

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ELIAS JAMES WALKER,

APPELLANT

APPELLATE CASE NO 2014-001462

RECORD ON APPEAL

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Mary Victoria Bourus	21	28	--	--

1 (March 21, 2014.)

2 MS. WILSON: This is Elias James Walker,
3 indictment 2013-GS-10-00499. This is an indictment for
4 murder and a waiver of indictment. No. 2014-GS-10-2442W,
5 that is a waiver of indictment for a possession of a
6 weapon during a violent crime.

7 Mr. Walker is here today to plead guilty to
8 voluntary manslaughter under the murder indictment and
9 the weapons charge, for which he's waiving presentment to
10 the grand jury, and we have negotiated a sentence in this
11 case.

12 THE COURT: All right. Is this Mr. Walker?

13 MS. PENN: It is, Your Honor.

14 THE COURT: Mr. Walker, you're here today on
15 two indictments, or two charges. The first is a murder
16 indictment which has been reduced down to voluntary
17 manslaughter. It's two to thirty years I'm told you want
18 to plead guilty to voluntary manslaughter; is that
19 correct?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: All right. Then you have a
22 charge of possession of a weapon during the commission of
23 a violent crime. That carries up to five years in
24 prison. That case has not been reviewed by the grand
25 jury. I'm told that you want to waive presentment to the

1 grand jury and plead guilty to that charge as well; is
2 that correct?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: All right. On both of these
5 charges, you have the right to a jury trial, and you give
6 up your right to a jury trial when you plead guilty. If
7 you want a trial, you stop me. We will arrange that for
8 you.

9 The State then has to present enough evidence
10 to convince 12 jurors that you're guilty beyond a
11 reasonable doubt. All 12 jurors have to agree that
12 you're guilty in order to convict you, and, if convicted,
13 you have the right to appeal. You can challenge the
14 State's evidence, put up evidence of your own, testify if
15 you want, and if you don't want to testify, the judge
16 will instruct the jury not to hold that against you while
17 they are deliberating.

18 Do you understand those rights?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you still want to enter this
21 plea today?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: I'm told you are pleading guilty
24 but mentally ill. Is that what you understand you're
25 here to do today?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Now, are you pleading guilty to
3 these charges because are you guilty of them?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: All right. Now, I'm told that
6 you have some mental health issues. We'll get into those
7 in some more depth in a few minutes, but your mental
8 health issues that you have, will somebody explain to me
9 what they are exactly for the record?

10 MS. PENN: Yes, Your Honor. Elias has a
11 history of mental health starting from when he was
12 younger. When he was 14, he was diagnosed with major
13 depressive disorder, conduct disorder, impulse control
14 disorder, and stimulant abuse. Currently, he has been
15 diagnosed with autism and unspecified psychosis. That's
16 the current diagnosis.

17 THE COURT: Are you taking any kind of
18 medication for those diagnoses?

19 THE DEFENDANT: At current?

20 THE COURT: Currently.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: What are you taking?

23 THE DEFENDANT: I'm taking Risperdal and
24 Tegretol.

25 THE COURT: You take the prescribed amount?

1 THE DEFENDANT: Yes.

2 THE COURT: You take these at the jail?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And when is the last time you
5 took some?

6 THE DEFENDANT: Last night.

7 THE COURT: And that was the prescribed
8 amount?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And they were administered to you
11 by someone at the jail?

12 THE DEFENDANT: Yes.

13 THE COURT: They help you think about things
14 better?

15 THE DEFENDANT: Yes.

16 THE COURT: And you understand why you're
17 here today?

18 THE DEFENDANT: Yes.

19 THE COURT: Tell me in your words what you
20 are doing here today.

21 THE DEFENDANT: I'm entering a plea for
22 voluntary manslaughter.

23 THE COURT: Okay. And for weapons charge?

24 THE DEFENDANT: Yes.

25 THE COURT: All right. All right. So the

1 medications that you're taking, they help you process
2 information?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. Now, neither of them
5 affect your ability to understand what you're doing?

6 THE DEFENDANT: No.

7 THE COURT: Okay. Now, you're standing next
8 to your lawyers. Are you satisfied with their
9 representation?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you need to spend any more
12 time with them?

13 THE DEFENDANT: I don't understand the
14 question.

15 THE COURT: Well, we're here today. We're
16 not going to trial. Presumably you've met with them
17 before this morning, correct?

18 THE DEFENDANT: Yes.

19 THE COURT: But do you need any more time
20 with them before we proceed?

21 THE DEFENDANT: No.

22 THE COURT: All right. Have they done
23 everything you asked them to do?

24 THE DEFENDANT: Yes.

25 THE COURT: Now, they set down and talked

1 with you about the evidence the State has against you; is
2 that correct?

3 THE DEFENDANT: Yes.

4 THE COURT: And they told you what that
5 evidence was, and did they tell you what the law is on
6 the various charges you were facing? For instance, you
7 were facing murder, and you're pleading guilty to
8 voluntary manslaughter, so they talked to you about what
9 the State has to prove in order to convict you of murder
10 and convict you of voluntary manslaughter; is that right?

11 THE DEFENDANT: Yes.

12 THE COURT: All right. And they explained to
13 you what the law was on possession of a weapon during a
14 violent crime; is that correct?

15 THE DEFENDANT: Yes.

16 THE COURT: You had these discussions over
17 the last several months. At some point in time, you
18 decided you don't want to go to trial, and you want to
19 enter this plea instead; is that right?

20 THE DEFENDANT: Yes.

21 THE COURT: So you have made a decision. You
22 don't want to put up a defense; is that correct?

23 THE DEFENDANT: Yes.

24 THE COURT: You understand that your mental
25 health condition is a plea that does not excuse you from

1 guilt or innocence in this charge. Do you understand
2 that?

3 THE DEFENDANT: Yes.

4 THE COURT: So when you enter this plea
5 today, it's guilty but mentally ill. Mental illness only
6 goes to some element of mitigation. That doesn't absolve
7 you of guilt. Do you understand that?

8 THE DEFENDANT: Yes.

9 THE COURT: You decided you do not want to
10 pursue a defense of not guilty by reason of insanity.

11 THE DEFENDANT: Yes.

12 THE COURT: And you made this consultation
13 with your lawyers after meeting with
14 a psychiatrist and going over the evidence with them; is
15 that right?

16 THE DEFENDANT: Yes.

17 THE COURT: You don't want them to make some
18 of the motions that you typically see in a trial, such as
19 trying to suppress evidence, maybe a confession, witness
20 identification, those sort of things? You don't want
21 them to pursue any of those motions?

22 THE DEFENDANT: No.

23 THE COURT: All right. You don't want to get
24 up and tell the jury your side of the story?

25 THE DEFENDANT: No.

1 THE COURT: And I told you earlier if you
2 didn't want to testify that the judge would tell the jury
3 they're not to hold that against you during their
4 deliberations. Do you remember that?

5 THE DEFENDANT: Yes.

6 THE COURT: Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: So you didn't want to have them
9 just put up a defense and you not testify? I probably
10 didn't say that very clearly, but you could go to trial
11 and not put up a defense. You could just set there, and
12 I would tell the jury, He doesn't have a burden of proof
13 in the case. He doesn't have to prove his innocence.
14 They have to prove he's guilty, and the fact that he
15 didn't call any witnesses and he didn't testify, you're
16 not allowed to hold that against him while you're
17 deciding whether the State met the burden of proof of
18 guilt.

19 Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: So these rights that you have,
22 you decide you want to give them up and plead guilty
23 today, correct?

24 THE DEFENDANT: Yes.

25 THE COURT: While you've had a chance to talk

1 with your lawyers, these are your lawyers, you're
2 ultimately the one to make the decision to give them up.

3 Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: And it is your decision and your
6 decision alone to give these rights up and plead today?

7 THE DEFENDANT: Yes.

8 THE COURT: All right.

9 Now, the State agrees to reduce the murder
10 charge down to voluntary manslaughter, so you went from
11 30 days to life, the sentence, to 2 to 30 years, all
12 right? So there was reduction in charge.

13 You also entered into a negotiated plea, and
14 a negotiated plea -- I'm sure your lawyers have explained
15 it to you, but I need to make sure you understand this on
16 the record. A negotiated plea says, Judge -- and you and
17 the State have agreed on the sentence, and you would like
18 me to impose the sentence if I believe the facts merit.

19 That sentence you have agreed to is a 30-year
20 sentence, but it's suspended upon you doing 18 years of
21 active time, and then you're going to be put on probation
22 for five years after that, so you got to do the active 18
23 years. You get credit for time served. You get --
24 you're not eligible for parole, but you can earn a little
25 bit of time off, but after you serve all of your active

1 time, you're still going to have 12 years hanging over
2 your head, and you'll be on probation for five years.

3 Do you understand that?

4 THE DEFENDANT: Yes, I do.

5 THE COURT: All right. The weapons charge,
6 you're going to get five years of probation -- you're
7 going to get five years, but that is subsumed by the 18
8 years that you're doing.

9 So do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: All right. Other than that
12 negotiated plea, did anybody threaten you to plead guilty
13 or promise you anything to get to you plead guilty?

14 THE DEFENDANT: No.

15 THE COURT: All right. How old are you?

16 THE DEFENDANT: I'm about to turn 24 in
17 April.

18 THE COURT: How far did you get in school?

19 THE DEFENDANT: I only finished eighth grade.

20 THE COURT: All right. Before you got
21 arrested, did you work?

22 THE DEFENDANT: Not on the books.

23 THE COURT: All right. What kind of work did
24 you do?

25 THE DEFENDANT: I worked in a plant nursery

1 for a year or two.

2 THE COURT: They just paid you cash?

3 THE DEFENDANT: They gave me a place to stay.
4 I worked on the property and I lived on the property.

5 THE COURT: Okay. That's the only job you
6 really ever had?

7 THE DEFENDANT: Were.

8 THE COURT: Are you married?

9 THE DEFENDANT: No.

10 THE COURT: Do you have children?

11 THE DEFENDANT: Yes.

12 THE COURT: All right.

13 Ms. Penn, in your opinion, does this
14 gentleman understand what he is doing here today?

15 MS. PENN: Yes, Your Honor, he does.

16 THE COURT: Do you agree with his decision?

17 MS. PENN: I do.

18 THE COURT: Mr. Butler, in your opinion does
19 he understand what he's doing?

20 MR. BUTLER: Yes, sir.

21 THE COURT: Do you agree with his decision?

22 MR. BUTLER: I do.

23 THE COURT: Let me ask you this: I
24 understand he is entering a guilty but mentally ill plea,
25 and I've seen the doctor's report about his mental

1 condition. That basically addresses criminal
2 responsibility, or the lack thereof. I didn't really
3 recall seeing anything in there about his competency to
4 stand trial and assist you.

5 Any issues in your mind about his ability to
6 understand what he is doing here today or to assist y'all
7 in preparation for trial?

8 MS. PENN: No, Your Honor.

9 THE COURT: Did you have any, Mr. Butler, any
10 reservations about that?

11 MR. BUTLER: None.

12 THE COURT: All right. I find his plea is
13 freely, voluntarily, and intelligently made.

14 What would the State like to tell me about
15 the case?

16 MS. WILSON: Thank you, Your Honor. This
17 occurred on September 17, 2012, a little after 1:00 in
18 the morning when officers were dispatched to the Fort
19 Moultrie Motel in Mount Pleasant where this defendant and
20 his father lived in a room there. That's in the Mount
21 Pleasant area of Charleston County.

