

VOL II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Ralph F. Cothran, Circuit Court Judge

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S.C. Supreme Court

RAHIM FAREED CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000623

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STATEMENT OF ISSUES

(1) Did the trial court err, and was the Appellants 5th, 6th, 14th Amendment Rights of the U.S. Constitution, as well as Article IVS2, and his Due Process Rights violated, by the indictments of South Carolina, as constructed, possessing a structural constitutional error and or defect, in that it's language and or charge, contained therein, which did create and or form conclusive presumption(s), that took away the Appellant's presumption of innocence, and automatically shift the burden of persuasion to the defendant, in regard to the crucial elements of dispute?

(2) Did the trial court err, and was the Appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IVS2, to include South Carolina State law, and the Appellant's Due Process Rights violated, by the "[p]rocedural [d]efect" in that the Sumter County Coroner called for the initiating of the autopsy when she did not have the authority to do so, since the death ensued in Florence County?

(3) Did the trial court err, and was the Appellant's 5th, 6th 14th Amendment Rights of the U.S. Constitution violated, as well as Article IVS2 and his Due Process Rights violated by the indictment for murder, failure to properly and or sufficiently allege the time of the assault and not allege the

time of death at all, in the body of the charging instrument, as time is recognized by law?

(4) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IVS2, and his Due Process Rights violated, as well as Rules of Court, to include Rules of Criminal Procedure, as well as the court lacking Subject Matter Jurisdiction, and or was prohibited from enacting, invoking or continuing it's Subject Matter Jurisdictionary "[p]owers" due to the [p]rocedural [d]efect" in that there was no [w]ritten (Emphasis added) order of continuance obtained pursuant to Article VS4 of the South Carolina Constitution?

(5) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IVS2 and his Due Process Rights violated by the indictment for murder failure to properly and or sufficiently appraise the appellant of the place of death, in the body of the charging instrument, as place is recognized by law?

(6) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IVS2, and his Due Process Rights violated by the court and or prosecuting body constructively amending the indictment[s] at the appellant's trial?

(7) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IV§2, and his Due Process Rights violated, by the trial court allowing testimony by various witnesses to be entered into the court record, and or allowing their statements related thereto to be entered as evidence in the record, when there was no evidence adduced at trial that they were given a copy of the statements the time they made it, nor was there given them a copy of a receipt for the taking thereof?

(8) Did the S.C. Supreme Court in State v. Gentry Supra err, and abused their discretionary power, and in such, the trial court did err, and lacked Subject Matter Jurisdiction, and or was prohibited from enacting, invoking, or continuing it's Subject Matter Jurisdictionary "[p]owers", due to the indictment defects and or errors contained and argued within the document, in violation of the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution, as well as Article IV§2, and the laws of Due Process?

STATEMENT OF THE CASE

Appellant was convicted of murder and possession of a deadly weapon after a jury trial held before the Honorable W. Jeffrey Young on August 5-6, 2009 in Sumter County. Respective sentences of life imprisonment and five (5) years were imposed..

The appellant appealed where State appointed counsel Robert M. Pachak submitted his final Answer's Brief and Motioned to be relieved as counsel on March 22, 2010. This appellant's Brief now follows.

ARGUMENTS

(1) Did the trial court err, and was the petitioner's 5th, 6th, 14th Amendment Rights of the U.S. Constitution, as well as Article IV§2, and his Due Process Rights violated, by the indictment[s] of South Carolina, as constructed, possessing a structural constitutional error and or defect; in that it's language and charge, contained therein, which did create and or form conclusive presumption[s], that took away the appellant's persuasion to the defendant, in regard to the crucial elements of dispute?

The appellant humbly contends, it is well established by the U.S. COnstitution, the 5th, , 6th., 14th., Amendment[s], as well as the Bill of Rights, that when an individual is brought before a court of Juris Prudence upon accusation, that individual alleged thereupon, is innocent, until proven by a jury of his peers, guilty of aforesaid accusation being brought before the court. This is the defendant's most basic, and most fundamental right by the Federal and State laws pertaining to Due Process. Because they posses a structural Constitutional error and or defect, in that the language and or charge contained therein, is constructed to produce conclusive presumption[s], that immediately shift the burden of persuasion to the defendant in regard to the crucial elements of the offense[s], the indictment[s] violate Due Process:

The appellant did not object to this defect and or erro at the time of his trial, and or before he gave his guilty plea, but the defect and or error serves to render the indictment wholly invalid. Defects in an indictment that are of such a fundamental character as to render an indictment wholly invalid, are not subject to waiver by the defendant, 41 Am. Jurs. 2d indictments and information §299(1968); State v. Munn, 357 S.E.2d 461 (S.C.1967).

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Moss v. Aetna Life Ins. Co., 228 S.E.2d 106; State v. Broad River Power Co., 177 S.C. 240, 181 S.E.2d 41; 31 C.J.S. Evidence §§6 and 9; Federal Rules of Evidence, Rule 201 (a).

This is also manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional Rights of the party are compramisid. A manifest constitutional error can be reviewed by a court of Appeals even if the appellant did not object at the proceedings. (Black Law Dictionary 8th Edition).

By that which is cited in Sandstrom v. Montana, 442 U.S. 510 at 520, 99 S.Ct.(2450) at 2457(61 L.Ed.2d 39)(1979), under (4) criminal law [West Key] 324, the Supreme Court was unequivocal and unambiguous when it stated [v]erbatim:

"Conclusive presumptions conflict with the overriding presumption of innocence with which the law endows the accused which extends to every element of the crime charged and they invade the fact-finding function which in a criminal case the law assigns the jury, Morissette Supra, at 275, 72 S.Ct. at 255, and United States v. Gypsum Co. Supra, at 446, 98 S.Ct. at 2878. The indictment[s] require the jury, if satisfied as to the facts that trigger the presumption to find intent unless the defendant offers evidence to the contrary. The indictment[s] by their structural constitutional error and defect, language and/or charge, mislead the jury, and we can add the defendant, to believe that the presumption was not limited to requiring the defendant to satisfy the burden of production, when the burden of production is to be bore by the State. A presumption although not conclusive, that has the same effect of shifting the burden of persuasion to the defendant, would suffer the same similiar infirmities", Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508(1975), even if it's embodied within the charge of an indictment.

To state by use of an indictment that an individual "DID", with intent, knowingly, malice, aforethought, and other such elements, imply conclusive first hand knowledge of the events pertaining to the accusation being brought before the court.

To such knowledge, the Grand jury who swore to such indictment[s] "[c]annot" by all scientific reason and juris prudence ascertain as being true under such circumstances, especially without a trial. It is universally recognized that every oath [o]ught and [m]ust be founded upon "[c]ertain [k]nowledge", meaning knowledge that is certain beyond a reasonable doubt as being true. (Omne Sacramentum Debet Esse De Certa Scientia). In as much, the reality of this matter, is that the issues embodied in said indictment[s] are allegations, they are accusation, not proven facts. So how can they be sworn by indictment[s] as being true? It is the command of the U.S. Constitution that anything, to include any and all legislation, whether it be by indictment, statute, or otherwise, that is contrary to it's intrinsic inherent and explicit presuppositions shall [n]ot [s]tand, and therefore, should be [a]bolished and rendered [v]oid, (Article IV§2 U.S. Const.).

"THE STATE MUST PROVE", I repeat, "THE STATE MUST PROVE", NOT THE DEFENDANT, every single element that is charged, and that is crucial to the offense. It is not to be given to them in any way. They [m]ust first [p]rove it before it can be declared. Every single time an indictment is sworn to where it states clearly without ambiguity a defendant "DID", ETC.: It immediately with destructive results tear down the Commonwealth's constitutional Due Process Right[s] of being innocent until proven guilty, and automatically shift the burden of persuasion to the individual or Commonwealth charged. It gives a false

unconstitutional premise and or presumption that such has already been proven by a jury of One's peers, or even more specific, without a trial by a jury of One's peers in violation of Due Process of law. To have such unconstitutional presumption[s] embodied in indictment[s] that they rely on such language is to constitutionally infirm.

The appellant avers, in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508, the court found as a violation of Due Process and Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 323(1970), an indictment that [p]resumed" that a defendant acted with "[m]alice and [a]forethought", if it were found that the homicide was intentional and unlawful, the defendant then bore the burden of disproving the elements. Similiar in Sandstrom, the jury was instructed in determining whether or not the defendant had the prerequisite intent to commit murder, [t]he law presumes that a person intended the ordinary consequences of his voluntary actions, thereby relieving the state of it's burden on that element. The language, and or charge in the indictment[s] do the same, taking away the presumption of innocence, and by what's written, presumes a person intends the ordinary consequences of his actions, thereby relieving the state of it's burden on the elements crucial to the offense. What if a person was forced to commit the crime at gun point?; or was the victim of brain washing by the induction of some chemically based mind controlling drug and under such control he committed

Or it was simply an accident depending upon the crime charged. These are just a few reasons why such wording is impermissible.

Once the courts of South Carolina have constructed an indictment contrary to the laws of Due Process, the attorney for the appellant, telling the appellant he is innocent until proven guilty, or the judge giving an instruction to the appellant and or jury that the appellant is innocent until proven guilty, or stating the state has the ultimate burden and must prove every element of the crime to the appellant and or jury, or stating the indictment[s] are not evidence to the appellant and or jury, does "[n]ot" cure the Due Process problem created and presented by the structural constitutional error, defect, and or charge in the indictment[s].

Constitutional law [West Key] 266(7), in situations where elements of offense and "so-called" "Affirmative Defense", pose same ultimate issue of shifting the burden of persuasion, the DueProcess problem is [n]ot" eliminated by including an instruction in a charge that the state has the ultimate burden of proving every element of the offense beyond a reasonable doubt. The teaching of these cases is that "[a]ny presumption, even if it's not conclusive, even if it's embodied within the charge of an indictment, that has the effect of shifting the burden of persuasion to the defendant on any element of the crime charged, violates Due Process, (U.S.C.A. Const. Amend 14), Humanik v. Beyers, 371 F.2d 432(3rd Cir.1989).

Such is a substantive disadvantage and not merely procedural disadvantage to the defendant related to his rights of Due Process. If the indictment[s] by their defect contained therein, require that the defendant prove he did not possess the "Mens Rea", on any element pertaining to the alleged crime charged at trial, and or before a guilty plea is given, 421 U.S. at 686, 95 S.Ct. at 1888, it becomes obvious that the burden of proof is shifted.

The court recognized by requiring the defendant to prove the critical elements of dispute, Id at 701, 95 S.Ct. at 1890, The Maine rule, as do the South Carolina indictment[s] affirmatively shift the burden of proof to the defendant, thus creating a further likelihood of an erroneous conviction and or guilty plea, due to the shifting of the burden to prove One's innocence, as implied by the language and or charge in the indictment[s], Id at 421 U.S. at 701, 95 S.Ct. at 1890. Such serves to negate certain facts of the crime which the statw is to prove to the jury in order to convict the defendant of a crime charged, 432 U.S. at 207, 97 S.Ct. at 2325. The Winship rule is clear in which the defencreates a reasonable doubt on any element of the offense(s) charged is entitled to an aquittal.

In such a case the relevance of the subsidiary facts in this case are the same, and the sole significance of the defendant's evidence and or testimony concerning the "so-called" "Affirmative Defense", is to create a reasonable doubt on the existence of an essential element of the offense, by the preponderance of evidence to contract an unconstitutional presumption.

As stated in United States v. Clemens, 843 F.2d 741, 752(3rd Cir.1988):

"Justly put, merely labelling something as "Affirmative Defense", "A Statutory Procedure", and we can add to this, "An Indictment", does not mean that such constructed contrary to the rights of Due Process are constitutional. It must appear that the aforementioned, as related thereto, do "[n]ot [n]egate" any element of the crime, and we can add shift the burden of persuasion, as the indictment(s) of South Carolina do", Id. W. LaFave & Scott Substantive Criminal Law §1.8 at 75(1986); see generally Sandstrom v. Montana supra. A defendant may be required to bear the burden of persuasion with respect to defenses such as showing justification or excuse, but not with respect to those that negate guilt by cancelling out the existence of some required element of the crime, nor should his presumption of innocence be deprived, W. LaFave & Scott Substantive Criminal Law supra, at 71,75. Accordingly, accessing the constitutionality of an "Affirmative Defense", "Statutory Procedure", and we can add to this, "An Indictment" etc., of any kind related thereto, even by terms of that which the statute requires, is defined in terms of fact so central to the nature of the offense that in effect, the prosecution has been freed of the burden of establishing each constituent element of the crime charged..

If the indictment[s] already predetermine that you "DIE", WITH malice, aforethought, intentionally, willfully, etc., the state has been relieved of proving it, see *id* at 213 at 233. By the structural constitutional error and or defect, it's already given and no longer by the charge and or defect have to be established. In order to contribute some significant burden a rational trial juror's only option, and we can add the defendant's only option, is to conclude that the indictment(s) are true, or are to be considered as true, and the facts sought to be proven are likely true, because the language and or charge reflects such in the depriving of the presumption of innocence. It is clear from Martin V. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267(1987), that this is constitutionally impermissible.

Perhaps the state of South Carolina would contend, that such is merely the conveying of information from witnesses, 1, 2, 3, or more possibly, and upon this testimony such an oath is based. Even if one would adopt this premise, still the indictment[s] "[c]annot be deemed as that which is founded upon "[c]ertain [k]nowledge" (Omne Sacramentum Debet Esse De Certa Scientia), but it is founded upon hearsay and or second hand knowledge. Notwithstanding, it has been recorded throughout history since the earliest stages of civilization that people do bear false witness in groups and in numbers depending upon their motivation. For example, you have an unjust king and queen, Ahab and Jezebel, coercing several people to lie in a covert plot to

steal the land of a righteous man in 1 Kings chapt. 21. In Micah, chapter 7:1-10, you have people in authority, and even a just man's closest members of his household bear false witness against a prophet of God. In Christianity you have officials who were in power, Sadducees and Pharisees, incite and pay groups of people in the Gospel(s) of Mathew, Mark, Luke, and John, to bear false witness against the Messiah(PBUH). In Islamic prophesy, the prophet Muhammad(PBUH), in Sahih Al-Bakhari vol. NO.3 Hadith NO.7086, prophesied how in these times there will hardly be a trustworthy person left in the world. The Spanish inquisition of 1478 and the English inquisition of 1534 found people unjustly burned at the stake and or hanged, due to unjust accusation by people in groups and in numbers for false claims of heresy. Adolph Hitler, and a group of people called Nazis, brought numerous unjust claims against the jews, falsely rooted in lies, in the holocaust of the 1930's. The Salem witch trial of the 17th century, in Massachusetts, found numerous men, women, and children burnt at the stake for false claims of practicing witchcraft, brought by people in groups and in numbers. The Ku Klux Klan, throughout the south, brought unjust accusation against innocent minority post Civil War era, and in the 1930's and 1960's. Judaism, Christianity, Islam, American history, European history, World history, "[fall]" are "[filled]" with unspeakable atrocities originating in lies, perpetrated by people in groups and in numbers against the innocent.

our constitutional forefathers in their wisdom and juris prudence saw the repeated pattern, that like a poisonous, venomous, snake, rose it's head from the spoils of society to fatally bite the Commonwealth. By such in their wisdom they set up "[b]ulwarks", "[b]arriers of [p]rotection", for the American citizenry, all who are held by us, and all who enter our borders or territories, that under no circumstances, outside of an individual committing acts of treason!, were to be torn down, because people in groups and in numbers do bring false accusation against the innocent.

