

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Lexington County

RECEIVED

Thomas A. Russo, Circuit Court Judge

DEC 06 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

SHELLIE LAVETTE DAVIS,

APPELLANT.

PETITION FOR
ORDER TO RECONSTRUCT
THE RECORD OF APPELLANT'S
SENTENCING HEARING TRANSCRIPT OR IN THE ALTERNATIVE
AN ORDER FOR A NEW SENTENCING HEARING

Appellate Case No.: 2018-000366

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order requiring the parties to reconstruct the record of Appellant's sentencing hearing transcript. The sentencing hearing was held on April 30, 2014, before the Honorable Thomas A. Russo in Lexington County. In the alternative, Appellant requests an order for a new sentencing proceeding.

In accordance with Rule 240(c), SCACR, Counsel submits the following documents to support her motion: pages 924–27 and 930–35 of the trial transcript dated April 21–25, 2014 (Exhibit A); email from court reporter Bethanie K. Creppon (Exhibit

B); letter from court reporter Bethanie K. Creppon (Exhibit C); Order Denying Defendant's Motion for Hearing to Reconsider Not Finding Battered Woman During Sentencing (Exhibit D).

Upon Appellant being approved as indigent, this office requested all transcripts based on information from trial counsel Aimee Zmroczek regarding all trial and hearing dates. This office received the complete trial transcript from the court reporter who was present at the trial. However, the sentencing hearing was held on April 30, 2014, the week after the trial, and a different court reporter was present. Upon inquiry by our office, that court reporter, Bethanie Creppon, informed us that she would be unable to provide transcripts of any hearings held before June 9, 2015, due to her car being broken into. Exhibit B; Exhibit C.

The trial court had postponed the sentencing after the jury verdict due to defense counsel requesting a finding by a preponderance of the evidence that Appellant was a battered woman under S.C. Code § 16-25-90, which provides parole eligibility after serving one-fourth of one's sentence. The trial court initially made that finding and disagreed with the State that the finding flies in the face of the jury verdict, emphasizing that although it agreed with the jury's verdict, that standard was reasonable doubt whereas the standard for the finding of a battered woman was a preponderance of the evidence. Further, the trial court stated that it believed, based on the testimony and evidence, that there was an abusive relationship both ways. Trial counsel offered to provide testimony from Dr. Donna Schwartz-Watts regarding the battered woman issue if the trial court wished to defer sentencing, and the trial court agreed to withhold

sentencing to do some research and allow both parties to present with regard to the issue of battered person syndrome. Exhibit A.

On April 30, 2014, the trial court held a sentencing hearing and ultimately determined that Appellant was not a battered woman and sentenced her to thirty (30) years. Because of the unavailability of the sentencing hearing transcript, there is no way to know what the trial court based its determination on. This is especially significant in light of the trial court's initially finding Appellant was a battered woman. On May 8, 2014, trial counsel Aimee Zmroczek filed a Motion to Reconsider Not Finding Battered Woman During Sentencing. On February 2, 2018, the trial court denied the motion to reconsider in an Order. Exhibit D. This Order is the only indication of what the trial court based its determination on, but it does not provide any information about what evidence and/or testimony was presented at the hearing.

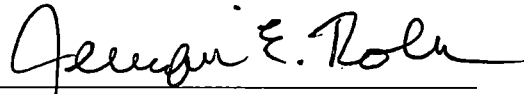
When a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273–74 (Ct. App. 2007). A critical portion of most trial transcripts is the sentencing of the defendant, and in this case it has been lost and is no longer available through no fault of Appellant. The court reporter's car was broken into on June 3, 2015, and all of her court reporting equipment, including her laptop, transcripts, audio files, and backup external hard drives, was stolen. Exhibit C. Therefore, meaningful review of the record below is not possible with the current transcript, especially in light of the requested

battered woman finding that would impact parole eligibility under S.C. Code § 16-25-90. Appellant seeks reconstruction of the sentencing hearing record to permit meaningful appellate review of her trial.

If the trial court is unable to reconstruct the record of the sentencing hearing, Appellant requests this Court order a new sentencing hearing because the trial transcript, without the sentencing portion, fails to permit meaningful review. In *Deaton v. Leath*, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant's convictions were set aside and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing *Deaton*, this Court denied a request for reconstruction in *State v. Serrette*, 375 S.C. 650, 652–53, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period, which this Court explained was “not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript.” Appellant was not at fault for the absence of the sentencing portion of her transcript. As a result, Appellant requests this Court order a new sentencing proceeding in her case if the record cannot be reconstructed.

