THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITION FOR WRIT OF SUPERSEDEAS

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Table of Contents

Table of Contents..... i

Table of Authorities..... ii

Introduction..... 1

Factual and Procedural Background..... 2

Grounds for the Petition..... 4

1. John Erb Has a Constitutional and Statutory Right to a Writ of Habeas Corpus on Supersedeas from the Court of Appeals..... 6

2. John Erb's Petition is Based on a Final Decision by the General Sessions Court and a Trial Jury..... 8

3. John Erb is an Aggrieved Party in the Charleston County Jail..... 14

4. The Potential Delays Associated with John Erb Filing a Simultaneous or Subsequent Habeas Petition in Federal Court Would Create an Unnecessary Expense and Irreparable Harm to Him..... 16

Conclusion..... 19

Table of Authorities

Cases

Abney v. United States 7, 18

Arizona v. Washington 16

Blueford v. Arkansas 11, 12, 13

Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dep't of Health & Envtl. Control, ... 9

Gilliam v. Foster ..... passim

Justices of Boston Mun. Court v. Lydon 18

Livingston v. Murdaugh 15, 16

Oregon v. Kennedy 16

Shields v. Martin Marietta Corp., ... 14

State v. Benton 12

State v. Cox 14

State v. Gregorie 7, 15

State v. Hughes 10, 11, 17

State v. Isaac 10

State v. Joseph Brown 12, 13

State v. Looper, ... passim

State v. McKnight 9, 11

State v. Miller 7

State v. Parker 12

State v. Rearick ..... passim

United States v. Allen, ... 3, 12, 13

United States v. Martin Linen Supply Co., ... 12

Table of Authorities

Statutes

28 U.S.C.S. § 1291 7

S.C. Code Ann. § 14-3-330 ..... 6, 8, 9

S.C. Code Ann. § 14-8-200 5

S.C. Code Ann. § 14-8-290 5

S.C. Code Ann. § 17-17-10 ..... 5, 6, 8

S.C. Code Ann. § 17-17-140 5

S.C. Code Ann. § 17-17-20 3

S.C. Code Ann. § 17-17-30 5

S.C. Code Ann. § 18-1-30 14

Rules

Rule 201(a), SCACR 9

Rule 201, SCACR 4, 5

Rule 241, SCACR 4, 5, 16

Rule 29, SCRCrimP 3

Constitutional Provisions

S.C. Const. art. I, § 12 ..... 5, 6

S.C. Const. art. I, § 3 6

U.S. Const. amend. V 6

U.S. Const. art. I, § 9 ..... 4, 6

Introduction

On September 21, 2023, a sworn jury unanimously found John Erb not guilty of murder in Charleston County. It delivered the verdict to the General Sessions Court in writing on the trial's verdict form. The trial judge published the verdict into the record -- in open court – "[A]s to indictment number 2023GS103932, as to the charge of murder, we the jury find the defendant not guilty." (Exhibit 1, p.2, ll.10-12). The verdict form said Erb was guilty of the lesser-included offense of voluntary manslaughter. The State did not request polling when asked by the judge. The Defense did request polling on the voluntary manslaughter conviction when similarly asked. During polling, after confirming the acquittal on murder, one juror refused to affirm the voluntary manslaughter verdict.

The judge removed the jurors from the courtroom. Then he requested that the dissenting juror be brought into open court in the absence of the other jurors. When asked about her verdict, the dissenting juror said: "It was *always* not guilty, and I just wanted to get it over with because they were all in there screaming and yelling at me and I just – I'll never change my – like, it's not guilty. I'm sorry." (Exhibit 1, p.7, ll.13-16)[emphasis added]. Judge Price immediately declared a mistrial *sua sponte* in response.

When the State refused to acknowledge that the not guilty verdict on the murder indictment was double jeopardy, and placed petitioner's murder charge on the trial docket for November 6, 2023, in Charleston, the Petitioner filed a petition for a writ of habeas corpus before the General Sessions Court (Exhibit 2). A hearing was held before the trial judge on the writ. The judge then issued a written order finding the jury verdict was not double jeopardy on the murder indictment, despite the unanimous not guilty verdict on the charge published in open court (Exhibit 3). The Petitioner filed a motion to reconsider the adverse double jeopardy ruling

informing the trial judge that he would seek this writ of supersedeas from this Court if the judge did not reconsider his order (Exhibit 4). The judge denied that motion to reconsider (Exhibit 5).

Petitioner now seeks a stay and a writ of supersedeas from this Court because the State is calling Erb to trial on November 6, 2023, to again stand trial for murder in violation of the constitutional prohibition against double jeopardy and depriving Erb of due process.

I. Factual and Procedural Background

Erb is currently incarcerated at the Charleston County jail without a bond. On March 20, 2020, the North Charleston Police Department arrested John Erb on a warrant for murder in Charleston County. On August 29, 2023, the Charleston County Grand Jury indicted John Erb for murder. It did not indict him for any other offenses.

On September 18, 2023, Erb's murder trial began before Judge Price. After three days of testimony from lay witness, police officers, and experts presented by the State and the Defense, the Court charged the jury on murder in addition to the lesser included offense of voluntary manslaughter, even though the State objected to the latter being charged against him. Then it dismissed the jury alternates and sent the remaining twelve jurors to the jury room for deliberations. The jury deliberated for roughly five and a half hours over the course of two days, and on September 21, 2023, the foreman of the jury delivered to the Court a verdict form in writing, finding John Erb not guilty of murder and guilty of voluntary manslaughter. The Court read the verdict into the record and stated that the foreman of the jury had signed the verdict form.

The Court subsequently asked the parties whether they wished to poll the jury. The State declined to do it, and upon the Defense's motion, one juror announced during polling that the verdict as read by the Court was not her verdict. The judge subsequently excused the jury from

the courtroom without a dynamite charge, per *United States v. Allen*, 164 U.S. 492 (1896), and without ordering the jury to continue deliberations. Then after fourteen minutes and over the Defense's objection, the Judge called the outspoken juror into the courtroom.

Upon questioning by the judge, the juror said she was bullied into convicting John Erb on manslaughter and that she never intended to find him guilty of any charge. Specifically, she said, "It was *always* not guilty, and I just wanted to get it over with because they were all in there screaming and yelling at me and I just – I'll never change my – like, it's not guilty. I'm sorry." (Exhibit 1, p.7, ll.13-16). After the juror's response, the judge immediately granted a mistrial, *sua sponte*, and released the panel without further explanation.

The Defense subsequently requested a copy of the verdict form from the Charleston County Clerk of Court and was told by the Clerk that it was destroyed and not filed in the case archives. Nonetheless, the recording of the proceedings and the transcript demonstrates the jury's acquittal of Erb for murder, as well as the intention of the lone dissenting juror, who refused to convict on any charge.

On September 29, 2023, the State published a trial docket with John Erb's murder charge listed at the top of it for a court term starting on November 6, 2023. In response, the Defense petitioned the Court for a writ of habeas corpus, or in the alternative, a judgment of "not guilty" within the appropriate timeframe, per Rule 29, South Carolina Rules of Criminal Procedure (SCRCrimP) and S.C. Code Ann. § 17-17-20 (Exhibit 2). Erb argued that jeopardy attached to his indictment for murder at trial and that another trial on the same indictment would be a violation of his due process rights and his protection against double jeopardy under the United States and South Carolina Constitutions. At the time of the petition's filing, John Erb remained incarcerated at the Charleston County jail, on his original indictment for murder, without a bond.

October 12, 2023, the State filed a response to Erb's petition (Exhibit 6), and on October 23, 2023, the Court denied the petition after conducting a hearing on the matter (Exhibit 4). Furthermore, on October 19, 2023, the Court denied John Erb's motion to reconsider the matter, while at the same time denying his request for a personal recognizance bond and a continuance of his trial date from November 6, 2023, (Exhibit 5) which had been requested for the purpose of petitioning for a writ of supersedeas before this Court.

II. Grounds for the Petition

This petition is merited and necessitates supersedeas action by this Court under Rule 241, South Carolina Appellate Court Rules (SCACR), because John Erb's unconstitutional incarceration in the Charleston County jail will become moot, if he is retried for murder on November 6, 2023. The rules state that "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decisions." Rule 201, SCACR. They also state that "[t]he effect of the granting of a supersedeas is to suspend or stay matters" decided in a Court order, Rule 241, SCACR(c)(1), and that "[i]n determining whether an order should issue. . . the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241 SCACR(c)(2).

The appellate rule relevant to John Erb's case generally states that in civil cases the service of a notice of appeal acts to automatically stay matters decided in a Court's order. Rule 241 (a), (SCACR). Also, the United States and South Carolina Constitutions state that "the privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it." U.S. Const. art. I, § 9; S.C. Const. art. I, § 12. This constitutional provision has been codified and expanded by the South Carolina legislature to apply to "any person. . . detained for any crime," S.C. Code Ann. § 17-17-10, and it

requires the use of civil law when appealing "all final decisions rendered on applications for writs of habeas corpus." S.C. Code Ann. § 17-17-140. Moreover, the statutory law on habeas states that "[a]ny of the judges of this State, in vacation time and out of term, . . shall upon request made in writing by such person as is committed as aforesaid or on his behalf, . . . award and grant a writ of habeas corpus, under the seal of such court. . ." S.C. Code Ann. § 17-17-30.