Referring back to the third situation here as illustrated by State v. Breakiron, 108 N.J. 591, 532 A2d 199(1987) and State v. Zola, 112 N.J. 384, 548 A2d 1022(1988), in inferring the state of mind element, whether the prerequisite intent and or purpose was present at the time of the crime. The grand jury in the form of the indictment[s] of South Carolina "[c]annot" say what was in a person's mind, nor do they have first hand knowledge of the facts related to the indictment charged. They do "[n]ot" possess "[c]ertain [k]nowledge". (Omne Sacramentum Debet Esse De Certa Scientia). Thus, again, the very language and or charge of the indictment[s] predetermine before trial or the giving of a guilty plea an individual is guilty of the state of mind elements, and force the defendant, due to the shifting of the burden of persuasion, to prove his innocence by the preponderance of the evidence and or testimony in violation of Due Process of law.

In regards to a charge, and we can add to this, a charge in an indictment, that constitutes a constitutionally impermissible charge/ instruction or contradicts the presumption of innocent until proven guilty, even with a later instruction "boilerplate" of being innocent until proven guilty by the court(s), or stating the indictment is not evidence by the courts, the problem is [n]ot [c]ured" where there exist a reasonable likely hood, that the jurors, and we can add to this, the defendant, may have considered the charge in the indictment[s] as conveying an unconstitutional message, Francis v. Franklin, 471 U.S. 307 105 S.Ct. 1965, 85 L.Ed.2d 344(1985).

Such presumptions intrinsically and explicitly established snatch the blindfold off of "[L]ady [J]ustice" herself, and now not only is she no longer impartial, unbiased, or fair, but now she says, because it's you, because it's this particular crime and or alleged criminal action, because you fall into this particular statute as opposed to another, you are no longer innocent until proven guilty, and your constitutional rights are hereby revoked. Such presumptions destroy the very metal of the shield of protection placed around the American citizenry, those who are held by us, and those who enter our borders or territories, and abolishes the very core integrity of our Due Process Clause our constitutional forefathers have died and sacrificed their best blood to establish and preserve.

The greater aspect of evil related to such action by the indictment[s] of South Carolina far and extremely out weigh the greater good that it sought to establish related thereto. If we as responsible citizens of the Commonwealth allow individuals who are placed in positions of legislative authority, whether it be by town, city, state, or federal level, whether it be intentional or unintentional, to initiate or place into effect legislation by statute or any other means, that deteriorate the very pillars of that which our constitution was founded upon, then we no longer establish ourselves as a true democracy, where the good of the many out weigh the good of the few. We step more into the realm of "Monarchy", and set ourselves on a path of constitutional destruction, detrimental to the Commonwealth, that can only lead to "Anarchy", creating the similarities in the trials that manifested themselves in the aforementioned nazi occupation, the Salem witch trials, the Spanish inquisition, before and during the Civil Rights era, and the like. Where trials and or hearings become an arbitrary action, a mere hollow and deceptive formality, and or empty mechanism, utilized to snatch from the Commonwealth their inalienable rights, and to rob them of their God given liberty. This we cannot do! It is our court[s] our Supreme court(s) our U.S. District court(s), inherent responsibility as guardians of the faith and integrity of our system of juris prudence to protect the Commonwealth from such a dark demise.

The presuppositions set forth by our constitutional forefathers "Epluribus Unum", were one nation, under God, indivisible, with liberty, and justice, "FOR ALL", "FOR ALL"; AND WAS NOT to be taken away simply because an individual fell victim to accusation, or fell under a particular statute of law as opposed to another, or was charged in one particular state as opposed to another. The only exception to this sacred standing and trust was to be if an individual committed high treason against our government itself, which in some particularity is what the indictment(s) of South Carolina reflect, because they innately swear allegiance to that which sets itself at enmity and variance to the constitutional rights of all citizenry of the Commonwealth, those who are held by us, and those who enter our borders or territories, who are subject to them. Therefore, they are a form of treason. The indictment(s) betray our constitution. Hencefore, they should be abolished and reformed. They are intense espionage and diabolical sabotage, and stands at war with the rights of the Commonwealth, those who are held by us, and those who enter our borders or territories, in violation of Due Process of Law. They covertly with corrosive results steal away stealthly, the fundamental truths by which the constitution was founded upon, and throw a "monkey wrench" into the mechanical works of "JUSTICE AND FAIRNESS", BY. DETONATING EXPLOSIVE RESULTS, that detrimentally tear down the

"[b]ulwarks", that were forthrightly established to protect the Commonwealth, those who are held by us, and those who enter our borders or territories, against unjust prosecution. By the structural constitutional error and or defect, language and or charge, contained within the indictment(s), you have already surmise and ascertained without the total weight of the evidence set forth before a jury, an individual's guilt, in violation of state and federal laws pertaining to the state(s) and federal constitution(s), inferring the state of mind element, negating the burden of proof, that by law was to be consistently boreed by the prosecution, in violation of Due Process of Law, Francis v. Franklin supra.

THE COURT HOLDS, that a charge, and we can add to this , a charge in an indictment, which impart to the jury, and we can add to this, the defendant, an unconstitutional understanding of the allegations, even more specific, the burden of persuasion, creates a reasonable likelihood that the jurors, and we can add to this, the defendant, understood the charge, specifically, the charge in the indictment(s), in an unconstitutional manner unless other language in the indictment(s) explain the infirm language sufficiently enough to eliminate this possibility. If such a reasonable possibility exist, "we have [n]o way of knowing that [t]he [d]efendant was [n]ot convicted, and we add to this, gave his guilty plea, on the basis of the

unconstitutional charge, specifically, the one embodied within the indictment(s)", Sandstrom, 442 U.S. at 526 (99 S.Ct. at 2460). For this reason, it has been well settled since Stromberg v. California, 283 U.S. 359 (51 S.Ct. 532, 75 L.Ed. 117)(1931), that where there exist a reasonable possibility that the jury relied upon an unconstitutional understanding of the law, and we can add, the defendant, relied upon an unconstitutional understanding of the law, in reaching a verdict, and we can add, in giving his guilty plea, that verdict and or guilty plea "[m]ust" be set aside, Id at 323n. 7, 105 S.Ct. at 1976n. 7. We conclude that there is more than a reasonable likelihood that the jurors, and we can add, the defendant, received an unconstitutional understanding of the situation related to their task.

This is in no way a mischaracterization of the law pertaining to the cases cited here. Even though some of the cases cited dealt with conclusive presumptions given by judges in charges that have the effect of shifting the burden of persuasion to the defendant regarding the crucial elements, in this case we are dealing with a similar charge, except this time it's given by the grand jury in the form of an indictment, that has the effect of shifting the burden of persuasion to the defendant regarding the crucial elements, and the inferring of the state of mind element to the offense(s) are the same in these matters.

Due to the defect in the construction of the indictment(s), the defendant's presumption of innocence is clearly taken away by the language and or charge contained therein, and the indictment(s) serve to negate the burden of proof. This creates a structural constitutional error. Structural constitutional errors and or defects compromise entire trial and or criminal proceedings. It requires reversal and or vacating as it involves deprivation of constitutional protection so basic, and so fundamental, that in it's absence criminal trial and or proceedings "[c]annot" reliably serve it's function as a vehicle for determination of guilt or innocence, and "[n]o" criminal punishment may be deemed fundamentally fair, Robinson v. Arvonio, 27 F.3d 877 rehearing denied, Cert. granted vacated 115 S.Ct. 1247, 513 U.S. 1186, 131 L.Ed.2d 129. Such a structural constitutional defect and or error is {n}ot subject to the harmless error analysis. Structural constitutional errors and or defects not subject to the harmless error analysis are defects and or errors affecting the framework, in which trial and or criminal proceedings "[c]annot" reliably serve it's function, involving deprivation of constitutional protection so basic, and so fundamental, that it's absence no criminal trials and or proceedings can be deemed reliable, nor any punishment fundamentally fair, Vines v. United States, 28 F.3d 1123 Crim. Law 1163(1), 1165(1).

It is perspicuous that such a defect and or error affect the framework of the proceedings, because the court(s) must constructively amend the indictment(s) on the crucial elements of the offense(s) to correct, rather, in an effort to correct the structural constitutional error and or defect. The boundaries cited by law are clear and certain even as cited by Winship Rule and Humanik v. Beyers supra. Any conclusive presumption of any kind, that is placed before a jury to obtain a conviction, or we can add, placed before a defendant to manipulate, mentally and or psychologically coerce, and or force the defendant into an unfreely, unknowingly, involuntarily, or unintelligently given guilty plea, that has the effect of shifting the burden of persuasion to the defendant, violates Due Process, and is grounds for an aquital, even if it's embodied within an indictment. Clearly there is nothing cited by law that would mandate that these strict Rules of Court and requirements of Due Process of Law, be solely limited to a judge's charge. They apply to any charge that is placed before a jury to obtain a conviction, or a defendant in order to manipulate, mentally and or psychologically coerce, and or force him into a guilty plea. Such a heavy weight of shifting the burden of persuasion, and the taking away of One's presumption of innocence, by the indictment(s) of South Carolina, have been unjustly and unconstitutionally used against defendants in the State of

South Carolina, to mentally and or psychologically coerce, and or force them into plea bargains, and at their trials for far too long.

To elaborate or bolster this proposition, if the Honorable Court would please take notice of the warrant(s) pertaining to the offense(s), as this is for every warrant in the state. In the body of every warrant in the state it reads:

"I further state that there is probable cause to believe that the defendant named above did ect., etc.,****".

This is the language that explains the constitutionally infirm language and or charge. This is the language that aids in the maintaining of the presumption of innocence, and also which confirms the specific job of the grand jury. The job of the grand jury is two prong. One is to determine and ensure that some state and or federal official is not acting arbitrarily in bringing accusatoin against a citizen of this country. The second is to determine whether or not there is sufficient probable cause to bring a defendant to trial, Stirone v. United States 361 U.S. 212(1960); Ex Parte Bain, 121 U.S. 1(1887); Gaither v. United States, 413 F.2d 1061(D.C. Cir.1969) ; S.C. Constitution; United States v. Abrams, 539 F.Supp. 376,384(S.D.N.Y. 1982); United States v. Calandra, 414 U.S. 338,342,343, 98 S.Ct. 613,617, 38 L.Ed.2d 561,568(1974); Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626(1972). To determine guilt

of the offense(s), to include the "Mens Rea" on the crucial elements of dispute, is a violation of it's shielding function. A grand jury merely investigates and reports. They are not authorized by federal or state constitution, nor federal or state laws, to convict, Jenkins v. McKeithen, 395 U.S. at 430, 89 S.Ct. at 1853, 23 L.Ed.2d at 422(1969). The powers of the grand jury are not unlimited, and are subject to supervisory of a judge. Grand juries may individually or collectively enjoy protections assertable in suits for defamation, but the privilege is not applicable to bar the petition of an applicant to remove language from the indictment, Compare Person v. Ray, 386 U.S. 747, 87 S.Ct. 1213, 18 L.Ed.2d 288, 294-95(1967). When the grand jury goes beyond the scope of the power and authority given to them, it is indeed a violation of Due Process, United States v. Chadwick, C.A.9 (Nev.) 1977, 556 F.2d 450; United States v. Briggs, 514 F.2d 794(5th Cir.1975). Yet, by the structural constitutional error, defect, language, and or charge of the indictment(s), the grand jury adjudicated not only guilt of the offense(s) charged, but also the "Mens Rea" related thereto. If such or similar language as aforementioned, is not embodied within the body of the charging instrument(s), then the indictment(s) are not constitutionally sound and they violate Due Process. The evil that has developed from this, far and extremely outweigh the original good it intended.

Any indictment, whether it be in the smallest of detail, whether it be in the smallest towns, or the largest cities, within the boundaries of any county or state, whether it be intentional or unintentional, that is construed in a fashion where it automatically shift the burden of persuasion from the state to the defendant, takes away One's presumption of innocence, and gives off an unconstitutional impression of his or her rights by the laws of Due Process; contrary to the U.S. Constitution [s]hall [n]ot [s]tand. They violate the appellant's as well as every single member of the Commonwealth's constitutional rights under the 5th., 6th., 14th., Amendment(s) and seeks to unjustly deprive one of life, liberty, and property. It is for this reason that the New Jersey and Maine Supreme Courts overthrew such similar actions in those states, and on this same premise, the same should be done to the State of South Carolina; and yes, under these circumstances, it may be far more difficult for the prosecution to obtain said conviction or guilty plea, but it is far better that they endure the difficulty than the greater degree and or likelihood, for innocent men and women to be subject to an erroneous conviction and or guilty plea, that is not freely, knowingly, voluntarily, or intelligently given, because it prejudice the individuals subject to these indictment(s). Prosecutors must be made to know and understand, that such is "The nature of the beast". The burden is theirs and it goes with the professional territory at hand.

The following statement in relevant part was made by the court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194(1963).

It pertained to the suppression of evidence favorable to the defense, but the subsidiary facts to Due Process violation have a bearing on these matters here. It has been slightly modified to paint a more true picture of this issue:

"WE HOLD, that such presumptions violate Due Process irrespective of the good or the bad faith of the prosecution. The principle here is not to punish society for such Due Process violations, or the misdeeds of the prosecuting body, but the avoidance of an unfair trial, and or plea hearing to the accused, Society not only wins when the guilty are convicted, but when criminal trials and or plea hearings are fair; our system of administration of justice suffers when it's citizens are treated unfairly in the courts. An inscription on the wall of the Department of Justice states the proposition candidly for the federal domain: The United States wins it's point whenever justice is done it's citizens in the court's", Brady v. Maryland, Supra; citing Mooney v. Holohan, 294 U.S. 103.

The appellant humbly quotes that which is stated in United States v. Walsh, 194 F.3d 37(2nd.Cir.1999) and United States v. Pirro, 212 F.3d 89(2nd.Cir.2000):

"The indictment(s) do more than simply track the language of 18 U.S.C. §242, which provides penalties for any person, who under color of any state and or federal law, statute, ordinance

regulation, custom, and we can add to this, "an indictment", willfully subject any person... to the deprivation of [a]ny" [a]ny", rights, privileges, or immunities secured and protected by the U.S. Constitution or the laws of the United States***", and this was done in violation of the appellant's rights to equal protection of the laws, Screws v. United States 325 U.S. 91 S.Ct. 1046 (1946); State v. Middleton, 207 S.C. 478, 36 S.E.2d 742 (1946); Eslinger v. Thompson, 340 F.Supp. 886 (D.S.C.1972) Aff'd 476 F.2d 225 (4th Cir.1973); McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); Dubinka v. Judges of Superior Court of the State of California, for County of Los Angeles, 23 F.3d 218; Jones v. State of Arkansas, 929 F.2d 275; Hicks v. Oklahoma, 447, U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980); Dozier v. Loop Collage, City of Chicago, 776 F.2d 752; Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-30, 102 S.Ct. 2744, 2749-50, 73 L.Ed.2d 482 (1982).

By the structural constitutional error, defect, language, and or charge contained within the indictment(s), the appellant's most basic and most fundamental right to be viewed as innocent until proven guilty, and to have the state bear the burden of production on the critical elements of dispute has been clearly taken away. This is a serious price to pay for the sake of obtaining a conviction.

"The teachings of these cases is that "[a]ny", "[a]ny", presumption, even if it's not conclusive, even if it's embodied within the charge of an indictment, that's placed before a jury to obtain a conviction, and on a defendant to coerce him or her into a guilty plea, that has the effect of shifting the burden of persuasion to the defendant on any element of the crime charged, or deprives him of his presumption of innocence, violates Due Process and is grounds for an acquittal",

In Re Winship Supra; Humanik v. Beyer Supra. It involves deprivation of constitutional protection so basic and so fundamental that in its absence criminal trials and proceedings "[c]annot" reliably serve its function as a vehicle for determining guilt or innocence and no criminal punishment may be deemed or regarded as fundamentally fair because the structural constitutional error and or defect affect the framework of the proceedings and "[c]annot" be viewed as harmless, Robinson v. Arvonie Supra; Vines v. United States Supra. Therefore, the sentence and conviction must be vacated, and the appellant humbly moves for such.

