

STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

AUG 30 2018

APPEAL FROM PICKENS COUNTY

S.C. SUPREME COURT

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2018-001042

STATE OF SOUTH CAROLINA.....PETITIONER

VS.

ARTHUR M. FIELD.....RESPONDENT

Unpublished Opinion 2017-UP-455

Rehearing Denied 5/7/2018

MOTION TO DISMISS APPEAL AND TO SUPPLEMENT RECORD

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Counsel for Respondent Field

Arthur M. Field, (Respondent in Appeal; Movant herein, "Field") acting by the undersigned counsel, moves pursuant to S.C. Rules of Appellate Procedure 212(b); 240(a), *et seq.* and Rule 260(c), *et seq.* for good cause appearing for the following relief:

- 1) To permit Field to Supplement the Record filed to add the intervening Order(s) of the Circuit Court rendered following issuance of the Writ of Certiorari, which Order(s) render this appeal moot, and evidence of Field's 'maxing out' the underlying sentence from the Dept. of Corrections, as of Feb. 8, 2019, as argued below and in Brief annexed; and/or
- 2) Alternatively, for this Court to take Judicial Notice of such Order(s) and proceedings in the Circuit Court pertaining to Field and germane to this appeal during the period September 7, 2018 through November 30, 2018, and further to take Judicial Notice of the action(s) of the Department of Corrections of South Carolina relating to Field in the period July 5, 2018 through February 8, 2019 relevant and material to this appeal and this motion; and
- 3) To Dismiss this Appeal on grounds set forth herein and as argued in Brief annexed, incorporated herein, and as referred to in 'Brief of Respondent in Opposition to Appeal' filed in November, 2018, incorporated herein;
- 4) Such other relief as may pertain in law or in equity, preserving all other grounds.

**Grounds for the Motion pursuant to SCRAP 240(c):**

- 1) All issues raised by the State in its Appeal are moot as a result of the intervening Orders of the Circuit Court issued October 30, 2018, as clarified November 24, 2018. resulting from the State's Motion to revoke probation heard by the Circuit Court on September 7, 2018 and Field's resulting incarceration and completion of the original sentence and subsequent

release by the Department of Corrections after fulfilling the maximum term of the underlying sentence, as Ordered by the Circuit Court—an ‘intervening event’;

- 2) The Order of October 30, 2018, constitutes a significant change of circumstance ‘intervening event’ following this Court’s issuance of Certiorari to the Court of Appeals and this Motion is relevant, and dispositive of the State’s appeal and should be granted;
- 3) Dismissal with prejudice is in the interests of judicial economy and this Court does not issue declaratory judgments concerning issues no longer justiciable or becoming moot;
- 4) The State waived its rights to appeal--explicitly and/or implicitly--in the original Plea Agreement executed by the parties in May, 2013 and such waiver is now recognized in South Carolina as a result of intervening case law;
- 5) The above deprives this Court of subject matter jurisdiction, which may be raised at any time;
- 6) The interests of justice and/or equity are served by permitting Movant to supplement the record with intervening actions and Order(s) of the Circuit Court taken following the issuance of the Writ of Certiorari and/or taking judicial notice of such actions and no prejudice will result to the State, which had actual or constructive notice of such action(s);
- 7) All other grounds for dismissal and in opposition to appeal are preserved.

Field relies on Brief annexed and incorporates this Motion into such Brief.

**ARTHUR M. FIELD**

BY 

8-30, 2019

J. TODD RUTHERFORD, HIS ATTORNEY

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STATE OF SOUTH CAROLINA

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BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL AND TO SUPPLEMENT RECORD

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## **FACTUAL/PROCEDURAL BACKGROUND:**

- 1) Arthur M. Field was sentenced by Hon. Cordell Maddox, Jr., Circuit Court Judge, on October 8, 2013 to 10 years, suspended upon service of 26 months, and awarded credits for 'any time spent' on GPS monitoring pursuant to statute per a Plea Agreement;
- 2) Field was placed on 5 years probation following release from his incarceration in 2013, as set forth in the October 8, 2013, Sentencing Order;
- 3) In July, 2014, the State's Motion to Reconsider was denied;
- 4) The State appealed the sentence and award of credits in violation of the Plea Agreement;
- 5) The Appellate Division denied the State's appeal and its Motion for Rehearing;
- 6) On August 21, 2018, this Court granted the State's Petition for Writ of Certiorari filed June 6, 2018;
- 7) Following the grant of such Writ, the Attorney General moved to revoke Field's probation in the sentence underlying the State's appeal;
- 8) Hearing was held before the Hon. Cordell Maddox, Jr. on September 7, 2018 concerning the State's Motion to Revoke Probation.;
- 9) **On September 7, 2018, Judge Maddox revoked and terminated Field's probation and Ordered Field incarcerated to complete the sentence imposed in October, 2013;**
- 10) Judge Maddox's Order was issued on October 30, 2018, and clarified on November 24, 2018—which Orders are in possession of the Clerk of the State Grand Jury;
- 11) The Order of October 30, 2018, constitutes a significant change of circumstance following this Court's issuance of certiorari and this Motion is dispositive of the State's appeal;
- 12) **As of February 8, 2019, Field completed the maximum of all periods of incarceration under the original sentence and probation revocation and was released by the D.O.C.**