Similarly, the statutory law governing the South Carolina Court of Appeals states that "[e]ach of the judges of the Court shall have the same power at chambers to. . . issue writs of habeas corpus. . ." S.C. Code Ann. § 14-8-290. As a result, John Erb is entitled to a stay of his case in General Sessions Court and a writ to of supersedeas from this Court, pursuant to Rule 241 (a), SCACR, because the General Sessions Court denied his request for a writ of habeas corpus, and he is entitled to it based on his unconstitutional incarceration in the Charleston County jail for a murder charge on which a jury found him not guilty at trial.

This Court "has the same authority to issue writs of supersedeas, grant stays, and grant petitions for bail as the Supreme Court. S.C. Code Ann. § 14-8-200. In addition, the South Carolina Supreme Court has held that appealability is determined by statute or a final judgment upon an aggrieved party. *State v. Looper*, 421 S.C. 384 390, 807 S.E.2d 203, 206, 2017 (citing Rule 201, SCACR). As such, John Erb is entitled to a writ of habeas corpus on supersedeas from the Court of Appeals because (1) he has a constitutional and statutory right to a writ of supersedeas; (2) his petition is based on a final decision by the General Sessions Court and a trial jury; (3) he is an aggrieved party in the Charleston County jail; and (4) the potential delays associated with him filing a simultaneous or subsequent habeas petition in federal court would create an unnecessary expense and irreparable harm to him and the jury system.

1. **John Erb Has a Constitutional and Statutory Right to a Writ of Habeas Corpus on supersedeas from the Court of Appeals.**

John Erb has a constitutional and statutory right to a writ of habeas corpus on supersedeas from this Court 1because his request is exceptional and based on a substantial right to review of the General Sessions Court's denial of his habeas petition. The Fifth Amendment to the United States Constitution states that "no one shall be deprived of life, liberty or property without due process of law." U.S. Const. amend. V. The Fourteenth Amendment makes the due process clause applicable to the states, and South Carolina has adopted a similar provision in its constitution. U.S. Const. amend. V; S.C. Const. art. I, § 3. Accordingly, as stated earlier, the United States and South Carolina Constitutions establish a right to habeas corpus with the South Carolina legislature applying the right to "any person. . . detained for any crime," U.S. Const. art. I, § 9; S.C. Const. art. I, § 12; S.C. Code Ann. § 17-17-10.

However, in *State v. Rearick*, the South Carolina Supreme Court said that "[i]n South Carolina, a criminal defendant has no constitutional right to appeal. Rather the right to appeal is authorized by statute and appellate court rules of procedure." 417 S.C. 391, 398, 790 S.E.2d 192, 196, 2016. The Court subsequently reiterated its point on statutory appeals in *Looper*, holding that "a party may appeal from a decision not amounting to a final judgment only where provided by statute" and that absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depended on whether it fell under S.C. Code Ann. § 14-3-330. 421 S.C. 384, 390-391, 807 S.E.2d 203, 206 (2017). The provisions of S.C. Code Ann. § 14-3-330, allow for, among other options, "the appeal of a final order affecting a substantial right made in any special proceeding." S.C. Code Ann. § 14-3-330(3).

In *Rearick*, our Supreme Court outlined its history of denying interlocutory appeals in criminal cases. The Court used a historical timeline of holdings over the years as a reference point for an opinion that distinguishes itself from precedent created by the United States

Supreme Court. In *Abney v. United States*, the United States Supreme Court held that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was an appealable, final decision within the meaning of 28 U.S.C.S. § 1291. 431 U.S. 651.[1] However, the South Carolina Supreme Court in *Rearick* affirmed and quoted a position it took in *State v. Miller*, determining that *Abney* had "no application to state court appeals." 417 S.C. at 401, 790 S.E.2d at 197 (quoting 289 S.C. at 427, 346 S.E.2d at 706). The Court also states in *Rearick* that it reaffirmed *Miller* in *State v. Gregorie* when it said "'a criminal defendant claiming a double jeopardy violation is not exempt from the regular appealability requirements.'" *Id.* (quoting *Gregorie*, 339 S.C. 2, 4 n.1 528 S.E.2d 77, 78 n.1 (2000)).

Here, John Erb has been incarcerated in the Charleston County jail without bond on an invalidated indictment for murder since September 21, 2023, when a jury found him not guilty of the crime. To remedy the situation, Erb filed with the General Sessions Court a petition for a writ of habeas corpus rooted in his constitutional protection against double jeopardy when the State noticed him for a retrial date of November 6, 2023, on the same murder indictment. The General Sessions Court denied John Erb's habeas petition, and it denied his request for a personal recognizance bond and a continuance of his retrial date for the purpose of filing a supersedeas appeal. Accordingly, John Erb is entitled to a stay of his criminal trial and a supersedeas appeal of the General Sessions Court's denial of his habeas petition because he has a constitutional and statutory right to habeas review under the United States and South Carolina Constitutions, in addition to S.C. Code Ann. § 17-17-10 and S.C. Code Ann. § 14-3-330.

[1] Under 28 U.S.C.S. § 1291, "[t]he court of appeals (other than the United States Court of Appeals for the federal circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United State District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . ."

Erb's right to habeas review on appeal, regardless of its roots in double jeopardy, transcends the South Carolina Supreme Court's history of statutorily denying interlocutory appeals in criminal cases. It is based on John Erb's constitutionally protected basic freedoms under habeas doctrine, and unlike the case precedent historically referenced in *State v. Looper*, his habeas petition is a post-trial prayer for relief based on his unlawful incarceration in light of a final and official jury verdict, not a pretrial motion or mistrial lacking finality. Furthermore, the laws on habeas review on appeal, delineated in S.C. Code Ann. § 17-17-10 and S.C. Code Ann. § 14-3-330, are the types of "specialized statute[s]" referenced in *State v. Looper* that create an exception to the law on appellate review because any other interpretation of the law would unconstitutionally render habeas review meaningless in South Carolina, under *Looper*, allowing John Erb to remain incarcerated and retried for murder at the enormous expense of the tax payer, simply based on a trial judge's and prosecutor's review of the law. Finally, even if the statutory law on habeas review with its foundation in the United States and South Carolina Constitutions, does not meet the appealability exception created in *Looper*, then the General Sessions Court's denial of John Erb's habeas petition can still be appealed under the law on appellate review in S.C. Code Ann. § 14-3-330, because the lower court's denial is "a final order affecting a substantial right made in [a] special proceeding" placing in the balance under habeas doctrine, Erb's constitutional right to life and liberty.

2. John Erb's Petition is Based on a Final Decision by the General Sessions Court and a Trial Jury.

The Court of Appeals should issue a writ of habeas corpus, upon a supersedes appeal for John Erb, because the trial court's denial of his habeas petition and a jury's verdict of not guilty on his pending charge amount to reviewable final decisions in his case. As stated previously, "Appeal may be taken, as provided by law, from any final judgment, appealable order or

decisions." *State v. Rearick*, 417 S.C. 391, 399, 790 S.E.2d 192, 196 (2016)(citing Rule 201(a), SCACR). The South Carolina Supreme Court defines a final judgment as one that "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Looper*, 421 S.C. at 388, 807 S.E.2d at 205(quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894 (2010)). However, the Court has said that a criminal defendant typically may not appeal his case without the imposition of a sentence by the General Sessions Court, even though the State conversely can appeal a pre-trial, interlocutory order by a trial judge granting the suppression of evidence. *Id.* at 387, 807 S.E.2d at 204. This interlocutory right to a pre-trial appeal afforded to the State, and not to the Defense, allows the State the opportunity, under S.C. Code Ann. § 14-3-330, to have a reviewing court scrutinize pre-trial orders granting the suppression of evidence, "which significantly impair[] the prosecution of a criminal case." *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985).

In *State v. Looper*, a magistrate judge granted the Defendant's motion to suppress evidence. 421 S.C. at 386, 807 S.E.2d at 204. The State subsequently appealed the pre-trial matter to the General Sessions Court, and the Court held that the magistrate erred in granting the motion. *Id.* at 387, 807 S.E.2d at 204. The Petitioner appealed the General Sessions Court's ruling. *Id.* The South Carolina Supreme Court ultimately affirmed the Court of Appeal's dismissal of the Petitioner's interlocutory appeal because the General Sessions Court's ruling, which overturned the magistrate's pre-trial order to suppress evidence, "did not purport to determine Petitioner's guilt or impose any sentence on [the Petitioner]," as a final judgment. *Id.* at 389, 205. In support, the South Carolina Supreme Court referenced *State v. Isaac*, where it

dismissed an appeal of a trial court's pre-trial denial of immunity under the Protection of Persons and Property Act, and it held that generally a defendant may not appeal their case until a sentence is imposed by the trial court. *Id.* (citing 405 S.C. 177, 182-83, 187, 747 S.E.2d 677, 679-80, 682 (2013)).

