

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5892 (S.C. Ct. App. filed 3/25/2022)
Lower Court Case No. 2016-GS-42-02201

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

PETITIONER

APPELLATE CASE NO. 2022-000497

**MOTION TO ABATE APPELLANT'S CASE *AB INITIO*, EXTINGUISHING THE
CONVICTIONS, AND TO WITHDRAW OPINION NO. 5892.**

On March 29, 2023, while preparing to file and serve the brief of petitioner it came to counsel's attention that Petitioner died on September 14, 2022. Counsel is currently working to obtain a copy of the death certificate to provide to the Court. Counsel for Petitioner respectfully asks this Court to withdraw the opinion by the Court of Appeals and to abate the case *ab initio*, extinguishing the convictions. Alternatively,

counsel asks that this Court find that the case is not rendered moot by the death of Petitioner and allow the appeal to go forward.

1. In May of 2016, the Spartanburg County Grand Jury indicted Petitioner, Thomas Stephen Acker, for criminal sexual conduct with a minor first degree and disseminating obscene material to a minor twelve years of age or younger, indictments #2016-GS-42-2201, 2202. (R. pp. 201-205). On November 16, 2016, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. Roger Poole and Paul Kreswell Neely represented Petitioner at trial. Bethany B. Miles prosecuted the case. The jury returned verdicts of guilty and Judge Cole sentenced Petitioner to twenty years for criminal sexual conduct with a minor and five years concurrent for the disseminating charge. (R. pp. 203, 206). A timely notice of intent to appeal was served on November 22, 2016, and the direct appeal perfected.

On October 10, 2019, a three judge panel of the South Carolina Court of Appeals heard oral argument in the case. Over two years later on January 19, 2022, the Court of Appeals affirmed the convictions in a published opinion. State v. Acker, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022). A timely petition for rehearing was filed on February 3, 2022. The panel of the Court of Appeals denied the petition for rehearing on March 25, 2022. This petition for writ of certiorari was served on April 25, 2022. The return to petition for writ of certiorari was filed on May 23, 2022. A reply to the return was filed on June 2, 2022. On March 7, 2023, this Court granted the petition for writ of certiorari as to issues one and two but denied the petition for certiorari as to issues three, four, and five. The brief of petitioner is being filed at the same time as this motion.

2. Counsel moves for abatement and withdrawal of the opinion by the Court of Appeals pursuant to State v. Anderson, 281 S.C. 198, 199, 314 S.E.2d 597, 597 (1984) (“We hold that the death of a criminal appellant, prior to the disposition of his appeal, abates that appeal and constitutes grounds for its dismissal.”). As persuasive authority counsel additionally moves for the withdrawal of the opinion by the Court of Appeals and the abatement *ab initio* and the extinguishing of the criminal convictions pursuant to decisions of various federal courts. See Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal Conviction, 80 A.L.R. Fed. 446 (1986). As the Seventh Circuit Court of Appeals wrote in United States v. Volpendesto, 755 F.3d 448, 453 (7th Cir. 2014):

The rationale for the abatement doctrine is that “the interests of justice ordinarily require that [a criminal defendant] not stand convicted without resolution of the merits of his appeal, which is an ‘integral part of our system for finally adjudicating his guilt or innocence.’” Moehlenkamp, 557 F.2d at 128 (quoting Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956)); Parsons, 367 F.3d at 415 (“The primary justification for the abatement doctrine arguably is that it prevents a wrongly-accused defendant from standing convicted.”). The doctrine rests on the idea “that the state should not label one as guilty until he has exhausted his opportunity to appeal.” Id. at 413. Although the abatement rule does not have a constitutional basis, it has been adopted almost unanimously by the federal courts, and many state courts also follow it. Id. at 413 n. 7 (citing cases from several U.S. courts of appeals); United States v. Pauline, 625 F.2d 684, 685 n. 5 (5th Cir.1980) (citing state cases). But see State v. Carlin, 249 P.3d 752, 762–63 (Alaska 2011) (recognizing that plurality of states follow abatement rule but disapproving it for Alaska); State v. McDonald, 144 Wis.2d 531, 424 N.W.2d 411, 413–14 (1988) (declining abatement and allowing appeal to proceed after defendant's death).

See United States v. Estate of Parsons, 367 F.3d 409 (5th Cir. 2004) (Death of criminal defendant pending appeal of his or her case abates, *ab initio*, the entire criminal proceeding; it is not merely that case is dismissed, but rather that everything associated with case is

extinguished, leaving defendant as if he or she had never been indicted or convicted.); United States v. Lay, 456 F. Supp. 2d 869 (S.D. Tex. 2006) (Death pending direct review of a criminal conviction abates not only the appeal but all proceedings had in the prosecution since its inception). U.S. v. Wright, 160 F.3d 905 (2nd Cir. 1998); United States v. Christopher, 273 F.3d 294, 295 (3^d Cir. 2001); United States v. Pauline, 625 F.2d 684 (5th Cir. 1980); United States v. Toney, 527 F.2d 716 (6th Cir. 1975), *cert denied* 429 U.S. 838.; United States v. Moehlenkamp, 557 F.2d 126 (7th Cir. 1977); United States v. Littlefield, 594 F.2d 682 (8th Cir. 1979); United States v. Oberlin, 547 F.2d 1379 (9th Cir. 1983); United States v. Koblan, 478 F.3d 1324, 1325 (11th Cir. 2007).

