

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County  
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge  
Appellate Case Tracking Number 2011-196627

The State,

Respondent,

v.

Teresa Blakely,

Appellant.

**FINAL BRIEF OF RESPONDENT**

ALAN WILSON  
Attorney General

WILLIAM M. BLITCH, JR.  
Assistant Attorney General  
S.C. Bar # 15608

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

ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. The trial court correctly found the prosecution of Appellant in this case was not the result of vindictive prosecution and correctly denied the motion to quash the indictment.
- II. The trial court correctly denied Appellant's motion to quash the indictment because the ABA Standards do not create a due process right, have not been adopted in South Carolina, and should not be determinative of whether the prosecutor abused his discretion in indicting Appellant for accessory after the fact.
- III. The trial court properly denied the motion to quash because the State did not take inconsistent factual positions as is prohibited but only took inconsistent legal positions which is allowed whether in the course of a single trial or two separate trials.

## STATEMENT OF THE CASE

Appellant was originally indicted on the charge of murder in September 2007. She proceeded to trial and the jury found her not guilty on May 29, 2009. The State indicted Appellant for accessory after the fact of a felony. Prior to trial, Appellant moved to quash the indictment, and the motion was denied. She proceeded to a bench trial before the Honorable Eugene C. Griffith, Jr. and was found guilty as indicted. Judge Griffith sentenced her to eight years, suspended on the service of four years in prison with three years probation. She was given credit for time served prior to her murder trial.

## ARGUMENT

**I. The trial court correctly found the prosecution of Appellant in this case was not the result of vindictive prosecution and correctly denied the motion to quash the indictment.**

Appellant contends her prosecution was in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, section 3 of the Constitution of the State of South Carolina. She maintains it was a vindictive prosecution because she proceeded to trial on a prior murder charge and was found not guilty, then she was subsequently indicted and tried for accessory after the fact. The prosecution was not a vindictive prosecution and did not violate the due process clauses of either the United States or South Carolina Constitutions.

“To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’” U. S. v. Goodwin, 457 U.S. 368, 372 (1982) (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978)). To establish vindictive prosecution a defendant must prove “that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus.” United States v. Wilson, 262 F.3d 305, 314 (4th Cir.2001). To establish genuine animus, the defendant may prove actual vindictiveness through direct evidence or raise a presumption of vindictiveness when the prosecutor's actions “pose a realistic likelihood of ‘vindictiveness.’ ” Blackledge v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

“A charging decision does not levy an improper “penalty” unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's

normal assessment of the societal interest in prosecution.” Goodwin, 457 U.S. at 380. “The Supreme Court further stated that an initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.” State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989) (citing Goodwin, 457 U.S. 368). “The imposition of punishment is the very purpose of virtually all criminal proceedings.” Goodwin, 457 U.S. at 372. Therefore, a punitive motivation alone “does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity.” Id. at 372-73. “A state’s punitive motivation does not represent a constitutional violation, where as here, the state sought to punish not for the right exercised, but for the crime committed.” Paradise v. CCI Warden, 136 F.3d 331, 336 (2<sup>nd</sup> Cir. 1998).

As a result, “[t]he presumption of regularity supports” prosecutorial decisions and, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926). In the ordinary case, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” U.S. v. Armstrong, 517 U.S. 456, 464 (1996).

Appellant has not argued there is any evidence of actual vindictiveness or that the prosecutor acted with genuine animus toward the defendant. Instead, he has argued the

State has failed to rebut a presumption of vindictiveness. South Carolina has not had opportunity to determine whether prosecution on a new indictment after obtaining an acquittal on a separate charge gives rise to a presumption of vindictiveness. Several Federal Circuit Courts of Appeal have considered the issue. The Second Circuit stated: “[W]e join the other courts of appeals that have held that a new federal prosecution following an acquittal on separate federal charges does not, without more, give rise to a presumption of vindictiveness.” U.S. v. Johnson, 171 F.3d 139, 141 (2<sup>nd</sup> Cir. 1999) (citing United States v. Wall, 37 F.3d 1443, 1449 (10th Cir. 1994); United States v. Rodgers, 18 F.3d 1425, 1430–31 (8th Cir. 1994); United States v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992)); see also, U.S. v. Kendrick, 682 F.3d 974, 983 (11<sup>th</sup> Cir. 2012) (“[W]e agree with our sister circuits that bringing a second indictment, supported by evidence, against a defendant after an acquittal does not result in a presumption of vindictiveness.”). The Johnson Court held no presumption applies even when “[t]he mere fact that a new crime is being charged [that differs from the original charges] . . . even after acquittal ” on the initial charges. Johnson, 171 F.3d at 141. Further, Johnson applied this rule even where the government appeared to have had the evidence of this new crime before the defendant’s jury demand on the initial charges.