22 As it turns out, the defendant was the one
23 who had called 911. When the officers arrived, they
24 found the defendant's father, Anthony, who is 45 years
25 old, lying on the floor with multiple stab wounds. He

1 was transported to MUSC where he later died from those
2 wounds. The autopsy revealed five chop wounds to the
3 left side of his head and other abrasions about his body.
4 The blood alcohol for Mr. Anthony Walker was .027.

5 When the officers arrived, defendant was
6 there on the scene and they noticed that he acted
7 strangely and didn't seem to act commiserate with the
8 scene that was there; in other words, he was very calm,
9 and they set out to interview him about what happened
10 there at the scene and then later at the station.

11 When they first interviewed him, he claimed
12 that he wasn't there and didn't have any involvement and
13 didn't know what had happened. He had been out to the
14 store and returned to find this gory scene.

15 Later, during questioning, he claimed that
16 his father had been trying to kill him his whole life and
17 admitted that he had stabbed him. Further along the
18 interview, he claimed, or he admitted, that he actually
19 attacked his father while his father was sleeping there
20 in the room and that he had delayed five or six minutes
21 after attacking his father before he called 911.

22 The murder weapon was recovered there at the
23 scene. There was a sword that was used that had blood
24 and other matter from Mr. Anthony Walker on it.

25 We have discussed this plea negotiation with

1 the Mount Pleasant police department who is in agreement
2 with the negotiation. I've also discussed it with the
3 one family member who has been the point of contact with
4 my office. I don't believe she is here today, but she
5 was aware of the plea and was involved in this
6 negotiation.

7 Your Honor, it's my understanding from this
8 family member who has given some history of the defendant
9 and the rest of the family that many members of this
10 defendant's family have mental illness, have struggled
11 with mental illnesses throughout their lives.

12 As for this defendant's prior record, Your
13 Honor, he really -- I did not see any convictions. I saw
14 a couple of arrests for disorderly conduct, that kind of
15 thing, noise ordinances, but no significant criminal
16 involvement at all.

17 THE COURT: All right. I find there is a
18 substantial factual basis for the plea.

19 What would y'all like to tell me?

20 MS. PENN: Thank you, Your Honor. A bit of
21 housekeeping question. We do have just general
22 mitigation to present, but also there is the issue of
23 whether or not Mr. Walker is parole eligible under
24 statute 16-25-90 as a victim of domestic violence.

25 We do have a witness who we would like to put

1 forth to testify about prolong violence and battered
2 children. Would you like to hear that first or after --

3 THE COURT: Well, why don't you go ahead and
4 tell me everything else you want to tell me and we'll
5 deal with that.

6 MS. PENN: Yes, sir. Mr. Walker is 24 years
7 old. In September 2012, he was 22.

8 As he told the Court, he has been fortunate
9 enough to have in his life somebody who let him stay
10 there in exchange for work. He grew up back and forth
11 between his father, Anthony Walker, and his mother, Marla
12 Horton, who is not here today.

13 During our investigation, a picture of
14 Anthony Walker, or Tony, as he was known, emerged as
15 someone who struggled with mental illness. His entire
16 family has, basically, schizophrenia and did not want to
17 be treated for it. And part of this mental health
18 issue -- you know, it's hard to say where mental health
19 starts and abuse begins, but Anthony Walker abused Elias
20 from the time he was little up until September 2012.

21 He abused Elias's mother figure in Elias's
22 life, which would be his biological mother, Marla Horton,
23 and his stepmother, Amy Maybach, who is in the courtroom
24 today, and the abuse was not just verbal abuse, although
25 it was certainly that. It was constant belittling,

1 constant threats that he was going to kill them, he was
2 going to hurt them, put them through the wall, but also,
3 very much so physical, abuse, where he would actually
4 beat these women in Elias's life, and he would beat
5 Elias.

6 Specifically, when we spoke to Ms. Maybach,
7 who is the stepmother who is here in the courtroom today
8 to support Elias, she said she had seen Tony beat Elias
9 with a belt. They had only been together from the time
10 Elias was one until he was eight.

11 Now, part of the reason this case is so
12 interesting is that in South Carolina, we do recognize
13 Battered Women's Syndrome, and we do recognize that as a
14 defense, but this Court has not yet adopted battered
15 child's syndrome.

16 Under 16-25-90, it provides that someone who
17 is a victim of domestic violence is eligible for parole
18 after a quarter of the sentence is served.

19 If I may approach, Your Honor, 16-25-90
20 provides that -- basically, if you are the victim of
21 domestic violence, you can be eligible for parole after a
22 quarter of your sentence is served. The way the statute
23 is set up is that it specifically lists out a spouse, a
24 former spouse, persons who have a child in common, and
25 then the last section of the statute is a

1 current or a prior cohabiting male and female.

2 It's our position that you can go either one
3 of two ways; and one is that is cohabiting male or female
4 means what it says, plain language, a male and a female.
5 And under that, the way this could pan out is you could
6 have a father who abused his daughter and she might snap
7 and she could be eligible for parole, or you could have a
8 mother and her son, and he could be eligible for parole,
9 but for some reason, if you have a father who beat a son,
10 the son is therefore not eligible.

11 I think that doesn't make any sense at all,
12 and we would ask the Court to find on that ground that
13 that violates the protection, that there is no point to
14 that.

15 The other way we think equal protection
16 applies is that there is no benefit and there is no
17 reason why children should not be protected, why children
18 should not have the benefit of parole eligibility if they
19 would cause harm to their abusers. I think the point of
20 this parole eligibility is to acknowledge in some way
21 that if you are abused, if you are in an abusive
22 relationship, that what you do is you are not as culpable
23 as somebody who is not, and I think that protection
24 should be extended to children as it is currently to
25 spouses.

1 As you heard, Elias's report is minimal and
2 we would argue he's not dangerous to anybody anymore.
3 One of the interesting things about this case is that
4 family on his father's side, his paternal side, actually
5 approached us and wanted to talk about Elias and wanted
6 to speak about Tony and what they've seen and heard and
7 their involvement with Tony in trying get him to seek
8 treatment and trying to get him to seek help.

9 This was a man who had started in life as a
10 very upward more middle classman who had jobs, could
11 afford to put his child in private school, and I think
12 really love his child, even though he abused him, and
13 devolved into somebody who, towards the end, was
14 paranoid, was convinced there was a hit out on him; went
15 so far as to report this to Walterboro police, so it's in
16 their records, and would stay in hotels.

17 And not only would they stay in hotels
18 because they had nowhere else to go because nobody would
19 take them in, but he would actually have to pick up and
20 leave in the middle of the night because he heard voices
21 in the walls telling him that they were going to come get
22 him. And once these two men, when the father and son
23 were staying together in this tiny little room, I think
24 that Tony's paranoia became Elias's paranoia, and it was
25 just a really unhealthy, horrible situation where life

MARY VICTORIA BOURUS - DIRECT

1 was bad for everyone.

2 One of the things that Elias told me he did
3 for money -- because I asked, You don't have a job, and
4 you were staying with your dad, is he would donate
5 plasma. And you can see, he's very tiny, and the way he
6 would get around the weight requirement is he would
7 actually put rocks in his pants so he could trick the
8 scale to get money for plasma.

9 Your Honor, that's all we have for
10 mitigation. There is so much, it's hard to condense into
11 something manageable, but we would like to call Vicky
12 Bourus to the stand.

13 THE COURT: All right.

14 MARY VICTORIA BOURUS,

15 having been first duly sworn,

16 was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MS. PENN:

19 Q. Would you please introduce yourself to the Court
20 and tell the Court about the work that you do.

21 A. I'm a licensed -- master's prepared licensed
22 social worker by the State of South Carolina. My current
23 position is as executive director of the Family Justice
24 Center in Georgetown.

25 That's a program that treats victims of domestic

MARY VICTORIA BOURUS - DIRECT

1 violence and their children, and I've been working in the
2 field of family violence for 27 years this year.

3 Q. In the course of your work in that past 27 years,
4 what other kinds of positions have you held?

5 A. I was the director of the South Carolina coalition
6 against domestic violence. That's a statewide
7 professional association for advocates and professionals
8 in the field of domestic and family violence throughout
9 South Carolina. That was my job previous to being in
10 Georgetown. I was in Columbia.

11 Previous to that I was the director of two
12 domestic violence shelter programs, one in Greenville,
13 South Carolina, and one in Florence.

14 Q. And what kinds of education or training have you
15 had to this point?

16 A. Numerous workshops and training experiences, and,
17 of course, actually serving as an advocate and the
18 director of shelter programs, working with literally
19 hundreds of battered women and their children, and at
20 some point in time, I did some observation and training
21 around the issue of perpetration as well.

22 So I have an extensive resume, if you would like
23 to have that in terms of workshops and conferences and
24 education. I'm required by the State to secure 20 hours
25 of continuing education a year to maintain my license,

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1 and you have to do that in the field in which you're
2 working in order to get credit.

3 Q. Have you been qualified as an expert before?

4 A. Yes, ma'am.

5 Q. And in what field?

6 A. In what county?

7 Q. In what field?

8 A. Oh, domestic violence. Yes, I was an expert
9 witness in domestic violence sexual assault and child
10 abuse.

11 MS. PENN: At this time, we would like to
12 offer her as an expert in the field of domestic violence
13 and child abuse.

14 THE COURT: Do you want to voir dire?

15 MS. WILSON: No, sir.

16 THE COURT: She is qualified as an expert in
17 that field.

18 BY MS. PENN:

19 Q. Could you tell the Court a little bit about
20 domestic violence and how it affects children.

21 A. Children who grow up in homes where their parents
22 are physical -- or their mother is being battered or vice
23 versa, who witness domestic violence and are often also
24 the victims of the battering as well, the effects of
25 domestic violence are very devastating and long term.

MARY VICTORIA BOURUS - DIRECT

1 About -- nationally, the statistic is about 92
2 percent of men who are arrested for battering grew up in
3 homes where they watched their mother or their stepmother
4 abused by their mother's partner.

5 It can happen in the reverse. Again, a national
6 statistic is about 2 to 5 percent of victims of battering
7 are men and about 95 are women, so I'm using that term
8 generally just to reflect the statistic.

9 Quite often, children in these homes develop
10 serious behavioral problems. You can imagine growing up
11 in a home where you see your mother battered, hurt, gun
12 held to her head, knife to her throat, thrown to the
13 floor, hair pulled, dragged around the house in the
14 middle of the night, no sleep, trying to get up and go to
15 school in the morning as an eight-year-old is a task,
16 and, you know, you would be very -- as a child, very
17 protective of one of the parents and feeling very badly
18 about what is going on, at the same time wanting a
19 relationship with your father or your stepfather.

20 Behavioral problems, physical problems, difficulty
21 eating, lots of grade problems, not being able to study,
22 achieve in school, these are some of the indicators that
23 we see. I'm not referring specifically to this case, but
24 I will tell you that some of the latest research shows
25 that mental illness can develop in the context of an

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1 ongoing abusive home.

2 I'm not making that connection here, but I think
3 it's important to note that children who grow up in these
4 homes have massive difficulties, and in the future they
5 usually have relationship difficulties, as you can
6 imagine too.

