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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2022-000748

THE STATE,

Respondent,

vs.

STEPHEN WILLIAM FLOOD,

Appellant.

RETURN TO COMBINED PETITION FOR REHEARING AND MOTION TO ABATE APPELLANT'S APPEAL AB INITIO

During the pendency of Appellant Stephen William Flood's appeal of his Marion County convictions for two counts of reckless homicide, he died. Upon discovering that information months after the fact, the State promptly notified this Court of Flood's death and—consistent with existing South Carolina law—asked this Court to dismiss the matter as moot. Cf. State v. Miller, 409 S.C. 312, 312, 762 S.E.2d 394, 394-395 (2014) (dismissing a criminal appeal as moot due to Miller's death during the pendency of the appeal). On October 2, 2025, this Court—relying on Miller—swiftly and correctly dismissed Flood's appeal due to Flood's death. Now, Flood—through his appellate counsel—has simultaneously petitioned for rehearing and requested this Court not just abate his appeal but abate his case ab initio. Furthermore, in the alternative, Flood—again through appellate counsel—asks this Court to reconsider its mootness

determination and permit his now-moot appeal to go forward despite his death and resulting inability to obtain any effectual relief. For the reasons that follow, Flood's petition for rehearing and motion seeking abatement ab initio should both be denied.

A. Consistent with existing South Carolina, this Court correctly dismissed Flood's appeal following his death, and our state has not applied and should not now start applying the obsolete doctrine of abatement ab initio.

In South Carolina, "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) (emphasis added); see Miller, 409 S.C. at 312, 762 S.E.2d at 394-395 (granting a motion to dismiss a criminal appeal due to the death of the criminal defendant involved); see also State v. Gleason, 349 So. 3d 977, 981 (La. 2022) ("For many state courts, abatement has historically meant dismissing the appeal, but leaving the conviction intact."). Meanwhile, unlike courts in some other jurisdiction, our appellate court rules do not permit the substitution of a party in interest in a criminal appeal. Anderson, 281 S.C. at 199, 314 S.E.2d at 597; see People v. Nowell, 195 N.Y.S.3d 413, 423 (N.Y. Sup. Ct. 2023) (explaining some jurisdictions permit a criminal appeal to proceed through a substitute party following the death of a criminal appellant); see also Commonwealth v. Hernandez, 118 N.E.3d 107, 122 (Mass. 2019) ("Most of the States using th[e substitution] approach have an appellate rule allowing for party substitution upon the death of a defendant in a criminal proceeding. We do not."). Furthermore and importantly, our appellate courts—unlike some courts in other jurisdictions—have also declined to order the abatement to be ab initio. State v. Bixby, 397 S.C. 154, 154-155, 723 S.E.2d 841, 841 (Ct. App. 2011); see Anderson, 281 S.C. at 199, 314 S.E.2d at 597 (instructing the appeal—and *not* the underlying conviction or convictions—should be dismissed when a criminal appellant dies during the pendency of a criminal appeal). Critically,

our state's distinction between abatement of an appeal and abatement of a case ab initio is a distinction that matters.

Now, through his rehearing petition and accompanying motion, Flood contends this Court should not just abate his appeal due to his death as our appellate courts have historically done under such circumstances and as this Court has already correctly done but, instead, should grant abatement ab initio and strike down the jury's verdict in his case along with his reckless homicide convictions. As support for that request, Flood does not cite to even a single appellate decision from South Carolina addressing what has historically occurred here when a criminal appellant dies during the pendency of an appeal, including the one this Court relied upon when correctly dismissing Flood's appeal. Instead, Flood simply notes *some* other federal and state courts follow the procedure he wants to be adopted in South Carolina before asserting the "interests of justice" purportedly demand it now be applied to his case. (Reh. Pet. pp. 3-4).

Significantly though, South Carolina—as already explained—simply does *not* apply the doctrine of abatement ab initio. Miller, 409 S.C. at 312, 762 S.E.2d at 394-395; Anderson, 281 S.C. at 199, 314 S.E.2d at 597; Bixby, 397 S.C. at 154-155, 723 S.E.2d at 841. And, there are very sound public policy reasons why our state does not do so.

