20220031
FILED AUGUST 30, 2022
CLERK OF THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, **Plaintiff/Appellee,** **vs.** **Chad Trolon Isaak,** **Defendant/Appellant.**	**Supreme Court No. 20220031** **Morton County No. 30-2019-CR-00326** **APPELLEE'S BRIEF REGARDING DISMISSAL FOR MOOTNESS AND ARGUING AGAINST ABATEMENT**

I. STATEMENT OF FACTS:

[¶1] The Defendant, Chad Trolon Isaak, was found guilty of all counts against him as alleged: Counts I-IV: Murder, Class AA Felony in violation of N.D.C.C. § 12.1-16-01; Count V: Burglary, Class B Felony in violation of N.D.C.C. § 12.1-22-02; Count VI: Concealment within a Vehicle, Class C Felony in violation of N.D.C.C. § 12.1-22-04; and Count VII: Unauthorized Use of a Motor Vehicle, Class A Misdemeanor in violation of N.D.C.C. §12.1-23-06. The verdict came after a three-week jury trial where the Defendant was represented by three attorneys.

[¶2] The Defendant was subsequently sentenced and appealed the conviction within thirty days of the judgment. While the appeal was pending, on July 31, 2022, the Defendant, Chad Trolon Isaak committed suicide while in prison. This Court stayed the appeal and requested simultaneous briefs regarding whether the Defendant's appeal is moot and/or whether the case should abate. This Court also requested the parties address victims' rights as they pertain to this Court's decision.

II. LAW AND ARGUMENT:

A. The Appeal is Moot and Should be Dismissed.

[¶3] Rule 42(c) of the North Dakota Rules of Appellate Procedure states, "When an issue before the court may have become moot due to a change in circumstance, the parties shall advise the court in writing and explain why appeal of the issue should or should not be dismissed." This Court has previously stated that "before reaching the merits of an appeal, we consider the threshold issue of mootness." *Fercho v. Remmick,* 2003 ND 85, ¶7, 662 N.W.2d 259 (2003) (quoting *Simpson v. Chicago Pneumatic Tool Co.*, 2003 ND 31, ¶657 N.W.2d 261). "This Court does not render advisory opinions, and…will dismiss an appeal if the issues become moot or academic so no actual controversy is left to be determined." *Id.* (quoting *Ashely Educ. Ass'n v. Ashley Pub. Sch. Dist.,* 556 N.W.2d 666, 668 (N.D. 1996). The *Fercho* Court outlined when an appeal is moot, stating, "An appeal is moot when an appellate court is unable to render effective relief because of the lapse of time or because of the occurrence of an event prior to the appellate court's determination." *Id.*

[¶4] In the instant case, the appeal of Defendant Chad Trolon Isaak is moot. The change in circumstance is the voluntary taking of his own life, leaving no live Defendant in a criminal case. The remedy sought from all issues in the appeal was a new criminal trial, which cannot be held in absentia or after the death of the Defendant. The sought remedy is no longer available. A new trial cannot be held, as no person can stand in the stead of, or substitute for, a criminal defendant. For these reasons, the appeal of Chad Trolon Isaak should be deemed moot and dismissed.

[¶5] The *Fercho* Court discussed whether an issue that is moot is decided by this Court. The *Fercho* Court cited to *Sposato v. Sposato*, 1997 ND 207, ¶9, 570 N.W.2d 212 in stating that "this Court will determine an issue that is moot, rather than dismiss the appeal, "if the controversy is one of great public interest and involves the authority and power of public officials or if the matter is capable of repetition, yet evading review." "Public interest" was defined as:

> [M]ore than mere curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interest of the particular localities which may be affected by the matter in question.

Ashley Educ. Ass'n v. Ashley Pub. Sch. Dist., 556 N.W.2d 666, 668 (N.D. 1996) (quoting *Forum Pub. Co. v. City of Fargo*, 391 N.W.2d 169, 170 (N.D. 1986)).

[¶6] In this case, there is no issue that meets the definition of "public interest." The issues raised on appeal were particular to Chad Trolon Isaak and whether his criminal trial was fair. Unlike the cases of *Walker v. Schneider*, 477 N.W.2d 167, 170 (N.D. 1991), where the public interest considered was the scope of a prosecutor's authority and the legal right of citizens, or *North Dakota Council of Sch. Adm'rs v. Sinner*, 458 N.W.2d 280, 283 (N.D. 1990), where the public interest considered was a statute unconstitutionally delegating legislative power and challenging state officials' authority to impinge on the legislative assembly's appropriation power regarding millions of dollars of state aid going to local school districts, there is no similar "public interest" in the case of Chad Trolon Isaak, where the community or the State of North Dakota at large has been affected.

