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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of General Sessions
The Honorable Bentley J. Price, Circuit Court Judge

On Petition for Writ of Certiorari to the South Carolina Court of Appeals
Court of Appeals Appellate Case No. 2023-001683

The State,

Respondent,

v.

John Joseph Erb,

Petitioner.

Appellate Case No. 2024-000762

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Question Presented

Did the South Carolina Court of Appeals err by dismissing John Erb's supersedeas action for a writ of habeas corpus, even though the action was based on Erb's unlawful incarceration for a murder indictment invalidated by a trial jury's not guilty verdict?

Respondent's Restatement of Question Presented

Did the Court of Appeals err by dismissing an interlocutory appeal pursuant to this Court's precedent that double jeopardy challenges are not immediately appealable?

STATEMENT OF THE CASE

Petitioner John Joseph Erb, though counsel, filed a notice of appeal from a general sessions order regarding a pending murder charge. The State moved to dismiss the appeal as interlocutory. On November 9, 2023, the Court of Appeals issued an order requesting additional materials and directing the parties to "serve and file memoranda addressing the question of double jeopardy and the application of *Blueford v. Arkansas,* 566 U.S. 599 (2012) and *State v. Brown*, 437 S.C. 550, 878 S.E.2d 364 (2022)." Both parties filed memoranda in response. On January 30, 2024, the Court of Appeals found the order was not immediately appealable citing *State v. Rearick,* 417 S.C. 391, 790 S.E.2d 192 (2016) and *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986). The Court of Appeals also noted that Erb was "free to assert his double jeopardy arguments – along with any other proper appellate issues – should a future appeal in this matter be necessary." (Jan. 30, 2024, Order). Erb's petition for rehearing was denied on April 9, 2024. Erb filed a petition for writ of certiorari on May 9, 2024. This return follows.

ARGUMENT

The Court of Appeals properly dismissed the notice of appeal from a general sessions order addressing a double jeopardy challenge as this Court's precedent establishes that orders from double jeopardy challenges are not immediately appealable.

"A writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Petitioner has failed show any "special and important reasons" to grant review of the Court of Appeals disposition. Though there is no controlling or discrete definition of "special important reasons," this Court will generally consider whether there are "novel question of law" presented, or "there is a dissent," or conflict between the Court of Appeals resolution and precedent from this Court or the Supreme Court of the United States. *Id.* This Court may also consider whether the petition presents a question reflecting a "substantial constitutional issue[]." *Id.* Such circumstances are not present here.

In essence, this case shows an ordinary application of this Court's precedent by the Court of Appeals as to *when* a question regarding double jeopardy may be raised. This Court has decided that such challenges are not immediately appealable. *State v. Rearick,* 417 S.C. 391, 790 S.E.2d 192 (2016). The Court of Appeals properly abided by this Court's precedent. *See, e.g., State v. Phillips,* 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("it is incumbent upon the court of appeals to apply this Court's precedent." (citing S.C. Const. art. V, § 9 ('The decisions of the Supreme Court shall bind the Court of Appeals as precedents.'))." The nub of Erb's complaints rests with his assertion that a prior jury acquitted him of the greater charge of the indictment, *i.e,* murder, and that he cannot be tried again for murder. Respondent submits that the record does not support his assertions, but regardless, he has not been tried again and no sentence has been imposed. Thus, the Court of Appeals properly dismissed the appeal as such orders are not

immediately appealable. *Rearick, supra.* Certiorari review is not warranted, and the petition for writ of certiorari should be denied.

Relevant Law:

It is well-established and has been "consistently held that a criminal defendant may not appeal until sentence is imposed." *State v. Rearick*, 417 S.C. 391, 400, 790 S.E.2d 192, 196 (2016); *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) ("in the criminal context, a judgment is final when sentence is imposed"); *see also State v. Hubbard*, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) ("An appeal in a criminal case must attend the final judgment rendered on the indictment" or must be dismissed). In fact, this Court has *repeatedly* found that "a criminal defendant may not appeal until sentence is imposed." *State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 680 (2013) (collecting cases). This Court has expressly considered whether double jeopardy challenges could be raised in interlocutory fashion, prior to trial and sentencing, and has consistently decided they may not. *Rearick,* at 404-405, 790 S.E.2d at 199; *see also State v. Miller,* 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) ("an order denying a double jeopardy claim is not immediately appealable").