WHEREFORE, the undersigned counsel requests an order for the reconstruction of the sentencing hearing portion of Appellant's trial transcript in order to perfect Appellant's direct appeal, to include the trial court's Findings of Fact and Conclusions of Law on the issue of Battered Woman Syndrome as it relates to this Appellant and her sentencing. In the alternative, Appellant requests this Court remand for a new sentencing hearing. While this petition is pending, Appellant asks this Court to hold the timelines for filing her initial brief and designation in abeyance.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jennifer E. Roberts", written over a horizontal line.

Jennifer E. Roberts
Appellate Defender

December 6, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

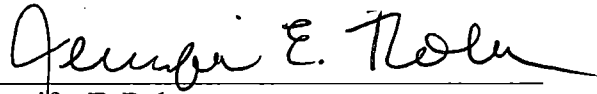
v.

SHELLIE LAVETTE DAVIS,

APPELLANT.

CERTIFICATE OF SERVICE

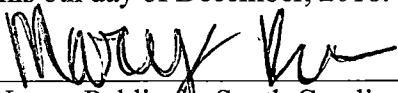
The undersigned attorney hereby certifies the petition for order to reconstruct the sentencing portion of appellant's trial transcript in the above referenced case has been served upon J. Benjamin Aplin, Esquire, Senior Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 6th day of December, 2018.



Jennifer E. Roberts
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2018.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027

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DEC 06 2018
SC Court of Appeals

Exhibit A

1 court, she's certainly welcome to do that. She's not
2 required to do that, and then if there's anyone that would
3 like to address the court on her behalf, I'll be happy to
4 hear from them as well.

5 MS. ZMROCZEK: Your Honor, before, before I address
6 the court, I would ask that the court make a finding under
7 the statute by a preponderance of the evidence that she is
8 a battered woman. What that does is that provides her
9 certain services within the South Carolina Department of
10 Corrections, and that's something that you would have to
11 note on the verdict sheet.

12 THE COURT: And that is by the preponderance of the
13 evidence?

14 MS. ZMROCZEK: It is by the preponderance of the
15 evidence, Your Honor.

16 THE COURT: All right, I'll make that finding.

17 MS. ZMROCZEK: Thank you.

18 THE COURT: I think that's appropriate.

19 MS. ZMROCZEK: Thank you, Your Honor.

20 Ms. Davis is forty-one years old. She has five
21 children, as you know. She has no record. You heard her
22 testify and you heard her facts.

23 Sorry.

24 I've just -- I've known her for a long time. She's
25 been in jail for four years, and she would ask that -- she

1 understands that there's a mandatory minimum sentence of
2 thirty years day for day, and she would ask that the court
3 exercise its discretion and provide the minimum sentence in
4 this case.

5 And I believe that there are two family members, or
6 one family member and one friend of the family that would
7 like to address the court.

8 THE COURT: Sure.

9 MS. ZMROCZEK: Thank you.

10 THE COURT: Happy to hear from them.

11 Mr. Riddle.

12 MR. RIDDLE: I just want to address the finding that
13 she's a battered woman because that kicks in a 25 percent
14 parole eligibility provision.

15 THE COURT: Okay.

16 MR. RIDDLE: And I think that flies in the face a
17 little bit of the jury's verdict, and I just wanted to put
18 that on the record.

19 THE COURT: Well, I, I, I don't see how it flies in
20 the face of a verdict. The law does not state that if
21 someone is a battered -- is considered to be suffering from
22 battered person syndrome that they can't be convicted of
23 murder.

24 MR. RIDDLE: Yes, sir.

25 THE COURT: So, it clearly doesn't fly in the face.

1 The standard -- and, and for what it's worth, which is
2 worth nothing, but for what it's worth, based on the
3 evidence that was presented this week, I agree with the
4 jury's verdict.

5 MR. RIDDLE: Yes, sir.

6 THE COURT: I think, I think they got it right, but
7 the standard is, is beyond a reasonable doubt.

8 MR. RIDDLE: Right.

9 THE COURT: For the jury.

10 MR. RIDDLE: Yes, sir.

11 THE COURT: The standard for what Ms. Zmroczek is
12 asking is by a preponderance or greater weight of the
13 evidence which is, as you know, a civil standard which is
14 just merely by, by the greater weight.

