceed in the matter pro se.

should grant this Petition for Rehearing and Petition for Rehearing En Banc pursuant to Rule 219, SCAR.

WHEREFORE, for the reasons outlined in this Petition and the accompanying Memorandum, Petitioner requests the Court to issue an order of rehearing and and/or an order of rehearing en banc in the above reference case. Further, Appellant seeks any additional relief the court deems just and proper.

June 6, 2013



Michael A. Humphrey
226 Barr St
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THE STATE OF SOUTH CAROLINA
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THE STATE,

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Appellate Case No. 2011-191566

**MEMORANDUM IN SUPPORT OF
APPELLANT'S PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC**

Michael A. Humphrey
226 Barr St.
Leesville, SC 29070
(803) 609 3279

Appellant Pro Se

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JUN 06 2013
SC Court of Appeals

MICHAEL A. HUMPHREY ("Petitioner" or "Defendant"), pro se, pursuant to Rules 219 and 240, SCACR, and other applicable appellate court rules, submits this Memorandum in support of his Petition for Rehearing and Petition for Rehearing En Banc in the above-captioned case.

STATEMENT OF THE CASE

The Statement of the Case as outlined in the Appellant's Final Brief provides a statement of the case. Petitioner craves reference and incorporates by reference the Statement of the Case as provided in his Appellant's Final Brief. Of significance, Petitioner notes that initially he was indicted for manslaughter by the Lexington County Grand Jury in November 2005 (hereinafter referred to as "Indictment No. 1). This indictment is not part of the record. Therefore, a certified true copy of this indictment is attached to this Petition as Exhibit No. 1. In January 2011, the State commenced the trial of the Petitioner under an amended version of Indictment No. 1 (hereinafter referred to as the "Amended Indictment"). This amended indictment is not part of the record. Therefore, a certified true copy of this amended indictment is attached to this Petition as Exhibit No. 2. After the January 2011 trial, the court declared a mistrial because the jury could not reach a unanimous verdict (hung jury). On April 25-27, 2011, the State tried the Petitioner again before a jury. Although the attorney representing the State incorrectly represented¹ to the trial court that the State was proceeding on the amended indictment, the State proceeded to trial the second time against the Petitioner on an indictment that was acquired on April 11, 2011 (hereinafter referred to as the "Trial Indictment"). The Trial Indictment is part of the Record on Appeal at page 484. There is no evidence that the original

¹ See page 59, Record on Appeal. Mr. Wedekind, representing the State, said, in part, the following: "The case was timely presented. It was indicted originally. There were some questions in the first trial. This is a --the first trial ended in a mistrial. Subsequent to that, we amended it. Really what the indictment that's before the Court is an amended indictment. The substance and the nature of the charges have not changed." Lines 12-18.

indictment was ever *nolle prossed* by the State. The state never moved before the trial court pursuant to § 17-19-100, Code of Laws for the State of South Carolina, 1976, as amended, in order to amend the Trial Indictment which served as the jurisdictional basis for convicting the Petitioner of Involuntary Manslaughter on April 27, 2011.

Defendant's counsel moved to quash the indictment at trial but the motion was denied. Record on Appeal ("ROA"), pp. 57-72.

Petitioner's conviction was affirmed on appeal by this Court in an unpublished opinion filed on May 22, 2013. Pursuant to the applicable rules of appellate procedure, these Petitions must be filed (received) by the Court not later than June 6, 2013. Petitioner now timely submits the said Petitions for consideration by the Court.

FACTS

The Statement of Facts is adequately presented in the Appellant's Final Brief at pages 3-12. Petitioner craves reference and incorporates by reference the Statement of Facts as outlined in the Appellant's Final Brief.

ISSUES PRESENTED BY THIS PETITION

DID THE COURT HAVE SUBJECT MATTER JURISDICTION TO TRY THE DEFENDANT?

ARGUMENTS

In a criminal case, the issue of whether the trial court has jurisdiction may be raised at any time, even on appeal. *State v. Oxner*, 391 S.C. 132 (S.C. 2011). However, in the case of *State vs. Gentry*, 363 S.C. 93 (S.C. 2005), our state Supreme Court changed the longstanding law by holding that a Defendant must Motion to Quash the indictment at trial before the jury is sworn. The State Supreme Court subsequently clarified that "*Gentry* merely held that a defendant must challenge an indictment prior to the swearing of the jury", and when the sufficiency of the

indictment was not at issue in a criminal case involving subject matter jurisdiction claim, *Gentry* was inapposite. *State v. Dickerson*, 395 S.C. 101 (2011). On the same day this court decided the case at bar, our state Supreme Court further clarified its holding in *Gentry* in the case of *State v. Samuels*, 27255 (S.C. 5-22-2013), and it held that *Gentry* did not deal with the issue of duplicitous indictments. Expressly in *Samuels*, the Court held that a defendant is entitled to relief, and implicitly, the Court held in *Samuel* that a defendant is entitled to relief if the indictment is invalid. *Id.* at pages 4-7.