As a growing number of courts throughout the nation have now recognized, "the doctrine of abatement ab initio is outdated and no longer consonant with the circumstances of contemporary life, *if, in fact, it ever was*." Hernandez, 118 N.E.3d at 110 (emphasis added); see State v. Moeller, 549 P.3d 1106, 1116 (Kan. 2024) (explaining "there has been a marked trend away from abatement ab initio among the states in recent years" and noting "five states have explicitly overruled precedent applying the doctrine of abatement ab initio" since 2014 while another expressly declined to adopt it as a matter of first impression); Nowell, 195 N.Y.S.3d at

423 (instructing New York's doctrine of strictly applying abatement ab initio when a criminal appellant dies during the pendency of an appeal "is not only the minority rule, but an increasingly remote one"). Moreover, as acknowledged by even the primary authority upon which Flood now relies, it has no constitutional basis whatsoever. United States v. Volpendesto, 755 F.3d 448, 453 (7th Cir. 2014); see Hernandez, 118 N.E.3d at 110 (instructing abatement ab initio is not grounded in the constitution or a statute but, instead, is a judicially-created common law doctrine). Furthermore, it runs contrary to the well-settled and long-recognized principles that a convicted defendant is presumed guilty and that the defendant's conviction is presumed to have been validly obtained. Hernandez, 118 N.E.3d at 119; see Parker v. State Highway Dep't, 224 S.C. 263, 272-273, 78 S.E.2d 382, 386 (1953) ("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." (citation and internal quotations omitted)); Nichols v. Patterson, 202 S.C. 352, 25 S.E.2d 155, 155 (1943) ("[B]efore conviction the law presumes [a criminal defendant] to be innocent, and after conviction the law presumes him to be guilty."); see also Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001) ("The regularity of the proceedings of a court of general jurisdiction will be assumed in the absence of evidence to the contrary."); State v. Williams, 166 S.C. 63, 164 S.E. 415, 424 (1932) ("Under our system of jurisprudence, this court, and all other courts, must, within the law, uphold the great right of jury trial, and, when a jury of the country has spoken, its verdict must be presumed to have been correct."), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Beyond that and most problematically, abatement ab initio unjustifiably strikes at the rights of a criminal defendant's victims, which—unlike the doctrine of abatement ab initio

itself—are, in fact, grounded in and protected by our state's constitution and laws. S.C. Const. art. I, § 24; see State v. Price, 441 S.C. 423, 447, 895 S.E.2d 633, 645 (2023) (acknowledging the critical importance of the Victims' Bill of Rights and the Victims' Rights Act in South Carolina). By effectively treating a presumptively-guilty defendant's appeal as successful without it ever being decided on the merits and regardless of whether it might even be wholly frivolous in nature, the doctrine of abatement ab initio—amongst other things—deprives victims of fair treatment and upsets a presumptively-valid conviction based purely on a defendant's death. See Payton v. State, 266 So. 3d 630, 640 (Miss. 2019) ("The abatement ab initio doctrine tramples upon victims' rights by denying victims fairness, respect and dignity." (citation and internal quotations omitted)); State v. Isaak, 988 N.W.2d 250, 253 (N.D. 2023) ("Although a criminal defendant may have enjoyed a statutory right to appeal before his death, deceased individuals' statutory rights cannot prevail over the constitutional rights of the living. Abatement of criminal convictions would foreclose victims' rights to fair treatment under the law and to meaningfully participate in the criminal justice system."). That nonsensical and unjustifiable outcome is why a growing number of states with robust protections for the rights of victims like we have in South Carolina are rejecting the doctrine of abatement ab initio and why our state should not now embrace it for the first time. See, e.g., State v. Al Mutory, 581 S.W.3d 741, 750 (Tenn. 2019) (abandoning the purely court-created doctrine of abatement ab initio that had previously been applied in Tennessee "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").

