STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SUZANNA BROWN SIMPSON,

APPELLANT

Appellate Case No. 2016-001387

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General
SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

W. WALTER WILKINS, III
Solicitor, Thirteenth Circuit
305 East North Street
Greenville, SC 29601
(864) 467-8282
ATTORNEYS FOR RESPONDENT

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III. Did the trial court err in refusing to direct a verdict for the defendant or grant a new trial?

IV. Did the trial court err in admitting forensic testimony where state expert was not qualified as a forensic expert?

COUNTER STATEMENT OF ISSUE ON APPEAL

I. The trial court properly admitted the testimony of Appellant's treating psychiatrist in the State's reply when Appellant placed her mental health at issue with an insanity defense, revealed the contents of the psychiatrist's notes during the defense's expert testimony, and waived her privacy interest in her remaining mental health records by disclosing that information to her experts.

II. The trial court properly sustained the State's objection to the defense witness' bolstering of his own testimony by claiming the State's expert "agreed with his opinion," when Dr. Smith's purported agreement was not used as a basis for Dr. Price's opinion of Appellant's sanity.

III. The State presented substantial evidence Appellant shot her husband and children while knowing right from wrong and with the ability to conform her conduct to the requirements of the law when Appellant failed to disclose her purported delusions to her doctor, understood the consequences of failing to take her medication, remediated quickly following the resumption of medication, carefully chose the order of and weapon for her victims, evasively answered questions in front of law enforcement, and staged an attempted suicide.

IV. Dr. Smith's qualification as an expert in psychiatry allowed him to opine on Appellant's criminal responsibility, even though he was not qualified as an expert in forensic psychiatry, because Dr. Smith had the requisite knowledge and skill to offer his opinion of Appellant's capacity to distinguish right from wrong.

STATEMENT OF THE CASE

A Pickens County Grand Jury indicted Appellant, Suzanna Brown Simpson, in February of 2014 for two counts of murder, possession of a weapon during the commission of a violent crime, and attempted murder. (R. pp. 725-734.) On June 20, 2016, Appellant's case proceeded to trial before the Honorable Brian M. Gibbons and a jury. (R. p. 1.) John Mauldin, Esq., Teal Johnson, Esq., and Jacob Goldstein, Esq. represented Appellant. (R. p. 1.) Solicitor W. Walter Wilkins and Deputy Solicitor Betty Strom represented the State. (R. p. 1.) At the conclusion of the trial, the jury returned a verdict of guilty on all charges. (R. p. 717, lines 1-11.) Judge Gibbons sentenced Appellant to consecutive life sentences for the two counts of murder, a consecutive term of thirty years' imprisonment for attempted murder, and a consecutive term of five years' imprisonment for the possession of a weapon during the commission of a violent crime. (R. p. 723, lines 2-18.)

This appeal follows.

STATEMENT OF FACTS

The Shootings and the Aftermath

In the early morning of May 14, 2013, a neighbor of Suzanna and Michael Simpson heard a commotion in his yard, ran outside, and saw Suzanna Simpson's truck in a ditch near some downed trees. (R. p. 127, lines 2-13.) As a former paramedic, the neighbor drove down the scene of the accident to assist the driver, and he saw Simpson slumped down in the driver's seat. (R. p. 128, lines 1-25.) When the neighbor approached the vehicle, Simpson recognized him, calling him by name and telling him her back hurt. (R. p. 129, lines 6-11.) The neighbor repeatedly asked Simpson where her husband and children were, and Simpson would respond by asking the neighbor, "Am I going to be okay?" (R. p. 129, lines 14-20.) Anytime the neighbor tried to walk away to talk to the other first responders, Simpson would grab his arm and ask him not to leave her. (R. p. 130, lines 1-8.) Simpson did not appear to be hallucinating or incoherent, and the neighbor had no trouble communicating with her. (R. p. 131, lines 8-17; p. 132, lines 7-11.) Both the neighbor and his daughter noticed Simpson would either ask if she was going to be okay or say, "I don't know" when anyone asked her about her husband and children. (R. pp. 129-146.) Because Simpson would not respond to his repeated questions about her family, the neighbor knocked on the doors and windows of Simpson's house to check on her husband and children. (R. p. 132, lines 13-22.) Concerned, the neighbor called 911 to request the police. (R. p. 133, lines 3-5.)

Interestingly, the path Simpson took through the neighbor's yard when she wrecked her car was the same path involved in a fatal wreck months before. In that wreck, a young man died when his car struck a large oak tree. (R. p. 133, lines 14-20.) When Simpson drove through the

path, she managed to avoid the large oak tree and a telephone pole, running over several smaller trees and then crashing into the ditch. (R. p. 133, lines 15-23; p. 137, lines 4-13.)

The nurse who treated Simpson at the hospital following the accident described walking into Simpson's treatment room, finding her lying on the table strapped to the back board and neck brace, and asking her what happened. (R. p. 152, line 22 – p. 154, line 19.) Simpson said very little at first, while the police were in the room, but as they began to leave, Simson started to talk. (R. p. 156, lines 2-8.) Simpson told the nurse, in a flat voice, "I shot my husband and kids. And then I had an accident." (R. p. 154, lines 7-23.) When the nurse questioned Simpson why, she responded, "Because it's an awful world." When the nurse asked why she did not kill herself instead, Simpson said, "I thought about it and tried, but I couldn't do it." (R. p. 155, lines 5-9.) The nurse was frustrated and asked Simpson how she could shoot her children and not herself. Simpson told him she tried but "it wouldn't shoot" and then decided to try to kill herself in a car accident the same way the young man had died before. (R. p. 155, lines 11-21.) Once the police noticed Simpson was talking to the nurse, they came back into the room. Simpson refused to talk after the police were present. (R. p. 156, lines 19-25.) The nurse was able to determine Simpson was alert, knew where she was and the time, and spoke clearly, but did not want to talk about the accident and shootings while the police were in the room. (R. p. 161, lines 6-15.)

While Simpson was receiving treatment, police rushed to the scene to check on the well-being of Michael Simpson and the children. (R. p. 164, lines 5-12.) The responding officer first noticed the open gun safe, with multiple firearms lying on the floor. (R. p. 169, line 17- p. 170, line 10.) The officer began to clear the house and found the bodies of Simpson's son and daughter in their bedrooms, both shot in the head. (R. pp. 166-168.) Michael Simpson was on the floor of the master bedroom, breathing heavily, but still alive. (R. p. 168, line 24 – p. 169, line 4.)

The little boy, who was still in his bed, had several gunshot wounds to the head, as did the little girl. In the little girl's room, there were also two bullet holes in the wall. In the master bedroom, officers saw multiple fired cartridge cases. (R. p. 184, lines 4-25.) In the kitchen, crime scene analysts found a still illuminated head lamp and a cell phone right nearby. (R. p. 186, line 5 – p. 187, line 2.) Analysts found .40 caliber spent casings on the floors of the children's bedrooms and 22 caliber casings on the floor of the master bedroom. (R. pp. 201-206.) Investigators later found the .40 caliber handgun at the scene of the wreck down the street. The gun ejected from the vehicle during the collision. (R. p. 208, lines 11-19.) The .40 caliber handgun was loaded with a magazine filled with .9 millimeter cartridges. (R. p. 209, lines 7-10.)

The Events Leading to the Shootings

On the day before the shooting, a friend of the couple, Nathan Stegall, stopped by the Simpson's house to borrow Michael's truck. (R. p. 271, lines 5-13.) Simpson could not find the key, so Stegall waited for Michael to return home with the spare key. (R. p. 272, lines 2-12.) While he waited, Stegall tried to initiate conversation with Simpson, but noticed she seemed angry. (R. p. 272, lines 15-25.) Stegall believed Simpson and her husband were arguing. (R. p. 273, line 22 – p. 274, line 2.) Stegall borrowed the truck, ran some errands, and returned the truck to Michael at the end of the day. (R. p. 275, line 9 – p. 333, line 15.) Later that evening, Stegall received a text message from Simpson that read, "Hell on earth?" (R. p. 277, lines 3-5.)

At the Simpson children's school, another parent saw Simpson in the school office the day before the shootings. (R. p. 282, lines 9-17.) The parent was checking his child out from school and walked in behind Simpson, who was withdrawing her daughter. (R. p. 283, lines 1-3.) When asked for the reason, Simpson said she was getting her daughter because her son was sick, and she was afraid her daughter might be sick, too. (R. p. 284, lines 11-16.) The little boy, who

was with Simpson, said, "I'm not sick, Mom." (R. p. 283, lines 3-6; p. 284, lines 9-16.) The parent noticed Simpson pacing back and forth and growing impatient. (R. p. 285, lines 1-8.) When the parent suggested the child probably needed to collect her backpack, Simpson replied, "Where she's going to go, she don't need no backpack." (R. p. 285, lines 10-21.) Simpson also appeared angry and snapped at the parent as they left the building with their children. (R. p. 286, lines 4-14.)