[¶7] Nor are any of the facts or procedural determinations contained within the case of the State of North Dakota versus Chad Trolon Isaak likely to be repeated without being subject to review. Each criminal defendant has a right to appeal or review, at which time any procedural or factual disputes or issues may be raised. Although there could be a criminal case where similar rulings are made regarding trial exhibits, jury selection, or bench conferences, this court does not "render a purely advisory opinion merely because the issue may arise in the future." *See In Interest of E.T.*, 2000 ND 174, ¶7, 617 N.W.2d 470; *Gosbee v. Bendish*, 512 N.W.2d 450, 454 (N.D. 1994). Because this appeal is moot and does not involve an issue of great public interest or a matter capable of repetition, yet evading review, it ought to be dismissed.

B. Abatement Is Not A Procedure Available To This Court In A Criminal Case.

[¶8] Abatement is an outcome or action not contemplated by the North Dakota Rules of Appellate Procedure. Instead, the rules of Appellate Procedure do contemplate dismissal or the substitution of a party. In fact, there is no statutory authority that allows for the legal mechanism of abatement by this Court in the State of North Dakota.

[¶9] The United States Supreme Court established in *Durham v. United States*, 401 U.S. 481, 484 (1971) (per curiam) that when a defendant in a federal criminal case died pending appellate review of his conviction, all proceedings against him, including the indictment, abated, and the conviction was dismissed on remand to the trial court. The rationale for this decision seemed to come from a misplaced idea that goals of criminal law, including rehabilitation, retribution, and deterrence, would not be furthered by upholding the deceased's conviction.

[¶10] However, the United States Supreme Court set new precedent on this issue in *Dove v. United States*, 423 U.S. 325 (1976) (per curiam) where a criminal defendant died while a petition for certiorari to the United States Supreme Court was pending. The Supreme Court denied certiorari and maintained the conviction on the Defendant's record. The *Dove* Court stated to the extent that its decision was inconsistent with *Durham*, *Durham* was overruled. *Dove v. United States*, 423 U.S. 325, 325 (1976) (per curiam).

[¶11] Federal and state appellate courts have various interpretations as to how far *Dove* overruled *Durham*. *Durham* itself stated that the difference between a direct appeal or petition for certiorari are both equal rights of a defendant, concluding: "Since death will prevent any review on the merits, whether the situation is an appeal or certiorari, the distinction between the two would not seem to be important for present purposes." 401 U.S. 481, 483 (1971).

[¶12] This Court considered the issue in *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994). In *Dalman*, the Defendant died after filing an appeal on an application for post-conviction relief but before the appeal had concluded. Dalman's attorney argued that Dalman should still have the right to withdraw his guilty plea and continue with the appeal to clear his name and memory. This Court disagreed. *Dalman* at p. 862.

[¶13] Rather, the *Dalman* Court cited to *Gosbee v. Bendish et al.,* 512 N.W.2d 450 (N.D. 1994) in stating, "We do not give advisory opinions." The *Dalman* Court continued, "Appeals are dismissed if the issues become moot or academic, such that no actual controversy is left to be determined." *Id.* "In this case the death of the appellant moots this appeal." *Id.* (citing *Jackson v. State*, 559 So.2d 320 (Fla.App. 1990). *See*

generally Annotation, Comment Note—When Criminal Case Becomes Moot so as to Preclude Review of or Attack on Conviction or Sentence, 9 ALR3d 462, 496-97 (1966 & Supp.) (majority of states hold that death of accused moots appeal); *but see State v. Witkowski*, 473 N.W.2d 512 (Wis. Ct. App. 1991) (upholding *State v. McDonald* 424 N.W.2d 411 (Wis. 1988), taking minority position that right to appeal survives death of defendant who dies while pursuing post-conviction relief). The *Dalman* Court ultimately dismissed the appeal of Donald Dalman as moot, and his conviction remained. *State v. Dalman*, 520 N.W.2d 860, 862 (N.D. 1994).

C. Victims' Rights and Wishes Favor Dismissal Without Abatement.

[¶14] Abatement in this case would be unprecedented in the State of North Dakota. Further, federal and state case law establish a precedent that abatement should not occur if this appeal is dismissed for mootness. Additionally, this Court's decision regarding mootness and abatement will undoubtedly impact victim's rights.

[¶15] As this Court is aware, victim's rights have expanded throughout the United States in recent years. In North Dakota, victim's rights have been deemed so important, our citizens have amended our Constitution to add Marsy's Law, giving victims a constitutional right to be heard. As a result, this Court must consider the impact of its holding not only on the survivors of Chad Trolon Isaak's victims, but on all future victims of crime.

