THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Court of General Sessions

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SC Court of Appeals

Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2016-001387

The State, ... Respondent,

v.

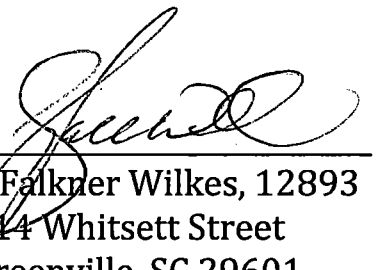
Suzanna Brown Simpson, ... Appellant.

INITIAL BRIEF OF APPELLANT

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Appellant

Suzanna Brown Simpson, 00368727
Leath Correctional Institution
2809 Airport Road
Greenwood, SC 29649

Respectfully submitted,



J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Appellant

May 1, 2017.

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STATEMENT OF THE CASE

The Appellant was indicted for the murder of her two children, and the attempted murder of her husband along with being in possession of a weapon during a violent crime. The Appellant proceeded to a jury trial in Pickens County on June 20, 2016. At trial the Appellant was represented by John Mauldin, Public Defender, Teal Johnson, and Jacob Goldstein of the Public Defender's Office. The State was represented by Walter Wilkins, Solicitor and Betty C. Strom, Deputy Solicitor, for the 13th Judicial Circuit. The case was tried before a jury, the Honorable Brian M. Gibbons, presiding. The jury returned a verdict of guilty on all charges and the Appellant was sentenced to the maximum possible sentence on the charges, two life sentences, a thirty year sentence and a five year sentence, all consecutive. The Appellant timely appealed and J. Falkner Wilkes substituted as counsel for the Appellant. This brief follows:

STATEMENT OF FACTS

The Appellant was charged with attempted murder of her husband and the murder of her two children, ages five and seven. The Appellant did not contest that she shot her husband and children. 173. Appellant defended on the basis of her inability to tell right from wrong at the time of the incident. 174. The incident occurred at approximately 4:00 a.m. on May 14, 2013. 384.

On the day before the incident Nathan Stegall, a friend of the defendant's husband, came over to borrow a car while the defendant's husband was at work. He had a short conversation with the defendant. Stegall said that he "could tell she was highly agitated." 330, l. 25. Stegall borrowed a truck and left. At 9:11 p.m. that night he received a text message from the defendant that said "Hell on Earth?" 334. Stegall testified that out of all the time that he had known the defendant this was the only text he had ever received from her and thought it very odd 337.

Kevin Sanders' son and the defendant's daughter attended the same school. The day before the incident Mr. Sanders was in the school office and recalled overhearing the defendant telling her son that she was signing out his sister because he was sick, to which the boy responded "I'm not sick, Mom." 339-340. Sanders characterized her behavior that day as odd. While

waiting for her daughter to come to the office the defendant was walking back and forth, real impatient. 342. Then when leaving, the defendant heard Sanders say something to his child and mistakenly believed that he had been speaking to her. The defendant around angrily and said, "What did you say to me?" 343. Sanders said that "something just didn't feel right" about the defendant's actions. 344. Sanders said that the defendant was acting very strangely. 345-346.

The defendant's mother-in-law, Alison Simpson, testified to the defendant's commitment to an in-patient mental health facility about a year before the incident, and that after the commitment she had openly questioned the defendant's ability to care for the children and whether she would ever hurt them. 352. Alison Simpson said that on the day before the incident the defendant had called and asked her about why she didn't come to the house as much. 354. The end of the call was bizarre with the defendant saying, "I just wanted to say hello." 354. Simpson testified to another bizarre conversation with the defendant just after she was released from inpatient psychiatric care. 358.

The defendant's mother Susan Brown testified about the defendant's history of mental health problems and her behavior leading up to her

hospitalization at St. Francis Hospital and the Carolina Center about ten months prior to the incident. She said that during a drive to Asheville the defendant was not making sense, nothing connected, talking about friends that she had talked to that had somebody else's voices coming out of their mouth. 369-370. Brown testified that the defendant later called her around midnight saying to turn the lights on because her house wasn't safe. 371. Brown said that the defendant did not even sound like herself in the phone call. 371. They took her to the emergency room and she was committed based on the psychotic episode. 372-373. Brown said that the defendant thought she was being followed, watched, her phones bugged, and that she was being watched through her ceiling fan. 374.

On the day before the incident, Brown indicated that the defendant wasn't quite herself when they went out to dinner for Mother's Day. 376; Def. Ex. 11, 12 13. Brown said that the defendant was just sitting and staring and wouldn't eat dinner. 378.

On the day of the incident Brown had several conversations with the defendant. 364. The defendant called her around 10:30 in the morning and asked one "very bizarre" question: "Did you and dad really want me?" 364, l. 10-12. About noon the defendant called a second time and asked another

"very bizarre" question about deceased family members being better off in heaven. R. 364. Brown testified that the defendant's tone was so strange that it almost didn't sound like herself. 364. Brown responded to the defendant's question about family members better off in heaven that they were because they had suffered so much. 364. Then around 1:30 in the afternoon the defendant called back and "was talking very fast, nonstop about the evils of the world and how you couldn't protect yourself, you couldn't protect your children from the evils of this world." 365, l. 14-18. At 5:45 that evening the defendant called Brown again and said that the defendant sounded so happy. 365-366. Then at 8:45 p.m., just hours before the incident, the defendant called back and sounded as sad and low as she had been happy hours earlier. 366. In that last conversation the defendant told her mother that she couldn't take care of the kids anymore. 367. In addition to the very bizarre nature of the calls Brown testified that it was very unusual for her to get so many calls from the defendant in one day. 367.

