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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge
Appellate Case No. 2022-000497

The State, Respondent,

v.

Thomas Stephen Acker, Petitioner.

RETURN TO MOTION TO ABATE APPELLANT'S CASE *AB INITIO*, EXTINGUISHING THE CONVICTIONS, AND WITHDRAW OPINION NO. 5892 AND MOTION TO HOLD APPEAL IN ABEYANCE UNTIL RULING

In January 2022, the Court of Appeals issued an opinion affirming Petitioner's convictions and sentences. State v. Acker, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022). After the denial of a Petition for Rehearing, Petitioner served and filed a Petition for Writ of Certiorari to this Court and the State filed a Return. While the Petition was pending before this Court, Petitioner died according to his counsel and verbal confirmation from the South Carolina Department of Corrections. Subsequently, this Court granted the Petition for Writ of Certiorari as to two issues. At the same time, Petitioner served and filed a Brief of Petitioner, his counsel filed the Motion to Abate. The State submits abatement *ab initio* has been denied in the past, is inappropriate in South Carolina, and is against public policy. As a result, the State asks this Court to declare the underlying case moot based on the death of Petitioner and deny the Motion

to Abate to the extent it seeks extinguishment of the convictions. The State leaves to this Court's discretion whether to order the withdrawal of Opinion 5892 by the South Carolina Court of Appeals because the appellate process was still on going at the time of Petitioner's death. Further, the State asks the Court to hold the appeal in abeyance pending a ruling on the underlying motion and a determination of whether the appeal should be dismissed as moot.

The doctrine of abatement *ab initio* has been defined as "[t]he negation of a criminal trial and verdict after a convicted defendant has died before exhausting all legal appeals. The case reverts to the beginning point as if the trial and conviction had never occurred." ABATEMENT, Black's Law Dictionary (11th ed. 2019). "The effect of abatement *ab initio* 'is to stop all proceedings *ab initio* and render the defendant as if he or she had never been charged.'" State v. Al Mutory, 581 S.W.3d 741, 743 (Tenn. 2019) (quoting Timothy A. Razel, Note, Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice & What Should Be Done Instead, 75 Fordham L. Rev. 2193, 2195 (2007)). Much renewed discussion of the doctrine came about because of the high-profile Aaron Hernandez case in which Massachusetts determined it was appropriate to reverse its prior decision adopting the doctrine of abatement *ab initio*. See Commonwealth v. Hernandez, 118 N.E.3d 107, 111 (Mass. 2019).

The appellate courts in South Carolina have had very limited opportunity to address a request for abatement, much less abatement *ab initio*. This Court has stated: "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." State v. Anderson, 281 S.C. 198, 199, 314 S.E.2d 597, 597 (1984). The case does not mention whether a request for abatement *ab initio* was made or whether the doctrine was even considered. However, it is clear this Court did not abate the conviction and only dismissed the appeal.

Later, the South Carolina Court of Appeals addressed a motion to abate *ab initio* after a defendant died while the petition for rehearing was still pending. The Court of Appeals, referencing Anderson, found: "Hence, the Court grants Appellant's request to abate the appeal and withdraw the opinion. However, the Court declines to find the abatement should be *ab initio*." State v. Bixby, 397 S.C. 154, 154–55, 723 S.E.2d 841 (Ct. App. 2011). As a result, the only time the issue has been squarely addressed, it was denied.

Petitioner points to the federal courts and additional cases from various jurisdictions which abate a prosecution *ab initio* upon the death of the defendant pending appeal. Many of the cases follow the general justification provided for by the federal courts which find the interest of justice requires a criminal defendant not stand convicted until his appeal is resolved. See e.g., United States v. Volpendesto, 755 F.3d 448, 453 (7th Cir. 2014) and United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977). However, it is important to note in South Carolina that this Court has noted: "Upon such conviction, there is no longer a presumption of innocence. There then arises a 'legal as well as laical presumption' that the conviction is just. Such a presumption is not destroyed or abrogated by appeal." Parker v. State Highway Dep't, 224 S.C. 263, 272–73, 78 S.E.2d 382, 386 (1953); see also, Schlup v. Delo, 513 U.S. 298, 326 n.42 (1995) (noting that not only does the presumption of innocence end upon conviction, from that time forward there is a "presumption of guilt"). Nothing has changed in the last seventy years to demonstrate South Carolina no longer accepts the finality of conviction.

Other cases reason that because "the purpose of a criminal action is to punish the defendant in person" when he dies the underlying purpose can no longer be fulfilled. See, e.g., State v. Fanalous, 99 Utah 322, 106 P.2d 163, 163 (1940). The Courts conclude no public policy would be served by refusing to abate the punishment, and as a result, the criminal proceedings

were abated. However, Courts recognize there is much more to a criminal action than solely to punish the defendant. South Carolina, like many other states, has recognized the significance of conviction for victims in our Victim's Bill of Rights. See S.C. Const. art. I, § 24 (finding among other provisions victims have a right to "receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury, including both adult and juvenile offenders" and "a reasonable disposition and prompt and final conclusion of the case").

Additionally, the trend is toward refusing to apply or eliminating the doctrine of abatement *ab initio* and simply abating the appeal leaving intact the conviction. See Al Mutory, 581 S.W.3d at 748 (explaining "the tide has turned again—currently, twenty-eight states do not apply the doctrine of abatement ab initio" and detailing cases throughout the country who do not apply the doctrine of abatement ab initio); State v. Korsen, 111 P.3d 130, 133 (Id. 2005) ("However, when reviewing the most recent cases, it is apparent that the trend has been away from abating a deceased defendants conviction ab initio."). South Carolina should not alter its current stance and join the growing minority of states who still follow the doctrine of abatement *ab initio*—many solely because of stare decisis and not because of any continuing rationale.