(2) Did the trial court err, and was the appellant's 5th, 6th, 14th, Amendment Rights of the U.S. Constitution violated, as well as Article IVS2 to include S.C. State law, and his Due Process Rights violated, by the "[p]rocedural [d]efect", in that the Sumter County Coroner called for initiation of the autopsy when she did not have the authority to do so, since the death ensued in Florence County?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Mess v. Aetna Life Ins. Co. supra; State v. Broad River Power Co. supra, 31 C.J.S. Evidence §§6 and 9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest constitutional error, an error on the part of the trial court and or prosecuting body that has an identifiably negative impact to such a degree that the constitutional and or Due Process of the party are compromised.

A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings (Black Law Dictionary 8th Edition).

S.C.Code.ANN.§1-7-730 and S.C.Code.Ann§17-13-150, require that the prosecution or prosecuting body "[s]hall" fulfill, and see that all duties, requirements, and Rules of Criminal procedure related to Due Process of Law and the Constitution are adhered to and completed within the law and or court.

By such provision "[s]hall is mandatory, see Article 12§2;
United States v. Meyers, 106 F.3d 936,941(C.A.10 1997);
State v. Carson, 317 S.C. 430,431, 454 S.E.2d 888,889(1995);
United States v. Ron Pair Enterprises, Inc. 109 S.Ct. 1026,1030
 (1989).

The appellant places forth this issue in a straightforward fashion. S.C.Code.Ann.§17-5-260 provides:

"The County Coroner and or Examiner of the County where the death was found shall make immediate inquiry into the cause and manner of death and shall reduce his findings to writting on forms provided for this purpose retaining a copy for his files"; 1962 Code§17-166; 1972(57) 3064.

S.C.Code.Ann.§17-5-250 provides:

"Power to determine the county Examiner and or Coroner of the county where the death is found shall have the power to determine that an autopsy shall be made in addition to the powers invested in other law enforcement officials to order an autopsy", 1962 Code§17-165; 1972(57) 3064.

If the court would take notice of TTPp 67, Lns.22-25; TTPp 68, Lns1-8, the allefe victim was supposedly assaulted in Sumter County, but shortly after he was transported to Florence Reginal Hospital where he expired over a week later in Florence County. If the court would take notice of TTPp 117, Lns11-13 and TTPp 119, Lns7-12 you will see that Verna Moore, the former Coroner of Sumter County at that time ordered the autopsy without legal

authority in clear violation of South Carolina Law. The autopsy is illegal. All testimony regarding it given at time is illegal standing in blatant defiance to South Carolina Law and the appellant's substantial constitutional rights of Due Process. The findings of the autopsy was used by the grand jury to produce the indictment in violation of the 5th Amendment. It deprived the appellant of a fair trial in violation of the 6th Amendment, and served to deny the appellant the Equal Protection of the laws against unjust prosecution. The law is clear on this issue. No man shall stand convicted on the basis of illegal evidence. Such illegally obtained evidence and or testimony is "Fruit of a Poisonous Tree", and must be stricken from the record. Without such testimony and or autopsy which establishes the homicide, the conviction cannot stand, Article IVS2; United States v. Brady, 842 F.2d 1313,1314(D.C.Cir.1988); Gomez v. Turner, 672 F.2d 134, 141(D.C.Cir.1982); United States v. Most, 876 F.2d 191(D.C.1989); United States v. Clyburn, 24 F.3d 613; Dalia v. United States, 441 U.S. 238,255, 99 S.Ct. 1682,1692, 60 L.Ed.2d 177(1979); Mapp v. Ohio, 81 S.Ct. 1684(1961) United States v. New York Telephone Co., 434 U.S. 159,179-80 98 S.Ct. 364,276, 54 L.Ed.2d 376; Silberman v. United States 365 U.S. 505 81 S.Ct. 679, 5 L.Ed.2d 734(1961) Weeks v. United States, 232 U.S. 383, 34 S.Ct. 3412, 58 L.Ed 652; Rochin v. People of the State of California, 1952, 343 U.S. 165,173, 72

S.Ct. 205, 210, 96 L.Ed. 183; Wolf v. Colorado, 1949, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 R.C. Ohio §2905-34; Skinner v. Railroad Labor Executive Assoc., 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639(1989).

Pursuant to the South Carolina Digest, Atty. Gen. 1963 provides:

"Coroner of Sumter County was limited to his jurisdiction to Sumter County and was not authorized to grant permission for any autopsy on person who died in Florence County", 1962-63 Opinion Atty. Gen. 105.

Pursuant to S.C. Digest Atty. Gen. 1952 under 1952 §17-91 provides:

"If a person is injured in one county and dies in another, the coroner in the county where the person dies or where the body is found should take the initiative and make such inquiry as to what caused the death as he consider proper", 1952-53 Opinion Atty. Gen. 58.

Pursuant to S.C. Code Ann. §17-7-10 provides:

"The coroner in the county of which the injury was inflicted has no authority to order an autopsy or post mortem examination of a person, if said person is taken out of the county and or state for treatment and dies in another county or state", 1978 Opinion Atty. Gen. NO. 78-68 Pg. 94.

It is not the appellants assertion that in exceptional circumstances should could not be done. What the appellant does contend is that if such exceptional circumstances existed,

criminal procedure would require that the parties either waive such jurisdiction in writing and or obtain a court order to do so, with either of the aforementioned being filed with the Clerk of Court granting such authorization. The trial court and or state acting unjustly under color of State Law, has failed to adhere to their own State Law, in violation of the appellant's substantial constitutional rights of Due Process, which conspicuously deny the appellant the Equal Protection of the laws. Screws v. United States supra.; Dubinka v. Judges of Superior Court of the State of California, For the County of Los Angeles supra.; Jones v. State of Arkansas supra.; Hicks v. Oklahoma supra.; Dozier v. Loop Collage of Chicago supra.; Lugar v. Edmondson Oil Co. supra.;

The appellant further contends that this "[p]rocedural [d]efect" not only compromises the entire proceeding depriving the prosecution of the ability to establish that the death was a homicide to be attributed to any action of the appellant, but it also deprives the trial court of Subject Matter Jurisdiction in establishing the Corpus Delicti, and or prohibits the trial court from enacting and or invoking their Subject Matter Jurisdictionary "[p]owers". Subject Matter Jurisdiction is the "[p]owers" to hear and determine cases of a general class to which the proceedings in question belong, Bell v. Monsanto Corp., 579 S.E.2d 325(S.C.2003). Inasmuch, the court's "[p]owers" to hear and determine a case, is also defined as the court's "[a]bility" to hear and determine a case.

Inasmuch, Subject Matter Jurisdiction does not only cover or involve whether or not a matter resides in the proper court of jurisdiction to hear and determine it. It also involves any issue that may "[a]ffect" and or "[h]inder" that court's "[p]ower" and or "[a]bility" to act in accordance to Rules of Court and or Criminal Procedure, as well as Due Process of Law. Such matters can be raised at "[a]ny time", "[c]annot be waived by the appellant, and the court "[s]hall [n]ot" fail to take notice, Mathis v. State, 355 S.C. 87, 584 S.E.2d 366(S.C.App.2003), Brown v. State, 343 S.C. 342, 540 S.E.2d 846(2001); State v. Browning, 320 S.C. at 368, 46 S.E.2d at 359; State v. Munn, 357 S.E.2d 461(S.C.1987).

For the S.C. Court of Appeals to make use of the holding made in State v. Gentry would be misplaced. That case dealt with indictment defects. This issue has nothing to do with indictment defects. The appellant places forth this question in a straightforward fashion and wants to make certain that there is no misunderstanding as to the specific claim or question that is placed before the S.C. Court of Appeals. The appellant is not arguing whether or not the criminal court has Subject Matter Jurisdiction to hear cases of this general class to which the proceedings in question belong. The appellant concedes to this fact. The appellant agrees with the 3, Gentry, Cotton, and Parkhurst court(s) when they determined that the criminal court does have Subject Matter Jurisdiction to hear cases of this

nature and or class. What the appellant is indisputably arguing is a question which clearly was not answered by either the Gentry Cotton or Parkhurst court(s) which is this. Despite the fact that the criminal court does have Subject Matter Jurisdiction to hear cases of this general class to which the proceedings in question belong. Do their egregious, blatant failure to be in compliance to certain essential, crucial "[j]urisdictional [p]rerequisites" or "[j]urisdictional [r]equisites at the commencement of or at various phases of the Subject Matter Jurisdictionary action and or process before the court; do such egregious failure to be in compliance to these essential, crucial, jurisdictional prerequisites or jurisdictional requisites at specific phases of the Subject Matter Jurisdictionary process, halt, checks, stop, constrain, restrain or arrest the continuance or action of the Subject Matter Jurisdictionary "[p]ower" before the court, that without a doubt they do indeed have. This is a crucially materially and distinctly different question related to Subject Matter Jurisdiction that was never answered by any of those courts involved. This is a new question of Law and fact. Thus making use of the holdings made in the Gentry court would be misplaced. This question is not barred in seeking relief for, which indeed pertains to Subject Matter Jurisdiction, can be raised at "[a]ny time", [c]annot" be waived by the appellant and the court shall not fail to take notice. Due to this error on the part of the trial court, the sentence must be vacated.

(3) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IV§2, and His Due Process Rights violated by the indictment for murders failure to properly and or sufficiently allege the "[t]ime" of the assault and not allege the "[t]ime" of death at all, in the body of the charging instrument, as "[t]ime" is recognized by law?

The appellant did not object to this defect and or error at the time of his trial and or before he gave his guilty plea, but the defect(s) and or error(s) serve to render the indictment(s) wholly invalid. Defects and or errors in an indictment that are of such a fundamental character as to render an indictment wholly invalid are not subject to waiver by the defendant, 41 Am.Jurs. 2d Indictments and Information §299(1968); State v. Munn supra. Subject to certain minor exceptions not present, the trial court is prohibited from enacting and or invoking the Subject Matter Jurisdictionary powers given to them to convict a defendant for an offense, when there is no indictment charging him with that offense when the jury is sworn, and or before he gives his guilty plea, State v. Beachum, 288 S.C. 325, 342 S.E.2d 597(1986).

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof

of facts, matters of common and general knowledge, Moss v. Aetna Life Ins Co. supra, ; State v. Broad River Power Co. supra.; 31 C.J.S. Evidence §§ 6 and 9; Federal Rules of Evidence, Rule 201(a).

This is also manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the constitutional rights of the party are compromised. A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings, (Black Law Dictionary 8th Edition).

The appellant humbly contends his 5th, 6th, 14th Amendment rights of the U.S. Constitution, as well as Article IV§2, and his Due Process rights were violated for the charge in question, because the charging instrument, in the body of the indictment does "[n]ot" state the "[e]xact" time of the allege assault, and do "[n]ot" allege any time of death at all since the allege victim(s) died over a week later. The indictment doesn't allege an exact time of assault and death as time is required by law, which is a necessary and requisite element of the offense of murder. For example, in State v. Rector, 158 S.C. 212, 155 S.E. 385(1930), the Supreme Court [s]pecifically and [u]nequivocally, with [c]larity and [p]articularity, stated in Haec [v]erba:

"The State must prove not only the assault and the death occurring from it, but also the "[t]ime" of the assault and the "[t]ime" of the death, as "[t]ime" is recognized by law. In addition the state must prove the place of the assault, and the place of death***".

The necessary elements of the crime "[m]ust" not only be proven before a person may be lawfully convicted, but they "[m]ust" be alleged in the body of the charging instrument, be passed upon by the grand jury, returned against the defendant in accordance to the constitutional rights of the accused. (Emphasis Added).

Inasmuch, it is the body of the indictment that is the [v]ital part of the charging instrument, State v. Tate, 345 S.C. 577, 549 S.E.2d 601(S.C.2001); and it "[c]annot" be so cryptic or the wording so loose and ambiguous as to fail to comply with the basic right of the accused to be fully informed as to the [c]ause and [n]ature of the accusation being leveled against him, which is one of the most basic fundamental and universally recognized rights of Due Process, Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572(1941); State v. Tabor, 262 S.C. 136, 141, 202 S.E.2d 852(1974)(holding that the state may not support a conviction *334 for an offense intended to be charged by relying upon the caption to the exclusion of the language contained within the body of the indictment).

Inasmuch, the statutory text of S.C.Code.Ann.§17-19-20 and S.C.Code.Ann.§17-19-30, also as a fact of "[W]ritten [L]aw", require that the "[t]ime" of the offense(s) be stated in the body of the charging instrument. The language in the body of the charging instrument of the indictment for murder in question alleges the assault occurred "ON OR ABOUT" October 2, 2007. Could they mean September 20th, 23rd, 25th, 29th, 31st, October 1st, 3rd, 4th, 6th, 7th? All of these dates are considered to be "ON OR ABOUT" October 2, 2007. There is no date at all listed for the actual death. Therefore, one could be made to believe the individual is still possibly alive and the allegations of death is something foreseen in the mythical future which there is no way possible the applicant could defend. This cannot be deemed as reasonable notice. Such creates an "Enigma" as to specifically what time and or date the indictment is alleging and creates an enigma as to what exactly the appellant is called upon to meet and defend. It is the appellant's position that this is "not" an exact "[t]ime" of assault and death as time is recognized by law.

In State v. Kennedy, (1a)(1845) 8 Rob.590, the court, in holding an indictment for murder bad, as not alleging the time and or place of death said: "The material fact in murder are the mortal stroke and the consequent death being a composite crime, and the death must appear upon the record and or face of the indictment to have occurred within one year and a day from the time when the mortal stroke was given. The averment, then of

each of these material facts, must, under the well established Rules of Criminal pleading, be accompanied by an allegation of a certain time and or place, to include not alleging "ON OR ABOUT" as it relates to time.

To amplify this proposition in State v. Rallo, 403 S.E.2d 653(1991), the court in relevant part stated [v]erbatim:

"It is true that the state need not prove the exact time and or date set forth in the indictment(s), unless "[t]ime" is an essential element of the offense, or is made a part of it", Id at 655.

In State v. Ham, 259 S.C. 118, 191 S.E.2d 13(S.C.1972). The South Carolina Supreme Court stated in Haec [v]erba:

"If" "[t]ime" is "[n]ot" of the essence or gist of the offense, the "[p]recise [t]ime" of which the offense is charged to have been committed is "[n]ot" material".

On the other side of the spectrum of this language, the "[p]recise [t]ime" at which the offense is said to have been committed "[i]s" material if time is of the essence or gist of the offense.

Inasmuch, to be "ON POINT", in State v. Pierce, 207 S.E.2d 414, which is a murder precedent, the indictment charges that the offense(s) and or crime(s) occurred on a certain date, and does not charge "ON OR ABOUT".

The trial court, state, and or prosecuting body, acting unjustly under the color of state law, has failed to adhere

to their own state laws, in violation of the appellant's substantial Federal Constitutional Rights of Due Process, serving to deny the appellant the Equal Protection of the laws against unjust prosecution, Screws v. United States supra; State v. Middleton supra; Eslinger v. Thompson supra; McLaughlin v. Florida supra; Jones v. State of Arkansas supra; Dubinka v. Judges of Superior Court of the State of California, for the County of Los Angeles supra; Dozier v. Loop Collage, City of Chicago supra; Hicks v. Oklahoma supra; Lugar v. Edmondson Oil Co. supra.

