THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lee County
Ralph Ferrell Cothran, Jr., Circuit Court Judge
Case No.: 2019-000969

The State, Respondent,

v.

Kevin E. Herriott, Appellant.

REPLY TO FINAL BRIEF OF RESPONDENT

/s/ K E Herriott
Kevin E. Herriott
#313862
Kirkland Corr. Inst.
4344 Broad River Road
Columbia, SC 29210

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ARGUMENT

On July 17, 2018, the Appellant Kevin E. Herriott requested that Counsel be assigned to represent Appellant because the Appellant's mail were being screened by gang affiliated inmates. On August 01, 2018, Counsel of record E. Thompson Kinney, has been referred to the Appellant. On December 18, 2018, the Appellant ask the trial court for leave to proceed pro se. On or before February, 2019, the Appellant ask the trial court for Brady disclosures that was not included in Appellants Rule 5, SCRCrimP, and to quash indictments. On March 19, 2019, counsel of record Timothy L. Griffith was appointed.

At the trial courts discretion, on June 04, 2019, the trial court allowed the Appellant to proceed and put forth facts as it relates to errors the Appellant identified before the trial court. See U.S. v. Adley Husni Abdul Wahab, 2011 U.S. Dist. LEXIS 108529, the decision to grant or deny hybrid representation lies solely within the discretion of the trial court.

On June 04, 2019, the trial court accepted to hear the motions by Appellant to quash the indictments and Brady material as well as exculpatory evidence. However, the trial court did not entertain the Appellant's motion to proceed pro se. The trial court denied the motion without asserting any grounds with prejudice.

The Appellant avers that he has a constitutional right to self-representation. Accord Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975), the Court held that a defendant in a criminal case has a constitutional right to self-representation. The Appellant asserts that once former Counsel E. Thompson Kinney was withdrawn, the Appellant desire was to represent himself. The Appellant was forced to have counsel Timothy L. Griffith, represent the Appellant. See Faretta, supra 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525, Indeed, courts must take care not to force counsel upon a defendant, because in addition to the right to the assistance of counsel, the Sixth Amendment implicitly provides an affirmative right to self-representation. And that right must be preserved [107 F.3d 1096] even if the court believes that the defendant will benefit from the advice of counsel. See McKaskle v. Wiggins, 465 U.S. 168, 79 L.Ed. 2d 122, 104 S.Ct. 944 (1984).

The Respondent contends that the Appellant raised that the trial court erred in refusing to quash the indictments of Appellant's charges; that the trial court lacked subjectmatter jurisdiction to hear the case; and raised other issues related to the indictments, terms of court, federal rules, disclosure of evidence, and the deliberations of the grand jury. See Respondent's Final Brief page 4.

The Appellant demonstrates to the Court that the Respondent has made a(n) erroneous statement. The Appellant show the Court that when the Appellant moved before the trial court he was [redacted] raising that the courts statutory or constitutional power to adjudicate the case deprive to convict

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the Appellant for an offense when there is no indictment charging him with that offense when the jury was sworn. See State v. Gentry, 363 S.C. 93, 610 S.E. 2d 773; see also, State v. Mann, 292 S.C. 497, 357 S.E. 2d 461 (1987); citing 41 Am. Jur. 2d Indictments and Informations, § 299 (1968).

This language conflated the meaning of subject matter jurisdiction. That's why the Appellant challenged the indictments as faulty and bad because the indictments were defective. See S.C. Code Ann. § 17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or on motion to quash such indictment before the jury shall be sworn.)

The indictment is the charge of the State against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, the accusation made, that pleading filed, the accused has two (2) courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. Pursuant to State v. Gentry, supra 610 S.E. 2d 773.

The Appellant contends that the dates the grand jury allegedly convened and the Court of General Sessions Terms show two (2) different dates and both dates are outside the dates by S.C. Code Ann. § 14-5-640. Nevertheless, the Appellant shows the Court that the dates

of the arrest warrants until the date of the multi-count indictment document demonstrates that the action on warrants the solicitor shall take was well over ninety (90) days after receipt of an arrest warrant from the Clerk of Court. See Rule 3, SC.R.Crim.P. Moreover, the trial court did not have the matters promptly and properly determined because the trial court ruled there is no record of the indictments.

The Appellant did assert to the trial court that there was no affidavit with the indictments while challenging the credibility of witness in what was stated inside the indictment. Trial Transcript pages 16 Ln 25 thru page 17 Ln 1. The Court explained to the Appellant that the indictment comes from testimony before the grand jury. The Appellant asked the trial court to receive the grand jury minutes. The Appellant made clear that he was not seeking the deliberations nor the vode of the grand jury panel. Trial Transcript page 17 Ln 9 thru 22.

At this time during the trial the Appellant did not have a copy of the true bill multi-count indictment document before the jury was sworn in which the Respondent has referenced. See Final Brief of Respondent page 7 Ln 18 thru Ln 20. The Appellant, however, raised in his motion to quash indictments several factors that each ground asserted reflected that the indictment on its face were faulty, bad, and defective.

The trial court invoke secrecy, pursuant to S.C. Code 1976, § 14-7-1720. Howbeit, a defendants right to obtain

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recorded proceedings and testimony before state grand jury in preparing defense, which right is subject to limitations imposed by statute and rule, necessarily arises post-indictment; although maintaining secrecy is essential while a matter is under deliberation by the grand jury, such concerns diminish following issuance of a true bill of indictment, and, thus, a defendant is allowed to obtain and use the impanchment documents in preparing a defense and ensuring protection of his due process rights. U.S.C.A. Const. Amend. 14; S.C. Code 1976, §§14-7-1700, 14-7-1720, 14-7-1770, Rules Crim Proc., Rule 5; see also Evans v. State, 363 S.C. 495 (2005). The Appellant was standing trial and was not afforded testimony that ultimately were withheld.

The Respondent further contends that the Appellants issues should not be considered because they were improperly raised in hybrid representation and because Appellant was represented by trial counsel nothing it were a nullity.

However, in accordance to United States v. Singleton, 107 F.3d 1091, 1103 (4th Cir. 1997); United States v. Simmons, 2008 U.S. Dist. LEXIS 63451, 2008 WL 3850778, at *1 (N.D. W. Va. Aug. 14, 2008), there is a right for hybrid representation when a defendant makes a showing of reason for the defendant to act as co-counsel.

The Appellant provides that the trial court considered the Appellant's motions because of the issues the motions addressed. These errors violated the Appellant's substantial rights, the errors were plain in sight and

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the Appellant were prejudice and affected thereby to which constitutes as a(n) miscarriage of justice. Nonetheless, the State lack to show that the government's interest in ensuring the integrity and efficiency of the trial in which outweigh's the defendant's interest in acting as his own lawyer.

The Appellant moves forward to a(n) manifest constitutional error that is plain and indisputable that has affected the Appellant's substantial rights. The Appellant avers that the State's prosecution failed to disclose favorable exculpatory and potentially impeachment material evidence. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 15. The materiality of evidence the Appellant sought was the Knife that the prosecution failed to profer in chief at trial before an impartial jury.

The Respondent argues that the Appellant failed to demonstrate any information which has not been turned over which was required to be turned over under Rule 5 or Brady. As a result there was no reason to suppress any evidence. Respondent's final Brief page 8.

The Appellant avers that even in the absence of a specific request the prosecution has a constitutional duty to turn over exculpatory evidence that would raise reasonable doubt about the defendant's guilt. See United States v. Agurs, 427 U.S. 97, 112 S.Ct. 2392, 49 L.Ed. 2d 342 (1976), where the prosecution failed to volunteer exculpatory evidence that was never requested, or requested in a general way.

The Appellant's standing is there was no chain of custody to

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produce the knife authenticity. The knife was not submitted as evidence. The knife was not produce during the discovery phase. For the knife was destroyed.

The suppression of material exculpatory evidence violates the right to due process, "irrespective of the good faith or bad faith of the prosecution." See Brady, supra, 83 S.Ct. 1194, 10L. Ed. 2d 215 (1963). Accord Fourteenth (14th Amendment, U.S. Const.

The Appellant has sought an directed verdict on all charges. The Appellant has sought an directed verdict on the possession of carrying or concealing a weapon by an inmate charge because according to the S.C. Code Ann. § 24-13-0440 (Supp. 2019), the statutory language states "the knife must be six (6) inches or more" to be a(n) felony charge in which the State failed to establish at Chief of Trial. See Trial Transcript page 70 Ln 1 thru Ln 4.

In Accordance to the ULA Penal Code §1.12 (1), "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof the innocence of the defendant is assumed."

The Appellant avers that the State failed to meet the burden of proof beyond a reasonable doubt and failed to prove the elements of the charge itself. State v. McHoney, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001), "A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged."

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Conclusion

WHEREFORE UPON, the above legal premises the Appellant ask this Court to reverse judgment and vacate Sentence.

Done This 12 Day of January, 2023.

Respectfully Submitted,

K E Herrodt

Kevin E. Herrodt, Pro Se.