STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2022-000671

THE STATE, ...RESPONDENT,

v.

TERRON G. DIZZLEY,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the retrial of Appellant in 2014 violated his right to double jeopardy when his first trial ended in an improvidently granted mistrial.

2. Whether the retrial of Appellant in 2014 violated his right to double jeopardy when the trial judge effectuated the granting of directed verdict when dismissing the jury at his first trial.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether this Court should hear this appeal at all since Appellant previously voluntarily withdrew his right to a direct appeal with prejudice and since the original motion which led to an Order that is now being appealed was filed by two individuals not licensed to practice law in the State of South Carolina?

2. Whether, if this Court reaches the merits, Judge Culbertson properly denied the motion for release as Appellant is not being held under a "Double Jeopardy standard" as the Judge Baxley, the first trial judge, properly dismissed the jury after it came back hung after an *Allen* charge?

STATEMENT OF THE CASE

Appellant was indicted at the July 2009 term of the grand jury for Georgetown County for the December 1, 2008 murder of Audrey Evans, Jr. (2009-GS-22-00778). He was prosecuted by Assistant Solicitor Scott Hixon and was represented by attorney Charles Barr. Appellant first proceeded to trial by jury from August 27 to 30, 2012, and deliberations began on August 29th at 1:07 P.M. Aug. 27-30, 2012 Tr. The jury asked to hear audio transcripts from four witnesses for the defense at 3:57 P.M., but later sent the judge a note at 5:23 P.M. indicating they could not reach a verdict at that time. Deliberations resumed the next day and ran from 9:42 A.M to 11:12 A.M. when the jury sent a second note indicating they were deadlocked. The Honorable Michael Baxley issued an *Allen* charge and then dismissed the jury after they reentered the courtroom without a verdict. Aug. 27-30, 2012 Tr.

Appellant proceeded to trial by jury for a second time before the Honorable Roger L. Couch from March 31-April 3, 2014. This time, he was prosecuted by Assistant Solicitor Erin Bailey, but Charles Barr's representation of Appellant continued. He was found guilty of murder on April 3, 2014 and was sentenced to thirty-five years' imprisonment. March 31-April 4, 2014 Tr. Appellant filed a post-trial motion for a new trial on April 14, 2014, and the judge issued an order denying the post-trial motions on May 5, 2014. Appellant timely appealed the verdict of his second trial with Jeremy A. Thompson as his first appellate attorney, who was then substituted for Susan Barber Hacket on May 12, 2015.

Appellant then filed a motion to voluntarily withdraw his direct appeal on July 14, 2015 with this Court, indicating he wished to pursue post-conviction relief instead. In his Affidavit (which he signed after being duly sworn by a notary) he affirmed he wanted his appeal to be "dismissed with prejudice so that I may pursue collateral relief," and "I consent to this Court

dismissing this appeal with prejudice." Case No. 2014-001339. This Court granted the motion two days later and the remittitur was handed down on August 4, 2015. Appellant then filed a myriad of *pro se* pleadings including an *Anders* brief under the appellate case number 2014-001339, but this Court declined to entertain them Appellant had knowingly and voluntarily withdrawn his direct appeal application and Appellant had an attorney representing him.

Appellant filed his PCR action by way of counsel Jeremy Thompson on September 9, 2015. In it, he admits he voluntarily withdrew his direct appeal application. After a full evidentiary hearing in Horry County occurred, PCR counsel Eleanor Duffy Cleary filed a 54-page Post Trial Brief in Support of Post-Conviction relief on June 17, 2019, but the PCR action was dismissed via a 54-page order of dismissal on December 2, 2019. Public Index. The Supreme Court of South Carolina dismissed the PCR appeal on April 27, 2021 after Appellant failed to file a petition for writ of certiorari and/or an appendix. Appellant did not raise the Double Jeopardy claim at the PCR stage, nor did he raise *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (granting limited direct appeals to defendants who have shown their trial counsel failed to fully advise of appeal rights and who have shown prejudice resulted.)

The action currently before this Court began on October 28, 2021 when Appellant and two women who are not attorneys filed an "Emergency Petition for Ex Parte Motion of Terron Dizzley pursuant to Immediate Release, Double Jeopardy, False Imprisonment, Lack of Trial Court's Jurisdiction to Impose Sentence" in the Fifteenth Circuit Court of General Sessions. The Honorable Benjamin H. Culbertson, Chief Administrative Judge, issued an Order denying the petition on April 12, 2022. In it, the judge states:

> [T]he motion . . . appears to seek the defendant's immediate release upon a claim of double jeopardy. The motion alleges the defendant was previously tried and acquitted on the charge for which he is now incarcerated. However, a review of the motion and supporting documents indicate that the defendant's first trial resulted in a mistrial after

> the jury failed to reach a unanimous verdict. Therefore, the defendant's right against double jeopardy has not been violated and the defendant's motion should be denied.

