STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge
Case No. 2010-GS-40-06478

Appellate Case No. 2016-000836

THE STATE ... ... RESPONDENT

v.

ANTWAN ADAMS ... ... APPELLANT

INITIAL BRIEF OF RESPONDENT

Thomas W. Nicholson,
Legal Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the probation revocation judge abused her discretion in imposing an eighteen-month revocation where she had previously imposed a suspended six-month revocation such that the maximum sentence that could be reinstated upon Appellant's subsequent violation of probation was six months?**

STATEMENT OF THE CASE

The Respondent agrees with the Appellant's statement of the case, except to add that the Appellant has completed his sentence and was released from State custody on November 30, 2016.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS MOOT.

The Appellant served the maximum time possible in this case and was released from State custody on November 30, 2016. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, (1973). Further, an appellate court will not decide moot and academic questions or issue a ruling where there remains no real controversy. Curtis v. State, 345 S.C. 557, 567 (2001). Moot appeals result when intervening events render a case nonjusticiable. Id. Here an intervening event – the Appellant's release from prison – has rendered the case nonjusticiable because a ruling in the case will have no practical legal effect. There is no relief this Court can grant the Appellant, thus this case is moot and should be dismissed.

A. The Court Should Not Consider the Case Because Its Facts Are Not Likely To Repeat.

The Appellant argues that even if his case is moot, the Court should consider it anyway because it is capable of repetition that evades review. However the facts of this case are not likely to repeat. An appellate court can take jurisdiction over a moot issue if the matter is capable of repetition but evading review. Curtis v. State, 345 S.C. 557, 568 (2001). The Appellant likens this case to that in Nelson v. Ozmint, 390 S.C. 432 (2010). There, the Petitioner was sentenced to two concurrent fifteen-month prison terms for his third or subsequent offense of criminal domestic violence. He

was given credit for time served of 162 days. He disputed the South Carolina Department of Correction's interpretation of S.C. Code § 16-25-20(B)(3), which stated that the mandatory minimum term of imprisonment required for his crime was one year. He wanted good time and earned work credits to apply against this time and thus reduce the amount of actual time he would serve to less than one year. SCDC refused to do so. Nelson at 434. Before his case could be decided, he was released from custody. Even though this mooted the case, the court considered it because it found that most inmates convicted of this crime would serve the year required by SCDC's interpretation before the lawfulness of that interpretation could be reviewed. Id at 434-435.

This case is not like that in Nelson v. Ozmint because here the facts of the case not likely to repeat. The Appellant was initially sentenced to a three year term under the Youthful Offender Act suspended to two years of probation. (2014 Tr. 4, ll. 1-4). He violated his probation and was brought before the sentencing court on May 5, 2014. At this hearing the Appellant requested that on revocation of his probation the judge convert his YOA sentence to a regular adult sentence. (2014 Tr. 6, ll. 1-4). Judge Benjamin agreed, but issued a confusing order. She ordered the Appellant's probation to be revoked for six months, but also ordered that the revocation should be suspended for four months pending the Appellant's payment of restitution, fines and fees. (2014 Tr. 8, ll. 8-17). She further ordered that the Appellant continue to report on probation for the four month period, and that if he did not he should be brought back before the Court. (Id.) The order issued by the court reflects these terms. R. * (the May 5th, 2014 Order). Thereafter the Appellant did not report as ordered, so he was brought back before Judge Benjamin on April 15, 2016. At this hearing, rather than sentence the Appellant to six months in prison, the judge noted he had "three years hanging over his head", sentenced him to eighteen months in prison, terminated the case and converted the fees to a civil judgment. (2016 Tr. 4, l. 8-11). The order issued by the court

reflects these terms, and also states that the YOA sentence was converted to an adult sentence. R. * (the April 15, 2016 order).

These facts are not a scenario that is likely to repeat. That would require, at a minimum, an offender whose sentence is suspended to probation to appear at a revocation hearing where the judge revokes the probation and sentences the offender to a jail term, but the judge simultaneously suspends the revocation and orders the offender to continue reporting on his probation, while promising to sentence him to a specific jail term in the future if he does not obey. Then, when the offender is brought before the judge at a subsequent revocation hearing, the judge actually revokes the offender's probation and sends him to prison, but sentences him to a longer term than he promised at the first revocation hearing (where no revocation or imprisonment actually happened). These facts are nothing like those in Nelson, which would likely repeat every time an offender was sentenced to the statutory minimum sentence and then challenged SCDC's interpretation of law. The facts of this moot case are not likely to repeat at all. Therefore the Court should dismiss it.

II. THE JUDGE DID NOT ABUSE HER DISCRETION WHEN SHE SENTENCED THE APPELLANT TO EIGHTEEN MONTHS IN PRISON.

The judge did not abuse her discretion when she sentenced the appellant to eighteen months in prison because her order of May 5, 2014 did not prospectively limit her power to do so. Both the order of May 5, 2014 (the May 5th order) and April 15, 2016 (the April 15th order) were made consistent with the Court's powers to manage the case. However, no matter how she characterized what she ordered at the May 5, 2014 hearing, the judge did not actually revoke the Appellant's probation or sentence him to a jail term at that time. She merely ordered that the offender's probation would continue with new conditions. The Appellant was initially sentenced to a three year term under the Youthful Offender Act suspended to two years of probation to terminate upon payment of costs and fines. (2014 Tr. 4, ll. 1-4). He violated his probation and was brought before

