

IN THE SUPREME COURT OF NORTH DAKOTA

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State of North Dakota,	)	<b>Supreme Court File No.</b>
	)	<b>20220031</b>
	)	
Plaintiff and Appellee,	)	<b>Morton County No.</b>
	)	<b>30-2019-CR-00326</b>
	)	
v.	)	
	)	
Chad Trolon Isaak,	)	<b>APPELLANT'S</b>
	)	<b>SUPPLEMENTAL BRIEF</b>
	)	
Defendant and Appellant.	)	

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[¶ 1] Chad Trolon Isaak appealed from a criminal judgment, arguing constitutional and structural errors occurred at his trial. On July 31, 2022, during the pendency of this direct appeal, Mr. Isaak died. The Court requested the parties brief:

- I. Whether the case is moot.
- II. Whether the case abates.

The Historical Context of Abatement Ab Initio

[¶ 2] The two questions this Court has posed unavoidably overlap. A discussion of the nature of the criminal justice system and the doctrine of abatement is, therefore, necessary. Jurisprudence surrounding the purpose of the criminal justice system articulates the goals of public safety as well as punishment and rehabilitation of the guilty. When a defendant dies pending the direct appeal of their criminal conviction, those objectives become both unnecessary and impossible. *See State v. Dalman*, 520 N.W.2d 860, 865 (N.D.

1994) (Justice Levine, concurring) *State v. Burrell*, 837 N.W.2d 459 (Minn. 2013); *State v. Hoxsie*, 570 N.W.2d 379, 380 (S.D. 1997); *People v. Mazzone*, 74 Ill.2d 44, 46 (1978). *State v. Carlin*, 249 P.3d 752, 756 (Alaska 2011).

[¶ 3] An appeal in the aforementioned context has historically been considered moot, but the conviction was not final therefore the common law doctrine of abatement ab initio was applied. In more recent decisions, state court holdings discuss the doctrine of abatement when considered within the context of the rights of victims, legitimacy of the criminal justice system, and the right of a defendant to have his conviction reviewed. *See People v. Robinson*, 187 Ill. 2d 461 (Ill. 1999); *State v. Al Mutory*, 581 S.W.3d 741 (Tenn. 2019). The consideration of the larger policy and administration of justice interests some state courts have advanced frames the issue of mootness differently. The abatement doctrine applies not because the issues on appeal are moot, i.e. the death of the defendant extinguishes all controversy, but because the conviction is not final. Dismissing the appeal but letting the conviction stand removes any meaningful review, and therefore, the legitimacy of the conviction and a party's right to appeal.

[¶ 4] The United States Supreme Court in *List* and then again in *Menken* treated abatement in a criminal case as the necessary action if a defendant died pending a criminal appeal. *List v. Pennsylvania*, 131 U.S. 396 (1888); *Menken v. Atlanta*, 131 U.S. 405 (1889). In *Durham* the Court clarified that the defendant's death pending review abates all previous

prosecutive proceedings. *Durham v. United States*, 401 U.S. 481, 483 (1971). The Court came to this conclusion after reviewing the federal courts' procedure and looking specifically at the Eighth Circuit's comprehensive discussion of abatement in *Crooker*. *Crooker v. United States*, 325 F.2d 318 (8th Cir. 1963).

[¶ 5] Shortly after *Durham*, the Supreme Court declined to apply the doctrine to a pending review by certiorari. See *Dove v. United States*, 423 U.S. 325 (1976). The Seventh Circuit in *Moehlenkamp* explained that the *Dove* Court was excluding only its discretionary review from the doctrine of abatement ab initio. *United States v. Moehlenkamp*, 557 F.2d 126, 127 (7th Cir. 1977). Since *Moehlenkamp* all the federal courts, excluding the First Circuit which has not addressed the issue, and a plurality of state courts apply abatement as it is laid out in *Durham*: when an appellant dies pending the determination of a direct appeal, the appeal and the underlying conviction are abated. See *Howell v. United States*, 455 A.2d 1371 (D.C. 1983); *People v. Johnson*, 499 P.3d 1045 (Colo. 2021); *People v. Matteson*, 75 N.Y.2d 745, 746 (N.Y. 1989); *People v. Robinson*, 187 Ill. 2d 461 (Ill. 1999); *People v. Schaefer*, 208 Cal.App.4th 1283, 1287 (2012); *Perry v. State*, 821 P.2d 1284 (Wyo. 1992); *State v. Burrell*, 837 N.W.2d 459 (Minn. 2013); *State v. Carter*, 299 A.2d 891 (Me. 1973); *State v. Clark*, 260 N.W.2d 370 (S.D.1977); *State v. Free*, 37 Wyo. 188, 260 P. 173 (1927); *State v. Holbrook*,

261 N.W.2d 480, 481 (Iowa 1978); *State v. McClow*, 395 So.2d 757, 758 (La.1981).

[¶ 6] The issue of finality is the underlying reasoning for abatement ab initio. An abated case is remanded to the trial court with instructions to abate the underlying judgment and sentence and to enter an order documenting that the appeal has been dismissed.

