

 ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

APPELLANT

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

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Opinion No. 4785

Appellate Case No. 2011-188646

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PETITION FOR REHEARING

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**RECEIVED**

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**S.C. Supreme Court**

Pursuant to Rule 221(a), SCACR, counsel for Wesley Smith petitions the Court for rehearing. Counsel submits that the Court correctly found that because Petitioner was indicted only for homicide by child abuse pursuant to section (A)(1), the court of appeals erred in affirming Petitioner's conviction under section (A)(2) – an unindicted charge that was not a lesser included offense of the indicted offense. Counsel respectfully submits, however, that the Court overlooked the fact that the jury, in finding Petitioner guilty of aiding and abetting homicide by child abuse pursuant to S.C. Code §16-3-85(A)(2), implicitly acquitted Petitioner of homicide by child abuse

pursuant to S.C. Code §16-3-85(A)(1). As a result, double jeopardy bars the State from prosecuting Petitioner for homicide by child abuse pursuant to S.C. Code §16-3-85(A)(1). As noted in footnote seven of the opinion, the State may seek an indictment for the charge of aiding abetting homicide by child abuse pursuant to S.C. Code §16-3-85(A)(2) and proceed on retrial for that charge alone. Counsel respectfully asks this court to remove the language in the final sentence of the opinion remanding the case for a new trial on the indicted offense of homicide by child abuse pursuant to section (A)(1) as Petitioner was implicitly acquitted of this charge.

In his charge to the jury the trial judge stated:

Now, Mr. Foreman, I have prepared for your guidance a verdict form, there's no suggestion by me as to what your verdict should be, and the form in which I give it is I could turn it around and give it to you the other way but there are several possible verdict forms.

First, as to guilty or not guilty of homicide by child abuse, as to that you may find him not guilty and so signify **or you could find him guilty and so signify**. Of course, any – any charge of guilty must be beyond a reasonable doubt.

Or as to – you may find him not guilty of aiding and abetting another person to commit child abuse which resulted in the death of a child or not guilty of aiding and abetting.

**And so it is that you will first consider the first charge and depending on your verdict, you will then consider if necessary the second charge**, and whatever it is, you would indicate and sign your name on the form of this verdict. [emphasis added].

(R. p. 622, line 11 – p. 623, lines 1-2). Later the judge told the jury:

Now, I have given you a form verdict, and I want to discuss it with you one more time. First, a person is guilty of homicide by child abuse if the person causes the death of the child under the age of eleven while committing child abuse or neglect and the death occurs under circumstances manifesting an extreme difference to human life. **You will consider that first. If your verdict be guilty of that, homicide by child abuse, unanimously, you would stop there and let us know, and we would accept your verdict.**

If under guilty of homicide by child by child, [sic] **you would then go to the next consideration, and that is as follows: A person is guilty of homicide by child abuse if the person knowingly aids and abets another person to commit child abuse or neglect and the child abuse or neglect results in the death of a child under the age of eleven.** If you are considering that portion of this verdict, obviously, your verdict is either not guilty or guilty and you would report that to the Court. What ever your verdict is, I continue to

emphasize, must be the unanimous verdict of all twelve of you. it cannot be a verdict of the majority. Obviously, it wouldn't be one of the minority. [emphasis added].

(R. p. 669, line 23 – p. 670, lines 1-18).

The verdict form was not included in the record on appeal but was present and referenced during oral argument before this Court. Attached is a copy of the verdict form and counsel respectfully asks that the verdict form be made part of the petition for rehearing. The only indication on the verdict form is an X next to guilty of aiding and abetting another person to commit child abuse or neglect which resulted in the death of a child. The other options listed on the verdict form: guilty of homicide by child abuse; not guilty of homicide by child abuse and not guilty of aiding and abetting another person to commit child abuse or neglect which resulted in the death of a child, were left blank by the jurors.

In Livingston v. Murdaugh, 183 F.3d 300 (4th Cir. 1999), a federal habeas corpus relief action, the United States Court of Appeals for the Fourth Circuit Court affirmed the order of the United States District Court for the District of South Carolina enjoining a subsequent state prosecution for reckless homicide finding that jeopardy attached with respect to the reckless homicide charge when the jury convicted defendant of felony DUI after receiving an erroneous instruction that it could convict defendant either of reckless homicide or felony DUI but not both.

