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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Alison Renee Lee, Presiding Judge
Indictment Nos 2013-GS-40-04051 and 04052

Opinion No 2013-002145 (S C. Ct App. filed Oct 21, 2013)

STATE OF SOUTH CAROLINA. Respondent,
vs
RYAN BRADFORD KIRBY Petitioner

**APPENDIX
FOR
PETITION FOR WRIT OF CERTIORARI**

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SC Court of Appeals

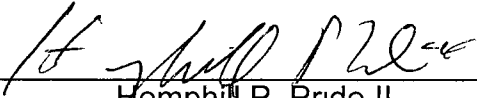


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Respectfully submitted,

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March 5, 2014.

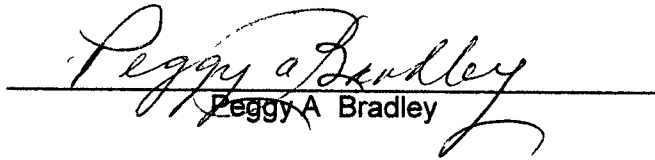
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address(es):

PLEADING (S) Motion to Suppress Electronic Communications
and for a Hearing

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Peggy A. Bradley

Columbia, South Carolina

July 24, 2013

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JEANETTE W McBRIDE
C.C.P. & G.S.

1

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
v.)
RYAN BRADFORD KIRBY,)
Defendant.)

**MOTION TO SUPPRESS
ELECTRONIC COMMUNICATIONS
AND
FOR A HEARING**

**Warrant Nos. 2013A4010600165
2013A4010600166**

COMES now the Defendant, by and through his undersigned counsel, and respectfully moves this Honorable Court for an Order, pursuant to the 4th and 5th Amendments of the United States Constitution and South Carolina Code §17-30-110(1), to suppress the intercepted (recorded) electronic communication of the Defendant; and, all evidence derived therefrom on the grounds that it is in violation the Defendant's 4th and 5th Amendment rights as well as South Carolina Code Ann., §17-30-65.

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July 23 2013.

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2.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
v)
RYAN BRADFORD KIRBY,)
Defendant)

**MEMORANDUM OF LAW IN SUPPORT
OF
MOTION TO SUPPRESS**

**Warrant Nos. 2013A4010600165
2013A4010600166**

NOW comes the Defendant, by undersigned counsel, and offers the following
Memorandum of Law in Support of Motion to Suppress

SUMMARY OF ARGUMENT

Pursuant to the 4th Amendment of the United States Constitution and S C Code Ann § 17-30-110(1), Defendant is an aggrieved person who hereby moves to suppress the intercepted (recorded) electronic communication described herein, on the grounds that it was unlawfully created and intercepted, disclosure of the contents of the communication and all evidence derived therefrom violates S C Code Title 17, Chapter 30 (See S C Code Ann § 17-30-65), and, further, admission of the call into evidence would violate the Defendant's 4th and 5th Amendment rights. Lastly, admission would unduly prejudice the Defendant.

S C Code Ann § 17-30-30 allows interception of electronic communications where one party consents, but that section of our Code does not allow the State to cause the consenting party to lie, mislead or defraud the non-consenting party to the intercepted conversation. S C Code Ann § 17-30-10 limits "interception" and use of electronic communications to the specifics of Title 17, Chapter 30. "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. S.C. Code

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C.C.P. & G.S.

Ann §17-30-15 "Intercept," thus, by this explicit definition, does not mean 'trick the recorded party' or 'invent inculpatory content' by means of lies, deception or emotional manipulation of the non-consenting recorded party

Defendant hereby moves to suppress the State's warrantless recording of a February 28, 2013 telephone conversation initiated by and at the behest of the State, under the following important circumstances The State, through Investigator Holly Wagner and/or Investigator Holdorf, directed the complaining witness to telephone Mr Ryan on his cell phone number, the conversation was recorded at the Richland County Sheriff's Department on the State's recording equipment (see statement of Holly Wagner, dated 2/28/13), the State instructed the complaining witness as to what she should say throughout the conversation, the State instructed the complaining witness to deny that the conversation was being recorded, at three separate times during the conversation

It is expected that the State will argue that the conversation is admissible under S C Code Ann §17-30-30, because the complaining witness was a consenting party to the conversation and acted for law enforcement investigative purposes "under color of law" However, Defendant's legitimate expectation of privacy, his 4th Amendment Constitutional right to be free from unreasonable search and seizure; and, his 5th Amendment privilege against self-incrimination were violated by the multiple misrepresentations made by the State through its agent – the complaining witness

The complaining witness acted as a State agent "under color of law" because she followed the State's explicit instructions and materially misrepresented the nature and purpose of the telephone call She lied when she said she was at home when, in fact, she was at Sheriff's Department She lied three (3) separate times when she denied recording the call She lied when asked who was with her by failing to disclose that State investigators were present with her She lied about wanting only "closure," "an explanation" and "an apology" when, in fact, she was actively

seeking inculpatory statements for use in a criminal investigation with police. Each of these lies was a material misrepresentation, and, her actions as the State's agent make her "consent" ineffective and the "search and seizure" or "interception" of the call unreasonable and, therefore, inadmissible.

Defendant was tricked into apologizing for acts (which, in context, he said had occurred when he was age 14), by way of the lies listed above, compounded by emotionally manipulative statements the State encouraged the complainant to make. Upon instruction to do so by the State, the complaining witness stated, among other things, "I just want closure", "I just want to know why", "I want to move on", "I'm looking for an apology", "My therapist said this would help", "This is hard on me", "This is my nightmare", "I see it every day" and other statements specifically scripted by the State. The State's instruction and control over the complaining witness is patently evident in the notes made by the State during the conversation. (See "Discovery Checklist" item number 9, "Handwritten Notes, 3 pages") These notes constitute the State's surreptitious and silent instructions to the witness as to what to say.

1. 4TH AND 5TH AMENDMENT GROUNDS TO SUPPRESS

When a criminal defendant moves to suppress evidence on Fourth Amendment grounds, the trial court must first determine whether the defendant has a legitimate expectation of privacy. See *State v. Crane*, 296 S. Ct. 336, 341, 372 S. E. 2d 587, 589 (1988), *State v. Bruce*, 402 S. Ct. 621, 741 S. E. 2d 590, 592 (Ct. App. 2013). Application of the Fourth Amendment depends on whether the person invoking its protection can claim a "legitimate expectation of privacy" that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy, and second, whether his expectation is one that society is prepared to recognize as "reasonable." *Katz*¹ v. *United States*, 389 U. S. 347, 88 S. Ct. 507 (1967), *Smith v. Maryland*, 442 U. S. 735, 99 S. Ct. 2577 (1979).

¹ Superseded by statute on another ground as stated in *United States v. Koyomejian*, 946 F. 2d 1450, 1455 (1991).

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a "search" can occur only when there has been a "physical intrusion" into a "constitutionally protected area," noting that the Fourth Amendment "protects people, not places." *Id.*, at 351-353, 88 S.Ct., at 511-512. Because the Government's monitoring of *Katz*'s conversation "violated the privacy upon which he justifiably relied while using the telephone booth," the Court held that it "constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*, at 353, 88 S.Ct., at 512.

Smith v. Maryland, 442 U.S. 735, 739-40, 99 S.Ct. 2577, 2579-80 (1979)

Here, Mr. Ryan had a recognized legitimate expectation of privacy in his personal cellular telephone communication. During the call, he asked the complaining witness three separate times whether the conversation was being recorded, and, three separate times, she emphatically answered "no", thus supporting his reasonable expectation that the call was private.

P2 22
P4 10
P5 17

Once the trial court finds the defendant had a legitimate expectation of privacy, it must then determine whether the police violated his Fourth Amendment rights. *State v. Bruce*, 402 S.C. 621, 741 S.E.2d 590, 592 (Ct. App. 2013). Defendant contends that the State violated his Fourth and Fifth Amendment rights here, even though our Code appears to allow intercepted calls where one party consents. In fact, Chapter 30 of our Code closely tracks the federal equivalent act, which provides in part

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception **unless such communication is intercepted for the purpose of committing any criminal or tortious act** in violation of the Constitution or laws of the United States or of any state.

8 U.S.C. §2511(2)(d). Emphasis added. Even when one party to the communication consents to the interception, if it is "intercepted for the purpose of committing any criminal or tortious act in

violation of the Constitution of laws of the United States or of any State, see 18 U S C § 2511(2)(d), the interception will still be considered unlawful " *United States v Jiau*, 794 F Supp 2d 484, 486 S D N Y 2011)

Defendant contends that the circumstances under which the conversation was intercepted, and, the manipulation the State engaged in so as to obtain self-incriminating statements by the Defendant, constitute the crime of manufacturing false or misleading evidence and the tort of constructive fraud. Whether viewed in light of the South Carolina statute or the federal statute which parallel each other, these circumstances – deceit and lies – violate Mr Ryan's 4th and 5th Amendment rights "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures " *Katz v United States*, 389 U S 347, 359, 88 S Ct 507, 515, 19 L Ed 2d 576 (1967)

Indeed, the contents of the call are clearly inadmissible as the product of the State's affirmative acts of deceit (through their agent, the complaining witness) by lying about the purpose of the call, who was present, where the caller was physically located, and, whether the call was being recorded. The touchstone of the suppression inquiry in the deception context is whether law enforcements made an affirmative misrepresentation. A consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation[] *United States v Tweel*, 550 F 2d 297, 299 (5th Cir 1977). Ineffective consent comes from affirmative acts by the agent, that materially misrepresent the nature of the inquiry. *United States v Dawson*, 486 F 2d 1326, 1329 (5th Cir 1973), *United States v Prudden*, 424 F 2d 1021, 1032-33 (5th Cir), cert denied, 400 U S 831, 91 S Ct 62 (1970). See also *United States v Goss*, 650 F 2d 1336, 1348-49 (5th Cir 1981), *United States v Wuagneux*, 683 F 2d 1343, 1347 (11th Cir 1982)

Analysis of case law decided in the context of a Fourth Amendment search and seizure claim extends to statements made in violation of the Fifth Amendment privilege against self-incrimination. See *United States v. Walker*, 760 F.2d 144 (7th Cir. 1985). Since all claimed violations depend upon a showing of the existence of fraud, deceit or trickery, it is not necessary to discuss each constitutional claim separately. *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970). South Carolina precedent on the issue could not be found, but the federal court's opinions cited throughout this memorandum, from around the nation, "recognize that fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable[.]" *Prudden*, 424 F.2d at 1032.

For this reason, the recording and any evidence derived from it should be suppressed.

2. THE CONTENTS OF THE CALL ARE UNFAIRLY PREJUDICIAL

Additionally, the Court should suppress the surreptitiously recorded conversation because its contents would confuse the jury and unfairly prejudice the Defendant. Rule 403, SCRE states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

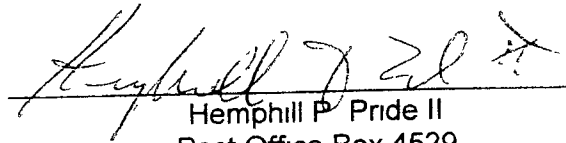
In the recorded conversation at issue, the speaker describing the illegal acts is clearly the complaining witness. In response, the Defendant stated that he was 14 years old at the time and he apologized. However, his exculpatory statement of his age (accompanied by his apologies), is likely to be misconstrued as an admission of all the acts, even though they are described only by the complaining witness during the call. His exculpatory statement is likely to be overshadowed in the minds of jurors by the complaining witness' descriptions of illegal acts and their effect on her. Thus, admission of the intercepted conversation into evidence will very likely influence and

confuse the jury and unfairly prejudice the Defendant. It should be suppressed on that basis. See, *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (S.C. Ct. App. 2012), reh'g denied (Sept. 20, 2012) ("To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.")

CONCLUSION

On the basis of all of the above and foregoing it is respectfully requested that this Honorable Court grant Defendant's motion to suppress the recorded telephone conversation itemized as "11 One CD – phone call" on the State's Discovery checklist and any and all evidence resulting from it.

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August 28, 2013

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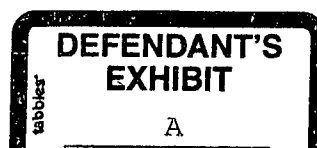
Inv Holdorf and I met with Ashley Jones and her mother at HQ Ashley called Ryan and the phone went to voicemail A few minutes later Ryan Kirby called back and Ashley answered When Ashley ask Ryan if he remembered the sexual abuse from their past he got very quiet Kirby wanted to meet with Ashley and talk with her face to face Ashley continued to talk with Kirby telling him she could not meet him and just wanted to know why the abuse took place and ask for an apology Kirby was very shaken by the call He pulls off the road to talk with her Eventually Kirby apologizes to Ashley While he is telling Ashley how he feels about the abuse her phone goes dead I downloaded the conversation off of the recorder and let Ashley take the recorder in case Ryan calls back after she charges her phone The recorded phone conversation is attached to this case in ACISS The notes from the phone call are also attached to this case in ACISS

3/6/2013

Ryan Kirby was arrested by the fugitive team While being read the warrants he made an excited utterance that he was not 18-20 He said that happened when he was a child himself

I met Inv Bell at the sally port I spoke briefly with Ryan Kirby I decided Kirby was too emotionally distraught to be interviewed at this time He repeated the excited utterance, saying this didn't happen when he was adult Ryan said he was 14-16 I told Kirby to call me when he gets out if he and his attorney want to sit down and talk

Case closed by arrest CJ



Any one else?

I want
closure

I accept
your apology

My therapist
said this would
help

This is hard
on me

Did you
care

I can not
see you

who it just
so you could
get off

That is
my nightmare

Why did you
keep doing it

I see it every
day

Are you
sorry.

Does it matter to
you

I looked up to you

Just want
to know why

Did you mean
to hurt me

Why didn't
you

This
has been
a struggle

I want to
move on

3.

3 STATE OF SOUTH CAROLINA) , IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)
The State of South Carolina) **STATE'S RESPONSE TO DEFENDANT'S**
) **MOTION TO SUPPRESS**
)
-v-)
RYAN BRADFORD KIRBY,) INDICTMENT NUMBER
) 2013-GS-40-04051 & 04052
Defendant)

The undersigned counsel for the State of South Carolina hereby moves this Court to deny the Defendant's Motion to Suppress which challenges statements made by the Defendant during a phone conversation between the Defendant and victim, which was recorded with consent of the victim

NO VIOLATION OF 17-30-110(1)

The Defendant alleges first in his single page MOTION TO SUPPRESS and again in his MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO SUPPRESS, that this recorded conversation is a violation of §17-30-110(1)

Initially, the State would argue that this Court has no jurisdiction to determine any violations under §17-30-110. This particular provision gives the sole and exclusive jurisdiction over a motion to suppress to the South Carolina Court of Appeals. "The motion must be made before the reviewing authority and must be decided on an expedited basis." §17-30-110(A). "Reviewing authority" is then defined in 17-30-15 (9) as a "panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals."

