

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

BRAQUETTE WYKINA WALTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001570

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Was trial counsel ineffective in failing to argue, pre-trial, that prosecuting Petitioner for both murder and abuse or neglect of a vulnerable adult resulting in death violates the Double Jeopardy Clause's protection against multiple punishments for the same offense?

STATEMENT

On February 16, 2012, the York County Grand Jury indicted Petitioner for murder (2012-GS-46-8650), exploitation of a vulnerable adult (2012-GS-46-866), four counts of forgery (2012-GS-46-868, 869, 870, 871), and abuse or neglect of a vulnerable adult resulting in death (2012-GS-46-883). On August 16, 2012, the York County Grand Jury indicted Petitioner for burglary first degree (2012-GS-46-3015) and four additional counts of forgery (2012-GS-46-867, 3016, 3017, 3018). On October 29, 2012, Petitioner proceeded to jury trial before the Honorable John C. Hayes. Phil Smith and Ashley Anderson represented petitioner at trial. Kevin Brackett and Willy Thompson prosecuted the case. The jury returned verdicts of guilty. Judge Hayes sentenced Petitioner to life in prison for murder, thirty (30) years concurrent for burglary first degree, five (5) years concurrent for each of the forgery counts and five (5) years concurrent for the exploitation charge. Judge Hayes withheld sentencing on the abuse or neglect of a vulnerable adult resulting in death charge based on Petitioner's argument that a conviction for both murder and abuse or neglect of a vulnerable adult resulting in death was inconsistent when both involved the death of one person.

On November 5, 2012, Judge convened a hearing and ruled that Petitioner could be convicted of both murder and abuse or neglect of a vulnerable adult resulting in death. Judge Hayes sentenced Petitioner to thirty (30) years concurrent for abuse or neglect of a vulnerable adult resulting in death. A timely notice of intent to appeal was filed and the direct appeal perfected. On November 5, 2014, the South Carolina Court of Appeals dismissed the appeal. State v. Walton, 2014-UP-377 (S.C.Ct.App. filed November 5, 2014).

On March 24, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on August 7, 2015. On April 19, 2016, an evidentiary hearing was held

before the Honorable Frank R. Addy, Jr. Leah Moody represented Petitioner at the PCR hearing. Justin Hunter represented the State. In a written order signed May 4, 2016, Judge Addy denied relief and dismissed the application. A timely notice of intent to appeal was served on July 25, 2016. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective in failing to argue, pre-trial, that prosecuting Petitioner for both murder and abuse or neglect of a vulnerable adult resulting in death violates the Double Jeopardy Clause's protection against multiple punishments for the same offense.

The jury found Petitioner guilty in the death of Pauline Cook. Ms. Cook lived at an assisted living facility in Rock Hill. Petitioner was an employee of the facility where Ms. Cook lived. The murder indictment alleges that "Braquette Wykina Walton did in York County on or about November 12, 2011, unlawfully and with malice aforethought kill Pauline Cook by suffocation and that Pauline Cook died as a proximate result thereof, all in violation of Section 16-3-10, Code of laws of South Carolina (1976), as amended. The murder occurred at [address redacted] Room [# redacted] Park Pointe Assisted Living Facility in Rock Hill, South Carolina." (App. p. 1010). The abuse or neglect of a vulnerable adult resulting in death alleges that, "Braquette Wykina Walton did in York County on or about November 12, 2011, knowingly and willfully abuse and/or neglect Pauline Cook, a vulnerable adult, resulting in Mrs. Cook's death. The crime occurred in Room [# redacted] of the Park Pointe Assisted Living Facility located at [address redacted], in Rock Hill, South Carolina; all in violation of Section 16-3-1050(F) Code of Laws of South Carolina (1976), as amended." (App. p. 1024).

After the jury returned their verdict, trial counsel moved for a new trial and then stated, "In addition, I think there is some inconsistency in a murder and an abuse resulting in death." (App. p. 991, lines 22-23). The judge denied the motion for a new trial but stated, "I would like to hear from the State, although it may be untimely at this point to raise the issue, which crossed my mind, of –not an inconsistency because they're two different crimes, but can both murder and the – any law regarding someone being charged with both murder and death by abuse and

neglect.” (App. p. 992, lines 1-6). The State, relying on State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), argued that there was no double jeopardy violation. (App. p. 992, line 7 – p. 993, lines 1-10). The State, however, failed to argue which element of murder was not included in the abuse or neglect of a vulnerable adult resulting in death charge. When the judge asked trial counsel if there was anything further from the defense, he answered, “Nothing further, Your Honor.” (App. 993, line 12). The judge took the matter under advisement and reserved sentencing on the abuse or neglect of a vulnerable adult resulting in death charge.

On November 5, 2012, the trial judge convened a hearing to rule on the matter he had taken under advisement. The trial judge stated:

At the end of the trial counsel for Miss Walton made a motion. The motion was basically that finding of death of vulnerable adult based on abuse and neglect was inconsistent with the finding on the murder charge in which she was also found guilty. Actually very consistent and not inconsistent.

My concern was whether or not under the Blockburger test there could be successive sentencing. I did some research and I particularly read the case – a case of mine out of Cherokee County, the Easler case and based on that I think it is clear that Miss Walton can be sentenced to both murder and death of a vulnerable adult based on abuse and neglect. So I would sentence her this morning.

