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OCT 18 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY

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Unpublished Opinion 2017-UP-455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

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL AND IN OPPOSITION TO REQUEST FOR LEAVE FOR LATE FILING

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LEGAL ARGUMENTS:

A. The State Should Not Be Permitted to File a Late Opposition.

Field filed and served a Motion to Dismiss on August 30, 2019. The State's Opposition was due 10 days thereafter, i.e. not later than September 9, 2019. SCAR Rule 240(e). Such Rule is mandatory; the word "shall" is used. The State did not timely request any enlargement of such 10 day period. Due to Hurricane Dorian, the Supreme Court extended time limits by 3 days. Such period expired on September 12, 2019.

On September 16, 2019, the Clerk entered "No Return" on the docket and gave notice thereof. The State did not respond. "Failure of a party to timely file a return may be deemed consent by that party to the relief sought in the motion..." *Ibid.*

On October 15, 2019, over 40 days after the mandatory deadline, the State seeks to file a Return to the Motion. It should not be permitted to do so. Either the time limits in the Rules have meaning, or they should not exist. The State's knowing lack of response should be deemed consent to the Motion.

Indeed, when Field sought to file a Supplemental Brief on June 5, 2019, the State immediately, strenuously opposed such Motion on the grounds that too much time had elapsed, and this Court denied Field's request on August 1, 2019. Now, the State seeks to ignore its prior intransigence and requests this Court overlook its lengthy delay. It should not be permitted to do so. The Motion for Leave should be denied and consent should be implied as set forth in SCAR 240(e). Field's Motion to Dismiss should be granted.

B. The Great Weight of Legal Precedent Supports Dismissal for Mootness.

The great weight of case law in this and other States, and the Federal Circuits support Field's Motion to Dismiss this appeal, contrary to the State's Opposition. **The law provides that any person who has maxed out his sentence and is released "is considered upon release to have served the entire term for which he was sentenced." S.C.C.A.§24-13-210(E).**[1]

In violation of the Plea Agreement, the State appealed the original factual calculation of credits from the underlying 2013 sentence. By way of analogy, in *Taylor v. SCDC*, 2017-01061(Ct.App. 10/10/2018), the Court of Appeals dismissed as moot Taylor's appeal of the calculation of credits for time served, similar to the State's appeal herein.[2] As a result of Field's re-sentencing and subsequent release in 2019 'maxing out' the 2013 sentence, the appeal is moot.

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[1] "240(E) Any person who has served the term of imprisonment for which he has been sentenced less deductions allowed for good conduct is considered upon release to have served the entire term for which he was sentenced..."

[2] "After filing the appeal, Taylor... had been released from prison. Because this court cannot provide effectual relief regarding Taylor's credit for time served, we dismiss the appeal as moot. See *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("Generally, this [c]ourt only considers cases presenting a justiciable controversy."); id. at 26, 630 S.E.2d at 477 ("A moot case exists whe[n] 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."); *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001) ("[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review."); *Sloan*, 369 S.C. at 27, 630 S.E.2d at 478 ("However, the action must be one [that] will truly evade review [for the mootness exception to apply]."). Although *Taylor* is an unpublished opinion, it is demonstrative of a factual situation akin to the one herein involving calculation of credits. The State benefitted from the dismissal of Taylor's appeal. Nevertheless, the *Taylor* court may have misconstrued *Curtis* exceptions as applicable to criminal matters, when the precise language in *Curtis* specifies 'civil'.

If a convict cannot appeal the calculation of credits after release, the State should not be able to do so either. "After all, in the law, what's sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson, NJ*, 136 S.Ct. 1412(2016); *Rodarte v. Univ. of South Carolina*, 419 S.C. 592, 799 S.E.2d 912, n.13(S.C. 2017)(Kittredge, J.).[3]

