

The Supreme Court of South Carolina

The State,

Respondent,

v.

Steven Louis Barnes,

Petitioner.

R. Knox McMahon
Edgefield County
Trial Court Case No. 2007-GS-19-00011

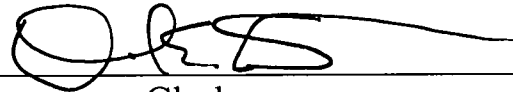
ORDER

For good cause having been shown, the time for serving and filing the Brief of Petitioner in the above entitled matter is hereby extended until May 9, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 11, 2012

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General David Spencer
Donald V. Myers, Esquire



SCCID

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ORIGINAL

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Robert M. Dudek, Chief Appellate Defender
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April 9, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

APR 9 2012

S.C. Supreme Court

Re: Steven Barnes v. The State

Dear Mr. Shearouse:

The brief of petitioner and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the brief of petitioner and accompanying appendix.

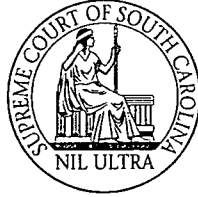
By copy of this letter, I am informing David Spencer, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: David Spencer, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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March 9, 2012

Appellate Defender Kathrine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Barnes, Steven Louis

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 9, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

CLERK

DES/lda

cc: Assistant Attorney General David Spencer
Donald V. Myers, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,

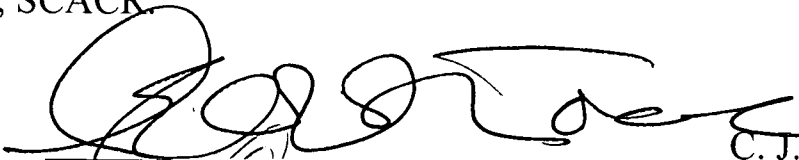
v.

Steven Louis Barnes,


Petitioner.

ORDER


We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Barnes*, Op. No. 2010-UP-427 (S.C. Ct. App. filed Oct. 11, 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.



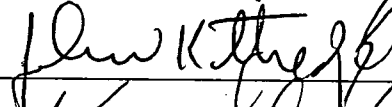
C.J.



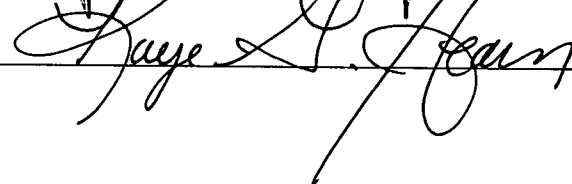
J.



J.



J.



J.

Columbia, South Carolina

March 9, 2012

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Knox McMahon, Circuit Court Judge

RECEIVED

APR 29 2011

S.C. Supreme Court

Opinion No. 2010-UP-427 (S.C. Ct. App. filed 10/11/2010)

07-GS-19-011.

THE STATE,

RESPONDENT,

V.

STEVEN LOUIS BARNES,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/28/2011.

QUESTION PRESENTED

Did the judge err in refusing to declare a mistrial, in violation of S.C. Code §14-7-1330, when the jury returned deadlocked twice and did not ask for further instruction from the judge?

STATEMENT OF THE CASE

In March of 2008, the Edgefield County Grand Jury indicted Barnes for throwing bodily fluids, indictment #2008-GS-19-011. On March 12, 2008, Barnes proceeded to jury trial before the Honorable R. Knox McMahon. Attorney W. Greg Seigler represented Barnes at trial. The jury returned a verdict of guilty and Judge McMahon sentenced Barnes to 15 years consecutive to any active sentence being served. A timely notice of intent to appeal was filed on March 19, 2008, and the direct appeal was perfected. On October 11, 2010, the Court of Appeals affirmed the conviction and sentence. State v. Barnes, 2010-UP-427 (S.C. Ct. App. filed October 11, 2010). The petition for rehearing was timely filed on October 26, 2010. The petition for rehearing was denied on January 28, 2011. This petition for writ of certiorari follows.

ARGUMENT

The judge erred in refusing to declare a mistrial, in violation of S.C. Code §14-7-1330, when the jury returned deadlocked twice and did not ask for further instruction from the judge.

