

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas  
J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2017-001153

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JERRY LEE DICKEY,

v.

STATE OF SOUTH CAROLINA,

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APR 24 2018

S.C. SUPREME COURT  
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APR 23 2018

SC Court of Appeals

Petitioner,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **RESPONDENT'S ISSUES PRESENTED**

Did the post-conviction relief court properly deny post-conviction relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to move for dismissal of his enhanced shoplifting charge following his plea to misdemeanor possession of stolen goods in North Carolina based on a purported double jeopardy violation?

## STATEMENT OF THE CASE

On August 28, 2014, Petitioner Jerry Lee Dickey entered a Family Dollar store in Clover, South Carolina, wherein he stole a number of items before fleeing in a green Dodge vehicle. (App. p. 47, 59-61). A dispatch reporting the shoplifting and giving a description of the green Dodge was broadcast to local law enforcement. (App. p. 47).

Shortly thereafter, Officer Charles Neelands of the Clover Police Department spotted the green Dodge driven by Petitioner. (App. p. 48). Officer Neelands activated his blue lights and pursued Petitioner, who sped up and eventually crossed the state line into North Carolina. (App. p. 48-51).

Neelands's supervisor, Officer David Dover, continued the pursuit of Petitioner into North Carolina and eventually found Petitioner and the green Dodge on the side of the road in Gastonia, North Carolina. (App. p. 66-73). Officer Dover made contact with Petitioner, who initially denied being in Clover that day but eventually admitted to being in Clover but denied shoplifting from Family Dollar. (App. p. 73-86). Various items, including socks, undershirts, and detergent, were found in Petitioner's vehicle with Family Dollar tags attached. (App. p. 63-64, 73-86, 147).

Officers with the Gastonia Police Department arrested Petitioner and took him into custody. While in custody, Petitioner confessed to shoplifting from the Family Dollar and attempting to evade law enforcement. (App. p. 84-86, 153).

Thereafter, Petitioner was indicted for misdemeanor possession of stolen goods in North Carolina. (App. p. 147-48). On October 27, 2014, Petitioner appeared in the Gaston County

District Court and pled guilty to misdemeanor possession of stolen goods, for which he received a sixty-one day sentence. (App. p. 152).

During its March 2015 term, the York County Grand Jury indicted Petitioner for shoplifting-enhancement (2015-GS-46-0891) and failure to stop for a blue light (2015-GS-46-0892). (App. p. 200-06). Assistant Public Defender Phillip Smith represented Petitioner. (App. p. 1) The case was prosecuted by Assistant Solicitor T. Matthew Hogge of the Sixteenth Circuit Solicitor's Office. (App. p. 1)

On May 20, 2015, Petitioner was tried in his absence in the York County Court of General Sessions before the Honorable Robin B. Stillwell, circuit court judge. (App. p. 1-130). The jury convicted Petitioner as indicted and Judge Stillwell sealed his sentences. On August 11, 2015, Petitioner appeared before the Honorable Paul M. Burch, circuit court judge, for a sentencing proceeding Judge Burch unsealed Judge Stillwell's sentence of ten years for shoplifting-enhancement and three years for failure to stop for a blue light. (App. p. 131-36).

Petitioner filed a notice of appeal, and was represented by Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. Before the filing of any briefs, Petitioner moved to withdraw his appeal. By written order filed May 20, 2016, the South Carolina Court of Appeals dismissed Petitioner's appeal. The Remittitur was sent on June 8, 2016.

On June 16, 2016, Petitioner filed an application for post-conviction relief, alleging he was being held in custody unlawfully based on double jeopardy and counsel's failure to argue for dismissal of his charges based on a double jeopardy violation. (App. p. 137-49). Respondent

made its return to the application on December 29, 2016, requesting an evidentiary hearing. (App. p. 155-59).

On January 31, 2017, a hearing on Petitioner's application was held before the Honorable J. Mark Hayes, II, circuit court judge. Nathan J. Sheldon, Esquire represented Petitioner. Assistant Attorney General Justin J. Hunter of the South Carolina Attorney General's Office, represented Respondent. At the hearing, testimony was presented from Petitioner, trial counsel, and appellate counsel. (App. p. 160-191).

By written order of dismissal signed April 26, 2017, and filed May 10 2017, the post-conviction relief court denied and dismissed the application, finding there was no double jeopardy violation prohibiting prosecution of Petitioner in South Carolina for shoplifting-enhancement following his plea to misdemeanor receiving stolen goods in North Carolina. (App. 197-98). (App. p. 192-99).

