

STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY 21 2015

CERTIORARI TO CHESTERFIELD COUNTY  
Court of Common Pleas

S.C. Supreme Court

The Honorable Edward B. Cottingham, Guilty Plea Judge  
The Honorable Edwin M. Davis, Drug Court Termination Judge  
The Honorable J. Michael Baxley, Post-Conviction Relief Judge

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Appellate Case No. 2011-197712

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Lenson Clyburn, Jr., ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**Return to Petition for Appellate Review  
Despite Petitioner's Death  
Per The Mootness Exception**

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, counsel for Petitioner has submitted a "Petition for Appellate Review Despite Petitioner's Death Per The Mootness Exception." In response, Respondent would present the following:

1. On November 7, 2007, Petitioner pled guilty to possession with intent to distribute (PWID) marijuana and PWID crack cocaine before the Honorable Edward B. Cottingham. Petitioner was represented by counsel. Judge Cottingham sentenced Petitioner to concurrent terms of 7 years for PWID marijuana and 7 years for PWID crack cocaine. The

sentences were suspended and Petitioner was deferred to drug court. Petitioner did not appeal.

2. On August 6, 2009, Petitioner appeared in court for a drug court termination hearing. Petitioner was pro se. The probate judge for Chesterfield County, the Honorable Edwin M. Davis, levied the original sentences of 7 years imprisonment for each charge. On September 30, 2009, the South Carolina Court of Appeals dismissed the notice of appeal, finding it was not timely filed.

3. Petitioner filed an application for post-conviction relief on March 29, 2010 and a hearing was held on June 8, 2011. Petitioner represented by counsel. The Honorable J. Michael Baxley denied relief in an order filed July 26, 2011.

4. The parties perfected the appeal and three judges of this Court granted Petitioner's petition for writ of certiorari on July 11, 2014.

5. By order dated February 4, 2015 (issued after the parties submitted briefs), this Court ordered the parties to brief an additional issue: "whether the probate court acting as a drug court had subject matter jurisdiction to impose Petitioner's suspended sentence upon his termination from the drug court program." Petitioner filed its amended brief on March 4, 2015. Respondent has been granted two extensions and its amended brief is due on June 4, 2015.

6. Counsel for Petitioner learned last month that Petitioner died on August 5, 2014. She has filed this Petition for Appellate Review Despite Petitioner's Death Per The Mootness Exception and requests this appeal be allowed to proceed. Respondent opposes

this Petition.

7. Petitioner's appeal should be dismissed as moot because Petitioner is deceased. As such, Petitioner no longer has a cognizable legal interest in this case. "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." Seabrook v. Knox, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006). "A case becomes moot when the parties no longer possess a cognizable interest in the outcome." Id. at 200, 631 S.E.2d at 912 (citing Powell v. McCormack, 395 U.S. 486, 496, 89 S. Ct. 1944, 1951 (1969)).

8. In Sloan v. Department of Transportation, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005), this Court noted "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." This Court also noted "if a decision by a 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." Id. These situations, however, are not present in Petitioner's case.

The issues in Petitioner's appeal (including the subject matter jurisdiction issue ordered by this Court) are not "capable of repetition but evading review." First, it is unclear whether the facts in Petitioner's case would be capable of repetition. It is unclear whether other defendants informed of a pending drug court termination hearing (and advised of the right to counsel) would choose to proceed pro se. It is unclear whether the drug court termination protocol in Chesterfield County today is the same as it was in 2009. It is unclear

whether the drug court termination protocol used in this case is used in any other county of the State. Second, the issues in Petitioner's appeal would not fall in the category of "evading review." There is nothing to prevent any defendant who has been terminated from a drug court program from filing a PCR application (and subsequent appeal) and raising any of the issues raised in Petitioner's brief. It is unnecessary for this Court to proceed with this appeal, as another ripe case is capable of being filed.

Further, the PCR judge's decision in this case will not "affect future events" because of the case-specific nature of PCR cases and their subsequent appeals. In this case, Petitioner's chief complaints centered around whether he was properly notified both of the drug court termination hearing date and his right to counsel. Petitioner's appeal is specific to his case alone, however, because it does not rest upon the validity of the drug court termination program in Chesterfield County but, rather, whether or not he was properly advised of the hearing date and right to counsel. The drug court coordinator testified he personally informed Petitioner of both things and Petitioner stated he was never advised of such. Crucial to Petitioner's case was the PCR judge's determination of the credibility of the witnesses who testified at the PCR hearing. This case-specific appeal will clearly not "affect future events."

9. The facts of Petitioner's PCR case would be very different from that of another subsequent PCR case. In addition, the drug court termination program in Chesterfield County may operate differently today than it did in 2009. Further, Respondent submits different counties often handle and administer their drug court programs differently.

The specific procedure followed in Petitioner's case would not necessarily be applicable to another PCR applicant in another county. As such, there is no benefit to Petitioner's appeal going forward now that he is deceased.

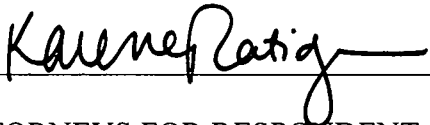
**WHEREFORE**, counsel for Respondent submits the Petition for Appellate Review Despite Petitioner's Death Per The Mootness Exception should be denied and the appeal in his matter be dismissed as moot.

Respectfully submitted,

ALAN WILSON  
Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General  
S.C. Bar # 68331

Post Office Box 11549  
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(803) 734-3737

By:  \_\_\_\_\_

ATTORNEYS FOR RESPONDENT

May 21, 2015

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO CHESTERFIELD COUNTY  
Court of Common Pleas

The Honorable Edward B. Cottingham, Guilty Plea Judge  
The Honorable Edwin M. Davis, Drug Court Termination Judge  
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Appellate Case No. 2011-197712

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Appellate Review Despite Petitioner's Death Per The Mootness Exception upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Wanda H. Carter, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 21st day of May, 2015.

  
KAREN C. RATIGAN, S.C. Bar # 68331  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

May 21, 2015

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MAY 21 2015

**S.C. Supreme Court**

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

**Re: Lenson Clyburn v. State  
Appellate Case No. 2011-197712**

Dear Mr. Shearouse:

Attached for filing, please find the original and six (6) copies of the **Return to Petition for Appellate Review Despite Petitioner's Death Per The Mootness Exception**. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General

cc: Wanda H. Carter, Esquire