15 I'm not, I'm not sure I'm totally clear on what all of
16 the requirements are for someone to medically be qualified
17 for that, that finding, but I, I do believe that, that,
18 based on the testimony and the evidence, that there, there
19 was -- this was an abusive relationship. I believe it was
20 an abusive relationship both ways. Give me, give me one
21 second.

22 MR. RIDDLE: Yes, sir.

23 (A PAUSE.)

24 THE COURT: Ms. Zmroczek, let me clarify. Are you
25 asking for a finding that she was suffering from battered

1 person syndrome at the time, or are you looking for a
2 finding that she was battered because I think there's a
3 difference.

4 MS. ZMROCZEK: If I, if I may pull up the statute,
5 Your Honor?

6 THE COURT: Sure.

7 MS. ZMROCZEK: Just so I can look at that?

8 THE COURT: Sure. I was under the impression that
9 we were deciding whether or not she was -- had been
10 battered, not that she was suffering from the syndrome,
11 but, but I ---

12 MR. RIDDLE: I was referring to 16-25-90, Your Honor.

13 (A PAUSE.)

14 THE COURT: We're, we're -- Ms. Zmroczek, we're
15 talking about section 16-25-90? Is that what we're
16 referring to?

17 MS. ZMROCZEK: Bear with me, Your Honor. I'm sorry.
18 I've read that statute, but there -- but...

19 (A PAUSE.)

20 MS. ZMROCZEK: Your Honor, while I'm -- I can --
21 while I'm researching that, if you want to hear from the
22 other ---

23 THE COURT: I'm going to get Hannah to look at it as
24 well.

25 MS. ZMROCZEK: Okay.

1 have a mom either. So, I'm just hoping that you see that
2 part and, and, and down in the bottom of your heart --
3 because I don't, I actually don't know what it's like to
4 not have my parents. I have, I have no idea what they're
5 going through. My parents have been married for forty-six
6 years and they love each other dearly, and we've never seen
7 our parents fight.

8 So, I don't know what she's going through and I don't
9 know what a married couple would actually go through
10 either, but from looking at it from the outside, just hope
11 that you could just give her a lesser sentence.

12 THE COURT: Thank you, ma'am.

13 MS. ZMROCZEK: Your Honor, I have had a chance to
14 review the statute. That, that would be the finding that
15 we are looking for under 16-25-90.

16 THE COURT: All right.

17 (A PAUSE.)

18 THE COURT: Let me hear from you, Ms. Zmroczek.

19 MS. ZMROCZEK: Your Honor, the evidence that came not
20 only from the witness stand, I believe even as the jurors
21 sat through sentencing and, as you said, that you believed
22 that this was an abusive relationship, they affirmatively
23 agreed with you.

24 Your Honor, I firmly believe that there was fault on
25 both parties in the relationship, not in this -- and maybe

1 even in this instance, Your Honor, but we obviously respect
2 the verdict of the jury. And we do not believe that this
3 flies in the face of the jury's verdict.

4 The statute was enacted by the legislature for this
5 very purpose because they recognized the mental aspect that
6 goes along with this crime, Your Honor, and it's not only
7 just parole eligibility. They receive special counseling
8 services. They receive special services once within the
9 Department of Corrections, Your Honor, and we believe that
10 she through -- not only through her own testimony but the
11 testimony of interested and not interested parties, we
12 believe that she would meet the requirements.

13 THE COURT: All right. Thank you, ma'am.

14 Let me, let me read what I've got here, and then I'll
15 recognize you, Mr. Riddle.

16 MR. RIDDLE: Yes, sir.

17 (A PAUSE.)

18 MS. ZMROCZEK: Your Honor.

19 THE COURT: Yes, ma'am.

20 MS. ZMROCZEK: I know you're discussing with ---

21 THE COURT: Go ahead.

22 MS. ZMROCZEK: I know you're discussing with your law
23 clerk, and I do not mean to interrupt, but I would have an
24 additional proposal if the court would consider it.

25 I have spoken with Dr. Donna Schwartz-Watts via text

1 message, and she indicates that if the court were to prefer
2 to defer sentencing, she could provide more testimony if
3 the court requires that if, if that's what the court
4 would...

5 THE COURT: Well, right now that's what I'm trying to
6 decide is -- because, because here's, here's what I, here's
7 what I have. The only testimony in this case of physical
8 violence, domestic violence -- and not that it doesn't
9 carry weight, but it, but it came from Ms. Davis. None of
10 the other folks that testified -- they all said they
11 believe it went on. No one saw it. They claimed to have
12 seen some bruising but they, they don't know, they don't
13 know where it came from.

