

STATE OF SOUTH CAROLINA )  
 COUNTY OF CHEROKEE )  
 )  
 The People of the State of New York, )  
 )  
 v. )  
 )  
 )  
 Timothy Braico and Terrence Edwards, )  
 In Re: )  
 The Matter John Thomas Burger, )  
 Material Witness. )  
 )  
 \_\_\_\_\_ )

THE COURT OF GENERAL SESSIONS  
 SEVENTH JUDICIAL CIRCUIT

Indictment No. 3885/2018

**RECEIVED**

**Oct 06 2023**

**SC Court of Appeals**

FILED IN THE OFFICE  
 CLERK OF COURT  
 2023 OCT - 3 P 3: 25  
 BRANDY W. MOBBE  
 CHEROKEE COUNTY, SC

Hearing Date/s: September 28th, 2023  
 October 2nd, 2023  
 Hearing Judge: Grace Gilchrist Knie

This matter was before the Court upon the State’s Motion, Order, and Rule to Show Cause for the Compliance of Material Witness with a Foreign Subpoena dated September 13th, 2023.

**PROCEDURAL AND FACTUAL HISTORY:**

This matter was commenced upon the Order and Rule to Show Cause signed by the Honorable R. Keith Kelly on September 13th, 2023, regarding a Petition of the State of New York to Secure an Out of State Witness. The Petition is addressed to the attendance of John Thomas Burger as a necessary and material witness in the criminal case of The People of the State of New York v. Timothy Braico and Terrence Edwards who have been charged with two counts of Assault in the Second Degree. The potential witness and the subject of the subpoena, John Thomas Burger, is now a resident of Cherokee County, South Carolina. There was an initial hearing on September 19th, 2023, before the Honorable R. Keith Kelly regarding the Rule to Show Cause. At that hearing

Defendant's Exhibit #1 was placed into evidence, a letter dated May 16th, 2023, from M. Jane Wasson, M.D. which stated that due to medical issues Mr. Burger was unable to travel for more than two hours and could not be more than 100 miles from home. Judge Kelly adjourned the hearing in order to allow Counsel the opportunity to establish Mr. Burger's medical issues in greater detail.

The hearing was reconvened on September 28th, 2023, and October 2nd, 2023, before the Honorable Grace Gilchrist Knie. At those hearings Counsel presented evidence of their positions and also presented evidence further detailing Mr. Burger's medical issues. A second letter from Dr. Wasson dated September 26th, 2023, was entered into evidence which detailed Mr. Burger's current medical conditions providing that he suffers from pancreatitis and vertigo and that Mr. Burger was hospitalized in April of 2023. The physician's opinion and recommendation is that travel at the present time is a hardship for Mr. Burger and that he does not fly due to vertigo and to drive would be a hardship due to exhaustion after four hours.

**LAW:**

The State of South Carolina has adopted the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings, S.C. Code Ann. 19-9-10 to 19-9-130 (1976).

S.C. Code Ann. 19-9-30 (1976) provides as follows:

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution or grand jury investigation and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

S.C. Code Ann. 19-9-40 (1976) provides as follows:

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state and that the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court in which the prosecution is pending or in which a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

Pursuant to Groff v. DeJoy, 600 U.S. 447 (2023), the statutory term, “hardship,” refers to, at a minimum, “something hard to bear” and suggests something more severe than a mere burden... Adding the modifier “undue” means that the requisite burden or adversity must rise to an “excessive” or “unjustifiable” level.

#### ARGUMENTS:

The State argues that Mr. Burger has been declared a material witness in this matter and has had ample notice of the proceeding. The State contests that Mr. Burger’s health condition prohibits him from traveling to New York to testify and points out that his most recent hospitalization was in April of 2023, and he has had minimal medical treatment since that time. This treatment consisted of four visits to Dr. Wasson’s medical group in which he met primarily with the physician’s assistant not the physician. The State further argues that the State has complied with all requirements of The Act and will continue to do so by making all necessary arrangements for appropriate accommodations to minimize Mr. Burger’s inconvenience and to accommodate any health concerns.

Mr. Burger alleges undue hardship in being compelled to attend and testify at a trial that is in excess of six hundred miles from Mr. Burger’s home residence based upon his current medical issues. In support Mr. Burger presented evidence from his treating physician, Dr. M. Jane Wasson,

M.D., which details that he suffers from intermittent episodes of severe pancreatitis and based upon his verification, vertigo. He further argues that his testimony is not necessary as there are other witnesses with the same knowledge to testify if subpoenaed.

**CONCLUSION:**

The Court acknowledges and appreciates the amount of research and preparation for the proceedings by Counsel, as well as, the professionalism of Counsel in their presentations to the Court. After consideration of the record, arguments presented, and the applicable law, the Court finds and Orders as follows:

1. The Court is Granting the Petition to secure John Thomas Burger's testimony as a necessary and material witness pursuant to S.C. Code Ann. 19-9-10 through 130 (1976) of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.
2. The Court finds that the State of New York has complied with the requirements as outlined in The Act and has presented a Certificate of Materiality by the Assistant District Attorney and the Honorable Maxwell Wiley that the witness John Thomas Burger is material and necessary to the matter pending in the Supreme Court of the County of New York, and the State of New York.
3. The Court finds that John Thomas Burger shall cooperate and comply with the subpoena.
4. In preparation for Mr. Burger's presence, which will be required on or about October 10, 2023, the District Attorney's Office shall make all necessary travel arrangements by automobile, train, or airplane to include any necessary hotel arrangements, meals, and other transportation in order to reasonably accommodate Mr. Burger's unique health conditions and to accommodate the needs of his spouse.

IT IS SO ORDERED.



The Honorable Grace Gilchrist Knie  
Resident Judge, Seventh Judicial Circuit

Dated: October 3rd, 2023