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/Petitioner.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to SCRAP Rule 221 the Appellant hereby moves this Court to reconsider its opinion and grant the Appellant a rehearing in this case based on the following:

The Court Erred in Admitting Forensic Testimony of the State's Expert Witness.

The Court's opinion fails to address the failure of the state to disclosure any forensic mental examination conducted by Dr. Smith or the substance of Dr. Smith's opinion and potential testimony on the issue of sanity prior to trial in light of the underpinnings of both Rule 5, SCRCrimP and Brady v. Maryland, as well as due process.

The prosecution failed to disclose that Dr. Smith had conducted a forensic mental examination or that he would opine on the issue of sanity. 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.

Although Dr. Smith was presented as a fact witness as the defendant's treating physician he also gave testimony as forensic expert on the issue of sanity. Dr. Smith therefore conducted a forensic mental examination of the defendant. This was based in part on the records that were provided to him by the solicitor. Despite being aware that it would call on Dr. Smith in rebuttal, the prosecution failed to disclose Dr. Smith's examination or that he would be called as forensic expert to opine on the issue of sanity. In proceeding in this way the state prevented the defense experts to comment on Dr. Smith's expertise, analysis, or opinion as to the defendant's sanity. This Court's opinion fails to address the issue of disclosure of Dr. Smith's forensic evaluation or opinion based on such evaluation, under the principals underlying both Rule 5, Brady, and due process.

"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. Allowing the state to avoid disclosure of any forensic mental examination or the substance of Dr. Smith's opinion and potential testimony on the issue of sanity prior to trial is inconsistent with the underpinnings of both Rule 5, SCRCrimP, Brady v. Maryland as well as a matter of due process. *See* Kennerly, at 220; *See also* Riddle v. Ozmit, 369 S.C. 39 (2006).

The Court Erred in Admitting Testimony of State Expert Based on Evidence Obtained in Violation of State and Federal Privacy Laws as well as the Fourth Amendment.

The Court's opinion fails to fully address the issues raised in regards to the admission of Dr. Smith's forensic testimony based on records provided to him by the state which were obtained in violations of state and federal law. In

particular, the manner of obtaining those records without valid consent furthered the ability to offer Dr. Smith as a surprise forensic expert. Absent the defendant's consent, 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. Court order would have required notice to the defendant. The state avoided any notice to the defendant of the unlawful seizure of her records as well as the purpose for which the records were sought, which in this case was for Dr. Smith to conduct a forensic mental evaluation. 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 and allowed the state to offer surprise expert testimony in a way in which the defense could not anticipate or challenge.

This Court's opinion also fails to address the sound reasoning of other courts holding that suppression was the appropriate remedy for unlawful seizure of protected health information:

> 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 that the 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 another 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 Dr. Smith, both of which were 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.**

The Court's opinion overlooks the fact that the inevitable discovery rule can not be applied to the unlawful seizure of mental health records, especially in the present case. There can be no "inevitable discovery" as to protected health information. Mental health records are protected from disclosure under state and federal law. There is no way for the state to inevitably discover the records other than following the prescribed lawful process. Such process would require the defendant be provided notice of the state's intent

to obtain the records and the purpose for which the records were being sought. Illegal seizure and use of the defendant's mental health records allowed the state to conduct a forensic mental exam and testify to the results without notice to the defense. The state's intent to keep the defense from discovering the forensic mental exam is evident by the solicitor's comment at trial that he didn't want to tell the defense if he would call Dr. Smith, when he might call Dr. Smith, or for what purpose he might call Dr. Smith. R. p. 51. As argued above this, combined with Dr. Smith's testimony being presented in rebuttal, prevented the defense from having its expert witnesses comment on Dr. Smith's expertise, testimony or opinion. Assuming arguendo that the defendant waived her right to privacy, it does not alter the fact that the exclusionary rule is still appropriate as the unlawful seizure in and of itself was the source of the prejudice.

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. In this case the application of the exclusionary rule serves the interests of justice.

Trial Court Erred in Excluding Critical Testimony by Defense Expert as to Statements by State Expert.

This Court's opinion overlooks the fact that Dr. Smith testified at trial, was subject to cross-examination, and the statement was inconsistent with his testimony on the defendant's sanity. Rule 801(d)(1) provides in pertinent part: "The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." Rule 801, SCRE. Dr. Price's

testimony as to Dr. Smith's prior statement as to his being in agreement with Price's analysis was therefore not heresay. Nor was Price's testimony an attempt to bolster another witness' testimony. In State v. McKerley, relied on by this Court, one witness testified that she found another witness' testimony to be credible. *See* State v. McKerley, 397 S.C. 461, 463, 725 S.E.2d 139, 141 (Ct. App. 2012). In this case Dr. Price, as a forensic expert, was commenting on Dr. Smith's prior statement that Smith was in agreement with Dr. Price's analysis. As an independent expert Price's testimony did not constitute improper bolstering: "In Brown, however, this court clearly distinguished improper bolstering in cases involving experts who themselves conducted the forensic interview from cases involving independent mental health experts who addressed general behavioral characteristics.' State v. Barrett, 416 S.C. 124, 129, 785 S.E.2d 387, 389 (Ct. App. 2016) (*citing* Brown, 411 S.C. at 343–45, 768 S.E.2d at 252–53)." State v. Jones, 417 S.C. 319, 335, 790 S.E.2d 17, 25 (Ct. App. 2016), *aff'd as modified*, 423 S.C. 631, 817 S.E.2d 268 (2018). Exclusion of Dr. Price's testimony based on the grounds of hearsay or bolstering was therefore error.