Simpson's mother in law, Allison, recalled an unusual conversation the night before the shootings in which Simpson asked her why her mother and father-in-law did not come to visit them much anymore. (R. p. 296, lines 1-3.) Allison recalled another unusual conversation with Simpson the previous year following her release from a behavioral care center. In the same month she was discharged, Michael left on a hunting trip, and Simpson called her mother in law asking if she thought Michael would return home to his family. (R. p. 298, line 17 – p. 301, line 8.)

Simpson's mother testified Simpson called her the day before the murders and asked her if her parents really wanted her. (R. p. 307, lines 1-14.) Later that day, Simpson called again and asked her mother if various relatives who were deceased were better off in heaven. (R. p. 307, line 19 – p. 308, line 4.) In another call Simpson spoke to her mother about the evils of the world and how you could not protect your children from those evils. (R. p. 308, lines 14-18.) When Simpson called her again that evening, her mother said Simpson sounded happy, saying she and her husband were going to seek marital counseling. (R. p. 308, line 23 – p. 309, line 5.) Later that evening, however, Simpson called her mother and said, "Mike's through with me. He thinks I can't take care of the children." (R. p. 309, lines 23-25; p. 322, lines 14-17.) When her mother pressed her for details, Simpson said her husband told her she stares into space all the time.

Simpson also told her mother the couple was not seeking counseling. (R. p. 310, lines 1-10.) Simpson told her mother she loved her and said she needed to go put the kids to bed. (R. p. 310, lines 7-10.)

Simpson's mother testified about an episode the previous year in which Simpson appeared to have a psychotic, paranoid break from reality following a trip to Ashville, North Carolina. (R. p. 313, line 2 – p. 315, line 10.) Simpson was hospitalized for five days after this episode. (R. p. 315, lines 5-13.) Simpson then transferred to the Carolina Center for Behavioral Health, where she remained for three more days. (R. p. 316, line 18 – p. 315, line 4.) Simpson's mother recalled several instances in which her daughter told her she believed the family was being watched. (R. p. 317, line 13 – p. 318, line 17.)

The Defense Presents Its Case

Dr. Leonard William Mulbry, one of the defense's expert, testified he met with Appellant three times and examined her medical records prior to the shootings. (R. p. 377, line 10 – p. 378, line 10.) Dr. Mulbry diagnosed Appellant with schizoaffective disorder bipolar type. (R. p. 380, lines 19-20.) Dr. Mulbry outlined her medical treatment in the years before the shooting, beginning with some mild depression in college, followed by episodes of post-partum depression. (R. pp. 383-385.) In 2010, Appellant began seeing Dr. Smith, a local psychiatrist, who treated Appellant with several medications in an effort to control her symptoms. (R. p. 386, line 15 –p. 387, line 12.)

According to her medical records and Dr. Smith's notes, Dr. Mulbry explained Appellant's moods began cycling through depression, sleeplessness, confusion, and paranoia. (R. p. 387, line 16 – p. 388, line 1.) Dr. Mulbry opined Appellant was unable to distinguish right from wrong at the time of the shootings. (R. p. 390, line 21 – p. 391, line 6.) On cross

examination, Dr. Mulbry said he examined Appellant nine months after the shootings and determined that at the time of his meetings with her, Appellant did know right from wrong. (R. p. 408, lines 1-11.) Dr. Mulby also acknowledged he never consulted with Appellant's treating psychiatrist, Dr. Smith, instead, relying on Smith's notes for the basis of his opinion. (R. p. 408, line 12 – p. 409, line 7.) Dr. Mulbry said Appellant's prominent delusion around the time of her admission to the treatment facility in 2012 was that her mother in law was grooming the children to be victims of sexual molestation. (R. p. 410, lines 3-20.) Dr. Mulbry noted Appellant received treatment for her bipolar disorder at the Behavior Health facility, and she improved. (R. p. 411, line 5 – p. 469, line 17.) Appellant was also educated about her bipolar disorder and attended group sessions, where she would have been taught how to manage her medications and talk to her family about her symptoms. (R. p. 413, line 2 – p. 414, line 8.) In fact, when Appellant was discharged from the facility, her mood was improved, she had no hallucinations, no mention of concerns for the children, and no suicidal or homicidal ideations. (R. p. 417, lines 3-21.) In contrast with Dr. Mulbry's opinion, when Appellant was discharged in 2013, she was not diagnosed with schizoaffective disorder. (R. p. 418, lines 1-5.)

Dr. Mulbry admitted that during the period he believed she suffered from schizoaffective disorder in the hours before the shooting, he could not opine whether Appellant knew right from wrong when she lied to the officials at the children's school, interacted with the neighbor for about thirty minutes shootings, and had several conversations with her mother and mother in law. (R. p. 418, line 19 – p. 421, line 22.)

Appellant's second expert, Dr. David Price, also evaluated Appellant's "criminal responsibility" by reviewing her extensive medical records. (R. p. 436, line 15 – p. 437, line 16.) Dr. Price met with Dr. Smith, who first diagnosed Appellant as bipolar, having Attention Deficit

Disorder (ADD), and another unspecified anxiety disorder. (R. p. 442, line 24 – p. 443, line 4.) Dr. Price testified he discussed Appellant's diagnosis with Dr. Smith and, "as part of reaching [his] opinion ... Dr. Smith agreed with [his] opinion." (R. p. 443, lines 8-12.) Dr. Price also acknowledged Appellant was a patient of Dr. Smith when the shootings occurred. (R. p. 444, lines 6-14.) Dr. Price said Appellant told him about her paranoid ideations after the shootings occurred, but these paranoid thoughts were not documented in Dr. Smith's notes at the time Appellant supposedly suffered from the delusions. (R. p. 453, line 8 – p. 454, line 3.)

Dr. Frierson, the court appointed psychiatrist, also diagnosed Appellant with Schizoaffective disorder, bipolar type. Dr. Frierson explained Appellant suffered from episodes or mania and depression, and also had bouts of delusional or paranoid thinking. (R. pp. 470-473.) These moods and abnormal thought processes could coincide or appear at different times. (R. p. 472, lines 10-18.) Dr. Frierson opined Appellant could not distinguish right from wrong at the time of the shootings. (R. p. 493, lines 16-19.)

On cross examination, Dr. Frierson agreed Appellant told the treating emergency room physician she did not tell her husband about her delusions because she was afraid he would "lock her up." (R. p. 495, lines 1-9.) Appellant admitted to Frierson she did not tell Michael about the paranoid thoughts because it would upset him. (R. p. 495, lines 22-24.) Appellant also told Dr. Frierson she would take excessive amounts of her proscribed Adderall when she had an "important task to complete." (R. p. 498, lines 14-16.) Dr. Frierson said he was surprised Dr. Smith's records did not reflect Appellant's extensive paranoid delusions. (R. p. 502, lines 16-24.)

HOW THE ISSUES PRESENTED AT TRIAL

Appellant's Pre-Trial Motions

During pre-trial motions, Appellant moved for a directed verdict, arguing that once Appellant informed the State she intended to plead not guilty by reason of insanity, the State was then required to put Appellant on notice of an expert to rebut the claim of insanity. (R. pp. 23-29.) Because the State had not given Appellant notice of its intention to call an expert witness, Appellant argued the State would not meet its burden to prove guilt. (R. 24, line 6 – p. 25, line 24.)

The State responded by arguing the motion for a directed verdict was not appropriate as a pre-trial motion because the defense of insanity is an affirmative defense requiring Appellant to present some evidence. (R. p. 29, line 18 – p. 30, line 4; p. 31, lines 3-17.) The State also pointed out it was not obligated to give Appellant notice of an expert witness and an expert witness was not required to combat the affirmative defense of insanity. (R. p. 30, lines 5-20.) The trial court denied Appellant's motion for a directed verdict. (R. p. 33, lines 1-4.)

Appellant also sought to limit the opinion testimony of lay witnesses, again arguing the State could not prove its case Appellant was sane without expert testimony. (R. p. 41, line 12 – p. 44, line 12.) The State countered again that they could prove their case with lay witnesses, and with the testimony of the witnesses' perceptions of Appellant's actions. (R. p. 45, lines 8-17.) In denying Appellant's motion, the trial court compared the testimony of an officer being questioned about the potential intoxication of a driver, such as whether the driver appeared intoxicated, and the basis for the perception such as slurred speech or the smell of alcohol. (R. p. 45, lines 18-25.)