Coincidingly, *Rearick*'s historical analysis of denying interlocutory appeals by defendants, the South Carolina Supreme Court quoted *State v. Hughes*, which stated:

> It is bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society. To allow appeals to be heard from such preliminary rulings would enable a party charged with the most serious crime always to secure a continuance, when otherwise not entitled to it, by simply moving to quash the indictment, and when his motion is overruled, give notice of appeal from such ruling, and thereby stop the trial. . . 56 S.C. 540, 543, 35 S.E. 214, 215 (1900).

The Supreme Court in *Rearick* wrote that if it were "to carve out an exception for the denial of a double jeopardy claim" to the longstanding rule in *Hughes*, then "all pretrial motions implicating a constitutional right would be subject to immediate appeal." 417 S.C. at 405, 790 S.E.2d at 199.

Here, however, the Court of General Sessions made a final decision on John Erb's habeas petition by disposing of the "whole subject matter of the action," per *Looper*, because it denied the petition and, upon reconsideration of it, the Court also denied Erb's request for bond and a continuance of his trial date. This means that there is "nothing to be done but to enforce by execution" John Erb's unconstitutional incarceration on an indictment for murder for which a jury found him not guilty at trial. Accordingly, this Court should make an exception to the long standing rule in *Hughes* and upheld by *Rearick*, because John Erb's appeal is based on a habeas petition brought about by a jury verdict and not simply a double jeopardy claim based on a

pretrial motion, such as cases analyzed in *Rearick*'s historical analysis of interlocutory appeals in South Carolina. Allowing the State to retry Erb on an indictment for murder, which has been invalidated by jury at trial, could significantly impair the prosecution of his case, per *State v. McKnight*, and it would be "destructive of the prompt administration of justice, which is so essential to the peace of society," per *Hughes,* by obviating the even longer standing doctrine on habeas and the substantial significance and sanctity of the jury system in the jurisprudence of the United States and South Carolina.

The State's likely response to this action will be that it is simply based on another mistrial and denial of a pre-trial double jeopardy claim, like those outlined and analyzed in *Rearick.* The State essentially made the same claim in their response to John Erb's habeas petition (Exhibit 6). It essentially asserted that the General Sessions Court "hit the reset button" on the jury's not guilty verdict for his murder indictment when the Court ordered a mistrial based on the jury's verdict, or lack thereof, on the lesser included offense of voluntary manslaughter.

However, a denial of John Erb's habeas petition by the Court of Appeals in line with the State's response to John Erb's habeas petition would ultimately fail to acknowledge the finality of the jury's verdict on Erb's murder indictment. The United States Supreme Court held in *Blueford v. Arkansas* that a final decision on a charge is necessary for jeopardy to attach to it. 566 U.S. 599, 606-608 (2012). The Court has determined that the Double Jeopardy Clause "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 605 (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977)). Accordingly, in *State v. Brown*, the South Carolina Court of

Appeals held that, "a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." 437 S.C. 550, 563, 878 S.E.2d 364, 371 (2022)(citing *State v. Benton*, 435 S.C. 250, 258-59, 865 S.E.2d. 919, 923 (Ct. App. 2021)(quoting *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011)).

In *Blueford v. Arkansas*, the United States Supreme Court held that jeopardy did not attach to a petitioner's charge because a jury foreman's report about deliberations on the record lacked "the finality necessary to constitute an acquittal" on the charge. 566 U.S. at 606. At Blueford's trial , the jury foreman in his progress report to the judge said the jury had reached a unanimous vote of not guilty on capital and first-degree murder. *Id.* at 599. This report was not based on a motion by the petitioner to poll the jury after a unanimous not guilty verdict was formally announced such as in this case. *Id.* at 603. It came after the jury sent a couple of notes to the judge regarding their inability to reach a consensus and after the court administered a dynamite charge, per *United States v. Allen*, 164 U.S. 492 (1896), emphasizing the importance of reaching a verdict in the case. *Id.* When the court summoned the jury after the second note from the jury room to address the deadlock on voluntary manslaughter on the record in court, the jury foreman reported that the jury was unanimously in favor of not guilty on murder in the first degree and split on its decision regarding manslaughter. *Id.* at 603-604. Following the announcement, the court gave another *Allen* instruction, and it declared a mistrial after another half hour of deliberations. *Id.* at 604. The state subsequently attempted to retry Blueford on capital and first-degree murder, and he moved to dismiss the charges based on a violation of his protection against double jeopardy. *Id.* The trial court denied the petitioner's motion, and the Arkansas Supreme court affirmed the trial court's decision based on the petitioner's interlocutory appeal. *Id.* The United States Supreme Court quoted the Arkansas Supreme Court in its opinion,

stating that "the foreperson 'was not making a formal announcement of acquittal' when she disclosed the jury's votes," and "'a formal verdict was [not] announced or entered into the record.'" *Id.* (quoting 2011 Ark. 8, p. 9, 370 S.W.3d 496, 501).

Similarly, in *State v. Brown*, the South Carolina Court of Appeals relied heavily on the opinions of the United States Supreme Court and Arkansas Supreme Court in *Blueford v. Arkansas* in making its determination that jeopardy did not attach to one of the petitioner's criminal charges. 437 S.C. 550, 564, 878 S.E.2d 364 (Ct. App. 2022). The Court of Appeals held that the State properly retried the petitioner in *State v. Brown* for armed robbery even though the jury in the initial trial sent the trial court a note stating that it was unanimously not guilty for the charge but in disagreement on the verdicts for the other charges before them. *Id.* at 564, 372. The basis for the Court of Appeals' determination was that an additional period of deliberation occurred after the judge received the jury's note indicating the jury was unanimously not guilty for the armed robbery charge. *Id.* at 565, 372. Specifically, the Court of Appeals said, "[W]e find nothing in the record from the first trial – aside from the language in the note as read into the record by the circuit court – to indicate the jury did not continue deliberating or even reconsider its decision regarding [the petitioner's] armed robbery charge following the *Allen* charge." *Id.* at 564, 372.

Blueford and *Brown* are readily distinguishable from John Erb's case. The jury's verdict, in Erb's case, had "the finality necessary to constitute an acquittal" on his murder charge. *Blueford*, 566 U.S. at 606. It was not simply an accounting of the votes during deliberation, like in *Blueford* and *Brown*. The trial judge read the verdict form signed and provided to him by the jury foreman into the record, and the judge stated not guilty on murder, and guilty of voluntary manslaughter. Also, the State declined to poll the jury on murder before the Defense moved to

poll the jury on the guilty verdict for voluntary manslaughter. As a result, the trial court improperly ruled that jeopardy did not attach to John Erb's murder charge. This Court should grant a writ of habeas corpus to Erb, based on this supersedeas appeal, because the General Sessions Court failed to recognize the finality of the jury's not guilty verdict at his trial – a final ruling by the trial court which should be treated as an exceptional circumstance under *Rearick* and habeas doctrine as it makes him an aggrieved party illegally wallowing in jail without bond.

3. John Erb is an Aggrieved Party in the Charleston County Jail.

John Erb is an aggrieved party entitled to a writ of habeas corpus on supersedeas from this Court because he is aggrieved in the legal sense for serving a jail sentence on a charge that he did not commit according to the not guilty verdict of a duly sworn jury at trial. Under statutory law, an aggrieved party may appeal a General Sessions Court's final judgment, S.C. Code Ann. § 18-1-30, and according to the South Carolina Supreme Court, an aggrieved party is defined as "one who is injured in a legal sense or has suffered an injury to person or property." *Looper*, 421 S.C. at 388, 807 S.E.2d at 205-06 (citing *Rearick*, 417 S.C. at 398 n.9 790 S.E.2d at 196 n.9)(quoting *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997)). However, the South Carolina Supreme Court in *Looper* makes a distinction in the phrase "injured in a legal sense." *Id.* For an appeal, it suggests that a conviction and sentence by a trial judge as a definition of the phrase. *Id.* at 390, 206. In support of the suggestion, the Court quotes *Shields v. Martin Marietta Corp.*, which states, "Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal on an interlocutory order." 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991)[citation omitted].

In *Rearick*, the General Sessions Court declared a mistrial in a felony DUI case and denied the petitioner's motion to bar subsequent prosecution of the charge under the Double

Jeopardy Clauses of the South Carolina and United States Constitutions. 417 S.C. at 492, 790 S.E.2d at 192. The South Carolina Supreme Court dismissed the petitioner's appeal as interlocutory based on a nuanced distinguishing analysis of the precedential case, *State v. Gregorie*, where the Court said, "Gregorie's appeal was immediately appealable not because it involved a double jeopardy claim, but because Gregorie was otherwise aggrieved by [a] new trial remedy. . ." *Id.* at 402, 198 (citing *State v. Gregorie*, 339 S.C. 2, 4 n.1, 528 S.E.2d 77, 78 n.1 (2000).

