STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of General Sessions

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. **2022-000748**

Order filed on October 2, 2025

THE STATE,

RESPONDENT,

V.

STEPHEN WILLIAM FLOOD,

APPELLANT

PETITION FOR REHEARING AND MOTION TO ABATE APPELLANT'S CASE *AB INITIO*

Counsel for Appellant respectfully petitions for rehearing pursuant to Rule 221(a), SCACR. Specifically, Counsel respectfully requests that this Court withdraw the Order dismissing this appeal, abate this case *ab initio*, and remand with instructions to vacate the criminal convictions. Alternatively, Counsel respectfully asks that this Court find that the appeal is not rendered moot by the death of Appellant and allow the appeal to go forward.

Procedural History

1. In May of 2019, the Marion County Grand Jury indicted Appellant, Stephen William Flood, for two counts of involuntary manslaughter and two counts of reckless

homicide with death. (R. 5, line 15 – R. 6, line 2; R. 675 – 676).

2. On May 16, 2022, Appellant proceeded to jury trial before the Honorable William H. Seals, Jr., and a jury. (R. 1). Jared Bouchette and Marissa Drost represented Appellant, and Solicitors Edward Clements and John Jepertinger prosecuted the case on behalf of the State. The jury returned a verdict of guilty for all four indictments on May 19, 2022. The Trial Court sentenced Appellant to consecutive five (5) years imprisonment for each count of involuntary manslaughter and consecutive four (4) years imprisonment for each count of reckless homicide with death. (R. 630, lines 1-17; R. 645, lines 4-10).

3. On May 20, 2022, the Trial Court vacated the sentences for the involuntary manslaughter convictions and modified the reckless homicide sentences to consecutive terms of nine (9) years imprisonment for each conviction. (R. 663, lines 12-20; R. 664, lines 19-20).

4. On May 31, 2022, Appellant filed a Notice of Appeal in this Court. Counsel filed the Final Brief of Appellant and Record on Appeal on May 30, 2023. The State filed the Final Brief of Respondent on June 20, 2023.

5. On April 13, 2025, Appellant died in the South Carolina Department of Corrections (SCDC).

6. On September 24, 2025, Counsel received Appellant's death certificate from SCDC after numerous requests to obtain that document.

7. On September 29, 2025, this Court sent a letter to the parties notifying them of an issue with State's Exhibit #10 and requested to have corrected copy within ten days.

8. On September 30, 2025, Counsel spoke to Opposing Counsel for the Respondent regarding the issue with State's Exhibit #10 and informed Opposing Counsel

of the recent receipt of Appellant's death certificate and intent to file a motion requesting abatement *ab initio*.

9. The following day on October 1, 2025, Opposing Counsel submitted a letter to the Court requesting to dismiss this appeal based on Appellant's death. This Court issued an Order dismissing the appeal the next day on October 2, 2025.

Abatement ab initio

10. Counsel respectfully requests that this Court withdraw the Order dismissing this appeal, abate this case *ab initio*, and remand with instructions to vacate the criminal convictions.

11. As persuasive authority in support of Counsel's motion for abatement *ab initio*, Counsel points to the numerous federal court and state jurisdictions that follow this procedure. *See United States v. Reynolds*, 98 F.4th 62 (1st Cir. 2024); *See* John H. Derrick, Annotation, *Abatement Effects of Accused's Death before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. FED. 446 § 7 (2009) (collecting federal cases which abate the appeal alone); *See* Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4TH 189 § 5[b] (collecting modern state cases for the proposition that "where an accused dies during the pendency of his appeal, the proceedings against him are not abated from the beginning and the appeal may not proceed"). As the Seventh Circuit Court of Appeals explained in *United States v. Volpendesto*:

> 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).
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> . . .
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> The rule of abatement terminates criminal proceedings ab initio, "vacating the conviction entered against [the defendant]." *Moehlenkamp*, 557 F.2d at 128; *Logal*, 106 F.3d at 1552 ("Under the doctrine of abatement ab initio ... the defendant stands as if he never had been indicted or convicted. The absence of a conviction precludes imposition of the restitution order against [defendant] or his estate pursuant to § 3663.") (citation and quotation marks omitted).