As additional persuasive authority counsel moves for abatement and the extinguishing of the criminal convictions pursuant to the majority of other state jurisdictions. As the Supreme Court of Hawaii wrote in State v. Makaila, 79 Haw. 40, 42, 897 P.2d 967, 969 (1995)(n. 3 omitted), “The majority of state jurisdictions also abate the prosecution *ab initio*. See Annotation, *Abatement of State Criminal Cases by Accused's Death Pending Appeal of Conviction—Modern Cases* 80 A.L.R. 4th 189 (1990).” See Dixon v. Superior Court, 195 Cal. App. 3d 758 (4th Dist 1987); People v. Lipira, 621 P.2d 1389 (Colo. App. 1980); Howell v. United States, 455 A.2d 1371 (Dist. Col. App. 1983); Williams v. State, 602 So. 2d 676 (Fla. Dist. Ct. App. 1st Dist. 1992); State v. Holbrook, 261 N.W.2d 480 (Iowa 1978); State v. Beasley, 438 So. 2d 1229 (La. App. 3^d Cir. 1983); State v. Carter, 299 A.2d 891 (Maine 1973); State v. West, 630 S.W.2d 271 (Mo. App. 1982); State v. Campbell, 187 Neb 719, 193 N.W.2d 571 (1972); People v. Matteson, 75 NY2d 745, 551 N.E.2d 91 (1989); State v. Boyette, 24 N.C. 587, 211 S.E.2d 547 (1975); Johnson v. State, 392 P.2d 767 (Okla. Crim. 1964); State v. Marzilli, 111 R.I. 392, 303 A.2d 367

(Rhode Island 1973); State v. Clark, 260 N.W.2d 370 (South Dakota 1977); State v. Curl, 28 S.W.3d 838 (Tex. App. Corpus Christi 2000); State v. Fanalous, 99 Utah 322, 106 P.2d 163 (1940); State v. Free, 37 Wyo. 188, 260 P. 173 (1927).

3. Based on the death of Petitioner, the State's interest in the protection of society has been satisfied, and the imposition of punishment rendered impossible. The interests of justice require that Petitioner not stand convicted without resolution of the merits of the appeal which is an integral part of the system for finally adjudicating guilt or innocence. For these reasons counsel asks this Court withdraw the opinion of the Court of Appeals and to abate the case *ab initio*, extinguishing the convictions.

4. Alternatively, counsel asks this Court to find that the case is not rendered moot by the death of Petitioner and allow the appeal to go forward. See, State v. Jones, 220 Kan. 136, 137, 551 P.2d 801, 804 (1976); State v. McGettrick, 31 Ohio St.3d 138, 31 OBR 296, 509 N.E.2d 378 (1987); Commonwealth v. Walker, 447 Pa. 146, 147-48, 288 A.2d 741, 742 (1972); State v. McDonald, 144 Wis.2d 531, 424 N.W.2d 411 (1988). In State v. Passmore, 363 S.C. 568, 581, 611 S.E.2d 273, 280 (Ct. App. 2005), the South Carolina Court of Appeals wrote:

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. Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996); Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct.App.2002). In Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct.App.2003), we stated the law of mootness with exactitude:


In general, this court may only consider cases where a justiciable controversy exists. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. This Court will not pass

on moot and academic questions or make an adjudication where there remains no actual controversy.... The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review. *Id.* at 552, 590 S.E.2d at 349 (internal quotation marks and citations omitted).

Petitioner's direct appeal process was extremely lengthy and is still not yet complete. This Court granted the petition for writ of certiorari as to two issues on March 7, 2023, and the brief of petitioner is being filed at the same time as this motion. While Petitioner is now deceased, he was convicted in November of 2016, final briefs filed in September of 2017, and oral argument in the Court of Appeals held in October of 2019. On January 19, 2022, the Court of Appeals issued the opinion in the case, over five years after the date of conviction. Petitioner's interest in resolving the merits of his direct appeal is not diminished by the fact that he was unable to outlive the appellate process. This Court's review of the case would have a practical effect on Petitioner's conviction. The issues presented in the case are substantial and appropriate for judicial determination. The case is not moot.

In State v. McDonald, 144 Wis. 2d 531, 539, 424 N.W.2d 411, 415 (1988), the Wisconsin Supreme Court wrote, "We are not persuaded by the arguments of the parties and the court of appeals that the appeal from the judgment of conviction must be dismissed because the proceedings are moot. As we have noted, society and the deceased have a very real interest in a final determination of the defendant's appeal from the criminal conviction. Under these circumstances, we conclude that McDonald's appeal is not moot."

If this Court decides not to withdraw the opinion by the Court of Appeals and to abate the case *ab initio*, extinguishing the convictions, counsel asks that this Court find that the case is not rendered moot by the death of Petitioner and allow the appeal to go forward.


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This 4th day of April, 2023.