

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal From Lancaster County  
Hon. J.C. Buddy Nicholson, Jr., Circuit Court Judge  
Court of Appeals Appellate Case Tracking No. 2009-114206

The State,

v.

Phillip Miller,

**RECEIVED**

Petition ~~filed~~ 2 2014

**S.C. Supreme Court**

Respondent.

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Opinion No. 4977 (S.C. Ct. App. filed May 23, 2012)

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**RETURN TO MOTION TO DISMISS AS MOOT**  
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Petitioner would respectfully show unto this Court as follows:

On March 2, 2006, Respondent was indicted for possession of marijuana and possession with intent to distribute (PWID) crack cocaine, 10-28 grams. The jury found him guilty of PWID crack cocaine and acquitted him of the marijuana charge. The trial court sentenced him to twenty years in prison because the conviction was his third drug offense.

Respondent filed a motion for a new trial on May 4, 2007. He maintained a juror intentionally concealed the fact her mother was the victim of a crime when the question posed during voir dire asked: "Is there any member of the jury panel who has been a victim of a crime in Lancaster County or member of your immediate family a victim of a

crime please stand?" A hearing was held before Judge Nicholson on January 29, 2008. Neither party produced the juror, so no testimony appears in the record indicating the juror's reason for failing to answer the above question. On January 13, 2009, Judge Nicholson filed an order denying the motion for a new trial, finding the concealment if it occurred would not have been a material basis for the use of a strike. Respondent timely filed a Notice of Appeal.

The majority of the Court of Appeals reversed the trial court's determination the juror's concealment would not have been a material basis for the use of a material strike and remanded for a new hearing to determine whether intentional concealment occurred. See State v. Phillip Miller, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012). The dissent acknowledged Respondent had the burden of proof to demonstrate the concealment by the juror was intentional. Further the dissent found it was not unreasonable for the juror not to respond. Id.

The State filed a Petition for Writ of Certiorari with this Court. Respondent filed a Return. This Court unanimously granted the Petition for Writ of Certiorari and ordered briefing. It has come to the undersigned's attention that Respondent is now deceased. As a result, his counsel has filed a Motion to Dismiss as Moot.

Respondent's counsel indicates the Court of Appeals decision remanding for a new hearing regarding juror concealment will not provide Respondent any remedy and will serve no legitimate purpose. She further asserts this case is similar to the case of State v. Joseph West in which this Court dismissed the case as moot. The State agrees the remedy will provide Respondent with no meaningful relief and also agrees it serves no legitimate purpose. The State, however, believes that while the issue is technically

moot, this Court should hear the case to address significant issues in the majority of the Court of Appeals' published Opinion. Further, the State submits the West case is entirely inapposite. Finally, the State submits if the Court finds the case moot and subject to dismissal the Court should vacate the Court of Appeals published opinion.

“Where there is no actual controversy, this Court will not decide moot or academic questions.” South Carolina Retirement System Inv. Com'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758-759 (2013) (internal citations omitted); see also, State v. Passmore, 363 S.C. 568, 581, 611 S.E.2d 273, 280 (Ct. App. 2005) (“A case becomes moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy, thus making it impossible for the reviewing court to grant effectual relief.”).

However, the Court can address a case if the issue that is moot is capable of repetition and evading review. See Sloan v. Department of Transp., 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008); Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996); Steinle v. Lollis, 279 S.C. 375, 307 S.E.2d 230 (1983). Additionally, this Court has considered a case on appeal even though a development renders the case moot when the controversy presents a recurring dilemma which the Court will address to clarify the law. See Evans v. South Carolina Dep't of Social Servs., 303 S.C. 108, 399 S.E.2d 156 (1990).

The case at hand has resulted in a published opinion from the South Carolina Court of Appeals in which a majority of the panel indicates the “courts have not clearly indicated that the defendant has the burden of proving the juror’s concealment of the information was intentional.” State v. Miller, 398 S.C. 47, 56, 727 S.E.2d 32, 37 (Ct. App. 2012). The majority then examined State v. Woods, 345 S. C. 583, 550 S.E.2d 282

(2001) and concluded: “We do not interpret [the] language [in Woods] to mean there is no burden of proof. Rather, we interpret the lack of a clear statement about it to indicate that the existence and scope of any burden remains an open question.” The State submits the question is not open or unclear, but instead, is well established in Woods, Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986), and numerous other cases from both appellate courts as discussed in the State's Petition for Writ of Certiorari. This error needs to be corrected by this Court to state the established burden of proof to prevent any further misapplication of existing case law. Otherwise, the Court of Appeals' published opinion will not be reviewed and may remain as a problem for future trial courts in determining the appropriate burden of proof.