Other States agree. Florida's Court of Appeals dismissed as moot an appeal of revocation of probation and resentencing because the appellant had maxed out his sentence and was released. *Jones v. State*, 239 So.3d 1294(Fl. 1 DCA 2018), similarly *Miller v. State*, 79 So.3d 209,211(Fl. 1 DCA 2012). Georgia held the same, *Jayko v State*, 782 S.E.2d 788, 335 Ga.App.684(2016). Utah's Supreme Court stated, "When a defendant challenging his or her probation revocation serves out his or her sentence, the appeal becomes moot." *State v. Legg*, 2018 UT 12(2018). Also, *Blake v. Mass. Parole*, 341 N.E. 2d 902(Mass. 1976)("Appeal ...became moot when the inmate was released from custody on the basis of time served and good time credits.")[4]

The U.S. Courts of Appeal adhere to the same principles and dismiss for mootness and lack of subject matter jurisdiction. If "events occur during the pendency of [an appeal] which render the court unable to grant the requested relief the case becomes moot." *Abela v. Martin*, 309 F.3d

[3] Clearly there is no way this Court can restore improperly calculated insufficient good time credits to a prisoner after his final release, hence an appeal based thereon is moot. It would be manifestly unjust to sanction the *contra-scenario* where a prisoner could be forced to serve additional time after final release for improperly calculated *excess* credits based on an appeal from the State. Such would be a denial of the equal protection of the law guaranteed by the South Carolina Constitution.
[4] The Massachusetts Supreme Court held once a prisoner has been released for completion of his sentence, it is illegal to re-arrest him without a new, independent indictment. Mass.G.L. c.248, §24. *Averett v. Comm'r of Corrections*, 517 N.E.2d 844(1988)). Also see, *State v. Mastrodonato*, 2018 Oh. 4004(Oh. App. 10/1/18)(appeal dismissed as moot after completion of sentence) and *State v. Jones*, 2019 Oh. 1126(Oh.App. 3/28/19)(same). Also, *State v. Stafford*, 2017 Il.App.(5th) 150240(App. 12/5/2017)(appeal dismissed). *State v. Snowman*, 698 A. 2d 1057,1058(ME 1997)(same).

338,343 (6th Cir. 2002).[5] The intervening Orders of Judge Maddox in 2018 knowingly altered the underlying sentence and caused the appeal to be moot. See, similarly, *S.C. Dept. of Social Services v. Shawna O*, 2009-UP-145(Ct.App. 3/17/2009)(intervening lower court order moots appeal) citing *Curtis, supra,* and *Collins Music Co. v. IGT*, 365 S.C. 544,549, 619 S.E.2d 1,3 (Ct.App. 2005). See, also, *State v. Green*, 337 S.C. 67, 522 S.E.2d 602(Ct.App. 1999)(State's appeal dismissed when defendant pled guilty during pendency of appeal).

South Carolina only recognizes three exceptions to the mootness doctrine and generally only in the civil context. *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338(Ct.App. 2003).[6] This is clearly not a situation where any issue raised by the State would escape future review should the situation ever arise again.

Our courts decline to exercise jurisdiction when the defendant has been released even when the State has asserted the issue should be considered. See, e.g., *Tinsley v. S.C. Dept. of Probation, Parole & Pardon Services*, 2016-UP-163(Ct.App. 8/10/2016)("Tinsley will no longer be subject to parole hearings, and the Parole Board's use of allegedly inaccurate information to deny him

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[5] For other examples, see: *U.S. v. King*, 17-10006(9th Cir. 6/4/2018)(dismissing appeal of probation revocation and resentencing after maxing out and release); *U.S. v. Meyers*, 200 F.3d 715(10th Cir. 2000)(Attorney General's motion for dismissal for mootness and lack of jurisdiction granted after maxing out re-sentencing after probation revocation). And, *Demis v. Sniezek*, 558 F.3d 508(6th Cir. 2009)(dismissed as moot after sentence completion citing *Powell v. McCormack*, 395 U.S. 486,496(1969)). And, *Kendrick v. Hamblin*, 606 F.App'x 836(7th Cir. 2015). Since the Circuit Court terminated Field's probation and declined to order any supervision following Field's 2019 release, no further effect of the underlying sentence can occur and this appeal became moot no later than February 8; 2019. *U.S. v. Hardy*, 545 F.3d 280,282(4th Cir. 2008); *U.S. v. Jones*, 639 F. App'x 184(4th Cir. 2016). Cf. *U.S. v. DeLeon*, 444 F.3d 41,55(1st Cir. 2006).