Furthermore, the State submits that this was a lawful interception authorized under Title 17 which allows interception where one of the parties to the communication

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has given prior consent to the interception. See §17-30-30 (B) and (C). The South Carolina Wiretap Statute was passed as part of the Homeland Security Act in 2002. See S.C. Code Ann. §§ 17-30-10 et seq., South Carolina Homeland Security Act, 2002 Act No. 339. In writing the statute, the South Carolina General Assembly included a “consent exception” to the general rule prohibiting third parties from intercepting conversations between other individuals. This consent exception parallels the Federal Wiretap Statute’s consent exception in that they both proscribe third parties from intercepting a conversation unless one of the parties to the communication has given prior consent. Compare S.C. Code Ann. § 17-30-30 with 18 U.S.C. § 2511 (2) (d).

Defense counsel, at the hearing on his motion to suppress, conceded that the recording at issue in the instant case was authorized under §17-30-30.

NO FOURTH OR FIFTH AMENDMENT VIOLATION

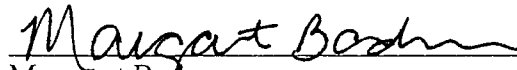
First, Defendant seems to argue that this recording violated his Fourth Amendment right against unreasonable searches and seizures and his Fifth Amendment right against self-incrimination because the victim lied about her location, who was with her during the phone call and whether or not the call was being recorded. He argues that these misrepresentations tainted the consent. “A consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation. Ineffective consent comes from affirmative acts by the agent, that materially misrepresent the nature of the inquiry.” DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS, Page 5. This argument has absolutely no basis in law nor in the contemplation of § 17-30-30. The consent provision of 17-30-30 is a one party consent provision. In this case, the victim gave consent to record her conversation with the defendant. Her consent was a fully informed consent. Compliance with §17-30-30, does not require that the defendant also give consent. His knowledge that the phone call is being recorded is not needed. In fact, his knowledge that the phone call is being recorded defeats the entire purpose of §17-30-30. As human

beings we recognize that people will often be most honest when they do not know that others are "listening" to the conversation

Furthermore, the defendant was not compelled to talk. The defendant was not in custody. The defendant was on the other end of a telephone call with the victim and could have hung up the phone at any time that he wished.

IN CONCLUSION

All of the defendant's arguments offered in support of suppression of the recording go to the weight that a finder of fact wishes to give those admissions. There is no provision in the law which supports the suppression of the statements made in the recorded conversation between the consenting party (the victim) and the defendant. We respectfully ask that this Court deny the defendant's motion to suppress.

A handwritten signature in cursive script, reading "Margaret Bodman", written over a horizontal line.

Margaret Bodman
Assistant Solicitor
Fifth Judicial Circuit

September 4, 2013
Columbia, South Carolina

4

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
)
)
 v)
)
RYAN BRADFORD KIRBY,)
)
)
Defendant.)
_____)

**REPLY MEMORANDUM OF LAW
IN SUPPORT
OF
MOTION TO SUPPRESS**

**Warrant Nos. 2013A4010600165
2013A4010600166**

Now comes the Defendant, by undersigned counsel, and offers the following reply
Memorandum of Law in Support of Motion to Suppress

ARGUMENT

1. CONSTITUTIONAL ANALYSIS

The State's Response to Defendant's Motion to Suppress glosses over its violations of Defendant's constitutional rights to be free from unreasonable search and seizure and self-incrimination under the Fourth and Fifth Amendments. It seems to assert that the State is free to violate one's constitutional rights so long as the State complies with South Carolina Code §17-30-30. It is beyond dispute that the United States Constitution trumps any state statute. Further, the State does not address the Defendant's reasonable expectation of privacy in his telephone conversation with the complaining witness, who assured the Defendant repeatedly that the call was not being recorded, and, their telephone conversation was, in fact, private.

Here, the Defendant was tricked by an agent of the State (the complaining witness) into making self-incriminatory statements in response to State-scripted questions and comments. These scripted questions and comments addressed extremely emotionally charged events occurring many years ago, when both parties were minors. That telephone conversation was

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Clerk of Court
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orchestrated by the State, whose law enforcement officer advised the complaining witness as to what to say throughout the conversation [See Defendant's Memorandum of Law in Support of Motion to Suppress, Exhibit B.] The words the witness spoke were the State's words – the witness was merely the voice delivering them. And, the State recorded its created conversation for the sole purpose of bringing criminal charges against the Defendant. The totality of these events constitutes an unconstitutional search and seizure of coerced self-incriminatory statements under the Fourth and Fifth Amendments to the U.S. Constitution. Prima facie compliance with §17-30-30 does not redeem the State here, because a deeper analysis reveals the constitutional violations.

A. Fifth Amendment Analysis

Physical coercion need not be shown to establish that a statement is involuntary. Fraud, deceit, or trickery, even silence when there is a duty to speak, may suffice. See *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir.1970). Existence of these factors and their psychological effect must also be assessed against the factual background of the accused and the interrogation. *Frazier v. Cupp*, 394 U.S. 731, 737, 739, 89 S.Ct. 1420, 1423–25, 22 L. Ed.2d 684 (1969); *United States v. Wertz*, 625 F.2d 1128, 1133–34 (4th Cir.1980); *United States v. Olmstead*, 698 F.2d 224, 226 (4th Cir. 1983). The United States Supreme Court held that the Fifth Amendment privilege against compulsory self-incrimination applies to the States through the Due Process Clause of the Fourteenth Amendment, which provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L. Ed.2d 653 (1964).

The State argues that South Carolina Code §17-30-30 does not require the Defendant's consent, because the complaining witness gave her consent. But the State does not refute Defendant's agency argument. The complaining witness was not acting merely as a witness (subject to Defendant's rights under the Confrontation Clause), when she gave voice to the State's

coercive script She acted as the State's agent – "under color of law" The State's response invites the Court to compare the South Carolina Code section to the federal counterpart, 18 U S C.A § 2511(d):

(d) It shall not be unlawful under this chapter for a person **not acting under color of law** to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U S.C.A. § 2511 (d) (emphasis added)

The State does not deny that the complaining witness acted as its agent, nor does it deny that the call was scripted by the State. Neither the South Carolina nor the federal statute authorizes a State agent to be the consenting party for purposes of intercepting electronic communications. The State ignores the constitutional mandates it violated when its agent used the State's scripted questions to coerce self-incriminatory statements from the Defendant, which it then intercepted. For this reason, the results should be suppressed.

B. Fourth Amendment Analysis

The State does not address the Fourth Amendment consent search analysis applicable to the circumstances of this case. The contents of the call are the product of the State's affirmative acts of deceit (under color of law, through its agent, the complaining witness) who lied about the purpose of the call; who was present, where the caller was physically located; and, whether the call was being recorded. [See Defendant's Memorandum of Law in Support of Motion to Suppress, Exhibit A.] For suppression, the analysis is whether law enforcement (through its agent) made an affirmative misrepresentation – which the State does not dispute. A consent search is unreasonable if induced by deceit, trickery or misrepresentation. *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). Ineffective consent comes from **affirmative acts by the agent, that materially misrepresent the nature of the inquiry.** *United States v. Dawson*, 486 F.2d 1326,

1329 (5th Cir 1973), *United States v. Prudden*, 424 F.2d 1021, 1032-33 (5th Cir.), cert denied, 400 U S 831, 91 S Ct. 62 (1970). See also *United States v. Goss*, 650 F.2d 1336, 1348-49 (5th Cir. 1981); *United States v. Wuagneux*, 683 F 2d 1343, 1347 (11th Cir 1982).

Defendant was essentially questioned by police without his consent; and, the results should be suppressed

2. UNFAIR PREJUDICE

The State ignores and fails to refute Defendant's argument that the scripted and coerced recording would confuse the jury and unfairly prejudice the Defendant. Per Rule 403, SCRE "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence " Unfair prejudice will likely result; and, a jury is reasonably (if not extremely) likely to be influenced by the State's scripted recording. The State ignores and fails to refute this argument because this prejudicial result is precisely the reason why the State went to the trouble to *create* this evidence. For this additional reason, the results should be suppressed.

CONCLUSION

On the basis of all of the above and foregoing it is respectfully requested that this Honorable Court grant Defendant's motion to suppress the recorded telephone conversation itemized as "11. One CD – phone call" on the State's Discovery checklist and any and all evidence resulting from it

[SIGNATURE BLOCK ON NEXT PAGE]

Law Office
of
HEMPHILL P. PRIDE II, LLC

A handwritten signature in cursive script, appearing to read "Hemphill P. Pride II", is written over a horizontal line.

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ATTORNEY FOR DEFENDANT

August 11, 2013

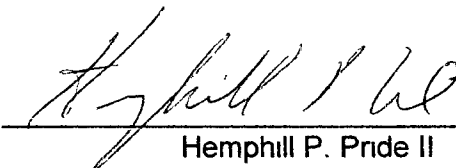
STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

The undersigned do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by hand delivering a copy of the same to the following, to wit::

PLEADING (S) Defendant's Reply Memorandum of Law in Support of Motion to Suppress

PARTIES: Margaret Fent Bodman, Esq.
Assistant Solicitor for the Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29201


Hemphill P. Pride II

Columbia, South Carolina

September 11, 2013

RICHLAND COUNTY
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JEANETTE W. McBRIDE
C.P. & G.S.

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTH JUDICIAL CIRCUIT

State of South Carolina,)

Indictment Nos . 2013-GS-40-04051 & 04052

Plaintiff,)

ORDER

v)

Ryan Bradford Kirby,)

Defendant.)

2013 SEP 26 AM 11:02

FILED

This matter comes before the Court by motion filed by Defendant Ryan Bradford Kirby to suppress intercepted electronic communication of the Defendant obtained in violation of S.C. Code Ann. § 17-30-65 and in violation of his Fourth and Fifth Amendment rights under the U.S. Constitution. A hearing was conducted on the motion on August 28, 2013 during which the parties argued their positions. Present at the hearing were Hemphill P. Pride II, Esquire, attorney for Defendant, and Margaret Fent Bodman, Esquire, Assistant Solicitor for the State of South Carolina. At the conclusion of the hearing, the Court allowed the State to provide a legal memorandum fully explaining its position and in response to the memorandum filed by the Defendant at the hearing. Defendant provided a memorandum in reply.

The State's argument is that the circuit court is without jurisdiction to hear the motion to suppress on the basis that S.C. Code Ann. Section 17-30-110 gives the sole and exclusive jurisdiction over a motion to suppress to the South Carolina Court of Appeals. Section 17-30-110 states, in part, that prior to any trial, hearing or proceeding, the "aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom The motion must be made before the trial, hearing or proceeding The motion must be made before the reviewing authority and must be decided on an expedited basis." Id. "Reviewing authority" is defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

In *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012), the trial court granted the defendant's motion to suppress a recorded telephone conversation. The State filed an interlocutory appeal seeking to vacate the trial court's suppression order pursuant to the Wiretap

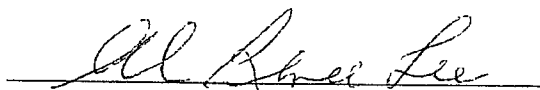
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Act¹, which was granted. The Supreme Court stated, "The court of appeals correctly granted the State's motion to vacate and found that the trial court lacked subject matter jurisdiction because the Wiretap Act requires that a motion to suppress be made before a panel of judges of the court of appeals." 399 S.C. at 551, 732 S.E.2d at 863. Additionally, in *State v. Guerrero-Flores*, No. 2013-03-06-01, 2013 WL 1197752 (S.C. Ct. App. Mar. 6, 2013), the Court of Appeals reiterated and confirmed the statutory provisions requiring the Court of Appeals to hear the motion to suppress.

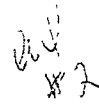
For the foregoing reasons, the circuit court is without jurisdiction to hear Defendant's Motion to Suppress Electronic Communication. The Court of Appeals is the reviewing authority pursuant to the South Carolina Homeland Security Act, codified at S.C. Code Ann. § 17-30-10 et seq. As the circuit court is without jurisdiction, Defendant's additional arguments were not considered.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
September 26, 2013

¹ The South Carolina Homeland Security Act was referred to as the Wiretap Act in *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012).



6.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

Indictment Nos.: 2013-GS-40-04051 and 04052

RECEIVED

OCT 9 9 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA, ... Respondent.

v.

RYAN BRADFORD KIRBY, ...Appellant.

NOTICE OF MOTION AND MOTION TO SUPPRESS

Please take notice that Appellant, by and through his undersigned counsel, respectfully moves this Honorable Court for an Order, pursuant to the 4th and 5th Amendments of the United States Constitution and South Carolina Code §17-30-110(A)(1), to suppress the intercepted (recorded) electronic communication of the Appellant of February 28, 2013; and, any and all evidence derived therefrom on the grounds that it is in violation of the Appellant's 4th and 5th Amendment rights as well as South Carolina Code Ann., §17-30-65.

By



Hemphill P. Pride II
Lesli B Darwin

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ATTORNEYS FOR APPELLANT

October 9, 2013.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by a copy of the same by United Respondents mail, postage prepaid, to the following address(es):

PLEADING (S): **Notice of Motion and Motion to Suppress**

PARTIES: Margaret Fent Bodman, Esq.
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192



Columbia, South Carolina

October 9, 2013.

RECEIVED

OCT 9 2013

SC Court of Appeals

7

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 09 2013

ORIGINAL JURISDICTION OF THE COURT OF APPEALS GS Court of Appeals

Indictment Nos : 2013-GS-40-04051 and 04052

STATE OF SOUTH CAROLINA, ... Respondent

v

RYAN BRADFORD KIRBY, Appellant

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

NOW comes the Appellant, by undersigned counsel, and offers the following
Memorandum of Law in Support of Appellant's Motion to Suppress

1 Appellant Ryan Bradford Kirby has been charged with Indictments Nos 2013-GS-40-04051 and 04052 in the Court of General Sessions for the Fifth Judicial Circuit of Richland County in South Carolina; and, moves this Honorable Court to suppress the Respondent's warrantless recording of a February 28, 2013 telephone conversation initiated by the alleged victim and at the behest of the Respondent. At all times herein mentioned, the events complained of by the alleged victim occurred in or about 1994 and, at which time, the alleged victim was age seven (7), and, Appellant was age fourteen (14)

2 On July 26, 2013, Appellant filed with the Richland County Clerk of Court a Motion to Suppress Electronic Communications and for a Hearing which, on said date, was served on the Respondent, State of South Carolina. [Copy of Motion attached as

Exhibit A] A hearing was conducted on August 28, 2013 before the Honorable Alison Renee Lee. Thereafter, on September 26, 2013, Judge Lee issued an Order denying jurisdiction to hear said Motion, and, directing the Appellant's Motion to the Court of Appeals. [See Order dated September 26, 2013 attached as Exhibit B] Thus, the Appellant is requesting the Chief Judge of the Court of Appeals to designate a panel of three (3) judges of the South Carolina Court of Appeals to hear this matter pursuant to S C Code Ann § 17-30-15(9)

SUMMARY OF ARGUMENT

3 Pursuant to the 4th Amendment of the United States Constitution and S C Code Ann §17-30-110(A)(1), Appellant is an aggrieved person who hereby moves to suppress the intercepted (recorded) electronic communication described herein on the grounds that it was unlawfully created and intercepted, disclosure of the contents of the communication and all evidence derived therefrom violates S C. Code Title 17, Chapter 30 (See S C Code Ann § 17-30-65); and, further, admission of the call into evidence would violate the Appellant's 4th and 5th Amendment rights. Lastly, admission would unduly prejudice the Appellant.

4 S C Code Ann §17-30-30 allows interception of electronic communications where one party consents, but, that section of our Code does not allow the Respondent to cause the consenting party to lie, mislead or defraud the non-consenting party to the intercepted conversation. S C Code Ann §17-30-10 limits "interception" and use of electronic communications to the specifics of Title 17, Chapter 30. "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. S C Code Ann. §17-30-15

"Intercept," thus, by this explicit definition, does not mean 'trick the recorded party' or 'invent inculpatory content' by means of lies, deception or emotional manipulation of the non-consenting recorded party

5 Appellant hereby moves to suppress the Respondent's warrantless recording of a February 28, 2013 telephone conversation, initiated by the alleged victim and at the behest of the Respondent, under the following important circumstances. The Respondent, through Investigator Holly Wagner and/or Investigator Holdorf of the Richland County Sheriff's Department, directed the alleged victim to telephone Mr. Ryan on his cell phone number; and, the conversation was recorded at the Richland County Sheriff's Department on the Respondent's recording equipment. [See Statement of Holly Wagner, dated 2/28/13, attached as Exhibit C.] Moreover, the Respondent instructed the alleged victim (i) as to what she should say throughout the conversation, and, (ii) to deny that the conversation was being recorded at three (3) separate times during the conversation.

6 It is expected that the Respondent will argue that the conversation is admissible under S.C. Code Ann. §17-30-30, because the alleged victim was a consenting party to the conversation and acted for law enforcement investigative purposes "under color of law." However, Appellant's legitimate expectation of privacy, his 4th Amendment Constitutional right to be free from unreasonable search and seizure and, his 5th Amendment privilege against self-incrimination were violated by the multiple misrepresentations made by the Respondent through its agent--the alleged victim.

7 The alleged victim acted as a Respondent agent "under color of law" because she followed the Respondent's explicit instructions and materially misrepresented the nature and purpose of the telephone call. She lied when she said she was at home when,

4TH AND 5TH AMENDMENT GROUNDS TO SUPPRESS

9 When a criminal Appellant moves to suppress evidence on 4th Amendment grounds, the trial court must first determine whether the Appellant has a legitimate expectation of privacy. See *State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988), *State v. Bruce*, 402 S.C. 621, 741 S.E.2d 590, 592 (Ct. App. 2013). Application of the 4th Amendment depends on whether the person invoking its protection can claim a “legitimate expectation of privacy” that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy, and, second, whether his expectation is one that society is prepared to recognize as “reasonable.” *Katz¹ v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577 (1979).

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In determining whether a particular form of government-initiated electronic surveillance is a “search” within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a “search” can occur only when there has been a “physical intrusion” into a “constitutionally protected area,” noting that the Fourth Amendment “protects people, not places.” *Id.*, at 351–353, 88 S.Ct., at 511–512. Because the Government’s monitoring of Katz’ conversation “violated the privacy upon which he justifiably relied while using the telephone booth,” the Court held that it “constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.” *Id.*, at 353, 88 S.Ct., at 512.

Smith v. Maryland, 442 U.S. 735, 739–40, 99 S.Ct. 2577, 2579–80 (1979).

10 Here, Mr. Ryan had a recognized legitimate expectation of privacy in his

¹ Superseded by statute on another ground as Respondent in *United States v. Koyomejian*, 946 F.2d 1450, 1455 (1991).

personal cellular telephone communication. During the call, he asked the alleged victim three (3) separate times whether the conversation was being recorded, and, three (3) separate times, she emphatically answered "no," thus supporting his reasonable expectation that the call was private and as reflected in his statement that "it should be like talking person to person." [Exhibit D, p 3, lines 7-8] He further addressed that their conversation was "something like you should talk about face to face." [Id. at p 2, line 13] Repeatedly, the Appellant sought and expected privacy as he said he would "prefer in private." [Id. at p 4, line 18]

11 Once the trial court finds the Appellant had a legitimate expectation of privacy, it must, then, determine whether the police violated his 4th Amendment rights. *States v Bruce*, 402 S.C. 621, 741 S.E.2d 590, 592 (Ct. App. 2013). Appellant contends that the Respondent violated his 4th and 5th Amendment rights here, even though our Code appears to allow intercepted calls where one party consents. In fact, Chapter 30 of our Code closely tracks the federal equivalent act, which provides, in part

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception **unless such communication is intercepted for the purpose of committing any criminal or tortious act** in violation of the Constitution or laws of the United States or of any state..

8 U.S.C. §2511(2)(d). Emphasis added. Even when one party to the communication consents to the interception, if it is "intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state, see 18 U.S.C. § 2511(2)(d), the interception will still be considered unlawful." *United*

States v Jiau, 794 F Supp 2d 484, 486 S D N Y 2011)

12 Appellant contends that the circumstances under which the conversation was intercepted, and, the manipulation in which the Respondent engaged so as to obtain self-incriminating statements by the Appellant, constitute the crime of manufacturing false or misleading evidence and the tort of constructive fraud. Whether viewed in light of the South Carolina statute or the federal statute which parallel each other, these circumstances – deceit and lies – violate Mr. Ryan's 4th and 5th Amendment rights. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v United States*, 389 U S 347, 359, 88 S Ct 507, 515, 19 L Ed 2d 576 (1967).

13 Indeed, the contents of the call are clearly inadmissible as the product of the Respondent's affirmative acts of deceit (through its agent, the alleged victim) by lying about the purpose of the call, who was present, where the caller was physically located, and, whether the call was being recorded. The touchstone of the suppression inquiry in the deception context is whether law enforcements made an affirmative misrepresentation. "A consent search is unreasonable under the 4th Amendment if the consent was induced by the deceit, trickery or misrepresentation[]" *United States v Tweel*, 550 F 2d 297, 299 (5th Cir. 1977). Ineffective consent comes from affirmative acts by the agent that materially misrepresent the nature of the inquiry. *United States v Dawson*, 486 F 2d 1326, 1329 (5th Cir. 1973), *United States v Prudden*, 424 F 2d 1021, 1032-33 (5th Cir.), cert denied, 400 U S 831, 91 S Ct 62 (1970). See also *United States v Goss*, 650 F 2d 1336, 1348-49 (5th Cir 1981), *United States v Wuagneux*, 683 F 2d 1343, 1347 (11th Cir

1982)

14 Analysis of case law decided in the context of a 4th Amendment search and seizure claim extends to statements made in violation of the 5th Amendment privilege against self-incrimination. See *United States v Walker*, 760 F.2d 144 (7th Cir 1985). Since all claimed violations depend upon a showing of the existence of fraud, deceit or trickery, it is not necessary to discuss each constitutional claim separately. *United States v Prudden*, 424 F.2d 1021, 1032 (5th Cir 1970). South Carolina precedent on the issue could not be found, but the federal court opinions cited throughout this memorandum, from around the nation, "recognize that fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable[.]" *Prudden*, 424 F.2d at 1032.

15 For this reason, the recording and any evidence derived from it should be suppressed.

THE CONTENTS OF THE CALL ARE UNFAIRLY PREJUDICIAL

16 Additionally, the Court should suppress the surreptitiously recorded conversation because its contents would confuse the jury and unfairly prejudice the Appellant. Rule 403, SCRE states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

17 In the recorded conversation at issue, the speaker describing the illegal acts is clearly the alleged victim. In response, the Appellant stated that he was 14 years old at

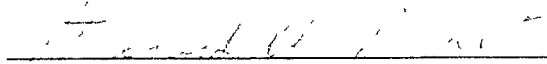
the time and he apologized. However, his exculpatory statement of his age (accompanied by his apologies), is likely to be misconstrued as an admission of all the acts, even though they are described only by the complaining witness during the call. His exculpatory statement is likely to be overshadowed in the minds of jurors by the alleged victim's descriptions of illegal acts and their effect on her. Thus, admission of the intercepted conversation into evidence will very likely influence and confuse the jury and unfairly prejudice the Appellant. It should be suppressed on that basis. See, *United State v Lee*, 399 S C 521, 527, 732 S E 2d 225, 228 (S C Ct App. 2012), reh'g denied (Sept 20, 2012) ("To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.")

CONCLUSION

18 On the basis of all of the above and foregoing, it is respectfully requested that this Honorable Court grant Appellant's motion to suppress the recorded telephone conversation itemized as "11 One CD – phone call" on the Respondent's Discovery checklist and any and all evidence resulting from it.

(SIGNATURE BLOCK NEXT PAGE)

By


Hemphill P. Pride II

Lesli B. Darwin

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(803) 256-8015

Lesli B. Darwin

es d1 v14 222 12

ATTORNEYS FOR APPELLANT

October 9, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
v)
RYAN BRADFORD KIRBY,)
Defendant)

**MOTION TO SUPPRESS
ELECTRONIC COMMUNICATIONS
AND
FOR A HEARING**

**Warrant Nos. 2013A4010600165
2013A4010600166**

COMES now the Defendant, by and through his undersigned counsel, and respectfully moves this Honorable Court for an Order, pursuant to the 4th and 5th Amendments of the United States Constitution and South Carolina Code §17-30-110(1), to suppress the intercepted (recorded) electronic communication of the Defendant, and, all evidence derived therefrom on the grounds that it is in violation the Defendant's 4th and 5th Amendment rights as well as South Carolina Code Ann , §17-30-65

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ATTORNEY FOR DEFENDANT

July 23 2013

EXHIBIT A

2013 JUL 26 AM 10:36
FILED
C.C.P. & G.S.

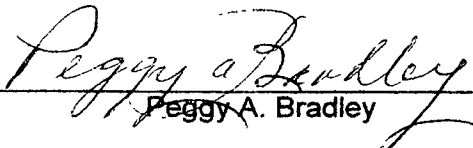
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address(es)

PLEADING (S) Motion to Suppress Electronic Communications
and for a Hearing

PARTIES: Margaret Fent Bodman, Esq.
Assistant Solicitor for the Fifth Judicial Circuit
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Peggy A. Bradley

Columbia, South Carolina

July 24, 2013

FILED
2013 JUL 26 AM 10:36
CLAUDETTE W McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTH JUDICIAL CIRCUIT

State of South Carolina,)
)
Plaintiff.)

Indictment Nos 2013-GS-40-04051 & 04052

v.)

ORDER

Ryan Bradford Kirby,)
)
Defendant.)

2013 SEP 26 AM 11:02

This matter comes before the Court by motion filed by Defendant Ryan Bradford Kirby to suppress intercepted electronic communication of the Defendant obtained in violation of S C Code Ann § 17-30-65 and in violation of his Fourth and Fifth Amendment rights under the U S. Constitution. A hearing was conducted on the motion on August 28, 2013 during which the parties argued their positions. Present at the hearing were Hemphill P. Pride II, Esquire, attorney for Defendant, and Margaret Fent Bodman, Esquire, Assistant Solicitor for the State of South Carolina. At the conclusion of the hearing, the Court allowed the State to provide a legal memorandum fully explaining its position and in response to the memorandum filed by the Defendant at the hearing. Defendant provided a memorandum in reply.

The State's argument is that the circuit court is without jurisdiction to hear the motion to suppress on the basis that S C Code Ann Section 17-30-110 gives the sole and exclusive jurisdiction over a motion to suppress to the South Carolina Court of Appeals. Section 17-30-110 states in part, that prior to any trial hearing or proceeding, the "aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom. The motion must be made before the trial hearing or proceeding. The motion must be made before the reviewing authority and must be decided on an expedited basis." Id. "Reviewing authority" is defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S C Code Ann § 17-30-15(9).

In *State v. Whitner*, 399 S C 547, 732 S E 2d 861 (2012), the trial court granted the defendant's motion to suppress a recorded telephone conversation. The State filed an interlocutory appeal seeking to vacate the trial court's suppression order pursuant to the Wiretap

EXHIBIT B

Act, which was granted. The Supreme Court stated, "The court of appeals correctly granted the State's motion to vacate and found that the trial court lacked subject matter jurisdiction because the Wiretap Act requires that a motion to suppress be made before a panel of judges of the court of appeals." 399 S.C. at 551, 732 S.E.2d at 863. Additionally, in *State v. Guerrero-Flores*, No. 2013-03-06-01, 2013 WL 1197752 (S.C. Ct. App. Mar. 6, 2013), the Court of Appeals reiterated and confirmed the statutory provisions requiring the Court of Appeals to hear the motion to suppress.

For the foregoing reasons, the circuit court is without jurisdiction to hear Defendant's Motion to Suppress Electronic Communication. The Court of Appeals is the reviewing authority pursuant to the South Carolina Homeland Security Act, codified at S.C. Code Ann. § 17-30-10 et seq. As the circuit court is without jurisdiction, Defendant's additional arguments were not considered.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
September 26, 2013

¹ The South Carolina Homeland Security Act was referred to as the Wiretap Act in *State v. Whitner*, 399 S.C. 517, 732 S.E.2d 861 (2012).

6/26/13
2

2/28/2013 1500

Inv Holdorf and I met with Ashley Jones and her mother at HQ Ashley called Ryan and the phone went to voicemail A few minutes later Ryan Kirby called back and Ashley answered When Ashley ask Ryan if he remembered the sexual abuse from their past he got very quiet Kirby wanted to meet with Ashley and talk with her face to face Ashley continued to talk with Kirby telling him she could not meet him and just wanted to know why the abuse took place and ask for an apology Kirby was very shaken by the call He pulls off the road to talk with her Eventually Kirby apologizes to Ashley While he is telling Ashley how he feels about the abuse her phone goes dead I downloaded the conversation off of the recorder and let Ashley take the recorder in case Ryan calls back after she charges her phone The recorded phone conversation is attached to this case in ACISS The notes from the phone call are also attached to this case in ACISS

2/6/2013

Ryan Kirby was arrested by the fugitive team While being read the warrants he made an excited utterance that he was not 18-20 He said that happened when he was a child himself

I met Inv Bell at the sally port I spoke briefly with Ryan Kirby I decided Kirby was too emotionally distraught to be interviewed at this time He repeated the excited utterance saying this didn't happen when he was adult Ryan said he was 14-16 I told Kirby to call me when he gets out if he and his attorney want to sit down and talk

Case closed by arrest CJ

EXHIBIT C

TRANSCRIPT OF CD

TELEPHONE CONVERSATION BETWEEN ASHLEY JONES AND KIRBY RYAN

ASHLEY: Hello

RYAN: Yes, hello.

ASHLEY: Hello, hey, is this Ryan

RYAN: Yea, this is Ryan

ASHLEY: Hey Ryan, this is Ashley, um, I was calling just to talk to you for a few minutes Are you busy?

RYAN: Um, just clocked out from work

ASHLEY: Oh, um, well I just kind of just wanted to tell you a few things and um just kind of ask you some questions

RYAN: Okay, uh, this is Ashley?

ASHLEY: Yeah, um, Shawn's sister

RYAN: Oh, Ashley, Oh.

ASHLEY: Yeah.

RYAN: Okay. How are you doing?

ASHLEY: Fine. I'm okay. I'm, I just wanted to ask you, do you um remember anything about our past, about like the sexual abuse or anything like that?

RYAN: INAUDIBLE

ASHLEY: No? Hello, Hello

RYAN: Hello

ASHLEY: Yeah, I'm here.

EXHIBIT D

RYAN: Oh, okay (pause). Where are you right now?

ASHLEY: I'm at home

RYAN: Okay I should be there in a minute though I'm going to my grandma's house

13 SEP 11 AM 11:51
JEANETTE W. McBRIDE
C.C.P. & G.S.

RICHMOND COUNTY
11 SEP 11

1. ASHLEY. Um, I mean you don't, you don't have to come over. I'm just, I'm just um just
2. wanted to talk now if you had a few minutes. Just, do you remember it at all?

3. RYAN. I mean its uh, I should be home in about a few minutes though

4. ASHLEY. I mean, I rather talk now. I don't want to see you, this, I mean this has been
5. kind of hard for me. That's why I want to talk to you about it. I'm actually um in counseling
6. now and stuff and its easier if I just talk with you over the phone. Is that okay?

7. RYAN. . . You got me really kind of caught off guard here. Uh.

8. ASHLEY. I kind of just wanted to know why? Like, why did the abuse happen or did you
9. mean it to hurt me? (PAUSE) Hello.

10. RYAN. Yeah, . . . I'll be home in a little bit this is real heavy on me calling me on the
11. phone (INAUDIBLE) I'll be home in a little bit.

12. ASHLEY. Did you care?

13. RYAN: That's something like you should talk about face to face, you know

14. ASHLEY. Yeah, but I'm really, I'd, just rather do it over the phone. I cannot, I mean, I
15. rather not see you. It's like really, really hard. But, I mean do you, do you remember it, like
16. the things that you use to do to do to me? I mean, I've been in counseling on and off for
17. years and, I mean, just calling is hard. But, I'd rather do it over the phone.

18. RYAN: Who is at your house now? I mean

19. ASHLEY. I mean

20. RYAN. Who's, who's at your house now? I mean

21. ASHLEY. I mean

22. RYAN: Are you like, I mean, are you like recording this? That's the thing

23. ASHLEY. I'm just, I am not able to see you, I mean, I'd rather not see you. (PAUSE)
24. Hello

25. RYAN. Yeah, I'm here

1 ASHLEY I just want closure so that I can move on with my life. That's all I just want
2 either an apology or you to admit it, or tell me why it happened I mean, you were, like, my
3 brother's best friend I just want to know, like, why?

4 RYAN: I'm, I'm, like literally in the car on the way home right now. Give me like ten
5 minutes

6 ASHLEY: I cannot see you My therapist said this would help out a lot and —

7 RYAN: This is the thing, that, over the phone, I don't, it's kind of like, it should be like
8 talking person to person

9 ASHLEY: I mean its hard, I promise you it's harder on me than it is for you. I am the one
10 who, like, who has been suffering for years and in and out of counseling. I just, can I at least
11 get an apology for the abuse or even an acknowledgment?

12 RYAN. I'm on the way home Okay? Just give me, you'll just see me, like, pull up in
13 a few minutes

14 ASHLEY: I can't, but I can't see you.

15 RYAN: But, I, I have seen you several times since you have been out of the army,
16 several times

17 ASHLEY: I've

18 RYAN: Several times and you still at next door, several times

19 ASHLEY: And, it's been very, very hard for me each time, very, very hard. And, I just,
20 I mean, I just need closure

21 RYAN: I, I definitely understand

22 ASHLEY: I just, I mean I really just want to know why. Can you just give me a reason why
23 and an apology?

24 RYAN. I'll be home in a minute and I'd rather do this like, it's just like I understand
25 where you are coming from but, I mean, it's just like, okay, I get a call like, okay, slow down,

slow down, I understand I'm on the way home, okay?

ASHLEY: I'm not ready for that I was really just calling to see if we could have just an adult conversation about things that took place years ago.

RYAN Yes, we are, we are, but --

ASHLEY Um, I mean we were kids Hello

RYAN. Yeah, I'm here

ASHLEY I mean, can I at least just get a reason why? Even if its not a reason why, just an apology so that I can have closure and move on with my life?

RYAN I mean, are you, is this a recording, I mean --

ASHLEY: No.

RYAN: Who is home with you right now I mean--

ASHLEY: What's wrong with me?

RYAN: Who is home with you right now?

ASHLEY: I can't understand what you are saying.

RYAN Who is home with you right now?

ASHLEY My mom, my mom is home with me I mean

RYAN: That's, I mean that's different. do I want to speak with you? Absolutely, but I prefer in private

ASHLEY: I mean, I, I can't

RYAN: (INAUDIBLE) ... over the phone.

ASHLEY: I'm not, I'm really, really not ready for that And, my mom doesn't want you at the house. I'm just doing this because I was encouraged by my therapist and she said that would help me to move on. (PAUSE) This has been a struggle for me for years. I mean I thought maybe that you could at lease explain to me why it took place or even apologize to me I want to move on with my life Could I at least get that? (PAUSE) Hello.

RYAN: I'm here.

ASHLEY: I mean, what are you thinking like an apology?

RYAN: A million different things like –

ASHLEY: All I want is closure; like I'm not, that all I want is to move on with my life, I feel like an apology would definitely help with that or even an explanation. Do you understand what I'm saying? (Pause) Hello.

RYAN: I feel like I'm about to pass out, like –

ASHLEY: I just want to hear you are sorry for what you did to me. That's it. I mean, it caused me years and years of pain and in and out of counseling and just trauma. I just want an apology.

RYAN: Let me, let me pull over. Let me pull over. (PAUSE) Hold it, give me one second. (PAUSE)

ASHLEY: Hello

RYAN: Yeah, I'm back. (INAUDIBLE) I am really scared right now.

ASHLEY: Are you sorry? (PAUSE) Hello

RYAN: Is this, you said this isn't a recording? I mean

ASHLEY: No, it's not, I'm at home

RYAN: Is this your phone? Your cell phone?

ASHLEY: Yes. (PAUSE) I mean, are you, are you sorry for what you did to me?

RYAN: (INAUDIBLE) I mean, I (PAUSE)

ASHLEY: This is harder for me. Does it, does it matter to you what happened at all?

RYAN: Can I, can I get a one moment, I'm like, oh God, Ashley, I –

ASHLEY: I mean, I just really looked up to you as one of almost like my brothers, and, I just really want closure and move on with my life. I lived in years of pain, and

RYAN: (INAUDIBLE) I never imagined anything like that or wanted it to happen. I

1. I don't what happened I mean, it been - we were 14 or 15. We were at Little Mike's house
2. or Melvin's or somebody's house at a cookout and you had sat on my lap just out of the blue
3. I was - you were young. You didn't mean any harm. I didn't think that nothing would happen.

4. I don't know, AND IT WAS --

5. ASHLEY: I mean, are you, are you sorry for the other stuff that took place?

6. RYAN I didn't intend for any of that to happen Absolutely I thought about that
7. and repented tremendous times

8. ASHLEY. Why did you keep doing it over and over. I mean, at my house, your
9. grandmother's house, like over and over (PAUSE) I fear every day, every day of my life.
10. (PAUSE) I just want closure. I mean, are you --

11. RYAN: I definitely apologize. I am totally, truly, truly indebted to you. I am sorry, Ashley
12. Jones It was not -- It was like --

13. ASHLEY. I mean, was anyone else touched like the way I was?

14. RYAN: No, no, absolutely not. No, oh God

15. ASHLEY Did you care?

16. RYAN: I knew, it was just, I don't know

17. ASHLEY: I mean, I just want to know why, really, just why. (PAUSE) Hello.

18. RYAN Yeah, I'm here

19. ASHLEY. I accept your apology.

20. RYAN I'm trying to calm down, like (PAUSE) I can't tell you how many times I, like,
21. wanted to stop, but, it was just, that was just evil -

22. ASHLEY: So you wanted to stop touching me but you just couldn't? (PAUSE) Hello.

23. RYAN: I'm here, I'm

24. ASHLEY So you just couldn't stop touching me? (PAUSE) I know this is hard, but it's
25. um, I mean, it's much harder for me I, mean like, I just need closer, like an explanation I

1. accept your apology

2. RYAN. This is something I dealt with at the back of my mind. Ashley, I'm not going to
3. lie to you I had a dream about two (2) years ago I would have to kind of talk with you about
4. that. I just don't know when

5. ASHLEY. What was it about?

6. RYAN. It was, literally, you were older and the dream was like affectionate and, when
7. I saw it, I knew exactly what it was about I said oh my goodness I, I -

8. ASHLEY. About the abuse that took place? (PAUSE) Hello.

9. RYAN. Yeah, I'm here

10. ASHLEY. Yeah, that's what the dream was about.

11. RYAN. That, that I was (PAUSE)

12. ASHLEY. That is my nightmare, it's not a dream for me at all It's still a nightmare
13. (PAUSE) I just want an explanation (PAUSE) I just want to know why. (PAUSE) Well, um,
14. I guess I 'm just not worth an apology So, um -

15. RYAN. I, I apologize to you -

16. ASHLEY. Well, I guess I'll just try and figure out why myself I am going to um -

17. RYAN: Wait, wait, wait (PAUSE)

18. ASHLEY: I mean, I know this may be hard for you, but I've been in counseling for years,
19. years, and years of counseling to just try and move pass it And, I think if I just knew why that
20. would help me with the closure so I can move on with my life. (PAUSE) Is there a reason
21. why?

22. RYAN. Like I said, the only thing I can think of is you, I'm, I'm literally telling you how
23. It happened, how it started, you had sat on my lap at Melvin's house (INAUDIBLE) and I got
24. aroused, and you were, literally before anything happened, moving very kind of like in a
25. a sexual type manner, um, and every since that you were just automatically wanted to set

on my lap ever since then and I kind of let you. The more you did that the more I wanted you to continue to sit on my lap. I knew that was wrong, I don't know why, I, I, don't feel it was cute or innocent, but it was leading up to a lot of stuff that just shouldn't have happened. I, literally, remembered that moment when that happened. It was like a gate way (INAUDIBLE).

ASHLEY: How did it progress from there, like an innocent child sitting on your lap to years of sexual abuse? (PAUSE)

RYAN: I don't think, it was just kind of, once you (INAUDIBLE) something, its almost kind of like you never can get enough. That's with anything, what your call a habit, a bad one or a good one. From that moment, it just, it just continued.

ASHLEY: Was it just so you could get off?

RYAN: Even at that age, I had never been with a woman, never, never had sex. I was fourteen (14) or so, never had intercourse, not with one woman, not then, not til later in life, literally my senior year in high school

ASHLEY: I was a girl, a little girl, a child – (PAUSE) Hello.

RYAN: I just would apologize, I, I –

ASHLEY: Thank you.

RYAN: I'm really, I mean like with all sincerity admire you. I, I from the bottom of my heart to the depths of my soul, it is just, it is just some things I've learned since then that I would not wish on anybody, not, I just hate it all took place being that you had to deal with that, especially someone that was friends of my older siblings. I, I, disrespected you; I disrespected my family that outside of God means everything. My integrity wasn't there, I was very immature just not thinking and just like going with the flow. It was just wild behavior that I buried extremely. You know what, I'm going to be real with you right now. In all of my 33 years of living that is probably the worst. I wish I could take it back. That right there is the epitome of just absolute devilish and devious behavior, not only that, it was satanic. That's

how -

(Persons talking in background)

END OF TRANSCRIPTION

Any one else?

I want
closure

I accept
your apology

My therapist
said this would
help

This is hard
on me

EXHIBIT E

Did you
care

I can not
see you

use it just
so you could
get off

That is
my nightmare

Why did you
keep doing it

I see it every
day

Are you
sorry.

Does it matter to
you

I looked up to you

Just want
to know why

Did you mean
to hurt me

Why didn't
you

This
has been
a struggle

I want to
move on

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by a copy of the same by United Respondents mail, postage prepaid, to the following address(es):

PLEADING (S) **Memorandum of Law in Support of Motion to Suppress**

PARTIES

Margaret Fent Bodman, Esq.
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192



Columbia, South Carolina

October 9, 2013

RECEIVED
OCT 09 2013
SC Court of Appeals

8

The South Carolina Court of Appeals

State of South Carolina, Respondent,

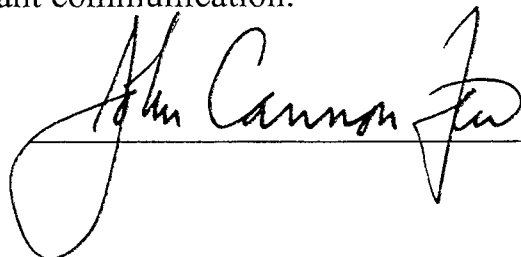
v.

Ryan Bradford Kirby, Petitioner.