Here, John Erb is suffering an injury to his person, as an aggrieved party, under *Rearick*, because he is unconstitutionally incarcerated in the Charleston County jail, not because he is trying to avoid trial. John Erb is aggrieved because he is facing an imminent trial for murder after being found not guilty of that charge by a unanimous jury in the Charleston County Court of General Sessions. He has been denied a writ of habeas corpus by that same Court, and he has been denied reconsideration of the petition in addition to bond and a continuance of his trial date. In other words, the only result possible, based on the General Sessions Court's orders of denial, is a retrial of John Erb on his invalidated murder indictment and in violation of his protection against double jeopardy. Such a course of action would be judicially uneconomic and the source of irreparable harm to John Erb as analyzed and indicated by the United States Court of Appeals for the Fourth Circuit in *Livingston v. Murdaugh* and *Gilliam v. Foster* – cases which are recognized as "remedies" in *Rearick* by the South Carolina Supreme Court for defendants with habeas claims rooted in double jeopardy. *Id.* (citing *Livingston v. Murdaugh*, 183 F.3d 300, 301 (4th Cir. 1999); *Gilliam v. Foster* , 63 F.3d 287, 291 (4th Cir. 1995)).

4. The Potential Delays Associated with John Erb Filing a Simultaneous or Subsequent Habeas Petition in Federal Court Would Create an Unnecessary Expense and Irreparable Harm to Him.

John Erb's retrial on his invalidated murder indictment would be the source of irreparable harm to him and a waste of judicial resources, if this Court does not stay his case and grant his supersedeas appeal under Rule 241, SCRAC, because his case will likely proceed to trial while he waits for the federal courts to stop and/or overturn a potential conviction for murder. The United States Court of Appeals for the Fourth Circuit, in *Livingston v. Murdaugh*, held in a case involving a habeas petition rooted in double jeopardy in South Carolina that "[i]t would be contrary to the Fifth Amendment to require [the accused] to 'run the gantlet' again after the first jury implicitly acquitted him." 183 F.3d 300, 302, 1999. Also, *in Gilliam v. Foster*, the Fourth Circuit said:

> "Among the protections provided by [The Double Jeopardy Clause] is the assurance that a criminal defendant will not be subjected to 'repeated prosecutions for the same offense.' This protection encompasses the right to have a particular tribunal decide guilt or innocence once jeopardy has attached. . . '[A] second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may enhance the risk that an innocent defendant may be convicted.'" 75 F.3d 88, 893, 1996 (quoting *Oregon v. Kennedy*, 456 U.S 667, 671 (1982); *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978).

In terms of procedural posture, the United States Court of Appeals for the Fourth Circuit, in *Livingston v. Murdaugh*, denied the State of South Carolina's appeal and affirmed a district court's issuance of a writ of habeas corpus in a criminal case involving charges for reckless homicide and felony DUI.

The opinion, authored by Circuit Judge James Wilkinson III, recognizes that according to the district court, the respondent Livingston "had exhausted his state remedies" based on a "futile" attempt to appeal his double jeopardy claim in South Carolina. 183 F.3d 300, 301 (1999). The district court enjoined the State's prosecution of the reckless homicide charge based on a double jeopardy question of whether the prosecution judicially dismissed the charge after

the initial trial, and the court granted a writ of habeas corpus in favor of Livingston as the felony DUI case resumed in state court. As such, the timeliness of appellate review of Livingston's habeas petition considering his retrial was relatively moot because Livingston, unlike John Erb, was facing more than one charge. Nevertheless, in response to the State's appeal of the district court's habeas writ, Judge Wilkinson wrote:

> The State has had its fair opportunity to try Livingston for reckless homicide. A contrary judgement would run afoul of double jeopardy principles. Allowing a second trial for reckless homicide in this case would mean a prosecutor could strategically seek an instruction requiring a jury to choose between one of several charges and then, once the trial has ended, go after the defendant on undecided charges. Such a ruling would allow prosecutors to try defendants piecemeal, each time using a new trial to garner further convictions. *Id.* at 302.

In other words, Judge Wilkinson condemned the same piecemeal approach to trying cases that was condemned by the South Carolina Supreme Court in *State v. Hughes*, as quoted in *Rearick*, only he did so from the standpoint of the defendant based on the longstanding and complex judicial reasons for constitutional protection against double jeopardy, and not from the standpoint of the State based on the boilerplate public policy reasons surrounding "the prompt administration of justice, which is so essential to the peace of society." *Hughes*, 56 S.C. at 543, 35 S.E. at 215.

Furthermore, in *Gilliam v. Foster*, the United States Court of Appeals for the Fourth Circuit upheld the decision of the district court granting a writ of habeas corpus to a defendant based on an improvidently granted mistrial. 75 F.3d 881, 885 (1996). This *en banc* decision came after the South Carolina Supreme Court dismissed the defendant's appeal as interlocutory under South Carolina law for reasons unspecified in the opinion. *Id.* at 889. Circuit Judge William Wilkins authored the opinion in the case on double jeopardy in terms of habeas doctrine with one of the primary focuses being federalism and the constitutional complications created by

the South Carolina Supreme Court's refusal under *Abney v. United States* to hear interlocutory appeals, especially when based on a habeas petition. *Gilliam* , 75 F.3d at 904. The Wilkins opinion states:

> [B]ecause the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also "against being twice put to trial for the same offense," *Abney v. United States*, 431 U.S. 651, 660-62, 52 L.Ed. 2d 651, 97 S.Ct. 2034 (1977), a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level. *Id.* at 904 (citing *Justices of Boston Mun. Court v. Lydon,* 466 U.S. 294, 303 (1984); *Abney*, 431 U.S. at 662.

Moreover, in the advent of the opinion based on the *en banc* proceeding, Circuit Judge Wilkins authored another opinion about the case, which is cited previously in John Erb's petition as being referenced in *Rearick.* This opinion was a response to the State's motion for expedited consideration of its appeal of the district court's issuance of a writ of habeas corpus and the State's motion for temporary relief from harm created by the appeal's delay of the retrial of the defendant. *Gilliam* 63 F.3d at 288. At the time of the State's motion, the retrial of the defendant was already underway because of the "regrettable" delays associated with the inability of the district court, or any court for that matter, to grant a stay of the case. *Id.* at 291.

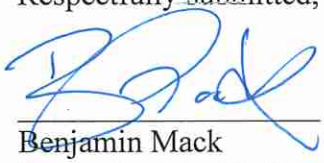
In the opinion, Judge Wilkins recognized the serious implications of his position under federalism doctrine on a matter he acknowledges as being hotly contested among the justices of the Fourth Circuit. *Id.* at 291. Referencing *Abney* on behalf of the slight majority, he stated, "The rub in this instance is that because of procedural rules the correction that could be afforded by [the South Carolina appellate courts] would come too late to safeguard the constitutional right at stake." *Id.* (citing 431 U.S. at 660-62). This suggests that only the United States Supreme Court can resolve "the split of authority as to the import of *Abney* in the state appellate court realm" without some exceptional position taken by the South Carolina appellate courts. *Rearick*, 417

S.C. at 403, 709 S.E.2d at 192. Nonetheless, the Wilkins opinion concludes that the State's motion "failed to show that it will suffer any irreparable harm by awaiting an *en banc* decisions of this court." *Gilliam*, 63 F.3d at 292. The opinion goes on to state, "In contrast, Petitioners will likely suffer an irreparable loss of their constitutional rights if the court grants the State the relief it seeks. Accordingly, the balance of the hardship tips decidedly in favor of the Petitioners." *Id.* In other words, the State has nothing to lose by waiting to retry John Erb's case while it is on appeal; conversely, John Erb has his rights and life to lose in double jeopardy.

III. Conclusion

This Court should stay John Erb's trial and grant him a writ of habeas corpus in this supersedeas action for the sake of judicial economy and to prevent the irreparable harm soon to be brought upon Petitioner Erb by a retrial on a murder charge where a unanimous jury in the Court of General Sessions in Charleston County previously found him not guilty on the charge.

Respectfully submitted,



Benjamin Mack
Senior Assistant Public Defender
Ninth Circuit Public Defender's Office
101 Meeting Street, 5th Floor
Charleston, South Carolina 29401

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITIONER'S EXHIBIT 1

State of South Carolina)
)
County of Charleston)

Circuit Court
202A1021000355

State of South Carolina)
)
vs.)
)
John Joseph Erb)

Second Amended
Transcript of Record

September 21, 2023
Charleston, South Carolina

B E F O R E:

The Honorable Bentley Price, Judge; and a jury.

A P P E A R A N C E S:

Timmy Finch, Solicitor
Attorney for the State

Benjamin A. Mack, Public Defender
Attorney for the Defendant

Kelly Borngen
Transcriber

THE BAILIFF: All jurors sitting present.

THE COURT: Thank you very much.

Mr. Foreman, it's my understanding you all have a verdict.

THE FOREPERSON: We do.

THE COURT: Is it unanimous?

