THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041
Appellate Case No. 2021-000226

State of South Carolina, Respondent,

v.

Duane A. Harrison Appellant.

APPELLANT'S REPLY IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL, IN THE ALTERNATIVE, APPELLANT'S REPLY TO RESPONDENT'S MOTION TO COMPEL APPELLANT TO ORDER TRANSCRIPT OF PROCEEDINGS

Appellant, Duane A. Harrison, by and through the undersigned attorney, tenders this Reply in Opposition to Respondent's Motion to Dismiss Appeal, and, in the alternative submits this Reply in Opposition to Respondent's Motion to Compel Appellant to Order Transcript of

Proceedings.

ISSUES RAISED BY RESPONDENT'S MOTIONS:

Respondent's Motions present two issues for the Court's consideration. The first issue is whether this Court has jurisdiction over the appeal, and the second issue, submitted in the alternative, is whether the Court should compel the Appellant to order the transcript of the proceedings. The procedural history, rather than the facts of the underlying conviction, is a crucial component to analyzing the Respondent's Motion to Dismiss. To that end, the Appellant submits the following procedural history of the case:

PROCEDURAL HISTORY OF THE CASE:

On October 30, 2012, Appellant/Defendant Duane Arness Harrison ("Defendant", "Appellant" or "Harrison") and a co-defendant were arrested, in the County of York, State of South Carolina, and charged with trafficking in cocaine. Harrison was originally indicted at the May 2013 term of the York County Grand Jury for Trafficking in Cocaine over 400 grams (2013-GS-GS-46-2041). On May 29, 2014, the indictment was amended by the York County Grand Jury, and the said amended indictment was filed on April 30, 2015, alleging violation of *S.C. Code of Law, § 44-53-370(e)(2)(a)*. *Exhibit 4*, to Motion to Vacate, p. 2 (Amended Indictment).

On September 02, 2014, Harrison pled no contest to trafficking in cocaine, 28 to 100 grams, before the Honorable Lee S. Alford. A copy of the Transcript of Record (hereinafter referred to as the "Sentencing Transcript") for the sentencing hearing is attached to the Motion to Vacate Sentence and Conviction as *Exhibit 3*. Based upon a thorough review of the Sentencing

Transcript, no indictment reflecting the reduced drug amount was used to effectuate the Defendant's no contest plead to the reduced drug amount. *See, Exhibit 3, Transcript of Record*. Defendant was sentenced to the South Carolina Department of Corrections ("SCDC") to a determinate term of twelve and one-half (12.5) years. *Sentencing Transcript, page 29.*

Defendant was represented at the sentencing hearing by Attorney Todd Rutherford, of the Richland County Bar. No appeal was filed on Harrison's behalf. Defendant is currently incarcerated at SCDC's prison in the County of Kershaw. Defendant was taken into custody on the date of sentencing, and he has remained incarcerated since September 02, 2014.

Defendant filed a PCR Application which was dismissed by the Honorable Letitia Verdin by written order dated September14, 2016, in the matter captioned as *Duane Harrison vs. State of South Carolina, County of York, Court of Common Pleas, Case No. 2015-CP-46-1244*. The issues raised by the motion which gave rise to the appeal before the Court were not raised in the PCR Application. Thereafter, Harrison appealed Judge Verdin's Order of Dismissal to the Supreme Court of South Carolina ("SC Supreme Court"), which was docketed as *Appellate Case No. 2016-002384*. The SC Supreme Court dismissed Harrison's *pro se* petition by written order dated April 23, 2018, with the remittitur being issued on May 09, 2018. The issues raised by the current Appeal before the Court were not raised in the appeal/petition before the SC Supreme Court.

On August 27, 2018, Harrison, represented by counsel, filed a Petition for *Writ of Habeas Corpus*, in the District Court for South Carolina, captioned as *Harrison vs. Stirling et., Case No. 4:18-cv-02373-CMC*. A review of the PACER System shows that counsel was allowed to withdraw from the case on April 29, 2019, and Harrison was required to respond to the

proceedings *pro se*. The district court summarily dismissed the *Writ of Habeas Corpus* on May 24, 2019, and it did not issue Harrison a certificate of appealability. The issues raised by the current Appeal before the Court were not raised in the *writ* before district court.

Harrison filed a *pro se* Notice of Appeal of the district court's order of dismissal on July 26, 2019, bearing appeal number 19-7100. The Fourth Circuit Court of Appeals dismissed Harrison's Notice of Appeal by unpublished *per curiam* opinion on November 19, 2019, and the mandate issued on December 16, 2019. The issues raised by the current Appeal before the Court were not raised in the appeal before the Fourth Circuit Court of Appeals.