Appellant went on to argue the State could not prove through lay witnesses that Appellant had a mental impairment and, due to that mental impairment, could not conform her conduct to the requirements of the law. (R. p. 46, line 21 – p. 47, line 5.) The basis of the argument was the

jury could not "practice psychiatry" because they were not qualified to make that finding. (R. p. 47, lines 6-20.)

Solicitor Wilkins countered that the role of the jury is to make the factual determination of whether Appellant could conform her behavior based on the evidence presented and the trial court's instruction on the law. (R. p. 48, lines 8-17.) The trial court then denied Appellant's motion to limit the witness testimony, but noted the objection for the record. (R. p. 48, lines 18-20.)

Appellant next moved to bar the testimony of Appellant's treating physician, Dr. Jeff Smith. (R. p. 50, lines 14-22.) Appellant's expert consulted Dr. Smith and he was a known witness. Solicitor Wilkins informed the court he might ask to qualify him as an expert in psychiatry, but he was not sure how he would use his testimony yet. (R. p. 51, lines 1-10.) The solicitor also mentioned the emergency room physician who treated Appellant after the murders, but told the court that although he was not certain who exactly he would call and the extent of their testimony, he did not intend to call an expert unknown to the defense. (R. p. 51, line 12 – p. 109, line 1.)

Appellant indicated she was aware of both witnesses and understood the role they played in her treatment. (R. p. 52, lines 4-11.) The trial court decided to rule on any objections to the testimony at the appropriate time. (R. p. 52, lines 2-15.)

The Close of the State's Case

At the close of the State's case, Appellant again renewed her motion for a directed verdict, arguing the State had given the defense no notice of their intent to call an expert witness and thereby could not prove their case. The solicitor argued the law presumes the defendant is sane, and an affirmative defense requires them to prove by a preponderance of the evidence that

Appellant was insane at the time of the murders. (R. p. 343, lines 9-15.) After the defense shows that, the State must prove beyond a reasonable doubt that she was not sane. (R. p. 343, lines 13-15.) The solicitor went on to explain to the trial judge that Appellant filed a limited Rule 5 motion approximately three weeks before the trial. (R. p. 344, lines 20-25.) Because the defense filed a limited Rule 5 motion, the State was not entitled to reciprocal discovery. (R. p. 345, lines 1-3.)

The solicitor explained that days before the trial, the defense gave the State one report of their experts, and another expert would not talk to the solicitor. (R. p. 345, lines 3-16.) The trial court asked the solicitor if he intended to call an expert witness to reply to Appellant's defense she was insane at the time of the murders. (R. p. 346, lines 1-7.) The solicitor said he could not be sure without knowing how Appellant would present her case, but if it did call a witness, it would be one of Appellant's treating physicians, Dr. Jeff Smith. (R. p. 346, lines 16-21.) The trial court again denied Appellant's motion for a directed verdict. (R. p. 348, lines 5-7.)

The Close of the Defense's Case

At the conclusion of the defense's case, in which Appellant presented three witnesses who formed opinions based on Dr. Smith's records, the State informed the court it sought to call Dr. Smith as a reply witness. (R. p. 505, lines 2-11.) Appellant again renewed her motion for a directed verdict, then again argued the State was not entitled to present a rebuttal witness because her due process rights were violated when the State did not present evidence of her sanity beyond a reasonable doubt in its case in chief. (R. p. 507, lines 1-16.) Appellant then went on to argue that she did not consent to Dr. Smith's testimony, nor had she waived her physician/client privilege. (R. p. 509, lines 17-22.) The trial court inquired whether it could order Dr. Smith to testify because his testimony would be relevant to the issue at hand. (R. p. 510, lines 4-14.)

The solicitor argued Appellant waived her privilege in accordance with S.C. Code § 44-22-90 when she released her medical records to her retained experts. The solicitor also argued the State was entitled to call Dr. Smith pursuant to Rules 703 and 705 because Appellant's expert's relied on Dr. Smith's treatment of Appellant in forming their opinions about her diagnosis. (R. p. 529, lines 6-10.) The solicitor said Dr. Smith would be qualified as a psychiatrist and as a fact witness to his treatment of Appellant in the years prior to the shootings. (R. p. 512, lines 1-9.) The solicitor told the court he also expected Dr. Smith to explain that Appellant's remediation within 48 hours of the shooting was atypical, and that he would not expect to see that in a patient with a true psychosis. (R. p. 512, line 15 – p. 513, line 6.)

Appellant argued Dr. Smith should not be permitted to testify whether Appellant knew right from wrong or could conform her behavior. (R. p. 513, lines 13-16.) The trial court replied, "Because you say he's not qualified to because he's not a forensic psychiatrist." (R. p. 513, lines 17-18.) The court informed Appellant he would make that determination after voir dire. (R. p. 513, lines 19-22.)

The Trial Court's Ruling on the Testimony

The following day, the State argued Dr. Smith was qualified to testify about Appellant's ability to conform her behavior to the requirements of the law because of his qualifications as a psychiatrist. The solicitor argued any distinction between a treating psychiatrist and a certified forensic psychiatrist would be a matter of weight for the jury to determine. (R. p. 538, line 18 – p.596, line 23.) Appellant countered that it would be unethical for the State to call a treating physician to testify "in a forensic manner against his own patient." (R. p. 540, lines 6-13.)

The trial court issued several rulings. First, the court found the State was entitled to present reply evidence. (R. p 540, lines 21-24.) The trial court also found Appellant waived her

privileged medical information because that information was used by three defense experts to aid in Appellant's defense. (R. p. 541, lines 7-17.) The trial court specifically made no finding concerning the manner SLED obtained Appellant's medical records. (R. p. 541, lines 18-22.) Judge Gibbons further ruled he would allow Dr. Smith to testify. (R. p. 541, lines 22-24.) The court also found Dr. Smith would likely be qualified in the expertise of psychiatry, and the court would make its determination of his qualifications as set forth in *State v. Council*. (R. p. 542, lines 1-25.) The trial court found that beyond its role as gatekeeper, it was the purview of the jury to weigh the credibility of the expert's opinion on the matter. (R. p. 543, lines 1-7.)

Voir Dire of Dr. Smith

During the State's voir dire, Dr. Smith testified he had been in private practice for twenty-eight years and exclusively treats patients of all ages and with a variety of diagnoses. (R. p. 554, lines 1-23.) As part of his practice, Dr. Smith must evaluate whether his patients suffer from mental illness and must determine their state of mind. (R. p. 555, lines 17-25.) Dr. Smith had given opinions on patients' criminal responsibility and their ability to conform their behavior. (R. p. 556, line 23 – p. 557, line 14.)

Dr. Smith's Testimony

Dr. Smith began treating Appellant in March of 2010. Over the course of his treatment, he saw Appellant as a patient 34 times. (R. p. 588, lines 4-17.) At times over the years, Appellant's condition appeared stable, and at other times Dr. Smith would adjust her medications to treat her three separate conditions: bipolar disorder, ADD, and anxiety. (R. p. 584, lines 7-17; p. 588, line 21 – p. 589, line 3.) Dr. Smith said these three conditions were "tricky" to manage because the medications for ADD could enhance the symptoms of bipolar disorder if the patient were not taking the mood stabilizer to manage the mood disorder. (R. p. 589, lines 1-8.) In fact,

in one of three instances in which Appellant admitted having paranoia, she also told Dr. Smith she had stopped taking her mood stabilizer. (R. p. 589, lines 11-17.) Dr. Smith said Appellant's decision to continue taking the stimulant medication for ADD without the stabilizer would significantly contribute to her psychosis. (R. p. 591, lines 1-4.)

Dr. Smith reviewed the report of Dr. Frierson, and he spoke to Dr. Price, but told Dr. Price that Appellant presented entirely differently in the 34 visits with Smith than she did during their evaluation. (R. p. 592, line 17 – p. 593, line 3.) Dr. Smith said he told Dr. Frierson, "it was like we were talking about two different individuals." (R. p. 593, lines 11-12.) Dr. Smith explained Appellant only complained, vaguely, of paranoid thoughts along the lines of "I think people are talking about me." (R. p. 593, lines 17-21.) Smith said the extensive delusions reported by Appellant and her family were never mentioned to him during the course of his treatment. (R. p. 593, lines 17-25.) Dr. Smith had no recollection of any family members accompanying Simpson to her visits. (R. p. 595, lines 11-13.) Dr. Smith noted the hospital records from the treating emergency room psychiatrist, who saw Appellant directly after the shootings, did not indicate Appellant wanted to kill herself or heard any voices. (R. p. 596, lines 1-23.) Further, the ER psychiatrist's description of her psychosis was not nearly as severe as the forensic psychiatrists' reports. (R. p. 596, line 23 – p. 597, line 2.) Further, Dr. Smith believed Appellant's rapid resolution of symptoms, both during the earlier admission and during the treatment after the shootings, was an unusual response to a functional psychosis. In other words, typically, a functional psychosis such as schizophrenia, bipolar disorder with psychosis, or depression with psychosis would not react that quickly and positively to medication. (R. p. 597, lines 7-21.)

Dr. Smith also found it unusual for Appellant's five statements to her mother the day before the shootings to sound normal in one call, then psychotic in another. Dr. Smith said it would be unusual for someone who is psychotic to come in and out of psychosis throughput the day. (R. p. 598, lines 3-13.) Dr. Smith also pointed out the comment about her husband being "done with her" and her decision to withdraw the children from school indicated some organized planning on her part. (R. p. 598, line 18 – p. 599, line 5.) Dr. Smith opined Appellant knew right from wrong but was unable to conform her conduct to the behavior of the law. (R. p. 599, lines 14-17.)

ARGUMENT

I. The trial court properly admitted the testimony of Appellant's treating psychiatrist in the State's reply when Appellant placed her mental health at issue with an insanity defense, revealed the contents of the psychiatrist's notes during the defense's expert testimony, and waived her privacy interest in her remaining mental health records by disclosing that information to her experts.

The crux of Appellant's first issue on appeal is her attempt to limit the testimony of her treating psychiatrist, even though three of her witnesses told the jury about the information in Dr. Smith's notes and then based their expert opinions on Dr. Smith's assessment of Appellant. In effect, Appellant sought to use Dr. Smith's notes and treatment to her advantage, but did not want the jury to hear Dr. Smith's interpretation of his own treatment notes. In support of this argument, Appellant claims she was not given notice of the basis of Dr. Smith's testimony, and suggests the State illegally obtained and seized her medical records from other treating physicians. However, although it was not required, the State notified Appellant it might call Dr. Smith, depending on the defense testimony. The only other documents Dr. Smith reviewed were medical records already in Appellant's possession. Simply put, no discovery violation occurred. Further, the State was entitled to Appellant's other mental health records when she waived

privilege in her records and submitted her information to her retained experts and the court appointed psychiatrist. By putting these experts on the stand, Appellant opened the door to Dr. Smith's testimony by presenting her mental health information to the jury. Appellant's efforts to limit Dr. Smith's testimony because of the actions of SLED[1] are merely a distraction. Had Appellant truly sought to suppress the information in her medical records as protected by her State and Constitutional privacy rights, she would not have presented that information to the jury via the testimony of her expert witnesses.

Standard of Review

The admissibility of the testimony of an expert on a fact in issue is largely within the discretion of the trial court. *Hundley ex rel. Hundley v. Rite Aid of S. Carolina, Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50-51 (Ct. App. 2000). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. To warrant reversal, any error by the trial court in admitting or excluding expert testimony must result in prejudice." *State v. Cope*, 385 S.C. 274, 287, 684 S.E.2d 177, 184 (Ct. App. 2009).

a) The State was not required to disclose its expert, but did so as a curtesy, and was certainly not required to disclose the substance of the expert's testimony. The State committed no discovery violation because the expert's opinion was based, in part, on documents already within Appellant's possession and submitted to their own experts.

Appellant's medical records were central to her defense of insanity. Appellant signed her waiver and HIPAA releases of her medical information shortly after trial counsel was appointed to represent her, and counsel received her records within 30 days. (R. p. 517, line 18 – p. 518,

[1] The provision of §44-22-90 and §44-22-100 protect communications with health care providers and limits the disclosure of the protected information. The statutes create penalties for the **provider** who violated these provisions, not for the recipient. See § 44-22-100(C). Appellant's reliance on this provision to attack the recipient of the records (SLED) is misplaced.

line 3.) Necessarily, Appellant's medical records were then disclosed to the defense experts and the court appointed psychiatrist to aid in the formation of their opinion. Indeed, Appellant already disclosed her medical records to her own expert and the court appointed expert in formulating her defense before the State's reply witness, Dr. Smith, requested the information. (R. pp. 603-604.) Appellant cannot argue the State violated Rule 5, SCRE and *Brady* by its failure to disclose the **documents** as the basis for Dr. Smith's opinion, when the documents were in the possession of the defense and were willingly submitted to numerous experts to prepare their assessment. Appellant appears to argue the State was required to disclose the exact opinion testimony of their expert, when the State is under no such obligation to do so.

It is well settled that an expert witness may state an opinion based on facts not within his firsthand knowledge. *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432 (1997); *State v. Franklin*, 318 S.C. 47,. 456 S.E.2d 357 (1995); *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct. App.1990). An expert may base his opinion on information; whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions. *Halbersberg*, 302 S.C. at 97, 394 S.E.2d at 7. Also, an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving her opinion. *State v. Slocumb*, 336 S.C. 619, 636, 521 S.E.2d 507, 516 (Ct. App. 1999) (finding Rules 703 and 705, SCRE "permit[s] the disclosure of otherwise hearsay evidence for the purpose of illustrating the basis of the expert witness' opinion."); *Halbersberg*, 302 S.C. at 97, 394 S.E.2d at 7 (citing *United States v. 5139.5 Acres of Land in Aiken and Barnwell Counties*, 200 F.2d 659 (4th Cir. 1952)).

With respect to notice to the defense, the State is not required to provide its witness list to a criminal defendant, and the disclosure of a witness to the defense before trial is nothing more

than a professional courtesy. *State v. Nicholson*, 366 S.C. 568, 579, 623 S.E.2d 100, 105-106 (2005). There is no right to discovery in a criminal trial in South Carolina beyond what is provided by statute, case law, or court rule. *See State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986); *State v. Flood*, 257 S.C. 141, 184 S.E.2d 549 (1971) (holding there is no general discovery in criminal cases in South Carolina). *See also, Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the State to divulge to a criminal defendant material exculpatory or mitigating information); Rule 5, SCRCrimP (requiring the State to disclose, *upon request of the defendant*, certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations or tests and witnesses to be called in response to an alibi defense).

The *Nicholson* case is instructive. In *Nicholson*, the State intended to call an expert to testify about the general characteristics of a sex abuse victim. *Nicholson*, 366 S.C. at 579, 623 S.E.2d at 105. The State provided notice of the expert to the defendant, but the defendant requested a continuance claiming the notice was too close in time to trial for him to fully prepare his defense. *Id.* The Court of Appeals found the trial court acted within its discretion in denying the motion for a continuance, finding the notice provided to the defendant was a "professional courtesy" because a witness list is not required to be provided. *Id.* at 579, 623 S.E.2d at 105-106. Here, the defense was fully aware of Dr. Smith as a potential witness because he was the only treating psychiatrist of Appellant. Further, the defense's own experts relied on Dr. Smith's records in performing their evaluation. Dr. Price even sought out Dr. Smith to discuss the case. The solicitor informed the court he might call Dr. Smith, depending on the defense's evidence, but he could not be certain. *Nicholson's* holding should apply here when the professional courtesy was extended but not required.

In the instant case, Dr. Smith reviewed the following information: 1) Dr. Smith's own clinical notes from Appellant's 34 visits; 2) the treatment notes of the emergency admission to St. Francis hospital in 2012, provided by the State; 3) the treatment notes of Appellant's subsequent admission to the Carolina Behavioral Health Center in 2012, provided to him as a matter of practice because he was her treating psychiatrist; 3); the emergency room notes of Dr. Harris, provided by State; and 4) the reports of Dr. Frierson, the court appointed psychiatrist, and Dr. Price, the defense retained expert, provided to him by the defense's expert. (R. p. 563, line 18 – p. 564, line 10.) The documents provided by the State, Appellant's emergency room notes in 2012 and the day of the shootings, were provided by the State after Dr. Smith was subpoenaed in the days before the trial. (R. p. 562, lines 1-9, p. 605, lines 13-24.) Further, Dr. Smith was not subpoenaed until after he discussed Appellant's case with Dr. Price. (R. p. 565, lines 3-14.) Dr. Smith denied he received any records from SLED in his review of Appellant's case. (R. p. 566, lines 16-21.) In sum, Dr. Smith did not review Appellant's St. Francis and emergency room records, the only documents provided by the State, until long after Appellant submitted those same records to her own experts and the court appointed expert.