THE FOREPERSON: It is unanimous, Your Honor.

THE COURT: You'll hand it to the bailiff please. Thank you, sir.

All right. As to indictment number 2023GS103932, as to the charge of murder, we the jury unanimously find the defendant not guilty.

As to the charge of voluntary manslaughter, we the jury unanimously find the defendant guilty. Signed the foreperson, dated September 21st, 2023.

Mr. Foreman, this indictment isn't for murder, and you put guilty. Will you -- will you write the word manslaughter on there please.

THE FOREPERSON: Yes.

THE COURT: All right. Thank you very much.

Any further polling from the State?

MR. FINCH: Not from the State, Your Honor.

THE COURT: From the defense?

MR. MACK: Judge, will you please poll the jury?

THE COURT: Absolutely. Ms. Ray (phonetic)?

THE DEPUTY CLERK: Ladies and gentlemen of the jury, I will call out your juror number. And when I do, please raise your hand. I will then ask you each two questions. Please answer yes or no.

Juror No. 189? Is this your verdict?

JUROR NO. 189: It is.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 189: It is.

THE DEPUTY CLERK: Juror No. 283? Is this your verdict?

JUROR NO. 283: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 283: Yes.

THE DEPUTY CLERK: Juror No. 131? Is this your verdict?

JUROR NO. 131: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 131: Yes.

THE DEPUTY CLERK: Juror No. 59? Is this your verdict?

JUROR NO. 59: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 59: Yes.

THE DEPUTY CLERK: Juror No. 91? Is this your verdict?

JUROR NO. 91: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 91: Yes.

THE DEPUTY CLERK: Juror No. 268? Is this your verdict?

JUROR NO. 268: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 268: Yes.

THE DEPUTY CLERK: Juror No. 271? Is this your verdict?

JUROR NO. 271: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 271: Yes.

THE DEPUTY CLERK: Juror No. 67? Is this your verdict?

JUROR NO. 67: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 67: Yes.

THE DEPUTY CLERK: Juror No. 22? Is this your verdict?

JUROR NO. 22: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 22: Yes.

THE DEPUTY CLERK: Juror No. 290? Is this your verdict?

JUROR NO. 290: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 290: Yes.

THE DEPUTY CLERK: Juror No. 16? Is this your verdict?

JUROR NO. 16: Yes.

THE DEPUTY CLERK: Is it still your verdict?

JUROR NO. 16: No.

THE COURT: All right, ladies and gentlemen, you'll have to return to the -- to the jury room.

(Whereupon, the jury exited the courtroom at 12:40 p.m.)

THE COURT: All right. Well, do we want to read him an Allen charge?

MR. MACK: Judge, the difficulty here is now we've done a split of the jury.

THE COURT: I know. That's what happens when you do the polling. All right. Hang tight.

(Recess from 12:40:50 p.m. to 12:54:46 p.m.)

THE COURT: I ask to clear the courtroom. The only people I need in here is the court reporter, the clerk, and the lawyers.

We have to do that because I can't take you back there because you'd have -- you have to stay in here. So that's why I cleared them out.

All right. Where'd the bailiff go?

Will you go get the juror for me? The female?

THE BAILIFF: Yes, sir.

THE COURT: Please.

THE BAILIFF: Mm-hmm.

MR. MACK: Judge, may I ask what the plan is here?

THE COURT: I'm just going to ask her what she wants to do. I mean, if she thinks it's futile and to continue to deliberate, I'm going to declare a mistrial. If she says I just lost it, I think I can talk to my friends, I just got to see what she needs to do before I make a decision.

MR. MACK: Can I respectfully object to this?

THE COURT: Sure.

MR. MACK: I feel like it would be coercive of you speaking to her and making her --

THE COURT: Well, have you --

MR. MACK: -- make a decision.

THE COURT: -- ever seen this before?

MR. MACK: Sorry?

THE COURT: I said, well, have you ever seen this before?

MR. MACK: I have not, Judge.

THE COURT: Okay then, neither have I. So we're all in this together. Okay?

MR. MACK: Right. And the objection I'm making comes under State v. Taylor, which recently was handed down by the Court of Appeals, 427 S.C. 208.

THE COURT: All right.

MR. MACK: Where they discourage giving Allen charges once -- when we know the breakdown of the jury.

MR. FINCH: And Your Honor, for the State's position, I was anecdotally told that this happened -- when this happened previously, the justice sent them back and see if they can deliberate. If it deadlocks after that and --

THE COURT: Yeah. That's what I'm going to see if it's even -- if it's even worth it.

MR. FINCH: I think the State's position is if they are

just sent back to go and then give them some time to see if there's a deadlock or bring them all in and say continued, perhaps everybody from the jury, and they're all told to work together sort of, not an Allen charge specifically, but just that we're sending them back to deliberate and that if they reach an impasse then to just let us know it's a hung jury. And then I -- I will just say, my concern is if it's just the one juror.

THE COURT: All right. So you indicated that it was your verdict and then that it was not your verdict. Only one question is that is me allowing you a little bit more time to deliberate that it'd be futile.

JUROR NO. 16: Yes, sir. It was always not guilty, and I just wanted to get it over with because they were all in there screaming and yelling at me and I just -- I'll never change my -- like, it's not guilty. I'm sorry.

THE COURT: Bring them out.

THE BAILIFF: You just can stay here.

JUROR NO. 16: Yes, sir.

THE BAILIFF: I'll bring everybody else back.

THE COURT: You don't stay here. You can stand out there. You don't have to --

JUROR NO. 16: Okay. Thank you.

THE COURT: Yeah.

(Whereupon, the jury came into open court at

approximately 12:59 p.m.)

THE BAILIFF: All jurors present.

THE COURT: All right. Thank you so very much. Ladies and gentlemen of the jury, I want to thank you for your time and your effort and commend you for the effort that you've put into this case. You all deliberated, as you're fully aware, for five hours and 12 minutes, so that's a lot of work, a lot of effort. But this is why we have a jury system. We have to get 12 people to agree, and we weren't able to, so I'm going to declare a mistrial.

So you all are free to go. I hope you have a wonderful rest of your day. All right.

(Whereupon, the jury exited the courtroom at 1:00 p.m.)

THE COURT: All right. Thank you all for everything. You all just need anything, just let us know.

MR. FINCH: Thanks, Judge.

THE COURT: All right. Have a good day.

(End of Transcript of Record)

CERTIFICATE OF TRANSCRIBER

State of South Carolina)
)
County of Charleston)

I, KELLY BORNGEN, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Charleston County, South Carolina, on the 21st day of September, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 4, 2023

Kelly Borngen

Kelly Borngen, CDLT-290
Transcriber

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITIONER'S EXHIBIT 2

FILED
2023 OCT -5 PM 4:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	**IN THE COURT OF GENERAL SESSIONS FOR THE NINTH JUDICIAL CIRCUIT**
	Warrant No(s): 2020A1021000355
STATE OF SOUTH CAROLINA vs. JOHN JOSEPH ERB, Defendant	**DEFENSE PETITION FOR HABEAS CORPUS OR IN THE ALTERNATIVE MOTION FOR ENTRY OF VERDICT PURSUANT TO RULE 29, SCRCrimP**

RE: John Erb's Incarceration for Murder despite a Jury's Verdict of Not Guilty on the Corresponding Indictment for the Charge at Trial

John Erb respectfully requests the General Sessions Court issue a writ of habeas corpus to determine that jeopardy has attached to his indictment for murder in Charleston County and that he is unconstitutionally being incarcerated in the Charleston County Jail in violation of his right to due process of law. The Fifth Amendment to the United States Constitution states that "no one shall be deprived of life, liberty or property without due process of law," and under the Double Jeopardy Clause, it prohibits anyone from being prosecuted twice for substantially the same crime. U.S. Const. amend. V. The Fourteenth Amendment makes the due process and double jeopardy clauses applicable to the states, and South Carolina adopted similar provisions in its constitution. U.S. Const. amend. V; S.C. Const. art. I, § 3; S.C. Const. art. I, § 12. Also, the South Carolina Constitution states that "the privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it," S.C. Const. art. I, § 12. This constitutional provision has been codified and expanded by the South Carolina legislature to apply to "any person. . . detained for any crime." S.C. Code

Ann. § 17-17-10. As a result, John Erb is entitled to a writ of habeas corpus from the Court (1) because jeopardy has attached to his indictment for murder in Charleston County based on a "not guilty" jury verdict at trial on the charge and (2) he is being incarcerated in the Charleston County Jail by the Charleston County Sheriff's Office against his constitutional right to life, liberty and due process of law under the Fifth Amendment.