On November 05, 2020, Harrison filed a Motion to Vacate Sentence and Judgment in the in the trial court in York County, where he was convicted. The Motion was heard by the Honorable Judge William A. McKinnon, who took the matter under advisement and subsequently issued an order denying the Motion on February 18, 2021. *See, Order*. Appellant received written notice of entry of this order on February 18, 2021. Counsel for Appellant received Notice of the Order giving rise to this appeal on February 18, 2021. A timely notice of Appeal was filed on March 05, 2021, and this Court granted Appellant an extension of time until and including May 5, 2021, to file this initial brief. The Appellant's Initial Brief was filed by the required due date.

In lieu of filing its Reply Brief, Respondent filed the Motion to Dismiss that is currently before the Court on June 02, 2021.

This Court granted Appellant an extension until July 14, 2021, to Reply to Respondent's Motion to Dismiss.

LEGAL STANDARDS:

The jurisdiction of a court over the subject matter of a proceeding is fundamental. *Anderson v. Anderson, 299 S.C.110, 115, 382 S.E.2d 897, 900 (S.C. 1989)*. "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." *Id.* It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972)*. Furthermore, "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void." *Funderburk, 259 S.C. at 261, 191 S.E.2d at 522*. "A judgement by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on." *Blanton v. Stathos. 351 S.C. 534, 570, S.E.2d 565 (Ct. App. 2002).*

In 2005, our jurisprudence concerning the role indictments play in conferring subject matter jurisdiction in our state was drastically changed in many respects when our highest state court decided the seminal case of *State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)*. First, *Gentry* carried forward the principle that "[s]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Gentry, 363 S.C. at 100, 610 S.E.2d at 498; see also Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000)*. Further, *Gentry* held that "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts, and the blending of these concepts serves only to confuse the issue." *Gentry, 363 S.C. at 101*. Therefore, to alleviate the confusion concerning subject

matter jurisdiction and sufficiency of the indictment, *Gentry* espoused the following standards by stating the following:

> To end the confusion that was created by [prior precedent], we now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. See S.C. Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). However, a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted.

Gentry, 363 S.C. at 101-102. Additionally, under *Gentry*, our state "returned to our earlier view that an indictment is a 'notice document', 'albeit one required by our state constitution and statutes," and the Court stated the following standard:

> [A] presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. However, an indictment is needed to give notice to the defendant of the charge(s) against him. See S.C. Const. Art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . ."); S.C. Code Ann. § 17-19-10 (2003) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury. . . ."). A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment. If the defendant does not object, he is deemed to have waived the right to presentment. *See State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971)* (individual may waive any provision of the Constitution intended for his benefit).

Gentry, 363 S.C. at 93, footnote number 6.

In sum, *"Gentry* is the seminal case in our jurisprudence that deals in concert with subject matter jurisdiction and the sufficiency of an indictment," and it radicalized our criminal law procedures concerning challenging the sufficiency of an indictment. *Id. at*

93. However, the state statutory and constitutional standards that "[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . ." remained after *Gentry*. *See, S.C. Const. art. I, § 11 and art. V, § 22; S.C. Code Ann. § 17-19-10 (2003)* ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury. . . ."). Moreover, post-*Gentry*, an amendment to an indictment that changes the nature of the offense charged or charges a different offense divests the trial court of subject matter jurisdiction. *41 Am.Jur.2d Indictments and Informations § 174 (1995)* ("An indictment is impermissibly amended if the altered indictment charges a different offense or changes the nature of the offense."). *Means, 367 S.C. 374*.

The ultimate legal standard that is dispositive to the analysis of the Motions now before this Court is that there no time limit for challenging subject matter jurisdiction, even after *Gentry*. Appellant is not challenging the sufficiency of his indictment, rather he is asserting that his conviction is void because the trial court did not have subject matter jurisdiction.

ARGUMENTS:

A. RESPONDENT'S MOTION TO DISMISS IS VOID OF ANY AUTHORITY TO SUPPORT ITS CONTENTIONS.

The essence of Respondent's Motion to Dismiss is that Appellant's Motion to Vacate his sentence and conviction is untimely. Appellant's first response is quite simple: the Respondent has failed to cite any *applicable* authority to support its position that a Court

cannot vacate a defendant's sentence when it lacked jurisdiction. One of the major cases Respondent relies upon is *State v. Campbell, 376 S.C. 212 (2008).* However, the Respondent's reliance on *Campbell* is misplaced because Campbell was not a "jurisdiction case." Justice Moore stated the following in *Campbell*:

None of the authorities cited by Respondent makes this assertion even when he cites *Blanton v. Stathos*, supra, which clearly represents the jurisprudence in this state that "[a]" judgement by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on." *Blanton v. Stathos. 351 S.C. at 570.* Respondent further compounds the analytical confusion by citing cases dealing with post-trial motions in criminal cases, even when his cited authority does not negate the law that jurisdiction can be challenged at any time. For example, Respondent relies upon *State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (S.C. 2008)* to support his argument that the criminal rule precludes the Court from consider the Appellant's Motion to Vacate Conviction and Sentence. However, this reliance is misplaced. The Campbell clearly stated that the procedural rule was not a subject matter jurisdiction rule. Justice Moore stated the following in *Campbell*:

> While we have used the "jurisdiction" language, we have not stated that the trial court lacks subject matter jurisdiction when the term of court ends. See, e.g., State v. Hinson, supra; State v. Walker, 269 S.C. 349, 237 S.E.2d 583 (1976); State v. Best, supra. When we used the "lack of jurisdiction" language, we meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended. At least three Court of Appeals' cases have discussed or mentioned the term of court rule as being a rule of subject matter jurisdiction.