The jury began deliberating at 4:45 PM. (R. p. 56, lines 5-6). At 5:38 PM the jury returned to the courtroom. The judge stated, “It appears our jury is back present in the courtroom, along with our alternate at this time. I received your note Mr. Foreman, ‘We are unable to reach a verdict in this case.’” (R. p. 57, lines 7-10). The judge then gave an Allen¹ charge. (R. p. 57, lines 11 – p. 58, 59, lines 1-18). The judge advised that the note sent by the jury included the break down, nine for guilty and three for not guilty. (R. p. 60, lines 1-2). The note was made a part of the record and marked as Court’s exhibit # 2. (R. p. 59, lines 21-23; R. p. 81). Barnes did not object to the charge.

At 6:14 PM the judge received another note from the jury asking for further instruction. (R. p. 60, lines 15-19). This note was also made a part of the record and marked as Court’s exhibit #3. (R. p. 60, lines 20-21; R. p. 82). The jury returned to the courtroom and the judge re-charged the law on direct and circumstantial evidence. (R. pp. 61, line 1 – p. 62, lines 1 – p. 63, lines 1 – 16). Barnes did not object to the re-charge.

At 6:44 PM the judge received another note indicating that the jury was unable to reach a verdict. (R. p. 63, line 25 – p. 64, lines 1-10). The note was made a part of the record and marked as Court’s Exhibit #4. (R. p. 68, lines 3-4; Supp. R. p. 1). The judge commented that the note said, “‘One not guilty, lock, will not change their vote.’” (R. p. 64, lines 8-10). Barnes objected to sending the jury back for further deliberations. (R. p. 64, lines 16-25). Barnes noted that the jury

¹ Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

was not requesting further instruction. (R. p. 64, lines 21-22). When the jury returned deadlocked for the second time, the trial judge asked the jury:

About quarter to five my court reporter tells me. Of course, it's now perhaps past some of y'all's supertime, I'm not sure. But you have been out for some three hours, and it's obvious that you have worked very diligently and very focused on the task at hand in fulfilling your duties and responsibilities under the oath y'all have taken.

Obviously court is going to be operating tomorrow. I would have no problem whatsoever to releasing y'all from your service tonight and asking you to return in the morning after having slept on it and having kept your counsel.

You certainly could not discuss it with any person during this break, just like a lunch break or regular evening break or anything of that nature and just come back fresh in the morning and go from there.

That is the absolute option that I would choose to take. Sometimes I forget I'm a judge, so I know I can order it, but at the same time y'all are the judge's of the facts in the case. I don't want to necessarily dictate that.

But would y'all be amenable to that? I know I have one juror who is protected for Friday. Of course, I see no way we would go into Friday, but that would give y'all the opportunity to sleep on it tonight and come back and start fresh in the morning. Would you discuss that with your fellow jurors? Do you think that would be an option, Mr. Foreman?

(R. p. 66, lines 4 – p. 67, lines 1-6).

In response to the judge's question, the foreman stated, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." (R. p. 67, lines 7-9). Rather than accepting the foreman's comment as a clear indication of the jury's desire to discontinue deliberations as they would be futile, the judge stated, "All right. Well, I appreciate that very much; however, I am going to decline to declare a mistrial at

this time. I am going to ask you – I will release y'all from your jury service for the remainder of the evening.” (R. p. 67, lines 10 – 14). Barnes objected. (R. p. 68, lines 12-16). The judge did not question whether the jury’s deliberations of almost two hours for a one day trial with only two witnesses constituted due and thorough deliberation.

The next morning the jury returned and reached a verdict of guilty. (R. p. 70, lines 11-16). Barnes renewed his objections and motions. The judge again denied the motions noting that he had reviewed S.C. Code §14-7-1330 and the case of State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). (R. p. 72, lines 16-21). The judge stated that after receiving the second note indicating that the jury was unable to reach a verdict, “I did not Allen charge them at that time. I did have a brief colloquy with the foreperson. He indicated uncertainty of whether or not the particular juror would or would not change ‘their,’ as he indicated on his note, his vote. As I say, I did not Allen charge them at that time. I did not feel that they were withholding consent to continue deliberations. However, I felt in my discretion it was best to send them home for the evening and allow them to return in the morning.” (R. p. 73, lines 23 – p. 74, lines 1-7). The judge went on to state, “I did not get an indication they were unwilling to continue deliberations. Obviously they were not. I think there has been compliance with both 14-7-1330 and State versus Pauling.” (R. p. 74, lines 12-15). The judge erred in refusing to grant a mistrial when the jury returned with a second note indicating that they were unable to reach a verdict.

S.C. Code §14-7-1330 provides:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again

without its own consent unless it shall ask from the court some further explanation of the law.