14 I had no one ever, ever witnessing domestic violence
15 between the two. I even have testimony from other folks
16 that say that they seemed to be a happy couple and that the
17 children never witnessed any arguing between their parents.
18 I mean, these are the things I'm weighing. I don't know if
19 there's any other evidence, and I don't know what Dr.
20 Schwartz-Watts would have, but I'm, I'm happy to consider
21 it.

22 (A PAUSE.)

23 MR. RIDDLE: Your Honor.

24 THE COURT: Yes, sir.

25 MR. RIDDLE: I'm sorry. I don't want to interrupt

1 you.

2 THE COURT: I welcome the interruption. I mean, I,
3 I've never had a case that, that dealt with battered person
4 syndrome.

5 MR. RIDDLE: Sure.

6 THE COURT: So, this is the first time I'm encountered
7 with it, which is why I'm having to do some research on the
8 fly.

9 MR. RIDDLE: Me, too, actually, Your Honor. I have
10 two things. I wanted to hand up a copy of *State vs.*
11 *Grooms*, which is a case which interprets Section 16-25-90
12 which basically indicates that -- it requires the defendant
13 do more than produce evidence of a history of criminal
14 domestic abuse that she believes is credible. Use of the
15 term credible evidence indicates the legislature intended
16 that the evidence, in fact, be trustworthy, not simply
17 plausible. And it goes on to say some other things, and I
18 will hand this up.

19 THE COURT: All right.

20 MR. RIDDLE: That's point number one. Point number
21 two is while none of the family members wanted to address
22 the court regarding sentencing, I know that at least one
23 family would like to address the court regarding the issue
24 of whether or not Jermaine was a batterer. And I had
25 placed what I placed on the record before regarding

1 sentencing prior to Ms. Zmroczek making that motion.

2 THE COURT: Sure.

3 MR. RIDDLE: So, let me hand up the case, and I'll
4 wait for your direction.

5 THE COURT: All right. Well, I think, I think what I
6 will do, to give me an opportunity to research this issue,
7 is withhold sentencing until I can -- and we can reconvene
8 for a hearing, which I think is appropriate, a hearing as
9 to this issue, and then allow both sides to present. Not
10 to retry the case clearly, but simply to present what they
11 wish to present with regards to the issue of battered
12 person syndrome.

13 MR. RIDDLE: Can I check one thing, Your Honor?

14 THE COURT: Yeah.

15 (A PAUSE.)

16 MR. RIDDLE: Thank you for your indulgence, Your
17 Honor. Are you just going to notice us?

18 THE COURT: All right, here's, here's what we're going
19 to do. Obviously Ms. Davis is in custody, and I don't want
20 to delay this too long, but we'll have, we'll have to
21 reconvene some time the, the week of -- I might could do it
22 next week. Next week is a chambers week, so I don't have a
23 court reporter scheduled, but I could probably get one.
24 So, how about April the 30th, next Wednesday? Any problem
25 or any issue with that?

1 MR. RIDDLE: No, sir. I can do that.

2 THE COURT: All right, and let me say this because
3 I've had -- and understandably I've had the request from
4 the family with regards to, to leniency and the young lady
5 who asked to reduce the charge.

6 The conviction for murder carries a mandatory minimum
7 thirty years up to life. So, I can't, I, I can't, nor
8 would I, reduce the charge because I think the verdict was
9 appropriate. So, that, that's, that -- just so you -- for
10 your understanding, that, that's -- if, if I were to be as
11 lenient as I could possibly be, it's a mandatory minimum
12 thirty years up to life. So, I just -- I didn't want to
13 send folks away this evening hoping for a lighter sentence
14 than that even though I know that they, they would like
15 that.

16 And I apologize to the members of the jury that have
17 remained here, but as I said before, in all the years I've
18 done this, this is the first case I've had that involves
19 this, this issue, and the statute does talk about a
20 post-verdict hearing to address the issues regarding the
21 battered person syndrome.

22 So, we'll reconvene Wednesday, 10:00. I'll get Court
23 Administration to get us a court reporter, and then I'll
24 hear from both the state and the defense with regards to
25 that issue, all right?

Exhibit B

Roberts, Jennifer

From: Creppon, Bethanie <bcreppon@sccourts.org>
Sent: Monday, April 2, 2018 2:14 PM
To: Burk, Adriane
Subject: Re: The State v. Shellie Lavette Davis - Appellate Case No. 2018-000366
Attachments: Official Letter.doc

Follow Up Flag: Follow up
Flag Status: Flagged

Ms. Burk,

I regret to inform you that I will be unable to provide this transcript. Please see the attached letter that was sent out in June of 2015.