[¶16] Although not binding on this Court, this exact issue was addressed by the Supreme Court of Tennessee in *State v. Al Mutroy*, 581 S.W.3d 741 (2019). Prior to *Al Mutroy*, Tennessee followed the doctrine of abatement. *Id.* at 743 (citations omitted). Abatement, "defined as the discontinuance of a legal proceeding 'for a reason unrelated

to the merits of the claim,'" was adopted by the State of Tennessee in *Carver v. State*, 217 Tenn. 482, 398 S.W.2d 719 (1966). As previously discussed, "the effect of abatement…'is to stop all proceedings *ab initio* (from the beginning) and render the defendant as if he or she had never been charged." *Al Mutroy* at 743. However, "due to changes in Tennessee's public policy in the arena of victim's rights," the doctrine was abandoned in 2019 after the holding in *Al Mutroy. Id.*

[¶17] In *Al Mutroy*, the Defendant was convicted of reckless homicide. *Id.* Following trial, the Defendant appealed. *Id.* While the appeal was pending, the Defendant died. *Id.* As in this case, the appeal was stayed and the parties filed motions on whether the doctrine of abatement should apply. *Id.* Ultimately, the Tennessee Supreme Court abandoned abatement, citing two main reasons: restitution and victim's rights. Specifically, the Tennessee Supreme Court focused on the detrimental impact abatement has on victims of crime, both emotionally and financially.

[¶18] Like in *Al Mutroy*, this Court should find that Marsy's Law and the rights of crime victims do not support abatement. This is because, as in *Al Mutroy*, abatement would significantly and detrimentally impact the victims' survivors.

[¶19] First, abatement would detrimentally affect the emotional well-being of the victims' survivors. The family, friends, and co-workers of Robert Fakler, William Cobb, Lois Cobb, and Adam Fuehrer were greatly affected by the violent and unprovoked crimes committed by the Defendant. Those individuals put faith in law enforcement, in prosecutors, and most importantly, in the judicial process as they sought justice on behalf of their loved ones and closure for themselves. During the trial process, an impartial jury was impaneled and sworn, and after presentation of the evidence and deliberation, the

Defendant was found guilty on all charges. Although the jury verdict did not provide complete closure or make the survivors whole, as their loved ones can never be brought back, it did provide a sense of peace and relief. In fact, several surviving family members and friends of the victims testified at the sentencing hearing held on December 28, 2021, highlighting the impact of the Defendant's crimes, the trial process, and the jury verdict. While doing so, they addressed the fear, stress, instability, lack of closure, and economic loss that arose as a direct result of the Defendant's crimes; before discussing the significance of the jury verdict and how they hoped it would close one of the darkest chapters in their lives. *See* R. 1524. Should this Court choose to follow the doctrine of abatement, that sense of peace and closure would be ripped away.

[¶20] Second, abatement would detrimentally affect the financial stability of the victims' survivors. Jackie Fakler, wife to Robert Fakler, close friend and business partner with William and Lois Cobb, and employer and friend of Adam Fuehrer was one of the many survivors who testified at the sentencing hearing held on December 28, 2021. *Id.* Significantly, she noted how the trial convictions helped reduce some of the lost business and negative publicity that had dramatically effected RJR Maintenance and Management Company, both professionally and financially, following the crimes. *Id.* Again, should this Court choose to follow the doctrine of abatement, that would also be taken away.

[¶21] By taking the lives of Robert Fakler, Lois Cobb, William Cobb, and Adam Fuehrer, the Defendant victimized countless family members, friends, and co-workers. In the same way, by taking his own life, those same individuals have been re-victimized, forced to relive one of the darkest days of their lives. Since abatement would only re-victimize those we seek to protect under Marsy's Law, this Court should follow the

Tennessee Supreme Court and choose not to adopt abatement. Instead, this Court should find the appeal moot and allow the jury verdict and underlying conviction to stand, in order to best serve the interests of justice.

III. CONCLUSION:

[¶22] For all of the reasons expressed above, the State respectfully asks this court to dismiss Chad Trolon Isaak's appeal as moot and find that the district court case and convictions should not abate.

Respectfully submitted this August 30, 2022 by:

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District Court No. [30-2019-CR-00326]

State of North Dakota,	)
	)
Plaintiff/Appellee,	)
	)
v.	)
	)
Chad Trolon Isaak,	)
	)
Defendant/Appellant.	)

CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on the 30th day of August, 2022, a true and correct copy of the **APELLEE'S BRIEF REGARDING DISMISSAL FOR MOOTNESS AND ARGUING AGAINST ABATEMENT** in PDF was filed with the Clerk of the North Dakota Supreme Court with a copy served upon the Defendant/Appellant by electronic mail to his counsel of record, Kiara Kraus-Parr to her email address: service@kpmwlaw.com.

Dated the 30th day of August, 2022.

/s/ Gabrielle J. Goter

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