This Court's opinion further overlooks the fact that while Dr. Price may have formed a preliminary opinion prior to speaking with Dr. Smith, he

appears to have subsequently considered his discussion with Dr. Smith in formulating his opinion given at trial . R. 443, l. 8-12. Even though his opinion on sanity at trial may have been the same as his opinion prior to talking to Dr. Smith, Smith's comments were nevertheless relevant to the opinion he expressed at trial. Excluding that testimony prevented Dr. Price from testifying to the underlying basis for his opinion at trial.

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 defendant's treating physician. This Court has held that the hearsay rule does not preclude forensic psychiatrist from testifying as to what she learned from a defendant's treatment provider. 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.

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.

This Court's opinion overlooks the fact that Dr. Smith, the defendant's

treating physician was never offered nor qualified as a forensic psychiatrist. The question is not the scope of a qualified forensic expert's testimony but the admissibility of a forensic opinion as to sanity by a witness that has not been qualified as a forensic expert.

Sanity is a forensic question. Forensic psychiatry is a specific area of psychiatry for which there is a board certification. Smith was not board certified in forensic psychiatry, nor did he practice forensic psychiatry. The state admitted that he could not be qualified as an expert in forensic psychiatry. After extensive voir dire Smith was qualified only as an expert in general psychiatry only. Although not qualified in forensic psychiatry, Smith was subsequently allowed to render a forensic opinion as to sanity as of the time of the incident. This exceeded the scope of the court's qualification of Smith.

Once a witness is qualified as an expert, continued objections to the amount or quality of the expert's knowledge, skill, experience, training, or education go to weight of the expert's testimony, not its admissibility. Id. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011). But the court must first address whether an expert is qualified on the topic for which he is testifying or opining. "Before a witness is qualified as an expert, the trial

court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert's testimony is reliable. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). Here the trial court did not make those findings and therefore did not qualify Smith as an expert in forensic psychiatry. Rule 702, SCRE, provides that a witness *qualified as an expert* may testify when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Without the requisite findings and qualification of Dr. Smith as an expert on the issue of forensic psychiatry, he could not testify as to the issue of sanity at the time of the incident.

This Court's opinion rests on its determination that Smith is qualified to testify as an expert in forensic psychiatry. This however is contrary to the scope of Smith's qualifications as found by the trial court. The qualification of a witness as an expert is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Caldwell, 283 S.C. 350, 352, 322 S.E.2d 662, 663 (1984); State v. Goode, 305 S.C. 176, 177–78, 406 S.E.2d 391, 392–93 (Ct.App.1991). Here the Court overlooks the ruling of the trial court in limiting Smith's qualification and excluding the area of forensic

psychiatry. This Court is in effect overruling the scope of Smith's qualification as determined by the trial court when no error as to the limitation on Smith's qualification was raised by the State at trial or on appeal.

The Trial Court Erred in Denying Motion for a Directed Verdict and Motion for New Trial.

This Court's opinion misperceives facts relevant to the directed verdict issue. The Court stated that Simpson appeared irritated with her husband and children. The Court's opinion also states that Nate Stegall testified that Simpson seemed angry. Stegall described Simpson as an "angry wife" without any reference to the children. R. p. 272. Stegall did testify that Simpson appeared aggravated or irritated but admitted that he had no idea as to why. 278-280. Stegall did not testify that Simpson was angry, irritated or aggravated with the children. Additionally, evidence that the alarm was turned off in the morning fails to support an inference of guilt.

This Court further relied on the testimony of Dr. Smith in its ruling as to the directed verdict. The State did not call Dr. Smith as a witness in its case in chief. Pursuant to Rule 19 the defendant's motion for direct verdict must be judged on the evidence existing after the evidence on either side is closed. At the close of the state's case in chief and at the close of the defense case the

lack of evidence as to guilt entitled the defense to a directed verdict.

Additionally, as argued above, Dr. Smith's forensic testimony and opinion should have been excluded. To the extent that Dr. Smith's testimony is properly excluded, then the defense was entitled to a directed verdict at the close of the State's rebuttal as well.

CONCLUSION

Based on the foregoing the Appellant moves this Court to reconsider its opinion and grant a rehearing in this case.

Respectfully submitted,

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February 7, 2019.

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Brian M. Gibbons, Circuit Court Judge

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Suzanna Brown Simpson, ... Appellant.

CERTIFICATE OF SERVICE

I certify that I have, on the 7th day of February, 2019, served a copy of the Appellant's Petition for Rehearing 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:

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February 7, 2019.