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, \_\_\_ S.C. \_\_\_, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court properly denied post-conviction relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to move for dismissal of his enhanced shoplifting charge following his plea to misdemeanor possession of stolen goods in North Carolina based on a purported double jeopardy violation.**

Petitioner asserts trial counsel was constitutionally ineffective for failing to move for the dismissal of his shoplifting indictment or otherwise object based on double jeopardy grounds and the post-conviction relief court erred in denying his application for post-conviction relief on this ground. However, the post-conviction relief court properly denied Petitioner post-conviction relief, as there was no valid double jeopardy claim that counsel could have raised. This Court should deny certiorari.

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 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its

“reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner asserts double jeopardy protections prevented the State of South Carolina from prosecuting him for the theft of stolen goods from the Family Dollar store in South Carolina because he had already pled guilty to misdemeanor possession of stolen goods in North Carolina based on the same stolen items from the South Carolina Family Dollar. However, this argument fails, as Petitioner was convicted of two separate and distinct offenses arising out of different conduct. Additionally, assuming the South Carolina and North Carolina were the same offense for double jeopardy purposes, the dual sovereignty doctrine allows for each state to prosecute Petitioner without running afoul of any constitutional provisions.

**A. Petitioner committed and was convicted of two separate and distinct offenses.**

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V (“No person shall be . . . subject for the same offense to

be twice put in jeopardy of life or limb . . . .”); S.C. Const. art. I, § 12 (“No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . .”). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

However, a single act can constitute multiple distinct offenses without subsequent indictment or punishment running afoul of the Double Jeopardy Clause. See State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (1996) (“A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two ‘distinct’ offenses.”). Multiple punishments and successive prosecutions are **not** prohibited where a different offense calls for proof of a fact another offense does not. Cuccia, 353 S.C. at 438, 578 S.E.2d at 49.

The traditional test for determining whether successive prosecutions are barred by the Double Jeopardy Clause was explained in Blockburger v. United States, 284 U.S. 299 (1932). In Blockburger, the United States Supreme Court instructed: “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id. at 304. Accordingly, the Blockburger test “requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offense in the subsequent prosecution.” Moyd, 321 S.C. at 258, 468 S.E.2d at 9.

Notably, following the decision in Blockburger, the United States Supreme Court temporarily expanded the test for determining whether a double jeopardy violation has occurred with its opinion in Grady v. Corbin, 495 U.S. 508 (1990). Under that expanded approach, the Grady Court instructed the test from Blockburger must still be applied in a double jeopardy analysis. Id. at 520. However, in addition to applying the traditional Blockburger test, the Grady Court held: “[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” Id. at 521. Critically though, the United States Supreme Court overruled Grady shortly thereafter in United States v. Dixon, 509 U.S. 688, 704 (1993), and abandoned its “same-conduct” test.

Therefore, in light of the United States Supreme Court’s ruling in Dixon, “Blockburger remains as the *only* test of double jeopardy for successive prosecutions as well as for multiple punishments in a single prosecution” in South Carolina. Moyd, 321 S.C. at 259, 468 S.E.2d at 9 (italics in original); see also State v. Easler, 327 S.C. 121, 131, 489 S.E.2d 617, 623 (1997) (“We hereby affirm the Court of Appeals’ abandonment of the Grady v. Corbin same conduct test.”). Thus, if a defendant’s conduct constitutes the elements of two distinct offenses, the defendant can be prosecuted for and convicted of two separate crimes arising from the same conduct without running afoul of the constitutional prohibitions against double jeopardy. State v. Elders, 386 S.C. 474, 482, 688 S.E.2d 857, 861 (Ct. App. 2010).

In the present case, Petitioner committed two separate and distinct offenses and was properly prosecuted for each. In South Carolina, Petitioner was indicted for shoplifting-enhancement pursuant to S.C. Code Ann. § 16-13-110(A) and § 16-1-57, alleging that Petitioner

“did on or about August 28, 2014, in York County, take possession of, carry away, transfer from one person to another or from one area of a store to another area, or cause to be carried away or transferred any merchandise valued at less than two thousand dollars (\$2,000) displayed, held, stored, or offered for sale by Family Dollar with Intent to deprive Family Dollar of the possession, use, or benefit of the merchandise without paying full retail value; and said defendant has been convicted of two or more offenses for which the term of imprisonment is contingent upon the value of the property involved[.]” This indictment and subsequent conviction is based on Petitioner entering the Family Dollar store in South Carolina and stealing merchandise. In North Carolina, Petitioner was indicted for possession of stolen goods based on his conduct of possessing stolen goods within the State of North Carolina—not shoplifting. Looking at the elements of each offense, it is clear that the South Carolina shoplifting-enhancement indictment and the North Carolina possession of stolen goods indictment are separate and distinct offenses. Therefore, there was no violation of the double jeopardy and trial counsel was not ineffective for failing to move for dismissal or otherwise object on double jeopardy grounds.