Hence the doctrine of "Stare Decisis Et non Quieta Movere", an indictment "[m]ust" properly set forth all the essential elements of the offense. By Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887(1974), it is well established and recognized under American Jurisprudence: That if an indictment fail to charge all the necessary elements, it fails to charge the offense. If it fails to charge the offense, such violates the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution, as well as Article IV§2 and his rights of Due Process. Thus the sentence and the conviction must be vacated, United States v. Cabrera-Teron, 168 F.3d 141(5th.Cir.1999); United States v. Pupo, 841 F.2d at 1239(4th.Cir.1988)(En banc) United States v. Hooker, 841 F.2d 1225(4th.Cir.1988).

(4) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IV§2, and his Due Process Rights violated, as well as Rules of Court, to include Rules of Criminal Procedure as well as the court lacking subject Matter Jurisdiction, and or was prohibited from enacting, and or invoking it's Subject Matter Jurisdictionary "powers", due to the "[p]rocedural [d]efect in that there was no "[w]ritten"(Emphasis added.) order of continuance obtained pursuant to Article V§4 of the South Carolina Constitution?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Moss v. Aetna Life Ins Co. supra; State v. Broad River Power Co. supra; 32 C.J.S. Evidence §§ 6 and 9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the constitutional and or Due Process Rights of the party are compromised. A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings, (Black Law Dictionary 8th Edition).

The appellant humbly contends, in pursuant to Article V54 of the South Carolina Constitution:

"IT IS ORDERED, that all criminal cases in the State of South Carolina "[s]hall" be disposed of within (180) days from the date of the defendant's arrest. Provided, however, the Circuit Court may continue a criminal case beyond the (180) days by "[w]ritten" order (Emphasis added), if the court determines that exceptional circumstances exist in the case. This order does not create and or define a right to a speedy trial (see S.C. Rules of Court 2003 Edition, page 652).

This order has never been rescinded by any subsequent legislation. Therefore it applys today. To make use of the holdings made in State v. Calebreth, pertaining to Rule 3(c) would be misplaced. Rule 3(c) is administrative. If the court would take notice of the bottom of the page 652 as it relates to this mandate, you will see that the administrative factors related to this mandate have been rescinded. Further there is another material and distinct difference between Rule 3(c) and this provision. Rule 3(c) is not tied to the provisions of the South Carolina Constitution. This Rule of Criminal Procedure is. This has absolutely nothing to do with a speedy trial issue. This is simply a matter of "Stare Decisis Et Non Quienta Movere", S.C. Rules of Court, S.C. Rules of Criminal Procedure and Due Process law. Once this provision has been tied to the S.C.

Constitution it's observance became mandatory by the provision of the S.C. Constitution contained therein.

S.C. Code Ann. §1-7-730 and S.C. Code Ann. §17-13-150 require that the prosecution and or prosecuting body "[s]hall" fulfill, and see that all duties, requirements, and Rules of Criminal Procedure related to Due Process and the Constitution are adhered to and completed within the court.

In order to understand the meaning of any statute or phrase of law, it is necessary to determine the meaning of the language as it is used in the particular context; Robinson v. Shell Oil Company, 117 S.Ct. 843 (1997). Article 12§2 utilizes the words "[s]hall provide, ...". In this context "[s]hall" is mandatory, see United States v. Meyers, 106 F.3d 936, 941 (C.A. 10 1997). In order to understand the meaning of any word, sentence or phrase, "[t]he cardinal Rule is that the words should be given their plain, and ordinary meaning and or interpretation", Seckinger v. The Vessel Excalibur, 483 S.R.2d 775 (S.C.App. 1997); also see United States v. Ron Pair Enterprises Inc., 109 S.Ct. 1026, 1030 (1989).

Article 1§23 of the South Carolina Constitution dictates:

"The provisions of the South Carolina Constitution shall be taken, deemed, and construed to be mandatory and or prohibitory and not merely, directory, except where made directory or permissive by it's own terms".

Article 12§2 of the South Carolina Constitution is clear and unambiguous, "[s]hall" is mandatory, State v. Carson 317 S.C. 430, 431, 454 S.E.2d 888, 889 (1995).

Therefore, it can be factually stated that not only by the appellant's Rights of Due Process, but also by the provision of Article V§4 of the South Carolina Constitution, it is mandatory that the appellant's Due Process matters be disposed of before the criminal court within (180) days of his arrest. If the court would take notice of the captioned side of the indictment you will see that the appellant was arrested on November 21, 2007. If the court would take notice of TTpp 3, Lns.1-11, the court will find that the trial did not commence until August 3, 2009. By the arrest date, this means that the appellant's Due Process matters should have been concluded by May 21, 2008. Yet they were not disposed of until August 5, 2009 over (455) days past the (180) days prescribed by the provisions of the South Carolina Constitution. There is no "[w]ritten" order of continuance filed with the Clerk of Court before the (180) day time period expired; or which was served on the appellant. Such an order by the appellant's Rights of Due Process "[c]annot" be obtained after the fact, it must be obtained before the (180) day time period expires. To go beyond the prescribed time period and or deadline without a "[w]ritten" (Emphasis added) order of continuance creates a "[p]rocedural [d]effect" which deprives the trial court of Subject Matter

Jurisdiction, and or the "[p]ower" and or "[a]bility" to enact and or invoke it's Subject Matter Jurisdictionary powers in compliance with Rules of Court and Due Process Law to adjudicate the appellant's trial and or accept the appellant's guilty plea. Again, the question is, despite the fact that the criminal court does have Subject Matter Jurisdiction to hear cases of this general class to which the proceedings in question belong. Do their egregious, blatant failure to be in compliance to certain essential, crucial "[J]urisdictional [p]rerequisites" or "[J]urisdictional [r]equisites" at the commencement of or at various phases of the Subject Matter Jurisdictionary action and or process before the court; do such egregious failure to be in compliance to these essential, crucial Jurisdictional prerequisites or Jurisdictional requisites at special phases of the Subject Matter Jurisdictionary process, halt, check, stop, constrain or arrest the continuance or action of the Subject Matter Jurisdictionary "[p]ower" before the court, that without a doubt they do indeed have. This is a new question of law or fact not answered by any of the courts in Gentry.

The trial court and or prosecuting body, acting unjustly under color of State Law, in blatant defiance to the Rules of Court, the provisions of the South Carolina Constitution, has again failed to be in compliance with their own State Laws in violation of the appellant's substantial Federal Constitutional Rights of Due Process.

Thus, such action serves to violate the appellant's rights under the Equal Protection of the laws clause subjecting to unjust prosecution, Screws v. United States supra, Dubinka v. Judges of Superior Court of the State of California, For the County of Los Angels supra; Jones v. State of Arkansas supra, Hicks v. Oklahoma supra, Dozier v. Loop Collage, City of Chicago supra; Lugar v. Edmondson Oil Co. supra.

Subject Matter Jurisdiction is the "[p]ower" to hear and determine cases of a general class to which the proceedings in question belong, Bell v. Monsanto Corp. supra. Inasmuch, Subject Matter Jurisdiction does not only cover and or involve whether or not the matter resides in a proper court of jurisdiction to hear and determine it. The court's "[p]ower" to hear and determine a case is also defined as the court's "[a]bility" to hear and determine a case. Thus, Subject Matter Jurisdiction also involves any issue that may "[a]ffect" and or "[h]inder" that "[p]ower" and or "[a]bility" to act in accordance to Rules of Court and Due Process Law. Such matters can be raised at any time, "[c]annot" be waived by the appellant and the court shall not fail to take notice, Mathis v. State supra; Brown v. State supra; State v. Browning supra; State v. Munn supra. Without a "[w]ritten" (Emphasis added) order of continuance filed with the Clerk of Court issued, the parties were prohibited from continuing the cause. Such deprives the court of Subject Matter Jurisdiction and or prohibits them from continuing to

enact and or invoke the Subject Matter Jurisdictionary powers that are given to them, to adjudicate the appellant's trial. Therefore the sentence and the conviction must be vacated. They procedurally defaulted on the cause.

(5) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment Rights of the U.S. Constitution violated, as well as Article IV§2, and Due Process Rights violated by the indictment for murder's failure to properly and or sufficiently appraise the appellant of the "[p]lace" of the death, in the body of the charging instrument, as "[p]lace is recognized by law?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Moss v. Aetna Life Ins. Co. supra; State v. Broad River Power Co. supra; 31 C.J.S. Evidence §§ 6 and 9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the constitutional Rights of the party are compromised. A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings, (Black law Dictionary 5th Edition).

The appellant did not object to these defects and or errors at the time of his trial and or before he gave his guilty plea, but the defects and or errors serve to render the indictment(s) wholly invalid. Defects and or errors in an indictment that are of such a fundamental character as to render an indictment wholly invalid are not subject to waiver by the appellant, 41 Am. Jurs. 2d Indictments and Information §299(1968); State v. Munn supra. Subject to certain minor exceptions not present, the trial court is prohibited from enacting and or invoking their Subject Matter Jurisdictionary powers to convict a defendant for an offense, when there is no indictment charging him with that offense when the jury is sworn, and or before he gives his guilty plea. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597(1986).

The appellant humbly avers, his 5th, 6th, 14th Amendment Rights of the U.S. Constitution, as well as Article IV §2, and his Due Process Rights were violated for the charge in question, because the charging instrument, in the body of the indictment does "[n]ot state the place of death as "[p]lace" is recognized by law which is a necessary and requisites element for the offense of murder. For example, in State v. Rector, 153 S.C. 212, 155 S.E. 385(1930) The Supreme Court [s]pecially and [u]nequivocally with [c]larity and [p]articularity, stated in Haec [v]erba:

"The state "[m]ust" prove not only the assault and the death occurring from it, but also the time of the assault and the time of the death, as time is recognized by law. In addition the state "[m]ust" prove the "[p]lace" of the assault and the "[p]lace" of death***".

These necessary elements of the crime "[m]ust" not only be proven before a person may be lawfully convicted, but they "[m]ust" be alleged in the body of the charging instrument, be passed upon by the grand jury, returned against the defendant in accordance to the constitutional rights of the accused (Emphasis added).

Inasmuch, it is the body of the indictment that is the [v]ital part of the charging instrument, State v. Tate supra, and it "[c]annot" be so cryptic or the wording so loose and ambiguous as to fail to comply with the basic right of the accused to be fully informed as to the "[c]ause and [n]ature" of the accusation being leveled against him, which is one of the most basic, fundamental and universally recognized rights of Due Process, Smith v. O'Grady supra; State v. Tabor supra, (holding that the state may not support a conviction*** For an offense intended to be charged by relying upon the caption to the exclusion of the language contained within the body of the indictment).

Inasmuch, the statutory text of S.C.Code,Ann.§17-19-20 and S.C.Code,Ann.§17-19-30, also as a fact of "[w]ritten [l]aw", require that the place of the offense(s) be stated in the body of the charging instrument. The language in the body of the charging instrument of the indictment(s) in question allege a county for the place of the assault, but it doesn't allege a place of death at all. The allege victim did not die in Sumter County. It is the appellant's position that Sumter County is not the place where the allege victim expired as noted by TTpp 67, Lns22-25; TTpp 68, Lns1-8.

The place of death is a material allegation in an indictment for homicide under a constitutional provision giving accused the right to demand the nature and cause of the accusation against him. Now if we understand the states contention in an instant case, it is that Chief Justice Fuller's decision is to be distinguished from the law of our state, because the provision of our state as to jurisdiction, to which we had previously referred; but an examination of Chief Justice Fuller's decision disclose that there is the same provision of the Federal statutes with reference to the judicial districts of the several states of the United States that there is in our state with reference to counties, Brockway v. State, -Ind- 138 M.E. 88; Ball v. United States 140 U.S. 118, 35 L.Ed. 377, 11 Sup. Ct. Rep. 761; State v. Coleman, 17 S.C. 473; State v Blakeney, 33 S.C. 111, 11 S.E. 637

In State v. Kennedy, (La) (1845) 8 Rob 590, the court, in holding an indictment for murder bad, as not alleging the place of death said: "The material facts in murder are the mortal stroke and the consequent death; and the death must appear upon the record and on the face of the indictment to have occurred within one year and a day from the time when the mortal stroke was given. The averment, then, of each of these material facts, must, under the well established Rules of Criminal pleading, be accompanied by an allegation of a certain time and place of the assault and death."

The use of the holdings made in State v. Gentry would be misplaced in this case because the appellant is not arguing this issue merely pursuant to indictment defects, but also pursuant to violation of the statutory provisions. The Statutes relied on for this purpose is the [Act of 1859 Stat. 822], incorporated into the general [Statutes Chapt. 128 Sections 19, 20 and 21], as amended by the Act of December 21st, 1880, (17 Stat. 336). There are four classes embraced within the statutory provisions: 1st- where the injuries causing the death is inflicted within the limits of this state and the death ensues beyond the limits of the state. 2nd- where the injury is inflicted by a person who, at the time, is within the limits of the state, upon a person who, at the time, is beyond the limits of the state or visa versa, where the injuries causing

the death is inflicted by a person who at the time, is beyond the limits of the state but the death ensues within the limits of the state. 3rd- where the injury causing death is inflicted by a person who, at the time, is within the bounds of one county, upon a person who, at the time, is within the limits of another county. 4th- where the injury causing death is inflicted in one county, and the death ensues therefrom in another county other than where the injuries causing it were inflicted, and therefore an indictment, in such cases "[m]ust" be framed in accordance with the established Rules of Criminal proceedings and or pleadings, although unaffected by these statutory provisions.

The indictment in this case now under consideration "[c]annot" be regarded as framed under any of these statutory provisions, for there is no rule better settled than that, in framing an indictment under a statute that care [m]ust be taken to follow the terms of the statute closely, in order that the indictment may show on it's face that the offense charged comes within the class provided for by the statute, and in this case the indictment does not show that the offense(s) charged come within anyone of the four classes provided for by these statutes. There is an allegation that the injuries causing the death were inflicted in Sumter County upon the decessed while in that county, but there is no allegation as to where the death ensued from such injuries- whether within or without the state, or whether

within or without the county of Sumter. This is not merely an issue arguing Subject Matter Jurisdiction by way of indictment defects. It's the appellant position that the wording of the indictment is so cryptic, the wording so loose that Jurisdiction over the matter, by the language of the indictment may possibly reside in another state. Not only did the Criminal Court by this defect ailed to establish their power of Jurisdiction over the Corpus delecti by county, Jurisdiction can possibly lie in Sumter county of another state. Inasmuch, Ipso facto, an indictment for murder that does not state where the decessed died is held "[b]ad" as well at common law as under those statutes that provide for cases where the injury was inflicted in one Jurisdiction and the death occurred in another. An indictment under the statute "[m]ust" clearly follow the terms of the statute, State v. Coleman, 17 S.C. 473 citing State v. Burgabie, 51 S.C. 291, 28 S.E. 937; State v. Stewart, 26 S.C. 127, 1 S.C. 468; State v. Turner, 82 S.C. 282, 64 S.E. 424.

The appellant further contends, that a panel of jurors that embodied the Grand jury upon their Oaths aforesaid, stated, that the victim died on or about October 2, 2007 in Sumter County. This is a lie. This is a falsified document utilized to bring a false allegation against the appellant which must be quashed. Falsified documents cannot be permitted to be used. It is universally recognized that every oath [m]ust be founded upon

constitutional rights of the accused. The Act in question was not intended to reach thus far with the indictment being defective in this manner and no trial should have commenced in light of these facts. It would be an error of law not to dismiss and arrest the judgment especially since the defect cannot be repaired by amendment, State v. Blakeney, 33 S.C. 111, 11 S.E. 637 infra State v. Stewart, 26 S.C. 125, 1 S.E. 468.

