STATE OF SOUTH CAROLINA
in the
Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2024-000762
(S.C. Ct. App. filed Oct. 27, 2023)

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

REPLY TO THE STATE'S RETURN ON PETITION FOR A WRIT OF CERTIORARI

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I. Introduction

The South Carolina Supreme Court should respectfully disregard the State of South Carolina's return to John Erb's petition for a writ of certiorari because it plainly ignores his constitutional right to a writ of habeas corpus. Erb has not merely made a run-of-the-mill interlocutory appeal of his criminal case to this Court to determine if jeopardy has attached to his pending murder charge, as suggested by the State's boilerplate application of *State v. Rearick* in its return. 417 S.C. 391, 790 S.E.2d 192 (2016). On the contrary, Erb has properly requested certiorari review from this Court to address his desire for a writ of supersedeas under South Carolina's appellate rules for the purpose of determining whether to grant him habeas relief. In addition, the State's cursory analysis of manifest necessity and jury polling is not enough for this Court to deny Erb a writ of certiorari to address his claims for supersedeas action and his protection against unconstitutional incarceration.

On September 21, 2023, a sworn jury unanimously found John Erb not guilty of an indictment for murder at trial, and the General Sessions Court ordered a mistrial *sua sponte* in his case when the jury could not unanimously agree on a verdict for the lesser included offense of voluntary manslaughter. A lone juror withdrew her verdict on the lesser included offense upon polling by the Court, per Erb's motion. However, the jury invalidated Erb's murder indictment when the jury foreman signed the verdict form, the judge read the form into the record as not guilty on the charge, and the State did not request the Court to poll the jury on the matter. Accordingly, John Erb is wrongfully in jail because of the invalidated indictment, which is the only indictment pending against him in Charleston County and keeping him behind bars. The General Sessions Court made a final decision on whether to release Erb from jail when post-trial it denied him bond on the murder charge associated with his indictment and relief under habeas

doctrine. In addition, the State seeks to have Erb run the gauntlet of trial, once again, in violation of his constitutional protection against double jeopardy. It has already attempted to retry him on the invalidated indictment. His case would have proceeded to trial in Charleston County, despite his petitions before this Court and the Court of Appeals, on the weeks of November 6, 2023 and May 28, 2024, but for the General Sessions Court's removal of the case from the trial docket.

This situation is plainly not in line with the *Rearick* opinion's opposition to interlocutory appeals in criminal court based on double jeopardy. Unlike the appellant in *Rearick*, Erb's petition for a writ of supersedeas, though rooted in a double jeopardy claim, is based on the vehicle of habeas doctrine – a longstanding constitutional concept in the United States and South Carolina that is essentially ignored in the State's return as a remedy for unlawful incarcerations. The sacred doctrine allows unlawfully incarcerated individuals in South Carolina, like Erb, to draw on the "law in civil actions" in the form of petitions for writs of supersedeas when appealing "*all* final decisions rendered on applications for writs of habeas corpus." S.C. Code Ann. § 17-17-140 [emphasis added]. As a result, the South Carolina Supreme Court should not dismiss John Erb's petition for certiorari, as an interlocutory appeal per the State's return, because the petition is based on a final decision by the General Sessions Court on his request for relief from incarceration under South Carolina's habeas corpus doctrine. In other words, the sanctity of habeas corpus will essentially be nullified in South Carolina's courts, if this Court agrees with the State, compelling John Erb to continue to languish in jail, to rely on the federal court system for relief, and to withstand the stresses of another exhausting and expensive murder trial, despite final decisions on his relief from jail time by a trial judge and jury.