Volpendesto, 755 F.3d 448, 453 (7th Cir. 2014).

12. Based on the death of Appellant, the interests of justice require that Appellant not stand convicted without resolution of the merits of the appeal which is an integral part of the system for finally adjudication. Therefore, Counsel asks this Court to abate the case *ab initio* and to remand with instructions to vacate the convictions.

Capable of Repetition and Evading Review and Need for Clarification of the Law

13. Alternatively, Counsel asks this Court to find that this appeal is not rendered moot by the death of Appellant and allow the appeal to go forward because issue two raised by Appellant is capable of repetition and evading review and presents a dilemma which this Court can address to clarify the law. *See generally State v. Passmore*, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005) (finding Passmore's appeal after serving her sentence for criminal contempt was not moot based on exceptions to the mootness doctrine; the issue

was capable of repetition, but evading review, and Passmore could continue to be affected by collateral consequences); *Evans v. South Carolina Dep't of Social Servs.*, 303 S.C. 108, 399 S.E2d 156 (1990).

Specifically, Appellant raised the following issue: Whether the Trial Court erred by invading the province of the jury where, after the jury found appellant guilty of involuntary manslaughter and reckless homicide for both decedents, the trial court initially imposed consecutive sentences totaling eighteen (18) years, and only after being informed of one homicide – one punishment rule, the trial court unilaterally elected the homicide charges for which appellant would be found guilty solely to keep the eighteen (18) year punishment the court originally imposed. *See State v. Greene*, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018) (citing State v. *Cavers*, 236 S.C. 305, 311-12, 114 S.E.2d 401, 404 (1960) ("Multiple offenses, including multiple homicide offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense.").

Here, the Trial Court's unilateral decision violated Appellant's fundamental Due Process rights by invading the province of the jury. Appellant was further prejudiced by the Trial Court's decision to intentionally chose the two offenses—reckless homicide—with larger sentencing ranges to maintain a larger overall sentence than what would have been permissible under the involuntary manslaughter offenses. Specifically, the Trial Court violated these fundamental principles of invading the province of the jury by unilaterally selecting which offense and concomitant sentence Appellant would incur. As in *Cavers*, Appellant was likewise tried for both involuntary manslaughter and reckless homicide for each decedent. However, unlike in *Cavers*, Appellant was convicted of all

charges,[1] and the Trial Court sentenced Appellant to consecutive five (5) years imprisonment for each count of involuntary manslaughter and consecutive four (4) years imprisonment for each count of reckless homicide with death. (R. 630, lines 1-17; R. 645, lines 4-10).

The following day, it was brought to the Trial Court's attention that Appellant could not receive two homicide convictions and sentences for one decedent (one body/one crime rule). The State asserted that the Trial Court should vacate the lesser two charges of involuntary manslaughter and amend its sentences to reckless homicide with the previously imposed sentence. (R. 661, line 2 – R. 662, line 7). Defense Counsel argued that the Trial Court did not have "the authority to unilaterally pick which charge to vacate . . . the one with the lesser maximum sentence as opposed to the one with the higher maximum sentence." (R. 662, lines 20-24). Defense Counsel also argued that if the Trial Court vacated a particular conviction, the sentencing for the remaining charges should be modified. (R. 663, lines 3-11).

The Trial Court ultimately held:

> In order to comply with the *Green[e]* case, I'm going to vacate both involuntary manslaughter sentences and convictions. I'm going to modify both reckless homicide sentences to comply with my original intent, which was 18 years. Thus, I'm going to sentence on each reckless homicide conviction to nine years and run them both consecutive. In essence, there is no prejudice to the defendant because it's the exact same sentence. It's done a little different to comply with *Green[e]*.