Further, the Court needs to address whether the Court of Appeals properly allowed Respondent two bites at the apple to try and prove intentional concealment. The remedy of remand now can be considered an appropriate remedy even where the issue could have been addressed below and Respondent failed to meet his burden of proof. See State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 378 (2004).

Additionally, the issue continues to surface and needs clarification from this Court. As one example, the Court of Appeals issued an Order requiring parties to brief an issue in a case submitted originally pursuant to Anders v. California, 386 U.S. 738 (1967). The specific issue required to be addressed is: “In light of State v. Miller, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012), did the trial court err in denying Dingle's Motion to excuse juror Smoak?” (See Attached Exhibit A; Order in State v. Samuel Dingle, Appellate Case Tracking Number 2011-193567). The Court of Appeals is requiring

briefing in light of its published decision in Miller, which the State submits misrepresents and misapplies the correct law regarding juror concealment.

The State submits the published opinion by the Court of Appeals needs to be addressed by this Court to provide clarity of the law and because it will otherwise evade review until such time as this Court has the opportunity to overrule or clarify it in another case. In the meantime, juror concealment remains a question of concern for the Court as evidenced by the Order in Dingle.

Finally, this case is entirely different from the case of State v. West cited by Respondent's counsel. As counsel explained, West died after oral argument but prior to an opinion being issued. Hence, there was no published opinion resulting from the case which would need to be addressed in some manner to establish the correct law in South Carolina. In this case, there is a published opinion which the State submits articulates an incorrect statement of the law in South Carolina and needs to be addressed by this Court. As a result, the State submits that while the case may be moot, it is a significant issue which needs clarification by this Court.

In the alternative, if this Court finds the issue moot, and does not believe it should be addressed pursuant to Byrd or Evans, then the State asks the Court to vacate the opinion of the Court of Appeals. If the opinion is allowed to stand, it is likely to continue creating confusion regarding the law applicable in determining whether a juror intentionally concealed information during voir dire. Further, the opinion is clearly contrary to prior opinions such as Thompson and allowing it to stand is likely to cause confusion or further error.


WHEREFORE, Petitioner requests this Court hold this appeal in abeyance pending a ruling on Respondent's counsel's motion; allow the case to proceed and deny Respondent's counsel's motion to dismiss the appeal as moot; allow the parties to brief the issues upon which this Court has already granted the State's Petition for Writ of Certiorari and set a deadline for the State's Brief of Petitioner; or in the alternative, if the Court dismisses the appeal as moot, the State asks the Court to vacate the Court of Appeals' published opinion to preclude further confusion.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

July 2, 2014

# EXHIBIT A

# The South Carolina Court of Appeals

The State, Respondent,

v.

Samuel Dingle, Appellant.

Appellate Case No. 2011-193567

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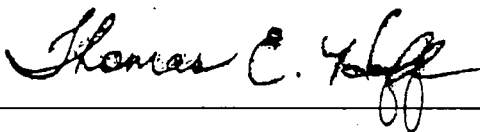
## ORDER

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Counsel has submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a motion to be relieved as counsel. We deny the motion to be relieved as counsel and direct the parties to brief the following issue and any other issue of arguable merit:

In light of *State v. Miller*, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012), did the trial court err in denying Dingle's motion to excuse juror Smoak?

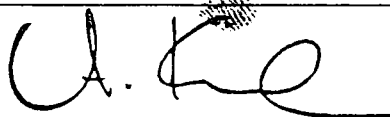
Appellant shall serve and file a brief on this issue within thirty days of the date of this order. Thereafter, Respondent shall have thirty days to serve and file its brief.



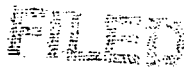

J.



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The State,

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**PROOF OF SERVICE**

I, Sally B. Ellison, certify I served the Return to Motion to Dismiss as Moot on Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire  
Assistant Appellate Defender  
South Carolina Commission on Indigent Defense  
Division 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 2<sup>nd</sup> day of July, 2014.



SALLY B. ELLISON

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