## I. LEGAL ARGUMENTS:

### A. All issues raised by the State in its Appeal are moot.

On September 7, 2018, Circuit Court Judge Cordell Maddox, Jr. conducted an extensive hearing on the State's Motion to Revoke Field's probation resulting from the Sentencing Order of October 8, 2013, --the sole basis for the State's appeal. All issues germane to probation revocation were reviewed by the court, including: the prior sentence; the credits awarded for GPS monitoring; the appropriate sentence to impose upon revocation in light of all prior events leading to such revocation hearing; and the State's pending appeal and the effect of sentence revision.

Judge Maddox revoked Field's 5-year probation and the suspended sentence. The court, in its discretion, reinstated and revised the original sentence and determined the period of incarceration to be served to complete such sentence. S.C.C.A. §24-21-460. The Court stated it would permit probation to expire on October 18, 2018 without extension.

Field served the full sentence and was released by the Department of Corrections on February 8, 2019—having 'maxed out' the entire underlying sentence.

The intervening events of probation revocation and sentence revision moot the appeal. *Byrd v. Irmo High Sch.*, 321 S.C.426,430, 468 S.E.2d 861,864(1996). "Appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543,558, 703 S.E.2d 499,506(2010).

**"Moot appeals ... result when intervening events render a case non-justiciable."** *Curtis v. State*, 345 S.C.557,567, 549 S.E.2d 591,596(2001)(Attorney General moved to dismiss appeal because injunction issue became moot resulting from intervening event after appeal was filed.) "This Court will not pass on moot and academic questions or make an adjudication where there remains

no actual controversy.” *Byrd, supra*, 321 S.C. at 431, 468 S.E.2d at 864. Also, *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174,180, 519 S.E.2d 567,570-71 (1999) (quoting *Byrd*). "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." *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596 (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344,346, 195 S.E.2d 713,715 (1973)). The ‘grant’ of effectual relief is impossible. *S.C. Ret. Syst. Inv. Comm'n v. Loftis*, 402 S.C. 382,384, 741 S.E.2d 757,758(2013); *Slezak v. S.C.D.C.*, 361 S.C. 327, 605 S.E.2d 506(2004).

**Field fulfilled the entire sentence by ‘maxing out’ and had no further supervision after his release. Completion of his sentence moots the appeal.** *McClam v. State*, 386 S.C. 49, 686 S.E.2d 203(S.C.App. 10/13/2009) (State’s appeal dismissed as moot when inmate had completed his sentence). And, *Skipper v. S.C.D.C.*, 370 S.C. 267, 633 S.E.2d 910(App. 2006).<sup>1</sup> “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.” *Pee Dee Elec. Coop, Inc. v. Carolina Power & Light Co.*, 279 S.C.64,66, 301 S.E.2d 761,762(1983).

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<sup>1</sup> Also, see, e.g., *U.S. v. McAtee*, #13-4526 (4<sup>th</sup> Cir. 10/21/2014); *Spencer v. Kenna*, 523 U.S. 1,7(1998); *U.S. v. Hardy*, 545 F.3d 280(4<sup>th</sup> Cir. 2008)(appeal moot when term served and no supervised release to follow). *Lane v. Williams*, 455 U.S. 624,630(1982).

The intervening probation revocation and imposition and successful completion of the original sentence of incarceration renders the appeal moot and the case non-justiciable, since the original sentence is no longer operative, there can be no further effect on Field's liberty, and there is no further controversy between the parties.<sup>2</sup> *Sloan v. Friends of the Hunley, Inc.*, 369 S.C.20, 630 S.E.2d 474(2006) (appeal became moot by intervening act and no exception applied); *Nelson v. Ozmin*, 390 S.C.432, 702 S.E.2d 369, 370(2010)(Release from SCDC making underlying claim moot.). This is a criminal appeal and none of the civil exceptions to mootness apply. This is not a question of 'imperative and manifest urgency', nor one where issues would escape later review. *Curtis, supra*, 345 S.C. at 568, 549 S.E.2d at 596(exception applies only in the civil context).

This appeal should be dismissed.

**B. Dismissal is in the interests of judicial economy, law and equity.**

This Court repeatedly affirms it will not consider moot issues except in extremely limited circumstances in the civil context. *Mid-State Distributors v. Century Importers*, 310 S.C.330, 426 S.E.2d 777(1993). "The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies .... Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review." *Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981). The appeal should be dismissed.

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<sup>2</sup>The Attorney General regularly moves to dismiss appeals for mootness resulting from subsequent court proceedings. See; *S.C.Dept. of Social Services v. Wicker*, 2016-UP-268(App. 6/8/2016) (holding intervening events and lower court orders rendered appeal moot). Also, *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94(2002)(intervening death of lead class member rendered appeal moot). And, *Douan v. Charleston Cnty Council and Charleston Cnty Election Comm'n*, 373 S.C.384, 645 S.E.2d 241(2007)(dismissing for mootness for intervening action). Limited exceptions apply only to civil matters. *Shah v. Richland Mem. Hosp.*, 350 S.C. 139, 564 S.E.2d 681(App. 2002). *State v. Passmore*, 363 S.C.568, 611 S.E.2d 273(App. 2005) (Attorney General moves to dismiss for mootness since sentence has been served during the appeal).