(R. 663, lines 12-20). After the Trial Court indicated its ruling, Defense Counsel argued

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[1] The jury sent out a note to the trial court requesting definitions for both involuntary manslaughter and reckless homicide during deliberations, and the trial court simply read the instructions to them again. (R. 625, line 5 – R. 628, line 21).

that, had the jury been properly instructed that it could find Appellant guilty of one homicide charge, or the other, but not both, then it would have been for the jury to decide which homicide charge Appellant was guilty of committing.

The Trial Court disagreed and vacated the sentences for the involuntary manslaughter convictions and modified the reckless homicide sentences to consecutive terms of nine (9) years imprisonment for each conviction. (R. 663, lines 12-20; R. 664, lines 19-20). In so doing, the Trial Court erroneously adopted the State's argument that it should *sua sponte* vacate the lesser two charges of involuntary manslaughter and amend its sentences for reckless homicide to maintain the same overall sentence previously imposed. (R. 661, line 2 – R. 662, line 7).

As *Cavers* instructed, "It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither." *Id.*, 236 S.C. at 311, 114 S.E.2d at 404. By following the State's request, the Trial Court's ruling effectively acted as a post-trial motion to elect by the State. As such, to sustain this point "would require the court, instead of the jury, to determine whether his conduct was negligent or reckless, if either, which, under the evidence in this case, would be an invasion by the court of the province of the jury." *Id.* 236 S.C. at 312, 114 S.E.2d at 404. Accordingly, Appellant's fundamental due process rights were violated by the Trial Court's ruling.

Additionally, Appellant was prejudiced by this error because it was not for the Trial Court to decide which offense should be imposed upon Appellant; as indicated above, it was solely the province of the jury to determine whether Appellant should suffer the consequences of a conviction for involuntary manslaughter or reckless homicide. Therefore, the Trial Court's imposition of any sentence without knowing specifically

which charge the jury would have chosen in its domain as the sole judge of Appellant's guilt requires reversal and remand.

Furthermore, the Trial Court intentionally selected the two convictions with higher sentencing ranges in order to impose a harsher penalty than what would be available if Appellant was convicted of involuntary manslaughter[2] rather than reckless homicide.[3] In the worst-case-scenario, Appellant could have been sentenced to ten (10) years imprisonment if the Trial Court imposed the five-year maximum punishment for each involuntary manslaughter conviction and ordered consecutive sentences. Instead, the Trial Court's unilateral election of convictions was guided not by principles of fundamental fairness and due process, but by its goal of imposing a sentence of eighteen (18) years.

[Conclusion and Signature Page to Follow]

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[2] "A person convicted of involuntary manslaughter must be imprisoned not more than five years." S.C. Code Ann. § 16-3-60 (West, Westlaw current through 2022).

[3] "A person who is convicted of . . . reckless vehicular homicide is guilty of a felony, and must be fined not less than one thousand dollars nor more than five thousand dollars or imprisoned not more than ten years, or both." S.C. Code Ann. § 56-5-2910(A) (West, Westlaw current through 2022).

CONCLUSION

Based on the foregoing reasons, the Appellant respectfully requests that this Court grant the Petition for Rehearing and withdraw the Order dismissing the appeal, abate this case *ab initio*, and remand with instructions to vacate the criminal convictions. Alternatively, Counsel respectfully asks that this Court find that the appeal is not rendered moot by the death of Appellant and allow the appeal to go forward.

Respectfully submitted,

Dayne Phillips
S.C. Bar No. 77712
PRICE BENOWITZ LLP
1614 Taylor Street, Ste. D.
Columbia, SC 29072
(803) 807-0234
dayne@pricebenowitz.com

ATTORNEY FOR APPELLANT

October 6, 2025

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Appellant.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Rehearing has been served upon **Mark Farthing, Esquire,** at S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211, on **October 6, 2025.**

Dayne Phillips
PRICE BENOWITZ LLP
1614 Taylor Street, Ste. D.
Columbia, SC 29201
(803) 807-0234
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 6th day of October, 2025.

Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027