Dr. Leonard Mulbry, Jr., M.D., was qualified as an expert in forensic psychiatry. 433. Mulbry reviewed the defendant's extensive medical, psychiatric and associated records. 435. He met with the defendant on three different occasions as part of his forensic evaluation. 35. Dr. Mulbry diagnosed

the defendant with schizoaffective disorder bipolar type, the typical symptoms for which can include long periods of very severe depression and high rates of suicide. 437-438. Mulbry testified that this also includes mania where the mind races, irritability, and the inability to think clearly because thoughts don't link very well which can result in a person not sleeping for a week or more at a time. 439. Mulbry testified that his review of records showed that the defendant had been treated for bipolar disorder for a long time. 439. Mulbry explained schizophrenia which involves the marked loss of reality. 439. Symptoms include hearing things that aren't there. 439. Symptoms also include paranoia, inability to link thoughts, and the inability to complete a sentence or thought. 439. Dr. Mulbry testified that the defendant suffered a major decline in mental health beginning in 2010. 444. In 2012 the defendant was committed to in-patient psychiatric treatment by St. Francis Hospital emergency room staff. At that time the defendant was found to be psychotically paranoid. 445. Dr. Mulbry testified that there is no cure for the defendant's condition. 447. Dr. Mulbry indicated that the photo taken of the defendant the day before the incident at the Mother's Day dinner showed a typical appearance for someone distracted and fearful from paranoia. Def. Ex. 11;12;13. Based on an extensive forensic review of the defendant's records,

Dr. Mulbry opined that at the time of the incident the defendant was unable to tell moral and legal right from wrong. 448.

Dr. David Price, PhD., was qualified as an expert in forensic psychology, clinical psychology, and neuropsychology. 492. Dr. Price reviewed thousands of pages of medical history for the defendant and met with her on nine different occasions. 496. Dr. Price also interviewed the defendant's parents, and her treatment providers, including Dr. Jeffrey Smith. 497. Dr. Price diagnosed the defendant with schizoaffective disorder bipolar type. 506. After an exhaustive forensic review, Dr. Price opined that at the time of the incident the defendant did not know legal and moral right from wrong. 497. Dr. Price testified that he had no question about her psychosis, delusions, or paranoia, and that she was acting under the presence of a significant delusion at the time of the incident. 498.

Dr. Richard Lesense Frierson, M.D., was qualified as an expert in the field of forensic psychiatry. 520. On the motion of the State Dr. Frierson was appointed by the court to perform an evaluation of the defendant. Dr. Frierson did an extensive evaluation, reviewed records, interviewed family member, interviewed the ER physician that treated the defendant after the incident, and met with the defendant three times. He also diagnosed the defendant

with schizoaffective disorder bipolar type. 526. His diagnosis was wholly independent of the diagnosis of the other two defense experts. 527. Frierson explained that the defendant suffered from delusions which he defined as fixed false beliefs and psychosis which he defined as "out of touch with reality". 528-529. Dr. Frierson opined that the defendant was, due to mental illness, unable to distinguish leagl or moral right form legal or moral wrong at the time of the incident. 532. Dr. Frierson related the defendant's paranoid delusional thought that hell had come to earth to the text message the defendant sent to Nate Stegall the day before the incident. 532. Def. Ex. 10. Dr. Frierson has conducted over a thousand evaluations for criminal responsibility. 549. Dr. Frierson testified that the defendant was not criminally responsible for her actions when she shot her family. 550.

In reply, and over the discovery violation objection by the defense, the State offered surprise forensic testimony by Dr. Jeffrey K. Smith, M.D. Dr. Smith was the defendant's treating physician leading up to the date of the incident. Dr. Smith last saw the defendant clinically three months prior to the incident, and then for only 8 minutes. 667-678; 683. Dr. Smith's average appointment with the defendant lasted 7.4 minutes. 683-684. Dr. Smith was qualified as an expert in psychiatry. 640. The state chose not to offer Smith as

an expert in forensic psychiatry, stating that it would not be able to have him qualified in forensic psychiatry. 569, l. 1-2. Dr. Smith believed that the defendant had stabilized around that time but admitted in his testimony that he was obviously wrong. 667. Smith admitted that his own records indicated that the defendant suffered from psychosis on at least three occasions. 670. Throughout his treatment Smith had the defendant on various antipsychotic drugs. 672. Smith admitted that during her treatment the defendant's condition would destabilize when she would stop taking medications which resulted in mood swings and recurrence of paranoia. 674. During Smith's treatment the defendant had the psychotic episode that caused her to be committed for psychiatric by the emergency room at St. Francis Hospital. 674. Smith's records indicate that on the appointment immediately following the defendant's release from her commitment in Carolina Behavioral Center he saw the defendant for eight minutes for her August 16, 2012. 677-678. Over the course of his treatment of the defendant the average time spent with the defendant was 7.4 minutes. 683.

In preparing to testify for the State Dr. Smith never reviewed witness statements, police reports, supplemental reports, EMS reports, 911 phone calls. 664. Dr. Smith never met with any of the family members, Michael

Simpson, the defendant's parents, the defendant's in-laws. 665; 667. Over the objection of the defense Smith gave a forensic opinion that the defendant knew right from wrong but was unable to conform her conduct to the behavior of the law. 656.

The defense objected to the testimony of Dr. Smith based on a lack of prior notice to the defense required by Rule 5, Brady and due process. 82-85; 93; 397-398; 567; 573-580. Based on Fourth Amendment grounds, HIPAA, and state privacy laws pertaining to mental heath records the defense further objected to any forensic testimony by Dr. Smith. 574-584; Def Ex. 16. The defense also sought to suppress any forensic testimony that was based on his review of the defendant's mental health records illegally seized by SLED. 574-584; Def Ex. 16. Those records, which Dr. Smith admitted that he had never seen before, were provided to him by the solicitor just prior to trial to allow Dr. Smith to give forensic testimony. 624. The court expressly refused to make any findings as to the SLED's seizure of the defendant's records or make a clear ruling on the issue. 598.