II. Reasons for Reply

A. The State's Return Fails to Address Habeas Petitions, Like John Erb's, under *Rearick* in South Carolina.

The State's return argues that John Erb's petition for supersedeas should be dismissed because it is simply a pre-trial double jeopardy claim that fails to raise "a novel question of law" or "a substantial constitutional issue" under Rule 242 of the South Carolina Appellate Court Rules (SCACR). Specifically, the State's return refers to Erb's petition for habeas relief as "an ordinary application of this Court's precedent" on questions regarding double jeopardy claims. (quoting *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016)). However, the State's return fails to analyze Erb's alternatives for habeas relief – in particular the case law referenced by *Rearick* as examples of the optional remedies to the South Carolina Supreme Court's bar on interlocutory appeals. The South Carolina cases referenced in *Rearick*, found their way to the United States Court of Appeals for the Fourth Circuit, and unlike *Rearick*, they involved habeas petitions rooted in double jeopardy claims, where the federal courts granted relief to the petitioners under habeas doctrine. See *Livingston v. Murdaugh*, 183 F.3d 300, 301 (4th Cir. 1999); *Gilliam v. Foster*, 63 F.3d 287, 291 (4th Cir. 1995).

Consequently, the State's return does not explain why this Court should follow in the footsteps of *Livingston* and *Gilliam* with Erb's request for habeas relief. The State essentially wants Erb to use the federal court system while it attempts to retry him for murder at the needless expense of the taxpayer and in violation of his constitutional rights, despite the disapproving *Livingston* and *Gilliam* opinions. In *Gilliam v. Foster*, the Court of Appeals for the Fourth Circuit stopped the retrial of the petitioner in Newberry County to restore his rights to protection against unlawful incarceration and double jeopardy. 75 F.3d 881, 885 (1996). This is a woefully expensive and harmful process, according to the Court, that undermines and complicates the federalism doctrine. *Id.* Nevertheless, the State has no problem repeating it under the law in John Erb's case, having already attempted to retry him on an invalidated murder indictment by placing

him at the top of a trial docket for the weeks of November 6, 2023 and May 28, 2024, while his appeal was pending before this Court and the South Carolina Court of Appeals. The State's end game of retrial and its desire to skirt the application of civil rules to habeas doctrine essentially solidifies the "futile" nature of petitions for habeas corpus in South Carolina, acknowledged in *Livingston* by the Fourth Circuit Court of Appeals. 183 F.3d 300, 301 (1999). It also undermines the state's jury system and the legislative intent under S.C. Code Ann. § 17-17-140 to protect the precious nature of habeas corpus relief by allowing the use of civil rules to appeal final determinations on potentially unlawful incarcerations. Habeas corpus doctrine is alive and well in South Carolina, despite the other remedies listed in *Rearick*, and it should be applied to John Erb's case to protect against the constitutional complications and procedural problems portrayed in the *Livingston* and *Gilliam* opinions.

B. The State's Return Fails to Address the Finality of the General Sessions Court's Denial of John Erb's Habeas Petition and the Finality of His Not Guilty Verdict at Trial.

The State's motion argues that John Erb's petition for certiorari should be dismissed because it is not based on a final judgement. This Court has said that appeals are merely a statutory right, and a "[p]etitioner's appeal is premature and must be dismissed," if it is not based on a final judgement. *State v. Looper*, 421 S.C. 384, 390, 870 S.E.2d 203, 206 (2017). See also *State v. Hubbard*, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982). It also has said that "a criminal defendant may not appeal until a sentence is imposed" by the court. *State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 680 (2013) (citing *In re Lorenzo B.*, 307 S.C. 439, 415 S.E.2d 795 (1993)). However, the law on habeas corpus in South Carolina is strongly rooted in the state's constitution, and it does not require that a sentence is imposed by a trial court for the purposes of an appeal. As stated previously, the law allows for the appeal of "*all* final decisions rendered on

applications for writs of habeas corpus." S.C. Code Ann. § 17-17-140 [emphasis added]. Accordingly, the General Sessions Court made a final decision in John Erb's case because it denied his petition for habeas relief and his request for bond, following Erb's not guilty verdict for his only pending charge in Charleston County at trial. No other relief short of another costly and taxing murder trial can possibly be granted by the General Sessions Court in John Erb's case, while he remains incarcerated in Charleston County. His only option for relief is appealing the General Sessions Court's orders to the South Carolina Court of Appeals and this Court because the federal exhaustion doctrine requires him to seek relief in state court before filing a federal habeas petition.[1]

