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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

JUL 11 2023

SC Court of Appeals

APPEAL FROM OCONEE COUNTY  
ADMINISTRATIVE LAW COURT

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No.: 2018A3710400073

STATE,

RESPONDENT(s),

Versus

MACK ADAMS GAINES,

APPELLANT.

APPELLATE CASE NO. 2022-000567

PRO SE BRIEF OF APPELLANT

Comes Now The Appellant, MACK GAINES Hereby FILES THIS PRO SE BRIEF IN  
OPPOSITION TO THE STATE AND THE ANDERS BRIEF FILED BY THE SCCID AS  
FOLLOWS:

**APPELLANT IS NOT GUILTY UNDER S.C.C.A.  
§ 43-35-85(F) FOR NEGLIGENCE OF HIS MOTHER**

**STATEMENT OF FACTS**

Appellant, Mack Adams Gaines ("Appellant" or "Gaines"), has been charged by  
indictment with Abuse or Neglect of a Vulnerable Adult – Resulting in Death, in  
violation of S.C. Code Ann. § 43-35-85(F). The Affidavit in support of the arrest warrant  
for Gaines alleges as follows:

The Appellant did, between 12-15-17 and 12-18-17, knowingly and willfully  
neglect to provide proper care and seek medical attention for Alma Louise Gaines,

who was a vulnerable adult during the timeframe in question. The victim is also a member of the Appellant's household and his mother. Alma Louise Gaines is a 92 year old female who fell in the residence on 12-15-17. The Appellant did not seek medical attention until 12-18-17 and did not move the victim from the floor where she fell during the time in question. Further, he failed to provide adequate food, water or assistance. The victim was found unconscious by emergency medical personnel unclothed from the waist down, covered in feces and urine on 12-18-17 and she was subsequently admitted to the Greenville Hospital System at Oconee Memorial Hospital. As a result of said neglect, the victim died on 1-17-18. This incident occurred at 689 Henderson Drive, Seneca, SC in Oconee County and was investigated by OCSO. Report is on file. Case #17005351.

Gaines contends that after his mother fell, he tried to help her, but she told him and insisted that she did not want to be touched and did not want Gaines to call for medical assistance. Gaines honored his mother's wishes, but when she became unconscious, he called 911 for assistance. Gaines' mother was mentally competent and fully aware of what had happened to her when she instructed Gaines not to touch her or call anyone. Prior to her fall, Gaines' mother was physically and mentally healthy and took care of herself, and, in fact, drove Gaines to work every day. She was not in need of any assistance and could fully and adequately provide for her own care and protection.

The facts set forth by the State's witnesses does not establish that the Appellant was a caregiver as defined by the act defining what constitutes a caregiver.

Appellant raised this issue below before the circuit court judge during the directed verdict stage of the trial. Record Page 194-199.

## ARGUMENT AND AUTHORITY

### 1. APPELLANT WAS NOT A "CAREGIVER" AS DEFINED BY STATUTE AND THUS IS NOT GUILTY OF VIOLATING § 43-35-85(F)

Gaines is charged under S.C.C.A. § 43-35-85(F), which provides as follows:

(F) A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in death is guilty of a felony and, upon conviction, must be imprisoned not more than thirty years.

(emphasis added). According to the Affidavit in support of the arrest warrant, the prosecution alleges that Gaines "knowingly and wilfully neglected to provide proper care and seek medical attention" for his mother, who the indictment alleges was a "vulnerable adult".

Section 43-35-85 is part of the Omnibus Adult Protection Act (the "Act") set forth in Chapter 35 of the South Carolina Code. Section 43-35-10 of the Act sets forth the pertinent definitions that apply for purposes of § 43-35-85(F). Therefore, in order to determine if, based on the facts alleged by the State, in light of Gaines' contentions, Gaines "knowingly and wilfully neglected to provide" care for his mother in violation of the Act, the applicable definitions set forth in the Act must be examined to determine whether Gaines' alleged conduct constitutes "neglect" so as to fall within the scope of the Act.

"Neglect" under the Act means

the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult. Noncompliance with regulatory standards alone does not constitute neglect. Neglect includes the inability of a

vulnerable adult, in the absence of a caretaker, to provide for his or her own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death.