Importantly, in this Petition, the Petitioner is not challenging the sufficiency of the indictment that was used by the State to acquire his conviction. Instead, Petitioner asserts that the Trial Indictment used by the State was null and void as a matter of law and could not confer subject matter jurisdiction on the trial court. Alternatively, Petitioner asserts that the trial court was deprived of subject matter jurisdiction because the indictment obtained by the State in April 2011 was duplicitous of the indictment that was still pending from the mistrial.

A. *The trial indictment was null and void as a matter of law, which deprived the trial court of subject matter jurisdiction.*

The Circuit Court does not have subject matter jurisdiction to convict a defendant of an offense unless: (1) there has been an indictment which sufficiently states the offense; (2) the defendant has waived presentment of the indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. *State v. Primus*, 349 S.C. 576; *State v. Guthrie*, 352 S.C. 103, (Ct. App. 2002). Once an indictment has been issued, the only way to amend is to follow the statutory requirements under § 17-19-100, Code of Laws for the State of South Carolina, 1976, as amended. This section of law provides, in part, the following:

§ 17-19-100. Amendments of indictments; proceedings after amendment.

If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, **the court** before which the trial shall be had **may amend the indictment** (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended. . . (emphasis added).

It is undisputed that the State did not amend the original indictment (Indictment No. 1) that was still pending from the mistrial, except, the State went before the jury in April 2011, not the court as the law requires, and sought an amendment of an indictment.

If a defendant is tried on an invalid indictment, all proceedings emanating therefrom are nullified. *State v. Charles*, 183 S.C. 188, 199 (S.C. 1937). Any conviction obtained on an invalid indictment is null and void. *State v. Jones*, 312 S.C. 100, 102 (S.C. 1994). Applying the established law as cited above to the case before the court, the inescapable conclusion is that the State did not amend the Trial Indictment using the procedures required by Section 17-19-100. The State told the court that it was proceeding on an amended indictment—an indictment that had been amended by the grand jury in a non-adversarial secret proceeding. In that the indictment was not amended in the manner prescribed by law, the indictment is invalid, null, and void, and as such, could not provide the court the required subject matter jurisdiction. Simply put, **the Grand Jury** of Lexington County, April 2011, did not have the authority to amend the indictment that was still pending before the trial court after the mistrial in the case against the Defendant. Under the common law of this state, a true bill indictment found by a grand jury that was not qualified to act is null and void. *See, State v. Bibbs*, 192 S.C. 231, 238 (S.C. 1939).

Based upon this argument alone, Petitioner asserts that his case raises an issue of importance and that his case is one requiring a second look by the court in order to ensure that he has been treated constitutionally just.

B. *Alternatively, the trial indictment was tantamount to a duplicitous indictment, which deprived the trial court of subject matter jurisdiction.*

Justice Hearn said the following in an opinion issued the same date the court decided this appeal: “Duplicity is an ill-favored quality in both life and the law. . . While commonly understood to be synonymous with deceitfulness and double-dealing, when used in the law, duplicity means ‘[t]he charging of the same offense in more than one count of an indictment. [citing Black’s Law Dictionary 541 (8th ed. 2004)].’ Duplicity in the indictment normally presents itself within the four corners of one indictment. However, there is no law known to the Petitioner that prevents duplicity from revealing itself in two separate indictments. This uncertainty, by itself, is important enough for the court to reconsider the case and clarify this important point of law. Be that as it may, Petitioner argues duplicity on the assumption that it is not prevented from appearing in the four corners of two separate indictments. *State v. Samuels*, 27255 (S.C. 5-22-2013) at pages 1-2. Generally, duplicity is waived if the sufficiency of the indictment is not challenged before the jury is sworn. *State v. Parker*, 344 S.C. 250 (Ct. App. 2001)(footnote 13). At trial, counsel for the defendant challenged the sufficiency of the indictment before the jury was sworn, albeit it, not on the duplicity grounds. ROA. Petitioner submits that the *Samuels* case was not at the disposal of trial counsel because it was decided the same day that the court rendered a decision in this case. *Samuels* stands for the proposition duplicity entitles a defendant to relief if prejudice can be shown. Petitioner respectfully asks the Court to reconsider his case, in light of *Samuels* in order to allow the parties to litigate the issue