7 Q. And in your opinion, is Elias the victim of
8 domestic violence?

9 A. Yes.

10 Q. And what do you base that opinion on?

11 A. His own statements to me, a review of his record,
12 some of the information that we got from the partners of
13 his father. His father also has a tendency to really
14 thumb his own nose at the system, and often we'll see
15 that batterers don't follow the rules in society.

16 And this man had quite a record himself, drug
17 charges, arrests for other kinds of misdemeanors, but
18 some felonies as well, some of his actions around
19 collections of and dealings with firearms and guns, so he
20 wasn't a person who was an upstanding citizen, even
21 outside his home, and what we know about batterers is
22 that those that take their breaking of the law outside
23 their own home are even more dangerous than men who keep
24 their violence behind closed doors.

25 Q. Can you give a sort of insight as to why Elias

MARY VICTORIA BOURUS - DIRECT

1 would live with his father, even as an adult?

2 a. It's very similar, I think, to the situation where
3 a battered woman continues to stay in a battering
4 situation or tries to leave and then returns. It's part
5 of the pattern that we know happens. A woman may leave
6 as many times as five to seven times before she's able to
7 make that break.

8 Now, it's important to remember that batterers are
9 violent, dangerous people; however, that's not all you
10 see with them. Sometimes you'll see a person who can be
11 very charming, can be very accomplished, educated,
12 outside the home, you would not -- in this courtroom, you
13 might not suspect that a person would be a batterer
14 because they can be very convincing that they're
15 competent people. You don't see -- quite often you don't
16 see that side of that person.

17 They're also that way at home. They can be very
18 charming. They can be loving partners. They can be good
19 parents periodically. It's almost like a Dr. Jekyll/Mr.
20 Hyde kind of a situation, and so what that woman fell in
21 love with is not the batterer, she fell in love with that
22 part of the person that is charming, attractive, and
23 appealing, and she continues to hope, as children do,
24 that that person is going to emerge and that's going to
25 be the way their life is.

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1 They continually hope for something better, and
2 the batterer will say, I'm sorry. I'm not going to let
3 it happen again. Please forgive me. I promise I'll get
4 help. I promise I'll do better.

5 And my understanding is, back to this, Elias had
6 lived separately from his father for some period of time,
7 and when his father reentered his life and asked Elias to
8 come back, he was sorry, he would do better -- exactly
9 the same thing happens with battered women, hoping,
10 believing that person means what they say. And they may
11 mean it, but that kind of behavior requires long-term,
12 intense treatment in order to mitigate it.

13 Q. Do you think that Elias is a danger to society in
14 the future?

15 A. No.

16 Q. Why not?

17 A. I'll tell you why, what I based my opinion on.

18 I don't guess there's any way for me to say to
19 this Court that there is a 100 percent chance that this
20 will not happen, but in my professional opinion and my
21 experience working in these cases, what you would see as
22 a predictor of future violence against others would be
23 reflected in this young man's history, and as the
24 solicitor pointed out, there is none of that.

25 He didn't assault his classmate. He never

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1 threatened his classmate. He never was violent with, as
2 far as we know, his other siblings, his friends, people
3 in the neighborhood. There's no charges; there's no
4 evidence that would support that he's a violent person
5 other than this awful crime that happened.

6 MS. PENN: Thank you very much. Court's
7 indulgence.

8 BY MS. PENN:

9 Q. I forgot to ask you this because I think it's
10 obvious, but in your talking with Elias, what did Tony do
11 to him that was abusive?

12 A. I think this young man has suffered almost every
13 form of abuse chronically over his lifetime that a person
14 could endure: Physical abuse, slapping, pushing, beating
15 with a belt, other objects, constant environment of
16 threat, awful verbal abuse, terrible ways in which this
17 man talked to his son, continually putting him down,
18 making sure he knew the father was in charge.

19 He told him he was un-reliant, so this continual
20 kind of verbal putdown, emotional, which is so
21 deprecatory to a child's development; the emotional
22 abuse, witnessing his father's violence against his
23 mother and his second wife, living in that environment.

24 One of the saddest things he said to me was that
25 he never felt like he had a caretaker. He never went to

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1 the dentist, until he went to the jail last year.

2 MS. PENN: Thank you, Your Honor. I don't
3 have any further questions.

4 THE COURT: State want to cross?

5 CROSS-EXAMINATION

6 BY MS. WILSON:

7 Q. Other than the reports that Elias made to you, did
8 you have any other independent reports of abuse that he
9 faced?

10 A. No. Other than the statements made by the -- I
11 think the first wife and --

12 Q. So you interviewed them or reviewed reports of
13 their interviews?

14 A. Yes, ma'am.

15 Q. Or both wives -- or his mother and the wife?

16 A. Yes.

17 Q. Were you able to review any of the reports
18 regarding Mr. Walker's former treatment, mental health
19 treatment, or anything of that nature?

20 A. Yes, yes, yes. I reviewed as much of the record
21 as I had.

22 Q. And those records predate this murder?

23 A. Yes.

24 Q. And in those records, was there evidence of abuse
25 that the defendant faced at the hands of his father?

1 A. I believe in one of the -- in the psych eval, it
2 referred to the sexual abuse that the father had
3 perpetrated that was documented in the psychiatric -- one
4 of the early psychiatric hospitalizations.

5 Q. And so I guess my point is, all of these claims of
6 abuse by the defendant didn't just arise after this
7 murder. There were claims years before this.

8 A. Yes.

9 MS. WILSON: That's all I have, Your Honor.

10 THE COURT: Redirect?

11 MS. PENN: No redirect, Your Honor.

12 THE COURT: Let me ask you a question. The
13 defense is going to give me evidence that this gentleman
14 is suffering from hallucinations and that hallucination
15 basically said kill your father.

16 THE WITNESS: The voices.

17 THE COURT: So that's a psychiatric
18 diagnosis. You're laying, from what I'm hearing, a
19 foundation that would apply to anybody, whether they had
20 a psychiatric condition or not, correct?

21 I mean, somebody who does not have
22 hallucinations could be abused and that the two aren't
23 necessarily related. So what I'm trying to get at is, is
24 the basis for your opinion the abuse or is the basis of
25 your opinion the abuse plus the psychiatric condition?

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1 Did one cause the other, or is that beyond the scope of
2 your abilities as an expert?

3 THE WITNESS: You know, what I would say is
4 that there are two major factors that I think in
5 combination along with some substance abuse that was
6 going on that night was a lethal mix. Does that help,
7 or -- what I can say about that is that quite often, in
8 cases where a battered woman strikes back and kills her
9 husband, sometimes there is no psychiatric disorder.

10 It's an awful buildup of many years of being
11 battered and hurt and then striking back, hitting the
12 wall, if you will, and that's not meant to exonerate a
13 guilty person at all, but I think the lifetime of abuse
14 that this young man suffered in combination with his
15 mental illness resulted in this crime, and they could
16 happen separately.

17 It could have happened separately, but in
18 this case I think there are two twin poisons.

19 THE COURT: All right. Anybody want to ask
20 her anything based on what I asked her?

21 MS. PENN: No, Your Honor.

22 BY MS. WILSON:

23 Q. I believe you testified earlier in this situation
24 you can't say that the abuse that the father inflicted on
25 the son caused his mental illness. That may have

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1 developed separately, and, in fact, many other members of
2 this family who didn't suffer abuse from Tony Walker also
3 have mental illness?

4 A. Yes, exactly.

5 Q. But in your experience, it can happen where there
6 is no family history of abuse -- I mean, of mental
7 illness, but abuse ensues and mental illness develops.

8 A. Yes. Thank you. That's a good clarification,
9 yeah.

10 MS. WILSON: That's all I have, Your Honor.

11 THE COURT: You may step down.

12 MS. WILSON: Judge, I don't know if we
13 formally made or the defense formally made all the things
14 we handed up a part of the record, but we would ask that
15 Dr. Schwartz-Watts' letter be a part of your record and
16 also the CV of Ms. Bourus be a part of the record.

17 THE COURT: I don't have Dr. Schwartz-Watts'
18 letter. Do you have it? All right. Well, let me look
19 at what they have to say.

20 Dr. Schwartz-Watts' letter doesn't address
21 child abuse in any way. Do you want to reply to that?

22 MS. PENN: I didn't ask her to, Your Honor.

23 THE COURT: Well, I'm hearing -- what did you
24 offer her testimony for, this lady we just had?

25 MS. PENN: For the parole eligibility issue.

1 THE COURT: All right. And so you're saying
2 he is -- I should take that into consideration. At the
3 same time, the basis for the guilty but mentally ill plea
4 is Dr. Schwartz-Watts' opinion --

5 MS. PENN: Yes, Judge.

6 THE COURT: -- that he suffers from autism
7 and a psychosis not otherwise specified. He's mentally
8 ill, in other words.

9 MS. PENN: Yes, sir.

10 THE COURT: But nowhere in here does she
11 state that anything other than a hallucination voice told
12 him to kill him, that doesn't seem to support that the
13 mitigation evidence that the reason why he killed his
14 father was because of his father's abuse when he was a
15 child.

16 It's two separate opinions. On the one hand,
17 you want me to consider what this lady just said: Well,
18 that's the reason why he killed his father. But yet
19 Dr. Schwartz-Watts doesn't address that had anything to
20 do with why his killed his father. There was a voice
21 that told him to do it.

22 MS. PENN: No, sir. I'm sorry if I gave the
23 Court this impression, but we are here to plead guilty
24 but mentally ill in that he knew right from wrong but did
25 what he did anyway, essentially.

1 THE COURT: I understand that.

2 MS. PENN: The reason we have -- and I think
3 it's complicated and it's difficult because it's a
4 chicken and egg kind of question. When does mental
5 illness start and how does criminal domestic violence and
6 battered child all go together? And the answer is I just
7 don't know.

8 The reason I asked Ms. Bourus to testify was
9 to go to that parole eligibility issue, and I think
10 that's so important because it addresses how we handle
11 mental illness in South Carolina, and the idea that
12 the -- very much reality that after he serves his
13 sentence Mr. Walker will come out into society, and what
14 kinds of things will be available to him and what kind of
15 chance does he have coming out with treatment?

16 And that's why eligibility is so important to
17 him and his case is that we all know SCDC and what they
18 do for the mentally ill is not ideal. I'm not even sure
19 it meets the standard, and I'm hoping if the Court would
20 give him the chance to be considered to be eligible after
21 a court ordered sentence as opposed to longer, he might
22 have more of a chance when he gets out.

23 THE COURT: I understand what you're trying
24 to say. Here is my problem with what you're trying to
25 say: On the one hand, Dr. Schwartz-Watts' opinion is

1 silent on the issue of child abuse, so if you didn't have
2 that evidence that I just heard, I would have
3 Dr. Schwartz-Watts' saying he has a mental illness and
4 the basis of that mental illness also was -- caused a
5 voice to tell him to kill his father, all right?

6 Because she doesn't say anything at all about
7 prior child abuse perhaps causing that hallucination to
8 tell him, I'm left with, well, it's entirely possible
9 that when he finishes that sentence that another voice
10 may tell him to go kill somebody else, so it's -- which
11 doesn't support getting out early, all right?

12 So I'm wondering if that is a big issue here,
13 child abuse. Why didn't Dr. Schwartz-Watts address it in
14 her letter?