S.C.C.A. § 43-35-10(6) (emphasis added). Thus, because "neglect" is defined as the failure or omission of a "caregiver" to provide the care, etc. for a vulnerable adult, only a "caregiver" as defined by the Act is subject to the Act's criminal sanctions; it is only a "caregiver" who has the duty to act so as to be liable for "neglect" under the Act. *See Delgado v. Manor Care of Tucson AZ, LLC*, 395 P.3d 698, 702 (Ariz. 2017) (requirements of abuse claim under similar Arizona statute are that vulnerable person has suffered injury caused by abuse "from a caregiver").

"Caregiver" under the Act is defined as

a person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not limited to, a relative, household member, day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility.

S.C.C.A. § 43-35-10(2).

"Vulnerable adult" means

a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

S.C.C.A. § 43-35-10(11).

As set forth above, "caregiver", as defined by the Act, is a person who "provides care to a vulnerable adult." Although the definition can include a relative or household

member, it does not define such person as a caregiver; it requires that the person "provide care". Gaines was not a "caregiver" under the definition. Gaines' mother was a fully physically and mentally capable person who fully provided for herself. Gaines never provided care to his mother and never assumed that duty, and his mother never needed such care. After her fall, Gaines' mother was mentally alert and told Gaines not to touch her or call for medical assistance. Gaines, whether reasonably or not, merely complied with his mentally competent mother's wishes. Thus, at no time was Gaines ever a "caretaker" as defined by the Act. Section 43-35-85(F), as limited in its scope by the Act's applicable definitions, does not punish mere presence, or wholly passive conduct, but, rather, penalizes the failure of a person (with the requisite criminal intent) to provide care to a vulnerable adult only if that person is a "caregiver" as defined by the Act. *See Sieniarecki v. State*, 724 So. 2d 626 (Fla. 4th D.C.A. 1998) (construing an even broader definition of "caretaker" under the Florida statute), *approved by* 756 So. 2d 68 (Fla. 2000). Indeed, Gaines' mother was not a "vulnerable adult" before her fall, as defined by the Act. *See* S.C.C.A. § 43-35-10(11). *See Doe v. South Carolina Department of Social Services*, 407 S.C. 623, 757 S.E.2d 712 (2014) (woman's advanced age insufficient to prove that she was a vulnerable adult, and, applying clear and convincing standard of proof, Department of Social Services failed to prove Doe was a vulnerable adult under the Act). After her fall, Gaines' mother may well have been considered a "vulnerable adult", but her status as such did not affect Gaines' status as not being a caregiver. Gaines could not become a caregiver merely by virtue of his mother's fall and her arguable change in status. Whether or not Gaines may have had a moral obligation to do more, he

was not a "caregiver" and thus was under no legal obligation under the Act to provide care for his mother.

"It is a long-established principle that criminal law generally regulates action, rather than omissions, and that for criminal liability to be based upon a failure to act it must first be found that there is a duty to act – a legal duty and not simply a moral duty." *United States v. Sanford Ltd.*, 880 F. Supp. 2d 9, 16 (D.D.C. 2012) (quoting *United States v. Sabhmani*, 599 F.3d 215, 237 (2d Cir. 2010); internal quotes and other citations omitted); see *State v. Lisa*, 919 A.2d 145 (N.J. Super. App. Div. 2007), *aff'd*, 945 A.2d 690 (N.J. 2008) (granting dismissal of indictment for manslaughter based on failure to act, where State sought to incorporate principles from civil common law concerning duty to seek medical attention, and, as such, there was insufficient motive to satisfy due process). Here, Gaines had no legal duty under the applicable statute to act.

As tragic as his mother's death was, Gaines is charged under the Act, and to be held liable under the Act, he must have been a "caregiver" as defined by the Act in order to have had a legal duty to provide care for his mother and, thus, to be guilty of "neglect". The facts show, however, that Gaines was not a "caregiver" and thus had no duty to act under the Act. Therefore, he cannot be found guilty of neglect under the Act in violation of § 43-35-85(F).