Additionally, in United States v. Esposito, 968 F.2d 300 (3d Cir.1992), the defendant was acquitted of Racketeer Influenced and Corrupt Organizations Act (“RICO”) charges, and later indicted for offenses based on the same drug transactions that formed a basis for the RICO charges. The Third Circuit held that it would “not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case [was] justified by the evidence and [did] not put the defendant twice in jeopardy.”

Id. at 306. The court noted that creating a presumption in these circumstances would be “tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution.” Id. The Court concluded: “It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace. We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality.” Id.; see also, People v. Valli, 187 Cal.App.4th 786, 805 (Cal. App. 3 Dist. 2010).

Further, courts have considered whether on re-trial the indictment on additional charges raises a presumption of vindictiveness. This is an analogous situation to the present one in which instead of re-trial, Appellant faces a second trial on a separate charge. The courts have held there is no presumption of vindictiveness, even when the crimes were related and arose from the same spree in which the original indictments arose. See U.S. v. Mallah, 503 F.2d 971, 988 (2<sup>nd</sup> Cir. 1974); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), *Cert. denied*, 434 U.S. 1049, 98 S.Ct. 897, 58 L.Ed.2d 801 (1978); U.S. v. Thomas, 593 F.2d 615, 624 (5<sup>th</sup> Cir 1979); U.S. v. Taylor, 749 F.2d 1511 (11<sup>th</sup> Cir. 1985).

The argument raised by Appellant requiring the State to bring all charges in one trial, has also been addressed. In Paradise v. CCI Warden, 136 F.3d 331, 336 (2d Cir.), *cert. denied*, 525 U.S. 836, 119 S.Ct. 94, 142 L.Ed.2d 74 (1998), the Second Circuit rejected the defendant’s argument that the initial choice to withhold certain charges, and then later proceed on those charges after an acquittal, amounts to a constitutional violation. Specifically, the Court in Paradise stated: “Accepting [the defendant’s] contention would encourage prosecutors to overcharge defendants, by charging both a

greater number of crimes and the most severe crimes supported by the evidence. This is a result we do not wish to promote. Instead, the validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against the accused.” Id. (internal citations omitted).

The prosecutor in this case chose to proceed to trial on the theory Appellant took part in, planned, and helped commit a murder. The jury found her not guilty of murder. The facts as established at trial and in Appellant’s statement indicate she committed the crime of accessory after the fact. (State’s Exhibit 4, statement of Teresa Fuller, R. 86; T. 26-33; R. 26-33). This is a completely separate charge, based on completely separate facts. While the fact she assisted in disposing of the body and lied to the children about what was going on may have been used by the solicitor to try and establish knowledge and malice for murder, the facts clearly support the second charge for accessory after the fact as well. Moreover, there is nothing more than exercise of normal prosecutorial discretion involved if the prosecuting attorney decides to proceed in a second case when his first legal theory is rejected by a jury. As a result, this Court should find there is no due process violation, and no vindictive prosecution, by the State charging Appellant for accessory after the fact after she was found not guilty of murder when the facts of the case clearly establish probable cause for charging accessory after the fact.

**II. The trial court correctly denied Appellant's motion to quash the indictment because the ABA Standards do not create a due process right, have not been adopted in South Carolina, and should not be determinative of whether the prosecutor abused his discretion in indicting Appellant for accessory after the fact.**

Appellant next maintains the State violated her due process rights by not bringing both the murder charge and the accessory after the fact charge in the same trial. She maintains the ABA Criminal Justice Standards require the State to bring the charges in one trial. The charges are separate and distinct charges and as discussed above it is a prosecution decision whether to proceed on the second charge after the not guilty verdict on the first. Further, South Carolina has not adopted the ABA standards and while they have been referenced on occasion, they are not determinative in this case and certainly do not create a due process right as alleged by Appellant.