Accordingly, since South Carolina abates an appeal when a criminal appellant dies but not a case ab initio, this Court did exactly what it was supposed to do by dismissing Flood's

appeal upon learning he died during the pendency of it. Miller, 409 S.C. at 312, 762 S.E.2d at 394-395; Anderson, 281 S.C. at 199, 314 S.E.2d at 597. And, because the doctrine of abatement ab initio not only is not applied in South Carolina but is not even sound, this Court should do precisely the same thing it has done in the past when asked to apply that unsound doctrine and flatly refuse to do so. Bixby, 397 S.C. at 154-155, 723 S.E.2d at 841. Flood's petition for rehearing and motion seeking abatement ab initio should both be denied.

B. Just as this Court has already correctly recognized, Flood's appeal was rendered moot by his death, and Flood's current claim the mootness problem should be ignored because one of the issues he raised on appeal is capable of repetition yet likely to evade review is fundamentally incorrect.

As a practical matter and pursuant to well-established South Carolina law, an appellate court in our state "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). Significantly, a case becomes moot when: (1) "judgment, if rendered will have no practical legal effect upon the existing controversy"; or (2) "when some event occurs making it impossible for the reviewing court to grant effectual relief." Sloan v. Greenville Cnty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

Notably, in a criminal case, the death of the appellant typically renders the case moot and warrants dismissal. Miller, 409 S.C. at 312, 762 S.E.2d at 394-395. Logically, that is true because no effectual relief can be granted to a convicted offender who is no longer alive. See Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) ("A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. 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*." (emphasis added and citations omitted)).

Through his current petition for rehearing and motion, Flood does not contend an actual controversy still remains in his case despite his death. Likewise, Flood does not identify any effectual legal relief that can be granted to him in his case now that he is deceased. Nevertheless, Flood maintains this Court should not dismiss his appeal as moot because the second issue he raised on appeal purportedly "is capable of repetition and evading review and presents a dilemma this Court can address to clarify the law." (Reh. Pet. p. 4). Tellingly though, Flood follows that claim not by actually explaining *how* his second issue is truly capable of evading review in the future but, instead, by simply repeating the argument on the perceived merits of the issue from his appellate brief[1] in a nearly word-for-word fashion. (App. Br. pp. 18-21; Reh. Pet. pp. 5-8).

Unquestionably, an appellate court can address an otherwise-moot issue when it "is capable of repetition but will generally evade review." Sloan v. Dep't of Transp., 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). There are multiple problems with Flood's request for that mootness exception to be applied now in his case, though.

First, his argument concerning the mootness exception is completely conclusory and does not even include an attempt to explain how the particular issue he contends is capable of evading review is, in fact, likely to do so. Cf. Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (finding an issue was abandoned on appeal when the appellant's argument on the issue consisted of a "bald conclusion" that "le[ft] unargued the error assigned by this exception"). Under such circumstances, that undeveloped argument for all intents and purposes has been abandoned and, therefore, should be rejected on that basis. See Whitehurst v. Town of

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[1] Indeed, Flood has even repeated the footnotes from his appellate brief. (App. Br. p. 18; p. 20; Reh. Pet. p. 6; p. 8).

Sullivan's Island, 446 S.C. 137, 158, 919 S.E.2d 402, 414 (2025) (deeming an argument abandoned on appeal because it was unsupported and undeveloped); State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding an argument to be abandoned when it was raised in a conclusory manner); R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory.").

Second, even assuming the conclusory nature of Flood's mootness argument could be ignored, that argument is still fundamentally wrong because the second issue he raised—whether the trial judge erred by vacating his involuntary manslaughter convictions and sentencing him solely for his reckless homicide convictions after the jury simultaneously convicted him of both reckless homicide and involuntary manslaughter[2]—is not truly likely to evade review. Critically, that is true because Flood's second issue is not one that, due to its nature and the time required for the appellate process to be completed, is ordinarily likely to be rendered moot before it can actually be addressed on appeal. See Croft v. Town of Summerville, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) ("The exception is most applicable in situations where the prejudice suffered by the complaining party is temporary and has ended by the time of appellate review."); cf. Nelson v. Ozmint, 390 S.C. 432, 434-435, 702 S.E.2d 369, 370 (2010) ("[T]his issue is one

