

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge  
\_\_\_\_\_

Opinion No. 5630 (Filed February 27, 2019)  
\_\_\_\_\_

**ORIGINAL  
RECEIVED**

**MAR 28 2019  
SC Court of Appeals**

THE STATE,

APPELLANT,

v.

JOHN KENNETH MASSEY, JR.

RESPONDENT

APPELLATE CASE NO. 2015-000431  
\_\_\_\_\_

RETURN TO STATE'S MOTION TO DEPUBLISH  
AND  
PETITION FOR REHEARING  
\_\_\_\_\_

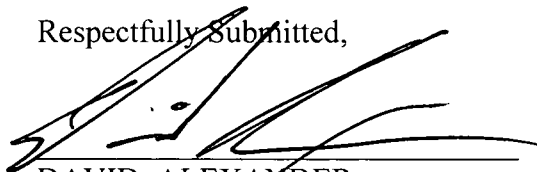
Pursuant to the Court's Order of March 18, 2019, counsel for Respondent hereby files this Return to the State's Motion to Depublish and its Petition for Rehearing. This Court should not depublish its well-reasoned and correct Opinion. This Court publishes opinions on a regular basis and the losing party always disagrees with this Court. The proper channel for a losing party, however, is to file a petition for rehearing and seek reversal at the Supreme Court. Whether to publish an opinion lies within this Court's discretion concerning the development of the common law, which it wisely exercised in favor of publication in this case.

As for the merits of the State's petition for rehearing, the Attorney General persists in the remarkable position that so long as a solicitor correctly cuts and pastes the words of a statute into an indictment, a circuit court judge has no power to prevent a criminal defendant from facing a trial no matter the underlying facts or, as in this case, the purely legal interpretation of the statute and indictment. Surely the State does not possess the nearly unlimited power to haul citizens to trial without judicial review as it claims here. The State simply failed to do its research and overcharged this defendant. Far from making a "lawless" decision, Judge Griffith properly recognized the legal deficiency in the State's charge and correctly ruled on the defendant's motion to quash. And also far from being "lawless," Judge Griffith gave the State the opportunity to proceed on the lesser offense, which it declined so that it could pursue this appeal. R. 51, l. 8 – 56, l. 17.

Furthermore, as the Court noted, the argument about Judge Griffith's power to hear the motion was raised for the first time on appeal and is not preserved. Another reason to keep the Court's Opinion in the ranks of published cases is to remind solicitors that our error preservation rules also apply to them and they have an equal duty to make their record below. The Court

should deny both the motion and the petition and the State may then pursue the normal procedural alternatives available to all losing parties to seek further review should it so desire.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', written over a horizontal line.

DAVID ALEXANDER  
Appellate Defender

This 28th day of March, 2019.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

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THE STATE,

APPELLANT,

V.

JOHN KENNETH MASSEY, JR.

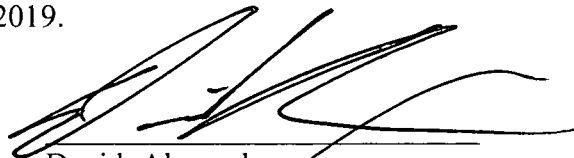
RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Kenneth Massey, Jr., #305341, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 28th day of March, 2019.



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 28th day of March, 2019.

Courtney Powers (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.