**B. Assuming the two offenses were not separate and distinct offense arising from different conduct, the dual sovereignty doctrine allowed each state to prosecute Petitioner without violating double jeopardy provisions.**

Notwithstanding that the two indicted offenses are separate and distinct and arise from separate conduct, the dual sovereignty doctrine allowed South Carolina and North Carolina to prosecute Petitioner without violating double jeopardy provisions.

“Successive prosecutions are barred by the Fifth Amendment [of the United States Constitution] only if the two offenses for which the defendant is prosecuted are the ‘same’ for double jeopardy purposes.” Heath v. Alabama, 474 U.S. 82, 87 (1985). However, the dual

sovereignty doctrine establishes successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause. Id. at 88. “The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government.” Id. “When a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’” Id. (citing United States v. Lanza, 260 U.S. 377, 382 (1922)). “As the Court explained in Moore v. Illinois, 14 How. 13, 19, 14 L.Ed. 306 (1852), ‘[a]n offence, in its legal signification, means the transgression of a law.’” Id. “Consequently, when the same act transgresses the laws of two sovereigns, ‘it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.’” Id.

The dual sovereignty doctrine applies not only to prosecutions by the federal government and a state, but also between two separate states. Id. Thus, [e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty, not that of the other.” Id. at, 89–90 (internal citations omitted). The United States Supreme Court “has plainly and repeatedly stated that two identical offenses are not the “same offence” within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns. Id. at 92.

South Carolina has also recognized that under the dual sovereignty doctrine, successive prosecution of the same conduct by separate sovereigns is not a violation of the federal constitutional prohibition against double jeopardy. State v. Rice, 348 S.C. 417, 420, 559 S.E.2d 360, 362 (Ct. App. 2001) (citing Heath v. Alabama, 474 U.S. 82, 88 (1985)).

In the present case, the York County Grand Jury indicted Petitioner for shoplifting-enhancement pursuant to S.C. Code Ann. § 16-13-110(A) and § 16-1-57. North Carolina, acting within its own sovereign authority separate and apart from South Carolina, indicted Petitioner for possession of stolen goods based on the stolen items from Family Dollar that he had in his possession in North Carolina.

Petitioner asserts counsel was ineffective for failing to move for dismissal or otherwise object to South Carolina's prosecution of its shoplifting-enhancement indictment because North Carolina had already prosecuted Petitioner for possession of stolen goods. However, Petitioner's argument is wholly without merit, as this is exact situation covered by the dual sovereign doctrine as discussed in Heath. "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws." Heath v. Alabama, 474 U.S. 82 (1985).

In support of his argument, Petitioner cites to unrelated statutes pertaining to drug prosecutions following federal prosecution for the same conduct and competing municipal or magistrate jurisdictions, but wholly fails to address why the dual sovereign doctrine is inapplicable in this case. Petitioner appears to recognize that Heath covers precisely this situation, but nonetheless argues Heath is distinguishable from the present case "because Heath involved extremely serious crimes of murder and kidnapping." (PWC p. 7). Petitioner fails to cite to any authority to support the relevancy of this "distinction" or otherwise argue how the seriousness of the crime is dispositive on the dual sovereignty doctrine.

In conclusion, counsel was not ineffective for failing to move for dismissal of his shoplifting-enhancement conviction on double jeopardy grounds because there was no valid

double jeopardy argument to make. Counsel himself acknowledged this at the evidentiary hearing. (App. P. 175. 179). Therefore, the post-conviction relief court properly denied relief. Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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By:   
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April 23, 2018

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas  
J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2017-001153

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JERRY LEE DICKEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**PROOF OF SERVICE**

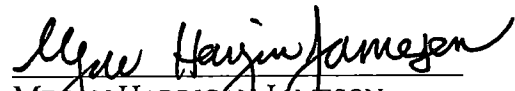
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I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire  
South Carolina Commission on Indigent Defense—Office 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 23<sup>rd</sup> day of April, 2018.

  
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APR 24 2018  
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April 23, 2018

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
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*BSJ*  
~~RECEIVED~~  
APR 28 2018  
SC Court of Appeals

**Re: Jerry Lee Dickey. State of South Carolina**  
**Appellate Case No. 2017-001153**  
**Lower Court Case No. 2016-CP-46-1813**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
SC Bar No. 100108

MHJ/cc  
Enclosures

cc: LaNelle C. DuRant, Esquire (2 copies)