Indubitably, the ABA Standards do not create a due process right; due process rights must emanate from the United States Constitution or the South Carolina Constitution. The United States Supreme Court has noted "while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been careful to say these standards 'are only guides' and do not establish the constitutional baseline." Rompilla v. Beard, 545 U.S. 374, 400 (2005). Additionally, the Court has stated: "the Constitution does not codify the ABA's Model Rules." Montejo v. Louisiana, 556 U.S. 778, 790 (2009) (finding the Sixth Amendment is the appropriate standard and not the ABA's Model Rules). Appellant references Padilla v. Kentucky, 130 S.Ct. 1473 (2010) as an example where the United States Supreme Court has "recognized standards by the [ABA]" and "used the ABA standards to impose an effective assistance of counsel obligation upon defense counsel." The Padilla Court specifically noted the Standards

were “only guides” and “not ‘inexorable commands.’” Id. at 1482.<sup>1</sup> Certainly the Standards were not the basis for the holding of the case nor should they be a basis to impose a due process of law standard as requested by Appellant.

In South Carolina, the Supreme Court “has never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina.” Ard v. Catoe, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal dissenting). Additionally, Justices of the South Carolina Supreme Court have explained: “The fact that these [ABA Criminal Justice Standards] have been sanctioned by the ABA is of no real consequence. They are in effect the thinking of the Criminal Justice Section of the ABA, whose members are basically engaged in the practice of criminal law and who understandably seek a rule favorable to those people indicted for crime.” Medlin v. State, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981) (Littlejohn and Gregory, concurring in part and dissenting in part) (discussing the Court’s specific adoption of an ABA Standard related to judicial participation in plea bargaining). Accordingly, the ABA Standards may act as guidelines for the Court to consider, but certainly do not provide a due process right as articulated by Appellant in her brief.

Further, with the exception of New Jersey, the States cited by Appellant which follow the ABA Standard have done so pursuant to a statute requiring it.<sup>2</sup> The South Carolina Legislature has not determined the requirements of the ABA Standard are

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<sup>1</sup> As Justice Alito noted in his concurrence in Bobby v. Van Hook, 130 S.Ct. 13, 20 (2009) (Alito, J., concurring): “The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. . . . I see no reason why the ABA Guidelines should be given a privileged position.”

<sup>2</sup> It should be noted New Jersey subsequently codified the holding of State v. Gregory, 333 A.2d 257 (1975). Even with the provisions of the ABA being in existence for a significant period of time, the South Carolina Legislature, nor the majority of legislatures in the country, has codified a similar requirement.

necessary and accordingly, the policy should not be adopted by the Court. It is appropriate to leave the decision for the Legislature to adopt such a rule.

South Carolina has not required mandatory joinder of indictments in one trial, instead leaving the decision on whether to join charges to the discretion of the trial judge after motion by one party. See e.g., State v. Hinson, 253 S.C. 607, 613, 172 S.E.2d 548, 551 (1970); State v. Evans, 112 S.C. 43, 99 S.E. 751 (1919). In the instant case, there is no reason to require the State to bring the charges in one trial. The State had probable cause to believe Appellant was involved in more than just the cover-up of the murder, but was instead a party to the murder itself. After Appellant was found not guilty of the murder, the State still had probable cause to believe she committed the separate and distinct charge of accessory after the fact to a felony. As a result, the State should not be precluded by the ABA Standards or any other reason from bringing Appellant to trial for the possible charges she faced.

As stated above, the argument raised by Appellant requiring the State to bring all charges in one trial, has also been addressed by federal courts. In Paradise, 136 F.3d at 336, the Second Circuit rejected the defendant's argument that the initial choice to withhold certain charges, and then later proceed on those charges after an acquittal, amounts to a constitutional violation. Specifically, the Court in Paradise stated: "Accepting [the defendant's] contention would encourage prosecutors to overcharge defendants, by charging both a greater number of crimes and the most severe crimes supported by the evidence. This is a result we do not wish to promote. Instead, the validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against the accused." Id. (internal citations

omitted); see also Johnson, 171 F.3d 139, 141 (finding no error in prosecutor bringing new charges after an acquittal even when it appears knowledge of the charges existed prior to the first trial). This is the holding this Court should make in this case, and any other decisions regarding adopting the force and effect of the ABA Standard should be left to the legislature or established through an appropriate Court Rule.