In addition, the State's motion fails to analyze how the jury verdict at John Erb's trial was a final decision based on a finding of not guilty on his indictment for murder because it neglects the case law on the matter. The final verdict in Erb's case eliminated the ability for the trial court to impose a sentence against Erb for a murder conviction. The South Carolina Court of Appeals exemplified the finality of jury verdicts in *State v. Brown* with citations to a couple of "persuasive" opinions by the Nebraska and Mississippi Supreme Courts. 437 S.C. 550, 565-566, 878 S.E.2d 364, 372-373 (2022) (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 – all factors that are evident in Erb's case. *Id.* In particular, the Mississippi Supreme Court in *Nickson v. State* said that a jury can render a partial,

[1] In *Prentis v. Atlantic Coast Line Co.*, the United States Supreme Court declined to hear a claim that certain railroad rates that a state agency planned to promulgate were confiscatory in violation of the Fourteenth Amendment. 211 U.S. 2010 (1908). In the majority opinion, Justice Oliver Wendell Holmes said that the challengers should verify whether the State would respect their rights, before resorting to the courts of the United States. *Id.* at 230. Justice Holmes also emphasized that the Court's decision was grounded in mandatory jurisdictional limits, comity, and efficiency. *Id.* at 232.

final verdict. 293 So. 3d 231, 237, 2020 Miss.[2] As such, the jury's inability to agree on the lesser included offense of voluntary manslaughter in John Erb's trial did not obviate the finality of the jury's not guilty verdict on murder, per *Brown*'s opinion of the controlling law in Nebraska and Mississippi. Neither the trial court's unnecessary ordering of a mistrial nor incomplete polling of the jury negates the finality of Erb's acquittal for murder.

1. **The Trial Court's Incomplete Polling of the Jury Does Not Negate the Finality of John Erb's Acquittal for Murder.**

The State suggests that the trial court's failure to complete polling of the entire jury panel at Erb's trial potentially negates Erb's acquittal for murder. The State's return states, "During 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." Accordingly, the State's return alludes to the possibility that the twelfth juror could have changed their mind about Erb's not guilty verdict on murder during polling, much like the eleventh juror changed her mind about Erb's guilty verdict on voluntary manslaughter. However, this possibility is a fiction that creates a record where it does not exist for Erb's trial. The State had the option to poll the jury on their decision to unanimously find Erb not guilty of murder,[3] and it declined to do so. It also did not object to the manner that the Court conducted the polling of the jury on Erb's conviction for voluntary manslaughter upon his motion. We can only assume that the State was satisfied with the verdict of not guilty on murder and guilty on voluntary manslaughter when it was read into the record by the jury foreman, since it did not request to

[2] See also *Brazzel v. Washington*, 491 F.3d 976, 982, 2007 (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).
[3] A poll must be taken if requested by either party, and "a request, if any, for individual polling must be made immediately after the verdict is published." *State v. Wright*, 439 S.C. 101, 103 (2023).

poll the jury on the murder verdict, and we cannot assume that the twelfth juror would not have changed their mind about the verdict on voluntary manslaughter in the same fashion as the eleventh juror.

2. The Trial Court's Ordering a Mistrial Does Not Negate the Finality of John Erb's Acquittal for Murder.

The State suggests that the trial court's *sua sponte* ordering of a mistrial in Erb's case allows them to retry him for murder, despite being based on the jury's lack of unanimity over the lesser included offense of voluntary manslaughter. The State's return cites *Blueford* and states, "a mistrial if warranted on the basis of 'manifest necessity,' retrial is not barred. See, eg., *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." 566 U.S. 599, 605 (2012). However, the State's return does not provide an explanation about how the mistrial ordered *sua sponte* by the trial court was necessary or how it impacts Erb's acquittal on his murder indictment. In actuality, the jury's acquittal for Erb's pending murder charge is not impacted by the mistrial ordered by the Court. The jury was unable to reach a verdict on the lesser included offense of voluntary manslaughter, not murder, as indicted by the record during polling, and the trial court improvidently granted the mistrial on the murder charge because (1) it singled out and questioned juror 16 about her verdict and (2) it did not order the jury to continue deliberations after polling on the voluntary manslaughter charge.