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[2] For what it's worth, what the trial judge did in Flood's case was strikingly similar to what our Supreme Court has done and approved of in the past when similar issues have arisen. Cf. State v. Greene, 423 S.C. 263, 283-284, 814 S.E.2d 496, 507 (2018) (vacating Greene's involuntary manslaughter conviction and sentence while leaving her more-serious homicide by child abuse conviction and sentence in place after finding the "one homicide, one homicide punishment" rule had been violated in her case); State v. Samuels, 403 S.C. 551, 559, 743 S.E.2d 773, 777-778 (2013) ("[T]he circuit court employed a special verdict form that unequivocally established the jury found Samuels guilty of both assault of a high and aggravated nature and simple assault. However, because Samuels was indicted and tried for only one count, the court only sentenced him for one of the offenses comprising that count. Because he was found guilty of assault of a high and aggravated nature, we find no error in the circuit court sentencing him for that offense.").

that is capable of repetition, yet will usually evade review because most inmates will have served the year required by SCDC's interpretation of the statute before the lawfulness of the interpretation can be reviewed."); Byrd v. Irmo High Sch., 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. Therefore, we conclude that the present case clearly fits into the evading review exception of the mootness doctrine, even if it were not otherwise appropriate for the Court to address this appeal."); State v. Simpson, 429 S.C. 83, 88-89, 837 S.E.2d 669, 672 (Ct. App. 2020) ("The State has argued persuasively that the sentencing question raised here is capable of repetition yet generally evades review in that the suspension of mandatory minimum sentences continues to occur in circuit court, but due to the duration of the home detention or probationary portions of such sentences, the question presented here generally evades review."). Instead, it is an issue that is only moot in Flood's case because Flood died before the conclusion of his appeal, which is not something that typically occurs during the course of most criminal appeals. See Friends of Hunley, 369 S.C. at 27, 630 S.E.2d at 478 ("[T]he action must be one which will truly evade review."). Therefore, since the issue is not one likely to evade review in the future, it can—and, thus, should—be addressed in some future case if and when it arises again, and no legitimate need exists for this Court to issue an advisory opinion in Flood's now-moot case when no meaningful relief can be granted to him. See Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."); see also In re Chance, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (recognizing South Carolina appellate courts have "consistently refrained from rendering [purely advisory] opinions); cf. Isaak, 988 N.W.2d at 254 (dismissing a criminal appellant's appeal as moot after explaining: "Isaak is no longer alive to serve his

sentence if we were to affirm the judgment. If we were to reverse the judgment, we could not grant Isaak the new trial he sought. Under these circumstances, a decision would be advisory."). Flood's petition for rehearing and motion seeking abatement ab initio should both be denied.

Conclusion

For all the foregoing reasons, this Court—consistent with South Carolina law—has already correctly dismissed Flood's appeal because his death rendered it moot, and this Court should not now revisit that proper decision. Cf. Miller, 409 S.C. at 312, 762 S.E.2d at 394-395 (dismissing an appeal as moot subsequent to the death of Miller during the pendency of the appeal); Anderson, 281 S.C. at 199, 314 S.E.2d at 597 ("Appellant died in an automobile accident pending the disposition of his appeal. The State moved to dismiss the appeal and we granted the motion. Appellant's counsel now petitions for a rehearing. We deny."). Accordingly, Flood's petition for rehearing and motion seeking abatement ab initio should both be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Return to Combined Petition for Rehearing and Motion to Abate Appellant's Appeal Ab Initio on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

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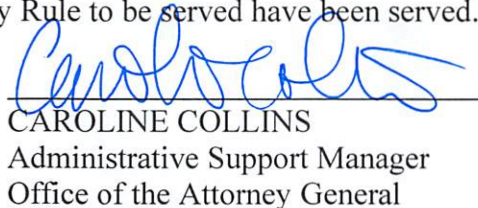
I further certify all parties required by Rule to be served have been served.
This 6th day of November, 2025.



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