It is therefore determined, that even in face of the statute referred to, it is still absolutely essential in this state in an indictment for murder, to allege the place of death of the decess. Later cases in a somewhat exhaustive research and involving similiar question held not sufficient justification to overthrow decision regarding criminal practice standing unchallenged for well over (100) years. The decision made in the Blakeney case bears upon the issue involved in this matter under review here; we find (4) distinct holdings made in that decision: (1) That the statutes simplifying indictments, and permitting the amendment thereof have not had the effect of doing away with the necessity of the indictment containing all the essential allegations of the offense sought to be charged; (2) that those statutes do not authorize the amendment of the indictment as to an essential allegation; (3) that in an indictment for murder, the place of death of the decess party is an essential allegation; (4) that the allegation as to the

place of death is so essential that it cannot be amended. Yet you have constructive amendment of the indictment throughout the proceedings. To strengthen this view and establish these principles of law as accepted authority, we are reminded in at least three other cases, the Blakeney case, on certain holdings therein, has been cited with approval, see State v. Faile, 43 S.C. 52, 20 S.E. 798; State v. Assman, 46 S.C. 554, 24 S.E. 673; State v. McCoy, 98 S.C. 133, 82 S.E. 280.

There is no question that the matters related to the Coleman and Blakeney case do pertain to the issue at hand. We observed particularly that in both the Coleman and the Blakeney case, the party who was killed died in the same county where the mortal blow was given as alleged in the indictment. Such is not the fact here. According to proof submitted Sub-judice the party died in a place other than where the mortal blow was given. But the question is not one that relates to jurisdiction alone. It is more than this. The autopsy in this case must be ordered by the coroner of the county where the death ensues. The affidants and or indictment must show jurisdiction. It must also charge the offense with sufficient certainty that the court may know what judgment to pronounce, and with such certainty that it may be pleaded in a bar of a subsequent prosecution for the same offense, and further than this, with such particularity and certainty as to time and place of material

averments that the defendant may prepare himself, and get his witnesses, to meet the charge. Thus, it seems the question is not just one that relates to Jurisdiction alone. The indictment in this case does worse than fail to charge the place of death, for it lays a false place. The power to hear and determine the case can possibly lie in Sumter County of another state. The indictment to a great extent destroys the identity of the "Corpus delicti". The accused is entitled to be informed of the nature of the accusation against him, and the Jurisdiction should not be exercised when there is a doubt as the authority and or power to exercise it. The indictment is at fatal variance with the proof of the allegations, Ball v. United states, 140 U.S. 118, 11 S.Ct. 761, 35 L.Ed. 377; State v. Platt, 154 S.C. 1, 151 S.E. 206.

The trial court and or prosecuting body acting unjustly under color of state law again has failed to adhere to their own state laws in violation of the appellant's substantial Federal constitutional rights, to include his rights of Due Process, serving to deny the appellant the Equal Protection of the laws against unjust prosecution, Screws v. United States supra; Dubinka v. Judges of Superior Court of the State of California, for the County of Los Angels; supra) Jones v. State of Arkansas supra; Hicks v. Oklahoma supra; Dozier v. Loop Collage City of Chicago supra; Lugar v. Edmondson Oil Co. supra.

Therefore the sentence and conviction must be vacated.

(6) Did the trial court err, and was the appellant's 5th, 6th, 14th Amendment rights of the U.S. Constitution violated, as well as Article IV§2, and his Due Process Rights violated, by the trial court and or prosecuting body constructively amending the indictment(s) at the appellant's trial?

The appellant did not object to these defects and or errors at the time of his trial and or before he gave his guilty plea, but the defects and or errors serve to render the indictment(s) wholly invalid. Defects and or errors in an indictment that are of such a fundamental character as to render an indictment wholly invalid are not subject to waiver by the defendant, 41 Am. Jurs.2d Indictments and Information §299(1968); State v. Nunn supra.

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Hoss v. Aetna Life Ins Co. supra; State v. Broad River Power Co. supra; 31 C.J.S. Evidence §§ 6 and 9; Federal Rules of Evidence, Rule 201(a)

It is the body of the indictment which is the vital part of the charging instrument, State v. Tabory supra and it cannot be so cryptic or wording so loose and ambiguous as to fail to comply with the basic right of the accused to be fully informed as to the cause and nature of the accusation being leveled against him, which is one of his most basic fundamental and universally recognized rights of Due Process, Smith v. O'Grady supra; State v. Tabory supra. Reliance upon a caption to bolster a fatally deficient indictment is therefore contrary to the constitutional mandate that for most offenses, a defendant may only be required to answer an indictment of a grand jury that is deemed good, S.C. Const. Article I §11: Cf State v. Tabory supra (holding that the state may not support a conviction*334 for an offense intended to be charged by relying upon the caption to the exclusion of the language contained within the body of the indictment).

Insomuch, the indictment for murder does not properly and or sufficiently allege the time of the assault and or death,, in fact the time of death is not alleged at all. The same indictment does not properly and or sufficiently allege the place of the assault and or death, in fact it does not list the place of death at all. The aforementioned essential allegations of time and place must be alleged in the body of the charging instrument. To not allege these crucial allegations

in the body of the charging instrument returned against the accused, having them passed upon by the grand jury, then there after the trial court, and or prosecuting body add these material averments in one form or the other within the proceedings, and allow the trial to go forward where such was not passed upon by the grand jury, is constructive amendment of the indictment(s). No one can say what was in the mind of the grand jury, State v. Tate supra ; State v. Rector supra; State v. Tabor supra; State v. Kennedy supra; State v. Rallo supra; State v. Ham supra; State v. Pierce supra ; Hamling v. United States supra; United States v. Cabera-Teron supra; United States v. Pupo supra; United States v. Hooker supra; State v. Coleman supra; State v. Blakeney supra; State v. Platt supra; Brockway v. State supra; Ball v. United states supra.

In regard to the constitutional structural error and or defect in the indictments, as constructed, taking away the presumption of innocence and automatically shifting the burden of persuasion. According to the finding of the grand jury the appellant is already found guilty and convicted. The grand jury does not have the power or authority by State or Federal Constitution to convict a defendant. This is an egregious violation of their shielding function. For the grand jury to produce indictments that state, adjudicate and or allege that the defendant is not only guilty of the crime(s) charged, to include the "Mens Rea" elements related to the offenses; then thereafter, the court

alters the allegations of the indictment(s), to include the "Mens Rea" elements, and charges that the defendant is innocent until proven guilty, is constructive amendment of the indictment(s), and changes the very nature of the allegations returned by the grand jury. This creates an instant double jeopardy issue. To accept a guilty plea or take a defendant to trial on charges in an indictment for which he has already been found guilty of, violates Due Process and is double jeopardy. No one can say what was in the mind of the grand jury, which means this is an error which can only be corrected by the grand jury and not the trial court. This further serves to validate that the structural constitutional error and or defect affect the framework of the proceedings and cannot be viewed as harmless, because the court must constructively amend the indictments on the Mean Rea elements of the offense(s) to correct, or in an effort to correct the structural constitutional error; Sandstrom v. Montana supra; Norissette supra; United States v. Gypsum supra; Humanik v. Beyer supra; United States v. Clemens supra; Martin v. Ohio supra; Robinson v. Arvonio supra; United States v. Briggs supra; United States v. Chadwick supra; Compare Pieirson v. Ray supra; Jenkins v. McKeithen supra; Branzburg v. Hayes supra.

Constructive amendment of an indictment is a per se violation of the provisions of the 5th amendment, when such amendment

affects an essential element of the offense. Such a violation requires reversal of the conviction, even without a showing of prejudice, but once prejudice is clearly shown, the sentence and conviction must be vacated, State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309; Article IV§2 U.S. Const.; United States v. Coyne 4 F.3d 100(2nd.Cir.1993); United States v. Morgenstien, 933 F.2d 1108,1115(2nd.Cir.1991); Wilson v. Lindler, 995 F.2d 1256; Strone v. United States, 361 U.S. 212(1960); Gaither v. United States, 413 F.2d 1061(D.C.Cir.1969); Douglas v. State of Alabama, 380 U.S. 417, 85 S.Ct.1074(1965).

Inasmuch, constructive amendment did occur and the unconstitutional) amendment prejudiced the appellant at his proceeding leading to an unfair and partial trial depriving the appellant of reasonable notice and of his right to have material averments properly passed upon by the grand jury in egregious violation of the appellant's substantial rights of Due Process. This occurred when the charging terms of the indictment were altered literally and or constructively in the manner aforementioned. S.C.Code.ann.§17-19-100(1985) Permits amendments to an indictment provided the nature of the offense charged is [n]ot changed. If (A) there is a defect in form in any indictment, or (B) on the trial of any case there shall appear to be any variance between the allegations of the indictment and evidence offered in proof thereof, the court before which the trial may be had

may amend the indictment(s) according to the proof, if the amendment be because of variance, if such amendment does not change the "[n]ature" of the offense charged. After such amendment the trial and or hearing should proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as to surprise the defendant in which case the defendant shall be entitle upon demand to a continuance of the cause.

A variance between pleadings and proof is [n]ot material where matter alleged is [n]ot an [e]lement of the offense, State v. Hiott, 276 S.E.2d 163.

On the other side of the spectrum of this language, a variance between pleadings and proof "[i]s" material where the matter alleged "[i]s" an "[e]lement" of the offense; and furthermore such an amendment to correct this variance "[c]annot" be allowed if such an amendment changes the [n]ature of the offense, Hope v. State, 328 S.C. 78, 492 S.E.2d 76; State v. Granger, 507 S.E.2d 322(S.C.1998). Once the nature of the elements became altered in the manner aforementioned, the indictment(s) were no longer to be considered the indictment(s) returned against the appellant. A defendant is entitled to be tried and or give his guilty plea on charges that are properly set forth in an indictment and such properly set forth charges must be passed upon by the grand jury, S.C.Code.Ann.§17-19-10(1976).

The true test of the sufficiency of an indictment is whether or not it contains the necessary elements of the offense intended to be charged and sufficiently appraise the defendant of what he is called upon to meet. By the language and or charge of the indictments, as constructed, it informs the appellant that he is called upon to meet the burden of production on the critical elements of dispute related to the offenses. By the mandates of Due Process law, the appellant is not, by State or Federal Constitution; nor by State or Federal law, called upon to meet the burden of production on the critical elements of dispute related to the offenses, Brown v. State supra; Mathis v. State supra; Francis v. Franklin supra; United States v. Abrams supra; Martin v. Ohio supra; Winship supra; Mallaney v. Wilbur supra.

What's worse than this, the indictments not only by their very nature already, prematurely convict the appellant of all charges made and or laid before the court, denying the appellant of the presumption of innocence, but it also creates this egregious, blatant, outrageous violation of Due Process, where the indictments by the structural constitutional error and or defect deny the appellant the right to a trial by a jury of One's peers; deny's the appellant of the right to confront his accusers or to cross examine witnesses; deny's the appellant the right to call witnesses in his defense or to present expert

testimony; deny's the appellant the right to take the stand and testify at his proceedings; deny's the appellant the right to place forth evidence that would vindicate him at trial; deny's the appellant the right of counsel of choice, way before a true jury was sworn, not this illegal trial jury in the form of the grand jury, or way before a trial commenced satisfying these essential constitutional requirements of Due Process law, or way before he voluntarily, freely or intelligently gave them up if we are dealing with a guilty plea, and way before the court ever appointed legal counsel to assist the defendant. With the existance of the structural constitutional error and or defect the court has attempted to close the barn door far after the time the horses have already been released and or escape. The grand jury being duly sworn, in clear violation of their shielding function, has taken upon themselves the role of the trial jury, and has already convicted the appellant of the crime charged. To permit the appellant to obtain counsel of choice after this injustice, or to appoint counsel after the appellant has already been convicted by the grand jury and deny the appellant the previous mentioned constitutional rights involve deprivation of constitutional protection so basic and so fundamental that in their absence no criminal trial and or proceeding can be deemed reliable as a vehicle for the determination of guilt or innocence and no criminal punishment can be regarded as fundamentally fair, because such action has

criminally stripped the appellant of his inalienable rights of Due Process, also in violation of the taking clause of the 5th amendment. The state acting unjustly under color of state law, causing extreme prejudice to the appellant's proceedings has denied the appellant the Equal Protection of the laws. Since the appellant guilt was already unjustly adjudicated by the structural constitutional error and or defect; this serves to make any other subsequent proceedings initiated [v]oid, [n]ulified [a]rrested and or a violation of the 5th amendment and the appellant's rights of Due Process, to include his right to double jeopardy protection. How could the trial court be allowed and or permitted to have a trial and or accept a guilty plea for an offense the grand jury upon their oath already found the appellant guilty of? The structural constitutional error and or defect does affect the framework of the proceedings and cannot be deemed harmless; State v. Guthrie 352 S.C. 103, 572 S.E.2d 309; Vines v. United States 28 F.3d 1123 Crim.law 1163(1),1156(1); State v. Reddick 348 S.C. 631,635, 560 S.E.2d 441,443(Ct.App 2002) State v. Padgett, 354 S.C. 268 271, 530 S.E.2d 159,161(Ct.App.2003) State v. Honey, 344 S.C. 95,97, 544 S.E.2d 30,36(2001); Carter v. State, 329 S.C. 355,362, 495 S.E.2d 773,777(1998); 28 U.S.C. §1654; Turner v. American Bar Ass'n D.C. Tex. 1975, 407 F.Supp 451 Aff'd 539 F.2d 715, Aff'd 542 F.2d 56; Ferretta v. California, 422 U.S. at 835n. 46, 95 S.Ct. at 2541, 45 L.Ed.2d 562, 592(1975) Wiggins v. Estelle

681 F.2d 266(1982); United States v. Gonzales-Lopez, 548 U.S.-
 2006; Chaplin & Brysdale Chartered v. United States, 491 U.S.
 617,624-625(1989); Rodriguez v. Chandler, 382 F.3d 670,675(C.A.7
 2004) Cert. denied 543 U.S. 1156(2205); Stirene v. United States,
supra; United States v. Silverman, 30 F.2d 106,110(2nd.Cir.
 listing these functions modified 439 F.2d 198(2nd.Cir.1970).
 91 S.Ct. 1619(1971); Martin v. Ohio supra; Francis v. Franklin
supra; Mathis v. State supra; Brown v. State supra; United States
v. Abrams supra.

The requirement of the indictment(s) limit and constrain the
 Subject Matter Jurisdictionary "power" of both the prosecution
 and the court, by limiting what can be presented at trial,
 conviction and sentencing. United States v. Promise, 255 F.3d
 150(4th.Cir.2001); State v. Guthrie supra.. It is the command
 of the United States Constitution, that anything to the contrary
 is notwithstanding, (Article IVS2).

The state and or prosecuting body, acting unjustly under color
 of state law, has failed to adhere to their own state laws,
 in violation, egregious violation of the appellant's Federal
 Constitutional rights serving to deny the appellant the Equal
 Protection of the laws against unjust prosecution, Screws v.
United States supra; Bubinka v. Judges of Suprerier Court of
the State of California, or the County o Los Angels supra;
Jones v. State o Arkansas supra; Hicks v. Oklahoma supra;

Dezner v. Loop Collage, City of Chicago supra; Lugar v. Edmondson Oil Co. supra.