the sentencing court on May 5, 2014. At this hearing the Appellant requested that on revocation of his probation the judge convert his YOA sentence to a regular adult sentence. (2014 Tr. 6, ll. 1-4). Judge Benjamin agreed, but issued a confusing order. She ordered the Appellant's probation to be revoked, but also ordered that the revocation should be suspended for four months pending the Appellant's payment of restitution, fines and fees. (2014 Tr. 8, ll. 8-17). She also ordered that the Appellant continue to report for the four month period, and that if he did not he should be brought back before the Court. (Id.) In court she emphasized to the Appellant that he was to continue reporting to probation, and instructed him that if he failed report and pay as ordered she would sentence him to six months in jail. (2014 Tr. 8, l. 18-23; Tr. 9, ll. 1-3). The order issued by the court reflects these terms. R. * (the May 5th, 2014 Order).

The May 5th order does not make sense as a revocation order. To suspend a revocation before it starts is to refrain from ordering the revocation. However, note that the judge also ordered the Appellant to continue reporting to probation and paying restitution, costs and fines while the revocation was suspended. What this means is that, no matter how the judge described what she was doing, she did not actually revoke the Appellant's probation at the May 5th hearing. She merely continued his probation with new conditions and told him that if he disobeyed her order he would be brought back before her and *then* she would revoke his probation and sentence him to prison. That was consistent with her powers over the case. "In the event of a conviction of a youthful offender the court may . . . suspend the sentence and place the youthful offender on probation". S.C. Code Ann. § 24-19-50(1). The court may at any time modify the terms of an offender's probation. See S.C. Code Ann. § 21-24-430. "The trial court retains jurisdiction of the case for the purpose of modifying the manner in which court-ordered payments are made until paid in full, or until the defendant's active sentence and probation or parole expires." S.C. Code Ann. §

17-25-323(A). See Also S.C. Const. Art. V, §11. The Court's order of May 5, 2014 was consistent with these powers and did not exceed them.

The fact that on its face the May 5th order stated that the Appellant was revoked and that he must serve six months had no effect because the Appellant was in no sense revoked on that day. The practical effect of the order was to continue his probation. His actual revocation did not occur until he was brought back to court on April 15, 2016. At this hearing, rather than sentence the Appellant to six months in prison, the judge noted he had "three years hanging over his head", sentenced him to eighteen months in prison, terminated the case and converted the fees to a civil judgment. (2016 Tr. 4, l. 8-11). The order issued by the court reflects these terms. R. * (the April 15, 2016 order). This order was also consistent with the Court's powers: "[u]pon such arrest the court, or the court within the venue of which the violation occurs, shall cause the defendant to be brought before it and may revoke the probation or suspension of sentence." S.C. Code Ann. § 24-21-460. Whether or not to revoke a defendant's probation, in whole or in part, is committed to the circuit court's sound discretion. See State v. Knapp, 338 S.C. 541, 543 (S.C.App. 2000).

Like the May 5th order, The April 15th order states that the Appellant's suspended sentence is revoked and sentences him to a jail term. R. * However, unlike the May 5th order, the April 15th order contains no condition limiting the effect of the revocation. The April 15th order therefore had the immediate effect of actually revoking the Appellant's suspended sentence and actually sending him to prison. The May 5th order was not truly a revocation order at all, and the Judge did not actually sentence the Appellant to a jail term in that order. The May 5th order is best described as an order to continue the Appellant's probation, and thus did not limit the judge's discretion to sentence him to eighteen months in prison on April 15, 2016. Thus the judge did not abuse her discretion in the April 15th order when she sentenced the Appellant to eighteen months in prison.

CONCLUSION

The case is moot, and its facts not likely to repeat. Therefore the Court should dismiss this appeal. Even if the Court hears the case, the Judge did not abuse her discretion when she sentenced the Appellant because she acted within her powers to do so.

Respectfully submitted,

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January 6, 2017

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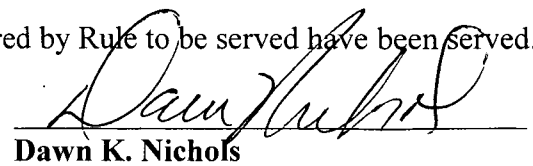
CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter,* dated January 6, 2017, on Appellant this 6th day of January, 2017, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Laura Baer, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellant Defense
PO Box 11589
Columbia, S.C. 29211-1589

I further certify that all parties required by Rule to be served have been served.



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January 6, 2017

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: **State v. Antwan Adams**

Dear Ms. Kitchings:

Please find enclosed the original and one of copy of Respondent's Initial Brief and Designation of Matter along with a certificate of Service in the above captioned case.

Thank you for your assistance in this matter.

Sincerely,

Thomas W. Nicholson
Legal Counsel

TWN:dn
Enclosures

cc: Laura Baer, Appellate Defender

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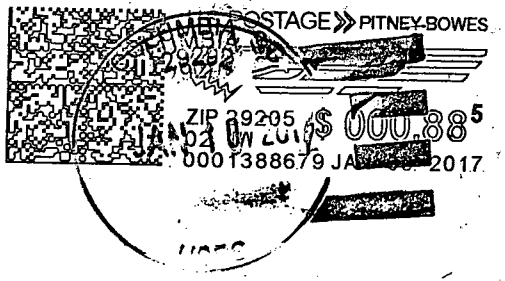

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