In *Arizona v. Washington*, the United States Supreme Court stated that manifest necessity is not a standard that can be applied mechanically. 434 U.S. 497, 506 (1978). Instead, it requires that the court find a "high degree" of necessity "before concluding that a mistrial is appropriate." *Id.* This Court similarly has said the existence of manifest necessity for a mistrial has been long held as "[t]he pivotal issue determinative of the constitutional prohibition against double

jeopardy," *State v. Kirby*, 269 S.C. 25, 28 (2000), and that the trial court's decision is reviewed for abuse of discretion, as "[a] mistrial should only be granted when absolutely necessary." *State v. Harris*, 340 S.C. 59, 63 (2000). More specifically, the South Carolina Court of Appeals has stated that a defendant "may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *State v. Rowlands*, 343 S.C. 454, 457 (Ct. App. 2000).

Here, a mistrial on Erb's murder indictment was not absolutely necessary and was improvidently granted by the trial court. After polling the jury, the judge for Erb's murder trial removed the jury from the courtroom without an order to continue deliberations. Then he asked Erb's defense counsel whether they wanted a dynamite charge to be read to the jury, and they initially expressed concerns about the idea based on the split in the jury apparent from polling. Subsequently, the judge left the bench for 14 minutes, returning to it with the order to clear the courtroom of everybody except for the court reporter, the clerk, and the lawyers. Erb's counsel inquired into the trial judge's plan and then objected to the coercive nature of it.[4] Specifically, the trial judge wanted to question juror 16 individually about the futility of continued deliberations outside the presence of the entire jury and without addressing the finality of the entire jury's verdict on murder. The judge said, "I mean, if [juror 16] thinks it's futile and to continue to deliberate, I'm going to declare a mistrial" before questioning her. (Exhibit 1 – p.5, ln. 22-23). In response, Erb objected to the plan under *State v. Taylor* because of its ability to blow-up deliberations. 427 S.C. 208 (2019). Similarly, the State expressed a preference for the trial judge to urge the entire jury to seek a unanimous verdict without a dynamite charge, saying

[4] The Supreme Court of South Carolina has established that "to preserve an issue for appellate review, the objection must be timely made, which usually requires it be made at the earliest possible opportunity." *State v. King*, 334 S.C. 504, 510 (1999).

"I will just say, my concern is if it's just the one juror," referring to the trial judge's desire to question juror 16 individually and outside the presence of the rest of the jury. (Exhibit 1 – p.7, ln. 1-8)

In *State v. Kelly*, the South Carolina Court of Appeals dealt with a similar situation, where the defense requested the polling of the jury after it claimed to have a unanimous verdict of guilty for each offense against the defendant. 372 S.C. 167, 171 (Ct. App. 2007). Eleven of the jurors confirmed their verdicts as guilty, during polling, while one declared that she was "not comfortable" with the verdict. *Id.* at 170. At this point, the judge sent the jury back to the jury room to continue deliberations "to see if [they could not] reach a verdict." *Id.* The jury eventually returned two hours later with a unanimous verdict of guilty on all counts, and this verdict was confirmed by subsequent polling. *Id.* On appeal, Kelly argued that the trial court should have immediately declared a mistrial based on the jury polling and that the trial court should have issued a full dynamite charge after the lone juror retracted her guilty verdicts during jury polling. *Id.* The South Carolina Court of Appeals expressly rejected Kelly's claims, directly stating that "declaring a mistrial was not an absolute necessity, and no prejudice resulted from sending the jury back for more deliberations." *Id.* at 172.[5]