(App. p. 1006, lines 6-21). The trial judge sentenced Petitioner to thirty (30) years concurrent for the abuse or neglect of a vulnerable adult resulting in death charge. Although the prosecutor and the trial judge relied on Easler and Blockburger v. United States, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), trial counsel failed to argue that Petitioner’s convictions for murder and abuse or neglect of a vulnerable adult resulting in death violated the prohibition against double jeopardy. Instead, trial counsel argued that the jury’s finding on both charges was “inconsistent.” Trial counsel was ineffective.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. S.C. CONST. art. I, § 12; U.S.

CONST. amend. V.; State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990)¹. The fact that concurrent sentences were does not cure the double jeopardy violation. Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) (even if second conviction results in no greater sentence, it is an impermissible punishment as it may have collateral consequences). In State v. Easler, 327 S.C. 121, 129–30, 489 S.E.2d 617, 622 (1997) (footnotes #10 and #11 omitted), the South Carolina Supreme Court wrote:

The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993). In Blockburger the United State Supreme Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, “the test to determine whether these are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” 284 U.S. at 304, 52 S.Ct. at 182.

In the present the Double Jeopardy Clause protects Petitioner from multiple punishments for the same offense. The murder charge does not require proof of an additional factor not included in the abuse or neglect of a vulnerable adult resulting in death charge.

S.C.Code §16–3–10 defines murder as “the killing of any person with malice aforethought, either express or implied.” S.C. Code §16-3-1050(F) provides that “A person who knowingly and willfully abuses or neglects a vulnerable adult resulting in death is guilty of a felony and, upon conviction, must be imprisoned not more than thirty years.” Abuse or neglect of a vulnerable adult causing death requires proof of the death of a vulnerable adult during the commission of knowing and willful abuse or neglect, a fact that is not required for murder. Murder, however, does not require proof of an additional fact not included in the abuse or

¹ Abrogated by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).

neglect of a vulnerable adult causing death charge. Abuse or neglect of a vulnerable adult constitutes malice.

In Easler the South Carolina Supreme Court found no Double Jeopardy violation in prosecuting for both reckless homicide and felony DUI causing death because reckless homicide requires proof of recklessness, not required in felony DUI, and felony DUI requires proof of driving under the influence, not required for reckless homicide. In contrast, in the present case, there is not a fact that must be proved for murder that is not included in the abuse or neglect of a vulnerable adult causing death charge. Prosecuting Petitioner for both violates the Double Jeopardy Clause's protection against multiple punishments for the same offense.

In State v. Molina, 271 Neb. 488, 713 N.W.2d 412 (2006), the Nebraska Supreme Court found no Double Jeopardy violation in prosecuting for both child abuse resulting in death and second degree murder because each offense requires proof of an element that the other does not. The Nebraska child abuse resulting in death offense requires proof of the death of a minor child not required in second degree murder. The Nebraska second degree murder offense requires proof of an intent to kill not required in the child abuse resulting in death offense. In contrast, in the present case, the South Carolina murder charge does not require proof of an intent to kill. The murder charge does not require proof of an element that the abuse or neglect of a vulnerable adult causing death charge does not.

During the PCR trial counsel was asked about his discussion with Petitioner about the elements of the charges. (App. p. 1097, lines 12-13). Trial counsel testified, "Same thing would

have applied to the latest direct indictment, the abuse and neglect resulting in death, because there's potentially, although the Court did not agree with me, an inconsistency with how one both murders someone and someone simply neglects them to the point they die." (App. p. 1098, lines 11-16). Trial counsel admitted he raised the "inconsistency" but the trial judge ruled against him. (App. p. 1098, lines 17-19). Instead of arguing "inconsistency" after the jury had returned verdicts, trial counsel should have argued, prior to trial, that prosecuting Petitioner for both murder and abuse or neglect of a vulnerable adult causing death violates the Double Jeopardy Clause's protection against multiple punishments for the same offense.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

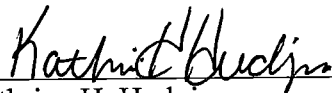
Trial counsel was ineffective in failing to argue, pre-trial, that prosecuting Petitioner for both murder and abuse or neglect of a vulnerable adult resulting in death violated the prohibition

against double jeopardy². There is a reasonable probability that, but counsel's deficient performance, the result of the proceeding below would have been different.

² The issue was not specifically raised during the PCR hearing and not specifically addressed in the order of dismissal. If this Court declines to remand the case to the PCR case to address the issue, in the interest of justice, the issue will have to be raised in a federal application for habeas corpus pursuant to Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

CONCLUSION

Based on the above argument, this Court should, in the interest of justice, remand the case to the PCR court to make specific findings in regard to trial counsel's failure to challenge Petitioner's prosecution for both murder and abuse or neglect of a vulnerable adult resulting in death as a violation of the Double Jeopardy Clause's protection against multiple punishments for the same offense.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2017.

STATE OF SOUTH CAROLINA

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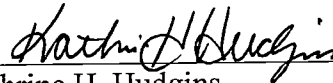
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Braquette Wykina Walton states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Frank R. Addy, which was held on April 19, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve her as counsel for Braquette Wykina Walton.

Respectfully Submitted,

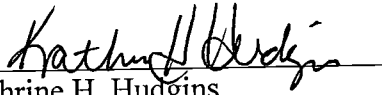


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


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South Carolina Commission on Indigent
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This 6th day of March, 2017.

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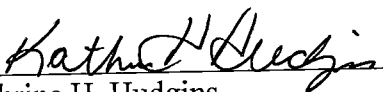
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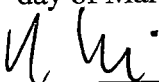
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Braquette Wykina Walton, #353118, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 6th day of March, 2017.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of March, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2025