The jury in Barnes' case returned a second time without having agreed upon a verdict. The jury did not request further instruction on the law. Contrary to the judge's recollection of the foreperson's "uncertainty," the record reflects that the foreperson did not believe the jury would be able to agree on a verdict. When asked if they wished to continue deliberations in the morning, the foreman stated, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." (R. p. 67, lines 7-9). The note reflects that one juror will not change their vote. (Supp. R. p. 1). The foreman's statement indicates a lack of consent to continue to deliberate. The record fails to reflect that the jury consented to further deliberations.

In State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996), the Court found that the trial judge did not abuse his discretion in determining that the jury consented to further deliberations after returning twice without reaching a verdict. In Pauling, unlike in the present case, jurors stated that a verdict could be reached and, importantly, one juror asked to be able to submit questions to the trial judge before renewing deliberations on the next day. In Barnes' case, the foreman indicated that he did not believe the jury could agree to a verdict and none of the jurors asked to submit questions or receive further instruction.

Once the jury returned a second time without reaching a verdict and not requesting further instruction, the judge was without authority to allow the jury to adjourn for the evening and continue deliberations in the morning. Prior to the foreman telling the judge that he did not believe the jury could reach a verdict, the judge said to the jury, "That is the absolute option that I would choose to take [adjourning for the evening and returning for continued deliberation in the morning]."

Sometimes I forget I'm a judge, so I know I can order it, but at the same time ya'll are the judges of the facts in the case. I don't want to necessarily dictate that." (R. p. 66, lines 20-24). The judge, however, "dictated" that the jury would return in the morning for further deliberations. The judge erred. The judge was statutorily prohibited from ordering further deliberation. There is nothing in the record to support that the jury consented, expressly or impliedly, to further deliberations.

The judge's erroneous instruction that he could order further deliberations and that was the absolute option he would choose prevents a finding that the jury impliedly consented to further deliberations as the Court found in Buff v. South Carolina Dept. of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000). As Justice Pleicones notes in his dissent in Buff, "Jurors are told from the beginning of a trial that the trial judge's pronouncements on the law are binding upon them and that their role is to be the sole and exclusive judges of the facts." Id. 342 S.C. at 426, 537 S.E.2d at 284. In Barnes' case the judge erroneously told the jury he could order further deliberations and then did just that, ordered further deliberations. The jury's response was not impliedly consenting to further deliberations but rather was simply obeying the order of the judge. Juries are presumed and bound to follow the instructions of the trial judge. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999).

At the conclusion of the majority opinion in Buff the Court writes, "In the future, we suggest the trial judge carefully ensure the existence of a sufficient record from which the appellate court can determine the jury's consent to further deliberation." Buff, 342 S.C. at 423, 537 S.E.2d at 283. The record in the present case fails to establish that the jury consented to further deliberation. The foreperson's response when asked if the jury wished to continue deliberations in the morning indicates a lack of consent. The purported exercise of discretion by the judge in refusing to grant a mistrial and requiring further deliberation constitutes an abuse. An abuse of discretion occurs

when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. Arrowood, 375 S.C. 359, 652 S.E.2d 438 (Ct.App. 2007). The judge's ruling in Barnes' case is based on both an error of law, the judge did not have the discretion to order further deliberation as he instructed the jury, and a factual conclusion that is without evidentiary support, the judge concluding that the jury was not withholding consent to continue deliberations when the foreperson's response indicates a lack of consent to continue.

The Court of Appeals affirmed pursuant to the following authorities: S.C. Code Ann. § 14-7-1330 (1976) (defining the procedure for when a jury fails to agree); Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments."); Id. ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial."); State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) ("It is well-settled that the decision to grant or deny a mistrial is within the sound discretion of the trial judge."). State v. Barnes, 2010-UP-427 (S.C. Ct. App. filed October 11, 2010) (App. p. 2). The Court of Appeals erred.

First, under the facts and law of this case, the decision to grant or deny a mistrial was **not** within the discretion of the trial judge. S.C. Code §14-7-1330 requires a mistrial when the jury returned deadlocked twice without asking for further instruction as the jury did in this case. The judge was statutorily prohibited from ordering further deliberation.

Second, there was no express or implied consent by the jury to continue deliberations. In Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000), the South Carolina Supreme Court wrote, "The jury's consent to resume or discontinue deliberations is determined,

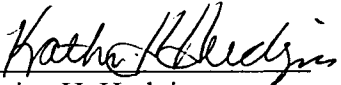
either expressly or impliedly, by its response to the trial judge's comments." In Buff the Court found that the jury impliedly consented to resume deliberations when none of the jurors expressed unwillingness to comply with the judge's request to continue deliberating. In the present case, however, in response to the judge's comments, the foreman expressed unwillingness to continue. The foreman stated, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." (R. p. 67, lines 7-9). Unlike the Buff case, there is nothing in the record to support that the jury consented, expressly or impliedly, to further deliberations.

"Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial." Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000). The trial judge's discussion with the jury was coercive rather than diplomatic. The trial judge told the jury that he would order further deliberations. "That is the absolute option that I would choose to take. Sometimes I forget I'm a judge, so I know I can order it . . ." (R. p.66, lines 20 – 22). It is inconceivable that any of the other jury members would express an unwillingness to continue to deliberate after the judge told the jury that he would order further deliberations, and in fact ordered further deliberations despite the foreman's comment that further deliberations would not be beneficial. The judge's failure to declare a mistrial constitutes an abuse of discretion requiring reversal.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of April, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2010-UP-427 (S.C. Ct. App. filed 10/11/2010)
07-GS-19-011.

THE STATE,

RESPONDENT,


V.

STEVEN LOUIS BARNES,

APPELLANT

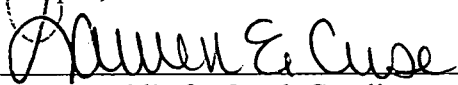
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, and the S.C. Court of Appeals this 29th day of April, 2011.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of April, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

—————
Certiorari to Edgefield County
R. Knox McMahon, Circuit Court Judge
—————

JUL - 6 2011

S.C. Supreme Court

THE STATE,

Respondent,

vs.

STEVEN LOUIS BARNES,

Petitioner.

—————
**RETURN TO PETITION
FOR WRIT OF CERTIORARI**
—————

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly instructed the jury to continue deliberations and did not err in denying the motion for mistrial.

STATEMENT OF THE CASE

Petitioner Barnes was indicted by the Edgefield Grand Jury for throwing bodily fluids on a prison guard. Following a jury trial, Barnes was convicted as charged on March 12, 2008, and sentenced by the Honorable R. Knox McMahon to fifteen years imprisonment consecutive to any other sentence being served.

ARGUMENT

The trial court properly instructed the jury to continue deliberations and did not err in denying the motion for mistrial.

Barnes complains the trial court erred in sending the jury out for further deliberations when, for the second time, they indicated they were deadlocked. The jury deliberated just an hour and forty minutes by the second time they reported being deadlocked. And this second indication occurred only fifteen minutes after they had been recharged on the law of circumstantial evidence. The trial court did not err as circumstances do not suggest that the jury thoroughly deliberated either the first or second time they returned to the courtroom. Further, the trial court properly determined the jury was not unwilling to return the following morning to further deliberate.

After receiving the trial court's instructions, the jury began deliberations at 4:42 p.m. At 4:45 p.m., the jury requested a laptop to view a video clip that had been introduced during the trial. After only fifty-six minutes, at 5:38 p.m., the jury sent a note to the trial judge stating: "We are unable to reach a verdict in this case." The trial court gave a detailed Allen charge, emphasizing that while a jury verdict must be unanimous, every juror has the right to his own opinion and the verdict must be the result of each juror's own conviction. The trial court instructed the jury they "should not give up your firmly held beliefs merely to be in agreement with your fellow jurors." The jury returned to the jury room to continue deliberations at 5:45 p.m. R. pp. 56-59. At 6:14 p.m., the jury requested a re-charge on the "difference between circumstantial evidence, the weight of circumstantial evidence against physical evidence." R. pp. 60-61. The trial court gave the requested charge and the jury

retired to continue deliberations at 6:29 p.m. At 6:44 p.m. the jury sent another note stating, "One not guilty, lock, will not change their vote." R. pp. 61-64.

The trial court indicated an overnight recess might be needed and asked the jury whether they would be amenable to recessing for the night and returning in the morning. The Foreman's response was, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." R. pp. 64-67. The trial court declined to declare mistrial and asked the jury to return in the morning. They were excused at 6:53p.m. R. pp. 67. The following morning at 10:05 a.m. a verdict was reached. R. pp. 69-70.

After excusing the jury, the trial court noted it reviewed Section 14-7-1330 and State v. Pauling, supra. The trial court noted the second time the jury returned saying they could not reach a unanimous decision, they had been deliberating less than two hours. The trial court found the jury was not withholding their consent to continue deliberations and felt, in its discretion, it was best to send the jury home for the evening and allow them to return in the morning. The trial court did not get any indication that the jury was unwilling to continue deliberations. R. pp. 72-74.

South Carolina Code Ann. § 14-7-1330 provides as follows:

When a jury, **after due and thorough deliberation** upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, **it shall not be sent out again without its own consent** unless it shall ask from the court some further explanation of the law.

(Emphasis added).

First, the issue is not preserved. Barnes' counsel objected to further enquiry of the jury on the basis that "they had been in there plenty of time", that "[t]hey are not requesting further instruction at this point", and that "it would be extremely unfair to my client to send them back again." R. p. 64, lines 21-25. Following the trial court's request for the jury to return to deliberate the following morning, counsel's objection was: "The foreman indicated he didn't think it would be fruitful to deliberate any further." R. p. 68, lines 12-16. Neither objection cited or addressed the statute made subject to this appeal. Following the verdict, the trial court referenced S.C. Code § 14-7-1330 and case law to explain its prior ruling.

A "general objection that does not specify the particular ground on which the objection is based is insufficient to preserve a question for review." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). Just "the trial court's mentioning the issue does not preserve it for appeal." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005). In the instant case, the objections were made seemingly unaware of § 14-7-1330 and failed to refer to the subject matter of that provision. The issue is not preserved for review.

Further, the trial court correctly exercised its discretion. The primary concern for the courts is whether the jury is coerced or forced into reaching a verdict. "[T]he object of the statute was to prevent forced verdicts, and to prevent undue severity of jury service." State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916).

In Freely, the jury returned twice unable to agree on a verdict and were returned for further deliberations after twenty hours of deliberations. The trial court did not advise the jury they could not be returned without their consent. The South Carolina Supreme Court found no error in sending the jury back to deliberate a third time, finding as follows:

If the circumstances satisfied the judge, in a wise exercise of his discretion, that the jury consented to the return, then it was lawful to return them. The exercise of such a discretion at so delicate stage of a trial ought not to be disturbed unless it was obviously wrongly exercised.

Id., at 644.

In State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922), the Supreme Court found no violation of the statute and no coercion exercised by the trial court in sending the jury back for further deliberations. The Court noted that whether the jury exercised “due and thorough deliberation upon any cause” without reaching a unanimous verdict must be determined by the trial court in the exercise of sound discretion. Id., at 309. Notably, the Supreme Court observed: “While a trial judge may not coerce a jury he is not precluded from indicating very plainly that he will not be coerced by the jury.” Id., at 310.

The Supreme Court found the following in State v. Simon, 126 S.C. 437, 120 S.E. 230 (1923):

[I]t was the clear intendment of the statute to give the jury the right to indicate to the court its own view of when time for due and thorough deliberation had elapsed by returning a second time without having agreed upon a verdict, and to make that action decisive of the question if accompanied by any expression of unwillingness to return for a third time.

The Supreme Court reversed Simon’s conviction and remanded for a new trial based

upon the judge's threat the jury would be required to spend the night in the jury room unless agreement was sooner reached. The Court found the combination of informing the jury it intended to keep them together for a specified time, along with the provisions of the statute regarding sending the jury back for further deliberations, resulted in a reasonable ground to believe the verdict resulted from the judge's ultimatum rather than concurrence by the deliberate and conscientious judgment of twelve jurors. Id., 120 S.E. at 233.

In two other cases, the Supreme Court reversed convictions based on violation of the statute at issue. In Rowland v. Harris, 218 S.C. 42, 61 S.E.2d 397 (1950), the jury, after deliberating for some time on a Friday evening, informed the trial court that they were unable to reach a verdict. The judge instructed the jury about the desirability of the verdict and went home, leaving the jury in the hands of the clerk. The Court found the jury could not know about the judge's secret instruction to the clerk that if the jury did not reach a verdict by 11:00 p.m. to release the jury, and the jury could reasonably assume they would be confined over the weekend unless they reached a verdict. Id., 61 S.E.2d at 398.

In State v. Kelley, 45 S.C. 659, 24 S.E. 45 (1896), the Court found the trial judge abused his discretion in sending the jury back for a third time after they had already been deliberating for over twenty-four hours, had been denied food for a time, and had informed the trial judge that they could not reach an agreement. The Court was no doubt concerned by the trial judge's return, reporting the following: "Supper was furnished the first night, and breakfast the next morning; and I then told the deputy sheriff, . . . , to give them nothing more to eat, that they would never agree if we kept on giving them sumptuous meals every meal time." Id. at 47.

In Edwards v. Edwards, 239 S.C. 85, 121 S.E.2d 432 (1961), the Supreme Court again found no abuse of discretion by the trial judge who sent the jury back a third time to deliberate. The jury deliberated for approximately twelve hours when they came out the second time and informed the judge they could not reach a decision. The judge sent them back for a third time and a verdict was reached shortly thereafter. The Court found the pertinent words of the statute for the case were “they shall not be sent out again without their own consent.” S.C. Code Ann. § 14-7-1330. Upon the jury’s second return, the trial court asked the jury to make one more attempt and if they could not reach a verdict, he would not send them back again. The Supreme Court found the jury’s consent was implied by the lack of response to the judge’s comments. “[U]nder the circumstances, if the Judge was satisfied in the exercise of his discretion that the jury consented to return for further deliberation, he should not have dismissed them but permitted further deliberation as was done in instant case.” Edwards, 121 S.E.2d at 436.

In two more recent cases, the Supreme Court found implied consent by the jury to continue deliberations. In State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996), the jury informed the judge a second time that they could not reach a decision on two of the eight charges. The trial judge gave the jury an Allen¹ charge on both occasions. The foreman expressed doubt the positions of the jurors would change, but other jurors stated a verdict could be reached and requested to be allowed to submit questions to the judge the following day. The following morning, the jury submitted a question asking the judge “whether the guilty verdicts would stand on the other six charges should a unanimous decision not be

¹Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

reached on the two counts of murder or would the whole case be retried.” The judge then informed the jury they could not reach a verdict on the two counts, the entire case would have to be tried over. The Court found no abuse of discretion on the part of the trial judge when, although the jury foreman expressed doubt that opinions would change, other jurors indicated a verdict was possible and the jury submitted a written question, indicating consent to continue deliberations.

In Buff v. South Carolina Dep’t Of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000), the Supreme Court again found the jury consented to continue deliberations and found no abuse of discretion on the part of the trial judge in determining the jury consented to continue deliberations. The jury, after deliberating for a little over three hours, informed the trial court it was deadlocked. The trial judge gave an Allen charge and deliberations resumed the next morning. At some point the next morning, the jury again informed the court, “we are deadlocked 11-1 with no chance of reaching an agreement.” The trial judge gave a second Allen charge and asked the jury to make one last effort to reach a unanimous decision. On appeal, the South Carolina Court of Appeals reversed and found the jury’s silence after the second Allen charge could not be construed as consent. Buff v. South Carolina Dep’t of Transp., 332 S.C. 472, 505 S.E.2d 360 (1998).

The Supreme Court reversed the Court of Appeals and found the question was whether, under all the circumstances, it appeared to the trial judge the jury consented to deliberate a third time. “The exercise of such a discretion at so delicate stage of a trial ought not to be disturbed unless it was obviously wrongly exercised.” Id. (citing State v. Freely, supra). The Court noted nothing in the language of Section 14-7-1330 or in case law

required the trial judge to inform the jury consent is necessary before sending the jury to deliberate a third time and it declined to impose such a requirement. Buff, at 422, 537 S.E.2d at 282. Lastly, the Court found, “under all circumstances of this case,” the trial judge did not abuse his discretion by determining the jury consented to return for further deliberation. Id., at 423, 537 S.E.2d at 283.

As in Buff, the jury did not verbalize its consent to further deliberations, but neither did they express reluctance to reconvene in the morning and further deliberate. The Foreman’s comment, “I don’t think the other person will be able to change his mind,” fails to indicate dissent. While the Foreman expressed concern the one holdout would not change his mind, the Foreman did not say it was impossible, nor did he indicate any dissatisfaction with the judge’s instruction to return in the morning, nor does he indicate the remaining jurors held this view. His comment reveals sheepish skepticism, not resolute objection.

The trial judge was in the best position to determine the willingness of the jury to reconvene in the morning. Edwards v. Edwards, supra (jury’s consent to continue deliberations may be implied from lack of verbal response to request or failure to indicate unwillingness to resume deliberations); State v. Drakeford, supra (consent implied where jury did not insist verdict could not be rendered and jury did not complain about further deliberations); State v. Rowell, 75 S.C. 494, 56 S.E.23 (1906) (consent implied where jury did not indicate it was unwilling to deliberate a third time).