In Wilson v. Lindler, 995 F.2d at 1256, it was held that constructive amendment of an indictment, sometimes referred to as a fatal variance, denies a criminal defendant the fundamental guarantee of notice of the charges pending against them. This right is safely guarded and embodied within the 6th Amendment, the 5th Amendment Indictment Clause and the appellant's 14th Amendment rights of Due Process, as well as the Appellant's rights to Equal Protection of the laws against unjust prosecution and these requirements must be adhere to and not denied. Therefore, due to the enormous amount of prejudice experienced by the appellant the sentence and conviction must be vacated.

(7) Did the trial court err, and was the appellant's 5th. 6th. 14th. Amendment rights of the U.S. Constitution violated, as well as Article IVS2, and his Due Process rights violated, by the trial court allowing testimony by various witnesses to be entered into the court record, and or allowing their statements related thereto to be entered as evidence in the case, when there was no evidence adduced at trial that they were given a copy of the statements the time they made it, nor was there given to them a copy of a receipt for the taking thereof?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Moss v. Aetna Life Ins. Co. supra; State v. Broad River Power Co. supra; 31 C.J.S. Evidence §6 and 9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the constitutional rights of the party are compromised. A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings, (Black Law Dictionary 8th. Edition).

S.C.Code.Ann. §1-7-730 and S.C.Code.Ann. §17-13-150, require that the prosecuting body "[s]hall" fulfill, and see that all duties, requirements and Rules of Criminal Procedure related to Due Process and or the State or Federal Constitution are adhere to and completed within the court(s).

So the law is written "ITA LEX SCRIPTA EST", S.C.Code.Ann. §19-1-80 states [v]erbatim:

"Conditions on examinations of witnesses in criminal proceedings concerning written statement(s) made to public employee(s)-no witness in any preliminary hearing or in any criminal judicial proceeding of any kind or nature, shall be examined or cross-

examined by any examiner, solicitor, lawyer or prosecuting officer concerning a written statement formerly made or given to any person employed by this state, or any county, city, or municipality thereof, or any part of any such government body, unless it first shown that at the time of the making of the statement the witness was given an exact copy, and that before any examination or cross-examination the witness was given a copy of the statement and allowed a reasonable time in which to read it, and the witness signed a receipt taken therefor, State v. Motes, (S.C.1975) 215 S.E.2d 19; State v. Steadman, 257 S.C. 528, 186 S.E.2d 712(1972)

S.C.Code.Ann.§19-1-90 state [v]erbatim:

"Admissability in criminal proceedings of written statements made to public employee--unless the provisions of S.C.Code.Ann. §§8-15-50 and S.C.Code.Ann.§19-1-80 have been complied with, no statement such as referred to in those sections shall be admissable into evidence in any case, nor shall any reference be made to it in the trial of any case."

It is conspicuously clear that the witnesses Citris Davis, Darrel Dawkins, Lakita McGee, Horace Michael, Quiten Ball, Brandon Taylor, Sebastian Jenkins, Barry Lowery and Frederick Owens did make mostly written and some oral statements at the time of the incident or some time afer, Officer/Detective Lyons indisputably acknowledge and testified they were indeed

statements. The provisions of S.C.Code.Ann. §§19-1-80, 8-15-50, 19-1-90 are clear. It was his duty to follow the provisions of the statute when it comes to taking statements from witnesses. This violates the appellant's 6th. Amendment right to a fair and impartial trial. Those statements he failed to obtain were crucial and necessary for purposes of impeachment to show any inconsistencies between the statements and the witnesses testimony at trial. This deficiency on the part of the state actors extremely prejudice the appellant violating his substantial rights of Due Process. None of the remainder of the witnesses who did give their statements in writting were in compliance to the provisions of the statutes. In order for the statements made by the allege witnesses, or any reference or examination, cross or direct, related thereto to be admissable into evidence at trial, an exact copy of those statements "[m]ust" be given to the specific parties at the time of their making such statements, and a receipt "[m]ust" be signed and given for the taking thereof. Such specifications and or acts "[m]ust" be adduced and properly made a part of the court record. There was "[n]o" evidence adduced at trial that would serve to indicate that the witnesses were given a copy of their statements the time they were made, nor is there any indication sub-judice that show any of the parties or witnesses signed a receipt for

the taking therefor. It is perspicuous that testimony and evidence of the statements, and the incidentals contained therein, were indeed made a part of the record, see testimony of witnesses Davis Dawkins, McGee, Ball, Taylor, Jenkins, Lowery, Owens, and Detective Lyons, TTpp. 150, Lns.9-25, TTpp. 153, Lns.20-25; TTpp. 40; TTpp. 188, Lns.8-25; TTpp. 189, Lns. 1-10; TTpp. 191, Lns.15-21; TTpp. 371, Lns.1-4; TTpp. 159, Lns. 16-25; TTpp. 225, Lns.11-25; TTpp.226, Lns.1-25; TTpp.227, Lns. 1-13; TTpp.257, Lns.7-11; TTpp.264, Lns.21-25; TTpp.265, Lns.21-25; TTpp.273, Lns.1-20; TTpp.270, Lns.8-25; TTpp.284, Lns.11-25; TTpp.285, Lns.1-25 and soforth.

The state or county officials failed in their duty to reduce the statements to writting for many of the witnesses for no other reason than derilection of duty in violation of my right to impeach these witnesses, and the others were not given copies of the statements the time they made them nor did they signa receipt for the taking therefor, which actions that stand in defiance to the applicable statutes and Due Process law. This issue is also based upon the principle that defendants are to be given a meaningful opportunity to present a complete defense.

To protect this right the United State Supreme Court has developed, "what might loosely be called the area of constitutionally guaranteed access to evidence," United States v. Valenzuela-Bernal, 458 U.S. 858,867, 102 S.Ct. 3440, 73 L.Ed.2d 1193,1203(1982).

In South Carolina, under Rule 608(c), of Rules of Crim. Pro. Evidence of character, conduct, and bias of witnesses state in haec [v]erba:

"Evidence of bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witnesses or by other evidence otherwise adduced."

In the case of United States v Bagley, 105 S.Ct. 3375, the prosecution failed to disclose evidence that the defense might have used to impeach the government's witnesses by showing bias, contradictions or perverted interest. The court stated that impeachment evidence as well as exculpatory evidence, falls within the Brady Rule. Such evidence is evidence favorable to the accused, so that if disclosed, and used effectively, it may make the difference between conviction and acquittal, but the matter is worse than this. You have the state actors conspiring under color of state law not being in compliance to the statutes to protect their witnesses from evidence that would have been used to impeach them in violation of the appellant's 6th. Amendment rights, serving to deny the appellant the Equal Protection of the laws against unjust prosecution by their blatant failure to be in compliance to their own state laws. Therefore, any questioning, examination, cross or direct pertaining to these crucial statements, to include their failure to reduce such statements in writting purposely, maliciously

done, thereafter such testimony being introduced into evidence, any reference made to them in any manner by and in the record sub-judice [m]ust be deemed inadmissable and stricken from the court record in fundamental fairness to the appellant and his substantial rights of Due Process. The prosecution and law enforcement officers failed to adduce any proof that show they were in compliance to this strict mandate of Due Process Law. Thus the appellant motions for a mistrial and or new trial to correct this egregious miscarriage of justice, Brady v. Maryland, 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215(1963); United States v. Augurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342(1976); State v. Jackson, 396 S.E.2d 101(S.C.1990); Giglio v. United States, 405 U.S. 150,154, 92 S.Ct. 763, 31 L.Ed.2d 104(1972); Napue v. Illinois, 360 U.S. 264,269, 79 S.Ct. 1173,1177(1959); Screws v. United States supra; State v. Middleton supra; Eslinger v. Thompson supra; McLaughlin v. Florida supra; Dubinka v. Judges of Superior Court of the State of California, For the County of Los Angels supra; Jones v. State of Arkansas supra; Hicks v. Oklahoma supra; Dozier v. Loop Collage, City of Chicago supra; Lugar v. Edmondson Oil Co. Supra.

(8) Did the S.C. Supreme Court in State v. Gentry supra err, and abused their discretionary power, and in such, the trial court did err, and lacked Subject Matter Jurisdiction, and or was prohibited from enacting, invoking and or continuing it's Subject Matter Jurisdictionary "[p]owers", due to the indictment defects and or errors contained and argued within this document, in violation of the appellant's 5th, 6th, 14th Amendment rights of the U.S. Constitution as well as Article IV §2 and the laws of Due Process?

The appellant did not object to these indictment defects and or errors at the time of his trial and or plea hearing, but the defects and or errors serve to render the indictment(s) wholly invalid. Defects and or errors in an indictment that are of such a fundamental character as to render an indictment wholly invalid are not subject to waiver by the defendant; which enhances the egregious error and abuse of discretion on the part of the Gentry court, 41 Am. Jur's. 2d Indictments and Information §299(1968); State v. Munn supra.

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Moss v. Aetna Life Ins. Co. supra; State v. Broad River Power Co. supra; 31 C.J.S. Evidence §§ 6 and 9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest constitutional error. An error on the part of the South Carolina Supreme Court that has identifiably negative impact on all the proceedings, criminal, in the state to such a degree that the constitutional rights of all defendants are compromised. A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings, (Black Law Dictionary 8th. Edition), especially in light of the fact that the court's decision effect all inmates within the state.

The appellant contends, that the indictment(s) do "[n]ot" properly and sufficiently appraised the appellant of the "[c]ause and [n]ature" of the accusation or properly and or sufficiently appraise the appellant of what he must prepare himself to meet and defend, because the indictment for murder does "[n]ot" properly and or sufficiently appraise the appellant of the time of assault and or death, not the place of assault or death as time and place is recognized by law. The appellant further contends, that the indictment(s) do [n]ot properly and or sufficiently appraise the appellant of the "[c]ause and [n]ature" of the accusation, or of what he is called upon to meet and defend, because the structural constitutional error, language and or charge embodied within the indictment(s), indicated and or imply to the appellant, that the burden of production belongs to the appellant and not to the state. By such they also violate

S.C.Code.Ann. §17-19-10 and S.C.Code.Ann. §17-19-20. The language and or charge in the indictment(s) indicate to the appellant that he is called upon to meet the burden of production on the crucial elements of dispute, in violation of the appellant's 6th. Amendment rights, the relevant statutes and Due Process Law. They violate the appellant's 5th Amendment right to double jeopardy protection, because they inform the appellant that for a second time he is made to plea or go to trial on a prior conviction for the same offense which infringe upon the appellant's 14th Amendment rights to Equal Protection of the Laws, against unjust prosecution. Due to the structural constitutional error and or defect in the construction of the indictment(s) they do "[n]ot" sufficiently, properly, or fully appraise the appellant of the cause and nature of the accusation being brought against him, or of what he is called upon to meet or defend, Mathis v. State supra; Brown v. State supra; State v. Browning supra; State v. Munn supra.

Perhaps the court(s) of South Carolina would contend that Subject Matter Jurisdiction, and the sufficiency of an indictment are, and have been combined in the various cited cases, that the indictment is merely a "notice document", and that Subject Matter Jurisdiction is the court's "[p]ower" to hear and determine a matter, and each should be viewed as separate and distinct from one another, and the insufficiency of an indictment

does "[n]ot" take away from or "[a]ffect" and or "[h]inder" a "[c]riminal" court's "[p]ower" and or "[a]bility" to hear this general class of case, to which the proceedings in question belong, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 495(S.C.2005) citing United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860(2002); State v. Parkhurst, 845 S.W.2d 31(Mo.1992). The court(s) in those case are in error, and they have abused their discretionary powers in their determination of this matter. An abuse of discretion occurs when the court(s) are controlled by some error of law, or when the order based upon findings of fact is without evidentiary support or fact, Sharpes v. Sharpes, 535 B.E.2d 913, 342 S.C. 71(2000).

The state of South Carolina, by this ludicrous piece of legislation, in an egregious abuse of discretionary power, acting unjustly under color of "[state law]", in defiance to fundamental fairness and judicial integrity in violation of the appellant's federal constitution rights of Due Process, has either altered, amend, modified, and or deleted, and or diminished, and or eradicated, just about every single right and privilege secured and protected by the 5th., 6th., 14th., Amendments of the U.S. Constitution as well as the South Carolina Constitution, as it pertains to the requirements and or use of an indictment in criminal proceedings, in blatant defiance

to the appellant's rights to Equal Protection of the laws, Screws v. United State supra; State v. Middleton supra; Eslinger v. Thompson supra; McLaughlin v. Florida supra; Dubinka v. Judges of Superior Court of the State of California For the County of Los Angels supra; Jones v. State of Arkansas supra; Dozier v. Loop Collage City of Chicago supra; Hicks v. Oklahoma supra; Lugar v. Edmondson Oil Co. supra.

Insomuch, the 5th. Amendment Indictment Clause has not been held applicable to the states, or Federal concept of a grand jury binding on the Federal courts under the 5th. Amendment are obligatory to the states. Nevertheless by their own state constitution, the state of South Carolina adopted the Federal provisions, requirements, standards, and mandates pertaining to the use of an indictment. In further resolving the conflict, the Federal courts have held by the "Bill of Rights", many rights guaranteed by the first (8) amendments of the United States Constitution, have been made applicable to the several states through the Due Process Clause, as well as have been protected against state action by same said Due Process Clause of the 14th. Amendment and the Supramacy Clause of Art. 6cl 2, see the South Carolina Constitution; Ex Parte Bain, 121 U.S. 1(1887); Costello v. United States, 350 U.S. 359; Russell v. United States 369 U.S. 749, 82 S.Ct. 1038(1962); Woods v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569(1962); Frisbee v. United States 157 U.S. 160, 15 S.Ct. 586, 39 L.Ed. 652(1895); Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed.(1906);

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232(1884); Powell v. State of Alabama, 287 U.S. 45 67, 535 S.Ct. 55, 63, 77 L.Ed. 682(1948); Gideon v. Wainwright 372 U.S. 335 342, 83 S.Ct. 792, 796, 4 L.Ed.2d 799(1963).

Yes, the indictment is a "notice document", but being a "notice document", is only one of the many purposes and functions the indictment was created for. The Honorable Judge Pleconnes, in the Gentry court, was the only one with insight enough to see clear to the truth of this matter in part.

Yes, Subject Matter Jurisdiction is the "[p]ower" to hear and determine cases of a general class, to which the proceedings in question belong, Bell v. Monsanto Corp. supra.. Insomuch, the court's "[p]ower" to hear and determine a case, is also defined as the court's "ability" to hear and determine a case. Inasmuch, Subject Matter Jurisdiction does not only cover and or involve whether or not a matter resides in a proper court of jurisdiction to hear and determine it. It also involves any issue that may "[a]ffect" and or "[h]inder" that "[p]ower" and or "[a]bility" to act in accordance to Rules of Court and Due Process law. Such matters can be raised at "[a]ny" "[t]ime", "[c]annot" be waived by the appellant, and the court(s) "[s]hall" "[n]ot [f]ail" to take notice, Mathis v. State supra; Brown v. State supra; State v. Munn supra; Browning v. State supra.

Subject to certain minor exceptions not present, the trial court lacks Subject Matter Jurisdiction, more specific, is prohibited from enacting, invoking or continuing it's Subject Matter Jurisdictionary "[p]owers" to convict a defendant, and or accept his guilty plea for an offense when there is no indictment charging him with that offense when the jury is sworn, or when he gives his guilty plea, We can add to this, or when he has already been unjustly convicted by the grand jury acting as the trial jury in violation of his double jeopardy protection rights and Due Process law, State v. Beachum, 288 S.C. 325, 324 S.E.2d 597(1986). The Gentry court is in error in their determination of this matter. What gives the court in "[c]riminal" cases and or proceedings the "[a]bility" to hear and determine cases of "[t]his" general class to which the proceedings in question belong, and allow it to enact, invoke, or continue it's Subject Matter Jurisdictionary "[p]owers" in these type of cases, placing these "[p]owers" in operation is "an indictment".