In Erb's case, the trial judge dismissed the jury without an order to continue deliberations, and he individually asked juror 16 a leading question regarding the *futility* of further deliberations separate from the rest of the jury. Intentionally or not, the judge's approach

[5] The South Carolina Court of Appeals in *State v. Kelly* cites *State v. Roper* and *State v. Singleton*, which involved similar circumstances of lone jurors dissenting during polling. In *State v. Roper*, this Court states that the trial court questioned the dissenting juror about her doubts on the verdict and that it collectively informed the jury that their verdict had to be unanimous. 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Then he had the jury retire to the jury room, and they "returned to the court room after approximately thirty minutes with a verdict of guilty, which was confirmed by individual polling. *Id.* Moreover, in *State v. Singleton*, this Court said, "if it is made known to the court when it is time to render a verdict that any juror does not assent to it, the verdict cannot be received and jury should retire to their room until they have agreed." 312 S.C. 316, 460 S.E.2d 573, 576 (1995)(citing *State v. Linder*, 276 S.C. 304, 278 S.E. 2d 335 (1981).

and the phrasing of his question is suggestive and prejudicial against continued deliberations. The trial court should not have individually questioned juror 16. It should have allowed for "extensive argument" on the appropriateness of ordering a mistrial and given "more appropriate consideration to alternatives less drastic than granting a mistrial." *Gilliam v. Foster*, 75 F.3d 881, 895 (1996).[6] In other words, the trial judge should have allowed the jury to continue deliberations without a dynamite charge, per the State and Erb's suggestions to avoid the creation of prejudice,[7] and in an abundance of caution.[8] This would have reduced the appearance of a potential predisposition by the trial court to declare a mistrial in Erb's case for the purpose of retrying him on murder. Simply put, the trial court's individual questioning of juror 16 blew up any chance of salvaging an untainted deliberation by the entire jury, like the improperly administered dynamite charges referenced in *State v. Taylor*. If the situation had gone the other way with juror 16 folding under the pressure of the judge's individual questioning and changing her mind in favor of convicting Erb for voluntary manslaughter, then the coercion of her by the trial judge would obviously be clearer. However, the coercive nature of the questioning is no less evident even though juror 16 stood her ground in the face of the judge's questioning, and Erb should not be punished with jail time and a retrial on his invalidated murder indictment because of it. The State opposed the individual questioning of juror 16 and wanted deliberations to

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[6] The Federal Rules of Criminal Procedure provide direct procedural guidance for the declaration of a mistrial. Rule 31(d) states, "After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury." However, Rule 26.3 states that, "Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." Applying these rules to this case as a persuasive authority, the trial court did not give an opportunity for the defense or the State to opine on the merits of a mistrial and did not fully consider any viable alternatives.

[7] *State v. Herring*, 387 S.C. 201, 217 (2009)("[t]he grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way").

[8] *State v. Kirby*, 269 S.C. 25, 29 (1977)("the discretionary power of a court to declare a mistrial ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes").

continue with the hope that juror 16 would change her mind. At the same time and without the trial judge's intervention, juror 16 might have slowly convinced others on the jury a la *12 Angry Men* to change their minds about Erb's conviction on voluntary manslaughter with the continuation of deliberations. That is the beauty and essence of the jury system unnecessarily denied to Erb by no fault of his own and without an agreement to disagree by the jury necessitating a mistrial.

III. CONCLUSION

This Court should respectfully disregard the State's return to John Erb's petition for a writ of certiorari because in the balance lies his constitutional right to due process, habeas corpus, and protection against double jeopardy. A dismissal would place another nail in the coffin of habeas corpus in South Carolina and force Erb to suffer more avoidable harm in jail, while seeking relief in the federal court system. John Erb is entitled to a writ of certiorari to determine if he is entitled to habeas corpus relief under a revitalized form of the doctrine, which exists in South Carolina outside the scope of *Rearick*.

Respectfully Submitted,

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Date: 6·27·24