The Fourth Circuit Court of Appeals wrote:

Here the jury was instructed that it could convict Livingston of either reckless homicide or felony DUI. The jury convicted on felony DUI, but remained silent on the reckless homicide charge. While there was no explicit acquittal, there was no conviction either. Under these odd circumstances, the jury's silence must be considered an implicit acquittal. See Green v. United States, 355 U.S. 184, 190-91, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) (holding that where a jury was instructed that it could convict on either first or second degree murder but returned a guilty verdict only on second degree murder, defendant could not be retried for first degree murder, since silence in the first trial on that charge constituted an implicit acquittal). Under the Green decision, jeopardy attached because the jury implicitly acquitted Livingston of the reckless homicide.

Livingston v. Murdaugh, 183 F.3d 300, 301-302 (4th Cir. 1999) (footnote omitted).

Under the Green and Livingston decisions, jeopardy attached because the jury implicitly acquitted Smith of homicide by child abuse. The jury was instructed that it could convict Smith of either homicide by child abuse or aiding and abetting another person to commit child abuse or neglect which resulted in the death of a child. The jury convicted on aiding and abetting but remained silent on the homicide by child abuse charge. While there was no explicit acquittal, there was no conviction either. Jeopardy attached with respect to the homicide by child abuse charge when the jury convicted Smith of aiding and abetting another person to commit child abuse or neglect which resulted in the death of a child.

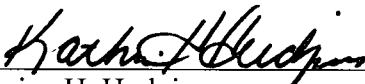
In addressing the “clean slate” rule in Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001) this Court recognized the doctrine of implied acquittal in the context of a conviction on a lesser included offense. In Gill this Court wrote, “As a general rule, a court cannot retry a defendant for an offense greater than and including the offense for which he was previously convicted. Conviction for a lesser included offense is an implied acquittal of any greater charges. Therefore, a prosecution on retrial for a greater offense than that which the defendant was first convicted would constitute a violation of the Double Jeopardy Clause.” 346 S.C. at 216, 552 S.E.2d at 30 (citations omitted).

In the present case this Court correctly found that aiding and abetting homicide by child abuse pursuant to S.C. Code §16-3-85(A)(2) is not a lesser included offense of homicide by child abuse pursuant to S.C. Code §16-3-85(A)(1). The fact that aiding and abetting pursuant to (A)(2) is not a lesser included offense of homicide by child abuse pursuant to (A)(1) does not preclude application of the implied acquittal rule. As noted in the footnote in Livingston, “This conclusion is not undermined by the fact that felony DUI is not a lesser included offense of reckless homicide. In Green, it was ‘immaterial’ whether second degree murder was a lesser included offense of felony

murder. 355 U.S. at 194 n. 14, 78 S.Ct. 221. Rather, “[t]he vital thing is that it is a distinct and different offense.” 183 F. 3d at 302 (additional citations omitted). In the present case this Court correctly found that (A)(1) and (A)(2) are two distinct crimes writing, “We find the language of section 16-3-85 unambiguously signals the General Assembly’s intent to codify two distinct crimes – homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to section (A)(2), each with distinct elements and sentencing ranges.” (footnote omitted).

Based on the above argument counsel respectfully requests rehearing and asks this Court to find that Petitioner was implicitly acquitted of homicide by child abuse pursuant to section (A)(1).

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

This 14th day of November, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Horry County  
Edward B. Cottingham, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

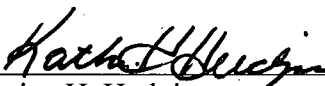
APPELLANT

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CERTIFICATE OF SERVICE

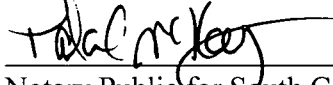
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of November, 2013.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day  
of November, 2013.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
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IN THE COURT OF GENERAL SESSIONS  
2004-GS-26-2150

STATE OF SOUTH CAROLINA )  
 )  
VS. )  
 )  
WESLEY SMITH, )  
 )  
DEFENDANT, )  
 )  
\_\_\_\_\_ )

VERDICT FORM

We the jury, unanimously, find the defendant

\_\_\_\_\_ GUILTY OF HOMICIDE BY CHILD ABUSE

OR

\_\_\_\_\_ NOT GUILTY OF HOMICIDE BY CHILD ABUSE

OR

GUILTY OF AIDING AND ABETTING ANOTHER PERSON TO  
COMMIT CHILD ABUSE OR NEGLECT WHICH RESULTED IN  
THE DEATH OF A CHILD

OR

\_\_\_\_\_ NOT GUILTY OF AIDING AND ABETTING ANOTHER PERSON  
TO COMMIT CHILD ABUSE OR NEGLECT WHICH RESULTED  
IN THE DEATH OF A CHILD

*William Powell*  
FOREPERSON OF THE JURY