One primary reason not to adopt the doctrine of abatement *ab initio* is the recognition in South Carolina of the rights of victims. As discussed, the South Carolina Constitution establishes a victim's right to be "treated with fairness, respect, and dignity"; a right to restitution; as well as the significant right to "a reasonable disposition and prompt and final conclusion of the case." The South Carolina Legislature enacted statutes in order to effectuate the victim's rights. The Legislature specifically indicated:

> [T]he General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity,

> respect, courtesy, and sensitivity; that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants . . . .

S.C. Code Ann. § 16-3-1505 (Supp. 2020).

With these policy decisions in mind, the doctrine of abatement *ab initio* is incompatible with ensuring the rights of victims. As the Tennessee Supreme Court noted: "many courts in other states have recognized, these changes in the arena of victims' rights are incongruent with the doctrine of abatement *ab initio* because abating a defendant's conviction can have a detrimental impact on victims both emotionally and financially." Al Mutory, 581 S.W.3d 741, 749. The Supreme Court of Mississippi acknowledged: "The landscape has changed to protect victims from being traumatized again." Payton v. State, 266 So. 3d 630, 637 (Miss. 2019). According to the Supreme Court of Alaska: "state courts have pointed to the unfairness to crime victims of abating criminal convictions and the doctrine's inconsistency with the presumption of guilt following a jury conviction." State v. Carlin, 249 P.3d 752, 759 (Alaska 2011). The Supreme Court of Idaho, in reversing its previous adoption of the doctrine of abatement *ab initio*, explained:

> If the conviction is abated, it may abate the restitution order because, under the statute, a conviction or finding of guilt is necessary for an order of restitution. Further, abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide.

Korsen, 111 P.3d at 135. The Supreme Court of Alabama also noted the extensive rights and protections that have been afforded victims in the state, and in declining to abate the convictions *ab initio* upon the death of the defendant during the appellate process, specifically referenced

"the callous impact such a procedure necessarily has on the surviving victims of violent crime." Wheat v. State, 907 So. 2d 461, 463 (Ala. 2005) (cleaned up).

The Supreme Court of Tennessee, in reversing its prior decisions adopting the doctrine, provided excellent explanation of the policy and considerations which should convince this Court not to adopt abatement *ab initio* and instead retain the finality of the conviction up on the death of the defendant during the appellate process:

> We conclude that the doctrine of abatement *ab initio* must be abandoned because **it is obsolete, its continued application would do more harm than good,** and it is inconsistent with the current public policy of this State, as reflected in the constitution, in statutes, and in recent judicial decisions. Changes to Tennessee law in the arena of victims' rights have expanded the purpose of the criminal justice system well beyond the "cardinal principle[ ]" of "punishment." Furthermore, abatement *ab initio* prioritizes the reputation of a deceased criminal and the financial interests of the criminal's estate over society's interest in the just condemnation of a criminal act and a victim's right to restitution. Its application would . . . [force victims] to re-litigate matters in civil law suits that were already resolved during deceased defendants' criminal trials. We can no longer countenance a doctrine that causes so much harm to the living for the sake of the dead. Thus, we abandon the doctrine of abatement ab initio . . . .

Al Mutory, 581 S.W.3d 741, 750 (emphasis added). This Court should decline the opportunity to adopt an outdated policy detrimental to the rights of victims and inconsistent with the State's policy that a conviction is final until proven in error.

Further, as this Court announced in Anderson because Petitioner has passed the case is moot. This Court should apply its traditional mootness considerations to determine whether to allow the case to proceed. Nothing in this case is capable of repetition and evading review such as short-term suspensions or emergency procurement procedures on a short-term construction project. See Byrd v. Irmo High School, 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996) ("Short-term student suspensions, by their very nature, are completed long before an appellate court can

review the issues they implicate."); Sloan v. Department of Transp., 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) (finding review proper of emergency procurement procedures in which construction was then completed within about six months). Here, any evidentiary issues—if the same ones were to ever occur—can be addressed in a future appeal.

In the instant case, nothing warrants continuing the appeal in light of Petitioner's death and the uniqueness of the issues related to admissibility of evidence in his trial. See In re Chance, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have "consistently refrained" from issuing purely advisory opinions). As a result, this Court should dismiss the appeal as moot.

Accordingly, the State asks this Court to deny the motion to the extent it seeks to adopt the doctrine of abatement *ab initio* and seeks to vacate his underlying conviction. The State asks this Court to dismiss the appeal as moot. Finally, the State asks this Court to hold the underlying appeal in abeyance until ruling on Petitioner's motion and a determination is made regarding whether the underlying appeal is to be dismissed.

CONCLUSION

For all of the foregoing reasons, the State requests this Court deny the motion to the extent it seeks to adopt the doctrine of abatement *ab initio* and seeks to vacate the underlying conviction. The State asks this Court find the appeal moot and to dismiss the underlying appeal. Finally, the State asks this Court to hold the underlying appeal in abeyance until ruling on Petitioner's motion and a determination is made regarding whether the underlying appeal is to be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

BY: _____
William M. Blitch, Jr.
S.C. Bar No. 15608
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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