Such abatement is premised on the theory that without it, the defendant would be deprived of his statutory right to review, that the conviction is not final until the time for appeal is exhausted, and that abatement prevents both recovery against the decedent's estate (if there is a fine) and the use of the conviction in civil litigation against the estate. Another justification is that punishment—the purpose of the criminal justice system—is not possible after the defendant dies.

Wayne R. LaFare et al., 7 Criminal Procedure . § 27.5(a) (4th ed. Nov. 2018 update).

[¶ 7] Notwithstanding the long precedent of the doctrine of abatement ab initio, some state courts have adopted a procedure that allows the appeal to continue on the merits. *See State v. Christensen*, 866 P.2d 533, 536 (Utah 1993); *State v. McDonald*, 144 Wis.2d 531, 537, 424 N.W.2d 411 (1988) (holding that a deceased defendant's appeal was not moot because his conviction may lead to "potential collateral consequences" for his estate); *State v. Salazar*, 123 N.M. 778 (N.M. 1997); *State v. Reed*, 456 P.3d 453 (Ariz. 2020) (the legislature had abolished abatement ab initio therefore the court will decide cases on the merits.) The states that allow the appeal to proceed on the merits of the case do so because there are issues that are not moot and

the courts need to correct or address important legal issues, which may reoccur.

### Moot Appeal Issues and the Substitution of Parties

[¶ 8] Similar to states that allow an appeal to proceed on the merits, some courts allow for the appeal to continue with a substitution of the deceased party. *See Bell v. State*, 392 Md. 17, 895 A.2d 1034 (2006); *Bevel v. Commonwealth*, 717 S.E.2d 789, 282 Va. 468 (2011); *City of Newark v. Pulverman*, 12 N.J. 105, 116 (N.J. 1953); *Ex parte State (In re Wheat)*, 907 So.2d 461 (Ala. 2005) (The State’s criminal procedure Rule 43 allowing substitution may continue the merits of the case resulting in abatement of the entire conviction.); *Majors v. State*, 465 P.3d 223 (Okla. Crim. App. 2020); *Payton v. State*, 266 So. 3d 630 (Miss. 2019); *State v. Al Mutory*, 581 S.W.3d 741 (Tenn. 2019) (Continuation of the case after death has been left open); *State v. Carlin*, 249 P.3d 752 (Alaska 2011); *State v. Clements*, 668 So. 2d 980, 982 (Fla. 1996); *State v. Makaila*, 897 P.2d 967 (Haw. 1995); *State v. McGettrick*, 31 Ohio St. 3d 138, 143 (Ohio 1987); *State v. Webb*, 167 Wn. 2d 470 (Wash. 2009). Some issues are deemed moot by the death of the defendant, generally fact issues, however the courts that allow substitution do so because there are collateral consequences for the estate and the heirs, the reputation of the defendant and the legitimacy of the criminal justice system is injured by an improper conviction.

[¶ 9] The courts that follow a procedure of substitution have also articulated that it is necessary to balance between the rights of the defendant, who died before his conviction was final, the rights of victims who have an interest in the conviction being maintained, and society at large's interest in having a legitimate criminal justice system where only the guilty are punished. *See Majors v. State*, 465 P.3d 223 (Okla. Crim. App. 2020)

#### Abated Appeals

[¶ 10] A significant minority of jurisdictions dismiss a pending appeal as moot or abate only the direct appeal not the underlying criminal conviction and indictment. *Commonwealth v. Hernandez*, 481 Mass. 582, 583, 118 N.E.3d 107 (2019); *People v. Peters*, 449 Mich. 515, 537 N.W.2d 160, 164 (1995) (But in *People v. Posby*, 586 N.W.2d 228 (Mich. 1998), when the prosecution sought review of the court of appeals the Court proceed on the merits of the case rather than dismiss the appeal as laid out in *Peters.*); *State v. Korsen*, 141 Idaho 445, 111 P.3d 130 (2005); *State v. Bixby*, 397 S.C. 154, 723 S.E.2d 841 (2011). This approach does not serve the interest of justice nor is it consistent with North Dakota's caselaw.