Appellant argues the State was required to disclose the basis of Dr. Smith's opinion, pursuant to Rule 5 and *Brady*, but the law does not support this contention. Rule 5 does not obligate the solicitor to notify the defendant of the substance of the expert's testimony, particularly when the expert is relying on information within Appellant's possession. Further, the record does not reflect that Appellant requested the State provide copies of her own medical information in accordance with Rule 5, presumably because Appellant already had that information within her control. Instead, Appellant argues the State was required to disclose whether Dr. Smith took her medical records into consideration. However, even if the State had

disclosed the entire basis for Dr. Smith's opinion, upon Appellant's request, the disclosure still would not have informed Appellant of Dr. Smith's opinion.

Further, Appellant cannot show she was prejudiced by the State's failure to disclose the basis for Dr. Smith's opinion. Determining whether evidence withheld by the state should have been disclosed under *Brady* turns on whether the cumulative effect of the withheld evidence results in a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *State v. Hill*, 368 S.C. 649, 661, 630 S.E.2d 274, 280 (2006) (citing *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)). The information in Appellant's medical records was clearly within the possession of Appellant. Her witnesses presented that information to the jury. She cannot show that had she known Dr. Smith would base his opinion on that information, she would have changed the proceedings at trial and opted not to call her defense experts.

In sum, although the State was not required to turn over the information prior to trial, Appellant's counsel was well aware of the possible expert testimony available for reply by the State. The solicitor committed no discovery violations for failing to disclose the basis for Dr. Smith's opinion, particularly when that basis was the same information presented to the defense witnesses.

b) Appellant waived her privacy interest in her mental health records when she consented to the disclosure of the medical records to her experts and opened the door to her mental health by placing it at issue before the jury.

Appellant opened the door to the disclosure of the privileged information within her medical records when she raised the defense of insanity. The Court implicitly found she waived the statutorily protected information when he ordered the appointment of a psychiatrist to

examine Appellant following notice of her defense of insanity, pursuant to S.C. Code Ann. § 44-22-90(A)(4) and §44-22-100 (A)(2). Later, at trial the Court again found Appellant waived her confidential communications with her treating physician by presenting that evidence to the jury through the testimony of the defense experts, pursuant to S.C. Code §19-11-95. Even if the trial court erred in making such a finding, there can be no prejudice when Appellant relied on these records and the testimony of corroborating witnesses in presenting her case to the jury. Because Appellant waived her claim of privilege in her records and her confidences to her treating physician, Appellant's argument SLED obtained her records improperly had no bearing on the issue before the trial court.

Two things are evident from the record: 1) SLED submitted a form requesting medical information from Appellant's providers and the form cited an inapplicable state statute,[2] and 2) the solicitor's office was unaware of the document submitted by SLED to Appellant's providers. (R. pp. 516-526.) What is not clear from the record is whether the hospitals complied with the request in violation of S.C. Code Ann. § 19-11-95, whether SLED obtained the records via warrant or other means at a later time, or whether the hospitals complied with the request from SLED only after consulting Appellant's signed release to her defense attorneys. Appellant made no request for a suppression hearing, no records custodian from the hospital testified about when the documents were disclosed, and no representative from SLED testified about how the information ultimately came into its possession. The trial court specifically refrained from

[2] The Child Fatality Unit with SLED is empowered to "expeditiously investigate child deaths in all counties of the State" in accordance with S.C. Code Ann. §63-11-1940. S.C. Code Ann. § 63-11-1960 authorizes the unit to obtain the medical records of a child whose death is being reviewed by the department. Here, SLED did not request the children's records, but Appellant's.

making a finding on that issue undoubtedly because the evidence before the court supporting Appellant's claim was inadequate to make that determination. (R. p. 541, lines 18-24.)

However, the trial court did find Appellant waived her privilege to protect her medical information by disclosing the information to her own experts, then calling those experts to testify to the contents at trial:

> All right. First of all, after considering all arguments of counsel, I am going to allow the State to present reply evidence. I believe the statutory scheme is clear.
>
> Again, I make this decision taking seriously into consideration the defendant's position of fundamental due process possible violation with the way the statutory scheme is drafted of burden shifting. Okay. I understand that 100 percent. But I'm constrained by the arguments and by fundamental fairness both -- well, to the State as well to allow the reply testimony.
>
> All right. Having considered -- having ruled that I am going to allow the reply testimony, I specifically find for the record that the privilege, if – the privilege that Ms. Simpson would have had with the doctor that's going to be testifying for the State has been waived.

(R. p. 540, line 21- p. 541, line 7-17.)

The court's finding that Appellant's mental health record was necessary for the conduct of the proceedings, both prior to trial and following the defense's case, were supported once Appellant opened the door to her mental health by claiming an insanity defense. The State became entitled to Appellant's metal health records from her admission to St. Francis in 2012 and her emergency room records when the trial court ordered the appointment of a psychiatrist to examine Appellant. *See* S.C. Code Ann. § 44-22-90 (A)(4)(allowing disclosure of information related through the course of a court-ordered psychiatric examination); *and* S.C. Code Ann. § 4-22-100 (A)(2) ("mental health records may be disclosed when a court directs that disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest.") Further, S.C. Code Ann. § 19-11-95 (D) (mandating disclosure by court order when the patient's mental illness are reasonably at issue in a proceeding) authorized the trial court to find Appellant waived her confidences in Dr. Smith. In allowing Dr. Smith to

testify, the trial court found Appellant placed the issue of her mental health squarely before the jury.

The concept of waiver by opening the door to mental health claims has been explored in our common law. For example, the Supreme Court has found where insanity is interposed as a defense in a criminal prosecution, compulsory examination of the accused by experts for the purpose of determining his mental condition does not violate either the constitutional protection against self-incrimination or the constitutional guaranty of due process of law. *State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000) (*citing State v. Myers*, 220 S.C. 309, 67 S.E.2d 506 (1951)). Although Locklair claimed an unlawful intrusion into his constitutional right to due process, the Court found he waived that right with the nature of is defense. Similarly, in *State v. Bixby*, the defendant informed the court before his capital trial that he intended to present mitigation evidence concerning his mental health. *Bixby*, 388 S.C. 528, 557, 698 S.E.2d 572, 587 (2010). The court then ordered a mental health evaluation. *Id.* Bixby argued the compulsory mental health evaluation violated his Fifth Amendment right against self-incrimination. The Supreme Court disagreed, finding Bixby opened the door to his mental health issues. *Id.* at 559, 698 S.E.2d at 588. Applying the logic of *Locklair* and *Bixby,* if the defense can open the door to mental health issues, and thereby waive a constitutional protection, Appellant can certainly waive any statutory protection of her otherwise confidential communications with her treating physician.

With respect to the underlying mental health records, the Court has offered recent guidance in *State v. Blackwell*, 801 S.E.2d 713, 2017 WL 2350965, which was filed May 31, 2017, almost one year after Appellant's trial. In *Blackwell*, the South Carolina Supreme Court recognized the dearth of case law on this issue and outlined a new procedure for the disclosure of

privileged mental health records in accordance with S.C. Code Ann. §44-22-100(A). Specifically, the Court addressed the circumstances in which the witness (patient) did not consent to the release of medical information, but a party sought access to the records by court order after a finding the disclosure necessary for "public interest." *Blackwell*, 801 S.E.2d at 727; S.C. Code Ann. § 44-22-100 (A)(2). The Court said:

> **If the witness does not consent**, the judge alone should review the contents of the records to determine whether "disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest." *Id.* § 44-22-100(A)(2). In making this determination, the judge should assess the importance of the witness to the prosecution's case and whether the records contain exculpatory evidence, including, but not limited to, evidence relevant to the witness's credibility.

Id. at 727-728 (emphasis added). Significantly, in *Blackwell*, the witness whose medical records were the subject of the opinion was not the defendant, but one of the victims of the defendant's crime. Blackwell murdered an eight year old child in front of the witness, then sought the witness's access to the mental health records of the therapist treating the victim after the murder. *Id.* at 725. Though the circumstances of the case at hand are vastly different, *Blackwell* is helpful because the Court recognized the policy interest in balancing the relevance of the mental health records to both the State's and the defense's cases. Of course, the trial court must make this determination only if the witness **does not consent**.

Intuitively understanding this rationale, the trial court in Appellant's case found Appellant constructively consented to the release of her medical records when she raised insanity as a defense and turned over her information to defense experts. In his reasoning, the court also performed the kind of balancing test outlined in *Blackwell* in noting, as a matter of "fundamental fairness," Appellant used the records "to help establish her defense" and "opened the door" for the State to use the evidence. (R. p. 541, lines 5-16.)

Other jurisdictions state this rationale more precisely. In Washington, a defendant who raises the insanity defense has "abandoned his right of medical privacy and waived the statutory physician-patient privilege as to any medical testimony which tends to contradict or impeach his medical evidence." *State v. Brewton*, 744 P.2d 646, 647 (1987) (the "assertion of a privilege would deprive the State, and ultimately the jury, of important evidence on that issue.") Confidentiality remains important, but a patient who could select among various physicians' opinions, and claim privilege as to the remainder, would make a mockery of justice. *State v. Tradewell*, 515 P.2d 172, (1973). Iowa and California have recognized the absurdity of a rule recognizing the privilege in such cases, and have required disclosure. *See e.g., State v. Cole,* 295 N.W.2d 29, 35 (IA, 1980) and *People v. Arcega,* 651 P.2d 338, 348 n. 8, (Ca. 1982) (referring to a statutory exception to the physician-patient privilege for patients who place their medical condition in issue.)

Although in South Carolina, *Locklair*, *Bixby*, and *Blackwell* did not confront this exact issue, South Carolina's rules of discovery and statutory framework for disclosure support this policy. Rule 705, SCRE allows a party to require the disclosure of the underlying facts or data supporting an expert opinion. The South Carolina Court of Appeals confronted the admissibility of protected information under this rule in *State v. Slocumb*, 366 S.C. 619, 521 S.E.2d 507 (1999). In *Slocumb*, the Court discussed the disclosure of otherwise inadmissible evidence of prior bad acts referenced in a psychiatric report when the defendant put his mental health at issue by raising an insanity defense to a criminal sexual conduct charge. Slocumb sought to restrict the cross examination of his own defense expert when the State tried to cross-examine the expert on an inconsistent juvenile mental health assessment considered, but disregarded, by the expert.

The Court found the earlier assessment, which addressed Slocumb's prior bad acts, would ordinarily be inadmissible as prejudicial. The Court cited Rule 705, SCRE, and reasoned:

> The State's cross-examination focused on establishing that Slocumb was sane, and the records were directly related to an evaluation of Slocumb's state of mind. Furthermore, the State in its case-in-chief did not refer to these incident reports nor did it attempt to admit Slocumb's prior criminal sexual conduct conviction for which he was incarcerated at DJJ. *See State v. Faulkner*, 274 S.C. 619, 266 S.E.2d 420 (1980) (Although the State may not attack a criminal defendant's character unless he or she places it in issue, relevant evidence properly admissible for other purposes need not be excluded merely because it incidentally reflects on his or her character.)

State, at 632–33, 521 S.E.2d at 514. In other words, a defendant who seeks to claim mental incapacity may open the door to otherwise inadmissible content within those records.

Finally, Appellant can show no prejudice from the trial court's decision to allow Dr. Smith's testimony based on her underlying mental health records from other facilities. Appellant called three expert witnesses, Dr. Frierson, Dr. Mulbry, and Dr. Price, to testify about their opinions of her mental health after reviewing her records from Dr. Smith. The defense experts explained to the jury the portions of Dr. Smith's records they found relevant to their opinions. Appellant cannot show how Dr. Smith revealed information to the jury that was not previously revealed through the defense witnesses. Any error in allowing Dr. Smith's testimony about these records was harmless beyond a reasonable doubt. *See State v. Terry*, 339 S.C. 352, 360, 529 S.E.2d 274, 278 (2000)(when a defendant offers protected medical records as mitigation evidence, he cannot claim prejudice from the disclosure of the records pursuant to §44-22-100).

The State was entitled to Appellant's mental health records via the rules of discovery, common law, and statutory law. Any attempt by SLED to gain access to that information under an inapplicable state statute has no relevance to whether the State was entitled to call Dr. Smith to testify in reply. Appellant's affirmative defense of insanity, based in large part of the treatment

notes of Dr. Smith, created the necessity for the State to call Dr. Smith to explain. Appellant's attempts to distract the Court with SLED's actions, which were never developed on the record below, should not be confused as trial court error.

c) Appellant's Fourth Amendment rights were not violated by the testimony of Dr. Smith because her mental health records were not seized and she did not seek suppression of the records' contents.

Lastly, Appellant's contention the Dr. Smith's testimony should not have been allowed because SLED violated Appellant's Fourth Amendment right is also without merit. The trials judge specifically declined to make a finding the records obtained by SLED were a search or a seizure in violation of Appellant's Fourth Amendment rights. (R. p. 541, lines 18-24.) Based on the record, SLED sent the medical providers a form letter saying it was entitled to Appellant's mental health records. (R. pp. 518-519.) Whether the providers complied with that request, and whether the providers considered Appellant's release of her medical records before voluntarily submitting that information to SLED was not presented to the trial court.

The Fourth Amendment itself provides no remedy for a violation of the warrant requirement, but the United States Supreme Court fashioned the exclusionary rule, a deterrent sanction whereby the State is barred from introducing evidence obtained in violation of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 237 (2011). A Fourth Amendment seizure "deprives the individual of dominion over his or her person or property." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). However, "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received." *See Nix v. Williams*, 467 U.S. 431, 432 (1984).

Here, Appellant did not request, nor did the trial court conduct, a suppression hearing on the medical records. As discussed in the preceding section, the State was entitled to Appellant's medical records, and was entitled to call Dr. Smith as a reply witness. Appellant was not deprived of dominion over her property because she did not possess the records in question. Further, Appellant did not actually seek the suppression of the records, or even expert testimony based on the contents of the record. That suppression would have surely disqualified her experts from offering opinions on her behalf. Instead, Appellant sought to suppress Dr. Smith's opinion on the basis of Appellant's record. In other words, Appellant does not object to the disclosure of the information in her medical records to expert witnesses. Nor does she object to the information in her medical records being presented to the jury. Appellant's Fourth Amendment violation claim is neither supported by the record, nor an appropriate claim of exclusion to Dr. Smith's testimony.

In this case, the same information in the medical records was used in defense of Appellant's actions and to condemn it. The experts' interpretation of that information resulted in vastly different conclusions, which the jury was free to give whatever weight it choose in determining Appellant's guilt. Despite her assertions the medical records were improperly obtained, Appellant did not and does not want this court to suppress the medical records, or the information contained therein. Instead, Appellant asks this Court to suppress only the expert testimony of Dr. Smith because he disagreed with Dr. Price and Dr. Frierson. The Fourth Amendment does not protect Appellant's interest in stacking the deck in her favor, nor does fruit of the poisonous tree doctrine allow for such a selective remedy.

II. The trial court properly sustained the State's objection to the defense witness' bolstering of his own testimony by claiming the State's expert "agreed with his opinion," when Dr. Smith's purported agreement was not used as a basis for Dr. Price's opinion of Appellant's sanity.

All of the defense's expert witnesses relied on Appellant's medical records during her treatment by Dr. Smith to form their opinions on Appellant's sanity. To his credit, Dr. Price was the only expert who sought out Dr. Smith to discuss Appellant's case before testifying at Appellant's trial. Although he discussed his opinion with Dr. Smith, logic requires Dr. Price to have formed an opinion on Appellant's mental capacity before Dr. Smith "agreed" with his conclusion. Accordingly, Dr. Smith's purported agreement was not the basis for Dr. Price's opinion. The only explanation for Dr. Price's testimony that Dr. Smith agreed with him was to bolster Dr. Price's credibility before the jury. In fact, Dr. Smith explained the limitations of his agreement when he testified in reply. Dr. Price's testimony was thus properly objectionable as not fitting with the hearsay exception for the basis of expert testimony, and the trial court committed no error.

Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. *See U.S. v. Williams*, 447 F.2d 1285, 1290 (5th Cir 1971) ("The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion."); *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 436 (1997) ("An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, *to arrive at his opinion*, that opinion is regarded as evidence in its own right and not as hearsay in disguise." (emphasis added)).

The trial court allowed Dr. Price to testify to the numerous details about Appellant's prior treatment. Dr. Price discussed details such as the events that led to Appellant's prior emergency

hospitalization. The contents of the records Dr. Price examined were properly within the hearsay exception enumerated above. However, when Dr. Price tried to suggest Dr. Smith supported his conclusions, Dr. Price's testimony crossed the line. As the record indicates, Dr. Price has already formed his opinion on Appellant's sanity when Dr. Smith purportedly agreed with him:

> Q Did you have an opportunity to review Dr. Smith's records and also have an interview with Dr. Smith about this patient?
>
> A I had time to meet with Dr. Smith, I have reviewed all of his records and had time to talk about Anna, his treatment, things that happened. And as part of reaching my opinion and actually, well, within that meeting, Dr. Smith agreed with my opinion.
>
> MR. WILKINS: Objection, Your Honor. He's about to opine as to what another doctor has – diagnosis or –
>
> THE COURT: Objection as to hearsay.
>
> MR. MAULDIN: Well, the evaluator obviously talked to tens of people, that he is relating what they told him about the person being evaluated. I don't know how --
>
> THE COURT: Is this something that was contained in the records?
>
> THE WITNESS: It's what he told me directly, Your Honor.
>
> MR. WILKINS: It's not in his medical records. It's what he told him.
>
> THE COURT: All right. Objection sustained.
>
> BY MR. MAULDIN:
>
> Q Don't say what Dr. Smith told you unless it actually is contained in Dr. Smith's records. Okay?

(R. p. 443, line 5 – p. 444, line 5.)

Here, the State objected, appropriately, to Dr. Price's testimony that Dr. Smith agreed with his opinion, which necessarily indicates Price formed his opinion after reviewing Smith's notes, perhaps sometime during his discussion with Smith at the latest, but *before* Smith "agreed with [his] opinion." Price's statement was an unnecessary attempt to bolster his credibility before the jury, did not fit within the hearsay exception for expert testimony.

A witness is not permitted to vouch for the credibility of another witness by offering testimony that bolsters the testimony of another witness. *See State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012). The prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility ... within the exclusive province of the jury." *Id.* at 464, 725 S.E.2d at 141; *see also Maddox v. State*, 275 Ga.App. 869, 622 S.E.2d 80 (2005) ("improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror."). The ultimate issue for the jury in this case was Appellant's sanity at the time she shot her family. Dr. Price's testimony another expert agreed with his assessment of her sanity served no other purpose than to convince the jury he was correct about the ultimate issue of fact for the jury.

Even if the statement had been admissible, Appellant cannot show she was prejudiced by the trial court's refusal to allow Appellant to question Dr. Price on Dr. Smith's opinion. First, the State objected after Dr. Price told the jury Dr. Smith agreed with him, so Appellant obtained the benefit of the jury hearing Dr. Smith concurred with Dr. Smith's assessment. Second, Appellant cannot argue she was denied an opportunity to expound on Dr. Smith's agreement with Dr. Price, because she had the opportunity to question Dr. Smith about any agreement when he took the stand in reply. Further, when Dr. Smith testified, he discussed the meeting he had with Dr. Price, in which Price told Dr. Smith his findings. (R. p. 592, lines 16-21.) Dr. Smith said he told Dr. Price, "Well, based on upon what you were seeing at that time, I can see how you arrived at your decision." (R. p. 592, lines 22-24.) Dr. Smith went on to say he adamantly told Dr. Price Appellant presented entirely differently in the 34 visits he had with her, and there was "nothing

similar in clinical presentation." (R. p. 593, lines 1-3.) Thus, Dr. Smith explained the underlying circumstances in which he agreed with Dr. Price's conclusion on the basis on what Dr. Price reviewed, but put that agreement within the framework of the larger conversation about Appellant. Thus, Appellant cannot show she was prejudiced by the trial court's refusal to allow Dr. Price to testify about Dr. Smith's opinion, unless she also concedes she sought to distort the context of the agreement before the jury.

III. The State presented substantial evidence Appellant shot her husband and children while knowing right from wrong and with the ability to conform her conduct to the requirements of the law when Appellant failed to disclose her purported delusions to her doctor, understood the consequences of failing to take her medication, remediated quickly following the resumption of medication, carefully chose the order of and weapon for her victims, evasively answered questions in front of law enforcement, and staged an attempted suicide.

Appellant argues the trial court erred in denying her motion for a directed verdict because the evidence at the close of the State's case and the defense's case failed to show Appellant knew right from wrong when she killed her two children and attempted to kill her husband. Despite Appellant's assertions, sufficient evidence supported submitting the case to the jury. In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). The evidence showed Appellant concealed her purported delusional thoughts from her family and physician, meticulously shot her family in the order of strongest to weakest, concealed her crimes from first responders, and staged an attempted suicide. Even without the benefit of Dr. Smith's testimony, the jury had ample evidence of Appellant's sanity at the time of the shootings. Appellant's motion for a directed verdict was properly denied.

In ruling on a motion for a directed verdict, the task of the trial court is to simply determine "whether the evidence presented is sufficient to allow **a reasonable juror** to find the

defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016) (emphasis added). "[T]he lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *Bennett*, 415 S.C. at 236-37, 781 S.E.2d at 354 (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955); *see also Crawford v. United States,* 375 F.2d 332, 334 (D.C. Cir. 1967) ("The jury question of whether there was proof of guilt beyond a reasonable doubt presents a stricter or higher standard than the trial court's consideration of whether there is sufficient evidence to allow the jury to find guilt beyond a reasonable doubt, and it rests in the unreviewable ratiocinations of twelve reasonable persons whose deliberations are protected by the highest security."). Further, "a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402, 409 (2013).

It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, 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. *See* S.C.Code Ann. §17-24-10(A). However, a defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. *See* S.C.Code Ann. §17-24-20(A).

The State clearly presented sufficient evidence to convince a reasonable juror that Appellant shot her children and her husband. Appellant admitted to her neighbor, the EMS

worker, the nurse at the hospital, and the defense experts that she was the perpetrator of the crime. Appellant then raised the affirmative defense of not guilty by reason of insanity. The burden shifted to Appellant to prove by a preponderance of the evidence her culpability should be mitigated by reason of her mental illness to a finding of guilty but mentally ill, or not guilty by reason of insanity. Therefore, the question whether Appellant was entitled to a directed verdict and a new trial turns on whether there was any evidence during the State's case in chief from which a jury could find Appellant was capable of recognizing her actions as morally or legally wrong. Appellant mistakenly claims the only evidence of her sanity was offered by the expert witnesses. However, this argument ignores the testimony of the lay witnesses during the State's case who observed Appellant in the moments before and after the crime. In its case in chief, the State presented the following evidence showing Appellant understood right from wrong:

1) Appellant withdrew her children from school the day before she killed them, lying to the school officials by claiming her children were sick. (R. pp. 282-285.)
2) Stegall testified Appellant seemed irritated with her children and her husband, not worried for their safety because of a delusion someone was going to hurt them. (R. pp. 271-273.)
3) Appellant rose early in the morning to commit the crime, even wearing a headlamp to find her way around the darkened house before her family awoke. (R. pp. 186, 393.)
4) Appellant shot her husband first with a .22 caliber handgun, presumably so he could not prevent her from killing the children. (R. p. 393.)
5) Upon her failure to kill Michael quickly, Appellant chose another larger caliber weapon to shoot her children. (R. pp. 183-203.)

6) Appellant's shot each victim multiple times in the head. (R. p. 184, 335)

7) Appellant turned off the alarm to the house at 4:48 am so the police would not be summoned. (R. p. 327.)

8) Appellant refused to answer her neighbor's questions about the whereabouts of her family. (R. p. 129-131.)

9) When she supposedly tried to kill herself, Appellant chose a path through the woods where a driver had previously been killed in a car accident, yet she avoided striking the large tree which killed the driver before. (R. pp. 136-138.)

10) Appellant refused to talk to the emergency room nurse while law enforcement officers were near or in her treatment room. (R. pp. 154-156.)

When a defendant presents evidence in his own defense, he waives the right to limit the appellate court's consideration of the denial of his motion for directed verdict to only the evidence presented in the State's case-in-chief. *See State v. Hepburn*, 406 S.C. 416, 432, 753 S.E.2d 402, 410 (2013). For this Court's review accordingly, the State presented the following evidence in its case on reply:

1) Appellant either did not suffer from extreme paranoid delusions, or if she did, she understood she needed to conceal them from her psychiatrist. (R. p. 593, line 17 – p. 594, line 11.)

2) Appellant understood the consequences of failing to taker her medication. (R. p. 589, lines 9-17.)

3) Appellant may have continued to take her Adderall even after discontinuing her mood stabilizer. (R. p. 589, lines 4-8; p. 590, lines 21-25; p. 591, lines 1-4.)

4) Appellant remediated quickly after her medications were administered in an institutional setting, indicating any psychosis was medication induced. (R. p. 597, lines 3-21.)

Although the defense presented experts who opined Appellant did not know right from wrong, the jury was not required to give the expert testimony greater weight than that of the lay witnesses. Indeed, expert testimony is not required to rebut the presumption of insanity. *State v. Pitman*, 373 S.C. 527, 545, 647 S.E.2d 144, 153 (2007); *State v. Poindexter*, 314 S.C. 490, 494, 431, S.E.2d 254, 256 (1993); *State v. Smith* 298 S.C. 205, 379 S.E.2d 287 (S.C. 1989) (finding the State is not required to produce expert testimony to prove sanity; lay testimony may be sufficient.)