**2. APPELLANT DID NOT ACT "KNOWINGLY AND WILFULLY" AS REQUIRED TO CONVICT HIM UNDER § 43-35-85(F)**

Even assuming, *arguendo*, that Gaines may be considered a "caregiver" under the Act, he did not act with the requisite criminal intent in order to be convicted under

S.C.C.A. § 43-35-85(F). A Appellant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for the particular offense. *State v. Lee-Grigg*, 374 S.C. 388, 402, 649 S.E.2d 41, 48–49 (Ct. App. 2007). Section 43-35-85(F) requires that the Appellant "knowingly and wilfully" neglect a vulnerable adult.

The term "wilfully" requires a Appellant to have acted with knowledge that his conduct was unlawful. *Dixon v. United States*, 548 U.S. 1, 5 (2006); *United States v. Moody*, 2 F.4th 180, 198 (4th Cir. 2021). As stated in *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994), "[a] willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something which the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey the law or disregard the law.'" (quoting *Spartanburg County Dep't of Social Services v. Padgett*, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988)); see *State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010) (our appellate courts have defined "willful" in a variety of contexts; in each instance, the court has required a showing of a consciousness of wrongdoing in order to provide willfulness, citing cases). The willfulness requirement ensures that the government must prove that a Appellant intended to violate the law to obtain a conviction, thereby eliminating any genuine risk of holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States v. Bishop*, 740 F.3d 927, 933 (4th Cir. 2014).

In this case, Gaines did not act willfully even if he is considered a "caregiver". If he was a caregiver, Gaines certainly was unaware that he was a "caregiver" who had a legal duty to act. He did not intend to violate the law; indeed, he was unaware of any such law. He did not intend to harm his mother but was only following her express wishes. Thus, Gaines did not act willfully.

Moreover, he did not act "knowingly". *See State v. Lee-Grigg*, 374 S.C. at 404, 649 S.E.2d at 49 (a person is said to act knowingly if he is aware the result is practically certain to follow from his conduct, whatever his desire may be as to that result). Gaines was not aware of the full extent of his mother's condition after she fell or that she would not soon be able to get up and care for herself, as she did before her fall, and he certainly was not aware that she would die as a result of her fall. Thus, Gaines did not act knowingly in failing to call for medical assistance sooner. Therefore, Gaines lacked the requisite intent necessary for a conviction under § 43-35-85(F).

### CONCLUSION

Gaines is not guilty of violating S.C.C.A. § 43-35-85(F) because he was not a "caretaker" and had no duty to act. In addition, Gaines did not act "knowingly and wilfully" as required to be convicted under § 43-35-85(F). Therefore, Gaines cannot be convicted under the statute and thus the Court should grant the Appellant's Motion to Dismiss and/or Directed Verdict.

Respectfully submitted,

Mack Gaines

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OCONEE, South Carolina  
Dated: July 2023

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Versus

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Appellee.

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CERTIFICATE OF SERVICE

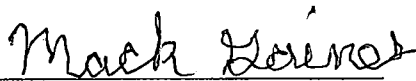
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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Pro Se Brief of the Appellant in the above referenced case has been served upon William Blitch, Jr. Esquire, at the primary address:

**William M. Blitch, Jr.**  
Sr. Asst. Deputy Attorney General  
Supervisor, State Collateral and  
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This July 5<sup>th</sup> 2023

  
Mack Gaines

Columbia, South Carolina  
Dated:

Mack A. Gaines, 00102020  
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**VIA US CLASS MAIL AND FACSIMILE TO: (803) 734-1839**  
**(Page(s) ; No Cover)**

The Honorable Jenny Abbott Kitchings  
Clerk of Court South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

In Re: State v Mack Adams Gaines  
Appellate Case No.: 2022-000567

Dear Ms. Abbott Kitchings:

Please find enclosed my Pro Se Brief for filing with the Court. You will note that I have been incarcerated and in the prison infirmary on several occasions and did not receive my mail in a timely fashion due to my medical condition.

Thanking you for your cooperation.

Sincerely,

Mack Gaines  
cc:

Ms. Katherine H. Hugins, Esquire  
Mr. William M. Blich, Jr. Esquire

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