**C. The State waived its rights to appeal--explicitly and/or implicitly--in the original Plea Agreement executed by the parties in May, 2013.**

The State did not preserve the right to appeal in the Plea Agreement of 2013. The government is forbidden from appealing absent an express reservation when the criminal defendant has waived its appellate rights in a Plea Agreement. *United States v. Zuk*, 874 F.3d 398(4<sup>th</sup> Cir. 2017) affirming *United States v. Guevera*, 941 F.2d 1299(4<sup>th</sup> Cir. 1991) *cert.den.* 503 U.S.977(1992). Plea Agreements are subject to greater scrutiny than contracts and are to be liberally interpreted in favor of protecting a criminal defendant's rights. See, e.g., *U.S. v. Oates*, No. 17-4550(4<sup>th</sup> Cir. 5/2/2018) citing *Zuk* and also *U.S. v. Davis*, 714 F.3d 809,814(4<sup>th</sup> Cir. 2013). The validity of such implied waiver and the preclusion of appeal by the State was upheld by this Court in *State v. Pfeiffer*, #27891,n.1, \_\_\_ S.C. \_\_\_(5/29/2019). And, unlike *Pfeiffer*, the State did not reserve to itself any right to comment upon or object to the sentencing or to appeal such discretionary determination by Judge Maddox. The Agreement precluded the State's input on sentencing. This has been more fully argued by Field in Briefs, incorporated herein.

**D. This Court is deprived of subject matter jurisdiction as a result of the above.**

This Court must have subject matter jurisdiction to consider any appeal. The actions of the Circuit Court taken after the issuance of the Writ of Certiorari to the Court of Appeals deprive this Court of subject matter jurisdiction. As a result, the appeal must be dismissed. This Court does not concern itself with moot or speculative questions. *Sloan v. Greenville County*, 380 S.C.528, 535, 670 S.E.2d 663,667(App.2009). Lack of subject matter jurisdiction may be raised at any time on appeal. *State v. Ervin*, 333 S.C. 351, 510 S.E.2d 220(App. 1998). The lower court's exercise of

sound judicial discretion based upon the facts before it in 2013, 2014 and 2018 should be affirmed. This appeal should be dismissed.

**E. Movant should be permitted to supplement the record and/or this Court should take judicial notice of action(s) and Order(s) of the Circuit Court subsequent to the issuance of certiorari to the Court of Appeals.**

This Court issued a Writ of Certiorari to the Court of Appeals on August 21, 2018. All such actions took place following the submission of the record by Appellant. The State Grand Jury Clerk is in possession of such Orders and the State has actual or constructive notice thereof.

Movant should be permitted to supplement the record with such Order, as clarified, in the interests of justice and to provide this Court with a more complete record, S.C.A.R.212(b). See, *Windham v. Sanders*, 287 S.C. 170, 337 S.E.2d 205(1985) (Supreme Court permits supplement of record on appeal); *Curtis, supra*(Attorney General's motion to supplement record granted). The State has actual and/or constructive notice of all prior court Orders and actions by the Dept. of Corrections.<sup>3</sup>

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<sup>3</sup> Alternatively, this court should take judicial notice of such Orders of the lower court, both of which are germane to the issues raised herein and are matters of fact, as is Field's completion of his original sentence and release by the S.C. Dept. of Corrections on February 1, 2019. SCRE 201, *et seq.*; *Martin & Martin v. Goddin, et al.*, 732 S.E.2d 667(S.C.App. 2012). Judicial notice at the appellate stage is acceptable when it involves matters of the court records and indisputable actions of the lower court. See, e.g., *Wise v. Wise and S.C. Uninsured Employers Fund*, No. 4879(S.C.App. 8/24/11) citing *Masters v. Rogers Dev.*, 283 S.C. 251,256, 321 S.E.2d 194,197(App. 1984)(fact may be determined by reference to indisputable sources, i.e. the State), and *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (App. 1984). Counsel requests any document not submitted be judicially noticed, since such remains in the possession of the State Grand Jury Clerk. A Record may be supplemented prior to oral argument.

No prejudice will result to the State as a result of this Court's consent to supplement the record and/or to take judicial notice of the above matters. The interests of justice, law and equity will be served and such will protect Field's due process rights.

## II. CONCLUSION

In light of the foregoing, and those matters contained in the Motion to Dismiss, and also referred to in Field's Briefs the undersigned respectfully requests this Court supplement the record and then dismiss the appeal with prejudice forthwith.

**ARTHUR M. FIELD**

BY  \_\_\_\_\_

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8-30, 2019

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Respondent Brief was hand delivered on August 30, 2019 to:

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**AUG 30 2019**

**S.C. SUPREME COURT**