CASE PROCEDURE

- On March 20, 2020, the North Charleston Police Department arrested John Erb on a warrant for Murder in Charleston County, and he currently does not have a bond on the charge.
- On August 29, 2023, the Charleston County Grand Jury indicted John Erb for Murder and no other offense.
- On September 18, 2023, the General Sessions Court swore a jury at trial for John Erb on the above-referenced indictment of murder in Charleston County.
- On September 21, 2023, after deliberating in secret, the jury returned to the courtroom and delivered to the court a verdict form finding Erb not guilty on murder and guilty on manslaughter. The Court read the verdict into the record and stated that the foreman of the jury had signed the verdict form. The Court first asked the State whether it wished to poll the jury; the State declined. Upon Defense's motion to poll the jury, one juror announced that the verdict as read was not her verdict. The Judge subsequently excused the jury from the courtroom without a dynamite charge, per *United States v. Allen*, 164 U.S. 492 (1896), and without ordering the jury to continue deliberations. Then after fourteen minutes and over the Defense's objection, the judge called the outspoken juror into the courtroom for questioning. Upon questioning, the juror said that she was bullied

into convicting John Erb on manslaughter and that she never intended to find him guilty for the charge. Specifically, she said, "It was *always* not guilty, and I just wanted to get it over with because they were all in there screaming and yelling at me and I just – I'll never change my – like, it's not guilty. I'm sorry." (Exhibit 1, p.7, lns.13-16).[1] After the juror's response, the Judge immediately granted a mistrial *sua sponte*. The Defense requested a copy of the verdict form from the Charleston County Clerk of Court and was told it was destroyed and not filed. Nonetheless, the recording of the proceedings and an official transcript prepared therefrom exemplifies the clear intent of the jury to find Erb not guilty of murder, as well as the intention of the lone dissenting juror to cast a vote of not guilty as to voluntary manslaughter. No further polling of the jurors occurred on the record, and there is no evidence other than that the jury was unanimous as to its verdict of not guilty as to murder and deadlocked as to a verdict on manslaughter.

- On September 29, 2023, the State published a trial docket with John Erb's murder charge listed at the top of it, despite the verdict delivered by the jury at his trial for the charge. This petition for a writ of habeas corpus follows the publication of the trial docket while John Erb remains incarcerated at the Charleston County Jail, and in an abundance of caution, it has been filed within 10 days and two court terms of the verdict delivered in John Erb's trial.
- In the alternative to the petition for writ of habeas corpus, Erb asks the General Sessions Court, pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure to enter a verdict of "not guilty" as to murder.

LEGAL ANALYSIS

[1] Kelly Borngen, Transcript of Record for *State of South Carolina v. John Erb*, in the Circuit Court before The Honorable Bentley Price, Judge; and a jury, 202A1021000355, September 21, 2023.

1. Habeas Corpus

John Erb is entitled to a writ of habeas corpus because he is currently incarcerated at the Charleston County Jail on a murder charge, despite a jury rendering a not guilty verdict on the indictment associated with the charge at trial. The law is general on the issuance of writs for habeas corpus. As stated previously, they may be issued by the Court for anyone being "detained for any crime." S.C. Code Ann. § 17-17-10. However, the South Carolina Supreme Court has said that "[h]abeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. For these reasons, a defendant bears a much higher burden in a habeas proceeding. A writ of habeas corpus is reserved for the very gravest of constitutional violations, 'which, in the setting, constitute[] a denial of fundamental fairness shocking to the universal sense of justice.'" *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602, 2008 (citing *Green v. Maynard*, 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002)). Nonetheless, any circuit judge in South Carolina can grant a writ of habeas corpus, S.C. Code Ann. § 17-17-30, and upon the issuance of the writ, the prisoner shall be brought within ten days before the court to determine "thereupon to do what justice shall appertain." S.C. Code Ann. §§ 17-17-80 and 17-17-90. The writ "shall be directed to the officer in whose custody the party so committed or detained shall be returned immediately before the judge issuing it," and the writ "shall be served upon the officer." S.C. Code Ann. §§ 17-17-50 and 17-17-60. Furthermore, a person "shall not have any habeas corpus to be granted in vacation time," if they have willfully neglected by the space of two whole terms after his imprisonment to pray habeas corpus," and appeals shall be interlocutory from "all final decisions rendered on applications for writs of habeas corpus." S.C. Code Ann. §§ 17-17-20 and 17-17-140.

Here, the Charleston County Sheriff's Office violated John Erb's constitutional rights by returning him to the Charleston County Jail after a jury rendered a not guilty verdict at trial on the indictment for murder associated with the charge, which resulted in his incarceration on March 20, 2020. Erb has been there without a bond since the issuance of the verdict on September 21, 2023, and he has not been directly indicted by a Charleston County Grand Jury for voluntary manslaughter – a lesser included offense of murder. Also, neither ten days for the purpose of appeal, nor two whole court terms have passed since September 21, 2023 in Charleston County. Consequently, John Erb is entitled to a writ of habeas corpus, under S.C. Code Ann. § 17-17-10, because he is being detained in the Charleston County Jail. The writ should be served on the Charleston County Sheriff, per S.C. Code Ann. §§ 17-17-50 and 17-17-60, for the purpose of determining "thereupon to do what justice shall appertain," under S.C. Code Ann. §§ 17-17-80 and 17-17-90, by conducting a hearing within ten days of the Court's issuance of the writ, regarding the attachment of jeopardy to his previously pending murder charge, and his unconstitutional incarceration at the Charleston County Jail.

2. Double Jeopardy

Jeopardy attached to John Erb's murder charge on September 21, 2023, because the jury made a final decision on the charge in the form of a not guilty verdict at trial. The United States Supreme Court held in *Blueford v. Arkansas* that a final decision on a charge is necessary for jeopardy to attach to it. 566 U.S. 599, 606-608 (2012). The Court has determined that the Double Jeopardy Clause "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 605 (citing *United States v.*

Martin Linen Supply Co., 430 U.S. 564, 569 (1977). Accordingly, in *State v. Joseph Brown*, the South Carolina Court of Appeals held that, "a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." 437 S.C. 550, 563, 878 S.E.2d 364, 371 (2022)(citing *State v. Benton*, 435 S.C. 250, 258-59, 865 S.E.2d. 919, 923 (Ct. App. 2021)(quoting *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011)).

In *Blueford v. Arkansas*, the United States Supreme Court held that jeopardy did not attach to a petitioner's charge because a jury foreman's report about deliberations on the record lacked "the finality necessary to constitute an acquittal" on the charge. 566 U.S. at 606. At the petitioner's trial, the jury foreman announced a unanimous vote of not guilty on capital and first-degree murder in his report to the judge at trial. This announcement was not based on a motion by the petitioner to poll the jury. It came after the jury sent a couple of notes to the judge regarding their inability to reach a consensus over the course of deliberating for hours and after the court administered a dynamite charge, per *United States v. Allen*, 164 U.S. 492 (1896), emphasizing the importance of reaching verdict in the case. *Id.* at 603. When the court summoned the jury after the second note from the jury room to address the deadlock on voluntary manslaughter on the record in court, the jury foreman reported that the jury was unanimously in favor of not guilty on murder in the first degree and split on its decision regarding manslaughter. *Id.* at 603-604. Following the announcement, the court gave another *Allen* instruction, and it declared a mistrial after another half hour of deliberations. *Id.* at 604. The State subsequently attempted to retry the petitioner on capital and first-degree murder, and the petitioner moved to dismiss the charges based on a violation of his protection against double jeopardy. *Id.* at 604. The trial court denied the petitioner's motion, and the Arkansas Supreme court affirmed the trial court's decision based on the petitioner's interlocutory appeal. *Id.* The

United States Supreme Court quoted the Arkansas Supreme Court in its opinion, stating that "the foreperson 'was not making a formal announcement of acquittal' when she disclosed the jury's votes," and "'a formal verdict was [not] announced or entered into the record.'" *Id.* (quoting 2011 Ark. 8, p. 9, 370 S.W.3d 496, 501).

Similarly, in *State v. Brown*, the South Carolina Court of Appeals relied heavily on the opinions of the United States Supreme Court and Arkansas Supreme Court in *Blueford v. Arkansas* in making its determination that jeopardy did not attach to one of the petitioner's criminal charges. 437 S.C. 550, 564, 878 S.E.2d 364 (2022). The Court of Appeals held that the State properly retried the petitioner in *State v. Brown* for armed robbery even though the jury in the initial trial sent the trial court a note stating that it was unanimously not guilty for the charge, despite disagreeing on the verdicts for the other charges before them. *Id.* at 564, 372. The basis for the Court of Appeals' determination was that an additional period of deliberation occurred after the judge received the jury's note indicating the jury was unanimously not guilty for the armed robbery charge. *Id.* at 565, 372. Specifically, the Court of Appeals said, "[W]e find nothing in the record from the first trial – aside from the language in the note as read into the record by the circuit court – to indicate the jury did not continue deliberating or even reconsider its decision regarding [the petitioner's] armed robbery charge following the *Allen* charge." *Id.* at 564, 372.