> See State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct.App.2007); Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006); State v. Rhinehart, 312 S.C. 36, 430 S.E.2d 536 (Ct. App.1993). **However, framing the rule as a subject matter jurisdiction rule is incorrect.**

Campbell, 376 S.C. at 216 [emphasis added]. Respondent Motion to Dismiss makes similar analytical errors with other authorities that it cites. For example, it cites *Tant v. South Carolina Dep't of Corr., 408 S.C. 334, S.E.2d 398,402 (2014)* for the proposition that the trial court did not have jurisdiction over the Appellant's Motion because the criminal case had even. The Respondent's reliance on *Tant* is misplaced because *Tant* dealt with whether an administrative agency had the authority to alter an inmate's sentence. *Tant, id.*

As additional support to establish that the State's reliance on its cited authority is misplaced, Respondent offers the Court the case of *Clair v. State, 324 S.C. 144 (1996*). In Clair, our supreme court affirmed the trial court's order which vacated a conviction that had occurred outside the post-trial motion period. In *Clair*, many years had transpired before the PCR Motion to vacate conviction was filed. The State's position now before this Court cannot be correct considering the holding in *Clair*.

In short, Respondent has failed to cite a single case to support its position that Appellant Harrison cannot motion a trial court to set aside and correct a sentence and conviction that was a nullity from the very beginning. Boldly, the State is asking this Court to summarily decide that a criminal defendant wrongfully convicted and sentenced by a Court which did not possess subject matter jurisdiction is without recourse once his time to file post-trail motions have expired. Despite this boldness, the State has cited no authority and then argues the merits of the appeal while asking for summary dismissal. The State's Motion is simply without merit.

B. THE TRANSCRIPT FROM THE HEARING OF THE APPELLANT'S MOTION TO VACATE CONVICTION AND SENTENCE IS IRRELEVANT FOR RESOLUTION OF THE ISSUES ON APPEAL.

The Respondent's "transcript argument" is likewise without merit. Respondent cites *Rule 207(a)(1), SCAR*, to support his contention that Respondent is required to order a transcript. Respondent is taking a portion of the rule out of context. *Rule 207* does not mandate that an appellant must order a transcript to pursue an appeal. The portion of the rule cited by the Respondent justifiably requires the Appellant to order the full transcript of the proceedings if the decision is made by the Appellant to order the complete transcript of the proceedings a decision to order a transcript is made, unless agreed otherwise in writing by the opposing party. This is a just rule which was obviously written to prevent the Appellant from order just the portions of the transcript that supports his cause.

In the case before the Court, the only transcript that is relevant is the Sentencing Transcript. The Sentencing Transcript is in possession by all parties because of previous proceedings, and Appellant proposed to make the complete Sentencing Transcript a part of the Record on Appeal. The hearing transcript on Appellant's Motion to Vacate Conviction and Sentence is completely irrelevant and contributes nothing to the resolution of the appeal. During the hearing on the Motion to Vacate Conviction and Sentencing, not a single piece of testimony was admitted—only the Memoranda of the parties were submitted, and oral arguments presented during the hearing. Ordering the transcript in this case would do further delay the resolution of the appeal now before the Court. To that end, Appellant requests the Court to refuse the State's request to slow down the resolution of the appeal by requiring

Harrison to order the transcript. Harrison has already spent too many days in prison and his appeal should be heard forthwith.

WHEREFORE, based upon the arguments presented heretofore, Appellant respectfully requests an order dismissing the Respondent's Motion to Dismiss.

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July 14, 2021, 2021

At Orangeburg, SC

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PROOF OF SERVICE

I, Glenn Walters, Sr., certify that I have served the foregoing APPELLANT'S REPLY IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL, IN THE ALTERNATIVE, APPELLANT'S REPLY TO RESPONDENT'S MOTION TO COMPEL APPELLANT TO ORDER TRANSCRIPT OF PROCEEDINGS on Respondent State of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2021, addressed to its attorneys of record as follows:

The Honorable Alan Wilson, Esquire
Attorney General for South Carolina
Robert Michael Dudek, Esquire
William M. Blitch, Jr., Esquire
Post Office Box 11549
Columbia, SC 29211 and

Matthew Shelton, Esquire
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Sixteenth Judicial Circuit
1675 York Highway
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July 14, 2021 /s/ Glenn Walters, Sr.___