of duplicity. Moreover, in *Yarbrough v. Collins*, 293 S.C. 290 (1987), our state Supreme Court noted that a judgment can be successfully attacked if the court issuing the judgment lacked jurisdiction and the lack of jurisdiction appears on the face of the record. *See also Prevatte v. Prevatte*, 297 S.C. 345 (Ct. App. 1989).

CONCLUSION

WHEREFORE, for the reasons outlined in this Petition and this accompanying Memorandum, Petitioner requests the Court to issue an order of rehearing and and/or an order of rehearing en banc in the above reference case. Further, Appellant seeks any additional relief the court deems just and proper.

June 6, 2013



Michael A. Humphrey
226 Barr St
Leesville, SC 29070
(803) 609-3279

Appellant Pro Se

WITNESSES

BLPD
Chief Wallace Oswald

DOCKET NO. 05-GS-32-4363

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2005

THE STATE

vs.

Michael Avery Humphrey

A-2004-32-02978

10/26/2005 10:29 AM

ARREST WARRANT NUMBER

I021127

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 11-14-05

VERDICT

Foreperson of Petit Jury

Date:

CDR# 0218

Indictment for

Manslaughter - Involuntary

§16-3-60

DONALD V. MYERS, SOLICITOR

Exhibit 1

*tried under #
2009-65-32-982*

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.C.

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.C.

That Michael Avery Humphrey did in Lexington County on or about October 17, 2004, with reckless disregard for the safety of others, unlawfully kill one Megan D. Jackson, to wit: while the truck, operated by the victim, was moving down a road, the defendant broke out the rear window of the truck, climbed into the cab and fought with the driver to the point she was compelled to jump out of the vehicle resulting in her death, in violation of § 16-3-60 of the Code of Laws of South Carolina, 1976, as amended.

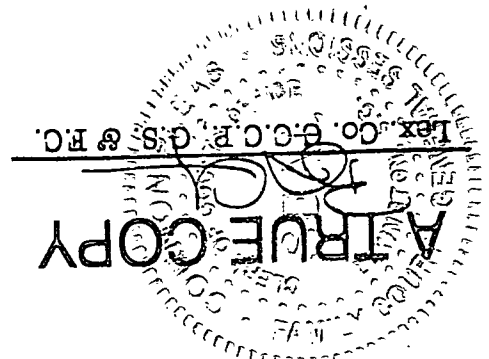
STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR
Manslaughter - Involuntary

§16-3-60

At a Court of General Sessions, convened on NOVEMBER, 2005, the Grand Jurors of Lexington County present upon their oath:

That Michael Avery Humphrey did in Lexington County on or about October 17, 2004, with reckless disregard for the safety of others, unlawfully kill one Megan D. Jackson, to wit: the defendant did with criminal negligence and with reckless disregard to the safety of others caused a wreck that led to the death of the victim (Megan D. Jackson), in violation of § 16-3-60 of the Code of Laws of South Carolina, 1976, as amended.



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


ASSISTANT SOLICITOR

Exhibit 2

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THE STATE,

RESPONDENT,

V.

MICHAEL AVERY HUMPHREY,

APPELLANT.

Appellate Case No. 2011-191566

PROOF OF SERVICE

I, Michael Avery Humphrey, certify that I have served the following documents on the individuals listed bellowed by depositing on **June 6, 2013** a copy in the United States regular mail, return address clearly visible addressed as indicated below: Documents served: (1) *Appellant's Petition for Rehearing and Petition for Rehearing En Banc*; (2) *Memorandum in Support of Appellant's Petition for Rehearing and Petition for Rehearing En Banc*; (3) *Motion to Relieve Appellant's Counsel*. Individuals Served:

Dayne C. Phillips
Appellate Defender
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Columbia, SC 29211-1589

Christina J. Catoe
Assistant Attorney General
Office of the Attorney General
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Donald V. Myers
Solicitor, Eleventh Judicial Circuit
205 Main Street
Lexington, SC 29072

June 6, 2013


Michael A. Humphrey

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JUN 06 2013
SC Court of Appeals