Appellant filed a motion to alter / modify / amend / reconsider / rescind on April 25, 2022, and then petitioned this Court as Appellant claimed the motion was never ruled on. This Court dismissed the appeal on May 24, 2022, for untimely service of the notice of appeal. The case was given the current Appellate Case No. 2022-000671. Appellant filed a second motion to reinstate the direct appeal on June 9, 2022, not addressing his April 25, 2022 motion to alter or amend Judge Culbertson's decision, but instead challenging this Court's acceptance of his voluntary withdrawal of his first direct appeal. He then moved to amend on June 14, 2022.

This Court then issued an Order on August 11, 2022 reinstating the appeal of Judge Culbertson's post-trial order only (it is unclear whether this Court has ruled on the reinstatement of Appellant's original direct appeal or whether that motion is properly before this Court at all) and remanded the case to the Court of General Sessions in order for it to rule on Appellant's April 25, 2022 motion to alter / modify, etc.

The Honorable Benjamin Culbertson of the Fifteenth Circuit Court of General Sessions held a hearing on November 17, 2022, and William G. Yarborough represented Appellant, while Deputy Solicitor Alicia Richardson represented the State. The transcript is 24 pages long. In it, the Court heard Appellant's double jeopardy argument and considered the first trial judge's (Judge Baxley) decision to dismiss the jury after the first jury hung after an *Allen* charge was given. Judge Culbertson stated, "[T]he law is clear: If you have a hung jury, the judge declares a mistrial, and then they can try him a second time if it is a hung jury where the jury could not reach a unanimous decision." Nov. 17, 2022 Tr. p. 5. Appellant argued the case was over (and was once and for all dismissed), however, and the State unlawfully retried and convicted him

(and thus he was being held unlawfully) because Judge Baxley said, "there is a strong message that the State has not met their burden of proof" during his remarks while dismissing the jury.

Judge Culbertson responded to this argument by saying, "Now, if this was a bench trial and the judge said they have not carried their burden of proof, then I agree with you, double jeopardy. So, I'm trying to figure out what happened in that first trial to determine whether or not jeopardy attached. Was the mistrial granted from the finding by the Court, or because the jury could not reach a unanimous verdict of guilt or innocence?" Nov. 17, 2022 Tr. pp. 5-6.

> Typically, the jury comes out, they say we cannot reach a unanimous decision, the judge gives them an *Allen* charge, sends them back out. If they come back out a second time saying they can't reach a unanimous decision, then the judge is compelled by law to issue a mistrial, and then the State can retry the case if the State chooses to . . . .

Nov. 17, 2022 Tr. p. 7.

Appellant responded by saying, "First, we're not arguing that the *Allen* charge was not a good *Allen* charge . . . What we're arguing is that when the *Allen* charge was made, and then . . . Judge Baxley dismissed the jury, was there a manifest necessity at that point to dismiss the jury?" Nov. 17. 2022 Tr. p. 7. He also referenced S.C. Code § 14-7-1330 and claimed Judge Baxley should have polled the jury when they came out hung a second time. Judge Culbertson responded by saying, "About what? They said they didn't have a unanimous decision. You can't poll them and say who votes guilty and who votes not guilty." Nov. 17, 2022 Tr. p. 9.

Discussions continued with Appellant arguing he was being held illegally under Double Jeopardy. Counsel for the Appellant offered cases to the judge that Appellant wanted argued. Nov. 17, 2022 Tr. p. 11. The State replied and clarified, "The case was tried, there was a hung jury with an *Allen* charge, the jury came back and said they were deadlocked, and a mistrial was declared . . . [t]hey are taking what happened out of context . . ." Nov. 17, 2022 Tr. p. 16. "There were discussions. The jury was out on one day. They came back the next day and deliberated, it

appears, until after lunch when they came back and said they were deadlocked. The judge denied the motion for directed verdict." Nov. 17, 2022 Tr. p. 16. The State continued:

> What it appears the judge did was sort of just a conciliatory statement to the jury; like, don't feel bad about what happened. He did make that statement saying, "There's a strong message to the prosecution that they are unable to meet their burden of proof to the extent that they can bring back a unanimous verdict," which is not the same standard as a directed verdict saying there is no evidence that the jury could find.
>
> This is more of a taken-out-of-context-conciliatory speech to the jury, pretty much like you did your job. **It is not a finding that there was insufficient evidence for it to go to the jury.**

Nov. 17, 2022 Tr. pp. 16-17 (emphasis added).