S.C.R.C.P., Rule 3(c) provides:

"Disposition on arrest warrants: The solicitor shall take action on the warrants within (90) days by preparing "an indictment" for presentment to the grand jury". In turn said indictment is to be passed on the trial court to allow it to enact, invoke or continue it's [p]ower of Subject Matter.

Jurisdiction, Sharpe v. Johnson, 107 F.3d 282(footnotes)(5th Cir. 1997); Santos v. State, 843 S.W.2d 953,956(Tex.App.1992); Studer v. State, 799 S.W.2d 263(Tex.App.1990); Williams v. Morris 320 S.C. 196, 464 S.E.2d 97(1995). The indictment is also the legal document that confirms the "[c]riminal" court's "[p]ower" and or "[a]bility" to hear the particular case, by stating and or documenting the class of case or allege offense and the statute of the offense charged, stating the offense in the language of the statute, further validating that the matter(s) resides in the proper court of jurisdiction to hear and determine the matter. These indisputable facts make the indictment more than merely a "Notice document". It is the vehicle in "[c]riminal cases which invest the "[c]riminal" court the right to act, and or confirms that right to act, thereby making them inter-linked, inter-locked, and inter-dependant upon the viability of each other. To determine without the indictment(s) it does "[n]ot" "[a]ffect" and "[h]inder" a "[c]riminal" court's "[p]ower" and or "[a]bility" to hear and determine cases of "[t]his" general class to which the proceedings in question belong, is an error of law, and is like stating, not having a soul, consciousness, or life force, do not "[a]ffect" and or "[h]inder" a man's "[p]ower" and or "[a]bility" to be a man. Without a soul or life force, by the laws of reason you would still have a man, but the total truth of the matter is that you will have a "dead man" whose worth to society is useless;

the same way the "[c]riminal" court's "[p]ower" and or "[a]bility to hear and or determine "[t]his" particular class of case is useless without the essentially needed vehicle in the form of the indictment(s). The sufficiency of an indictment is a "[j]urisdictional [p]rerequisite" in cases of "[t]his" general class, to which the proceedings in question belong, and for which an indictment is needed and or required, see notes Indictment Sufficiency 70 Column L.Rev. 876,888(1970); United State v. Abrams, 539 F.Supp.378, 384(S.D.N.Y.1982); Stirone v. United States, 361 U.S. 212(1960); Gaither v. United States, 413 F.2d 1061(D.C.Cir.1969); also see South Carolina Constitution. The Gentry court by it's misinterpretation of it's citings, changed Federal law, made applicable to the states, by their adopting such via their own state constitutions, standing unchallenged for well over 100 years. For the Gentry by it misinterpreting it's citings, to view the two concepts of Subject Matter Jurisdiction, and the sufficiency of an indictment as being combined, when Federal law adopted by their own state constitution(s), dictate that the sufficiency of an indictment is a "[j]urisdictional [p]rerequisite" to Subject Matter Jurisdiction in a criminal court, is an error of law. If both are to be viable and operate in the fullness of purpose for which they were established and created, they are not to be viewed and or separated in the manner reasoned by the Gentry.

court misinterpreting the holding made in the Cotton and Parkhurst court(s).

Furthermore, the indictments serve as a "[s]afeguard" to protect the american citizenry, all those who are held by us, and those who enter our borders or territories, from violations of their inalienable constitutional rights. Rule 7(c) requires that the indictment(s) contain a "[p]lain, "[c]oncise", and "[d]efinite" written statement of essential elements and or allegations constituting the offense charged. This requirement performs three constitutionally required functions: It fulfills the 6th Amendment right to be informed as to the "[c]ause and [n]ature of the accusation. (Notice document). Yet, more than this, it prevents a person from being subject to double jeopardy as required by the 5th Amendment; it also serves 5th Amendment protection against crimes based upon evidence not presented to the grand jury, United States v. Silverman, 32 F.2d 106,110 (2nd.Cir.) listing these functions modified 439 F.2d 198(2nd. Cir,1970) Cert. denied 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123(1971). The indictment clause of the 5th Amendment requires that the indictment(s) contain some amount of factual particularity to ensure that the prosecution will not fill in elements of it's case with facts other than those consider by the grand jury, United States v. Abrams, 539 F.Supp. 378,394(S.D.N.Y) (1982).

The judges in State v. Gentry supra; United States v. Cotton supra; State v. Parkhurst supra; in their determination appear to have not given full weight of the total requirements and purpose of S.C.Code.Ann§17-19-10, S.C.Code.Ann.§17-19-20, or S.C.Code.Ann.§17-19-30. It is for these reasons aforementioned, in relevant part and Federal Rules of Criminal Procedure, Rule 7(c), that the requirements of the mentioned statutes are in effect, to ensure that the indictment(s) comply with Federal and state Rules of Criminal Procedure, the U.S. Constitution, the S.C. Constitution, and the laws of Due Process, which make them more than merely a "Notice document."

In addition to this, the indictment(s) aid in instructing the jury of the circumstances of the crime, and the incidentals, as well as the elements of the offense, that they are to confirm, or reject the confirmation of, by the preponderance of evidence presented before them by the prosecution and or defense in reaching a verdict. This to, makes them more than merely a "Notice document", United States v. Abrams supra; United States v. Silverman supra. This requirement that the offense be stated*
 **specifying in detail each element of the crime was seen as providing assurance that both the grand jury understood what was necessary to establish the offense and that the jury did not engage in unanticipated extensions of the substance of the offense.

Lastly, the requirement of the indictment(s) limit and constrain the powers of Subject Matter Jurisdiction of both the prosecution and the court, by limiting what can be presented at trial, conviction, and sentencing, United States v. Promise, 255 F.3d 150(4th.Cir.2001); State . Guthrie, 352 S.C. 103, 572 S.E.2d 309. It is the command of the United States constitution that anything to the contrary is notwithstanding, (Article IV§2 U.S.Const.).

The appellant places forth this issue in a straightforward fashion and want to make certain that there is no misunderstanding as to the specific claims and or question that is placed before the court. The appellant is not arguing whether or not the criminal court has Subject Matter Jurisdiction to hear and or determine cases of a general class to which the proceedings in question belong. The appellant concedes this fact. The appellant in this context agrees with all (3), Gentry, Cotton and Parkhurst courts when they determined that the criminal court does have Subject Matter Jurisdiction to hear cases of this nature and or class, this is not the issue. What the appellant is indisputably arguing is a question which clearly was not answered by either the Gentry, Cotton or Parkhurst court(s) is this. Despite the fact that the criminal court does have Subject Matter Jurisdiction to hear cases of this general

class to which the proceedings in question belong. Do their egregious, blatant failure to be in compliance to certain, essential, crucial "[j]urisdictional [r]equisites and or "[j]urisdictional [p]rerequisites" at various phases of and or at the commencement of the Subject Matter Jurisdictionary action and or process before the court; Do the court's blatant failure to be in compliance to these certain essential, crucial "[j]urisdictional [p]rerequisites" and or "[j]urisdictional [r]equisites" at various phases of, and or at the commencement of the Subject Matter Jurisdictionary action and or process halt, check, constrain, arrest, or stop the continuance of the court's Subject Matter Jurisdictionary "[p]owers" before the court, that the court without a doubt do indeed have? This is a crucially, materially, distinctly different question related to Subject Matter Jurisdiction that was never answered by any of the courts involved pursuant to Gentry. This is a new question of law and fact. Thus, using the holding made by the Gentry court(s) would be misplaced. Such a new question is not barred in seeking relief for, does relate to Subject Matter Jurisdiction. cannot be waived by the appellant, and the court shall not fail to take notice.

Insomuch, Rules of Criminal Procedure, the sufficiency of an indictment, Subject Matter Jurisdiction, and Due Process law are inter-linked and are inter-locked in these matters.

Yes, Subject Matter Jurisdiction and the sufficiency of an indictment are two distinct concepts, but the indictment in "[c]riminal" cases and or pleadings is the vehicle upon which Subject Matter Jurisdiction is conferred upon the "[c]riminal" court, and or that which enables the "[c]riminal" court the "[a]bility" and or "[p]ower", and or right to enact, invoke and or continue it's Subject Matter jurisdictionary "[p]owers". It is not so much that they are combined, the sufficiency of an indictment is a jurisdictional prerequisites in cases of "[t]his" general class to which the proceedings in question belong, and for which an indictment is needed and or required. English 101, and english 102 are two separate and distinct english courses, but both make up one english program towards one, single collage degree. English 101 is a "[p]rerequisites" to english 102. You "[m]ust" have and or take english 101 before you can have and or take english 102. It's a simple concept. It's not hard. You "[m]ust" have and or take a sufficient indictment passed upon by the grand jury before you can enact, invoke, or continue the court's Subject Matter jurisdictionary power given to a "[c]riminal" court even though that court possesses such power. To view them as combined, when federal law made applicable to the states through the Due Process Clause and the South Carolina Constitution, dictates that one is a prerequisites of the other, is an error of law. Even if you

separate the two concepts of Subject Matter Jurisdiction and the sufficiency of an indictment from one another, the "[e]ffect" and or "[o]utcome" on the trial court's "[p]owers" of Subject Matter Jurisdiction are the same. Due to the deficiency in the [j]urisdictional [p]rerequisites pursuant to the presentment of the defective indictment, it "[a]nulifies" the Subject Matter jurisdictionary action even though the court has such power. They are distinct from one another the same way the inner-makings are distinct from the bread of a "sandwich", but "[b]oth" make the sandwich. They are distinct from one another the same way a man's soul is distinct from his body, but "[b]oth" make the man. The "[c]riminal" court can have Subject Matter Jurisdiction all day long, but without the indictments in this instance that "[p]ower" is useless. The lack thereof do "[a]ffect" and or "[h]inder" their "[p]ower" and or "[a]bility" to hear and determine cases of "[t]his" general class to which the proceedings in question belong. To determine otherwise is an egregious error of law. In comparison you can have two pieces of bread all day long, but without the inner-makings you will never have a "sandwich". Being a "Notice document" is only one of the numerous purposes and functions that the indictment serves. These numerous purposes and functions cannot be viewed and or work separately and independently of each other without affecting the "[t]rue" nature and purpose for which the indictment was created.

To do so is an error of law; see Herman Winns v. State memo NO.2000 m0-078 Daniel F. Piper judge.

Inasmuch, what the Honorable court(s) in the Gentry, Cotto and Parkhurst court(s) failed to see, is that the confusion that the Gentry court spoke of is "[n]ot" coming from mixing of the two concepts of Subject Matter Jurisdiction, and the sufficiency of an indictment together. The "[c]onfusion" that the Gentry court spoke of, is coming from our modern day court(s) and system of jurisprudence losing vision and insight of that which is laid and set before us by our constitutional forefathers in the establishing of our judicial system, that by all jurisprudence was not meant to be tampered with. That being a system of checks and balances, within a system of checks and balances. You have issues of Subject Matter Jurisdiction, Rules of Criminal Procedure, the sufficiency of an indictment issues of Due Process law, pertaining to the U.S. Constitution, as well as the S.C. Constitution, overlapping each other, and checking each other, as a "[s]afeguard" to ensure that the U.S. citizen all those who are held by us, and all those who enter our borders or territories, inalienable rights to a fair and impartial and or plea hearing. Our Constitutional forefathers purposely meant and designed for them to be viewed as a whole unit inter-locked and inseparable though independent to themselves

as an integral part of the overall machine, so that if one part fails, the other parts pick up and kick in. Thus, remaining true to the very nature of "[l]egal" system. A system is comprised of various components, nevertheless, it is still to be considered as one. As the appellant mentioned in one of his previous issues. Our constitutional forefathers in their wisdom and jurisprudence set up : "[b]ulwarks, "[b]arriers", of protection forthrightly established to protect the american citizenry, those who are held by us, and those who enter our borders or territories, from unjust prosecution, that outside of an individual committing acts of treason were "[n]ot" to be turn down. To view them as separate and independent in the manner viewed by the Gentry court(s), as they relate to each other, goes against the rightly established pattern and design of our judicial system, and is an error of law. It is a form of treason. It is the very epitome of betrayal to our constitution, and sets itself at war and enmity to the substantial rights of the Commonwealth, and seek to eradicate the very core integrity of the rights, immunities, and privileges of all citizens, those who are held by us, and those who enter our borders or territories our constitutional forefathers have died and sacrificed their best blood to establish and preserve. These sacred "[b]ulwarks" aid to ensure that "[L]ady [J]ustice" remains blindfolded, and the defendant's inalienable rights to a fair and impartial trial remain secure, and are never taken away.

Insomuch, these very issues were at the heart of the matters that existed, in relevant part, during the time of Ex Parte Bain, in 1887, and still vividly, with all certainty, exist now within our modern day court(s) and system of jurisprudence, and by the constitutional rights of every citizen, those who are held by us, and those who enter our border or territories "[c]annot" be ignored. These issues secured and protected by the rulings made in Ex Parte Bain, in 1887 as well as many other such holdings in other similiar cases, still apply today and are protected by the U.S. COnstitution, and the laws of the United States. These concepts are designed to overlap in these matters to ensure a more true court of jurisprudence to it's citizens, those who are held by us; and those who enter our borders or territories, for the sake of justice and fairness.

In regard to State v. Gentry, we are dealing with a state law, in such a way designed, crafted, drafted, initiated, and set into place, that is egregiously contrary to the U.S. Constitution's inherent, intrinsic, and explicit presuppositions, that by it's very nature is intense espionage and diabolical sabotage, and stands in defiance of the rights of the commonwealth, in violation of Due Process law. It creates the similarities seen in trial and or plea hearing that manifested themselves during the Nazi Occupation, the English Inquisition of 1518, the Spanish Inquisition of 1478, the Salem Witch trials of the 17th century, trials prior and during the Civil Rights era, and the like; where trials and or plea hearings became

an arbitrary action, a mere hollow and deceptive formality, and or empty mechanism, utilized to snatch from the commonwealth their inalienable rights, and rob them of their God given liberty.

Inasmuch, the issues here go far beyond that of dealing with indictment defects, which are to be quashed by motion before a jury is sworn, or acknowledged, and or objected to before a guilty plea is given. The matters here in crucial part, do not have to necessarily be preserved for appellate review by a timely objection, but only need be considered as a matter brought, conducted, and presented before the court. The government "[M]ust [a]lways" be held accountable to judiciary for a man's imprisonment, and that the restraints on liberty, if the imprisonment does not conform to the basic requirements of Due Process law. For the sake of justice and judicial fairness, the appellant should not be penalized and made to suffer an onerous conviction, because hired counsel, and or counsel that the state appointed to represent him or her, was so inept and constitutionally ineffective, that he or she could not even see the overwhelmingly obvious defects in an indictment presented before the court. Thereupon, the appellant, who later after conviction, previously having no knowledge of law, and latter to no access to legal materials before his trial and or plea hearing, later discovers these "[p]lain", "[c]lear" "[e]gregious", Subject Matter Jurisdiction and Due Process issues

should not in all fairness be barred from calling these matters to the attention of the court(s) in order to seek relief.

Shelton v. Ciccone, C.A.8 (Mo.)1978, 578 F.2d 1241; Evitts v. Lucy; 469 U.S. at 387, 105 S.Ct. 830, 83 L.Ed.2d 831(1985); Gray 800 F.2d 646; Powell v. Alabama, 287 U.S. 45; 53 S.Ct. 55, 77 L.Ed. 158(1932); United States v. Promise supra.