[6] "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). That case was a civil matter and the Supreme Court made it clear the issue was moot when the temporary injunction expired. However, the Court considered the merits of the underlying case separate from the injunction issue. Nothing in *Curtis* extended the 'evading review' standard to criminal cases.

parole is no longer capable of repetition... Because no justiciable controversy exists, we dismiss this appeal." Citing *Byrd v. Irmo H.S.*, 321 S.C. 426,431, 468 S.E.2d 861,864(1996).) [7]

C. **The Court Lacks Subject Matter Jurisdiction. The State is Incorrect.**

Mootness deprives this Court of subject matter jurisdiction. *Holden v. Cribb*, 349 S.C. 132,136, 561 S.E.2d 634,637(Ct.App. 2002); *Pashby v. Delia*, 709 F.3d 307,316(4th Cir. 2013). **This was not an error of law and the State did not claim it to be such at the hearing on Reconsideration. It claimed the credits had been miscalculated based on fact.** The issue of 'error of law' was not preserved. The State had every opportunity to raise prior court orders of Judge Benjamin at sentencing. It did not. It did not even contest the calculation of credits until Field was released from S.C.D.C. in 2013. However, errors of law are not an exception to the mootness doctrine depriving the court of jurisdiction. *Winkler v. State*, 27685(S.C. 2016)n.17 ("majority rightly declines to address a...moot error of law"). Also, *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 2011-UP-464(Ct.App. 2011)(dismissed as moot).

[7] "The 'capable of repetition' doctrine is not as broad as its capsule description sounds but applies only in exceptional situations." *City of Los Angeles v. Lyons*, 461 U.S. 95,109(1983). Repetition must not be a mere possibility, there must be a reasonable expectation of it. In the 6-plus years since the statute was amended, this precise factual situation has not arisen other than in the instant case. In most cases, avoiding mootness requires that both parties have a stake in the outcome. *Camreta v. Greene*, 563 U.S. 692(2011). Here, Field has fully completed his sentence and cannot be returned to prison based upon his initial release in 2013. The Legislature can resolve this matter if there actually exists any confusion about the construction of S.C.C.A. §24-13-40. This Court need not intervene and does not issue declaratory judgments. There is not a reasonable likelihood that the circumstances which brought about this unusual situation will occur, but if the Attorney General feels the statute requires clarification, it can and should look to the Legislature for such refinement. In the intervening 6 years since the statute was amended, it has not done so. Nor has a similar case arisen. Either Judge Maddox was correct in his discretionary calculation of credits in 2013, or the judiciary has reached a full understanding of the meaning of the 2013 amendment and no action by this Court is required.

The State is incorrect in its interpretation of *State v. Picklesimer*, 388 S.C. 264, 695 S.E.2d 845(S.C. 2010), which applied solely to the construction of S.C.C.A. §24-21-560(C), but did hold that any sentence is comprised of all portions, active and suspended. Since Field 'maxed out', §24-13-210(E) holds he fully completed all portions of his sentence, active and suspended. *Picklesimer.*

D. The State Did Not Preserve Any Appellate Rights. Any Doubt Concerning Such Waiver Must Be Resolved In Field's Favor.

The State did not preserve the right to appeal in the Plea Agreement of 2013. As stated by the Fourth Circuit in *United States v. Under Seal*, 17-4558(4th Cir. 8/22/2018):

> "When interpreting plea agreements, we draw upon contract law as a guide to ensure that each party receives the benefit of the bargain, and to that end, we enforce a plea agreement's plain language in its ordinary sense." *United States v. Warner*, 820 F.3d 678, 683 (4th Cir. 2016) (internal quotation marks omitted);.... As is the case with other contracts, **ambiguities in a plea agreement are "construed against the government** as its drafter." *United States v. Barefoot*, 754 F.3d 226, 246 (4th Cir. 2014). Indeed, **because plea agreements involve waivers of constitutional rights, we** review them "with greater scrutiny than we would apply to a commercial contract and **hold the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities** in plea agreements." *United States v. Davis*, 714 F.3d 809, 814-15 (4th Cir. 2013). (Emphasis added.)

