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January 26, 2013

FEB 05 2013

Timothy Jude Spires Jr.  
3822 Screaming Eagle Ext.  
Eastover, S.C. 29044

S.C. SUPREME COURT

Appellate Case # 2013-000070

Dear Mr. Shearouse:

Enclosed is an explanation as to why I believe I have grounds for an Appeal and why I believe the determination by the lower court in the Final Order of Dismissal of my PCR was improper.

As to my claim for a Belated Direct Appeal, I have fatally blundered my evidence in this matter whereas I had a law clerk in SCDC help me to file my PCR because of my ignorance in this matter, and in so doing, has written that I was not aware of the 10-day filing period for a Direct Appeal when in fact I was. Although I read over my original application for my PCR, I overlooked this error. In so doing, I do not believe I have any defense left to pursue the Belated Direct Appeal issue.

However, in the case of Subject Matter Jurisdiction, there is no statute of limitations and therefore this issue may be raised at any time; and this is why I believe I have grounds for an Appeal, as you will see in the following explanation. Please file and return a copy of this explanation to me at the above address.

P.S.

Also enclosed is a certified copy of my formal indictment and ~~sentencing~~ sentencing sheet to be used to compare the signatures of the parties involved.

Sincerely,

Timothy J. Spires Jr.  
Timothy J. Spires Jr.

January 26, 2013

Timothy Jude Spires Jr.,  
Petitioner

In the South  
Carolina Supreme  
Court

V.

Appellate Case #  
2013-000070

State of South Carolina,  
Respondent.

Ineffective Assistance of Counsel / Trial Court lacked Subject  
Matter Jurisdiction.

Trial Counsel was ineffective for allowing Petitioner to plead guilty to an offense when there was not an indictment in existence charging Petitioner with the offense at the time the Petitioner plead guilty. Trial court was without subject matter jurisdiction / personal jurisdiction or legal authority to accept Petitioner's plea and to sentence Petitioner to Ten (10) years confinement.

Trial Counsel was ineffective for advising the applicant to plead guilty to an offense that he was not legally indicted for which resulted in the court being without subject matter jurisdiction. Formal indictment is condition precedent to a valid waiver of presentment of charge to grand jury, which is prerequisite to a valid guilty plea. State v. Smalls, 581 S.E. 2D 850 (S.C. App. 2003). Two exceptions apply to the general rule that an indictment must sufficiently state the offense to confer jurisdiction on a court to accept a guilty plea; (1) If the Defendant waives presentment, and (2) the charge to which the Defendant pleads guilty is a lesser-included

offense of the crime charged in the indictment, Hocks v. State, 577 S.E. 2D 211 (S.C. 2003).

Here the Petitioner wants to make it clear that the trial court was without subject matter jurisdiction or legal authority to accept Petitioner's plea when there was no indictment charging him with an offense at the time of the plea and there was no valid waiver of presentment to the grand jury. Petitioner will concede the fact that he did sign a written waiver of presentment. However, the written waiver was not valid due to it not being executed in strict conformity with statute section 17-23-120 to 150 (1995).

In State v. Evans, 415 S.E. 2D 816 (S.C. 1992) held that in interpreting S.C. Code Ann. Section 17-23-120-150 (1995) In the absence of an indictment by the grand jury of the county where the offense was committed or a valid waiver of presentment of indictment, the circuit court lacks subject matter jurisdiction over the offense.

It is the Petitioner's position that written waivers of presentment to the grand jury must be executed in strict conformity with S.C. Code Ann. Section 17-23-120 to 150. These Sections which implement the General Assembly's authority to provide for waiver of presentment of an indictment under Article I Section 11, require the accused to execute a written waiver of presentment of the indictment before the "clerk of court of the county having jurisdiction of such a case."

In the instant case the written waiver that was accepted by the court did not comply with the mandates of strict statute. The written waiver was not executed before the

clerk of court as required by statute but instead was executed before the Petitioner's trial counsel outside of the courtroom. As can be seen on the face of the waiver trial counsel witnessed and signed the area designated for the clerk of court. This renders the waiver of presentment invalid, and therefore divests the circuit court of jurisdiction to accept guilty plea.

As the court knows, because this is a legal document, it must be executed in strict conformity with statute, otherwise it is void. A properly executed document or contract is one that has been fully performed by both parties. In an indictment or waiver of presentment, counsel for the accused cannot perform the duties of the clerk of court. Failure to comply with the G.C. Code Ann. 17-23-120 to 150 invalidates the waiver as well as the guilty plea. By its plain language certain statutory requirements must be met when signing a written waiver and is mandatory before the trial judge can accept a guilty plea. Failure to properly execute a waiver of presentment before the clerk of court renders the waiver invalid. It is also a fraudulent act by the trial counsel, when counsel performs the duties of the clerk of court.

The Applicant submits that with respect to the procedure to be followed when an accused pleads guilty, constitutional or statutory provisions are controlling and must be complied with. A plea of guilty can only be entered in a court having jurisdiction of a case; and the plea cannot be entered, and judgement thereon cannot be pronounced, unless there is a tribunal expressly empowered to perform such judicial acts in the particular case.

In Summerall v. State, 294 S.E. 2d 344, The South Carolina Supreme Court held that the Defendant's failure to properly execute written waivers of presentment of two indictments to the grand jury rendered invalid guilty pleas as to those indictments. S.C. Code of Laws Section 17-23-120 to 140 requires that Defendant must sign a waiver of presentment before pleading guilty to an indictment which has not been presented to the grand jury and the execution of this procedure must be done before the clerk of court. By the statutes' plain language it is mandatory that a written waiver be made where there has been no presentment to the grand jury. If there is not a "True Billed" indictment returned by a grand jury following a presentment there must be a written waiver taken before the clerk of court in order to confer subject matter jurisdiction on the trial court, and if not, the trial court can not accept a plea from the defendant.

It is the applicant's position that because there was no "waiver of presentment that was accomplished in accord with statute", see State v. Martin 294 S.E. 2d 345 (1982), the applicant would contend that the waiver of presentment on the face of the indictment was fatally defective in that it conflicts with the mandates of S.C. Code Ann. Section 17-23-120 to 140, which as the court knows is mandatory. The court held in Martin that his conviction must be vacated because of the holding in Summerall Supra. The waiver of presentment must be accomplished in accordance with S.C. Code of Laws Ann. Section 17-23-120 to 140.

As the court knows, it is required, wherever possible, to give force to each word in every statute, or constitutional

provision. See *Silveira v. Lockyer*, 312 F3d 1052 (9th Circuit 2002).

In construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Plain language of a statute cannot be contravened. As the court knows, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation, and court has no right to look for or impose another meaning. It (the court) cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.

Lastly, because counsel was constitutionally ineffective for not ensuring that the charging instrument was defective and in this regard, committed a fraudulent act by signing and witnessing the waiver of presentment, there is a reasonable probability that had counsel realized this, then the outcome of the proceeding would have been different. In *U.S. v. Thrackmorton*, 98 U.S. 61, (Dec 9, 1878) and *Thowbridge v. Oehanson*, 150 N.E. 556, it is held that "there is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments. Fraud vitiates everything, a judgment equally with a contract.

It is the Petitioner's understanding that Subject matter jurisdiction may be raised at any time, irrespective of desires of parties of litigation, as it is court's duty to assure that it renders no decision in matter when it

has no authority to do so, to act. See State v. Castleman, 64 S.E.2d 250, 252. Also State v. Funderburk, 191 S.E.2d 520. The jurisdiction of a court over the subject matter of an action depends upon the authority granted to it by the Constitution and laws of the State, and is fundamental. This is true irrespective of the desires of the parties to the litigation. State v. Douglas, 138 S.E.2d 845.

### Conclusion

Based on the issues listed above the Applicant asks this court to entertain his application for an Appeal, hear his motion and rule on the issues as Bar, and vacate his conviction and sentence.

Timothy Jude Spires Jr.  
Timothy Jude Spires Jr.

This 26<sup>th</sup> Day of January, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland  
STATE VS.

08

INDICTMENT/CASE#:  
-GS- 40 - 6768

Timothy Jude Splres

AW#: I-936498  
Date of Offense: January - May 2006  
S.C. Code §: 16-11-655 (B)  
CDR Code #: 0 1 3 1 9 1 6

AKA:  
Race: W Sex: M Age: \_\_\_\_\_  
DOB: 10-23-71 SS#: \_\_\_\_\_  
Address: Screeching Eagle Ext  
City, State, Zip: Eastover, SC 29040  
DL# \_\_\_\_\_ SID# 00733426

CASE RESTORED  
 SENTENCE SHEET  
 PLEA  TRIAL

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS

TO: Assault and Battery of a High and Aggravated Nature  
in violation of § 17-25-30 of the S.C. Code of Laws, bearing CDR Code # 0101113

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS (CSC  §17-25-45 w/minor 1<sup>st</sup> or Lewd Act)

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. TS (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:

Margaret Fent  
Solicitor

10 yrs.  
Timothy Splres Jr. Defendant  
Walter Deane Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 10 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_, provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_, plus costs and assessments as applicable\*, the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_  
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. CREDIT TIME FROM 7/25/07. WACD  
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

PAY COURT COSTS W/IN 14 D.  
OR RELEASE FROM PRISON OR SVR TRAIL

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: \_\_\_\_\_  
 set by SCDPPPS \_\_\_\_\_

PTUP \_\_\_\_\_ days/hours Public Service Employment if \_\_\_\_\_  
Obtain GED \_\_\_\_\_  
Attend-Voc. Rehab. or Job Corp. \_\_\_\_\_  
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling \_\_\_\_\_  
Random Drug/Alcohol Testing \_\_\_\_\_  
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund

Recipient: _____	
*Fine: _____	\$ _____
\$14-1-206 (Assessments 107.5%)	\$ _____
\$14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ _____
\$14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
\$56-5-2995 (DUI Assessment)	\$12 \$ _____
\$35.13 (Public Def/Prob)	\$500 \$ _____
\$73.3, 1B TP (Law Enforce. Funding)	\$25 \$ _____
\$33.7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
\$50-21-114(BUI Breath Test Fee)	\$50 \$ _____
\$56-5-2942(H) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
TOTAL	\$ _____

Other: DEF. HAS BEEN MADE AWARE THAT THIS PLEA CAN BE USED AS EVIDENCE IN A SEXUALLY VIOLENT PREDATOR CASE, AND THAT HE IS NOW SERVING A SENTENCE ON A CSC CHARGE.  
 Appointed PD or appointed other counsel, \$35.13 TP  
Requires \$500 be paid to Clerk during probation.  
DEF. MUST REGISTER AS A SEX OFFENDER

Barbara C. Scott  
Clerk of Court/ Deputy Clerk  
Court Reporter: Sheppard

PRESIDING JUDGE: William P. Cluskey  
Judge Code: ATTEST 1510  
Sentence Date: TRUE COPY 2008

BASED ON GOOD WORK SHEET  
RECOMMENDED BY \_\_\_\_\_

WITNESSES

(S) ROB MARTIN, RCSD

ARREST WARRANT NUMBER

1-938498

ACTION OF GRAND JURY

Foreperson of Grand Jury  
Date:

VERDICT

Foreperson of Petit Jury  
Date:

DOCKET NO. 2008-GS-40-6768

The State of South Carolina  
County of Richland

COURT OF GENERAL SESSIONS

92  
FEBRUARY TERM 2008

THE STATE  
vs.

TIMOTHY SPIRES

Indictment for  
CRIMINAL SEXUAL CONDUCT  
WITH A MINOR 2<sup>ND</sup>

SC Code: 16-3-855(C)  
CDR Code: 0397  
Class FEL/C(V)

After being fully advised as to my  
legal rights, I hereby waive presentment  
to the Grand Jury.

*Timothy Spires Jr.*  
Defendant

I Timothy Spires  
hereby appear in my own proper person and  
plead guilty to the within indictment or to

ABHAN

*Timothy Spires Jr.*  
Defendant

Witness:  
*[Signature]*  
C.C.C. P.L.S. AND G.S.

10:16 AM 6-10-08

11/09/2011 09:43 09J5761320

Timothy Jude Spiras Jr.  
3822 Screaming Eagle Ext  
Eastover, S.C. 29044

COLUMBIA SC 290

04 FEB 2013 PM 2 L



Daniel E. Shearouse, Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, S.C. 29201

29201323699