15 MS. PENN: I think the short answer is I
16 didn't ask her to, Your Honor. I only asked her about
17 mental health for the purposes of the guilty but mentally
18 ill.

19 THE COURT: Well, I understand that's what
20 your answer is. I'm suggesting to you that I understand
21 we went ahead with this today because she wasn't able to
22 come here today, but it is -- having just listened to
23 this, I didn't really learn about this until yesterday at
24 all, was the basis of it, I didn't know to ask her to
25 address that, and I'm wondering if it might be a good

1 idea to hear from her about, in her opinion, the child
2 abuse factored into this hallucination, or is he just
3 suffering from hallucinations that may tell him to go out
4 and kill people occasionally? That's an important thing
5 for me.

6 MS. PENN: Yes, Judge.

7 MR. BUTLER: Judge, if it would please the
8 Court: It wouldn't matter -- when Dr. Schwartz-Watts' is
9 asked to determine whether he's not guilty by reason of
10 insanity or not guilty but mentally ill, it wouldn't
11 matter whether he was a victim domestic abuse or not. If
12 he understood right from wrong, he doesn't have available
13 to him the defense of not guilty by reason of insanity.

14 That's all she's asked to assess. So the
15 fact that she doesn't mention it doesn't mean these two
16 things aren't mutually exclusive.

17 THE COURT: I don't disagree with you, but if
18 you want me to take the childhood abuse into mitigation
19 for parole eligibility, it would be helpful if the doctor
20 who said, Judge, he's mentally ill because a voice told
21 him to do this, might explore, Well, it wasn't just a
22 random thought out of nowhere to say go kill somebody,
23 because that kind of unnerves me, all right?

24 But if you factor in the fact that because he
25 was abused as a child, the voice told him to kill his

1 father, then it flows a little bit better.

2 MR. BUTLER: I think that that's what Ms.
3 Bourus testified to.

4 THE COURT: She's not qualified to opine as
5 to that.

6 MR. BUTLER: Yes, sir. Well, I don't think
7 there's any evidence in the record that he's ever -- or
8 in his record that he's ever heard voices to kill anyone
9 other than his abuser.

10 THE COURT: Well, I don't know.

11 MR. BUTLER: And the statute requires only
12 that the Court finds that he was a victim of domestic
13 abuse, not that that was the only cause of what occurred
14 on the night of the incident. If he's a victim of
15 domestic abuse and the Court so finds that, then I think
16 that given Ms. Penn's equal protection argument that it
17 wouldn't matter whether the mental illness was a factor,
18 and I think that they're both factors, but
19 Dr. Schwartz-Watts was only asked to give an opinion is
20 he NGRI or GBMI?

21 Because he understood right from wrong, he
22 doesn't have available NGRI, but because his mental
23 illness played role in the incident, it's GBMI. That
24 doesn't mean that she's excluding his history of abuse,
25 and the testimony today is he's a victim of domestic

1 violence.

2 THE COURT: I understand that. I'm just
3 saying it would be helpful in your argument if
4 Dr. Schwartz-Watts discussed that issue. I'm just saying
5 that. It would have been helpful to have that link.

6 MR. BUTLER: Beg the Court's indulgence.

7 MS. WILSON: Judge, would it help at all to
8 address the issue of whether or not the statute would
9 even apply? I mean, have you gotten to that point?

10 THE COURT: I haven't gotten to that point
11 yet at all. I'm just trying to address the issue of --
12 if I were to consider their arguments that it applied,
13 that there is a missing link or a link that could be
14 there isn't there, then it might be as simple as she
15 said, Oh, well, I didn't ask her to address it, but in my
16 opinion, it did play into it.

17 I don't know, but it just seems to me -- it
18 kind of stands out to me, having just walked into the
19 courtroom and dealt with this, to say, Well, I've got a
20 lady over here saying clearly he was abused and that
21 played into it, and yet I have a doctor's report here
22 that said nothing about abuse. It's absolutely silent
23 about abuse, and it just says a voice told him to do it.

24 So my query would be, why didn't she -- she
25 may not have talked about it -- she may not have talked

1 about it because nobody talked about it. She may not
2 have talked about it because in her mind it didn't have
3 anything to do with it. These are questions that I have.

4 MS. PENN: Yes, sir.

5 THE COURT: Which is one of the problems why
6 it's better if we have her, the expert, here, but I
7 agreed that we would do it without her, but I'm not
8 saying -- maybe we don't need to explore just a journey
9 in having her come back or get on the telephone?

10 MS. PENN: Would it help to hold the record
11 open until she can be here or we submit a report
12 addressing that? Because I never asked her to.

13 THE COURT: Well, we may. Let's -- we will
14 perhaps talk about whether or not the statute even
15 applies first, and you want to address that?

16 MS. WILSON: Your Honor, I think the statute
17 is very clear that it doesn't apply.

18 In 2003, the legislature amended the statute
19 that defined household member and specifically deleted
20 language that had been in there prior, and I don't know
21 the legislative history to that, but the statute in its
22 plain language just doesn't apply to this situation.

23 And, you know, we negotiated this plea taking
24 into account what we were being told about issues of
25 abuse and also issues of mental illness, and that's why

1 we negotiated the term that we negotiated, and we think
2 an 18-year sentence is appropriate under these facts and
3 believe that the statute simply as written doesn't apply,
4 and if there is an equal protection argument to be had,
5 they preserved it, and they can take that up with a
6 higher Court.

7 THE COURT: Do you have any further argument
8 you want to make on that?

9 MS. PENN: Just that it's our position that
10 the statute either does apply, but it violates equal
11 protection because of that section D that says cohabiting
12 male and female and that this distinction makes no sense
13 or that basically the statute should apply in that it
14 excludes children for no rational reason or anything that
15 make sense to me, and that that violates the Fourteenth
16 Amendment of the U.S. constitution, Article 1, Section 3
17 of the South Carolina constitution, and there is no
18 explanation or any good reason why children should be
19 excluded from this benefit.

20 And it's parole eligibility, it's not saying
21 parole, because who knows where we're going to be in
22 seven or eight years or what Elias might be like or what
23 treatment he will have and, hopefully, counselling he
24 will receive? This writing down that he is parole
25 eligible on the sentencing sheet would not guarantee that

1 he actually got parole, it would just mean the parole
2 board could look at him and at least consider it.

3 THE COURT: All right. Well, here is what I
4 would like to do: I will accept the plea, and I will
5 impose the sentence today. The only question is whether
6 or not he is entitled to consideration for early parole,
7 and there is -- first of all, I would like to consider
8 that before I decide. I just got it fresh this morning.

9 The second thing is, you're asking me to
10 declare a statute unconstitutional, and so while the
11 solicitor is here, we typically ask the Attorney General
12 to chime in, and the Attorney General may very well say
13 I'm fine with the solicitor's argument on that, but I
14 would like to have further briefing on that issue, which
15 would also then give us the opportunity that if you would
16 like to go back and ask Dr. Schwartz-Watts to expound on
17 her opinion letter to address the child abuse, I think
18 I've made it clear what my concern is.

19 It's possible that she just didn't address it
20 because she wasn't asked to address the issue of child
21 abuse, but if she would like to expound upon that, then
22 I'll give her the opportunity to do that, but in the
23 meantime, I'd like y'all to go ahead and brief me on the
24 issue of the constitutionality of the statute.

25 Madame Solicitor, it might very well be the

1 Attorney General says they're fine with you, but if you
2 would like to ask them if they want to brief on it --
3 because I think that, one, I mean, they have an argument.
4 I'm not saying it's a strong argument, but it's an
5 argument, but, also, I think declaring this statute
6 unconstitutional on equal protection grounds has some
7 further ramifications beyond this case and other laws
8 that it may impact, so I would really like to have the
9 Attorney General's office at least decide if they want to
10 weigh in on it.

11 So for today, I have reviewed the evidence,
12 which we will put in Dr. Schwartz-Watts's letter into
13 evidence. It's a letter dated March the 18th, 2014. It
14 does support the finding that he is guilty but mentally
15 ill. Her letter does opine that at the time he killed
16 his father he was hearing -- he was having
17 hallucinations. She calls this command oratory
18 hallucinations directing him to hurt his father, and, in
19 her opinion, she says although he was psychotic, he knew
20 right from wrong and would recognize specifically the
21 wrongfulness of his acts which explains why he went to
22 the bathroom afterwards and cried, and it is her opinion
23 that he lacked the capacity to conform his conduct to the
24 requirements of the law and he was unable to refrain from
25 acting upon his hallucinations.

1 So that supports a finding of guilty but
2 mentally ill. I will accept that plea. I will sentence
3 you to 30 years in the Department of Corrections. That
4 is suspended upon the successful completion of 18 years
5 of active time, follow that up with 5 years of successful
6 probation, and while you're on probation, you must
7 continue to receive mental health treatment and take any
8 kind of medications that you have. That is a condition
9 of your parole.

10 After you're finished with your
11 incarceration, you get five years of active time on the
12 possession, but that is suspended to five years of
13 successful probation, which will run concurrently with
14 the probation that you would have on voluntary
15 manslaughter.

16 MS. WILSON: I believe the way we had it
17 crafted -- and we talked with SCDC about this, that I
18 don't believe there would be any probation on the
19 voluntary manslaughter. There would be probation on the
20 weapons charge that is consecutive to his incarceration.

21 THE COURT: You're right. That would be
22 community supervision on parole.

23 MS. WILSON: As a part of that, Your Honor,
24 if you could include that the defendant not have contact
25 with family members on his father's side of the family.

1 THE COURT: Well, why would it be 30
2 suspended to 18 if he's not going to have probation?

3 MS. WILSON: Because that affects his
4 community supervision, how long he'll be on community
5 supervision.

6 THE COURT: All right.

7 MS. WILSON: We queried SCDC, and I shared
8 results with Ms. Penn about the best way to craft that.
9 So the weapons probation would be consecutive to the
10 voluntary manslaughter sentence, and they wanted the
11 language that said to be completed after his
12 incarceration.

13 THE COURT: All right. So it's 30 years
14 suspended to 18 on voluntary with credit for -- how much
15 time?

16 MS. PENN: 551 days, Your Honor.

17 THE COURT: All right. Then running
18 consecutive to that is five years suspended to five years
19 of probation for the weapons charge, and he must continue
20 mental health treatment and take any medications that are
21 prescribed to him as a result.

22 Then I will take the issue of parole
23 eligibility under advisement and ask that y'all brief me,
24 if you could, within ten days. If you need a little bit
25 of time once you weigh in with the Attorney General, just

1 let me know and we can reschedule that.

2 But in the meantime, if you would -- put in
3 this letter in that Dr. Schwartz-Watts signed in today,
4 and then see if she wants to expound on the child abuse
5 issue in her opinion letter. If she doesn't, she
6 doesn't, but we'll give her the opportunity if she wants
7 to, or we may reconvene if we need to, to put it on the
8 record.

9 MS. WILSON: And the no contact with family
10 members on the father's side of the family, Tony Walker's
11 family members.

12 THE COURT: Okay. You want to give me a list
13 of names or something? I don't know how they would
14 enforce that without specific names.

15 MS. WILSON: I agree. That's what I was
16 asked.

17 THE COURT: So if y'all could give me some
18 names to put on there, I'll be glad to do that, but just
19 to put no contact with family members of the victim, I
20 don't know -- I don't know how you would even put that
21 into the system, much less enforce it.

