

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

JAN 14 2015

Appeal From Dorchester County  
Kristi L. Harrington, Circuit Court Judge

S.C. Supreme Court

THE STATE,

Respondent,

vs.

WAYNE DANIEL MCCOMBS,

Petitioner.

RETURN TO MOTION  
TO ABATE APPEAL DUE  
TO DEATH OF PETITIONER

Respondent State of South Carolina now makes its return to the Motion to Abate Petitioner's Case filed by Petitioner McCombs' attorney. That motion further seeks to vacate and withdraw the Court of Appeals' opinion. See State v. McCombs, 410 S.C. 90, 762 S.E.2d 744 (Ct. App. 2014). The State objects to withdrawal of the published opinion.

The State agrees that dismissal of the petition for writ of certiorari is appropriate. However, the State opposes vacating the Court of Appeals' published opinion on the matter, which offers valuable guidance to the bench and bar on the proper application of Rule 404(b), SCRE.

## PROCEDURAL HISTORY

McCombs was indicted for lewd act on a minor. 2009-GS-18-1493. The case was called for trial on March 5, 2012, before the Honorable Kristi L. Harrington. Before the jury was sworn, Judge Harrington heard the State's motion in limine to admit a prior bad act. After testimony and argument, Judge Harrington excluded the prior bad act. The State appealed pursuant to State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1989).

The Court of Appeals reversed Judge Harrington's ruling and remanded the matter. State v. McCombs, 410 S.C. 90, 762 S.E.2d 744 (Ct. App. 2014). The Court of Appeals denied McCombs' petition for rehearing on September 18, 2014. McCombs filed a petition for writ of certiorari to this Court on October 16, 2014. The State promptly filed its return to the petition on November 13, 2014. Petitioner died on November 23, 2014.

## DISCUSSION

The State submits that the petition should be dismissed as Petitioner is deceased. However, this Court should decline to vacate the Court of Appeals' opinion as suggested by McCombs. The opinion was published and is useful in demonstrating to the lower courts the need to carefully weigh the substance, rather than just the existence, of perceived similarities and dissimilarities when trial courts determine the admissibility of prior bad acts based on the common scheme or plan exception of Rule 404(b), SCRE. In that case, the trial court suppressed the prior bad act based on dissimilarities that the Court of Appeals noted were insubstantial, even in the wake of numerous similarities

outlined by the Court of Appeals in its opinion.

Petitioner's attorneys rely on this Court's opinion in State v. Anderson, 281 S.C. 198, 199, 314 S.E.2d 597, 597 (1984). This Court found that the death of an appellant "abates that appeal and constitutes grounds for its dismissal." Id. The Court refused to allow substitution by another party for Anderson, holding substitution of another party for a defendant was not proper in a criminal case. In the instant case, Petitioner's death should abate the discretionary appeal in **this** Court; however Anderson does not require dismissal *ab initio* of the appeal in the lower court, concluded by the denial of Petitioner's petition for rehearing by the Court of Appeals.

Petitioner's attorney also cites State v. Bixby, 397 S.C. 154, 723 S.E.2d 841 (Ct. App. 2011). In that case, Bixby's petition for rehearing was pending when Bixby passed away. The Court of Appeals vacated its opinion in reliance on Anderson, but refused to dismiss the case *ab initio*, effectively allowing the conviction to stand.

Since Petitioner is now deceased, this Court now no longer needs to determine if discretionary review is warranted in this case. As Petitioner never stood trial for the underlying charge and therefore, does not have an outstanding conviction, Petitioner is not prejudiced by the opinion to the extent a deceased may be prejudiced. The result should be identical to the result that occurs when certiorari is not sought by either party after the Court of Appeals issues an opinion. See generally Dillon City v. Maryland Cas. Co., 217 S.C. 66, 76, 59 S.E.2d 640, 644 (1950) ("No one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others, for one attacking the constitutionality of a statute is not the champion of any rights except his own." (citation

and quotations omitted)). Further, since the Court of Appeals' rendering was final, its opinion should not be vacated *ab initio*. Accordingly, the State requests that the petition for writ of certiorari be dismissed and that this Court decline to vacate the Court of Appeals' sagely rendered opinion.

Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Senior Assistant Attorney General

DAVID M. PASCOE, JR.  
Solicitor, First Judicial Circuit

BY:   
\_\_\_\_\_  
DAVID SPENCER

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 14, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal From Dorchester County  
Honorable Kristi L. Harrington, Circuit Court Judge

---

THE STATE,

RESPONDENT,

vs.

WAYNE DANIEL MCCOMBS,

APPELLANT.

---

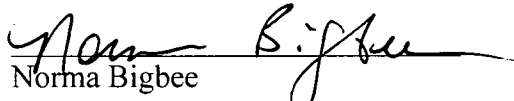
**PROOF OF SERVICE**

---

I, Norma Bigbee, certify that I have served the Respondent's Return To Motion To Abate Appeal Due To Death Of Petitioner on Appellant's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Jonathan Scott Bischoff, II, Esquire, 15 Prioleau St., Charleston, SC 29402.

I further certify that all parties required by Rule to be served have been served.

This 14<sup>th</sup> day of January, 2015.

  
Norma Bigbee  
Administrative Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

January 14, 2015

RECEIVED

JAN 14 2015

S.C. Supreme Court

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

RE: **State of South Carolina v. Wayne Daniel McCombs**  
**Appellate Case No: 2014-002194**

Dear Mr. Shearouse:

Enclosed please find the Original and six (6) copies of the Return to Motion To Abate Appeal Due To Death of Petitioner in the above case.

Sincerely,

  
Dave Spencer

Senior Assistant Attorney General

DS/nb

Enclosures

cc: Jonathan Scott Bischoff, II, Esquire (2 copies)  
Ms. Trisha Allen