This is not akin to *State v. Pfeiffer*, 27891(5/29/2019). Field entered into the Plea Agreement based upon the State's multiple representations it would not seek incarceration and would not object to the sentencing in any form or appeal. Field waived all of his substantial constitutional

rights.[8] In *Pfeiffer*, this Court found that the waiver did not apply since Judge Maddox lacked jurisdiction to perform the act the State appealed. Here, no such argument can be made.

The State did not contest the award of credits in its Motion for Reconsideration; it merely contested the computation of good time by the Department of Corrections. It only raised the factual calculation of original credits in oral argument. The undersigned immediately objected that such argument was a wrongful attempt to circumvent the Plea Agreement. There is no question that Judge Maddox had the jurisdiction and right to determine the credits to be awarded within his discretion.

And, the State only raised the 'error of law' argument in its appeal for the first time. This was not raised at sentencing or in its Motion for Reconsideration. Even today, the State is arguing whether Field was on 'house arrest'. At the hearings below, there was ample uncontested testimony that Field was effectively on house arrest the entire time for which he was awarded credit. Judge Maddox heard the uncontested evidence and made a ruling based on the facts as he understood them. The State explicitly or implicitly waived the right to object to or appeal such

[8] The Fourth Circuit has repeatedly upheld *Guevera* and the Supreme Court declined to overrule it, denying *certiorari*. Although some Circuits may disagree with the Fourth Circuit, this Court has consistently confirmed the rule of law set down by our Fourth Circuit is controlling in South Carolina as it relates to plea agreements. *Spoons v. State*, 379 S.C. 138,142, 665 S.E.2d 605,607(2008). The Fourth Circuit recognizes that the government enters into such Agreements in order to gain swift resolution of cases. In the instant case, a very complex matter was resolved by the entry of a guilty Plea, and the State obtained huge cooperation from Field and the agreement to testify against a co-defendant. The State should not be permitted to renege on such Agreement. See, e.g., Justice Few's opinion in *State v. Blakney*, 410 S.C.244, 763 S.E.2d 622(App. 2014). Judge Maddox took all of this into consideration when he sentenced Field and when he refused to alter that sentence in July, 2014, and again when he revised the sentence in 2018. A Circuit Court has vast authority in determining a sentence.

determination. Any other result would deprive Field of the equal protection of the law and his constitutional due process rights.

E. The Discretion of the Circuit Court Should Be Affirmed. Judge Maddox was Aware His 2018 Actions Would Moot the Appeal.

The Circuit Court acted within its sole discretion when it awarded the initial credits in October, 2013 and then when it resentenced Field in September, 2018. Judge Maddox was fully aware of the State's prior Motion to Reconsider, his denial thereof and the State's appeal. He took all of that into consideration in revising the original sentence and determining 9 more months' incarceration would complete and fully satisfy such sentence. His discretion should be upheld. Judge Maddox repeatedly stated in denying the Motion for Reconsideration that his sentencing goals and objectives had been met. Were that not the case, every person could revisit earlier rulings in a case after subsequent rulings caused such rulings to be ineffective. State law provides Field has fully completed his sentence. This court cannot 'return' Field to prison following such completion. S.C.C.A.§24-13-210(E).

It should further be noted that Field immediately appealed the imposition of criminal contempt by Judge Miller, which led to the probation revocation. That appeal was withdrawn based upon the understanding that the revised sentence by Judge Maddox would terminate all existing matters relating to the original 2008 sentence and in direct reliance thereon. But for such agreement, the appeal would not have been withdrawn. Ironically, since Judge Miller refused to release Field pending the appeal of the criminal contempt as mandated by SCAR Rule 246, Field would have served the 6 month sentence prior to the appeal being considered, which would then have mooted the appeal. What's sauce for the goose is sauce for the gander. The appeal should be dismissed and this 7 year ordeal should be ended.

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 deny the motion for leave to file late and then dismiss the appeal with prejudice forthwith.

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October 16, 2019

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Certificate of Service

I certify that I have served the *Reply Brief in Support of Motion to Dismiss Appeal* by depositing three copies in the United States Mail, postage prepaid, on October 18th, addressed to each of the State's attorneys of record:

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