Double Jeopardy and Mistrial

"The Double Jeopardy Clause provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Blueford v. Arkansas*, 566 U.S. 599, 605 (2012) (citing U.S. Const., Amdt. 5). "The Clause 'guarantees that the State shall not be permitted to make repeated attempts to convict...." *Id.* (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977)). However, a mistrial if warranted on the basis of "manifest necessity," retrial is not barred. *See, e.g., Arizona v. Washington,* 434 U.S. 497, 505 (1978)). "[D]eclaring a mistrial" because "the jury was unable to reach a verdict—has long been

considered the 'classic basis' establishing ... necessity" for a mistrial. *Blueford*, at 609 (citing *Arizona v. Washington,* at 509).

Relevant Facts:

Erb stood trial before a Charleston jury in September 2023 on the charge of murder. The jury indicated that they had reached a purportedly unanimous verdict and returned to the courtroom. The jury foreman reported a verdict for manslaughter; however, upon request by the defense,[1] the jurors were polled. During the polling, one juror (the eleventh polled) indicated that was not her vote. The transcript shows that the judge stopped at that juror, Juror No. 16. The remaining juror was never polled. (Portion of Trial Tr., at 4).[2] And, because there was no agreement, the judge directed the jury to return to the jury room for the possibility of further deliberations. (Portion of Trial Tr., at 4-5). The judge then had the juror who did not affirm her verdict return to the courtroom and inquired whether the juror would deliberate further. The juror indicated not just that deliberations would not be helpful but that her vote "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." (Portion of Trial Tr., at 7). With the juror refusing to deliberate, and without unanimity in a verdict, the judge declared a mistrial. (Portion of Trial Tr., at 8). Erb did not object, but he later filed a "petition for writ of habeas corpus" in the general sessions case and moved under various theories to have the court declare and acquittal on the murder charge.

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[1] Polling is mandatory upon the defendant's request. Indeed, "the denial of a defendant's request for individual polling is reversible per se." *State v. Wright*, 439 S.C. 101, 103, 886 S.E.2d 206, 207 (2023).

[2] A portion of the trial transcript was provided as Attachment 1 to the motion to dismiss filed in the Court of Appeals.

At the hearing on the general sessions petition, the defense relied upon *Blueford* in part and argued that *Blueford* reflected a "breakdown of the jury" and was distinguishable as deliberations continued before a mistrial was granted. (October 12, 2023 Tr., at 3). The defense attempted to distinguish a Court of Appeals decision, *State v. Brown*, 437 S.C. 550, 878 S.E.2d 364 (Ct. App. 2022), which considered *Bluefield,* by arguing that "there were multiple charges" in *Brown,* while here, "the only charge keeping John Erb in jail is the murder charge...." (October 12, 2023 Tr., at 3).[3] That was "the reason for the habeas petition in addition" to "a request of the judge to enter a not guilty verdict under Rule 29." (October 12, 2023 Tr., at 3-4).

The State argued that the mistrial was appropriately granted for a proper reason – "the judge's opinion that the jury will be unable to reach a verdict." (October 12, 2023 Tr., at 5). The State argued that the jury was sent back to the jury room, but ultimately the opportunity for further deliberations was stopped when the juror who did not affirm the verdict asserted that would be futile. (October 12, 2023 Tr., at 5-6). The State argued the defense had objected to any *Allen* charge. (October 12, 2023 Tr., at 5; Portion of Trial Tr., at 6).[4] The State also argued that Rule 29 would not apply to this case in pre-trial posture. (October 12, 2023 Tr., at 8).

In reply, the defense argued that rather than return for actual deliberations after the partial polling, the jury was instructed not to deliberate, that the court could make a double jeopardy determination "based on the amount of time that they supposedly deliberated," that his objection

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[3] This offered distinction notably does not account for *Blueford*, where the jury considered lesser offenses. *Blueford*, at 602. Respondent submits it is not a distinction of difference.

[4] The defense at the October 12, 2023, appeared to recall that there was not an objection to an *Allen* charge but an objection to "questioning the outspoken juror individually, because my belief is that deliberations couldn't continue after she was individually questioned." (Oct. 12, 2023 Tr., at 9). The portion of the trial transcript available, though, reflects: "... the objection I'm making comes under *State v. Taylor*, which recently was handed down by the Court of Appeals ... [w]here they discourage giving Allen charges once - - we know the breakdown of the jury." (Portion of Trial Tr., at 6).

to an *Allen* charge was restricted to the individual juror and not in general from the court, and that Rule 29 would be a proper vehicle "for the Court to enter a verdict on the murder charge..." (October 12, 2023 Tr., at 9).[5]

The judge denied the petition finding that Erb could be retried because the mistrial was properly granted based on the juror's responses and the futility of further deliberations. (October 12, 2023 Tr., at 10). The judge also declined to "enter a judgment on the ... charge." (*See* Notice of Appeal, Court of Appeals Appellate Case No. 2023-001683, October 23, 2023, Order, at 3).

