THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith Jr., Circuit Court Judge

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Supreme Court No. 2013-001343

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The State, ..... Respondent,

vs.

Teresa Blakely ..... Appellant

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# PETITION FOR WRIT OF CERTIORARI

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## Certificate of Counsel

Counsel for Petitioner hereby certifies that a timely motion for re-hearing was filed on April 24, 2013 and the motion was denied on May 23, 2013.

## Questions Presented

Question I: Was the prosecution of Teresa Blakely for accessory after the fact to murder after her acquittal for murder a result of a vindictive prosecution and therefore this prosecution is barred by the due process clause of the Fourteenth Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina?

Question II: Did the failure of the State to bring in one indictment when all charges against Teresa Blakely violate the due process clause of the Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America?

## Statement of the Case

*Procedural History*

On September 28, 2007, the State indicted Teresa Blakely[1] for the charge of murder. Rec. on App. at 81. The murder trial was conduct over four days from May 26, 2009 until May 29, 2009. The jury deliberated over seven hours before arriving at its not guilty verdict. The testimony at that murder trial was virtually the same as was presented at this trial. Ms. Blakely testified at her trial in 2009. After her acquittal on the murder charge, the State on December 7, 2009 indicted Ms. Blakely on the charge of accessory after the fact to murder. Rec.

[1] The State indicted Teresa Blakely as "Teresa Fuller" in her murder trial. No explanation was given for indicting her as "Teresa Blakely" in this action.

on App. at 78. The State developed no new facts at the trial on July 26, 2011 for the accessory after the fact trial than they had for the murder trial.

This case was tried before the Honorable Eugene Griffith, Jr. without a jury. Prior to trial Ms. Blakely moved to dismiss the indictment on the grounds set forth in this appeal. Rec. on App. at . Judge Griffith denied the motion. The parties stipulated to the testimony of the investigating officer which was a summary of the testimony given at the earlier trial. Judge Griffith convicted Ms. Blakely of the charge of accessary after the fact. He sentenced her to 8 years suspended upon the service of 4 years with three years probation. She was given credit for the 22 months she spent in pretrial confinement on the murder charge.

The South Carolina Court of Appeals affirmed her conviction in *State v. Blakely,* 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 201). A petition for re-hearing was denied on May 24, 2013

*Factual History*

Teresa Blakely was charged in this indictment with accessory after the fact to murder. She was accused of helping to conceal the murder of her husband Houston Fuller. The murder was committed by Paul Thomas Morris, Jr.[2] Mr. Morris was the brother of a friend of Ms. Blakely. According to Mr. Morris's statement, Mr. Fuller had made some derogatory statements about the sister of Mr. Morris and as a result, Mr. Morris vowed to avenge those statements by beating up Mr. Fuller. Mr. Morris went to the residence of Houston and Teresa Fuller at about 6 a.m. on the day of the incident. When Mr. Fuller answered the door, Mr. Morris

[2] Paul Thomas Morris, Jr. Entered a plea to voluntary manslaughter after Ms. Blakely was acquitted of murder.

attacked him and placed him in a neck hold. Mr. Morris stated that he felt Mr. Houston neck crack. The cracking of Mr. Fuller's neck killed him. Ms. Blakely did not expect Mr. Morris to come by the house and attack Mr. Fuller and did not have an agreement with Mr. Morris to kill her husband. She helped Mr. Morris place the body of Mr. Fuller in the truck and helped run it off the road in an attempt to make the death look accidental.

After Ms. Blakely's daughter informed the police of what she observed at the house on the morning of Mr. Fuller's death, Ms. Blakely was questioned by the police and gave them the statement admitting to the above facts. Rec. on App. at 86-87. Rec. on App. 88-126 Ms. Blakely was arrested on August 9, 2007 and remained in jail until she was acquitted on May 29, 2009. No new facts have been found since the trial of Ms. Blakely on the murder charged.