In *Pitman*, the South Carolina Supreme Court found lay testimony about Pitman's calm demeanor the day after he murdered his grandparents as he relayed his cover up story to investigators was sufficient to present a question for the jury as to Appellant's mental capacity. 373 S.C. at 547-548, 647 S.E. 2d at 154-155. In *Poindexter*, the State presented lay testimony showing Poindexter fled the state after murdering the victim. 314 S.C. at 493, 431 S.E.2d at 256. Hours later, Poindexter appeared normal and was cooperative during his arrest. *Id.* The State also showed Poindexter's co-workers noticed he became quieter and more reclusive and that his work quality decreased. The Court found the jury could have deduced Poindexter had the capacity to understand it was morally or legally wrong to commit the murder, saying, "the jury was free to rely on circumstantial evidence to find Poindexter sane even though expert testimony favored a finding that he was insane." *Id.* at 494, 431 S.E.2d at 256 (citing *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989); *State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985)).

Here, the State presented evidence of sanity in its case-in-chief, and then again offered evidence of sanity during its case in reply. Where there is any evidence tending to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced, the refusal to direct a verdict or grant a new trial is not error. *State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983). Viewing the evidence in the light most favorable to the State, a reasonable juror could conclude from Appellant's actions and statements that she knew right from wrong and could conform her behavior to the requirements of the law. The trial court committed no error in denying the motion for a directed verdict.

IV. Dr. Smith's qualification as an expert in psychiatry allowed him to opine on Appellant's criminal responsibility, even though he was not qualified as an expert in forensic psychiatry, because Dr. Smith had the requisite knowledge and skill to offer his opinion of Appellant's capacity to distinguish right from wrong.

In her claim Dr. Smith was not qualified to offer an opinion on her capacity to know right from wrong or conform her conduct, Appellant echoes a claim she made throughout her trial: A finding of incapacity requires the jury to "practice psychiatry," which she claims they are unqualified to do. (R. p. 47, lines 6-14.) Similarly, Appellant's objection to Dr. Smith's testimony focused solely on Dr. Smith's opinion concerning the ultimate issue at trial: did Appellant know right from wrong and could she control herself? Appellant mistakenly believes the determination of this question can be made only by experts qualified in forensics psychiatry. However, South Carolina law rejects this contention.

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson v. Ford Motor Co*, 389 S.C. 434, 446, 699 S.E.2d 169, 175. Second, the expert must have "acquired the requisite

knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* In the case before the court, neither the State nor the defense seriously disputed whether the subject matter of Appellant's psychiatric condition was beyond the ordinary knowledge of the jury. Appellant does not challenge the reliability of psychiatric treatment as a particularized discipline of medicine. Instead, Appellant argues Dr. Smith was not qualified to testify to Appellant's capacity to distinguish right from wrong or conform her conduct to the law. (R. p. 537, line 18 – p. 538, line 4.)

While an expert's qualification generally goes to weight of his testimony and not its admissibility, the trial court acts as a gatekeeper in vetting its reliability and deeming the testimony admissible. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The trial court correctly identified this standard, and specifically applied the *Council* factors to the testimony given at the pretrial hearing. (R. pp. 579-582.)

With respect to Dr. Smith's qualifications in particular, the qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion. *McMillan v. Durant*, 312 S.C. 200, 439 S.E.2d 829 (1993). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v.* White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). To present expert testimony, a party must show the witness possesses through either study or experience the knowledge or skill in a business, profession, or science making him or her better qualified than the jury to form an opinion on the particular

subject in question. *Hall v. Clarendon Outdoor Advertising, Inc.*, 311 S.C. 185, 428 S.E.2d 1 (Ct.App.1993).

Appellant claims Dr. Smith was not qualified to give an opinion on **forensic** psychiatry. However, in the case of psychiatry, the treating physician's opinion on the patient's mental health is critical to the everyday care of the patient; it is not solely for forensic purposes. "It has been said that a forensic interviewer's purpose is to prepare for trial." *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013); *See State v. Blue*, 717 N.W.2d 558, 564 (N.D.2006) (observing "[t]he forensic interviewer's purpose was undoubtedly to prepare for trial" as "[f]orensic by definition means 'suitable to courts,' ") (quoting *Merriam–Webster's Collegiate Dictionary* 490 (11th ed.2005)); *Black's Law Dictionary* 721 (9th ed.2009) (stating "forensic" is derived from the Latin terms "forensis" (public) and "forum" (court) and defining "forensic" as " [u]sed in or suitable to courts of law or public debate"). In short, "forensic" refers to the expert's preparation and participation in litigation. The term has little to do with the quality of the underlying opinion.

In the case of an affirmative defense of insanity, the jury must decide whether the defendant knew right from wrong based on the testimony of both lay witnesses and expert psychiatrists or psychologists. Only the doctors are directly asked to give an opinion that conclusively establishes a defendant's guilt. Regardless of whether a doctor is qualified as a "forensic" psychiatrist, which appears to mean prepares for and participates in litigation, a psychiatrist is more than qualified to conclude Appellant possessed the mental capacity to know right from wrong, particularly within the framework of serving as Appellant's treating physician for three years. In fact, no other doctor was more qualified than Dr. Smith to opine as to Appellant's mental capacity.

Dr. Smith obtained his medical degree from the University of Alabama and completed his residency at the William S. Hall Psychiatric Institute in Columbia. (R. p. 553, line 23 – p. 611, line 3.) At the time of trial, Dr. Smith practiced psychiatry for 26 years. (R. p. 554, lines 1-3.) Dr. Smith completes 30 hours a year of continuing education and treats patients "from 18 to 118" years of age with a variety of diagnoses. (R. p. 554, lines 12-24.) As part of his practice, Dr. Smith has to determine whether his patients suffer from serious mental illness and plan their treatment. (R. p. 555, lines 5-25.) Dr. Smith has been deposed "hundreds of times" in different civil cases, such as child custody, medical malpractice, and workman's compensation. (R. p. 556, lines 6-8.) He completed a rotation in forensic psychiatry during his residency and prepared an evaluation for a criminal defendant who ultimately pled guilty. (R. p. 556, lines 8-16.) Dr. Smith offered his opinion on a patient's criminal responsibility on 5 occasions and rendered an opinion on his patients' ability to conform their behavior on multiple occasions. (R. p. 556, line 23 – p. 557, line 14.) Finally, most importantly, Dr. Smith saw Appellant for 34 times over a three year period. Despite Appellant's claims the visits lasted 8 minutes, Dr. Smith said the visits were scheduled for 50 minutes and there was no way to know exactly how long the visits lasted. (R. p. 611, line 14 – p. 612, line 9.) Dr. Smith saw Appellant as recently as three months before the shootings and believed she was stable enough to extend her follow up visit for four months later. (R. p. 607, lines 17-20; p. 610, lines 7-13.) In contrast, defense expert Dr. Mulbry examined Appellant as late as nine months after the shootings, Dr. Price examined her 12 months later, and Dr. Frierson began his evaluation almost two years after the shootings. (R. p. 405, lines 6-16; p. 437, lines 2-10; p. 464, lines 13-24.) Not only was Dr. Smith qualified to opine on Appellant's mental capacity, he also had the most direct and most recent interaction with Appellant in relation to the shootings.

Appellant cannot show the trial court abused his discretion in finding Dr. Smith qualified to opine on Appellant's state of mind. Moreover, questions going to an expert's knowledge of state of mind of the accused at the time of the crime are proper, and the expert's opinion as to state of mind is admissible. *See State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990). Dr. Smith observed Appellant 34 times in a clinical setting, and was qualified to treat her mental condition with medications and monitor her progress while she took those medications. It was his professional responsibility to determine whether she knew right from wrong and could conform her conduct to the law. The fact that Dr. Smith was not as qualified as the other experts to prepare for and testify at trial does not render his opinion as her treating psychiatrist invalid. If the jury was entitled to hear from experts who based their opinions on Dr. Smith's treatment notes, then they were certainly entitled to hear an opinion directly from Dr. Smith. Lastly, Dr. Smith's opinion on whether Appellant knew right from wrong was the same question presented to the jury. As her treating physician, Dr. Smith need not be a forensic expert to make that determination.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE

Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Circuit
305 East North Street
Greenville, SC 29601
(864) 467-8282

BY: _____
SUSANNAH R. COLE
SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

ATTORNEY(S) FOR RESPONDENT

November 20, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SUZANNA BROWN SIMPSON,

APPELLANT

Appellate Case No. 2016-001387

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 21 1(b), SCACR, and the April 1 5, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Circuit
305 East North Street
Greenville, SC 29601
(864) 467-8282

BY: _____
SUSANNAH R. COLE
SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

ATTORNEY(S) FOR RESPONDENT

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