CONCLUSION:

Insomuch, there were no holdings made in the Gentry court(s), that would justify or serve to detach from the indictment(s) the 5th, 6th, 14th, Amendment issues aforementioned in this document made applicable to the states by they adopting such via their states constitutions and or the Supreme Clause of Art.6cl2. Likewise, there were no holdings made in the Gentry court that would serve to detach from the indictment(s) the Due Process issues aforementioned in this document. Even if you would view the two concepts of Subject Matter Jurisdiction, and the sufficiency of an indictment being a "[j]urisdictional [p]rerequisites", in cases of "[t]his" general class, to which the proceedings in question belong, and for which an indictment is needed and or required; the "[a]ffect" and or "[o]utcome" on the trial court's Subject Matter jurisdictionary "[p]owers" is the same. The result is due to the presentment of the "[f]atally [d]efective" indictment(s), it "prohibits" the trial court from enacting, invoking and or

continuing it's Subject Matter jurisdiction "[p]owers" in accordance to Rules of Court, Rules of Procedure, and Due Process law, even though they do indeed possess such power. Therefore, such action enacted subsequent to the presentment of the "[f]atally [d]efective" indictment(s) is "[n]ullified", and or is to be rendered "[v]oid". Since the appellant did not waive his right to double jeopardy protection, by these unjust, arbitrary actions, to include the overwhelming amount of prejudice and Due Process rights violations the appellant was subject to, the sentence and conviction must be vacated.

Insofar, the Gentry court reasoned, if a defendant does not object to an issue, he, by his failure to object, forfeits that right of law. Indictment defects that are of such a fundamental character as to render an indictment wholly invalid are not subject to waive by the defendant. We are also dealing with manifest constitutional errors that can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings. The appellant also seeks judicial notice and is arguing a materially, distinctly, different question related to Subject Matter Jurisdiction that was never addressed or answered by the Gentry court which can be raised at any time, cannot be waived and the court shall not fail to take notice. Nevertheless, no procedural principle is more familiar to the court, than that a constitutional right may be forfeited in criminal as well

as civil proceedings, by failure to make a timely assertion of that right before a tribunal having jurisdiction to hear and determine it. Nonetheless, the court's ability and or authority to correct forfeited errors is guaranteed by Rules of Criminal Procedure, Rule 52(b), applicable in Habeas Corpus and these proceedings, which provide that "[p]lain" errors affecting substantial rights may be noticed although they were not brought to the attention of the court, especially since these error seriously affect the fairness, integrity and public reputation of judicial proceedings. They involve deprivation of constitutional protections so basic and so fundamental that in their absence no criminal proceeding can be deemed reliable as a vehicle for the determination of guilt or innocence and no criminal punishment can be regarded as fundamentally fair because they affect the framework of the proceedings and cannot be deemed as being harmless, United States v. Olano, 507 U.S. 725, 731-732, 113 S.Ct. 1770, 123 L.Ed.2d 508(1993), interpreting Rule 52(b); United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 94 L.Ed.2d 1(1985); Johnson v. United States, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718(1997); United States v. Cedelle 89 F.3d 181, 185(4th.Cir.1996); United State v. Promise *supra*; Robinson v. Arvano *supra*; Vines v. United States *supra*.

Wherefore, due to the numerous constitutional and Due Process violations of the appellant's substantial rights, the blatant

disregard for clearly established state and Federal laws, and the overwhelming amount of prejudice the appellant experienced related thereto, the appellant moves and or motions to quash the indictments and or arrest the judgment, and or vacate the sentence and conviction, in pursuant to Federal Rules of Procedure Rules 52(b), and the other well established provisions of law cited in this document, Baker v. United States, C.A.Ill. 1969, 407 F.2d 618; Baughman v. United States, D.C.Minn. 1969, 301 F.Supp. 509; Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031(1945). The appellant also moves and or motions for an order to expunge his record, and alling for the return of all fees paid out by the appellant, to include any and all other relief the court would deem fair, just and proper.

(9) Did the trial court err, and was the appellant's 5th, 6th, 14th, Amendment rights of the U.S. Constitution violated as well as Article IV§2, and his Due Process rights violated by the prosecuting body and trial judge charging the jury that malice can be inferred by the use of a deadly weapon?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge, Moss v. Aetna Life Ins. Co. supra; State v. Broad River Power Co. supra; 31 C.J.S. Evidence §§ 6 and 9; Federal Rules of Evidence, Rule 201(a).

This is a manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the constitutional rights of the party are compromised. A manifest constitutional error can be reviewed by a Court of Appeals even if the appellant did not object at the proceedings, (Black Law Dictionary 8th Edition).

The appellant contends, his 5th, 6th, 14th, Amendment rights of the U.S. Constitution as well as Article IV§2, and his Due Process rights were violated because the prosecutor and trial judge charged that malice may be inferred from the use of a deadly weapon, where evidence was presented by testimony that would reduce, mitigate, excuse, or justify the homicide.

In State v. Hopkins, 15 S.C. 153(1881). Hopkins was convicted of murder. He pled accident, and objected to the following "use of a deadly weapon implies malice" instruction: In every case of intentional homicide the presumption of malice arises, and the fact of killing intentionally by the use of a deadly weapon being shown in any case, the burden of proof is thereby imposed upon the defendant to rebut such presumption, unless the facts and circumstances shown in the testimony on behalf of the state incidentally rebut it, Id at 156. Under these circumstances the charge was error, and Hopkins was granted a new trial.

This presumption is not applicable when the facts and circumstances attending the homicide are disclosed in evidence so as to draw a conclusion of malice or want of malice as one fact, from the evidence. Presumptions of this class are intended as substitutes in the absence of direct proof, and are in their nature indirect and constructive. The best evidence of the state of mind attending act is what was said and done by the person whose motive is sought for. The motive that impels to the taking of human life is no exception to this rule, and the importance of the consequences that depend on the accurate ascertainment of its nature in such cases, affords the strongest grounds for limiting indirect and constructive proof to the narrow grounds within which they belong. It appears from the record sub-judice

that the proofs embrace a statement of the origin of the difficulty between the two parties; their conduct's towards each other down to the time where the shots were fired causing death about (10)days later, and, to some extent, the subsequent conduct of the prisoner. When the evidence is of such a character it must be presumed to be sufficient to enable the jury to draw from it a conclusion of fact one way or the other. Under such circumstances there was no necessity, and, therefore, no propriety in resorting to any general presumption arising by operation of law. When the circumstances preceding and attending an act of this character are full, as in the present case, the appellant is entitled to the benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of homicide. A charge may be erroneous propositions of which it is composed may severally be conformable to recognized authority if in its scope and bearing in the case it was likely to lead to a misconception of the law, State v. Coleman, 6 S.C. 185(1875).

This is not a case where there was not a shadow of testimony tending to show any excuse or provocation for firing the fatal shots that eventually led to the death of the allege victim about 10(days later. Further you do indeed have elements of mitigating circumstances and or element that would serve to show heat of passion due to argument that develop.

Provocation exist in that the allege victim supposedly attacked and physically harmed a love one of the appellant. The testimony of the state witnesses clearly show the allege victim as being a drug dealer and gang related. The possession of a deadly weapon by the appellant in this context can easily be seen only as a means of defense so when the appellant went to confront this individual about the attack upon his love one, he would not be subject to being gun downed himself. At that moment, without any forethought or malice, in the heat of passion things just got out of hand. In this instance to charge malice can be inferred by use of a deadly weapon was an error on the part of the trial court and extremely prejudice the appellant's trial proceedings. Had this not been done, the outcome of the proceedings may have been different, see TTpp 326 Lns.7-9; TTpp 329 Lns.1-9; TTpp 331 Lns. 1-9; TTpp 332 Lns.1-8; TTpp 334 Lns.14-15; TTpp 340 Lns.14-16; TTpp 340 Lns.12-13; TTpp 336 Lns.12-22.

The error is that the prosecution or trial judge had no right to instruct the jury that they might infer malice from the mere fact of killing with a weapon calculated to do serious harm bodily, or to take life, for the reason that this is a charge on the facts contrary to the constitution. In that it undertakes to intimate to and instruct the jury what facts in the case are evidence of malice.

It was error, in that after all the evidence is out, the presumption of malice from the use of a deadly weapon fades from the case, and the jury must find malice, if at all, from the evidence, without any aid from the court as to what weight should be attached to killing with a deadly weapon, or what inference they may draw from such. The United States Supreme Court pronouncement is unequivocal there stating that the Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. The Due Process Clause forbids a state from placing the burden on the accused to prove his actions reduce the crime from "murder to manslaughter. Conclusive presumption deprive the appellant of Due Process of law, Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975).

One appellate court has described this jury charge as a "half-truth", Glenn v. State, 511 A2d 1110, 1126 (Md. Ct. Spec. App. 1986). In discussing its meaning behind the observation, Glenn notes that malice includes the absence of justification, excuse and mitigation, Glenn, 511 A2d at 1122. When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half truth". The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts

and evidence) are required for the fulfillment of these component parts.

The S.C. Supreme Court has held, that under the policy making role in the common law, we hold that the use of a deadly weapon" implied malice instruction has no place in a murder(or assault and battery with intent to kill prosecution where evidence is presented by testimony or otherwise, that would reduce, mitigate, excuse or justify the killing(or the alleged assault and battery with intent to kill).

The use of the term "intentional" is instructive. Say for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under this present given charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise". That highlights the half-truth nature of the charge, State v. Elmore, 279, S.C at 421, 308 S.E.2d at 784.

Errors including erroneous jury instructions, are subject to the harmless error analysis. In many murder prosecutions, there will be overwhelming evidence of malice apart from the use of a deadly weapon. Here, however the error in charging that malice may be inferred by the use of a deadly weapon cannot be considered as harmless. Evidence of argument arising

and heat of passion, as well as prior provocation or mitigating circumstances are present in the form of a prior assault upon a loved one, thereby highlighting the prejudice that resulted from the charge. To include the fact the appellant was confronting a known drug dealer and or gang member where possessing a weapon would be held as a means of defense if something went wrong in that confrontation. It is truly inconceivable that the only evidence of malice was the appellant's use of a handgun. Therefore, we need go no further than saying the court in fundamental fairness, cannot conclude the error was harmless beyond a reasonable doubt. State v. Belcher, Opinion NO.26729, heard May 14, 2009-October 12, 2009.

The state and or prosecuting body, acting unjustly under color of state law, and or common law, has failed to adhere to their own state laws, and or misinterpreted their own common law, in violation of the appellant's substantial Federal Constitutional rights of Due Process, serving to deny the appellant the Equal Protection of the laws against unjust prosecution. The U.S. Supreme Court has held that all acts of the state are automatically "Under color of law" no matter what the source of the substantive Rule. Screws v. United States supra; State v. Middleton supra; Eslinger v. Thompson supra; McLaughlin v. Florida supra; Dubinka v. Judges of Superior Court of the State of California, For the County of Los Angeles supra; Jones v. State of Arkansas; Hicks v. Oklahoma supra; Dozier v. Loop Collage City of Chicago

supra; Lugar v. Edmondson Oil Co. supra; Insomuch the appellant motions the judgment be reversed and remanded.

RESPECTFULLY
RAHIM F. CARTER
Rahim F. Carter #290280

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Rahim F. Carter,

Appellant.

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2011-UP-020
Submitted January 1, 2011 – Filed January 25, 2011

APPEAL DISMISSED

Appellate Defender Robert M. Pachak, of Columbia,
for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh, and
Assistant Deputy Attorney General Donald J.

Zelenka, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

PER CURIAM: Rahim F. Carter appeals his convictions for murder and possession of a deadly weapon. Carter argues the trial court coerced the jury by giving an Allen¹ charge when it returned deadlocked. After a thorough review of the record and counsel's brief, pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss² the appeal and grant counsel's petition to be relieved.

APPEAL DISMISSED.

FEW, C.J., SHORT and WILLIAMS, JJ., concur.

¹ Allen v. U.S., 164 U.S. 492 (1896).

² We decide this case without oral argument pursuant to Rule 215, SCACR.

WITNESSES

SPD

B. Lyons

AMENDED
DOCKET NO. 2008-GS-43-597

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

MAY TERM 2008

THE STATE
vs.

RAHIM FAREED CARTER

ARREST WARRANT NUMBER

J303408

D/A: 11/21/07

ACTION OF GRAND JURY

Team Bice

Foreperson of Grand Jury

Date: *21 May 2008*

VERDICT

Indictment for

MURDER, POSSESSION OF FIREARM
OR KNIFE DURING THE COMMISSION
OF A VIOLENT CRIME

C. KELLY JACKSON, SOLICITOR

Foreperson of Petit Jury

Date:

612

STATE OF SOUTH CAROLINA)
)
COUNTY OF SUMTER)

INDICTMENT FOR

MURDER, POSSESSION OF FIREARM OR
KNIFE DURING THE COMMISSION OF A
VIOLENT CRIME

At a Court of General Sessions, convened on May 21, 2009, the Grand Jurors of
SUMTER County present upon their oath:

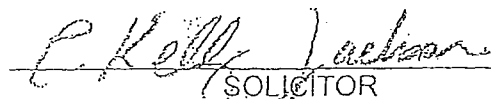
COUNT ONE - MURDER

That RAHIM FAREED CARTER did in Sumter County on or about October 2, 2007, feloniously, wilfully and with malice aforethought, either expressed or implied, kill one Matthew Horace by means of shooting him with a handgun, and that the said Matthew Horace did die as a proximate result thereof.

COUNT TWO - POSSESSION OF A FIREARM OR KNIFE DURING THE
COMMISSION OF A VIOLENT CRIME

That RAHIM FAREED CARTER did in Sumter County on or about October 2, 2007, was in possession of and did visibly display a firearm or knife during the commission of a violent crime, to-wit: a handgun during the commission of a murder, in violation of Section 16-23-490, 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:


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

STATE VS.

RAHIM FAREED CARTER

AKA:

Race: Black

Sex: Male

Age:

DOB:

SS#:

Address:

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008-GS-43-0597

A/W#: J303408

Date of Offense: October 02, 2007

S.C. Code §: 16-03-0010, 0020

CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDERin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 01116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Catherine Jant
Solicitor 14021

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of Life 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.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Defendant Waives Hearing, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

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 \$ _____

3.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

3.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

0-21-114 (BUI Breath Test Fee) \$50 \$ _____

3-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

to County (if paid in installments) \$ _____

TAL \$ _____

PTUP

_____ days/hours Public Service Employment

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

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

Clerk of Court/ Deputy Clerk

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

STATE VS.

RAHIM F. CARTER

AKA:

Race: Black

Sex: Male

Age:

DOB:

SS#:

Address:

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008-GS-43-0597

AW#: DP

Date of Offense: 10-2-07

S.C. Code §: 16-23-490

CDR Code #: 0549

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS a violent crim

TO: possession of firearm during commission of ~~other crime~~

in violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0151419

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

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

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

ATTEST:

Catherine Fant
Solicitor 14021

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 5 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.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Defendant Waives Hearing, ☐ Ordered

PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: \$
\$14-1-206 (Assessments 107.5%) \$
\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$
\$14-1-211(A)(2) (DUI Surcharge) \$100 \$
\$56-1-286 (DUI Breath Test) \$25 \$
\$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(J) (Vehicle Assessment) \$40/ea \$
3% to County (if paid in installments) \$ \$
\$90.11 TP (SCCJA Surcharge) \$5 \$
TOTAL \$

days/hours Public Service Employment

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

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Clerk of Court/ Deputy Clerk

Court Reporter:

