THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY
Criminal Court

James R. Barber, III, Circuit Court Judge

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Case No. 2012-GS-02-0521

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The State,

Respondent,

v.

Tammy Smathers, Appellant.

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# BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

DID THE LOWER COURT ERR IN FAILING TO GRANT ONE-FOURTH PAROLE ELIGIBILITY?

## STATEMENT OF THE CASE

Donald Smathers was shot by his wife, appellant Tammy Smathers, on January 26, 2011. He was severely injured. He was hospitalized and recuperated for a period of time. Eventually, the appellant was charged with attempted murder and possession of a weapon during the commission of a violent crime.

Donald Smathers died on January 20, 2012. An autopsy was conducted on the victim, and the pathologist determined that his death was directly related to the gunshot wound. The appellant was directly indicted for the offense of murder.

The appellant entered a plea of guilty to the lesser-included offense of voluntary manslaughter on February 8, 2013. She was sentenced by The Honorable James R. Barber, III to a fifteen-year term in the South Carolina Department of Corrections.

The attorney for the appellant filed a timely motion for reconsideration on February 12, 2013. He sought a reduction in her sentence and parole eligibility pursuant to S.C. Code Ann. § 16-25-90 (Supp.2010). That matter was heard on December 12, 2013. The appellant testified. The State offered no testimony. The Court issued its order denying the requests on January 14, 2014. This appeal follows.

## FACTS

The Appellant testified that she and Donald Smathers started a relationship in 1987. (R. p. 30, line 25-p. 31, line 6) They moved in together at 590 Briar Patch Lane in Aiken County, South Carolina in 1988 and lived there together until the charged offense occurred. (R. p. 31, line 17-p. 32, line 4) The appellant testified that she was the victim of criminal domestic violence as defined by S.C. Code Ann. § 16-25-20 (Supp.2010) from 1989 until January of 2011. The criminal domestic violence was triggered by the stresses associated with the couple's illegal gambling business and Mr. Smather's consumption of alcohol. (R. p. 33, lines 9-21) The beginning of their relationship was tumultuous with death threats and physical assaults by Mr. Smathers. (R. p. 33, line 22-p. 35, line 22) Although there were reconciliations over the years, the abuse continued. (R. p. 36, lines 5-24) The appellant was fearful of revealing the nature of the abuse, because she was convinced there would be reprisals. (R. p. 34, line 3 – p. 35, line 5; p. 36, lines 5-10) She stated that there was a history of criminal domestic violence throughout their relationship. (R. p. 36, lines 19-24) Further, the violence was exacerbated by the parties' unusual business. (R. p. 4, lines 12-24)

## ARGUMENT

BECAUSE THE RECORD CONTAINS CREDIBLE EVIDENCE OF A HISTORY OF CRIMINAL DOMESTIC VIOLENCE SUFFERED AT THE HANDS OF THE VICTIM/HOUSEHOLD MEMBER BY THE APPELLANT, THE LOWER COURT ERRED IN FAILING TO GRANT ONE-FOURTH PAROLE ELIGIBILITY.

The only evidence on the record regarding criminal domestic violence comes from the appellant. The State offered no witnesses or exhibits to contradict

the appellant's assertion that she was the victim of a history of criminal domestic violence.

> Pursuant to S.C. Code Ann. § 16-25-90, a person who is convicted of or pleads guilty to an offense against a household member is eligible for parole after serving one-fourth of his or her prison term if the person presents credible evidence of a history of criminal domestic violence, as defined in S.C. Code Ann. § 16-25-20 (2003), suffered at the hands of the household member. Such a history must be proven by a preponderance of the evidence. State v. Grooms, 343 S.C. 248, 254, 540 S.E.2d 99, 102 (2000) *as cited in* State v. Blackwell-Selim, 392 S.C. 1, 707 S.E.2d 426 (2011)

The preponderance of the evidence offered at the motion hearing supports the appellant's position that there was a history of criminal domestic violence against her perpetrated by the victim, who was also a household member. The lower court finds that there were "isolated incidents of domestic discord." (R. p. 47) However, that was simply not the testimony of the appellant who stated that the abuse came "twice a month," and the parties were together for twenty-three years. (R. p. 33, line 2-p. 36, line 24)

On appellate review, the Court of Appeals is not permitted to reverse the circuit court's factual findings when there is evidence to support them. State v. Hawes, 399 S.C. 21, 730 S.E.2d 904 (Ct.App.2012). The transcript of the motion hearing does not contain evidence to support the circuit court's factual findings. The lower court speculated that significance could be taken from the fact that the appellant's daughters did not testify. However, they were available as witnesses should the State have chosen to call them. It is inappropriate to assume their testimony would not have been supportive of the appellant's position. Rather than

state specifics as the lower court did in Hawes, the Judge in this matter chose to simply disbelieve the appellant.

The criminal domestic violence statute, S.C. Code Ann. § 16-25-20 (2003) reads, in pertinent part as follows:

> "It is unlawful to cause physical harm or injury to a person's own household member, or, offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril."

It was the appellant's testimony that her husband regularly lost his temper with her and committed acts of criminal domestic violence, and this was caused by the nature of his illegal gambling business. (R. p. 33, lines 11-21) This was exacerbated by his drinking. (R. p. 34, lines 6-7; p. 35, lines 4-5 ) Our Court of Appeals has said, "A sentencing judge is largely unlimited as to either the kind or the source of the information he may consider upon sentencing." The State v. Blackwell-Selim, 385 S.C. 394, 684 S.E.2d 208 (Ct.App.2009). However, it is clearly inappropriate to use conjecture and supposition to establish a factual basis to render a decision.

## CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and order parole eligibility.

Respectfully submitted,

November 8, 2014

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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