Appellate Case No. 2013-002145

ORDER

Petitioner filed a motion to suppress his intercepted electronic communication pursuant to the Fourth and Fifth Amendments of the United States Constitution, Rule 403, SCRE, and section 17-30-110(A)(1) of the South Carolina Code (Supp. 2012) (the Wiretap Act).¹ Because the victim consented to law enforcement's taping of the electronic communication in question and the plain language of the Wiretap Act does not include any exception to the general admissibility of an electronic communication where one party has consented, Petitioner's motion is denied. *See State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012) ("[W]hen a party to a communication gives consent for the communication to be intercepted, such recording does not violate the [the Wiretap Act.]"). Further, there is no evidence Respondent utilized deceit, trickery or misrepresentation to induce the victim to consent to the instant communication.

 _____ C.J.

¹ We decline to address Petitioner's constitutional grounds as well as those based on Rule 403, SCRE. *See* S.C. Code Ann. § 17-30-110(A) (Supp. 2012) (noting this Court's function under the Wiretap Act is to "decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter").

This is wrong

U. Ke

J.

Regina A. Carter

A.J.

Columbia, South Carolina

cc:

Margaret Fent Bodman

Hemphill P. Pride, II

Lesli Brown Darwin

FILED

10/21/13

9

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

ORIGINAL JURISDICTION OF THE COURT OF APPEALS NOV 04 2013

Indictment Nos : 2013-GS-40-04051 and 04052

SC Court of Appeals

STATE OF SOUTH CAROLINA, ... Respondent.

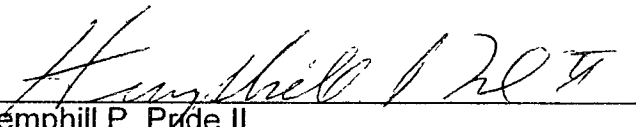
v

RYAN BRADFORD KIRBY, ... Petitioner.

PETITION FOR REHEARING

Pursuant to Rule 221, Rules of Appellate Practice, and for all of the reasons set forth in the accompanying Memorandum of Law in Support, Petitioner hereby moves this honorable Court to alter, amend or reconsider its Order of October 21, 2013.

By


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ATTORNEYS FOR PETITIONER

November 4, 2013

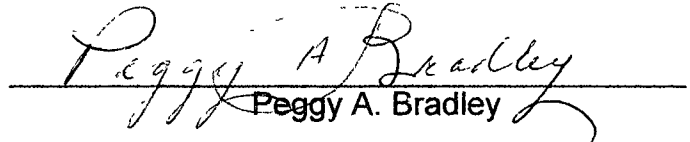
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by United States mail, postage prepaid, to the following address(es):

PLEADING(S): **Petition for Hearing**

PARTIES: Margaret Fent Bodman, Esq.
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192


Peggy A. Bradley

Columbia, South Carolina

November 4, 2013.

10

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

Indictment Nos : 2013-GS-40-04051 and 04052

RECEIVED

NOV 04 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA, ... Respondent,

v.

RYAN BRADFORD KIRBY, ... Petitioner

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HEARING

NOW comes the Petitioner, by undersigned counsel, and offers the following
Memorandum of Law in Support of Petitioner's Petition for Hearing

On October 9, 2013, Petitioner filed with this honorable Court Notice of Motion and Motion to Suppress, Memorandum of Law in Support of Motion to Suppress along with the Order of the Honorable Alison Renee Lee, Presiding Judge for the Court of General Sessions for the Fifth Judicial Circuit, dated September 26, 2013. This honorable Court, on October 21, 2013, issued an Order denying Petitioner's said Motion. Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Petitioner hereby petitions this honorable Court for a hearing.

The Petitioner's Motion to Suppress the electronic recording claims his constitutional rights as protected by the 4th and 5th Amendments were violated. Therefore, Petitioner has been denied an opportunity to articulate specific factual and legal grounds to support his contention that the evidence he seeks to suppress was obtained by conduct which violated his above-mentioned constitutional rights. See *State v. Blassingame*, 244 SE 2d 428 (1978) and *State v. Patton*, 472 SE 2d 245 (1996).

The trial court failed to provide Petitioner with a due process evidentiary hearing on his constitutional claims. "Procedural due process requires 'adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine witnesses, and the right to meaningful judicial review.'" *State v. Dukes*, 404, S.C. 553, 745 S.E.2d 137, 140 (2013) quoting *Dangerfield v. State*, 376, S.C. 176, 656 S.E.2d 352, 354 (2003). Moreover, in its Order of October 21, 2013, this honorable Court emphatically declined to address Petitioner's constitutional grounds as raised in his Motion to Suppress. Said Order reads, in pertinent part:

¹We decline to address Petitioner's constitutional grounds as well as those based on Rule 403, SR+SCRE. See S.C. Code Ann. § 17-30-110(A) (Supp. 2012) (noting this Court's jurisdiction under the Wiretap Act is to "decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter)

This honorable Court conducted a review of the Petitioner's Motion to Suppress and Memorandum in Support, dated October 9, 2013¹, along with the Order of Judge Lee, dated September 26, 2013. However, Judge Lee's Order did not address the merits of Petitioner's Motion to Suppress. Instead, Judge Lee ruled the trial court lacked subject matter jurisdiction, and, the South Carolina Appellate Court is the reviewing authority

pursuant to the South Carolina Homeland Security Act codified at S.C. Code Ann § 17-30-10 to which we disagree

This honorable Court did not request (i) records from the lower court in this case—Criminal Records Division, Office of the Richland County Clerk of Court [see Exhibit A attached hereto], (ii) copy of the transcript from the Court Reporter of the motion hearing in the Court of General Sessions before Judge Lee. [See Exhibit B attached hereto], (iii) the “CD of phone call” included in the States’s Discovery; or, (iv) the State to file any response. In accordance with [i] above, pursuant to § 17-30-110(A) of the S.C. Code of Laws, “the reviewing authority must notify the issuing judge who must then transfer copies of the contents of all recordings, applications, orders, and other documents relating to the issuance of the order of authorization.”

Neddy // Petitioner is entitled to a due process hearing on his Motion to Suppress the electronic recording and the burden would be on the State to prove the victim voluntarily consented or had the capacity to consent to law enforcement electronically recording the conversation in question. See William Eugene Carter v. State of Maryland: //

Accused, who moved for suppression of property seized pursuant to search and seizure warrant, was entitled to evidentiary hearing to determine whether any wiretapping or electronic eavesdropping was conducted in violation of his rights under Fourth Amendment; he had to be given opportunity to show that facts sworn to in affidavit as a basis for probable cause were obtained either directly or derivatively as an exploitation of any such illegal wiretapping or eavesdropping.

William Eugene Carter v. State of Maryland, 274 Md. 411, 337 A.2d 415 (1975).

This honorable Court erroneously concluded in its Order of October 21, 2013 that the “. . . taping. . .” The record is clear as reiterated in Judge Lee’s Order of September 26, 2013 the telephone call was recorded. In order to “tap” a phone line, law

enforcement would be required to obtain a Court Order. This honorable Court reiterated in its Order of October 21, 2013, “ ‘decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter ’” It is clear there is no such Order for taping in this case.

This honorable Court also seems to conclude that § 17-30-30 requires only the consent of the alleged victim. Prima facie compliance with § 17-30-30 does not redeem the State here because a deeper analysis reveals constitutional violations. Therefore, a hearing would allow Petitioner an opportunity to show the alleged victim acted as State’s agent “under color of law ” Petitioner invites the Court to compare the South Carolina Code section to the federal counterpart, 18 U.S.C.A. §2511(d).

(d) It shall not be unlawful under this chapter for a person **not acting under color of law** to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state..

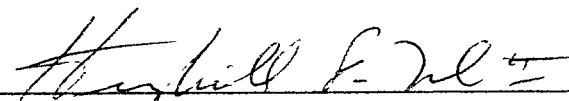
8 U.S.C.A. §2511(2)(d). [Emphasis added.]

The State does not deny that the alleged victim acted as its agent, nor does it deny that the call was scripted by the State. Neither the South Carolina nor the federal statute authorizes a State agent to be the consenting party for purposes of intercepting electronic communications. The State ignores the constitutional mandates it violated when its agent used the State’s scripted questions to coerce self-incriminatory statements from the Respondent, which it, then, intercepted. For this reason, a due process hearing is required.

Petitioner asserts a cursory dismissal of his Motion to Suppress violates his Fourth Amendment rights. As set forth in *Katz v. United States*, 389 U.S. 347, 359, 88 S.Ct. 507, 515 (1967) "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." In this case, as in the *Katz* case, "government agents here ignored 'the procedure of antecedent justification. . . that is central to the Fourth Amendment.'" *Id.* Petitioner contends the manner by which the conversation was intercepted was duplicitous in that Respondent manipulated the alleged victim in order to attempt to get self-incriminating statements by the Petitioner. Petitioner further contends his filing of a Motion to Suppress on grounds of Fourth Amendment violations requires first a determination "whether the defendant has a legitimate expectation of privacy" then a decision as to "whether the police violated his Fourth Amendment rights." *State v. Bruce*, 402 S.C. 621, 624, 741 S.E.2d 590 (2013)

Conclusion

The Petitioner respectfully request that this honorable Court reconsider its Order of October 21, 2013; and, grant a hearing on Petitioner's Motion to Suppress.

By 
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ATTORNEYS FOR PETITIONER

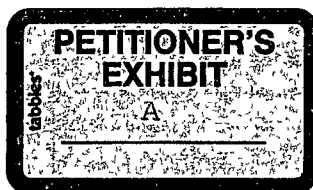
November 4, 2013

Subject RE State v Ryan Kirby (Docket No 2013-GS-40-04051 and 04052)
From Hams Elizabeth B (EHams@sccourts.org)
To hppride@bellsouth.net
Date Monday October 28, 2013 1:36 PM

No I haven't received an order from anyone

From H P PRIDE [hppride@bellsouth.net]
Sent Monday, October 28, 2013 12:17 PM
To Harris, Elizabeth B
Subject Re: State v Ryan Kirby (Docket No 2013-GS-40-04051 and 04052)

Did the Court of Appeals order the transcript from the case of State v Ryan Kirby before Judge Lee



Subject: RE State v Ryan Kirby (Indictment Nos 2013-GS-40-04051 & 04052)
From: TERESA CRIBB (CRIBBT@rcgov.us)
To: hppride@bellsouth.net,
Cc: MCBRIDEJ@rcgov.us,
Date: Tuesday, October 29, 2013 4 35 PM

We have no request in our incoming mail that we could find for this file. It is pending. Our file is public record so anyone can come get a copy of the file and pay for it, so we may not have a mail request. Hope this helps.

Teresa T. Cribb

Richland County Clerk of Court

Criminal Records Manager

PO Box 2766

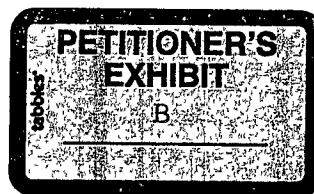
Columbia SC 29201

803-576-1936 cribbt@rcgov.us

From: H.P. PRIDE [mailto:hppride@bellsouth.net]
Sent: Tuesday, October 29, 2013 9:51 AM
To: TERESA CRIBB
Cc: JEANETTE MCBRIDE
Subject: State v. Ryan Kirby (Indictment Nos. 2013-GS-40-04051 & 04052)

SECOND REQUEST

From: H P PRIDE <hppride@bellsouth.net>
To: "mcbridej@rcgov.us" <mcbridej@rcgov.us>
Sent: Monday, October 28, 2013 12 38 PM
Subject: State v Ryan Kirby



Ms. Cribb

On yesterday, October 28, a request was made "To Criminal Records in the Clerk's Office" for

<http://us-mg206.mail.yahoo.com/neo/launch?partner=sbc&rand=1atci30gmm8pm>

10/30/2013

an " e-mail verifying [whether] the SC Court of Appeals requested records from [the Office of the Clerk]" in the case of *Ryan Kirby* Through inadvertence, the request was sent via e-mail to the Honorable Jeanette McBride instead of your e-mail address

Your consideration in providing this information is appreciated

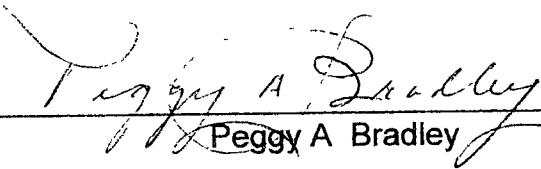
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

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I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by United States mail, postage prepaid, to the following address(es):

PLEADING(S): **Memorandum of Law in Support of Petition for Hearing**

PARTIES: Margaret Fent Bodman, Esq.
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192



Peggy A Bradley

Columbia, South Carolina

November 4, 2013.

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SC Court of Appeals

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DEC 02 2013

STATE OF SOUTH CAROLINA)

IN THE COURT OF APPEALS **SC Court of Appeals**

COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA)

**STATE'S RESPONSE TO PETITION
FOR REHEARING**

-v-

APPELLATE CASE # 2013-002145

RYAN BRADFORD KIRBY,)

INDICTMENT #

Petitioner)

2013-GS-40-04051 & 04052

The undersigned counsel for the State of South Carolina hereby moves this Court to deny the Petition for Rehearing on the Court's denial of his Motion to Suppress. Petitioner's Motion to Suppress challenged statements made by the Petitioner during a phone conversation between the Petitioner and victim, which was recorded with consent of the victim

RECORDING AUTHORIZED BY 17-30-110(1)

The Petitioner states in the first page and again in his third page of his MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO SUPPRESS, that the recording at issue in this case was a "February 28, 2013 telephone conversation initiated by the alleged victim and at the behest of the Respondent" EXHIBIT C of the Petitioner's MEMORANDUM represents the underlying facts as follows "Inv Holdorf and I met with Ashley Jones and her mother at HQ Ashley called Ryan and the phone went to voicemail. A few minutes later Ryan Kirby called back and Ashley answered" Petitioner's EXHIBIT C goes on to give a very brief summary of the phone conversation that took place between the victim and the Petitioner, Ryan Kirby It is then noted that after Ashley's phone goes dead, the phone call was downloaded off the recorder and Ashley was allowed to take the recorder with her in case the Petitioner called back after

she charged her phone EXHIBIT C, MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS.

This was a lawful interception authorized under Title 17 which allows interception where one of the parties to the communication has given prior consent to the interception See §17-30-30 (B) and (C) The South Carolina Wiretap Statute was passed as part of the Homeland Security Act in 2002 See S C Code Ann. §§ 17-30-10 et seq, South Carolina Homeland Security Act, 2002 Act No. 339 In writing the statute, the South Carolina General Assembly included a “consent exception” to the general rule prohibiting **third parties** from intercepting conversations between other individuals. This consent exception parallels the Federal Wiretap Statute’s consent exception in that they both proscribe third parties from intercepting a conversation unless one of the parties to the communication has given prior consent Compare S.C Code Ann § 17-30-30 with 18 U.S.C § 2511 (2) (d)

**NO ALLEGATION THAT VICTIM’S CONSENT WAS INDUCED BY DECEIT,
TRICKERY OR MISREPRESENTATION**

Petitioner asserts that the State engaged in deceit,¹ trickery and misrepresentation in its involvement in the recording of the phone call First, we agree with this Court’s Order denying his Motion to Suppress that the plain language of the Wiretap Act does not include any exception to the general admissibility of an electronic communication where one party has consented, citing to *State v Whitner*, 399 S C 547, 553, 732 S E 2d 861, 864 (2012). Second, the facts provided by the Petitioner in his MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS only assert that the victim made false statements to the Petitioner during the phone call Petitioner never makes any factual allegation that the State engaged in any deceit, trickery or misrepresentations to the victim in order to obtain her consent to make the phone call to the Petitioner

FOURTH AND FIFTH AMENDMENT VIOLATIONS AND RULE 403

The Petitioner's grounds for suppression of the Petitioner's statements pursuant to the Fourth and Fifth Amendments of the United States Constitution and Rule 403 SCRE, should be addressed by the trial court. These arguments are not within the function of the Court of Appeals when challenging a recorded phone call pursuant to S.C. Code Ann. § 17-30-110(A).

IN CONCLUSION

The State respectfully requests that this Court deny the Petition for Rehearing and remand to the trial court for trial.

Respectfully submitted,

DAN JOHNSON
Solicitor, Fifth Judicial Circuit

By Margaret Fent Bodman
Margaret Fent Bodman
Assistant Solicitor
Fifth Judicial Circuit Solicitor's Office
1701 Main Street, Third Floor
Columbia, South Carolina 29201

ATTORNEY FOR THE RESPONDENT

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

PRETRIAL FROM RICHLAND COUNTY
Court of General Sessions

Indictment No. 2011-GS-40-2059

STATE OF SOUTH CAROLINA,
RESPONDENT

V
RYAN KIRBY,
PETITIONER

PROOF OF SERVICE

I, Margaret Fent Bodman, certify that I have Served the State's Response to
Petitioner's Request for Rehearing depositing a copy of same in the United States mail,
postage prepaid, addressed to the following

HEMPHILL P PRIDE
LAW OFFICE OF HEMPHILL P PRIDE II, LLC
Post Office Box 4529
Columbia, SC 29240

Margaret Fent Bodman
Margaret Fent Bodman
Assistant Solicitor
Fifth Judicial Circuit

December 2, 2013
Columbia, South Carolina

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DEC 02 2013
SC Court of Appeals

12

The South Carolina Court of Appeals

State of South Carolina, Respondent

v.

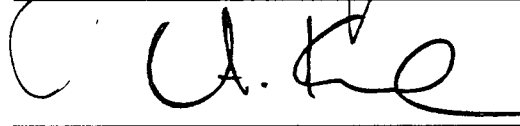
Ryan Bradford Kirby, Appellant.

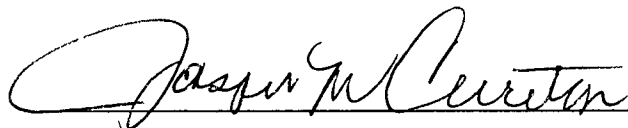
Appellate Case No. 2013-002145

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 A.J.

Columbia, South Carolina

cc:

Margaret Fent Bodman, Esquire

Hemphill P. Pride, II, Esquire

Lesli Brown Darwin, Esquire

The Honorable Alison Renee Lee

FILED

Dec. 4, 2013

13

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

Appellate Case # 2013-002145

Indictment Nos.: 2013-GS-40-04051 and 04052

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DEC 06 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA, ... Respondent

v.

RYAN BRADFORD KIRBY .. Appellant

APPELLANT'S MOTION FOR REINSTATEMENT

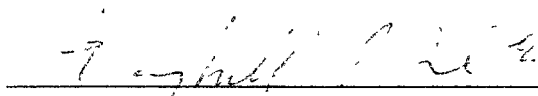
COMES now Appellant, by and through his undersigned counsel, and moves this Court for an Order to reinstate the above-captioned case on the following grounds

1. The Order of this Court, filed December 4, 2013, denying Appellant's Petition for Rehearing preempted the Appellant's right to file a Reply as set forth in South Carolina Appellate Court Rule 240(f)
2. The Respondent filed its Response On December 2, 2013, the envelope in which the Response was mailed is postmarked December 4, 2013; and, the Response was received by the undersigned counsel for Appellant on December 5, 2013 [Copy of envelope attached as Exhibit A.]

3 The Reply, which the undersigned intends to file on behalf of Appellant, is being prepared and will be filed timely

WHEREFORE, Appellant request this Court to rescind and/or modify its Order of December 4, 2013 to allow an opportunity for his Reply to be timely filed.

By


Hemphill P. Pride II

Lesli B. Darwin

LAW OFFICE OF HEMPHILL P. PRIDE II, LLC

Post Office Box 4529

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(803) 256-8015

hppride@bellsouth.net

leslidarwin@aol.com

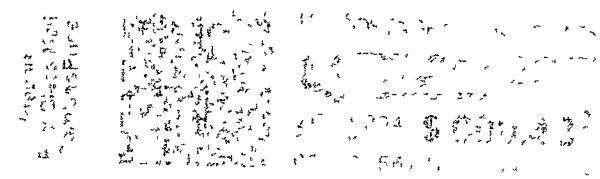
ATTORNEYS FOR APPELLANT

December 6, 2013

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DEC 06 2013
SC Court of Appeals

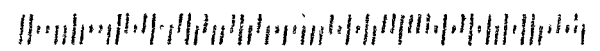


The State of South Carolina,
SOLICITOR'S OFFICE
Fifth Judicial Circuit
Post Office Box 192
1701 Main Street
Columbia, South Carolina 29201



Hemphill Pride
Law Office of Hemphill Pride II LLC
P O Box 4529
Columbia, SC 29240

NOV 29 2013



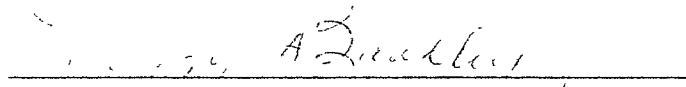
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by United States mail, postage prepaid, to the following address(es)

PLEADING(S): **MOTION FOR REINSTATEMENT**

PARTIES Margaret Fent Bodman, Esq
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192



Peggy A Bradley

Columbia, South Carolina

December _____, 2013

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SC Court of Appeals

14

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

Appellate Case # 2013-002145

Indictment Nos. 2013-GS-40-04051 and 04052

STATE OF SOUTH CAROLINA, ... Respondent.

v

RYAN BRADFORD KIRBY, ... Petitioner.

**PETITIONER'S REPLY TO THE STATE'S RESPONSE
TO
PETITION FOR REHEARING**

NOW comes the Petitioner, by undersigned counsel, and offers the following
Reply to the State's Response to his Petition for Rehearing:

Petitioner is entitled to a due process hearing on his Motion to Suppress the
electronic recording and the burden would be on the State to prove the victim voluntarily
consented or had the capacity to consent to law enforcement electronically recording the
conversation in question. See *Carter v. State*, 274 Md 411, 337 A.2d 415 (1975):

Respondent argues that as long as one party to the communication at issue
consented, then, the intercepted communication passed under Title 17. However,

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Respondent offers no evidence that the alleged victim consented (i.e., oral or written proof of same)

It is undisputed that Investigator Holdorf of the Richland County Sheriff's Department was an over zealous law enforcement officer: (a) led alleged victim to have Petitioner make self-incriminating statements; and, (b) encouraged alleged victim to lie as well as give false and misleading statements.

Petitioner was tricked into apologizing for acts (which, in context, he said had occurred when he was age 14), by way of the lies made by the alleged victim (i.e., denied recording the call, failed to disclose the presence of the investigators, wanting only closure, explanation and apology) compounded by emotionally manipulative statements the Respondent encouraged the Appellant to make.

Upon instruction to do so by the Respondent, the alleged victim stated, among other things, "I just want closure"; "I just want to know why"; "I want to move on"; "I'm looking for an apology", "[m]y therapist said this would help"; "This is hard on me", "[t]hat is my nightmare"; "I see it every day"; and, other statements specifically scripted by the Respondent. The Respondent's instruction and control over the alleged victim is patently evident in the notes made by the Respondent during the conversation. ["Discovery Checklist" item number 9, "Handwritten Notes, 3 pages" attached as Exhibit A.] These notes constitute the Respondent's surreptitious and written instructions to the alleged victim as to what to say

On January 30, 2013, the alleged victim was admitted to Palmetto Baptist Hospital Behavioral Program with an admission and discharge diagnosis of major depression and post traumatic stress disorder [Copy of Discharge Summary attached as Exhibit B].

And, the Discharge Summary indicates the alleged victim stated she had been sexually molested by the Respondent and her brother. The alleged sexual abuse was, in turn, reported to law enforcement.

When Investigator Holdorf was assigned to the case , he either knew or should have known the alleged victim had psychological and medical issues:

- a. From January 30, 2013, through February 7, 2013, the alleged victim was an in-patient at Palmetto Health Baptist Behavioral And, as further documented in this report, Dr. Timothy Malone diagnosed the alleged victim at the date of discharge with major depression; and, post-traumatic stress disorder The alleged victim was discharged on February 7, 2013, with the following medications Klonopin 0.5 3 times daily, Pristiq 100 mg daily, and Trazodone 50 mg at bedtime She was further instructed to follow-up with the Baptist Partial Day Program and Post Traumatic Resources [See copy of Discharge Medical Record previously attached as Exhibit B]
- b. On February 5, 2013, Investigator Wagner interviewed the alleged victim; and, on said date, the alleged victim was in the in-patient program at Palmetto Health Baptist Behavioral [See copy of Incident Report attached as Exhibit C]
- c. The alleged victim has reported struggling with her sexual orientation as well as has a past history of smoking marijuana [See copy of Medical Record attached as Exhibit D]
- d. On October 12, 2012, the alleged victim states she had marijuana two weeks prior [See copy of Report of William Walkup, M D attached as Exhibit E]
- e. The alleged victim also has a medical history of seizures. [See copy of Report of Michael Mareska, M D attached as Exhibit F]

With the above medical profile, it is imperative to determine the alleged victim's capability to consent as well as the voluntariness of the alleged victim's consent. Only a due process hearing could determine these issues.

As presented previously, the Respondent had surreptitious and written instructions orchestrating the alleged victim as to what to say. Although Respondent argues that the conversation is admissible under S.C. Code Ann. §17-30-30, Petitioner would counter that the officer induced the alleged victim to facilitate the phone call all the

while intentionally directing the alleged victim to tell the Petitioner lies as well as misrepresent material facts

The Respondent does not address the issue as to (i) whether the consenting party had the ability to consent; or (ii) whether the consent was voluntary. Therefore, based on the alleged victim's medical diagnoses, the Petitioner proffers the Court should inquire and determine the alleged victim's ability and capability to knowingly and voluntarily consent to said wiretap and, accordingly, the recording and evidence derived therefrom should be suppressed.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Honorable Court provide the Petitioner with a due process hearing in order for a determination as to the alleged victim's capacity to consent to the warrantless recording of a telephone conversation as well as the voluntariness of the alleged victim's consent to said recording

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of
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hppride@bellsouth.net
leslidarwin@aol.com

ATTORNEYS FOR PETITIONER

December 9 2013.

Any one else?

I want
Closure

I accept
your apology

My therapist
said this would
help

This is hard
on me



Did you
care

I can not
see you

use it just
so you could
get off

That is
my nightmare

Why did you
keep doing it

I see it every
day

Are you
sorry

Does it matter to
you

I looked up to you

Just want
to know why

Did you mean
to hurt me

Why didnt
you

This
has been
a struggle

I want to
move on

Facility Info Palmetto Health Baptist Behavioral
Taylor at Marion
Columbia, SC 29201-

Attending Physician: Malone MD, Timothy D
Admitting Physician: Malone MD, Timothy D

Patient Info JONES, ASHLEY SHARRELL
300 LINCOLN PARKWAY
COLUMBIA, SC 29203-

Pt Age: 26 years
Date of Birth: 9/6/1987
CMRN: 000823511

MRN: R005395260, B000082772
FIN: B1303002270

History and Physical

D 01/31/2013 06:22 T. 01/31/2013 07:17 TID
Job # 36685 Doc # 00087657
cc Jean Massey, RN ANP PhD
*Electronically Signed & Verified on 01/31/2013 19:43
by Massey NP, Jean A*

*Electronically Signed & Verified on 02/15/13 17:27
by Malone MD, Timothy D*

Discharge Information

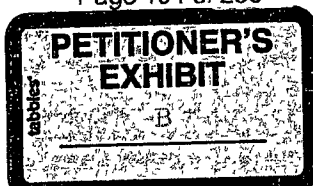
DOCUMENT NAME
SERVICE DATE/TIME
RESULT STATUS
PERFORM INFORMATION
ELECTRONICALLY SIGNED BY

Discharge Summary
2/7/2013 17:00 EST
Auth (Verified)
Glenn RN, Jestine (2/7/2013 17.00 EST)

Discharge Summary
02/07/13 05 00 pm Performed by Glenn RN, Jestine
Entered on 02/07/13 05 02 pm

Discharge Summary

Patient Disposition	Discharged
Discharged to	Home
Mode of Discharge	Ambulatory
Assisted By	Nurse
Accompanied By at Discharge	Parent
Patient's Home Meds	None
Follow-up Appointments Grid	
1 Physician-Provider	BAPTIST PARTIAL DAY PROGRAM
Date-Time of Appointment	02/08/13 08:00
Phone Number	296-8765
2 Physician-Provider	POST TRAUMA RESOURCES-AUNDREA
Date-Time of Appointment	02/13/13 11 00
Phone Number	765-0700
Discharge Comment	PERSONAL BELONGINGS RETURNED TO PATIENT WRITTEN DIRECTIONS GIVEN TO PATIENT FOR BAPTIST DAY PROGRAM.



Facility Info: Palmetto Health Baptist Behavioral
Taylor at Marion
Columbia, SC 29201-

Attending Physician: Malone MD, Timothy D
Admitting Physician: Malone MD, Timothy D

Patient Info: JONES, ASHLEY SHARRELL
300 LINCOLN PARKWAY
COLUMBIA, SC 29203-

Pt. Age: 26 years
Date of Birth: 9/6/1987
CMRN: 000823511

MRN: R005395260, B000082772
FIN: B1303002270

Discharge Information

DOCUMENT NAME	Discharge Summary
SERVICE DATE/TIME	2/22/2013 14:42 EST
RESULT STATUS	Auth (Verified)
PERFORM INFORMATION	Malone MD, Timothy D (2/22/2013 14:42 EST)
ELECTRONICALLY SIGNED BY:	Malone MD, Timothy D (2/22/2013 18:08 EST)

Discharge Summary
DATE OF ADMISSION: 01/30/2013

DATE OF DISCHARGE: 02/07/2013

JUSTIFICATION AND CRITERIA FOR ADMISSION This is a 25-year-old who presents secondary to worsening depression and anxiety. The patient is having panic attacks and unable to cope. The patient reportedly was sexually assaulted by her brother and a cousin who lives next door as a child. She has been unable to deal with this over the past several years. She feels helpless, hopeless, and worthless. She has also had some suicidal ideations but able to contract for safety in the hospital.

ADMITTING DIAGNOSES:

Axis I: Major depressive disorder
Axis II: Deferred
Axis III: Pelvic pain
Axis IV: Severe, abuse
Axis V: 30 upon admission and 60 over the past year

HOSPITAL FINDINGS: A CBC was obtained along with a basic metabolic profile, thyroid profile, urinalysis, and urine drug screen.

HOSPITAL COURSE The patient was admitted to the adult psychiatric ward and placed under the appropriate observation. She received routine labs and a physical examination by the internist. The multidisciplinary treatment team met initially and subsequently throughout the hospitalization and updated her master treatments accordingly. She was enrolled in the full therapeutic module.

Upon the initial assessment the patient was somewhat constricted. She was able to contract for safety, however, and was advanced to routine observation. She did gradually but significantly over time become more able to process and cope with her past abuse issues. She was participating well with groups and was able to discuss openly and honestly her ongoing history of nightmares and flashbacks. She indicated that she planned to contact the authorities and did so during her hospital stay. She was encouraged to work on developing better coping skills using DBT.

Facility Info. Palmetto Health Baptist Behavioral
Taylor at Marion
Columbia, SC 29201-

Attending Physician Malone MD, Timothy D
Admitting Physician Malone MD, Timothy D

Patient Info: JONES ASHLEY SHARRELL
300 LINCOLN PARKWAY
COLUMBIA, SC 29203-

Pt. Age 26 years
Date of Birth: 9/6/1987
CMRN 000823511

MRN: R005395260, B000082772
FIN: B1303002270

Discharge Information

treatment She continued to brighten over time and improved and was agreeable to stepping down into the Partial Hospitalization Program at discharge She subsequently was released on 02/07/2013

CONDITION ON DISCHARGE Her affect was much brighter She was denying suicidal or homicidal ideas, visual or auditory hallucinations, or delusions. She was endorsing a plan to follow up with outpatient treatment as recommended

FINAL DIAGNOSES.

Axis I Major depression
Post-traumatic stress disorder
Axis II None
Axis III None
Axis IV Severe psychosocial stressors and abuse
Axis V 25 upon admission and 50-55 at discharge

DISCHARGE DIET Regular

ACTIVITIES Ad lib.

PROGNOSIS: Guarded

DISCHARGE MEDICATIONS

1. Klonopin 0.5 mg 3 times daily
2. Pristiq 100 mg daily.
3. Trazodone 50 mg at bedtime

D: 02/22/2013 13:42 T 02/22/2013 14:42 TID:
Job # 52858 Doc # 00089111
cc Timothy D Malone, MD

*
*
*
*

*Electronically Signed & Verified on 02/22/2013 18:08
by Malone MD, Timothy D*

Patient Name: JONES ASHLEY SHARRELL
Date of Birth: 9/6/1987

MNRN: R095395260, 6000081
FIN: B130300227

* Auth (Verified) *

2013 5 4 PM

40 2717 7

Palmetto Health Baptist
Psychiatric Progress Note

JONES, ASHLEY SHARRELL
81303002270
MR 000082772
09/06/1987 25Y F
MALONE TIMOTHY D

559 C1

Patient Name: Ashley Jones

Chief Complaint: I am feeling a little better
HPI: patient's mood today continues slowly improve. patient today opened to the possibility of partial program. Seems to be slowly showing more insight and feeling less anxious. She does feel the medicine has been helping. She is encouraged to continue to open up and share her past trauma. The police have not come back for a follow-up interview although she admits to being somewhat anxious about this encounter.
Presenting ROS:

Mental Status Exam

Thought Content: ☒ appropriate ☐ confused ☐ paranoid ☐ grandiose
☐ suicidal ☐ homicidal ☐ hallucinations ☐ delusions
☐ hyper religious
Thought Processes: ☒ appropriate ☐ illogical ☐ tangential ☐ disorganized
☐ flight of ideas ☐ concrete ☐ blocked
Mood: ☐ appropriate ☐ depressed ☒ anxious ☐ elated ☐ angry ☐ sad
Affect: ☐ mood congruent ☐ blunted ☐ flat ☐ tearful ☒ labile ☐ constricted
Speech: ☐ normal ☐ rapid ☐ rambling ☐ loud ☐ soft ☒ talkative ☐ slow
Appearance: ☐ neat ☒ casual ☐ poor hygiene ☐ disheveled ☐ isolative
☐ anxious ☒ guarded ☐ threatening
Motor Activity: ☐ normal ☒ fidgety ☐ hyper ☐ other:
Concentration: ☒ fair to interview ☐ easily distracted
Memory: ☐ recent intact ☐ remote intact
Orientation: ☒ alert oriented x 4 ☐ other
Judgment/Insight: ☐ poor ☐ good ☒ limited * ☐ conversation ☐ observation ☐ staff report

Response to medication ☐ poor ☐ improv.

range ☐ side effects

Vital Signs: ☐ stable

Abnormal movements/gait: normal

Laboratory:

Assessment and Dx: major depression, PTSD

I continue medications continue

Plan: continued her therapy monitor medication
to work on DBT skills considering partial at dis
Estimated discharge date:

Reason for continued stay: ☐ risk of harm ☒
☐ detox ☐ other

ate at lower level

Patient Progress: ☐ improving ☒ made que
Medical decision complexity: ☐ low (15min)

g ☐ other
high (35min)

Total floor time:

Total time counseling/coordination of care 50%

Patient Name: Ashley

Physician Signature: _____

Date 2/4/13 SW

* Auth (Verified) *

Feb 4 2013 6:45PM

No 2717 0-7

Palmetto Health Baptist
Psychiatric Progress Note

JONES, ASHLEY SHARRELL 559 01
B1303002270
MR 000082772 MALONE, TIMOTHY D
09/06/1987 25Y F



Patient Name: Ashley Jones

Chief Complaint I am feeling a little better

HPI. patients seen today continues slowly improve. patient today opened to the possibility of partial program. Seems to be slowly showing more insight and feeling less anxious. She does feel the medicine has been helping. She is encouraged to continue to open up and share her past trauma. The police have not come back for a follow-up interview although she admits to being somewhat anxious about this encounter. Pertinent ROS.

Mental Status Exam:

Thought Content: ☒ appropriate ☐ confused ☐ paranoid ☐ grandiose
☐ Suicidal ☐ homicidal ☐ hallucinations ☐ delusions
☐ hyper religious

Thought Processes: ☒ appropriate ☐ illogical ☐ tangential ☐ disorganized
☐ Flight of ideas ☐ concrete ☐ blocked

Mood: ☐ appropriate ☐ depressed ☒ anxious ☐ elated ☐ angry ☐ sad

Affect: ☐ mood congruent ☐ blunted ☐ flat ☐ tearful ☒ labile ☐ constricted

Speech: ☐ normal ☐ rapid ☐ rambling ☐ loud ☐ soft ☒ talkative ☐ slow

Appearance: ☐ neat ☒ casual ☐ poor hygiene ☐ dishelved ☐ isolative
☐ anxious ☒ guarded ☐ threatening

Motor Activity: ☐ normal ☒ fidgety ☐ hyper ☐ other

Concentration: ☒ fair to interview ☐ easily distracted

Memory: ☐ recent intact ☐ remote intact

Orientation: ☒ alert oriented x 4 ☐ other

Judgment/Insight: ☐ poor ☐ good ☒ limited * ☐ conversation ☐ observation ☐ staff report

Response to medication ☐ poor ☐ improve ☐ side effects

Vital Signs: stable

Abnormal movements/gait: normal

Laboratory:

Assessment and Dx: major depression, PTSD

Plan: continued her therapy monitor medication
to work on DBT skills considering partial at discharge

Estimated discharge date

Reason for continued stay: ☐ risk of harm ☒ ☐ detox ☐ other

Patient Progress: ☐ improving ☒ inadequate

Medical decision complexity: ☐ low(15min)

Total floor time:

Total time counseling/coordination of care 50%

Patient Name: Ashley
Physician Signature: _____

Date: 2/4/13

RICHLAND COUNTY SHERIFF'S DEPARTMENT

INCIDENT REPORT (L)

CASE NUMBER

NCIC

INC ENTG

AGENCY ID
CORI 400000

100104033

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. POSSIBLE FONDLING - 11D	☒ YES ☐ NO	☐ YES ☒ NO	20		☒ INDIVIDUAL ☐ BUSINESS ☐ FINANCIAL INST ☐ GOVERNMENT ☐ RELIG OPNG ☐ SOCI/PUBIC ☐ OTHER ☐ UNKNOWN ☐ POLICE OFFICER
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET AND NAME AND NUMBER)			SUBDIVISION	ZIP CODE	WEAPON TYPE
300 LINCOLN PKWY				29700	90
INCIDENT DATE	24 HR CLOCK	TO	DATE	24 HR CLOCK	DISPATCH DATE
09011994	0900		09012001	0900	01212013
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT	RES	PAGE	AGE	ETH
JONES, ASHLEY	1 2 3	J	B	25	N
ADDRESS				DAYTIME PHONE	EVENING PHONE
300 LINCOLN PKWY				803 266 5431	
				CITY	STATE ZIP CODE
				COLUMBIA	SC 29203

VICTIM NO 1	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
VICTIM'S NAME (LAST, FIRST, MIDDLE)					
JONES, ASHLEY					
HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR	SCARS TATTOOS GLASSES CLOTHING PHYSICAL PECULIARITIES ETC
510	135	1	2		
ADDRESS				CITY	STATE ZIP CODE
300 LINCOLN PKWY				COLUMBIA	SC 29203
VISIBLE INJURY (VICT 1) ☐ YES ☒ NO EXPLAIN				COMPLAINANT OF ANY NON-VISIBLE INJURIES ☐ YES ☒ NO	
VICTIM (NO 1) USING ALCOHOL ☐ YES ☒ NO ☐ UNK				DRUGS ☐ YES ☒ NO ☐ UNK TYPE	
☐ TWO MAN VEH ☐ ONE MAN VEH ☐ DET/SPEC ASST ☐ OTHER ☐ ALONE ☐ ASSISTED				GANG RELATED ☒ NO ☐ YES	
SUBJECT NO 1					
☒ SUSPECT					
☐ RUN AWAY					
☐ WANTED					
☐ VIO PANT					
☐ JAIL					
☐ SUMMONS					
NAME (LAST, FIRST, MIDDLE)					
KIPPEY, RIAN					
FACIAL HAIR SCARS TATTOOS GLASSES CLOTHING PHYSICAL PECULIARITIES ETC					
ADDRESS				CITY	STATE ZIP CODE
UNKNOWN				COLUMBIA	SC 29203
SUBJECT (NO 1) USING ALCOHOL ☐ YES ☐ NO ☒ UNK				ARRESTED NEAR OFFENSE SCENE ☐ YES ☒ NO	
DRUGS ☐ YES ☐ NO ☒ UNK TYPE				OFFENSE DATE	OFFENSE TIME
				ARREST DATE	ARREST TIME

On the above date and time R/O was dispatched to Baptist Hospital in reference to a rape report. When R/O arrived on scene, contact was made with the C/V. The C/V stated as a child, between the ages of seven and thirteen, the suspect had forcibly fondled her with his hands.

The C/V stated that between the approximate dates listed above, her older brother's friend (suspect), who lived next door to the I/L (C/V's residence), would come over to her house and fondle her. She stated that he would also fondle her when she would go over to his house to play with his sister. The C/V stated that this would happen almost every day after school and when she was home alone.

The C/V stated that the suspect either forced or bribed her to perform oral sex on him, masturbate for him, or he would fondle her privates. The C/V stated that when she was eleven years old, he tried to force intercourse on her. The C/V stated that on one instance, while he was fondling her, he was interrupted by her brother. The suspect then offered the brother a bike to be quiet about the incident.

The C/V stated that the suspect was about twenty years old at the time of these incidents. She also stated that he possibly still lives at the residence next to the I/L. The C/V stated that she would like to prosecute and a case number was issued. The C/V gave a written statement to these facts.

The C/V decided to come forward now because she was scared that the suspect would harm her if she would have reported it back when the incidents were occurring.

PROPERTY	SLIPED	TURNED	DAMAGED	OTHER
☐ ACTIVE	☐ ADJ. CLOS.	☐ ARRESTED UNDER	☐ BY CLEAR UNDER	☐ BY CLEAR UNDER
☐ UNFOUNDED	☐ OFFENSE ID. IN	☐ NO PROSECUTION	☐ EXT. ADJ. DENIED	☐ VICTIM RECEIVED OFFENSE
REPORTING OFFICER'S NAME	DATE	C. NO.	APPROVING OFFICER	DATE
2511	01/11/01		Robins, Brandon	01/11/01
REPORTING OFFICER'S NAME	DATE	C. NO.	APPROVING OFFICER	DATE
2511	01/11/01		Robins, Brandon	01/11/01



RICHLAND COUNTY SHERIFF'S DEPARTMENT SUPPLEMENTARY REPORT

AGENCY ID
CORI 400000

CASE NUMBER

1301046031

NCIC

INC

ENTO

☐ ORIGINAL REPORT
☐ MODIFIES ORIGINAL

☐ SUPPLEMENTAL REPORT
☐ CASE STATUS CHANGE

☒ INVESTIGATIVE FOLLOW UP

☐ ADDITIONAL STOLEN PROPERTY
☐ ADDITIONAL RECOVERED PROPERTY

PAGE 1 OF 1 PAGES

The C/V does not have a telephone number. She stated that she is at Baptist Hospital due to depression and other mental issues related to these incidents. She does not know how long she will be there, but while she is there she can be contacted at 296-5432, then her ID code is 01270. After she is released from the hospital she is going to return to her residence.

NARRATIVE

ADMINISTRATIVE	☐ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED		☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER		☐ EX CLEAR UNDER 18 ☐ EX CLEAR 18 AND OVER	
	REASON FOR EXCEPTIONAL CLEARANCE: ☐ OFFENDER DIED ☐ NO PROSECUTION ☐ TRANSITION PERMITTED ☐ VICTIM DECLINES COOPERATION ☐ JUVENILE NO CUSTODY					
	S NO	REPORTING OFFICER(S)	DATE	S NO	APPROVING OFFICER	DATE
	1511	Harris, Floyd	01312012		Rodriguez, Brandon	02032012
			FOLLOWUP INVESTIGATION: ☐ YES ☐ NO		S NO: 1511 W. J. J.	OFFICER: W. J. J.

Facility Info. Palmetto Health Baptist Behavioral
Taylor at Marion
Columbia, SC 29201-

Attending Physician: Malone MD, Timothy D
Admitting Physician: Malone MD, Timothy D

Patient Info. JONES, ASHLEY SHARRELL
300 LINCOLN PARKWAY
COLUMBIA, SC 29203-

Pt. Age: 26 years
Date of Birth: 9/6/1987
CMRN: 000823511

MRN. R005395260, B000082772
FIN: B1303002270

Behavioral

Miss Jones reports she is homosexual and has a female friend of one month. When asked, the patient says her parents have not directly asked about her sexuality but she believes they "have a feeling" about this. Patient lives with her parents. She has four living brothers and one brother who died in December, 2011. She has no children. She reports suffering the losses of six family members during 2012.

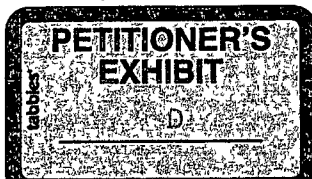
Her history of abuse involves sexual molestation, including oral and anal penetration. She was violated by her oldest brother, a cousin, and a neighbor between the ages of seven and 15. All of her alleged abuse was reported to her parents at age 16. The brother has apologized. This trauma has been followed up with Post-Trauma Resources. She says her parents confronted their son.

This LMSW spoke with the patient's father and mother. They offered their support. Mother says patient tends to keep to herself, and does not willingly share her feelings. They have recently discussed her past abuse again. Patient also divulged her sexual orientation to them. Mother believes patient's ongoing pain issue is adding to her depression. Mother says patient wants to go on with her life but has had setbacks. She sees other peers moving on and having things. Patient had to leave college and the military due to the undiagnosed health problem. Patient has also reacted to peer influence and may be easily affected by what others say. It appears there has been lots of issues that have come together at the same time.

Miss Jones works part-time at "The Express", an apparel shop, part-time for six years. She denies any work problems. She completed some college but was forced to withdraw due to health reasons. She also completed basic training in the Army, but again had to be medically discharged.

The patient reports being a social drinker, and she smokes "black and mild", a nicotine product. She has smoked marijuana in the past. She denies any legal history. She is Apostolic in faith. Her strengths include her youth, a supportive family, employment, and hobbies. Weaknesses include an abuse history, chronic pain, and sexual orientation issues. She is motivated for help.

Miss Jones is encouraged to attend all therapeutic classes and groups. She is aware of her rights as a patient, exceptions to confidentiality, and the role of this social worker. She has previously seen Dr. Walkup @ Midlands Psychiatry. She is currently taking the medication, Prestiq. She will also be encouraged to talk about her issues with staff and keep staff informed if she has suicidal thoughts. Patient will return home with her parents at discharge and resume outpatient therapy and medication aftercare. She is insured through her parents, Blue Cross Blue Shield, and is eligible for Baptist's Partial Hospitalization Program as an aftercare option.



Patient: Ashley Jones
Provider: Dr. William Walkup

DoB: 09/06/1987
Visit: 10/12/2012 3 00PM

Gender: F
Chart: JOAS000001

Assessment:

Type	Code	Description
ICD-9-CM Condition	296.33	MAJOR DEPRESSIVE AFFECTIVE DISORDER RECURRENT EPISODE SEVERE DEGREE WITHOUT PSYCHOTIC BEHAVIOR
ICD-9-CM Condition	309.81	POSTTRAUMATIC STRESS DISORDER

Plan:

Type	Code	Modifiers	Quantity	Description
CPT	90801		1 UN	PSY DX INTERVIEW

Medications & Allergies:

Active Medication & Dosage	Route	Frequency	PRN?	Indication
Lexapro (escitalopram 20 mg oral tablet)			No	
Pristiq (desvenlafaxine 50 mg oral tablet, extended release)		QAM	No	#30

Billy's psych eval:

Referral Source Andrea Bradley

History of present illness Depressed, PTSD Does not think lexapro helps her and she sleeps all the time Has hopeless thoughts, passive ideation. She reports, anhedonia, fatigue, isolating self.

Medical Illnesses Seizure disorder took Keppra but DC'd it Pseudoseizures.

Allergies hydrocodone

Surgeries. Abdominal surgery 2008

Etoh/drug Drinks 1-2 drinks 3x/ month She denies negative consequences Drugs- tried MJ 2 weeks ago

Past Psychiatric History: Suicide attempt age 16yo cutting wrists, denies previous hospitalizations. Lexapro. Zoloft did not help Seroquel did not help

Family Psychiatric History Denies

Social History Single, lives with parents 4 brothers 1 died last December. Was sexually abused age 7-15

Education HS, some college

Occupation Retail



THE SOUTH CAROLINA NEUROLOGICAL CLINIC, P.A.
P.O. BOX 1488
COLUMBIA, SOUTH CAROLINA 29202

J E. Carnes, M.D. Michael C. Mareska, M.D.
Mark K. Lencke, M.D. Alan R. Morgan, M.D.

Telephone: (803) 254-6391 Fax: (803) 799-0682

11/21/2011

246354

DR MICHAEL MARESKA
S.C. NEUROLOGICAL CLINIC
1333 TAYLOR ST
SUITE 1C
COLUMBIA, SC 29201

RE: JONES, ASHLEY S

Date of Birth: 9/6/1987

Patient ID: 178035

Requesting Physician: DR MICHAEL MARESKA S C. NEUROLOGICAL CLINIC
1333 TAYLOR ST
SUITE 1C COLUMBIA SC 29201 United States

Reason for Study: **SEIZURES**

Date of Study: 11/21/2011

EXAMINATION: **mri-brain w & w/o contrast (neuro)**

COMPARISON: No previous.

TECHNIQUE: Multiplanar multisequence imaging of the brain was performed with and without contrast.

FINDINGS: Brainstem and cerebellum appear normal.

The pituitary appears normal No suprasellar masses are seen

Supratentorium demonstrates no midline shift or mass effect. I see no intraaxial or extraaxial hemorrhage Ventricles appear normal. Cisterns appear clear.

Diffusion images show no abnormal signal. There is an enhancing, heterogeneous pineal lesion measuring 13 x 12 x 9 mm. There is a high T2 component of this lesion, without definite calcium seen Findings most likely represent a pineocytoma

CONTINUED ON THE NEXT PAGE

m

JONES, ASHLEY S

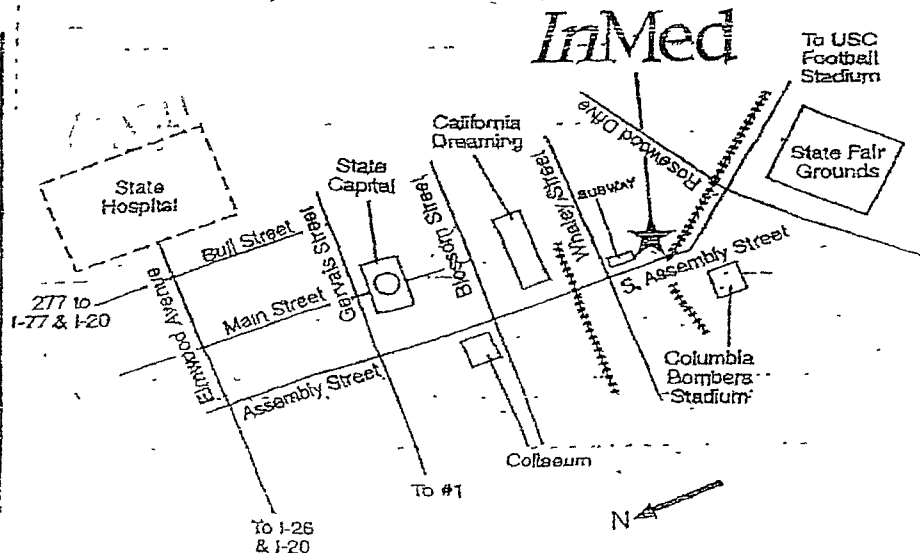
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PATIENT NAME: Ashley Jones DOB: 9/6/87
CHART #: 346356 ACCOUNT #: _____
APPOINTMENT DATE: 11/11/11 TIME: 9:00 AM/PM

MRI ORDERED: Brain &
DIAGNOSIS: Seizures K
INSURANCE COMPANY: BBS
AUTHORIZATION #: 113215
SPECIAL INSTRUCTIONS: 24 12/17/10

SCHEDULED BY: Sherry
DATE: 11/12/11 OFFICE: Jung
ORDERING PHYSICIAN: M. Mareska



South Carolina Neurological Clinic
Federal ID # 57-0893002
(803) 254-6391

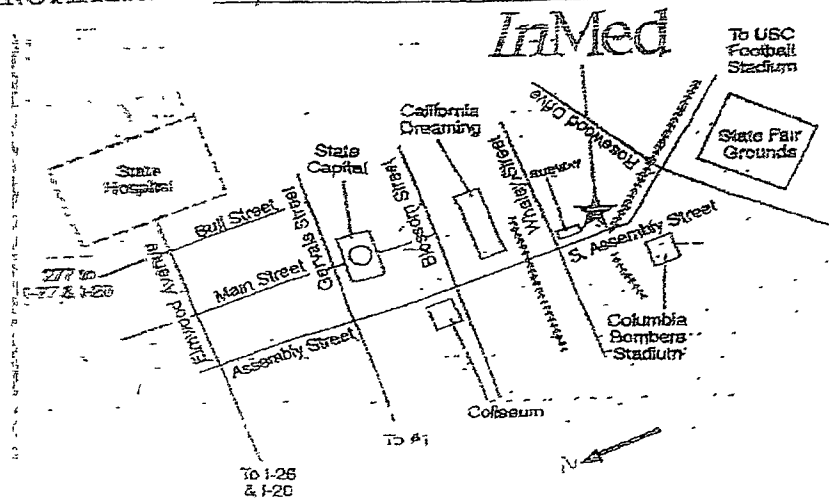
PATIENT NAME: Ashley Jones DOB: 9/6/87
CHART #: 340356 ACCOUNT #: _____
APPOINTMENT DATE: 11/11/11 TIME: 9:00 AM/PM

InMED Diagnostic Services of S.C.

LOCATION: 128 South Assembly St
Columbia, SC 29201
(803) 988-0082

MRI ORDERED: 4 Brain C
DIAGNOSIS: Seizures K
INSURANCE COMPANY: BBS
AUTHORIZATION #: 113215
SPECIAL INSTRUCTIONS: 2x 12/17/11

SCHEDULED BY: Sherry
DATE: 11/11/11 OFFICE: Juglor
ORDERING PHYSICIAN: M. Moroska



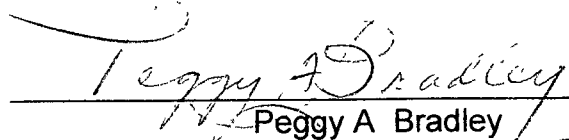
STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by United States mail, postage prepaid, to the following address(es):

PLEADING(S) Petitioner's Reply to The State's Response to Petition for Rehearing

PARTIES Margaret Fent Bodman, Esq
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192



Peggy A. Bradley

Columbia, South Carolina

December 9, 2013

RECEIVED

DEC 09 2013

SC Court of Appeals

The South Carolina Court of Appeals

State of South Carolina, Respondent

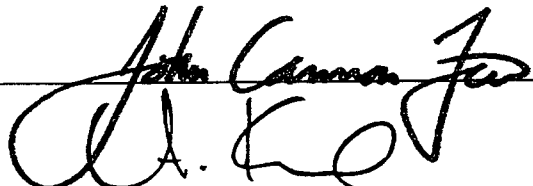
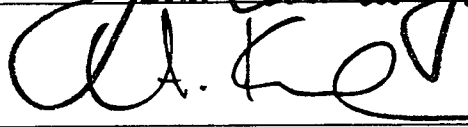
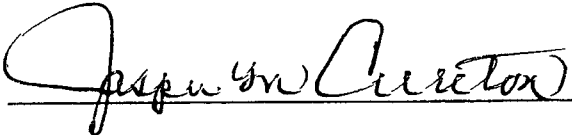
v.

Ryan Bradford Kirby, Petitioner.

Appellate Case No. 2013-002145

ORDER

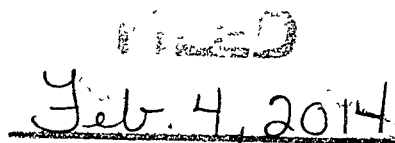
Petitioner has filed a motion to reinstate his appeal and a reply to Respondent's response to the petition for rehearing. After reviewing Petitioner's motion and reply, we deny Petitioner's motion to reinstate and adhere to our initial order.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:
Margaret Fent Bodman
Hemphill P. Pride, II
Lesli Brown Darwin
The Honorable Alison Renee Lee

RECEIVED
MAR 06 2014
SC Court of Appeals


Feb. 4, 2014

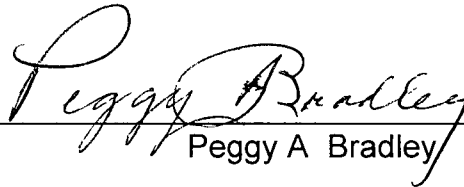
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that all counsel and/or parties in this action were served with a copy of the pleading(s) herein below specified by United States mail, postage prepaid, to the following address(es)

PLEADING(S) Appendix for Petition for Writ of Certiorari

PARTIES Margaret Fent Bodman, Esq
Assistant Solicitor for the Fifth Judicial Circuit
OFFICE OF THE SOLICITOR
Post Office Box 192
Columbia, South Carolina 29202-0192


Peggy A. Bradley

Columbia, South Carolina

March 5, 2014