Appellant seems to argue the criminal rule in the ABA Standard is analogous to the bar of a second civil action based on *res judicata*. In order to establish *res judicata*, “the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). This case would certainly fail the third prong as the issue of whether Appellant was guilty of accessory after the fact was never decided or adjudicated in the first trial. As a result, Appellant’s reference to *res judicata* is unavailing. Accordingly, this Court should find the trial court properly denied the motion to quash the indictment as that motion related to the ABA Standards.

**III. The trial court properly denied the motion to quash because the State did not take inconsistent factual positions as is prohibited but only took inconsistent legal positions which is allowed whether in the course of a single trial or two separate trials.**

Appellant contends the trial court erred in failing to quash the indictment because the State violated Appellant's due process rights by taking inconsistent positions in the two trials. The State did not take inconsistent positions in the trials and, even if it did, inconsistent positions are not prohibited.

Appellant seems to be arguing for a form of judicial estoppel in a criminal case.<sup>3</sup> He does not frame it as such, however; likely because he knows he cannot meet the requirements to apply the doctrine. First, judicial estoppel relates to inconsistent statements of fact. As the Supreme Court found in adopting the judicial estoppel doctrine in South Carolina, "the doctrine does not apply to conclusions of law or assertions of legal theories." Hayne Fed. Cr. Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). The State has not made inconsistent statements of fact, it has merely focused on different facts to support the two charges. While the State may have advanced two different conclusions of law or legal theories—guilt of murder versus guilt of accessory after the fact—the State has not advanced inconsistent factual positions.

Further, in order to invoke judicial estoppel, one must show (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining the first position and must have received some benefit; (4) the

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<sup>3</sup> It should be noted: "South Carolina courts have not addressed the applicability of judicial estoppel in criminal cases." State v. McCall, 364 S.C. 205, 209, 612 S.E.2d 453, 455 (Ct. App. 2005).

inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Carrigg v. Cannon, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001). The proceedings here are not related, the State was not successful in maintaining an alleged inconsistent position in the first trial because Appellant was acquitted, and the inconsistency is certainly not part of an effort to mislead the court. See e.g., State v. McCall, 364 S.C. 205, 612 S.E.2d 453 (Ct. App. 2005).

As Appellant has clearly failed to meet the requirements to apply judicial estoppel, he looks to a generic claim of due process to support his theory the State is prohibited from pursuing two separate and possibly inconsistent charges in two trials even though he admits the State could pursue the same charges in the course of one trial. He points to Smith v. Goose, 205 F.3d 1045 (8<sup>th</sup> Cir. 2000), for support that the State taking inconsistent positions violates due process. What he fails to explain, is the prosecution in that case took inconsistent factual positions, not inconsistent legal positions. In Goose, the State first argued a witness's first statement implicating one defendant was the truth and another statement was false. In a second trial of a different defendant, the State maintained the second statement, which the State previously argued against, was now true and convicted a different defendant of the same murder. Id. at 1050.

In the instant case, the State has never argued factually inconsistent positions. Appellant has not contended the State presented inconsistent facts during the murder trial as compared to the trial for accessory after the fact. The State presented additional testimony to indicate she was involved in the planning and carrying out of the actual murder, in addition to the cover-up and disposal of the body. In the second trial, the State

merely focused on the cover-up and disposal of the body. The State did not take an inconsistent factual position; instead, arguing the facts supported a crime standing on their own as opposed to constituting a portion of the evidence of a more significant and serious crime.

Appellant has not advanced any South Carolina case or accepted doctrine which would prohibit the State from asserting two different legal theories based on the same set of facts. Significantly, Appellant admits the State could present—and has argued throughout his brief was required to present—inconsistent legal theories in a single trial. The result should be no different if there are two trials versus one, and no case requires a different result. Accordingly, the trial court properly denied the motion to quash the indictment as it related to the State's adoption of inconsistent legal conclusions or theories.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

WILLIAM M. BLITCH, JR.  
Assistant Attorney General

BY:



William M. Blich, Jr.  
S.C. Bar # 15608  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

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November 14, 2012

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Appellant.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON  
Attorney General

WILLIAM M. BLITCH, JR.  
Assistant Attorney General

BY: 

William M. Blich, Jr.  
S.C. Bar # 15608  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

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**PROOF OF SERVICE**

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise Esquire  
305 Main Street  
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.  
This 14<sup>th</sup> day of November, 2012.

*Ellen R. DuBois*  
ELLEN R. DuBOIS  
Legal Assistant

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

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