The trial court did not abuse its exercise of discretion in determining the jury was not unwilling to further deliberate: Buff v. South Carolina Dep’t of Transp., supra. The jury was obviously not afraid to communicate with the court as they sent four notes to the judge. The

judge was in the best position to determine their willingness to continue. He determined they were not unwilling and correctly refused to declare mistrial.

Further, the record indicates the jury had not exercised “due and thorough deliberation”. The jury deliberated less than an hour the first time they were deadlocked, a short amount of time that indicates they had not thoroughly deliberated. This indication is borne out by their request, shortly after, for further instruction on the law from the trial court. Given that the jury came back indicating deadlock a second time, with less than two hours total deliberation and only fifteen minutes after re-instruction on circumstantial evidence, it is questionable whether the jury truly exercised due and thorough deliberation until they reached a verdict the following morning. As Drakeford observed, the trial court must not coerce a jury, but also, he should not be coerced by an impatient jury, perhaps waiting overlong for dinner, into declaring a mistrial where evidence of thorough deliberation remains wanting. See Drakeford, supra.

A review of events surrounding the jury deliberation process refutes argument that the verdict was forced or that the jury’s duty was unduly severe. State v. Freely, supra. The jury deliberated for only two hours and fifteen minutes total. The trial court properly exercised its discretion and did not err.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 6, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Edgefield County
R. Knox McMahon, Circuit Court Judge
—————

THE STATE,

Respondent,

vs.

STEVEN LOUIS BARNES,

Petitioner.

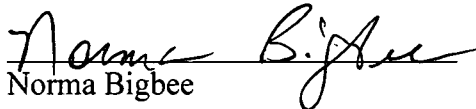
—————
PROOF OF SERVICE
—————

I, Norma Bigbee, certify I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211 - 1589

I further certify that all parties required by Rule to be served have been served.

This 6th day of July 2011.


Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUL - 6 2011

S.C. Supreme Court

July 6, 2011

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

JUL - 6 2011

S.C. Supreme Court

RE: State of South Carolina v. Steven Louis Barnes
2008-GS-19-011

Dear Mr. Shearouse:

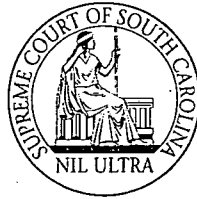
Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General

DS/nb
Enclosures

cc: Appellate Defender Kathrine H. Hudgins (2 copies)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 6, 2011

Assistant Attorney General David Spencer
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Barnes, Steven Louis

Dear Counsel:

The following Order has been endorsed on your Motion to Relax Rule 242(f) and for an Extension of Time in Which to File Return to Petition for a Writ of Certiorari in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

June 6, 2011.”

Please be advised the return should be served and filed within thirty (30) days of the date of this letter.

The State v. Barnes, Steven Louis
Page Two
June 6, 2011

Very truly yours,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

cc: Appellate Defender Kathrine H. Hudgins

Hopkins, Debbie

From: Kathrine H. Hudgins <KHudgins@sccid.sc.gov>
Sent: Friday, June 03, 2011 3:36 PM
To: Hopkins, Debbie
Subject: RE: In the Interest of Joelle T. and The State v. Steven Louis Barnes

Debbie – I have no objection.

Kat Hudgins

Kathrine Haggard Hudgins, Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady St. P.O. Box 11589
Columbia, SC 29211
(803) 734-1343
Fax (803) 734-1397
khudgins@sccid.sc.gov

RECEIVED
JUN 3 2011
S.C. Supreme Court

From: Hopkins, Debbie [mailto:DHopkins@sccourts.org]
Sent: Friday, June 03, 2011 3:14 PM
To: Kathrine H. Hudgins
Subject: In the Interest of Joelle T. and The State v. Steven Louis Barnes

Katharine,

Do you have any objection to the Motions to Relax Rule 242(f) and for an Ext of Time to File the Returns to the Petitions for Cert filed in this cases?

Please advise,

Thanks.

Debbie M. Hopkins
South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211
(803) 734-1080



ALAN WILSON
ATTORNEY GENERAL

June 2, 2011

RECEIVED

JUN 2 2011

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Steven Louis Barnes

Dear Mr. Shearouse:

Enclosed for filing are the original and six copies of Respondent's Motion to Relax Rule 242(f) and for an Extension of Time in Which to File Respondent's Return to Petition for Writ of Certiorari in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General

DS/nb

Enclosures

cc: Kathrine H. Hudgins
Ms. Trisha Allen

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 2 2011

Appeal From Edgefield County
Honorable R. Knox McMahon, Circuit Court Judge

S.C. Supreme Court

THE STATE,

RESPONDENT,

vs.

