

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEE COUNTY  
Court of General Sessions

Ralph Ferrell Cochran, Jr., Circuit Court Judge

Case No. 2019-000969  
2024 WL 2748592

The State of South Carolina \_\_\_\_\_ Respondents

v.

Kevin E. Herrdott \_\_\_\_\_ Appellant.

THE APPELLANT'S MOTION FOR REHEARING

The Appellant Kevin E. Herrdott, pursuant to Rule 221, of the South Carolina Appellate Court Rule, (SCACR), moves the Court to reconsider and modify its May 29, 2024, opinion. In support of the motion, the Appellant shows the following to the Court:

1. This Court was without jurisdiction to submit an opinion sua sponte due to Appellant had 15 days to submit an appeal to his Writ of Mandamus to obtain discovery in this case action to support preserved issues on appeal. In failing to allow the appeal process to run its course, this Court reached into judgments

2. This Court has overlooked and misapprehended material facts in the record, Statutes, and decisions which is controlling as authority. The Court has erroneously construed and misapplied previous of law, and controlling authorities in the following respects:

a. Associate Justices misconstrued and misapprehended Appellant's raised constitutional grounds of the lower Court lacked subject matter jurisdiction for trial court failed to grant his motion to quash indictments

This Court held, Appellant indictments regarding attempted armed robbery and possession of a weapon by an inmate are not preserved. Holding Appellant did not raise this issue at trial.

The Appellant avers the Court reached this conclusion without sufficient evidence to support its decision lacking Appellant's motion to quash indictment and the Court err by ruling contrary to clearly established law.

In Accordance to *State v. Conroy*, 363 S.C. 93, 610 S.E.2d 494, the Court held that, "A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment." The Court continued to interpret the law asserting that "A defendant may for the first time on appeal raise the issue of a trial court's jurisdiction to try the class of case of which the defendant was convicted." *ibid.*

At the outset, the Appellant challenged the trial court lacked subject matter jurisdiction arguing the indictments upon its face were faulty and bad demonstrating to the trial court that the propriety of the accusation, the manner in which it has been presented, and the source from which it proceeds were unconstitutional violating the Appellant's Fifth Amendment Right indictment clauses, Sixth Amendment Right, specific notice clauses, and the Appellant's Fourteenth Amendment Right, due process of law clause. See Trial Transcript page 16 Ln 18 thru Ln 21; and motion to quash indictment.

CONFIDENTIAL  
ROOM

The Court overlooked the material fact that the single indictment document which was initially presented to the Appellant, the single multi-count indictment read in bold Capital letters located on the upper right of the face of the indictment reads Indictment for Assault or Assault and Battery of a High & Aggravated Nature. On this same indictment it read:

"At a Court of General Sessions, convened on August 30, 2018, the Grand Jurors of LEE COUNTY present upon their oath:

**Count One**  
A brief description of what Appellant was alleged of in violating Section 16-3-600(B)(1).

**Count Two**  
Named Titled Attempted Armed Robbery, class of case and gave a brief description of what Appellant was alleged of in violating Section 16-11-0330(B).

**Count Three**  
No named titled identifying classification of an charge but gave a brief description of what Appellant was alleged of in violating Section 2413-440."

The Respondent contends that Appellant received a multi-count indictment document on listing the charges Appellant was charged for. See Final Brief of Respondent page 7 Ln 13 thru Ln 14.

The Appellant requested the grand jury minutes in a timely manner to determine whether the grand jury process was initiated by the prosecution. Accord Rule 3(c) of the South Carolina Rules of Criminal Procedure, see also Trial Transcript page 17 Ln 13 thru Ln 15; Ln 21 thru Ln 23.

The Appellant argument to the trial court were, the State failed to initiate the prosecution by the grand jury process and it is considered a jurisdictional defect when such process is not afforded a criminal defendant. See 1 Wharton's Criminal Procedure §4:3 (14th ed.). For the principles found in Centry, the Court distinguished by State v. Dickerson, 363 S.C. 93, 610 S.E. 2d 494, The Court hold that the "concepts of subject-matter jurisdiction and sufficiency of an indictment are distinct."