#### North Dakota: Abatement Ab Initio

[¶ 11] The court has never before specifically addressed the issue of abatement of a criminal appeal on direct review. In *Dalman* the Court dismissed an appeal from a post-conviction case. *State v. Dalman*, 520 N.W.2d 860, 865 (N.D. 1994). This court following the reasoning set forth in

*Dove* and *Moehlenkamp* excluded discretionary review from the doctrine of abatement ab initio. *Dove v. United States*, 423 U.S. 325 (1976); *United States v. Moehlenkamp*, 557 F.2d 126, 127 (7th Cir. 1977). The Court found that the defendant had the opportunity to directly appeal the conviction and an appeal from a discretionary or post-conviction context is moot. *Dalman* at 862. Despite this being a case of first impression, Justice Levine’s concurrence in *Dalman* argued that the best approach if a defendant died pending direct appellate review would be to apply the doctrine of abatement ab initio.

[¶ 12] These specific facts have not yet come before this Court, and, unlike other jurisdictions, there are no specific criminal procedural rules for the abatement upon the death of the defendant pending an appeal, however the common law doctrine of abatement has been applied by this court repeatedly. This Court applied the notion of finality used in the application of the doctrine of abatement ab initio in direct criminal appeals to a divorce case as recently as 2014. *See Albrecht v. Albrecht*, 2014 ND 221, ¶ 15, 856 N.W.2d 755 (N.D. 2014). The *Albrecht* Court held, “Albrecht’s death before entry of a final judgment from which an appeal could be taken abated the divorce action. We therefore reverse the divorce judgment and remand for dismissal of the divorce action.” *Id.*

Article I section 25 Does Not Abrogate Common Law Doctrine

[¶ 13] The Illinois Supreme Court in *Robinson* considered constitutional amendments that gave crime victims ten distinct rights in criminal prosecutions, which were extremely similar to those found in the North Dakota Constitution Article I section 25, and determined it had “neither application nor reference to the abatement of criminal prosecutions.” *People v. Robinson*, 187 Ill. 2d 461, 463 (Ill. 1999). Similarly, the Court in *Johnson* found that unless the legislature expressly abrogates a common law doctrine the doctrine remains. *People v. Johnson*, 499 P.3d 1045 (Colo. 2021); *See also Bornsen v. Pragotrade Llc*, 804 N.W.2d 55 (N.D. 2011); N.D.D.C. § 1-01-06 (“In this state there is no common law in any case in which the law is declared by the code.”).

[¶ 14] The common law doctrine of abatement ab initio for the underlying reasons of finality have been discussed and applied in North Dakota, the concurrence in *Dalman* specifically stated the doctrine should apply in direct appeals. Nothing in the constitution or by direct statute abrogates that doctrine. *See also State v. Reed*, 456 P.3d 453 (Ariz. 2020) (Where the legislature specifically abolished the doctrine of abatement ab initio the Court could no longer abate a case, but the legislature cannot infringe on the Court’s power to create procedural rules allowing the case to be heard on the merits.)

[¶ 15] This Court’s precedent adheres to doctrine of abatement ab initio because a judgment is not final until the appeal has been decided or the



time for requesting review has run, otherwise known as the finality principle, the Court should dismiss Mr. Isaak's appeal and all previous prosecutive proceedings consistent with this court's holding in *Albrecht* and Justice Levin's concurrence in *Dalman*.

[¶ 16] Alternatively if the Court overturns prior common law doctrine this case should proceed on the merits as the issues presented to the Court are not merely factual disputes but important legal questions of a constitutional dimension that should be resolved as they have a statewide impact and are likely to reoccur before the issue can be raised before this Court.

Dated: August 30, 2022

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**CERTIFICATE OF COMPLIANCE**

[¶ 1] This Appellant's Supplemental Brief complies with the page limit set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: August 30, 2022

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	)	
v.	)	
	)	
	)	
Chad Trolon Isaak,	)	<b>DECLARATION OF SERVICE</b>
	)	
Defendant and Appellant.	)	

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[¶ 1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

**Appellant’s Supplemental Brief**

And that said copies were served upon:

Gabrielle Goter, Morton County Assistant State’s Attorney,  
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by electronically filing said documents through the court’s electronic filing system.

Dated: August 30, 2022.

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