THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith Jr., Circuit Court Judge

Case No. 2009-GS-30-1790

The State, ... Respondent,

vs.

Teresa Blakely ..... Appellant

FINAL REPLY BRIEF OF APPELLANT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
Bar #: 006188

Attorney for Appellant

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Argument

Question I:

Was the prosecution of Teresa Blakely in this matter a result of a vindictive prosecution and therefore the 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 State did not in the court below nor in its brief before this Court ever attempt to justify the decision to prosecute Teresa Blakely in a second trial that arose out of the same facts as her murder prosecution. The State has simply offered no evidence to rebut a presumption of vindictiveness.

The State's reliance upon *Paradise v. CCI Warden,* 136 F.3d 331 (2nd Cir. 1998) is misplaced. In *Paradise* a defendant was indicted for a non-capital murder. After he successfully had the charges dismissed because the charge violated the state's statute of limitations, the State indicted the defendant for capital murder. Any presumption of vindictiveness was rebutted when the state was able to show that they did not believe they could prosecute Paradise for capital murder because of the same statute limitations, until the appellate court in affirming the dismissal of the charges, noted in a footnote that the statute of limitations did not apply to capital murder. Thus, the state was easily able to explain the decision for the second prosecution.

Unlike the facts in *United States v. Johnson*, 171 F.3d 139 (2nd Cir. 1999), the government in this case is taking inconsistent positions from the same facts. When the state, after an acquittal for murder, now urges that the same facts only support the charge of accessory

after the fact, a presumption of vindictiveness should apply. The government in *Johnson* did not take inconsistent positions. When the state has to take a different position from what it took in the first trial, then Ms. Blakely has shown something more than an acquittal on her first charges. The government spent over twenty months investigating the case and preparing for trial and concluded that the only reasonable conclusion from the facts is that Ms. Blakely is guilty of murder. After an acquittal, the government changed its position and now told the judge that the only reasonable conclusion is that she did not help the co-defendant commit the murder but only helped cover up the crime. Those facts should give rise to a presumption of vindictiveness. In no case cited by the state in its brief did the government take contradictory positions.

Ms. Blakely agrees that our State has not had the opportunity to determine whether a prosecution on a new indictment and trial on the same facts after an acquittal, creates a presumption of vindictiveness. This Court now has that opportunity. If the second prosecution of Ms. Blakely was not vindictive, the state at the trial below had ample opportunity to present any reasonable explanation for the second trial. They elected not to do so.

In *Patrick v. State,* 349 S.C. 203, 562 S.E.2d 609 (2002) our Supreme Court determined that there was a sufficiently reasonable likelihood that the second prosecution was in part vindictive. In *Patrick* the state elected to re-indict the defendant on several charges that had been dismissed in the first prosecution. The second trial occurred when the defendant had been successful in his post conviction relief. The Court found that the reasonable likelihood created a presumption that the state had not rebutted. The same principle applies here. The State has given no explanation for the second trial. Here, as in *Patrick*, there is a reasonable likelihood that the second trial was vindictive. This Court should apply the same presumption of

vindictiveness and reverse the conviction.

The burden on the government to bring all the charges in one indictment is not burdensome. If the defendant elects to sever the charges then the defendant would, of course, waive an objection to a second trial on the severed charge if he is acquitted on the first charge. Such a rule would make our court system more, not less, efficient.

Question II:

Did the indictment for accessory after the fact to murder after the defendant had been acquitted of murder 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?

Ms. Blakely agrees that standards of the American Bar Association do not always equate with a violation of the due process clause. But that does not mean that the standards of the ABA will never be a violation of the due process clause. As noted in the opening brief, the United States Supreme Court has relied upon the Standard of the ABA in deciding its cases. In relying upon ABA Standards, the Court has said "Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides." *Missouri v. Fyye,* 132 S. Ct. 1399, 1408 (2012)(holding ABA Standards apply to the performance of defense counsel in advising client of a plea offer).

What is a violation of due process in a very general concept. "Due process in essence means fundamental fairness . . . ." *Hampton v. United States*, 425 U.S. 484, 495 (1976) (Powell, concurring opinion). What is a violation of due process is not subject to rigid rules. Fundamental fairness would require under the circumstances of this case for both charges to be

tried together. Such a rule is fundamentally fair to the state and fundamentally fair to the defendant.

While the State may have presented additional testimony at the murder trial, they did not present new evidence in the accessory after the fact trial. All of the evidence present at the second trial was presented at the first trial. The State cannot argue that it learned of new facts after the first trial.

Question III

Can the state, in keeping with the due process clause of 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, take inconsistent positions in two separate criminal proceedings against the same defendant?

The State has argued that judicial estoppel relates to inconsistent statement of facts and not conclusion from the facts. There is no difference. If the State argues at one trial that the facts prove beyond a reasonable doubt that Ms. Blakely helped plan and carry out the murder of her husband, it is certainly inconsistent to argue at a second trial that the same facts show beyond a reasonable doubt that Ms. Blakely was only guilty of accessory after the fact. Requiring the State to adhere to a single theory places no undue burden upon the state.

Conclusion

For the reasons stated above and for the reasons set forth in the opening brief, this matter should be reversed and the charges against Teresa Blakely be dismissed.

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C. RAUCH-WISE
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauch@simplepc.net
S.C. Bar № 6188

Attorney for Teresa Blakely