(Additional facts included in the argument section)

ARGUMENT

I. THE COURT ERRED IN ADMITTING FORENSIC TESTIMONY OF THE STATE'S EXPERT WITNESS.

A. The Court Erred in Allowing the Testimony of State Expert Despite Discovery Violations under Rule 5 and Brady.

At the beginning of the trial, when the defense first learned that Dr. Jeffrey K. Smith might be offered as witness by the State. Dr. Smith was the Appellant's treating physician for approximately three years leading up to the incident but had not seen the defendant for three months prior to the incident, and then for only about eight minutes. Although the defense was aware of who Dr. Smith was, it had no notice that he had conducted a forensic evaluation or that he would be offered to give a forensic opinion as to sanity at the time of the incident. The defense therefore objected to Smith being qualified or allowed to testify as a forensic expert. After extensive arguments the State subsequently offered Dr. Smith only as an expert in psychiatry, with the solicitor admitting that he didn't think he could have Dr. Smith qualified as an expert in forensic psychiatry. Accordingly the court qualified Dr. Smith only as an expert in psychiatry.

There is no question that the State failed to disclose to the defense prior to trial that it would offer Dr. Smith as an expert, or that he would be asked to

give forensic testimony based on documents (medical records) obtained by SLED that belonged to the Appellant. Pursuant to Rule 5, and as a matter of due process, the defendant objected to the State's failure to provide notice of Dr. Smith as a forensic expert, or the substance of his testimony which clearly was the result of an undisclosed forensic evaluation. 81-89. The defense objected repeatedly throughout the trial to the State's use of Dr. Smith as an undisclosed forensic expert. 85; 398.

The record shows that the State's failure to disclose the substance of Dr. Smith's testimony was entirely intentional. In the State's reply to the defense's initial objection the solicitor specifically said: "I don't want to tell the defense." 108. Yet as the State's expert, Dr. Smith was ultimately asked by the state to testify to matters clearly the subject of Rule 5. Timely disclosure to the defense prior to trial was therefore required.

In his testimony, Dr. Smith testified to the contents of the defendant's mental health records. Dr. Smith's testimony covered not only his own records, as one of the defendant's prior treating physicians, but also to the content of records from other mental health providers which were obtained by SLED and provided by the solicitor to Dr. Smith to review. 653-653; 584. Even though those documents were not introduced as exhibits, the content nd

substance of the records were put to the jury through Dr. Smith's testimony. 652-653. Accordingly, the State was required to disclose to the defense any documents from which that the State intended to have Dr. Smith testify.

Rule 5 provides:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, *documents,* photographs, tangible objects, buildings or places, or copies or portions thereof, *which are within the possession, custody or control of the prosecution,* and which are *material to the preparation of his defense* or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or *belong to the defendant.*

Rule 5(a)(1)(C). Disclosure of Evidence by the Prosecution, Information Subject to Disclosure, Documents and Tangible Objects. *emphasis added.*

Here the mental health records at issue belonged to the defendant, were in the possession of the prosecution, and material to the preparation of the defense. They were therefore required to be disclosed to the defense. The defense made a proper request for the disclosure of any such documents and timely objected when it learned at trial that the State might offer testimony as to those documents despite a lack of any prior notice to the defense. Disc Motion; 85; 398.

In addition to the failure to give prior notice of medical records seized by SLED that belonged to the defendant, the prosecution further failed to

disclose the forensic mental examination conducted by Dr. Smith based on those records. Rule 5 provides:

> Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any *results* or reports of physical or *mental examinations*, and of scientific tests or experiments, or copies thereof, which are *within the possession, custody, or control of the prosecution*, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are *material to the preparation of the defense* or are intended for use by the prosecution as evidence in chief at the trial.

Rule 5(1)(D) Reports of examinations and tests.

Over the defense objection the court also allowed Dr. Smith to give a forensic opinion that the Appellant knew the difference between right and wrong, thus negating the Appellant's defense of insanity. 632. Since Dr. Smith had not seen the defendant for three months prior to the incident, and then for only eight minutes, Dr. Smith's testimony was necessarily based on his review of records that were obtained by SLED and provided to him by the solicitor to enable him to give forensic testimony at trial.

Although Dr. Smith had a dual role being a fact witness, he also became the State's forensic expert when asked to review the defendant's records from other providers and opine on the issue of sanity. Dr. Smith's pre-trial review of the records of other providers, including Carolina Center for Behavioral

Health and St. Francis Hospital, constituted a forensic mental evaluation of the defendant. 641-656. This is obvious as Dr. Smith admitted that he had never seen the records before they were provided to him by the solicitor. 624. Using these records Dr. Smith gave forensic testimony, including his opinion that the defendant knew the difference between right and wrong *at the time of the incident.* 656. As this testimony was clearly based on a forensic mental examination or evaluation of the defendant through her medical records, it was discoverable under Rule 5 and Brady.

"The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings." State v. Proctor, 348 S.C. 322, 330, 559 S.E.2d 318, 322 (Ct.App.2001), *rev'd on other grounds*, 358 S.C. 424, 595 S.E.2d 480 (2004). Despite the different underpinnings of Brady and Rule 5, each has the same goal of ensuring the criminal defendant's right to a fair trial. Neither is designed "to displace the adversary system as the primary means by which truth is uncovered, but [rather] to ensure that a miscarriage of justice does not occur." Bagley, 473 U.S. at 675, 105 S.Ct. 3375. Furthermore, "the prosecutor's role transcends that of an adversary [because] he 'is the representative not of an ordinary party to a controversy, but of a sovereignty

... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Id. at n. 6* (*quoting* Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). Taking this into consideration and understanding that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." Agurs, 427 U.S. at 108, 96 S.Ct. 2392. State v. Kennerly, 331 S.C. 442, 454, 503 S.E.2d 214, 220–21 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999)

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that, irrespective of good or bad faith, suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process where such evidence is material to either guilt or punishment. Brady imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence that is materially favorable to the accused, either as direct or impeaching evidence. Brady is not a rule of discovery; it is a rule of fairness and minimum prosecutorial obligation. United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979) *citing* United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). See also

United States v. Campagnuolo, 592 F.2d 852, 859 (5th Cir. 1979). The obligation to disclose is measured by the "character of the evidence, not the character of the prosecutor." Agurs, 427 U.S. at 110, 96 S.Ct. at 2400.

Information known to investigative or prosecutorial agencies may, under certain circumstances, be imputable to the State. *see* United States v. Auten, 632 F.2d 478 (5th Cir.1980); State v. Von Dohlen, 322 S.C. 234, 240–41, 471 S.E.2d 689, 693 (1996). In this case SLED obtained the defendant's mental health records, so possession of those records is clearly imputable to the prosecution. Of course the record clearly shows that the solicitor had actual possession of the documents since he personally gave them to Dr. Smith to conduct a forensic mental evaluation in this case. Based on the prosecution's actual possession of the documents, and nature of the use of those records, the failure to provide notice to the defendant prior to trial constitutes a discovery violation. The court erred in failing to properly address the issue.

When a trial judge determines the prosecution violated Rule 5, the judge should fashion a proper remedy. The rule itself explains that if a party failed to comply with the rule, the court "may prohibit the party from introducing evidence not disclosed, or it may enter such other order as it

deems just under the circumstances." Rule 5(d)(2), SCRCrimP. This Court in Kennerly explained the definition of "material" as used in Rule 5 is the same as the definition used in the context of violations and obligations pursuant to Brady. Kennerly, *supra* at 220. Thus, evidence is material for the purposes of Rule 5 "if there is a resaonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

As explained in Kennerly, the goal of Rule 5 is to ensure a criminal defendant's right to a fair trial. Further, the role of a prosecutor is to be a minister of justice, not the representative of an ordinary party. As the representative of the sovereign, the prosecutor's interest in a criminal prosecution is not to win, but to see that justice is done. Kennerly, at 220; *See also* Riddle v. Ozmit, 369 S.C. 39 (2006).

Similarly, the Rules of Professional Conduct impose certain duties upon prosecutors. Specifically, the Rules require a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Rule 3.8(3) SCACR. The special duties imposed upon prosecutors are due to the prosecutor's "responsibility of a minister of justice and not simply

that of an advocate." Thus, the prosecutor has "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, *cmt. 1*, SCACR.

Brady requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession.[1] United States Supreme Court decisions have extended the Brady obligation to include (1) the duty to disclose impeachment evidence, (2) favorable evidence in the absence of a request by the accused, and (3) evidence in the possession of person or organizations. *See* Giglio v. United States, 405 U.S. 150 (1972); United States v. Afurs, 427 U.S. 97 (1976); Material must be disclosed "when prejudice to the accused ensures ... [and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Stickler v. Greene, 527 U.S. 263, 281-282 (1999).

The trial judge erred in failing to exclude Dr. Smith's forensic testimony based on the State's violation of Rule 5 and Brady.

B. The Court Erred in Admitting Testimony of State Expert Based on Evidence Obtained in Violation of State and Federal Privacy Laws.

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[1]Dr. Smith's opinion as to GBMI would constitute exculpatory evidence where it mitigated the potential sentence.

Dr. Smith testified to records of other mental health providers that were given to him by the solicitor and that he had never seen before. Those records were obtained by SLED in clear violation of state and federal privacy laws relating to mental health records. The record shows that SLED sent a letter demanding that the defendant's current and prior mental health providers turn over the defendant's mental health records to the State. 623-624; Def. Ex. 16. SLED did not obtain a search warrant, court order, or subpoena for the records. SLED'S demand failed to comply with both state and federal law relating to mental health records.

The defendant had a constitutional and statutory right to privacy in her mental health records. The defendant's mental health records were confidential, privileged, and protected by S.C. Code § 44-22-90 which provides:

> (A) Communications between patients and mental health professionals including general physicians, psychiatrists, psychologists, psychotherapists, nurses, social workers, or other staff members employed in a patient therapist capacity or employees under supervision of them are considered privileged. The patient may refuse to disclose and may prevent a witness from disclosing privileged information except as follows:
> (1) communications between facility staff so long as the information is provided on a "need-to-know" basis;
> (2) in involuntary commitment proceedings, when a patient is

diagnosed by a qualified professional as in need of commitment to a mental health facility for care of the patient's mental illness;
(3) in an emergency where information about the patient is needed to prevent the patient from causing harm to himself or others;
(4) information related through the course of a court-ordered psychiatric examination if the information is admissible only on issues involving the patient's mental condition;
(5) in a civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when the condition is introduced by a party claiming or defending through or as a beneficiary of the patient, and the court finds that it is more important to the interests of justice that the communication be disclosed than the relationship between the patient and psychiatrist be protected;
(6) when a competent patient gives consent or the guardian of a patient adjudicated as incompetent gives consent for disclosure;
(7) as otherwise authorized or permitted to be disclosed by statute.
(B) This does not preclude disclosure of information to the Governor's ombudsman office or to the South Carolina Protection and Advocacy System for the Handicapped, Inc.

S.C. Code § 44-22-90.

None of the exceptions of § 44-22-90 existed at the time SLED obtained the defendant's mental health records in this case. The defendant's mental health records were further protected under S.C. Code Section 19-11-95 which provides in pertinent part:

(B) Except when permitted or required by statutory or other law, a provider knowingly may not:

(1) reveal a confidence of his patient; .....
.....

(C) A provider may reveal:
(1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed;
(2) confidences when allowed by statute or other law;
(3) the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm;
(4) confidences reasonably necessary to establish or collect his fee or to defend himself or his employees against an accusation of wrongful conduct;
(5) in the course of diagnosis, counseling, or treatment, confidences necessary to promote care within the generally recognized and accepted standards, practices, and procedures of the provider's profession;
(6) confidences in proceedings conducted in accord with Sections 40-71-10 and 40-71-20;
(7) confidences with the written authorization of the patient or patients affected for processing their health insurance claims, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed.

(D) A provider shall reveal:
(1) confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding; provided, however, confidences revealed shall not be used as evidence of grounds for divorce;
(2) confidences pursuant to a lawfully issued subpoena by a duly constituted professional licensing or disciplinary board or panel;
(3) confidences when an investigation, trial, hearing, or other proceeding by a professional licensing or disciplinary board or panel involves the question of granting a professional license or the possible revocation, suspension, or other limitation of a

professional license.

(E) A disclosure pursuant to subsection (C) or (D) is limited to the information and the recipients necessary to accomplish the purpose of the subsection permitting the disclosure.

(F) A person to whom a disclosure is made pursuant to subsections (C)(1), (5), and (7), an employee to whom a disclosure is made pursuant to subsection (G), and any other person to whom a confidence, written or oral, is disclosed by a provider are bound by the same duty of confidentiality as the provider from whom he received the information.

(G) A provider shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences of a patient, except that a provider may reveal the information allowed by subsections (C) and (D) through an employee.

(H) A provider releasing a confidence under the written authorization of the patient or under the provisions of this section is not liable to the patient or other person for release of the confidence to the person authorized to receive it; provided, however, a patient has a cause of action for damages against a provider, associate, agent, employee, or any other person who intentionally, wilfully, or with gross negligence violates the provisions of this section.

(I) Nothing in this section alters the existing requirements of nonproviders to preserve confidences or the requirements of providers subject to Sections 44-23-1090 and 44-52-190.

S.C. Code Ann. § 19-11-95. None of the exceptions were applicable at the time SLED seized the defendant's mental health records. SLED's seizure therefore violated the defendant's privacy rights under state law.

SLED's seizure of the defendant's records further violated federal law. Under federal law mental health records are protected under HIPAA. HIPAA defines "protected health information" as "individually identifiable health information," which in turn is defined as information that:

> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
> (i) That identifies the individual; or
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103 (2016).

Federal regulations further provide that a health care provider may disclose protected health information (i.e., "individually identifiable health information") for a law enforcement purpose to a law enforcement official "*[i]n compliance with ... [a] court order or court-ordered warrant*" as long as "(1) [t]he information sought is relevant and material to a legitimate law enforcement inquiry; (2) [t]he request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and (3)[d]e-identified information could not reasonably be used." 45 C.F.R. § 164.512(f)(1)(ii) (2016), *emphasis added.*

State v. Smith, 789 S.E.2d 873, 878 (N.C. Ct. App. 2016).

Absent patient consent, under both state and federal law, SLED could not lawfully obtain the defendant's mental health records except by court order (or other enumerated means), which, it clearly did not have at the time of the seizure. SLED's seizure of the defendant's mental health records therefore violated the defendant's statutory right to privacy under both state and federal law. As a result, the court erred in allowing the State's expert to testify to the contents of those records.

In addressing a similar issue under Florida law similar to the provision of HIPAA, the Florida Court held that suppression was the appropriate remedy for unlawful seizure of protected health information. It's reasoning is informative:

> Given the fact that these statutes were passed into law over a decade ago, and that the State Attorney's Office for the 15th Judicial Circuit has handled similar cases and is well aware of the mandated procedures, it is almost incomprehensible that law enforcement proceeded in the manner as they did herein. Other than one's expectation of privacy in one's personal effects and papers in our homes, Americans next most hold as intensely personal and private the status of their health, medical treatment, medical advice and therapy.
>
> Suppression is the only remedy to sanction this police misconduct and deter similar misconduct. The danger of the law enforcement practices in this case are amply demonstrated by the willingness of medical professionals to surrender private medical

> records and engage in discussions regarding private and privileged communications concerning their treatment of individuals on the mere naked display of authority by law enforcement. Without court intervention and review as mandated by statute, countless innocent patient records are subject to examination and review by well-meaning but misguided law enforcement officials.

State v. Sun, 82 So. 3d 866, 874 (Fla. Dist. Ct. App. 2011).

The Sun Court went on to reason: "Application of the exclusionary rule where there has not been a good faith effort to comply with subsection 456.057(8) should "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of" a patient. State v. White, 660 So.2d 664, 666–67 (Fla.1995) (*quoting* United States v. Leon, 468 U.S. 897, 919, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (*quoting* Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974))." State v. Sun, 82 So. 3d 866, 874 (Fla. Dist. Ct. App. 2011).

Based on the same reasoning as seen in Sun, in a similar case the Florida Court suppressed the testimony of doctors where police had unlawfully obtained protected medical information about the defendant stating: "Under the circumstances we can neither agree with the State that it acted in good faith nor disagree with the trial court's determination that it failed to so act. The medical records secured from Dr. Shapiro, comprised of both his and Dr.

McKnight's records, were properly suppressed." State v. Strickling, 164 So. 3d 727, 734 (Fla. Dist. Ct. App. 2015). In the present case, suppression of the forensic testimony, and opinion of the State's expert, both based on medical records obtained by SLED in violation of the defendant's right to privacy, is the appropriate remedy.

C. The Court Erred in Admitting Testimony of State Expert Which Was Based on Evidence Obtained as a Result of an Unlawful Seizure Under the Fourth Amendment.

In addition to the foregoing grounds the defense further objected to the State's use of testimony based on SLED's unlawful seizure of the defendant's mental health records under the Fourth Amendment. 584. The court expressly declined to make any findings as to the way SLED retrieved the evidence, but indicated that the matter was preserved. 584 The court allowed a very limited proffer into facts underlying SLED's seizure of those records. 573. SLED obtained the defendant's protected mental health records by sending a written demand to all of the defendant's mental health providers. 576-575; Def. Ex. 16. The letter was misleading as to the State's right to require providers provide those records. The letter was characterized by one provider as "a long submission form that indicated that in felony cases that

HIPAA regulations did not apply and we turned over the records of the patient to SLED." 623, l. 2-624, l. 1. A review of SLED's demand letter shows that it misrepresented the law to the mental health providers in order to have them release the defendant's records. Def. Ex. 16.[2]

The letter cites S.C. Code Section 63-11-1960 and 63-11-1990, neither of which authorizes the disclosure of protected mental health records in the defendant's case. SLED obtained the records without a warrant, court order, or lawful subpoena, and therefore, in violation of the Fourth Amendment.

The records obtained unlawfully by SLED were then provided by the solicitor to the State's expert, Dr. Smith, to allow him to perform a forensic evaluation and testimony, including an opinion on sanity to negate the defense in the case. 624. Based on SLED's unlawful seizure of the records the defense objected to Dr. Smith's forensic testimony which was based on those records. 647. Despite the defense having timely raised the issue, the court expressly refused make appropriate findings or properly rule on the unlawful seizure issue. 598.

The record shows that Dr. Smith's forensic testimony was based in large

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[2]The requirements of HIPAA and state law are set forth in the preceding arguments and incorporated by reference herein.

part on the unlawfully seized records. Dr. Smith testified that the solicitor provided him with the records seized by SLED. 622-623. Dr. Smith testified that he met with the solicitor prior to trial and reviewed documents "that I had not previously seen". 661, l. 13-15. While the State appears to agree that SLED improperly obtained the records, the Solicitor nevertheless provided them to the State's expert to prepare him for his forensic testimony. 583, l. 12-20; 624.

The only defense the State argued as to the unlawful seizure of the defendant's mental health records was "its" been waived by placing those records in front of the jury through the defense witnesses' testimony. 583-584. This argument however, does not address the issue of the use of evidence seized in violation of the Fourth Amendment, or the application of the exclusionary rule. Nor did the court properly rule on those issues.

The defendant clearly had a privacy interest in her mental health records. Communications with a mental health provider are confidential and protected. §§ 19-11-95; 44-22-90. The defendant further had a privacy interest in her mental health records pursuant to federal law under HIPAA. As a general rule, a mental health patient may refuse to disclose and may prevent

a witness from disclosing privileged information.[3] The defendant clearly had an expectation of privacy in her mental health records which were seized by SLED, without a warrant, court order, subpoena, or other lawful process, and provided to the State's expert witness, Dr. Smith.

The Fourth Amendment guarantees "[t]he right of the people to be secure ... **790 [from] unreasonable searches and seizures." U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both State and federal court. Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

"Generally, a warrantless search is *per se* unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct.App.1995). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically

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[3]State and Federal law on privacy of mental health records are in the foregoing arguments and incorporated herein by reference.

established and well delineated exceptions to the Fourth Amendment exclusionary rule." *Id.* at 331–32, 457 S.E.2d at 621. These exceptions include: (1) search incident to a lawful arrest; (2) "hot pursuit;" (3) stop and frisk; (4) automobile exception; (5) "plain view" doctrine; (6) consent; and (7) abandonment. State v. Dupree, 319 S.C. 454, 456–57, 462 S.E.2d 279, 281 (1995), *cert. denied*, 516 U.S. 1131, 116 S.Ct. 951, 133 L.Ed.2d 875 (1996). "The burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures is upon the prosecution." Bultron, 318 S.C. at 332, 457 S.E.2d at 621. In the present case, no exception to the warrant rule exists and at trial the solicitor seemed to conceded that the seizure by SLED of the defendant's mental health records was improper. Testimony regarding the improperly obtained records should therefore be excluded.

The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ..' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Mapp v. Ohio,

367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961). This prohibition applies as well to the fruits of the illegally seized evidence. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '(T)he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637, 85 S.Ct. 1731, 1742, 14 L.Ed.2d 601 (1965). Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). *Accord*, Mapp v. Ohio, *supra*, 367 U.S., at 656, 81 S.Ct., at 1692; Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966); Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect,

rather than a personal constitutional right of the party aggrieved.

The right to privacy in one's mental health records has been held to be of considerable importance. In Jaffee, the Supreme Court resolved a circuit split when it "recognize[d] a psychotherapist privilege under Rule 501" in the context of a § 1983 excessive force action. 518 U.S. 1, at 7, 116 S.Ct. 1923. There the Court concluded that a social worker's notes from her counseling sessions with the defendant police officer were protected by the psychotherapist-patient privilege from disclosure to the plaintiff for use in cross-examination. The Supreme Court reasoned that "[e]ffective psychotherapy ... depends upon an atmosphere of confidence and trust" and that "the mere possibility of disclosure" of "confidential communications made during counseling sessions" could hinder productive therapy. *Id.* at 10. "By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the ... privilege thus serves important private interests." *Id.* at 11. Most importantly, the Court found that, like other testimonial privileges, the psychotherapist privilege serves the greater public interest by facilitating effective mental health care—"a public good of transcendent importance." *Id.* at 4. The Court concluded that a "privilege protecting confidential communications between a psychotherapist and her

patient 'promotes sufficiently important interests to outweigh the need for probative evidence.' " *Id.* at 9–10. (*quoting* Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)). In other words, the public benefit produced by the recognition of the psychotherapist-patient privilege is sufficiently weighty to trump the cost to the administration of justice of precluding the use of relevant evidence. In this case, application of the exclusionary rule serves the same end. As a result, it was error for the trial court in this case to allow the introduction of testimony that was based on the SLED's unlawful seizure of the defendant's mental health records.

II. TRIAL COURT ERRED IN EXCLUDING CRITICAL TESTIMONY BY DEFENSE EXPERT AS TO STATEMENTS BY STATE EXPERT.

The defense offered Dr. David Price, PhD., as an expert in forensic psychology. Dr. Price testified that in his opinion the defendant did not know the difference between moral or legal right and wrong at the time of the incident. 497. In explaining the basis for his opinion Dr. Price testified that he had reviewed records and discussed the defendant's treatment with Dr. Smith. 500. Dr. Price testified that during their discussion Dr. Smith had agreed with him. 500. It appears that Dr. Price considered his discussion with

Dr. Smith in formulating his opinion. 500, l. 8-12. Based on hearsay the State objected to Dr. Price testifying as to what the State's expert, and treating physician, had told him during their discussion. 500 The objection was sustained with the court reasoning that Dr. Price was relating something Dr. Smith told him directly and was not in Dr. Smith's medical records. 500. This was clearly error.

An expert may testify as to matters of hearsay for the purpose of showing what information he or she relied on in giving an opinion of value. *In re* Manigo (S.C.App. 2010) 389 S.C. 96, 697 S.E.2d 629, *rehearing denied, certiorari granted, affirmed* 398 S.C. 149, 728 S.E.2d 32. Here Dr. Smith was the treating physician as well as the State's expert that would ultimately give forensic testimony on the issue of sanity. This court has held that the hearsay rule did not preclude forensic psychiatrist from testifying as to what she learned from sex offender's treatment provider, in proceeding to civilly commit offender as a sexually violent predator (SVP), where psychiatrist relied on that information to form the basis of her opinion that offender was an SVP. *In re* Manigo (S.C.App. 2010) 389 S.C. 96, 697 S.E.2d 629, *rehearing denied, certiorari granted, affirmed* 398 S.C. 149, 728 S.E.2d 32. In the present case Dr. Price's testimony, as to what he had been told by Smith, both as the

defendant's treating physician, as well as the State's forensic expert, was clearly admissible. Its exclusion was therefore error.

Because Dr. Smith later testified to his opinion that the defendant knew right from wrong, testimony that he at one point agreed with Dr. Price was substantial evidence. Especially where Dr. Smith's testimony was the only evidence offered of the defendant's sanity. The exclusion of Dr. Smith's prior statements to Dr. Price further prevented full and effective cross-examination of Dr. Smith. Precluding the defense from relating Dr. Smith's prior statement foreclosed any ability of the defense to effectively cross examine or impeach Smith with the prior statement. The therefore court erred in failing to allow Dr. Price to testify to the prior statements of Dr. Smith.

III. TRIAL COURT ERRED IN DENYING MOTION FOR A DIRECTED VERDICT AND MOTION FOR NEW TRIAL.

At the close of the State's case the defense moved for a directed verdict. The only evidence at the close of the State's case was that the defendant suffered from severe mental illness and could not tell legal or moral right from wrong. The defense again moved for a directed verdict at the close of the defense case. The only evidence at the close of the defense case was that the defendant could not distinguish between moral and legal right and wrong.

An accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts. State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978); State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973). This is the *M'Naghten* insanity defense, codified as S.C. Code 17-24-10. The *M'Naghten* rule is old and well established:

> The test here given to the jury was, as we understand it, the ordinary test in such cases; the test authorized by the opinion of all the judges of England in answer to the questions of the House of Lords growing out of *McNaghten's* Case; the test applied in the case of the United States v. Guiteau for shooting President Garfield, and in many other cases in most of the States. *See* Lawson on Insanity as a Defence to Crime, 270, and following pages.

State v. Bundy, 24 S.C. 439, 445 (1886).

Under the *M'Naghten* rule a defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C. Code Ann. § 17-24-10(A) (Supp.1996). "[T]he key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong'." State v.

Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23, *cert. denied*, 506 U.S. 846, 113 S.Ct. 137, 121 L.Ed.2d 90 (1992), *quoting* State v. McIntosh, 39 S.C. 97, 17 S.E. 446 (1893).

Under Rule 19(a) of the South Carolina Rules of Criminal Procedure, "the court shall direct a verdict in the defendant's favor on any offense charged in the indictment *after the evidence on either side is closed*, if there is a failure of competent evidence tending to prove the charge in the indictment." State v. Nicholson, 366 S.C. 568, 574–75, 623 S.E.2d 100, 103 (Ct. App. 2005). *emphasis added.*

At the beginning of a trial there is a presumption that a criminal defendant is sane. This presumption relieves the State of the burden of proving sanity in every case. However, when the defendant offers evidence of insanity, the presumption disappears and it is incumbent on the State to present evidence from which a jury could find the defendant sane. State v. Milian-Hernandez, 287 S.C. 183, 185, 336 S.E.2d 476, 477 (1985). After the close of the defense in the present case there had been no evidence offered that would support a finding that the defendant knew right from wrong at the time of the incident. In the defense case, three expert witnesses testified that the defendant could not distinguish between right and wrong. A number of

other witnesses testified to the defendant's long history of mental illness and psychosis. By the close of the defense case the presumption of sanity was extinguished by overwhelming evidence of the defendant's insanity. Under Rule 19, the defendant was entitled to a directed verdict when the defense made the motion at the close of the defense case. It was therefore error for the court to deny the defense motion to direct a verdict under Rule 19.

IV. THE TRAIL COURT ERRED IN ALLOWING THE STATE WITNESS TO GIVE FORENSIC TESTIMONY AND OFFER OPINION ON SANITY WHERE THE WITNESS WAS NOT QUALIFIED AS A FORENSIC EXPERT.

After extensive argument and voir dire Dr. Smith was qualified as an expert in the field of psychiatry. 640. The State did not seek to have Dr. Smith qualified in the field of forensic psychiatry and even admitted that he could not be qualified as a forensic psychiatrist. 568-569. Yet, over the objection of the defense, the State asked Dr. Smith to formulate an opinion as to the defendant's criminal responsibility based in large part on Smith's forensic mental examination of the defendant through her mental health records provided in part by the State. 656. Smith testified that it was his opinion that the defendant knew right from wrong but was unable to conform her conduct to the behavior of the law. 656.

Dr. Smith, as the treating physician, had not seen the defendant for three months prior to the incident, and then for only eight minutes. Dr. Smith's opinion as to sanity at the time of incident was therefore clearly based on a review of the case, including documents that the solicitor provided, in what constituted an undisclosed forensic type of evaluation. Dr. Smith reviewed documents for trial and on his own initiative contacted one of the defense experts to discuss the case. 636; 657. To prepare him for testifying the solicitor gave Dr. Smith mental health records of the defendant that Dr. Smith had never seen before. 624. As the State's expert, Smith clearly prepared for and testified to his opinion based on a forensic evaluation of the case which included records provided by the solicitor. Both his preparation and testimony exceeded that of a fact witness or his qualification in court as an expert in psychiatry. While certainly qualified to testify as the defendant's condition during his treatment of the defendant, Dr. Smith extended that into a forensic opinion of the defendant's condition *at the time of the incident,* which was three months since he had last seen her.

The trial court erred in allowing Dr. Smith to testify as a forensic expert where he was not so qualified, and the state did not seek to have him qualified and even admitted that it would be unable to have him so qualified.