## LEGAL MAIL

## MAIL ROOM

The Court overlooked the material fact of the style multi-count indictment not even considering the inferences that can be identified in the record on appeal to conclude Appellant was not afforded due process of law. The Appellant challenged that the single multi-count indictment document were invalid, defective, faulty, and bad on its face that invoked a hearing based on the fact the grand jury convening date is outside of South Carolina Statute 14-5-640, Section (2). The Appellant relied upon the Third (3rd) Judicial Circuit General Sessions Court Schedule to which reflected there was no court judicial proceedings, hearings, convening of grand jurors or grand jury, nor Common Pleas were conducted for the Month of August, 2018.

Absent from the record, the prosecution did not obtain a true bill valid indictment before the jury was sworn, nor was Appellant presented with an presentment on the grand jury true bill indictment before the trial judge sentenced and convicted the Appellant.

The Appellant avers that former counsel of record E. Thompson Kinney submitted to the Court upon filing of a Brady motion requesting specifically to furnish defense with Indictments with all markings of an sitting grand jury and the State disclose the single indictment that are being held as faulty and bad. Appellant only received one (1) indictment form identifying itself as "Indictment for Assault or Assault and Battery for An High & Aggravated Nature entailing three (3) counts of offenses. The Appellant challenged this single indictment in respect to the three (3) offenses that notified Appellant of what he is charged of.

Nonetheless, the controlling authority is South Carolina Constitution Article 1, § 11, presentment or indictment. The law requires presentment of grand jury as a condition precedent to the trial of a crime. See Rule 3, SCR Crim P. This required notice is a component of the due process that is accorded every criminal defendant. U.S. Const. Amend V; S.C. Const. Art. 1 § 3.

Furthermore, case law suggest that S.C. Code Annotation Statute § 17-19-90, applies to non-jurisdictional defects in the indictment. The defect or insufficiency of must be objected to before the jury is sworn.

This Court ruled contrary to established law and holding Appellant conviction and sentence affirmed without a valid presentment of a grand jury indictment is unconstitutional where such judgment is deemed voided on appeal. See *State v. Hany*, 196 S.C. 213, 12 S.E. 2d 720 (1946), holding a conviction obtained without presentment of a grand jury will be voided on appeal.

The Appellant clearly has put forth non-harmless error issues that was overlooked and were preserved by Appellant's motions and court orders to which can be found as sufficiently clear bringing into focus the precise nature of the alleged error so that it could be reasonably understood by the presiding judge.

In *State v. Brannon*, 388 S.C. 498, 502, 697 S.E. 2d 593, 595, To preserve issue at trial for appellate review, the issue must have been: (1) raised to an ruled upon by the trial court; (2) raised by the appellant, (3) raised in a timely manner, (4) raised to the trial court with sufficient specificity.

The Appellant avers that a party is not required to use the exact name of a legal doctrine in order to preserve an issue. The Court overlooked the Appellant raised the lower court lacked subject-matter jurisdiction and construed Appellant's claim for trial court failed to grant Appellant's motion to quash indictments. This tactic by the trial court to stifle Appellant's due process of law rights calls for justice to be administered. Moreover, Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving the Court an opportunity to rule on the issue. *Brannon, Supra*, citing *Herron v. Century BMW*, 219 S.E. 2d 640 (S.C. 2011).

The Appellant has a constitutional right to demand that a grand jury which is properly established and constituted under the laws consider the criminal allegations against him. See S.C. Const. art. 1, §11 and art. V, §22. Thus, the trial court failed to remedy or correct this process and it affected the Appellant to suffer prejudice.

- b. Associate Justices misapplied provisions of law when improperly denying Appellant's motion for directed verdicts

The Court held that the trial court properly denied Appellant's motion for directed verdict because the State presented direct evidence that Appellant committed armed robbery and possessed a weapon such that it was appropriate to send the case to the jury.

The Appellant avers the Court reached this conclusion without sufficient evidence to support its decision and erred by ruling contrary to clearly established law.