22 MS. PENN: Your Honor, could you also please
23 put on the sentencing sheet that Mr. Walker is to be
24 assessed by a psychiatrist for an admission into the
25 psychiatric unit?

1 THE COURT: I'll put that on, but that's
2 required under the statute for a guilty but mentally ill
3 plea.

4 All right. Anything else?

5 MS. PENN: No, sir.

6 MS. WILSON: Just that magic language for
7 whatever reason the lawyer for SCDC said that probation
8 needs to say to begin upon completion of incarceration on
9 the voluntary manslaughter.

10 THE COURT: Okay.

11 MS. WILSON: That's it.

12 THE COURT: Thank you.

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14 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 21st of March 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 6, 2015



Circuit Court Reporter

FILED

STATE OF SOUTH CAROLINA

) IN THE COURT OF GENERAL SESSIONS

2014 APR 15

) FOR THE NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

) Case No(s): 2013GS1000499

) Warrant No(s): 2012A1020900039

) Charge(s): Murder

STATE OF SOUTH CAROLINA

BY _____

vs.

Motion to Apply

SC Code § 16-25-90

ELIAS JAMES WALKER,

Parole Eligibility to Elias Walker

Defendant

Introduction

Elias Walker asks the Court to find that §16-25-10 of the South Carolina Code of Laws is unconstitutional when it excludes all children who are the victims of domestic violence from being parole eligible after a quarter of their sentence is served or the statute includes children but only those who are a different gender than their abuser.

Elias Walker has pled guilty but mentally ill to voluntary manslaughter of his father, who abused him physically and mentally on a continuous basis since his childhood. Section 16-25-90 provides that a household member who is a victim of domestic violence from another household member is eligible to seek a Court finding that will allow the defendant to apply for parole release after a quarter of their sentence is served. The term "household member" is defined in §16-25-10, South Carolina Code of Laws. It identifies *current and former spouses, people with children in common, and a male and female who are cohabiting or formerly have cohabited.* It does not expressly include or exclude children.

Section 16-25-10 and 16-25-90 violate the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Constitution and Article I, Section III of the South Carolina Constitution in one of two ways in this case. First, if the statutes are read as excluding all children, this exclusion is not rationally related to a legitimate state purpose and violates substantive due process under both federal and state constitutions.

Alternately, if the statutes are read as including children who are cohabiting with a parent, but only offering relief to those of a different gender than the abusing parent, such gender discrimination does not serve an important governmental objective nor is substantially related to the achievement a legitimate governmental objective. Thus, § 16-25-10 and 16-25-90 violate

equal protection under the law for cohabiting children of the same gender as their batterer. Elias Walker asks that the Court find that the benefit that this statutory section denies to children of the same gender as their batterer be applied to him by order of this Court in this case.

Elias Walker has shown the Court by credible evidence that he cohabited with his father and that he was the repeated victim of his father's abuse; as such, he should be parole eligible after a quarter of his sentence is served under a constitutional application of § 16-25-90.

Question Presented

Are §16-25-10 and 16-25-90 of the South Carolina Code of Laws unconstitutional because they exclude children who are the victims of domestic violence from being parole eligible after a quarter of their sentence is served but provide that benefit to people in current or former intimate relationships, or because they include children, but only those that are a different gender than the abusing parent?

Statement of the Facts

Anthony Walker had beaten his son, Elias Walker, for his entire life. When Elias a young child, Mr. Walker would beat him with a belt so that Elias was covered in bruises. He would also hit him, slap him, and threaten to kill him, or to put him through a wall. Mr. Walker did the same to the two mother figures in Elias's life. Elias's biological mother, Marla Horton, was threatened by Mr. Walker with knives and guns. He also beat her. Elias's stepmother, Amy Maibach, who raised Elias until she left Mr. Walker when Elias was eight, was also beaten by Mr. Walker, who also held knives to her throat, and guns to her head. When Amy was pregnant with Elias's half-brother, Ethan, Mr. Walker would threaten to push her down the stairs and put her head through a wall. While Marla and Amy both eventually left Mr. Walker, Elias lived with his father on and off until his father's death in September 2012.

By September 17, 2012, Elias and Mr. Walker had been living together for a few weeks in a small hotel room. Before that, Elias had been staying with a family friend, Alton O'Tuel, who took care of Elias in exchange for Elias doing some work at his thrift store. Schizophrenia runs in Mr. Walker's family, and by then Mr. Walker, who refused treatment and refused to acknowledge that he might be schizophrenic was exhibiting extremely paranoid tendencies. He would sometimes leave a paid hotel room in the middle of the night because he heard voices in the walls telling him they were going to kill him. He was fascinated with guns and knives and kept them close by. While Elias was with him, for money they would donate

plasma. Elias is slight and small, but would put rocks in his pants so that he would weigh enough to be able to donate. Initially, Mr. Walker was kind to Elias to convince Elias to come stay with him. As time passed, however, Mr. Walker began to fall into old patterns. He would hit Elias, and would constantly berate and degrade him, telling him that he was worthless, that he would never amount to anything. The night of Mr. Walker's death, Elias and Mr. Walker had donated plasma for money, and then drank together all day. Anthony Walker threatened his son before going to sleep. When Mr. Walker fell asleep, Elias heard voices telling him to kill his father. Elias took his father's sword that was in the room and struck his father multiple times. He then called 911 and reported that his father was injured. See March 24, 2014 letter of Dr. Donna Schwartz-Watts reporting and supplementing her findings. See Exhibit "A".

On March 21, 2014 Elias pled guilty but mentally ill to voluntary manslaughter and the possession of a weapon during a violent crime. He received a sentence of thirty years, suspended on the service of eighteen years for the voluntary manslaughter, to be followed by five years, suspended on the service of five years of probation on the weapon charge.

Argument

I. ELIAS SHOULD BE PAROLE ELIGIBLE AFTER A QUARTER OF HIS SENTENCE IS SERVED BECAUSE § 16-25-10 and 16-25-90 VIOLATE DUE PROCESS and EQUAL PROTECTION BY EXCLUDING HIM

The Equal Protection Clause of the Fourteenth Amendment commands that all persons similarly situated should be treated alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (U.S. 1985). In violation of this command, Section 16-25-90 at worst deliberately excludes children as victims of domestic violence, and at best is so carelessly drafted so as to only include children who are a different gender than their abusing parent.

Section 16-25-90 provides a potential benefit to victims of domestic violence who commit crimes against their abusers. It allows for those victims of abuse to be considered for parole after serving a quarter of their sentence—

An inmate who was convicted of, or pled guilty or nolo contendere to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty to, nolo contendere to, or was convicted of an

offense against the household member, or in post-conviction proceedings pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member. S.C. Code Ann. § 16-25-90.

Note that the statute does not require the Court to find that the crime was caused by the earlier abuse.

The definition of household member in § 16-25-10: "Household member" defines who is to be considered a victim of domestic violence—"As used in this article, "household member" means: (1) a spouse; (2) a former spouse; (3) persons who have a child in common; or (4) a male and female who are cohabiting or formerly have cohabited." S.C. Code Ann. § 16-25-10.¹

The rationale behind providing the possibility of parole after a quarter of a sentence has been served lies in the understanding that a victim of domestic violence who commits a crime against their abuser is not as culpable as someone who commits the same crime against someone innocent. Although the crime is not totally excused or forgiven, there is the acknowledgment that there had been a history of abuse by the victim that may have contributed to the defendant's conduct. However, no causal factual linkage is required to be demonstrated to the Court to obtain the benefit of 16-25-90; the defendant only needs to show by credible evidence a history of abuse of the defendant by the victim.

This rationale extends logically to co-habiting children who have been victimized as much as it does to intimate partners. In fact, given current research on the slow maturation of the

¹ This provision originated in 1995 in Act No. 7. Part I, Section 14. The first version only provided 1/4 parole eligibility for a "battered spouse" who showed a sentencing court credible evidence of a history of criminal domestic violence suffered by the defendant at the hands of the spouse. The 1995 Act, Section 15 also legislatively recognized the admissibility of the "battered spouse syndrome" in SC criminal court.

In 1998 in Act No. 401, section 1, § 16-25-10 was created and defined "Household member" to be "spouses, former spouses, *parents and children, persons related by consanguinity or affinity within the second degree, persons having a child in common, and a male and female who are cohabiting or formerly have cohabited.* This entire group was incorporated into section 16-25-90's 1/4 parole eligibility.

male human brain, young adult male children are arguably more vulnerable and more deserving of the grace potentially available under 16-25-90.²

Please also note that Elias Walker had the explicit protection of 16-25-90 from 1998 to 2003 for the abuse that occurred during that time period. There is no legislative history supporting an intention by the legislature to remove this protection from battered children who offend against the parent abuser that they live with. Domestic violence against children is a horrible and pervasive problem.³ Although South Carolina law does recognize child abuse as a crime, it does not provide any parole benefit to children who are victims of abuse elsewhere in its code of laws. There is no corresponding law that addresses parole eligibility of children who commit crimes against their abusers. By including children in this benefit, nothing is taken away from intimate partners who are also the victims of domestic violence. An interpretation that excludes children serves no purpose and makes the statute unconstitutional.

A. Section 16-25-90 can be read to include only people in current or former romantic relationships as victims of domestic violence.

Generally, any classifications drawn by legislation must be rationally related to a legitimate state interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (U.S. 1985). The classification drawn by the legislation in § 16-25-10 are not rationally related to any legitimate state interest. There is no reason why cohabiting children should not be considered victims of domestic violence for the purposes of the 16-25-90 parole eligibility statute. There is no rational basis why a cohabiting child who commits a crime against an abusive parent is not entitled to the same consideration as a spouse or an intimate partner who does the same.

Attached is an affidavit of Vicki Bourus (**Exhibit "B"**) who served as the Executive Director of the SC Coalition Against Domestic Violence and Sexual Abuse (SCCADVASA) in 2003 when the legislature amended 16-25-10 and removed "parents and children" from the definition of household member in the definition of those who could be involved in criminal

² See Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455; 183 L. Ed. 2d 407 (2012). This is a United States Supreme Court case in which the Court held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders, in part based on evidence of the immaturity of the developing brain in young adults.

³ For a comprehensive look at battered child's syndrome and its similarities to battered women's syndrome, see "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers" by Nancy Wright. 4 Crim. L. Brief 76

domestic violence in SC. Law enforcement and victim advocates felt that CDV should be focused on those who were in or had been in an intimate relationship, in order to better track the number of these crimes involving intimate partners. The discussion was that children and parents had other applicable protective statutes that covered assaults against them and CDV was redundant. According to Ms. Bourus, no thought was given to the impact of this change on the parole eligibility of battered children under 16-25-90. Thus, the amendment of 16-25-10 created an unintended consequence of eliminating the opportunity to seek ¼ parole eligibility for crimes by battered children against their battering parent.