On the contrary, in John Erb's case, the jury's verdict had "the finality necessary to constitute an acquittal" on his murder charge. *Blueford*, 566 U.S. at 606. It was not simply an accounting of the votes during deliberation, like in *Blueford* and *Brown*. The trial judge read the verdict form signed and provided to him by the jury foreman into the record, and the judge stated not guilty on murder and guilty of manslaughter. While the subsequent statement of the

dissenting juror called into question the verdict as to manslaughter, no other person expressed dissent as to the verdict of "not guilty" as to murder, nor was the dissenting juror's statement inconsistent with the verdict as to murder. As a result, the Court should order that jeopardy attached to John Erb's murder charge, precluding the State from bringing the charge against him at trial on November 6, 2023, and releasing him from his unconstitutional incarceration at the Charleston County Jail.

Arguably, under *Brown*, the jury's possible deliberation after poling obviated the finality of the jury's not guilty verdict on murder. During poling, an outspoken juror changed her mind about her verdict on voluntary manslaughter, saying she found John Erb not guilty of the charge, and the trial judge removed the jury from the courtroom, while determining how to handle the extraordinary situation. However, the other jurors did not withdraw their not guilty verdict for murder when polled by the clerk of court, and the record does not show whether the jury continued deliberations after being removed from the courtroom, as the court did not order it. Furthermore, the judge called the outspoken juror into the courtroom after polling, and she said that the other jurors forced her to convict John Erb of manslaughter against her will and that she never intended to find him guilty for the charge. This action by the Court reveals, under Rule 606(b), SCRE, which is referenced in *Brown,* that deliberations by the jury had ended, because under the rule "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations. . ." *Id.* Plus, it suggests that "extraneous prejudicial information was improperly brought to the jury's attention" under the rule during deliberations. *Id.* Finally, in *Brown*, the Court of Appeals cites a couple of "persuasive" opinions by the Nebraska and Mississippi Supreme Courts, which provide clarity on the meaning of a final verdict under *Blueford*. 437 S.C. at 565-566, 372-373(citing *State v. Combs*, 297 Neb. 422, 900 N.W2d 473,

482-83 (2017); *Nickson v. State*, 293 So. 3d 231, 237 (Miss. 2020)). Both opinions, according to *Brown*, establish that the finality of a verdict turns on the completion of the verdict form, placing the verdict on the record, and polling the jurors. *Id.* In particular, the Mississippi Supreme Court in *Nickson v. State* distinguishes itself from *Blueford*, because the Court stated the jury could render a partial, final verdict and "[t]he foreperson did not simply disclose the jury's votes on each offense. Instead, the foreperson announced that the jury had reached a verdict on two counts and had delivered a verdict in writing and in proper form. . . although the jury continued its deliberations, it did so only after it had reached and delivered its verdict against guilty on first degree murder." 293 So. 3d 231, 237, 2020 Miss.[2] As such, the jury's removal from the courtroom after poling at John Erb's trial did not obviate the finality of the jury's not guilty verdict on murder, regardless of whether they continued deliberations, per *Brown*'s opinion of the controlling law in Nebraska and Mississippi.

3. Due Process

As a matter of due process, under the United States and South Carolina Constitutions, the Court should quash John Erb's indictment for murder based on a finding that jeopardy attached to it at trial thereby releasing him of his unconstitutional incarceration at the Charleston County Jail and preventing the possibility under *Blueford* "that even though innocent he may be found guilty" of the charge. *Blueford* supra at 605. The State may present its case against John Erb to the Charleston County Grand Jury for a direct indictment on voluntary manslaughter based on the Court's *sua sponte* granting of a mistrial on the charge. But, in the event of such a move by the State, Erb will likely move to quash any indictment for voluntary manslaughter based on (1)

[2] See also *Brazzel v. Washington*, 491 F.3d 976, 982, 2007 (That that a defendant may not be retried after an implied acquittal of *any* offense by way of a jury being deadlocked on a lesser included offense); *Stow v. Murashige*, 389 F.3d 880, 891, 2004 (Even if the jury did return "Not Guilty" verdicts because of an error of law by the trial court, even this potentially "egregiously erroneous" acquittal still raises a double jeopardy bar to a subsequent retrial).

a concern that the Court improvidently granted the mistrial by ordering it *sua sponte* without giving an *Allen* instruction after individually questioning the outspoken juror about her decision and (2) a concern that the State cannot claim in good faith to the grand jury probable cause exists for voluntary manslaughter when the State objected to the offense being charged by the Court to the jury at trial as a lesser included offense of murder before the jury's deliberations and finding of not guilty on John Erb's indictment for murder.

CONCLUSION

This court should grant the writ of habeas corpus, under the 5th Amendment, and order Erb released from the Charleston County Detention Center by quashing his indictment for murder. In the alternative, the Court should, pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure, direct the Clerk of Court to enter a verdict of "not guilty" on the charge of murder.

Respectfully Submitted,

/s/ Benjamin A. Mack

Benjamin A. Mack
Senior Assistant Public Defender
For John Erb

October 5, 2023
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITIONER'S EXHIBIT 3

FILED
2023 OCT 23 PM 4:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

vs.

JOHN JOSEPH ERB,

DEFENDANT.

ORDER DENYING DEFENSE'S PETITION FOR HABEAS CORPUS OR IN THE ALTERNATIVE MOTION FOR ENTRY OF VERDICT PURSUANT TO RULE 29, SCRCrimP

Arrest Warrant #2020A1021000355

Indictment #2023-GS-10-03932

THIS MATTER came before the Court on October 12, 2023, for the purpose of hearing the Defense's Petition for a Writ of Habeas Corpus or in the Alternative Motion for Verdict Pursuant to Rule 29, SCRCrimP. The Petition/Motion also prayed for a finding that Jeopardy had attached to the above referenced charge.

The Defendant's motion follows the declaration of a mistrial by the Court after jury deliberations were deemed futile by the Court. The Defendant trial for the above referenced charge in the Charleston County Court of General Sessions commenced September 18, 2023.

After two days of testimony and presentation of the State and Defendant's cases, the jury was charged on the law, including the lesser-included offense of voluntary manslaughter, and the Court explained the verdict form to the foreman. The verdict form had the following options for "Guilty" or "Not Guilty." The Jury was then instructed to go to the jury room and begin deliberations and return when there was a unanimous verdict. The jury began deliberations in the afternoon of Wednesday, September 20, 2023. Unable to reach a verdict, the jury was sent home to reconvene the next day to continue deliberations. On Thursday, September 21, 2023, the jury resumed deliberations in their jury room per the Court's instruction.

After several hours, the jury announced that it had reached a verdict in the case and returned to the Courtroom. The foreman of the jury delivered the verdict form and the indictment to the clerk who then presented it to the Court. The Court published the verdict as not guilty as to Murder and guilty as to Voluntary Manslaughter. The Court then asked the foreman to amend the indictment to reflect the verdict.

At the request of the Defense the jury was polled on its verdict. Each juror affirmed the verdict until the clerk reached the 11th juror, Juror #16. Juror #16 initially stated that it was her verdict when asked, but when asked to confirm, she stated that it was not her verdict.

The Court then sent the jury back to its jury room to continue deliberations toward reaching a unanimous verdict. After the jury retired to its room, the parties discussed next steps with the Court and defense objected to an Allen charge pursuant to *State v. Taylor*, 427 S.C. 208, as the split in the jury was known.

After approximately 14 minutes from the time the jury was sent back to deliberate, the Court asked that Juror #16 be brought before the Court to be examined on the utility of continued deliberation. Once before the Court, the Court asked Juror #16 if she could continue to deliberate or if the effort was futile. Juror #16 immediately and forcefully expressed that continued deliberation would be futile, stating, "Yes, sir. [My verdict] was always not guilty, and I just wanted to get it over with because they were in there screaming and yelling at me and I just – I'll never change my – like, it's not guilty. I'm sorry."

The Court, being in the best position to judge the credibility of Juror #16, determined that the jury would not be able to reach a unanimous verdict under the circumstances expressed by Juror #16. Further, based on Juror #16's statements, further deliberation would have been futile.

As the alternate jurors had been released, it was the Court's determination that there was no other choice than to declare a mistrial. The Defense did not object to the Court's declaration of a mistrial. The jury was then released from its service with the thanks of the Court.

The Defense then filed a "Petition for a Writ of Habeas Corpus or in the Alternative Motion for Entry of Verdict Pursuant to Rule 29, SCRCrimP" on October 5, 2023. The Court set a hearing on the matter for 10:00 a.m. October 12, 2023.

At the October 12 hearing, the following attorney appeared on behalf of the Defendant: Benjamin A. Mack, Esq. and the State was represented by Timothy Finch, Esq. of the Solicitor's Office.

The Court being well acquainted with the case, heard argument regarding the propriety of granting a Writ, determining if jeopardy had attached to the above charge, or entering a verdict on the above charge.

After hearing from the Defendant and the State and reviewing the applicable law and applying it to the facts of the present case, the Court finds it appropriate, and it is therefore **ORDERED, ADJUDGED, AND DECREED** that:

The Petition for a Writ of Habeas Corpus is DENIED, Jeopardy has NOT attached to the above referenced charge leaving the State in a position to retry the Defendant for Murder and the Court DENIED the request to enter a judgment on the above charge.