The Appellant challenged his conviction and sentence based upon several factors, but brings this Court's attention to the fact it was unconstitutional to pronounce judgment on questionable inferences as found in the record that brings into focus the issue, whether the evidence presented were triable issues before the trial court.

The record reflects on appeal that the State introduced surveillance video footage without objection in open court, Tr. Trans. pg. 28 Ln 11 thru Ln 25, formally marked for identification purposes and witnesses at trial were interrogated at length about the knife including Appellant.

Upon presenting the video surveillance, the court overlooked that the State did not establish a proper chain of custody. The Court overlooked the material fact that direct examination by the State was without explanation or qualification identifying purposes of the knife, for which could not fail to suggest an inference that the knife depicted in the video surveillance was used to commit the offenses of inmate possession of a weapon, and attempted arm robbery to which the Appellant was on trial.

Once the video surveillance was produced, Trial Transcript pg. 28 Ln 22-Ln 25 thru page 29 Ln 1-Ln 8, it became not only appropriate but imperative that any additional evidence concerning the knife be made available either to substantiate or refute the suggested inference.

The Appellant avers that if the knife was pertinent for any purpose, so also was the opinion of South Carolina Law Enforcement Division (SLED) experts who could determine that the knife was not authenticated. This case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense.

The Appellant directs the Court attention to the existence or non existence of evidence, not its weight. The Appellant show the Court that this Court is in receipt of the video surveillance of the cameras within the housing dormitory that housed Appellant, but the Court does not have the depicted knife in evidence that is observed on camera footage.

The Appellant avers that the State put forth direct evidence and testimony to the trial court transferring the burden of proof on the Appellant's trial lawyer who failed to show the trial court that the evidence the State relies upon are inadmissible and incompetent evidence is objectionable. This Court overlooked the material fact that Appellant was denied to proceed prose and was forced to be represented by an incompetent trial lawyer appointed by the State preventing Appellant to raise objections at trial.

The record on appeal is absent any objections from Appellant's trial counsel Timothy L. Griffith during direct examination of the State when State witnesses answering questions concerning or making reference to the knife. Trial Counsel Timothy Griffith also failed to motion to strike Appellant's testimony concerning the knife references because the State prosecution decided for the Court what is admissible or for the defense what is useful. See *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842.

Former Counsel Griffith failed to motion in limine to the trial Court seeking a pre-trial ruling on the knife a proxi trial matter nor raised contemporaneous objections to the line of questions to the effect of inferences surrounding the identification and use of the knife by both witnesses from the State and defense to preserve for appeal.

It is well settled that two (2) pre-trial rulings commonly create error-preservation issues: (A) motions in limine, and (B) orders denying a particular mode of trial; see, 15 S. C. Jur. Appeal and Error - 578.

- c. Associate Justices' decision involves "an unreasonable application of" clearly established federal law. This Court identified the correct governing legal principle from Supreme Court's decisions but was objectively unreasonable that had unreasonably applied suppression of exculpatory evidence to the set of facts of Appellant's case.

This Court held the trial court did not err in finding the State did not suppress exculpatory evidence because Appellant failed to identify any evidence that would have been favorable to him that was withheld.

The Appellant avers this Court overlooked the totality of the evidence before the trial judge or jury without considering or having attention to whether the result of the trial was fundamentally unfair or unreliable is objectively unreasonable.

Upon review of the record on appeal the Court would have found:

- (1) the prosecution did not disclose the knife as evidence to the defense preventing Appellant to analyze the weapon to prepare for his defense
- (2) the prosecution did not have the knife in evidence.
- (3) SEDC Police Services Investigators botched the investigation by not preserving the knife as evidence.

In Accordance to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), the Supreme Court established a requirement of disclosure as a fundamental element of a fair trial by holding that a defendant was denied due process if he was not given access to favorable evidence that is material either to guilt or punishment.

In addition, the Court recognized that the fundamental interest in a fair trial combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the defendant all information known to the government that might reasonably be considered favorable to the defendant's case. This formulation of this right, and imposition of this duty, are "the essence of due process of law. It is the State that tries a man, and it is the State that must ensure that the trial is fair. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 citing *Moore v. Illinois*, 408 U.S. 786, 809-810, 92 S.Ct. 2562.

The Appellant show the Court that the Appellant requested for exculpatory evidence of any and all information that is material favorable to the defense either to guilt or punishment to exculpate Appellant Brady, supra. Although this request may have been requested in a general way, the Court overlooked whether a non-disclosure would have a certain impact on the trial according to Appellant's material facts presented before the Court. See *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 842 (1976).

The Court overlooked the impact it had on the trial of Appellant when the suppression by the prosecution of information concerning the destruction of the knife was the reason the prosecution failed to preserve the knife that is material either to guilt or punishment. The Appellant's defense was not given access to exculpatory evidence that would have exculpated him denying Appellant due process of law. The Appellant was summoned to give an answer to alleged crimes to confront his accusers on the State's theory of armed robbery and assault.

According to common law, i.e. case law the State would be bar to infer armed robbery without having in custody concrete evidence to establish Appellant had a weapon. The State knew prior to the destruction of evidence it would be apparent to preserve the knife. The video surveillance depicted Appellant had an object in his hand was for the jury to decide whether or not it was a weapon without interference of questionable inferences.

The prosecution failed to disclose to the defense information that is material to the extent of what evidence the state intended to call or put forth to be used at chief of trial neglecting its affirmative duty to proffer a list of evidence that should have been catalogue, named, field tested, and exhibited showing the compromise had with the defense. Accord to South Carolina Rules of Evidence.

When the trial court questioned the Appellant to identify what evidence Appellant suspects to be missing is improper and does not negate the fact that the State has a duty to disclose favorable information that is material to guilt or punishment. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3325.

The Appellant did not have prior knowledge before nor during trial concerning the prosecution destroyed the knife yet was the State adamant to pursue to obtain a verdict based upon incompetent and inadmissible evidence. Therefore this Court overlooked the material fact nor considered whether the knife was competent evidence to warrant the trial court to procure a curative instruction necessary to leave out the knife references, in light of the available evidence produced at trial by the prosecution.

This Court failed to remedy to rule the video surveillance inadmissible to the extent of references to the knife as a weapon to which would limit or restrict the line of questions of witnesses from both the State and defense to correct the prejudice the State orchestrated and created.

3. The above aforementioned material facts, statutes, and decisions overlooked requires a different decision from that rendered by the Court of Appeals.
4. The decision that should have been rendered is for Appellant Kevin E. Herrick.

WHEREFORE UPON, the Appellant respectfully requests the Court to reconsider its May 29, 2024, opinion and rule in favor of the appellant.

Done This 31 Day of May, 2024.

Respectfully Submitted

*K. E. Herrick*  
Kevin E. Herrick, #325862  
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386 Redemption Way  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEE COUNTY  
Court of General Sessions

Ralph Ferrell Cochran, Jr., Circuit Court Judge

Case No. 2019-000969  
2024 CWL 2742582

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The State,

Respondent,

v.

Kevin E. Herrick,

Appellant,

PROOF OF SERVICE

I, certify that I have served motion for rehearing, notice of appeal, and proof of service on Assistant AG Mark Reynolds Ferthing of the S.C. Attorney General's Office by depositing a true copy of the same in the internal mailing system at McCormick Correctional Institution on this 3<sup>rd</sup> day of June, 2024.

I further certify that the Clerk of this Court required by Rule to be served, have been served on      day of June, 2024.

1st) Kevin E. Herrick  
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Kevin E. Herrick, # 313862  
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May 31, 2024

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SC Court of Appeals

Clerk Catherine Harrison, Chief Deputy  
S.C. Court of Appeals  
Office of the Clerk  
1220 Senate Street  
Columbia, SC 29201

Re: The State v. Kevin E. Herrick  
Case Action No. 2019-000969  
2024 WL 2748582

Dear Clerk:

WILL YOU PLEASE FIND ENCLOSED one (1) motion  
for rehearing, one (1) notice of appeal, and proof of service. I  
ask that this office file the enclosed correspondence within this  
Court.

Yours Truly,

K E Herrick  
Kevin E. Herrick, Pro Se.

Kevin E. Herrick #35862  
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