

STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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Opinion No. 4785 (S.C. Ct. App. filed 1/26/11)  
Appellate Case No. 2011-188646

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NOV 22 2013  
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WESLEY SMITH,

PETITIONER.

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**RETURN TO PETITION FOR REHEARING**

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On October 30, 2013, in Opinion No. 27328, this Court reversed Petitioner's conviction for homicide by child abuse under S.C. Code § 16-3-85 (A)(2). This Court found that, because Petitioner was indicted only under section (A)(1) of the statute, and since section (A)(2) was not a lesser-included offense, the indictment failed to provide adequate notice. In the final sentence of the opinion, this Court remanded the case "for a new trial on the indicted offense of homicide by child abuse pursuant to section (A)(1)." Petitioner submitted a Petition for Rehearing on November 14, 2013, arguing that this Court overlooked the fact that the jury, by finding Petitioner guilty under section (A)(2), implicitly acquitted Petitioner under section (A)(1) such that double jeopardy prevented the State from re-trying Petitioner under section (A)(1). Petitioner requested that this Court remove the language in the final sentence of the opinion remanding the case for a new trial under section (A)(1).

In the State's view, the issue of whether or not double jeopardy bars a subsequent trial under section (A)(1) has not yet arisen; therefore, Petitioner's arguments regarding double jeopardy are premature. We would respectfully request that the Court replace the challenged language in the final sentence of the opinion with language indicating the matter is remanded for a new trial, without further elaboration. This would allow the parties to address the issue of double jeopardy below, assuming the issue arises and becomes ripe for litigation.<sup>1</sup>

Respectfully submitted,

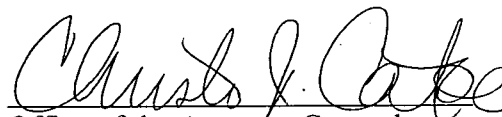
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**ATTORNEYS FOR RESPONDENT**

November 22, 2013

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<sup>1</sup> The State would note that the issue may become moot as there have been discussions between the solicitor and trial counsel regarding possibly resolving this matter through a plea pursuant to a new indictment under section (A)(2) of the statute.

STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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Opinion No. 4785 (S.C. Ct. App. filed Jan. 26, 2011)  
Appellate Case No. 2011-188646

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WESLEY SMITH,

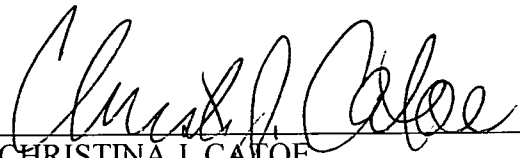
PETITIONER.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that the **Return to Petition for Rehearing** in the above-referenced case has been served upon **KATHRINE H. HUDGINS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **22<sup>nd</sup> day of November, 2013**.

  
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