The Court ruled: "I'm going to deny the motion. I find that the defendant's first trial ended in a mistrial; therefore, double jeopardy did not attach. Further, the current motion is filed by individuals not licensed to practice law in the State of South Carolina. On both of those grounds, I'm denying the motion." Nov. 17, 2022 Tr. p. 19. Judge Culbertson also issued a Form 4 Order denying the motion, stating, "The defendant's first trial ended in a mistrial. Therefore, double jeopardy did not attach[]. Further, the defendant's current motion was signed and filed by individuals not licensed to practice law." It was received by this Court on November 28, 2022.

This Court sent Appellant and Respondent a letter on November 29, 2022, stating, "The Court has determined that the above matter will be allowed to proceed." Appellant through counsel filed his initial brief on April 18, 2023, and after motions by both Appellant and Appellant's counsel to relieve counsel (and a plethora of other motions) were denied, this Brief of Respondent now follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

ARGUMENT

I. This Court should not hear this appeal. First, Appellant voluntarily withdrew his direct appeal with prejudice and is thus not entitled to a second. Second, the motion which led to the Order that is now being appealed was filed by two individuals not licensed to practice law in South Carolina. Therefore, the matter is not properly before the Court.

This Court should dismiss this appeal for four reasons[1]: **(1)** Appellant did not raise this issue to the trial court during or after his first trial or before, during, or after his second trial in a timely manner. Therefore, the issue is not preserved for appellate review. **(2)** Appellant is not entitled to a second bite at the direct appeal apple because he voluntarily dismissed his first direct appeal with prejudice; **(3)** The motion from which this appeal springs was untimely and should have been dismissed in the circuit court on that ground; and **(4)** The women who filed the motion from which this appeal springs were not licensed to practice law in the State of South Carolina.

First, Appellant did not raise this issue to the trial court during or after his first trial or before, during, or timely after his second trial. Therefore, he has not preserved the issue for appellate review. Respondent does acknowledge, however, that certain types of jurisdictional issues may be raised at any time. To that extent, second, Appellant was convicted by the second jury on April 3, 2014 and timely filed a notice of appeal through counsel Charles Barr after post-trial motions were raised and ruled on. Appellant filed a motion to withdraw his appeal with prejudice on July 14, 2015, this Court issued an Order granting the motion to withdraw two days later, and the remittitur was issued on August 4, 2015. The Double Jeopardy issue was not raised post-trial by Mr. Barr or on PCR. Therefore, Appellant has waived the right to a direct appeal in general, and has waived his right to a direct appeal on or of this issue.

[1] There are more reasons, and to the extent this Court wishes to rely on them, Respondent asks this Court to dismiss this appeal pursuant to Rule 220(c), SCACR. Judge Culbertson reached the correct result even though jurisdiction to hear the motion may not have been proper, so to the extent this Court wishes to simply affirm, Respondent asks this Court so to do.

Rule 261, SCACR, governs agreements and settlements (along with Rule 260, SCACR), and Section (d) of Rule 261 provides, "the parties may request vacation of opinions, orders, decisions, and judgments previously issued in the matter. The agreement must set forth the facts that warrant this extraordinary relief." Appellant's original agreement to voluntarily withdraw with prejudice was submitted to this Court properly pursuant to Section (a) of Rule 261, SCACR, and was accepted by this Court. Appellant has not formally asked for a second direct appeal, nor has he set forth facts that warrant the extraordinary relief of a second direct appeal. He has not alleged (nor he is entitled to) a *White v. State* belated appeal. Appellant has not and does not allege he was never advised of his right to a direct appeal; trial counsel Charles Barr properly served the notice of appeal, then Appellant signed the withdrawal of that appeal with counsel Jeremy Thompson, and it was properly notarized, accepted, and ruled upon by this Court.

The facts from which his alleged Double Jeopardy claim spring were available to him the entire time; he is not asserting newly discovered evidence. Thus, Appellant is not entitled to a second bite at the direct appeal apple. He is appealing a post-trial order of a judge who likely did not have jurisdiction to hear Appellant's motion in the first place, but even if jurisdiction had vested, Appellant's current appeal springs from the same set of facts and circumstances his first direct appeal sprang from, and he gave up his right to that appeal. Thus, Court should dismiss.

Third, Appellant's ex parte post-trial motion was untimely filed in the Court of General Sessions and should have been dismissed on that ground. Appellant was found guilty on April 3, 2014, and trial counsel filed – and the trial court heard – post-trial motions at that juncture. Rule 29(a) of the South Carolina Rules of Criminal Procedure mandates that, "Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence." Appellant filed his motion on October 28, 2021,

nearly eight years later. Even if the motion were (and it as not) a motion for a new trial based on after-discovered evidence, Rule 29(b) mandates the motion must be made "within one year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." The alleged Double Jeopardy issue arose on the record in open court in April of 2014. Therefore, Appellant filed his post-trial motion out of time, and it should have been dismissed on that ground alone. This Court should dismiss this appeal from the denial of that motion on that ground.