**Argument**

*Question I*

**Was the prosecution of Teresa Blakely for accessory after the fact to murder after her acquittal for murder a result of a vindictive prosecution and therefore this prosecution is barred by the due process clause of the Fourteenth Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina?**

The United States Supreme Court and the South Carolina Supreme Court have recognized that the state may not bring additional charges against an individual because they have invoked a constitutional right. *See*, *Blackledge v. Perry,* 417 U.S. 21 (1974); *Patrick v. State,* 349 S.C. 203, 562 S.E.2d 609 (2002). In this case Ms. Blakely exercised her right to a trial by jury on the murder charge. Because of her acquittal, the state elected, using the same facts, to

further prosecute her for accessory after the fact to murder.

As noted by the United States Court of Appeals of the Fifth Circuit, "[I]f *Blackledge* teaches any lesson, it is that a prosecutor's discretion to reindict a defendant is constrained by the due process clause." *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977). When a prosecutor indicts for a charge that could have been included in the original indictment and a new indictment ensues, the defendant has made a prima facie case of a vindictive prosecution. *Hardwick*, at 301. The state then has the burden of proving the prosecution is not vindictive. Had the state desired, they could have originally indicted Ms. Blakely in a two count indictment charging her with murder and accessory after the fact. *See*, *State v. Woodard*, 38 S.C. 353, 17 S.E. 135 (1893). This matter would then have been resolved in one trial at a savings to the state and the defendant.

Instead, the State made a tactical decision and presented only one charge to the jury in the apparent hope that if the jury were given the alternative of either convicting Ms. Blakely of murder or finding her not guilty of any charge, the jury would vote to convict her of murder. The State by bringing only one charge, sought to maximize its chances of successfully prosecuting Ms. Blakely for murder. Having made that tactical decision, the State should be prohibited from having a second bite of the apple by indicting her for accessory after the fact to murder. This is especially true when no new facts justify the subsequent indictment. Having gained what advantage they thought they could get from not charging her with accessory after the fact in the original trial, the due process clause prevents them from charging her again.

The State at the trial argued that the correct standard was to determine if the prosecution was a selective prosecution and cited cases supporting its position. Rec. on App. at

8, ll 22-25 to 9 at ll 1-10. Ms. Blakely did not argue below and has never argued that she was being prosecuted for exercising her First Amendment rights or because of her race or religion or any other criteria that would make the prosecution a selective prosecution . The State simply chose to never responded to the argument that the second prosecution of Ms. Blakely was a vindictive prosecution. Because the State never addressed the vindictive prosecution argument, the State never gave a reason for not trying the two charges together. Nor did the State give any reason for bringing the second charge after the acquittal on the murder charge. Simply put, the State never attempted to deny the second prosecution was in fact vindictive. The response by the State to the allegation of vindictive prosecution, was they did not selectively prosecute Ms. Blakely.

The State did not ever attempt to explain to the court below why it could not have tried the two charges together. The State simply ignored the allegation of vindictive prosecution. Under these facts this Court should, as have other courts, presume the second prosecution was vindictive.

The Court of Appeals improperly applied its decision in *State v. Fletcher,* 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996) in two important respects. First, *Fletcher,* unlike the present case, involved the continuation of a prosecution for presenting and pointing a firearm that began at the same time as the municipal court charges. The defendant was originally charged with presenting and pointing at the time of her municipal court charges. Secondly, again, unlike the present case, the solicitor in *Fletcher* gave an explanation for the charging decision which the trial court accepted.

In *Fletcher,* the Court of Appeals said "The mere continuation of the prosecution

of an existing charge does not constitute action which is constitutionally prohibited as retaliatory in nature, and it does not give rise to the suggestion that a presumption of vindictiveness is warranted" *Id.* at 262, 471 S.E.2d at 705. In the present case there was not a continuation of a prosecution but a totally separate decision to prosecute after Ms. Blakeley had been to trial on the murder charge. Thus, *Fletcher* is simply not applicable.

In *Patrick v State*, 349 S.C. 203, 562 S.E.2d 609 (2002) this Court did find the prosecutor had acted vindictively when he re-instated charges that had been dismissed years before. In an attempt to justify re-filing the charges, the prosecutor gave an explanation for his decision. This Court reject the explanation saying "The solicitor stated he prosecuted the previously *nol prossed* charges on retrial because it was in the interest of the State of South Carolina and the people of Abbeville County. He also stated that once a solicitor had a life sentence on one charge, it was common practice not to prosecute the additional charges. These are fairly weak reasons for bringing the charges, especially considering the length of time between the original trial and the retrial. Additionally, the charges were *nol prossed* ***prior*** to the first trial because they 'vanished.'" *Id.* at 210, 562 S.E.2d at 612 (emphasis in original).

In the present case in her motion to dismiss, Ms. Blakely stated her theory that the charges were brought in retaliation for the previous acquittal and the state did not bring the accessary after the fact charge at the original trial because they had sought to gain a tactical advantage. Rec. on App. at 5, ll 2-23. In response, the prosecutor, unlike the prosecutor in *Fletcher* or *Patrick,* gave no reason for the decision to bring additional charges after the acquittal of Ms. Blakely. The prosecutor instead equated Ms. Blakley's vindictive prosecution with a selective prosecution and cited only selective prosecution cases to the court. Rec. on App. at 8, l

22-25 to 10, ll 1-11. The prosecutor in *Fletcher* gave a very valid reason which the court accepted. In *Patrick*, the prosecutor gave a lame excuse and the Court found the prosecution to be vindictive.

What the Court of Appeals has done in this case is to simply say that no excuse is better than a poor excuse. If the prosecutor in *Patrick* had given no excuse instead of a poor one, would the result have been different?[3] The Court of Appeals failed to consider that the complete failure of the state to give a reason for the second trial should give rise to a presumption of vindictiveness.

The Court of Appeals further erred in relying upon *United States v. Kendrick*, 682 F.3d 974 (11th Cir. 2012). Ir *Kendrick* the Eleventh Circuit specifically noted "The government responded that, at the time of the original indictment, there was insufficient evidence to indict Kendrick for the alien smuggling charge, and, indeed, it was not until his admissions during the first case that it had a sufficient evidentiary foundation to bring the new charge." *Id.* at 980. Thus, unlike this case, the government did not have the information to indict Kendrick at the time of the original trial. *Kendrick*, however, recognized a presumption of vindictiveness which the court found had been rebutted by an adequate explanation. Here, the State gave no explanation.

The Court of Appeals also erred in relying upon *United States v Johnson,* 171 F.3d 139 (2nd Cir. 1999). The facts in *Johnson* are substantially different from this case. In

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[3] While Thomas Fuller, the English historian, has been quoted as saying "Bad excuses are worse than none" and George Washington has been quoted as saying "It is better to offer no excuse than a bad one" neither was committing on the propriety of the state justifying a second prosecution on the same facts after an acquittal.

*Johnson* the gun charge had been brought originally in state court. The trial of that case was delayed until after the acquittal of the RICO charge. The gun charge also apparently did not arise out of the RICO charges. Here the second charge of accessory after the fact to murder arose from the identical facts as the murder charge on which Ms. Blakely was acquitted.

The Court of Appeals also erred in relying upon *United States v. Rogers*, 18 F.3d 1425 (8th Cir. 1994). In *Rogers*, the government amended the indictment after a mistrial and not an acquittal. In addition the government gave an explanation for the additional gun charge by advising the court it was based upon evidence discovered after the original indictment but too late to file a superseding indictment before the first trial. Again, in this case, unlike *R*ogers, the State gave no explanation for the new charge.

The Court of Appeals also erred in relying upon *United States v. Esposito*, 968 F.3d 300 (3rd Cir. 1992). In *Esposito,* the court found "Here the government explains that it chose not to indict for all possible crimes in the *Accetturo* trial because to do so would have made the trial unmanageable and would have possibly confused the jury." *Id.* at 306. Again, unlike the present case, the government elected to give a reason and the reason was accepted by the lower court. Again, the State in this case gave no explanation for the new charge.

**Question II**

**Did the failure of the State to bring in one indictment when all charges against Teresa Blakely violate the due process clause of the Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America?**

The American Bar Association has issued standards for prosecutors involving the

prosecution of cases where a prosecutor has prosecuted the defendant on one charge and then indicted him on another charge arising out of the same criminal episode. The Standards provide "A defendant who has been tried for one offense may thereafter move to dismiss any additional offense based upon the same conduct or the same criminal episode . . . ." ABA STANDARDS FOR CRIMINAL JUSTICE Chap. 13, *Joinder and Severance*, Standard 13-2.3 at 13-21 (1978). The Standards define "a single criminal episode" as occurring "simultaneously or in close sequence, and they occur in the same place or in closely situated places. A critical characteristic of single episode offenses, particularly in cases involving otherwise unrelated offenses or offenders, is the fact that proof of one offense necessarily involves proof of the others." *Id.* 13-1.2 Commentary at 13-10. The two charges in this case certainly fit that definition.

The Standards have several exceptions, none of which apply to this case. The comments to the Standards state "The standard is intended to protect defendants from successive prosecutions for unified conduct, particularly when the only reason for the several prosecutions is to 'hedge against an unsympathetic jury at the first trial, to place a hold upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.'" *Id.* commentary at 13-26. The Standards, or their equivalent, have been adopted by several states by either court rule or statute. *See, e.g. People v. Mullenhoff*, 33 Ill.2d 445, 211 N.E.2d 744 (1965)(by statute) and *State v. Washington*, 101 Wash.2d 349, 678 P.2d 332 (1984)(by rule). While New York has a statute prohibiting a second prosecution for a related offense, the court in *People v. Williams*, 123 Misc.2d 165, 473 N.Y.S.2d 689 (1984)found that "basic fairness" was also a reason to bar the second prosecution. The court said "Even if this prosecution were not barred by double jeopardy concerns, principles of mandatory joinder and basic fairness compel

dismissal of the Bronx indictment. No legitimate prosecutorial interest justifies subjecting defendant to two prosecutions for a singie criminal transaction when both New York and Bronx authorities were fully aware of the facts at the outset and where the entire transaction could have been prosecuted in the Bronx." *Id.* at174, 473 N.Y.S.2d at 695. The same principle of basic fairness applies in this case.

New Jersey, without a court rule or statute, adopted the principles set forth in the ABA standards in *State v. Gregory*, 66 N.J. 510, 333 A.2d 257 (1975). In so holding the court said "The common law was properly concerned with the protection of the defendant from government harassment and oppression by multiple prosecutions for the same wrongful conduct. It embodied the principle cherished by all free men that no person may twice be put in jeopardy for the same offense, a principle which fortunately continues undiminished in force and is firmly embodied in our federal constitution." *Id.* at 513, 333 A.2d at 258. In establishing the new rule the court noted "In the civil field we have long required that the entire controversy be disposed of in a single proceeding and we have not hesitated to bar a second proceeding by a party who unfairly withheld a fragment of his claim for a later proceeding. There would seem to be even more reason for this approach in the criminal field." *Id.* at 518, 333 A.2d at 261. In South Carolina a plaintiff in a civil action under the principle of *res adjudicata* is not permitted to bring a second action for basically the same wrong. *Plum Creek Development Company, Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)

Recently the United States Supreme Court recognized standards by the American Bar Association impose upon a defense lawyer the obligation to inform his client of the collateral consequences of his plea. The Court said "The weight of prevailing professional norms supports

the view that counsel must advise her client regarding the risk of deportation." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010). Just as the United States Supreme Court used the ABA Standards to impose an effective assistance of counsel obligation upon defense counsel, this Court should use them to impose a due process of law standard upon a prosecuting attorney to prohibit multiple prosecutions of a defendant under facts such as this.

Many states, including South Carolina and the Fourth Circuit, have applied the American Bar Association Standards in deciding criminal cases. *See, e.g. United States v. Russell*, 221 F.3d 615 (4th Cir. 2000); *State v. Stanley*, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005); *McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983); *Walker v. State*, 430 So.2d 418 (Miss. 1983); *McCray v. State*, 416 So.2d 804 (Fla. 1982); *People v. Jones,* 81 Ill. App.3d 724, 401 N.E.2d 1325 (1980); *State v. LaBranche*, 118 N.H. 176, 385 A.2d 108 (1978); *State v. Cochran*, 97 Idaho 71, 539 P.2d 999 (1975). This Court should apply the ABA Standards to this case. The requirement that the State bring all it charges relating to a single criminal episode does not place an undue burden upon the State. In fact, it would require the State to use its court time more effectively by bringing all the charges in a related episode at one time rather than piece meal the charges over two or more trials. The benefit to the defendant is also obvious. The defendant is able to dispose of all the charges from a single criminal episode at one time saving the defendant time, money and stress from successive trials.

Ms. Blakely believes that it is important for this Court to understand what this case is not about. Ms. Blakely does not contend that a second prosecution is barred under all circumstances. After a first prosecution, the State may find additional evidence that would justify a second prosecution on a different charge that would not be barred by double jeopardy.

When additional evidence is found, the State can easily refute an allegation that the second prosecution is vindictive. If the State indicts a defendant on two charges in one indictment and the Defendant successfully moves to sever one of the charges, the State would not be prohibited from conducting a second trial. The State is not prejudiced by a requirement that all charges arising from the same incident be brought in one action.

As the trial judge noted, if the State were not satisfied with the result in this case it could continue to charge Ms. Blakely with any number of charges. Rec. on App. at 22, ll 3-7. For example, the State could charge her with obstruction of justice or false information to a police officer. With the large number of statutory crimes that cover a single factual episode, the State could easily continue to charge Ms. Blakely. If the legislature had passed a law making illegal the faking of an automobile accident or the moving of a dead body when the person knows a crime has been committed, Ms. Blakely could have been charged with those crimes. The list would be limited only by the imagination of the legislature and not limited by the dues process clause of the state or federal constitutions. Under the State's theory, the fact that Ms. Blakely were convicted or acquitted, would not bar a second prosecution.

The Court of Appeals erred in holding that the Standards of the American Bar Association did not provide due process relief to Blakely. Merely because the ABA Standards are not binding, does not mean the standards cannot be used to establish a due process violation. The term "due process" is vague and intentionally so. As the United States Supreme Court has said "This phrase, 'due process of law,' has always been one requiring construction; and, as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due

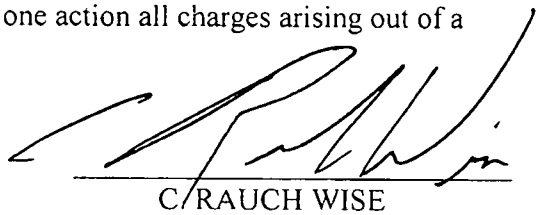
process of law and those which are not." *Freeland v. Williams*, 131 U.S. 405, 418 (1889). But because it is a vague term is not a reason to apply the concept to prevent a government from overreaching. The ruling from the Court of Appeals places no limit upon the ability of the State to try any defendant any number of times as long as the State can be imaginative enough to find another crime. After this decision, the state can go back to the General Session Court of Laurens County and seek consecutive sentences for the common law crime of obstruction of justice, false statement to a police officer in violation of S. C. Code § 16-17-725, or contributing to the delinquency of a minor in violation of S. C. Code § 16-17-490. Nothing in the opinion by the Court of Appeals gives Ms. Blakely any protection from further charges by the State. This Court should recognize the logic of the position of the ABA Standards and the fact that they promote efficiency in the criminal justice system. If all charges against Ms. Blakely had been brought at one time, the judicial system would have operated more efficiently.

If the due process clause does not prevent a second prosecution for another crime arising out of the same episode after an acquittal, then a citizen has no protection against successive prosecution for any number of possible criminal charges that may arise out of the single criminal episode. Simply put, how many bites of the apple does the due process clause permit the State get?

## CONCLUSION

For the foregoing reasons this Court should grant the Writ of Certiorari to the South Carolina Court of Appeals and reverse the decision of the Court of Appeals. This Court should hold that the failure of the State to prosecute in one action all charges arising out of a single incident is a violation of due process.

July 29, 2013



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AFFIDAVIT OF SERVICE

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PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for thePetitioner in the above entitled case. That on June 18, 2013, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Petition for Cert in which to file the Petition for Writ of Certiorari in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and to the South Carolina Court of Appeals, P.O. Box 11629, Columbia, SC 29211.

Sandy Traynham

SWORN to and Subscribed

before me this 29 day

of July, 2013.

Mary Jane Hartley (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22