B. Section 16-25-90 can be read to include cohabiting children as victims of domestic violence, but only those who are a different gender from their abusing parent

Legislative classifications based on gender also call for a heightened standard of review. Affording statutory protection only to cohabiting children *of a different gender than the abuser* has no rational basis for such differential treatment. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (U.S. 1985). Equal protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." GTE Sprint Comm'n's Corp. v. Pub. Serv. Comm'n of South Carolina, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986). In Moore v. Moore, 376 S.C. 467; 657 S.E.2d 743, the South Carolina Supreme Court held that "for a gender-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective, citing State v. Wright, 349 S.C. 310, 313, 563 S.E.2d 311, 312 (2002)(citing Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)). The Moore Court said that the "law will be upheld where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.*

There is neither a rational basis nor a compelling state interest in providing parole consideration only for defendant-victims who have a different gender than the household member who has abused them. The gender discrimination in this state statute that excludes Elias Walker would not exclude a similarly situated sister. This instance of gender discrimination does not provide a fair and substantial relationship to legitimate state ends. Instead it fits the dissent of Chief Justice Toal, with a concurrence by Justice Pleicones, in State v. Wright, 349 S.C. 310; 563 S.E.2d 311 (2002). Chief Justice Toal opined that she found that the historic, stand alone

aggravator called "difference of the sexes" in the common law definition of Assault and Battery of a High and Aggravated Nature (ABHAN, and incorporated into CDVHAN) violates the equal protection of the laws. The Chief opined that it failed the test for gender discriminatory laws because the provision "fails to substantially relate to the government objective of preventing domestic violence". The Chief recognized that size and strength differences may provide a valid basis for a finding of aggravation; but gender alone is based on "old notions" that no longer meet the guarantee of equal protection of the law.

Conclusion

Elias Walker asks that the Court rule that there is credible evidence of a history of criminal domestic violence against Elias, suffered at the hands his father, Anthony Walker, as provided in Section 16-25-20.

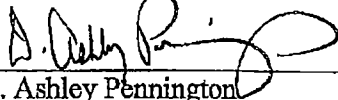
Elias Walker further asks that the Court to find that Elias was a cohabiting son of Anthony Walker at the time of the offense in this case.

Elias Walker asks that the Court find that SC Code Ann. Sections 16-25-10 and 16-25-90 violate due process because they do not apply to battered children and that this Court is required to find that the Elias Walker was a household member at the time of his offense because he was the cohabiting biological son of the victim-father and is therefore eligible for consideration for parole after serving one-fourth of his prison term under 16-25-90.

Alternatively, Elias Walker asks that the Court find that that Elias was cohabiting with his father and that the gender discrimination of 16-25-10 and 16-25-90 that bar his access to early parole eligibility because he is the same gender as his father does not meet the guarantee of South Carolina's and the federal Constitutional requirement of equal protection under the law. Because such gender discrimination is unconstitutional as applied to Elias Walker in this case, the Court must find that Elias Walker meets the standard set forth in 16-25-10 and 16-25-90 for consideration for parole after serving one-fourth of his prison term under 16-25-90.

FILED
APR -7 AM 3:00
CLERK OF COURT
Charleston, South Carolina
Dated: 4/7/14

Respectfully Submitted,



D. Ashley Pennington
Ninth Circuit Public Defender
Attorney for Defendant

EXHIBIT "A"

March 24, 2014

Alicia Penn
Charleston County Public Defender

Elias Walker
Date of Evaluation 9/29/12
Place of Evaluation: Charleston County Detention Center

Dear Ms. Penn,

As you know I evaluated Elias Walker on 9/29/12 at the Charleston County Detention Center. He was 22 years old at the time. He was taking Risperidone® 1mg at night at the time of the evaluation.

He reports a prior history of trauma and paranoia. He reports his father "hunted people." He states his father owned M-16s, a Glock and a revolver. He states his father dealt drugs. He reports his mother told him he had shot at her in the past. He reports his father shot at him with a .22 when he was 16 years old. He also reports his father "pulled a knife" on him.

In addition to being exposed to trauma, he reports stereotyped interests in philosophy and mythology. He reports deficits in social development. He states he did not have any friends.

He also reports a history of self-mutilating behavior: "when my girlfriend would piss me off, I would black out and cut myself." He reports he would feel better after cutting.

He reports he was forced to live with his father when he became homeless. "It was not safe because the way he acted in the past." He reports his father set up other drug dealers. "I didn't feel right. Staying there made me worse. He tried to hurt me too."

He reports a history of auditory hallucinations. "They come and go." He reports he hears two to three voices. He states they sometimes say good things and sometimes say bad things. He reports the voices talk to each other like he is not there. One voice says: "Don't listen to him." He states one voice is protective, but it is not an angel. He reports the onset of hallucinations at age 13.

He reports on the night of the offense, he and his father got into a "stupid argument at the bar we were at." He states, "it was about catching the tab." He states his father

had the money but wanted to leave without paying the tab. He states they went home. He states he went to Wal Mart to get something to eat. He states he bought beer at Wal Mart and drank some. He states his father started yelling at him and said "he would kill me." He reports he began hallucinating and the voices said to "hurt him". He states the voices were "overwhelming." He reports he thought he hit him in the head and neck. He states he went into the bathroom crying.

On mental status examination, he was alert and oriented. He was able to abstract similarities between objects. He performed poorly on a test of verbal fluency. He was able to register three items and recall them correctly after five minutes using visual clues. Therefore, other than mild deficits in frontal lobe functioning, he is cognitively intact. He had poor eye contact and a flat affect. He was not hallucinating during the interview. He endorsed stereotyped interests in mythology.

Mr. Walker's hallucinations are more consistent with a psychotic disorder than a dissociative disorder resulting from his abuse. They improved with a very low dose of antipsychotic medication.

It is my opinion to a reasonable degree of medical certainty that Mr. Walker suffers from an Autistic Spectrum Disorder and Psychosis Not Otherwise Specified. Although he is mentally ill, he has a rational and factual understanding of the proceedings, and the capacity to assist in his defense.

On the night of the offense, he had command auditory hallucinations to hurt his father. Although he was psychotic, he knew right from wrong and recognized the specific wrongfulness of his acts, which explains why he went into the bathroom afterwards and cried. It is my opinion he lacked the capacity to conform his conduct to the requirements of the law. He was unable to refrain from acting upon his hallucinations. "They were overwhelming." The exacerbation of his hallucinations was related to the abuse he suffered by his father.

He should remain on his antipsychotic medication. His symptoms could reoccur in situations where he perceives he is in danger. Upon his release from confinement, he could benefit from a period of supervision which includes his being adherent with any mental health treatments. Another way to ensure compliance with future treatments would include having an outpatient civil commitment order upon his release from confinement. He should also abstain from drugs and alcohol, as these substances can increase his chances for a relapse of hallucinations.

Donna Schwartz-Watts, M.D.
Consulting Forensic Psychiatrist

STATE OF SOUTH CAROLINA

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

) Case No(s): 2013GS1000499
) Warrant No(s): 2012A1020900039
) Charge(s): Murder

STATE OF SOUTH CAROLINA)

vs.)

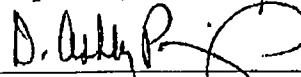
ELIAS JAMES WALKER,)

Defendant)

**EXHIBIT "B" of
Motion to Apply
SC Code § 16-25-90
Parole Eligibility to Elias Walker**

Attached is Exhibit "B", Affidavit of Mary Victoria Bourus, of defense Motion to Apply
SC Code § 16-25-90 Parole Eligibility to Elias Walker.

Respectfully Submitted,



D. Ashley Pennington
Ninth Circuit Public Defender
Attorney for Defendant

Charleston, South Carolina

Dated: 4/8/14

FILED
2014 APR - 8 PM 4:00
JULIE J. ARYSTROMS
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

vs.

ELIAS JAMES WALKER,

Defendant

) IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT

) Case No(s): 2013GS1000499
) Warrant No(s): 2012A1020900039
) Charge(s): Murder

AFFIDAVIT
OF
MARY VICTORIA BOURUS

JULIE ANSTRONG
CLERK OF COURT

2014 APR -8 PM 4:00

FILED

I, Mary Victoria Bourus, swear and affirm that the following facts are true as written:

- 1) I am the co-executive director of the Family Justice Center of Georgetown County. The Family Justice Center is a 503(C)(3) non profit that provides shelter and aid to victims of family violence and their children as well as educational programs for the community. Previously I was the executive director of the South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA). I served as the executive director for the South Carolina Coalition in 2003. At that time, the South Carolina Coalition managed 13 shelters for victims of domestic violence and 16 rape crisis centers. During my tenure as the director of the South Carolina Coalition, I was the organization's lobbyist at the South Carolina General Assembly.
- 2) In January, 2014, Ms. Alicia Penn, JD (Office of the Public Defender, 9th Judicial Circuit) to evaluate Elias James Walker, specifically in regard to his history of abuse at the hands of his father, Anthony Walker. My evaluation included interviews with Elias Walker, a review of all records provided to me, reports from both the mother of Elias and his step-mother and interviews with Ms. Alicia Penn. My findings are as follows. It is my professional opinion that Elias James Walker suffered chronic, severe abuse at the hands of his father, Anthony Walker. This abuse included physical, emotional, verbal and sexual abuse over the course of his entire life. Elias was slapped, punched, kicked, thrown on the floor and beaten with belts and, to quote Elias, "anything he could his hands on". Elias was constantly berated, put down and cursed by his father who also called him

humiliating names. Elias was hospitalized in November, 2004 or psychiatric treatment. The hospital reports indicate that Elias had also been sexually abused by his father.

3) The South Carolina General Assembly passed the Domestic Violence Prevention Act of 2003 to enhance and improve the domestic violence laws of South Carolina. I was involved in the discussion and the debate of this legislation and tracked its progress through the General Assembly. At that time there was national effort to collect accurate statistics on number of victims of domestic violence who were, or had been intimate partners. State agencies of South Carolina including SLED and other law enforcement entities were having difficulty determining the exact number of victims of domestic violence who had been intimate partners because S.C. Code § 16-25-10, defined "household member" as, among other things, *parents and children and persons related by consanguinity or affinity within the 2nd degree*. My observation and belief is that all the supporters of the 2003 amendments believed that other laws protected child victims adequately and there appeared to be no adverse consequences to child victims if they were eliminated from the definition of household members under § 16-25-10.

3) I was in hearings and I was in touch with the sponsor of the 2003 amendments domestic violence legislation, Senator Don Holland. I do not recall that there were any discussions or even an awareness that the removal of parents and children from the definition of household member under S.C. Code § 16-25-10 would cause the removal the child victims of domestic abuse from consideration for 1/4th parole eligibility as defined in S.C. Code § 16-25-90. In my opinion, the Legislature was not aware of nor did it consider the impact of removing parents and children from § 16-25-10 or § 16-25-90, which provides the 1/4th parole eligibility for victims of domestic violence. The 2003 amendments provided broader protection for victims rather than less protection. I believe that when the definition of household member was revised, there was an unintended consequence in that the 2003 amendment to § 16-25-10 narrowed the definition of household members and therefore eliminated the opportunity for 1/4th parole eligibility for child victims of domestic violence under § 16-25-90. I have no reason to believe that any advocate of this legislation believed that it was a good idea to remove the 1/4th parole eligibility from child victims of domestic violence.

FURTHER THE AFFIANT SAYETH NOT!

Mary Victoria Bourus
Mary Victoria Bourus
Family Justice Center
1530 High Market Street
Georgetown, SC 29442

Charleston, South Carolina

Dated: April 8, 2014

SWORN to and subscribed to before me this

8 day of April, 2014.

