

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Brooks Goldsmith, Circuit Court Judge
2012-GS-30-60, 61
Appellate Case No. 2013-000373

THE STATE,

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SEP 13 2013
SC Court of Appeals

Respondent,

vs.

Derrick A. McIlwain,

Appellant.

**RESPONDENT'S MOTION TO WITHDRAW THE MOTION TO DISMISS APPEAL
PURSUANT TO STATE V. ISAAC AND RESPONSE TO RETURN**

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v

Respondent ("the State"), through its undersigned counsel, would respectfully move to withdraw its earlier motion to dismiss this appeal. Respondent has learned that docket number State v. Derrick A. McIlwain, Appellate case number 2013-000373 refers to a conviction possession with intent to distribute cocaine 2012-GS-29-0060 and possession of marijuana. 2012-GS-29-0061. The notice of appeal in that matter was served on February 22, 2013. The motion was intended to be filed in State v. Derrick L. McIlwain, Appellate No. 2013 - ****.

On September 4, 2013, a third extension request was made by counsel for the Appellant and request it become a pool case. On September 8, 2013 the Respondent erroneously filed a motion to dismiss in this appellate matter rather than the independent pending matter of State v. Derrick L. McIlwain. The Appellant responded on September 11, 2013 to the State's motion to

dismiss that the matter addressed in 2013-000373 involved a drug conviction and was not the pending stand your ground matter in State v. Derrick A. McIlwine.

The Respondent's original motion to dismiss concerned an independent matter in State v. Derrick L. McIlwine, Appellate Case Number 2013 -***** (not assigned at time of filing) and as an improper interlocutory appeal from an order denying immunity under the Protection of Person's and Property Act pursuant to State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). That action is from an appeal by Derrick L. McIlwain (not Derrick A. McIlwine) from a March 21, 2013 Order of the Honorable Brooks Goldsmith denying a motion to dismiss the Lancaster County indictment for murder and award immunity from prosecution pursuant to the Protection of Person's and Property Act, S.C. Code Ann. 16-11-410, et seq. *State v. Derrick L. McIlwine, 2012-GS-29-508, 2012-GS-29-509*. A motion to dismiss pursuant to S.C. Code Section 16-11-450 was made by Derrick L. McIlwain through counsel William P. Frick on February 28, 2013. A motion hearing was held on March 21, 2013. The Appellant was represented by William Frick and the State was represented by Douglas A. Barfield of the 6th Circuit Solicitor's Office. Judge Goldsmith entered his written order denying the motion seeking immunity dated March 21, 2013. The Appellant, through counsel Frick filed a notice of appeal in the South Carolina Court of Appeals on March 25, 2013. The matter has not been tried. The matter is presently awaiting briefing.


A new motion to dismiss will be filed in that action when the Appellate Case Number has been provided.

WHEREFORE, Respondent moves withdraw the pending motion to dismiss in State v. Derrick A. McIlwine, Appellate Case No. 2013-00373.

Respectfully submitted,
ALAN WILSON

Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

By: 
Donald J. Zelenka

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September 18, 2013



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Brooks Goldsmith, Circuit Court Judge
2012-GS-30-60, 61
Appellate Case No. 2013-000373

THE STATE,

Respondent,

vs.

Derrick A. McIlwain,

Appellant.

PROOF OF SERVICE

I, Donald J. Zelenka, certify that I have served the within Motion to Dismiss Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S. C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201

Robert M. Dudek, Esquire
S. C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201

I further certify that all parties required by Rule to be served have been served.
This 18th day of September, 2013.



Donald J. Zelenka

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
S.C. Bar # 5758
(803) 734-3601

September 5, 2013

A handwritten signature in black ink, appearing to be 'G. G. G.' or similar, located on the left side of the page.



ALAN WILSON
ATTORNEY GENERAL

September 18, 2013

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SEP 18 2013
SC Court of Appeals

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Derrick A. McIlwain
Appellate Case No. 2013-000373

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Motion to Withdraw the Motion to Dismiss Appeal Pursuant to State v. Isaac and Response to Return in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Wanda H. Carter, Esquire
Robert M. Dudek, Esquire

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SC Court of Appeals