Best,

Bethanie K. Creppon
Circuit Court Reporter to
The Honorable R. Knox McMahan
PO Box 85411
Lexington, SC 29073

From: Burk, Adriane <aburk@sccid.sc.gov>
Sent: Monday, April 2, 2018 12:21 PM
To: Creppon, Bethanie
Subject: The State v. Shellie Lavette Davis - Appellate Case No. 2018-000366

Good Afternoon Ms. Creppon -

Attached is a letter requesting the transcript for the above case. The original is in the mail.

If you are not the court reporter or if another court reporter took a portion of the hearing, please let me know.

Thank you very much.

Adriane Burk
Legal Services Coordinator
Appellate Defense Division
Commission on Indigent Defense
803-734-1330

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

# **Exhibit C**



State of South Carolina  
The Circuit Court of the Second Judicial Circuit

Bethanie K. Creppon  
Circuit Court Reporter

June 12, 2015

P.O. Box 85411  
Lexington, SC 29073  
bcreppon@sccourts.org

Dear Judicial Department:

I regret to inform you all that I will be unable to provide any transcripts of any hearings or trials held before June 9, 2015. My car was broken into on June 3, 2015, and all of my court reporting equipment was stolen, including my laptop containing transcript and audio files, as well as my backup external hard drives.

I apologize for any inconvenience this may cause.

Sincerely,

Bethanie K. Creppon  
Official Court Reporter

CC: SC Court Administration

# **Exhibit D**

**ORIGINAL**

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF GENERAL SESSIONS  
ELEVENTH JUDICIAL CIRCUIT

FEB -7 AM 10:49

THE STATE OF SOUTH CAROLINA

Warrant No. J-816953

CLERK OF COURT  
LEXINGTON, SC

v.

SHELLIE DAVIS,

DEFENDANT.

**ORDER DENYING  
DEFENDANT'S MOTION FOR  
HEARING TO RECONSIDER  
NOT FINDING BATTERED WOMAN  
DURING SENTENCING**

**RECEIVED**

FEB 28 2018

90 Court of Appeals

THIS MATTER comes before the Court on motion of the Defendant, Shellie Davis, through her Defense Counsel, Aimee J. Zmroczek, for a hearing to reconsider the Court's finding that Defendant was not a battered woman during sentencing on April 30, 2014.

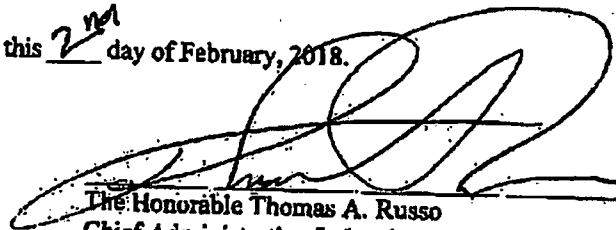
A jury found Defendant guilty of murder on April 25, 2014. Prior to sentencing, the Court took evidence and heard testimony from expert witnesses regarding the issue of Battered Woman Syndrome as it related to Defendant and her case. After reviewing the file, submissions of the parties, and the evidence presented, the Court determined that Defendant was not a battered woman by a preponderance of the evidence and proceeded with sentencing. Defendant's Motion to Request Hearing to Reconsider Not Finding of a Battered Women During Sentencing was filed May 8, 2014. It has recently come to the Court's attention that a formal ruling was never issued on Defendant's motion; the Court now takes the opportunity to do so.

Having heard sufficient testimony from expert witnesses for both the State and the Defendant prior to sentencing, this Court finds no need for another hearing on the issue of Battered Woman Syndrome.

**IT IS THEREFORE ORDERED** that Defendant's Motion for a Hearing to Reconsider is **DENIED.**

---

AND IT IS SO ORDERED this 2<sup>nd</sup> day of February, 2018.



The Honorable Thomas A. Russo  
Chief Administrative Judge for General Sessions  
Twelfth Judicial Circuit

Florence, South Carolina



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

December 6, 2018

**RECEIVED**  
DEC 06 2018  
SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, S.C. Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: State v. Shellie Lavette Davis

Dear Ms. Kitchings,

Enclosed please find the original and six copies of the petition for order to reconstruct the sentencing portion of appellant's trial transcript in the above case.

If you have any questions concerning this matter, please contact me.

Sincerely,

Jennifer E. Roberts  
Appellate Defender

JER/mba

Enclosures