Finally, Appellant's motion was written and filed by two women who affirmed on the record at the November 17, 2022 hearing before Judge Culbertson that they were not licensed to practice law in the State of South Carolina. Gwendolyn B. Frasier and LaQuesha Felder are not attorneys. "No person may practice or solicit the cause of another in a court of this State unless he has been admitted and sworn as an attorney." S.C. Code Ann. § 40-5-310 (2001). "The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts." *Brown v. Coe*, 365 S.E. 137, 139, 616 S.E.2d 705, 706-707 (2005); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). Appellant eventually retained Mr. Yarborough, a licensed attorney, to bring the motion to the circuit court, but the hearing sprang from the original pleading. Therefore, not only did the circuit court not have jurisdiction to hear the motion on November 17, 2022, the motion was initiated by non-lawyers. This Court should dismiss this appeal.

II. To the extent this Court would wish to reach the merits, the first trial judge lawfully dismissed the jury after an *Allen* charge and a second "hopelessly deadlocked" message. Therefore, Double Jeopardy did not attach, and the State lawfully tried Appellant for murder a second time. Judge Baxley did not make a ruling of acquittal when he said the jury hanging "sent a message" to the State.

Appellant argues Judge Baxley was making a formal ruling of acquittal when he stated, "That's actually a strong message to the Prosecution that they are unable to meet the burden of proof" when dismissing the first jury. August 2012 Tr. 314. The State disagrees and submits Appellant's argument is without merit. Appellant was tried for murder the first time from August 27 to 30, 2012. August 2012 Tr. Jury deliberations began on August 29, 2012, but the jury sent the judge a message telling him they were deadlocked. They resumed deliberations the next morning from 9:42 A.M. to 11:12 A.M., at which time the jury sent another note which caused the judge to bring them out for an *Allen* charge. August 2012 Tr. 308-313. The judge told the jury if they did not agree or could not agree on a verdict, he would declare a mistrial, meaning "nobody wins, neither the State nor the Defendant. It just means that at some future time this case will be tried again with some other jury sitting where . . . you sit today." After finishing the charge, he sent them back to continue their deliberations. August 2012 Tr. 312-313.

The jury sent the judge another note at 12:20 P.M. on August 30, 2012. August 2012 Tr. 313. He brought the jury back in, stated he had received a note telling him they were deadlocked, then said, "I don't want you to think in any way that your exercise as jurors has been a failure on your part because you could not reach a verdict. That's not a failure on your part." August 2012 Tr. 314. After talking about the strength of the system, he then said, "[W]hat you've told us is that you can't reach a unanimous decision, and I would say to you that that's not a failure on your part. That's actually a strong message to the Prosecution that they are unable to meet the burden of proof to the extent that they can bring back a unanimous verdict." August 2012 Tr.

314. At no time did Judge Baxley formally say he was directing a verdict of acquittal to Appellant. Trial counsel properly made that motion, and Judge Baxley denied it.

To further assuage any confusion about the meaning of his statements, Judge Baxley continued with, "Now, the way this process actually works is it is up to the Solicitor as to whether they will dismiss the charge or whether they will retry this case or perhaps redevelop the charge in some way and bring a separate of some kind and try that. It's a – the decision rests with the Solicitor. It's not within the control of the Defendant, but what's going to happen here is the Court is going to declare a mistrial . . ." August 2012 Tr. 314-315. The jury was dismissed shortly after, and the prosecution brought Appellant to trial a second time in April of 2014.

The Fifth Amendment's Double Jeopardy Clause does protect individuals from being twice placed in jeopardy of life or limb by the state. U.S. Const. amend. V. However, Double Jeopardy is not triggered when there is a ground of legal manifest necessity for a providentially granted retrial as there was here. U.S Const. amend. V; S.C. Const., art. 1, Section 12; *Ex Parte Prince*, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937); *State v. Bilton*, 156 S.C. 324, 153 S.E. 269 (1930). A mistrial because of a hung jury is a valid ground for manifest necessity. When announcing the mistrial, Judge Baxley did not announce a formal verdict of acquittal that would bar subsequent prosecutions pursuant to *Green v. United States*, 355 U.S. 184, 188 (1957). In fact, he denied the defense's motion for a directed verdict. Instead, he was merely thanking and encouraging the jury that their service was not in vain by his comment(s). He went on to explain that the ball was in the State's court regarding whether they wanted to re-try Appellant or change the charges, such that no reasonable person could conclude the case was over. At no time did Judge Baxley indicate he was intending to dismiss the indictment by his comments. This Court should dismiss the appeal.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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