AND IT IS SO ORDERED!

BY
JULIE J. ARMSTRONG
CLERK OF COURT

Charleston, South Carolina
DATE: 23 OCT 2023

FILED

The Honorable Bentley Price
PRESIDING JUDGE, 9TH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITIONER'S EXHIBIT 4

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF GENERAL SESSIONS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF CHARLESTON	)	
	)	
	)	Warrant No(s): 2020A1021000355
	)	
STATE OF SOUTH CAROLINA	)	
	)	**DEFENSE MOTION TO RECONSIDER**
	)	**PETITION FOR HABEAS CORPUS/**
vs.	)	**JUDGEMENT, OR IN THE ALTERNATIVE**
	)	**SET A PERSONAL RECOGNIZANCE**
	)	**BOND**
JOHN JOSEPH ERB,	)	
	)	
Defendant	)	
	)	

RE: John Erb's Incarceration for Murder despite a Jury's Verdict of Not Guilty on the Corresponding Indictment for the Charge at Trial

John Erb respectfully requests that the General Sessions Court reconsider its denial of his petition for a writ of habeas corpus under S.C. Const. art. I, § 12 and S.C. Code Ann. § 17-17-10 in addition to its denial of his petition for an order of judgement under Rule 29, SCRCrimP. (Exhibit 1). In the alternative, John Erb respectfully moves the General Sessions Court for a personal recognizant bond, under Rule 4, SCRCimP and S.C. Code Ann. § 17-15-55. If denied the bond and writ/judgement on reconsideration, John Erb respectfully requests a continuance of his trial date on November 6, 2023, for "good sufficient cause" under Rule 7(c), SCRCrimP, because he plans to take supersedeas action in the South Carolina Court of Appeals against the General Sessions Court's order under S.C. Code Ann. § 17-17-140, and Rule 241, SCACR, which (1) requires the use of the law in civil actions when appealing "all final decisions rendered on applications for writs of habeas corpus" and (2) requires the automatic stay of matters decided in an order "upon the service of a notice of appeal" in civil matters.

Respectfully Submitted,

/s/ Benjamin A. Mack

Benjamin A. Mack
Attorney for John Erb

Dated: October 18, 2023
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITIONER'S EXHIBIT 5

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	**IN THE COURT OF GENERAL SESSIONS FOR THE NINTH JUDICIAL CIRCUIT**
	)	Warrant No(s): 2020A1021000355
STATE OF SOUTH CAROLINA vs. JOHN JOSEPH ERB, Defendant	)	**COURT ORDER**

FILED
2023 OCT 19 PM 2:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

RE: Defense's Motion to Reconsider Petition of for Habeas Corpus/Judgement under Rule 29, or in the Alternative Set a Personal Recognizance Bond and/or Grant a Trial Continuance

This Order is a response to the Defense's Motion to Reconsider filed in Charleston County on October 18, 2023. In the Motion, John Erb requested that the Court reconsider its order denying his Petition for a Writ of Habeas Corpus/Judgement under Rule 29. He also requested, in the alternative, in the Motion to Reconsider, that the Court grant him a personal recognizance bond, under Rule 4, SCRCrimP and S.C. Code Ann. § 17-15-55, and a continuance of his trial date on November 6, 2023, for "good sufficient cause" under Rule 7(c), SCRCrimP. Specifically, the request for a continuance was based on John Erb's plans to take supersedeas action in his case with an appeal of the General Sessions Court's order denying his Petition for a Writ of Habeas Corpus/Judgement under Rule 29 to the South Carolina Court of Appeals under S.C. Code Ann. § 17-17-140, and Rule 241, SCACR. The Court did not conduct a hearing on the Defense's Motion to Reconsider, and the State did not file a response to it. Nevertheless, the Defense's requests for reconsideration, a personal recognizance bond, and a trial continuance are hereby denied by the Court.

IT IS SO ORDERED!

Judge Bentley Price
Administrative Judge

Dated: 10.18.23
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2020A1021000355

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITIONER'S EXHIBIT 6

FILED
2023 OCT 12 PM 2:55
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

vs.

JOHN JOSEPH ERB,

DEFENDANT.

MSS STATE'S REPLY TO THE DEFENSE'S PETITION FOR HABEAS CORPUS OR IN THE ALTERNATIVE MOTION FOR ENTRY OF VERDICT PURSUANT TO RULE 29, SCRCrimP

Arrest Warrant #2020A1021000355

Indictment #2023-GS-10-03932

The jury trial of the above referenced case ended in a mistrial on September 21, 2023. On October 5, 2023, the Defendant filed a "Petition for Habeas Corpus or in the Alternative Motion for Entry of Verdict Pursuant to Rule 29 SCRCrimP." The State opposes the petition/motion for the foregoing reasons.

1. **Habeas Corpus**

The Defendant's argument for issuance of a Writ of Habeas Corpus rests on his belief that a verdict was rendered after the trial of the above referenced case. However, as the Court is fully aware, the trial resulted in a mistrial on September 21, 2023, through no fault of the parties, after the Court determined that continued deliberation by the jury would be futile, and the jury would not be able to produce a unanimous verdict. The mistrial was declared pursuant to the "Classic basis for a proper mistrial … the trial judge's belief that the jury is unable to reach a verdict." *Baum v. Rushton*, 572 F. 3d 198, (quoting *Arizona v. Washington*, 434 U.S. 497 (1978)).

As the Defendant points out in his rendition of the facts of the case in its Petition, unanimity in the verdict originally pronounced by the Court was defeated when one of the jurors changed her verdict during the polling requested by the defense. The defendant's trial lacked the

finality of a verdict as during polling it was revealed that one of the jurors did not agree, that verdict cannot be received by the Court. *State v. Linder*, 276 S.C. 304, 309 (1981). In its Petition, the Defendant cites surviving polling is a necessary step in the finality of a verdict. (See Defense Petition page 9 of 10 citing the Court's reasoning in *State v. Brown*, 437 S.C. 550 (2022)).

2. Double Jeopardy

The Defendant further argues that any future retrial on the above charge is barred by Double Jeopardy. However, the law is well settled that no jeopardy attached to the charge because there was no verdict entered. A final decision on a charge is necessary for jeopardy to attach to it. *Blueford v. Arkansas*, 566 U.S. 599 (2012). There is no bar to a retrial as the mistrial was ordered by the Court after determining a manifest necessity reflecting the "public interest in a fair trial designated to end in just judgment." *State v. Baum*, 355 S.C. 209 (2003). Double jeopardy does not bar the retrial of a defendant after a mistrial, if the mistrial was required by manifest necessity. *U.S. v. Sanford*, 429 U.S. 14 (1976). This case ended in a providently declared mistrial based on the manifest necessity of the jury at its impasse. See *U.S. v. Perez*, 22 U.S. 579 (1824).

In its Petition the Defendant cites *State v. Brown*, 437 S.C. 550 (2022), and its reliance on the reasoning in *Blueford v. Arkansas*. Both of those cases allowed for the retrial of the respective defendant's charges after a mistrial. The Defendant endeavors to distinguish his case from those by arguing that the purported verdict had been written on the form, signed by the foreperson, and read by the Court. However, he leaves out that the final step in the process before the verdict could be received and recorded—the polling of the jury which he requested.

The Defendant further tries to distinguish *Brown* and *Blueford* by hypothesizing on the jury's lack of deliberations after polling, while also admitting that the record does not include

whether the jury deliberated. The defense argues that it is unknown whether the jury deliberated after that point as it was not ordered by the Court, however, deliberation would have been the default position per the Court's instruction when the jury was originally sent back to its room after being charged on the applicable law of the case. Additionally, the Court seemingly understood that the jury was deliberating but decided to make an inquiry of the juror who changed her verdict during polling as to the utility of continued deliberation. *See* Defense Exhibit 1, Page 5, Lines 21-25.

After discussion with the juror, the Court found that justice required a mistrial as the juror was unable and unwilling to continue deliberation.

3. Due Process

As to the Defendant's request to quash the murder indictment against him under a Due Process argument, the State again asserts that no jeopardy attached to the charge because of the mistrial dictated by manifest necessity. The Defense objected to an *Allen* charge based on *State v. Taylor*, 427 S.C. 208 (2019) and, after being summoned by the judge after 14 minutes with the jury in the jury room, the juror indicated to the Court that further deliberation was futile. The Court was left with no other choice but to declare a mistrial leaving the parties to retry the case unless an alternate resolution is agreed upon. A mistrial "is the equivalent of no trial and leaves the cause pending in the circuit court." *State v. Woods*, 382 S.C. 153, 158 (2009). Accordingly, the Defendant's incarceration is in the posture of pretrial detention.

CONCLUSION

This Court should deny the Petition for a Writ of Habeas Corpus and allow the case to proceed in the circuit court. The Court should also decline to enter any verdict on behalf of the people of South Carolina as the case in its pretrial posture.

Respectfully submitted,

Timothy Finch
Assistant Solicitor
Ninth Judicial Circuit

October 12, 2023
Charleston, South Carolina