Phoebe Collins
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3-1-17

BY _____

JULIE S. ARMSTRONG
CLERK OF COURT

2014 APR -8 PM 4:00

FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON	)	Warrant Number: 2012A1020900039
)	
STATE OF SOUTH CAROLINA	)	Indictment Number: 2013-GS-10-0499 Murder
)	
v.	)	Memorandum in Response to Defendant's
	)	Motion to Apply §16-25-90
Elias James Walker,)	
Defendant.)	

INTRODUCTION

South Carolina Code §16-25-90 provides a potential benefit to victims of domestic violence who commit crimes against their abusers. *S.C. Code Ann. §16-25-90*. The key to early release is that a court find that a defendant has produced credible evidence of a history of criminal domestic violence as defined in §16-25-20, which in turn requires that defendant/victims meet §16-25-10's definition of "household member." "Household member" is defined as: (1) spouse; (2) former spouse; (3) persons who have a child in common; or (4) a male and female who are cohabitating or formerly have cohabitated. *S.C. Code Ann. §16-25-10*.

The Defendant raises two arguments in support of applying §16-25-90 to calculate Defendant Elias Walker's parole eligibility. First, the Defendant claims the definition of household member violates Equal Protection and Due Process because it can be interpreted to apply to cohabitating children who are a different gender from their abusing parent. Second, the Defendant argues that denying him the benefit of the statute violates Due Process and Equal Protection because excluding children who are the victims of domestic abuse while allowing the

benefit for adults who are victims of domestic abuse serves no legitimate purpose. Even if the Court were to find §16-25-90 unconstitutional on Equal Protection and Due Process grounds, the Court may only strike the statute because it has no authority to re-write it.

ANALYSIS

I. The Defendant's Equal Protection Argument Fails Because He Cannot Demonstrate that the State Has No Legitimate Purpose In Limiting its Definition of Household Members or That He Has Received Disparate Treatment as Related to Other Abused Children

A. Standard for Analyzing Equal Protection Claims

No person shall be denied equal protection of the law. *U.S. CONST. AMEND. XIV, § 1; S.C. CONST. ART. I, § 3; Sunset Cay, L.L.C. v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). As in this case, where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013); *Sunset Cay*, 357 S.C. at 428–29, 593 S.E.2d at 469. To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose. *Dunes W.*, 401 S.C. at 293–94, 737 S.E.2d at 608; *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).

B. Section 16-25-90 Does Not Apply to Children Who Are Victims of Abuse by Their Parents, Regardless of Gender

The State agrees that if the definition of household member in §16-25-10 were read to include children as victims of domestic violence when their abusing parent is a different gender but to exclude child victims of abuse by same gender parents, it may violate equal protection. Such an interpretation, however, is not consistent with the plain meaning of the statute since "cohabitate" most commonly describes an intimate, romantic relationship. Cohabit or "formerly cohabited" refers to intimate relationships and does not apply to the parent child relationship. Under its ordinary use, cohabitation denotes intimacy and sexual activity. *See E.D.M. v T.A.M.*, 307 SC 471, 415 S.E.2d 812 (1992), (*defining cohabitation as including sexual activity or intimacy*). *See also* 71 A.L.R. 5th 285 (*discussion regarding the issue of cohabitation as it relates to of domestic violence*). On its face and in its application, the statute does not apply to any children, regardless of the gender of their abusive parents and does not violate the Defendant's right to equal protection and due process.

C. The State Has a Legitimate Interest in Criminalizing Domestic Violence Amongst "Household Members" and Offers Many Avenues for Criminalizing Violence Towards Children and Therefore §16-25-90 Does Not Violate the Equal Protection Clause

Child abuse and domestic violence are severe problems in South Carolina and the United States, as a whole. By its very nature, the abuse of children is often very different than the abuse of an intimate partner. State government, through the Legislature, has the difficult responsibility of crafting laws to address the problems of abuse in these contexts. In doing so, the Legislature has enacted numerous child protection laws in the criminal justice and welfare protection arenas, and also allows for special treatment of juvenile offenders. Likewise, the Legislature has taken steps to address domestic violence amongst adults. The Defendant makes no credible claim that

the domestic violence statutes offer parents a protection that is not likewise offered to children under the plethora of child abuse statutes enacted in South Carolina. Acts of domestic violence against both adults and children are criminalized in various statutes.

D. The State Has a Legitimate Interest in Allowing Battered Spouses or Partners the Potential Benefit of Early Parole When They Have Lived Together in an Intimate Relationship or Have a Child in Common With Their Batterer

The Equal Protection Clause of the Fourteenth Amendment does not require a State choose between attacking every aspect of a problem and not attacking the problem at all. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). It is sufficient that the State's action be rationally based and free from invidious discrimination. The South Carolina Supreme Court has acknowledged that the equal protection clause does not prohibit different treatment of people in different circumstances under the law. *Dunes W.*, 401 S.C. at 294-95, 737 S.E.2d at 608-09 (quoting *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 782-83 (Ct.App.2009)).

The criminal domestic violence statute in question and the parole eligibility statute for victims of domestic abuse appear to be in response to the widely accepted "Battered Woman/Spouse Syndrome" defenses often raised by defendants who harm their abusive partners. While both child abuse and domestic abuse may be rampant, the percentage of parents killed by their children is low. According to the Bureau of Justice Statistics, *Patterns & Trends Homicide Trends in the United States, 1980-2008*, BJS, NCJ 236018, November 2011, homicides by a spouse or ex-spouse accounted for just over a third (37%) of all family homicides in 2008. Children killed by their parents were the second most frequent type of family homicide at 25% of all family homicides in 2008. Parents killed by one of their children were up to 13% in 2008.¹

¹These are the most recent statistics the Attorney for the State could locate.

The Legislature has chosen to address a relatively widespread problem of murder amongst intimate partners. The State does not argue that the exclusion of defendants who were victims of child abuse from consideration for early prison release best fulfills relevant social and penal system objectives that the legislature might ideally recognize. *See Dandridge*, 397 U.S. at 497. The State agrees that acknowledging children as "household members" who may be victims of domestic abuse may bring a more just and humane result when calculating prison sentences. *See Id.* Children, however, do not often kill their parents. Laws governing children prosecuted as juveniles already allow for mitigated sentences. The Legislature has decided that there is no pressing need to allow early parole to children prosecuted as adults for killing their abusive parents.

II. Even If the Court Finds §16-25-90 Is Unconstitutional Because It Violates Equal Protection and Due Process, the Court May Only Strike the Statute Since it Has No Authority to Re-Write It.

Courts must take the statutes as they find them, giving effect to the legislative intent as expressed in its language. Courts cannot supply an omission in a statute. *See State v. White*, 338 S.C. 56, 58 (Ct. App. 1999). If this Court were to include children in the definition of household member, it would exceed the scope of its judicial authority, which is simply to answer the question of whether the challenged statute was constitutional or not. *See Bray v. Marathon Corp.*, 356 S.C. 111, 117, n.6 (2003) (Where the Legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. If the Act is to be amended, this must be accomplished by the Legislature, not the court.); *Henderson v. Evans*, 268 S.C. 127, 130 (1977) (Any other construction of the statute would be amendatory; certainly it is not the province of this Court to perform legislative functions.); *Page v. Winter*, 240 S.C. 516,

518 (1962) ("It is the function of the legislature, not the courts, to make, amend or repeal laws.... We do not have the right to repeal, alter, modify, or change the law of the land, even when it plainly appears that the law in force may be wrong." (citations omitted)); *Hadden v. South Carolina Tax Comm'n*, 183 S.C. 38, 190 S.E. 249, 253 (1937) (This court is not a lawmaking body.); *see also State v. Byrd*, 267 S.C. 87, 91-92 (1976) ("We bear in mind that when a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function.").

CONCLUSION

The Court has no authority to re-write and redefine statutory definitions. Even if it could, the Defendant has not shown that similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose.

Respectfully submitted,



Scarlett A. Wilson
Solicitor, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
) Case No(s): 2013GS1000499
) Warrant No(s): 2012A1020900039
) Charge(s): Murder

STATE OF SOUTH CAROLINA

vs.

ELIAS JAMES WALKER,

Defendant

**DEFENDANT'S
REPLY MEMORANDUM**

In reply to the State's Memorandum in Response to the Defendant's motion to apply § 16-25-90, the Defendant wishes to address the question raised by the State that the Court lacks the power to correct the equal protection violation. While it is absolutely clear that the Court cannot rewrite a statute, the Defendant argues that the Court does have the equitable authority to fashion a remedy for a wrongfully excluded person. This is similar to the famous lawsuit excluding Shannon Faulkner from admission to the Citadel. In that case there was a finding of an equal protection violation. The Court simply could have simply said this is an Equal Protection violation but there is no remedy. However, in that case the Court found that an equitable remedy had to be fashioned which led to the admission to Ms. Faulkner to the Citadel. The same principle of law would apply in this setting where a wrongfully excluded person based on gender should be given equal access and protection under the law to the privileges of a similarly situated sister who had committed a similar offense.

Respectfully Submitted,



D. Ashley Pennington
Ninth Circuit Public Defender
Attorney for Defendant

Charleston, South Carolina

Dated:

2014 MAY - 5 AM 11:18
JULIE J. LONG
CLERK OF COURT
BY 14

FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE 9TH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2013-GS-10-0499
	)	WARRANT NO(S): 2012A1020900039
STATE OF SOUTH CAROLINA	)	CHARGE(S): MURDER
)	
BY _____)	
	)	ORDER DENYING APPLICATION OF
vs.	)	SC CODE SECTION 16-25-90 TO
	)	DEFENDANT ELIAS JAMES WALKER
)	
ELIAS JAMES WALKER)	
)	
_____)	

2014 JUL -1
 JULIE J. ASHBY
 CLERK OF COURT

Elias James Walker pled Guilty But Mentally Ill to the lesser-included charge of the voluntary manslaughter of his father, Anthony Walker. He argues that since he lived with his father (who had continually abused him physically and mentally since his childhood) at the time he killed him, this court should find he is eligible for early parole under South Carolina Code Section 16-25-90. Section 16-25-90 of the South Carolina Code of Laws provides that a household member who is a victim of domestic violence from another household member is eligible to seek a court finding that will allow the defendant to apply for a parole with release after a quarter of their sentence is served. The term "household member" is defined in section 16-25-10 as "current and former spouses, people with children in common, and a male and female who are cohabiting or formally have cohabited." It does not expressly include (or exclude) children who have been battered by another household member.

The defendant also asks this court to find that if he is not entitled to early parole eligibility as a household member as defined by Section 16-25-10, then alternatively the court should find these statutes are unconstitutional because (1)

they exclude all children who are victims of domestic violence from being parole eligible after a quarter of their sentence is served, or (2) the statute includes children but only those who are a different gender from their abuser. Specifically, the defendant argues that Section 16-25-10 and 16-25-90 violate the Due Process and Equal Protection clauses of the 14th amendment of the United States Constitution and Article I, Section III of the South Carolina Constitution in one of two ways. First, the defendant argues that if the statutes are read as excluding all children, this exclusion is not rationally related to a legitimate state purpose and violates substantive due process under both federal and state constitutions. Second, the defendant argues that if the statutes are read as including children who are cohabiting with a parent, but they only offer relief to those of a different gender than the abusing parent, then such gender discrimination does not serve an important governmental objective nor is it substantially related to the achievement of a legitimate governmental objective. In other words Sections 16-25-10 and 16-25-90 violate equal protection under the law for cohabiting children of the same gender as their batterer. The defendant asks that the court find that the benefit of the statutory section (i.e., parole eligibility after a quarter of sentence service) denied to children of the same gender as their batterer apply to him.