STEVEN LOUIS BARNES,

APPELLANT.

**RESPONDENT'S MOTION TO RELAX RULE 242(f) AND
FOR AN EXTENSION OF TIME IN WHICH TO FILE
RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 24(b), SCACR, Respondent, by and through undersigned counsel, hereby moves this Honorable Court for an Order Relaxing Rule 242(f), SCACR, and for an extension of time in which to file Respondent's Return to the Petition for Writ of Certiorari. Respondent would respectfully show to this Honorable Court as follows:

1. Respondent's counsel received a telephone call on June 2, 201 from the office of the Clerk of the Supreme Court, advising that Petitioner had filed a Petition for Writ of Certiorari on April 29, 2011, and that Respondent's Return was overdue. The Petition was accompanied by a certificate showing that the document had been timely served upon Respondent.

2. Respondent's Return to Petition for Writ of Certiorari in the above captioned matter was due to be filed and served on May 30, 2011. Through inadvertence, the matter was improperly calendared.

II.

In view of the foregoing, it is respectfully requested that this Court relax Rule 242(f), SCACR, and allow Petitioner a thirty (30) day extension to file and serve its Return to the Petition for Writ of Certiorari.

III.

WHEREFORE, it is respectfully requested that this petition be granted.

Respectfully submitted,

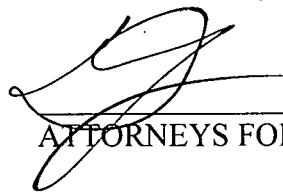
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By:

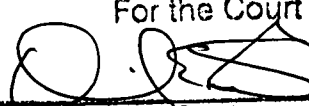


ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

June 2, 2011.

GRANTED.

Jean H. Toal C.J.
For the Court
By 
Clerk

June 6, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Edgefield County
Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

vs.

STEVEN LOUIS BARNES,

APPELLANT.

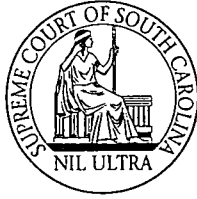
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served Respondent's Motion to Relax Rule 242(f) and for an Extension of Time in Which to File Respondent's Return to Petition for Writ of Certiorari on Petitioner's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Kathrine H. Hudgins, P.O. Box 11589, Columbia, SC 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of June, 2010.

Norma Bigbee
Administrative Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 2, 2011

Appellate Defender Kathrine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Barnes, Steven Louis
Case Tracking No. 2011-186426

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

Daniel E. Shearouse
CLERK _{bs}

DES/lda

Enclosure

cc: Assistant Attorney General David Spencer
Donald V. Myers, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,

v.

Steven Louise Barnes,

Petitioner.

The Honorable R. Knox McMahon
Edgefield County
Trial Court Case No. 2007-GS-19-011

ORDER

The request for an extension to serve and file Petition for Writ of Certiorari and Appendix is granted and extended until April 29, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Chief Deputy Clerk

Columbia, South Carolina

March 31, 2011.

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General David Spencer
The Honorable Tanya Gee



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 30, 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAR 30 2011

S.C. Supreme Court

(5)

Re: The State v. Steven Louis Barnes
County: Edgefield
Indictment: 07-GS-19-011
Judge: R. Knox McMahon
Trial Date: March 13, 2008

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing David Spencer, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

2008-84927
3-13-08
unpub

KHH/lec

cc: Court of Appeals
David Spencer, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v.

Steven Louis Barnes,

Petitioner.

R. Knox McMahon
Edgefield County
Trial Court Case No. 2007-GS-19-011

ORDER

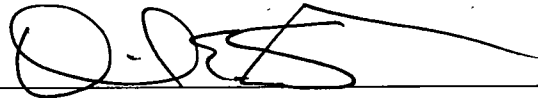
The request for an extension to serve and file Petition for Writ of Certiorari and Appendix is granted and extended until March 30, 2011.

Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

March 1, 2011

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General David Spencer
The Honorable Tanya Gee



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

 ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 28, 2011

RECEIVED

FEB 28 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Steven Louis Barnes
County: Edgefield
Indictment: 07-GS-19-011
Judge: R. Knox McMahon
Trial Date: March 13, 2008

(1)

Dear Mr. Shearouse:

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By copy of this letter, I am informing David Spencer, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: Court of Appeals
David Spencer, Esquire