Discussion:

The Court of Appeals properly dismissed the notice of appeal from the general sessions ruling because an appeal from such an order is improperly interlocutory and not allowed. *Rearick, supra.* Moreover, there is nothing to show a meritorious issue when the facts are considered in light of the facts and controlling law.

To be sure, the partial trial transcript shows that the jury had indicated agreement, and the trial court was poised to accept a purportedly unanimous verdict, but polling determined there was no unanimous verdict to accept. Polling is not an empty process, but one by which the court must determine and hold the jury to the requirement of unanimity. *State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981). *See also State v. Wright*, 439 S.C. 101, 102-103, 886 S.E.2d 206, 207 (2023) (affirming the importance of individual polling and the rule in *Linder*). The fact that polling was incomplete firmly undermines any reliance on the initial report. *See State v. Bilton*, 156 S.C. 324, 324, 153 S.E. 269, 273 (1930) ("A verdict of a jury should be presented in open

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[5] Rule 29(a), SCRCrimP, provides for motions post-trial and after imposition of a sentence. Erb has neither had a completed trial nor been sentenced. This rule does not afford him a vehicle to make the request.

court by the jury, properly published, assented to by all the jury, received by the court, and ordered placed of record before the final discharge of the jury.").

Moreover, another fact against Erb's position is that the verdict form does not exist[6] because one was never accepted as no unanimous verdict could be confirmed.[7] The only reason deliberations did not resume was because the juror who did not affirm her verdict would not participate in further deliberations. That itself undercuts a theory of unanimity. But the fact remains, that the judge was not "satisfied that the verdict [was] unanimous," *Linder, supra.*, when the eleventh juror failed to affirm. Nothing would bar the jury from further deliberations apart from the one juror's decision not to participate. Thus, in light of these facts of record and the guiding principles in *Blueford,* Erb's argument that double jeopardy bars a retrial lacks merit.

In *Blueford*, the jury informed the trial court it was deadlocked and further that the jury had found the defendant not guilty of murder (capital and murder first degree), though there was no agreement on a lesser offense. 566 U.S. at 603-604. The trial court gave an *Allen*[8] charge (the second such charge in Blueford's trial), and the jury resumed deliberations; however, the foreperson later returned and reported they had not reached a verdict at which time a mistrial was granted. *Id.,* at 604. Blueford agreed there was no "formal verdict" but argued "the foreperson's

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[6] Erb's counsel reported to the Court of Appeals that he "was not able to locate the verdict form from the ... trial after requesting it from the trial judge, the court reporter, and a representative of the Charleston County clerk of court." (Nov. 22, 2023 Letter, Appellate Case No. 2023-001683). Respondent agrees that these requests were made, but to be clear, the clerk's representative responded with the indictment and an assertion that "The Clerk's Office was not provided a verdict form in this case." (Email dated November 14, 2023).

[7] The trial judge, having received the initial report, had the foreman write "manslaughter," on the indictment. (Portion of Trial Tr., at 2). That was prior to polling which required the judge to determine unanimity, which the judge found did not exist. Thus, the foreman's notation was properly stricken by the trial judge upon declaring the mistrial. (*See* Indictment 2023-GS-10-03932).

[8] *Allen v. United States*, 164 U.S. 492 (1896).

announcement of the jury's unanimous votes on capital and first-degree murder" constituted "a resolution of some or all of the elements of those offenses in Blueford's favor." *Id.*, at 606. In reviewing the defendant's double jeopardy claim, the Supreme Court of the United States resolved "[t]he foreperson's report was not a final resolution of anything." *Id.* This was so because the jury was still able (and did) continue deliberations. *Id.* Though Blueford argued that the jury instructions indicated the jurors should only move to the next offense if they "resolv[ed] the greater offense in his favor," that mattered not because "[t]he jurors were never told that once they had a reasonable doubt, they could not rethink the issue. The jury was free to reconsider a greater offense, even after considering a lesser one." *Id.*, at 607.

Again, for Erb's prior jury, the only bar to additional consideration and to possibly "rethink the issue" through additional deliberations was the one juror who refused to participate. There is no bar to retrial under the *Blueford* precedent.

However, the State reasserts the appeal is impermissibly interlocutory as Erb has not yet been tried, convicted and sentenced. Consequently, the Court of Appeals was correct to dismiss the notice of appeal.

CONCLUSION

Based on the foregoing, this Court should deny the petition.

Respectfully submitted,

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