> "The qualification of a witness as an expert and admissibility of his testimony are matters largely within the discretion of the trial judge; however, the exercise of this discretion will be reversed where an abuse of discretion has occurred." Payton v. Kearse, 329 S.C. 51, 60–61, 495 S.E.2d 205, 211 (1998) (*citation omitted*). As discussed in a recent opinion of this Court, trial courts have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).
>
> In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

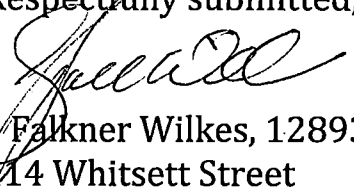
Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 206, 712 S.E.2d 428, 432 (2011).

Here, the state did not seek to have Dr. Smith qualified as an expert in forensic psychiatry. The solicitor even admitted that he could not have him qualified as an expert in forensic psychiatry. While competent to testify as an expert as the treatment he provided, any forensic testimony and opinion as to the defendant's sanity at the time of the incident, three months after having last seen her, should have been excluded.

CONCLUSION

Based on the foregoing the convictions and sentences of the defendant should be set aside and reversed.

Respectfully submitted,



J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

May 1, 2017.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Court of General Sessions

Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2016-001387

The State, ... Respondent,

v.

Suzanna Brown Simpson, ... Appellant.

CERTIFICATE OF SERVICE

I certify that I have, on the 1st day of May, 2017, served a copy of the Initial Brief of the Appellant and Designation of Matter to be Included in the Record on Appeal on the Respondent by placing a copy of same in the United States Mail, and by facsimile if so indicated, first class postage prepaid, addressed to counsel of record as follows:

John Benjamin Aplin, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for Respondent

Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

J. FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

May 1, 2017

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

Re: State v. Suzanna Brown Simpson, (00368727)
Appellate Case No.: 2016-001387

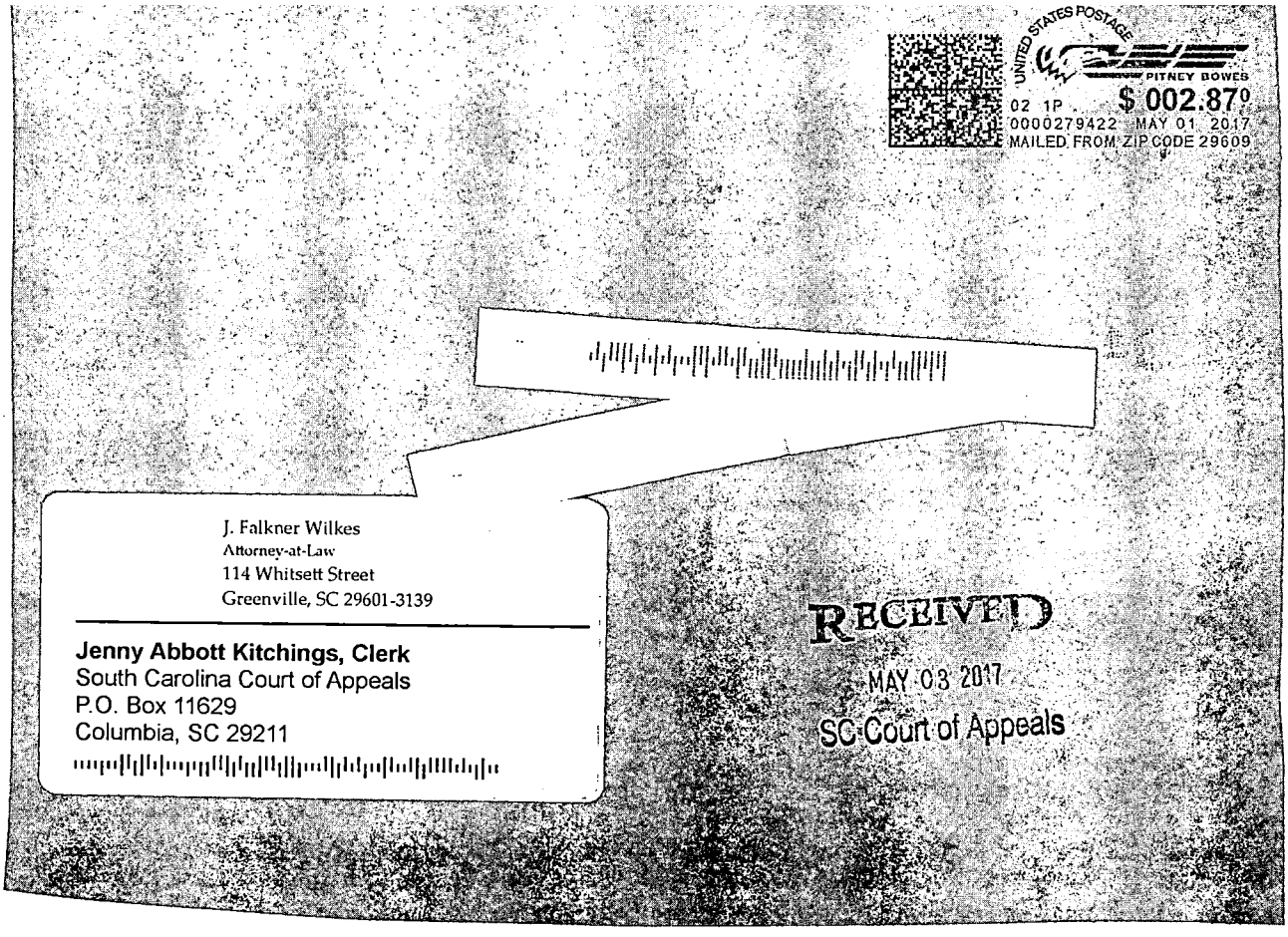
Dear Ms. Kitchings,

Enclosed please find the Appellant's Initial Brief and Designation of Matter in the above captioned case.

Sincerely,

J. Falkner Wilkes

c:
J. Benjamin Alpin
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211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Attorney-at-Law
114 Whitsett Street
Greenville, SC 29601-3139
Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
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