Applicability of Statutory Requirements to Defendant

The facts of this case are uncontroverted. Elias Walker's father abused him his entire life. At the time of the events leading to this conviction, the defendant and his father had been living in a small hotel room for several weeks. Without going into the great detail here, I find there is ample evidence in the record of a history of



criminal domestic violence against the defendant at the hands of his father as provided in Section 16-25-20. As such, the defendant asks the court to find that he meets the definition of a person cohabiting under Section 16-25-10. However, I find that the defendant does not meet the requirements of the statutory protection provided by section 16-25-90 because Section 16-25-10 defines the protected class of "household members" as spouses, former spouses, people who have a child in common with the batterer, and a male and female who are currently cohabiting or have formally cohabited. I find that prior to 2003 children were included in the class as defined by Section 16-25-10; however, the legislature removed children from the protected class in 2003. Clearly, a court cannot define a class to include someone who used to specifically belong in the class but was later removed from the class by the legislature.

Equal Protection

No person shall be denied equal protection of the law. U.S. CONST. AMEND. XIV, § 1; S.C. CONST. ART. I, § 3; *Sunset Cay, L.L.C. v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013); *Sunset Cay*, 357 S.C. at 428-29, 593 S.E.2d at 469. To prevail under the rational basis standard, a claimant must show similarly

situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose. *Dunes W.*, 401 S.C. at 293-94, 737 S.E.2d at 608; *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).

In *Dunes West*, the South Carolina Supreme Court noted that the equal protection clause does not prohibit different treatment of people in different circumstances under the law. *Dunes W.*, 401 S.C. at 294-95, 737 S.E.2d at 608-09 (quoting *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 782-83 (Ct. App. 2009)). Courts give great deference to the General Assembly's decision to create a classification. *Davis v. Cnty. of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386. Consequently, those who challenge the validity of one under rational basis review must "negate every conceivable basis which might support it." *Lee v. S.C. Dep't of Natural Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000). Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. *Id.* Moreover, "[t]he fact that the classification may result in some inequity does not render it unconstitutional." *Davis*, 313 S.C. at 465, 443 S.E.2d at 386. Accordingly, a court's equal protection inquiry revolves around interplay between the specific classification created and the purported basis for it, with a challenger coming under rational basis review facing a steep hill to climb.

The defendant bears the burden of proving beyond a reasonable doubt that the classifications created are not supported by any rational basis, not just that the scheme as a whole is arbitrary. Indeed, the South Carolina Supreme Court noted that "[w]ere we to examine the rationality of a law irrespective of any classification it creates, we would impermissibly step from our position as the arbiter of a statute's constitutionality and into the seats of the General Assembly." *Cabiness v. Town of James Island*, 393 S.C. 176, 191, 712 S.E.2d 416, 424 (2011). Permitting the defendant to attack these statutes on equal protection grounds without any consideration of the classifications or their relationship to their putative legislative goal therefore would fundamentally alter the core of a court's analysis, which is a step our Supreme Court refused to take. The Defendant's view would even remove our presumption of constitutionality by employing a form of "guilt by association," where potentially valid caps and exemptions are struck down for violating the equal protection clause simply because they happen to be in a larger scheme that may include invalid parts.

The State concedes that there may be a equal protection violation if the definition of a household member under Section 16-25-10 were read to include children as victims of domestic violence when their abusing parent is a different gender but exclude child victims of abuse by same gender parents. However, this court has found above that the statute does not apply to any children, regardless of the gender of their abusive parents.

The State readily concedes that both child abuse and domestic violence among spouses and people who cohabitate together are severe problems in South



Carolina and the United States as a whole. However, the State argues that the abuse of children is often very different than the abuse of an intimate partner. State government has the difficult responsibility of crafting legislation to address the problems of abuse in these differing contexts. In doing so, the legislature has enacted numerous child protection laws in the criminal justice and welfare protection and arenas, and also allows for special treatment of juvenile offenders. Likewise, the legislature has taken steps to address domestic violence amongst adults. The State is not required to choose between attacking every aspect of a problem and not attacking a problem at all. It is sufficient that the States's actions are rationally based and free from invidious discrimination. The law does not prohibit different treatment of people in different circumstances under the law. *Dunes West*, 401 SC at 294– 95, 7 S.E. 2d at 608 – 09.

The parole eligibility statute for victims of domestic abuse appears to be in response to the widely excepted "battered women/spouse syndrome" defenses often raised by defendants who have abusive partners. While both child abuse and domestic abuse may be societal problems, the percentage of parents killed by their children is lower than those killed by battered spouses or partners.

The legislature has chosen to address the relatively more widespread problem of murder amongst intimate partners. The State does not argue that the exclusion of defendants who were victims of child abuse from consideration for early prison release best fulfills relevant social and penal system objectives that the legislature might ideally recognize. See *Dandridge*, 397 US at 497. Indeed, the State agrees that acknowledging children as "household members" who may be victims of

domestic abuse may bring about a more just and humane result when calculating prison sentences. However, the legislature decided that there is no pressing need to allow early parole to children prosecuted as adults for killing their abusive parents (and can just as easily restore the right as it took it away in 2003). Therefore, I find the defendant has not met his burden of showing this different treatment is not rationally related to valid State interests.

Due Process

"The burden of proving the invalidity of a statute is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Therefore, in this case the defendant bears the burden of proving his substantive due process claim under the "arbitrary and capricious" framework.

A regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (stating that the Due Process Clause is intended in part to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"); see also *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 785 (1936) (striking down an ordinance prohibiting door-to-door sales calls as unconstitutional based on a finding that the ordinance failed to further the public health, safety, or welfare and was therefore unreasonable).

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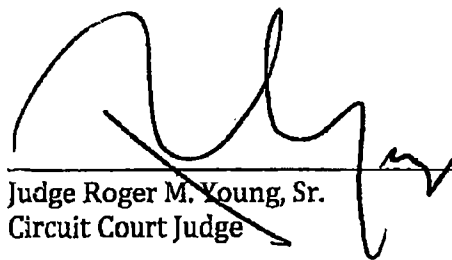
For the same reasons as stated in the equal protection analysis above, I find the defendant has failed to show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Section 16-25-90 of the South Carolina Code of Laws, which provides that a household member who is a victim of domestic violence from another household member is eligible to seek a court finding that will allow the defendant to apply for a parole with release after a quarter of their sentence is served, does not apply to the defendant because he is not a "household member" as currently defined in section 16-25-10; and
2. The defendant has failed to show that he is a similarly situated person receiving disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose, thus denying him the equal protection of the law under Constitutions of either the United States or South Carolina; and
3. The defendant has failed to show that the inapplicability of Section 16-25-90 to him fails to serve any legitimate governmental objective and is so without any reasonable justification that it deprives him of due process under the Constitutions of either the United States or South Carolina.

IT IS SO ORDERED!

2/1, 2014


 Judge Roger M. Young, Sr.
 Circuit Court Judge

JULIE ARMSTRONG
CLERK OF COURT

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FILED

ATTEST: A TRUE COPY
 JULIE ARMSTRONG (SEAL)
 CLERK OF COURT
 DEPUTY CLERK

EXHIBIT "A"

March 24, 2014

Alicia Penn
Charleston County Public Defender

Elias Walker
Date of Evaluation 9/29/12
Place of Evaluation: Charleston County Detention Center

Dear Ms. Penn,

As you know I evaluated Elias Walker on 9/29/12 at the Charleston County Detention Center. He was 22 years old at the time. He was taking Risperidone® 1mg at night at the time of the evaluation.

He reports a prior history of trauma and "paranoia. He reports his father "hunted people." He states his father owned M-16s, a Glock and a revolver. He states his father dealt drugs. He reports his mother told him he had shot at her in the past. He reports his father shot at him with a .22 when he was 16 years old. He also reports his father "pulled a knife" on him.

In addition to being exposed to trauma, he reports stereotyped interests in philosophy and mythology. He reports deficits in social development. He states he did not have any friends.

He also reports a history of self-mutilating behavior: "when my girlfriend would piss me off, I would black out and cut myself." He reports he would feel better after cutting.

He reports he was forced to live with his father when he became homeless. "It was not safe because the way he acted in the past." He reports his father set up other drug dealers. "I didn't feel right. Staying there made me worse. He tried to hurt me too."

He reports a history of auditory hallucinations. "They come and go." He reports he hears two to three voices. He states they sometimes say good things and sometimes say bad things. He reports the voices talk to each other like he is not there. One voice says: "Don't listen to him." He states one voice is protective, but it is not an angel. He reports the onset of hallucinations at age 13.

He reports on the night of the offense, he and his father got into a "stupid argument at the bar we were at." He states, "it was about catching the tab." He states his father

had the money but wanted to leave without paying the tab. He states they went home. He states he went to Wal Mart to get something to eat. He states he bought beer at Wal Mart and drank some. He states his father started yelling at him and said "he would kill me." He reports he began hallucinating and the voices said to "hurt him". He states the voices were "overwhelming." He reports he thought he hit him in the head and neck. He states he went into the bathroom crying.

On mental status examination, he was alert and oriented. He was able to abstract similarities between objects. He performed poorly on a test of verbal fluency. He was able to register three items and recall them correctly after five minutes using visual clues. Therefore, other than mild deficits in frontal lobe functioning, he is cognitively intact. He had poor eye contact and a flat affect. He was not hallucinating during the interview. He endorsed stereotyped interests in mythology.

Mr. Walker's hallucinations are more consistent with a psychotic disorder than a dissociative disorder resulting from his abuse. They improved with a very low dose of antipsychotic medication.

It is my opinion to a reasonable degree of medical certainty that Mr. Walker suffers from an Autistic Spectrum Disorder and Psychosis Not Otherwise Specified. Although he is mentally ill, he has a rational and factual understanding of the proceedings, and the capacity to assist in his defense.

On the night of the offense, he had command auditory hallucinations to hurt his father. Although he was psychotic, he knew right from wrong and recognized the specific wrongfulness of his acts, which explains why he went into the bathroom afterwards and cried. It is my opinion he lacked the capacity to conform his conduct to the requirements of the law. He was unable to refrain from acting upon his hallucinations. "They were overwhelming." The exacerbation of his hallucinations was related to the abuse he suffered by his father.

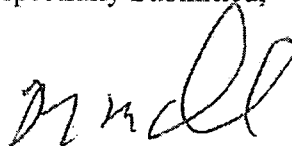
He should remain on his antipsychotic medication. His symptoms could reoccur in situations where he perceives he is in danger. Upon his release from confinement, he could benefit from a period of supervision which includes his being adherent with any mental health treatments. Another way to ensure compliance with future treatments would include having an outpatient civil commitment order upon his release from confinement. He should also abstain from drugs and alcohol, as these substances can increase his chances for a relapse of hallucinations.

Donna Schwartz-Watts, M.D.
Consulting Forensic Psychiatrist

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

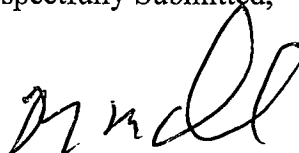
ATTORNEY FOR APPELLANT

This 12th day of August, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 12th day of August, 2016.

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SC Court of Appeals