

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

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OCT 08 2014

SC Court of Appeals

Appellate Case No. 2012-212639

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Walter Douglas Barclay petitions for rehearing from the Court's order of dismissal, filed September 22, 2014, because the Court may have misapprehended the application of Supreme Court's order in *State v. Anderson*, 281 SC 198, 314 SE2d 597 (1984). Specifically, counsel believes the Supreme Court did not intend to establish a *per se* rule of dismissal in *Anderson*, without regard to the nature of the issues presented or the collateral consequences of dismissal in any particular case.

Anderson is best viewed as an application of the mootness doctrine. The mootness doctrine is subject to several exceptions, however. In *Curtis v. State*, 345 SC 557, 549 SE2d 591 (2001), the Supreme Court explained the three primary exceptions to the doctrine:

“First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. 549 SE2d 596 (citations omitted);” see also *State v. Passmore*, 363 SC 568, 611 SE2d 273 (Ct.App. 2003).

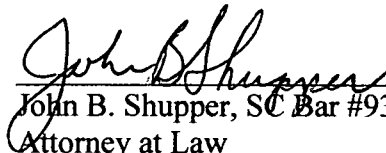
The present appeal involves the third exception to the mootness doctrine. The first issue presented raised the possibility of petitioner's actual innocence of felony DUI:

“The trial court committed reversible error by declining to instruct the jury on driving under the influence, SC Code Section 56-5-2930, as a lesser-included offense of felony DUI, Section 56-5-2945, since there was evidence the decedent himself was at fault in proximately causing the collision, so that appellant would have been guilty of only the lesser offense.” Brief of Appellant.

The state conceded there was evidence petitioner was not at fault, arguing instead that DUI is not a lesser-included offense of felony DUI as a matter of law. Nevertheless, if the appeal is dismissed as moot, the Barclay estate is precluded from litigating his liability in any subsequent civil action based on the collateral estoppel effect of the felony DUI conviction. See *Doe v. Doe*, 346 SC 145, 551 SE2d 257 (2001). In other words, dismissal at this stage would preclude not only petitioner but his estate as well from establishing his actual innocence of felony DUI, regardless of the evidence and as a matter of law. This cannot be the type of result that the Supreme Court intended in 1984 by issuing a brief order of dismissal in *Anderson*.

Counsel for Barclay asks the Court to grant rehearing, reinstate the appeal and reverse the conviction for felony DUI.

Respectfully submitted,


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ATTORNEY FOR APPELLANT

October 6th, 2014

STATE OF SOUTH CAROLINA
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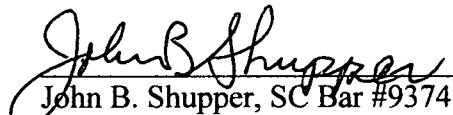
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Appellate Case No.: 2013-212639

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Petition for Rehearing in the above-captioned case have been served upon Christina Catoe, Esquire, by ~~hand~~ ^{mail} delivery, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 6th day of October, 2014.


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October 6, 2014