STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.

APPELLANT

APPELLATE CASE NO. 2019-001008

MOTION TO UNSEAL PORTION OF TRANSCRIPT AND EXHIBITS

On January 12, 2015, a Lexington County grand jury indicted appellant Timothy Ray Jones, Jr., for five counts of murder. The state sought the death penalty. On April 29, 2019, the state, represented by Solicitor Rick Hubbard, Deputy Solicitor Shawn Graham, and Deputy Solicitor Suzanne Mayes, called the death penalty case to trial before the Honorable Eugene C. Griffith, Jr. Boyd Young, Casey Secor, and Robert Madsen represented appellant. Ultimately, the jury found appellant guilty as charged and recommended a sentence of death. Judge Griffith imposed the death sentence.

Upon filing and serving of the notice of appeal, undersigned counsel began representing appellant along with co-counsel. In reviewing the transcript, counsel learned the trial judge "sealed" a portion of the transcript and the exhibits. Counsel now moves to unseal the transcript and exhibits because no basis exists (or existed) to support the sealing.

To the five counts of murder, appellant pled not guilty by reason of insanity. During the first phase of the trial, appellant presented numerous witnesses in support of his defense. In reply, the state called Dr. Kimberly Kruse, a clinical neuropsychologist, who claimed appellant was faking psychosis. Dr. Kruse had performed several tests on appellant. Based on those tests, Dr. Kruse opined appellant was malingering. Oddly, Dr. Kruse had not diagnosed appellant as malingering in the report she prepared, which was provided to defense counsel prior to trial. Further, Dr. Richard Frierson, who ordered the testing to be completed by Dr. Kruse and relied upon her report in arriving at his conclusions, did not diagnose appellant as malingering either in the report he prepared prior to trial or in his trial testimony.

During the penalty phase, the defense sought to call a witness, Dr. Adriana Flores, an assistant professor at the Emory School of Medicine to refute Dr. Kruse's testimony. The solicitor objected. According to the solicitor, the proposed testimony was "an attack on Dr. Kruse." In the state's view, Dr. Flores would challenge "both the professional credentials and, really, the personal integrity of Dr. Kimberly Kruse." The solicitor explained that Dr. Kruse was "concerned there [was] a threat on her career and her license."

According to the solicitor, Dr. Flores had "not touched a single bit of this case, yet, she's going to come in and pick apart Dr. Kruse without the benefit of all the notes and things that Dr. Kruse used to justify her opinion." Based upon the information the solicitor had, he determined that Dr. Flores would "professionally and personally destroy" Dr. Kruse if she were allowed to testify. The solicitor also claimed the defense was "going to build this record for appellate purposes and, also, to use against Dr. Kruse to ensure Dr. Kruse never steps into a criminal courtroom again."

In response to the solicitor's objections, defense counsel explained that Dr. Flores would testify "regarding errors and incorrect conclusions regarding the testimony of Dr. Kruse." Dr. Flores would not testify as to Dr. Kruse's character. Dr. Flores reviewed Dr. Kruse's testing and was prepared to testify about "significant problems, errors and misreports with regard to Dr. Kruse's testing."

Immediately prior to the defense proffer of Dr. Flores' testimony, the solicitor moved "to have it sealed so that when this goes before the high court that it's not released to the public to protect the integrity of Dr. Kruse, who is not here, nor is her counsel." Defense counsel objected to the request. The judge indicated he was going to grant the motion "because it's kind of out of the blue." He then inquired of what harm would occur "if the Appellate Court can see it, but the general public can't." The defense responded that there was no reason to seal the record. Ultimately, defense counsel relented, and the judge indicated he would seal the record "out of an abundance of caution."

After the proffer, the defense moved to call Dr. Flores as a witness during the penalty phase. The judge refused the request.

On appeal, undersigned counsel intends to assert the trial judge erred in excluding the testimony of Dr. Flores. In light of this intent and the complete lack of factual or legal basis for the sealing of the record, undersigned counsel moves to unseal the record and accompanying exhibits.

The public's right of access to the courts dates back to English law and was firmly established in the United States when the Bill of Rights was adopted. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 9, 630 S.E.2d 464, 468 (2006). The South Carolina Constitution guarantees public access to the courts. S.C. Const. art. I, § 9. "All courts shall be public, and every person

shall have speedy remedy therein for wrongs sustained." Id. Court proceedings are presumptively open in South Carolina. Capital U-Drive-It at 10, 630 S.E.2d at 469.

Courts restricting access to filings or evidence "must make specific factual findings, on the record, which weigh the need for secrecy against the right of access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption." Id. at 12, 630 S.E.2d at 470. The factors a court must consider include:

> (1) ensuring the parties' right to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents. . . . (8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; (12) whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors.

Id. at 12, 630 S.E.2d at 470.

In a case involving the secrecy of juror deliberations in a death penalty case, this Court held juror depositions should be unsealed. Ex parte Greenville News, 326 S.C. 1, 5, 482 S.E.2d 556, 558 (1997). William Bell, in his capital PCR, learned of potential misconduct and received permission from the PCR court to take jurors' depositions. Id. The discovery order and depositions were sealed and the hearing regarding the matter was closed. Id. The media sought to unseal these matters, and this Court reversed the lower court's decision to deny access. Id. The privacy of the jurors could be protected with a less drastic measure, such as redaction. Id. Nothing about the proffered testimony of Dr. Flores, including the criticisms of Dr. Kruse's testing methodology and conclusions, comes close to the interest of safeguarding the privacy of juror deliberations and conduct, which was ultimately held not properly sealed.

The Nevada Supreme Court cited Capital U-Drive-It when determining whether pleadings should be sealed in a criminal case. Howard v. State, 291 P.3d 137, 144 (2012). In Howard, defense lawyers in a death penalty case sought the sealing of motions regarding the substitiution of counsel. Id. After dispensing with the claim that the pleadings contained privileged material, the court found that the contents were embarrassing to the attorneys. The court held, "Although we can appreciate the desire to avoid unnecessary embarrassment, that alone is insufficient to warrant sealing court records from public inspection." Id.

Here the state—not even the party affected, Dr. Kruse—cannot overcome the presumption of public access because it seeks to avoid the embarrassment of its expert by another expert. The state simply failed to overcome its burden, and the trial judge neglected to consider the relevant factors as dictated by this Court. The judge simply indicated he sealed the transcript and accompanying exhibits "out of an abundance of caution."

Sealing the transcript was unnecessary to ensure the parties received a fair trial. Neither party relied upon any expectation of confidentiality in the proceedings. It was a capital murder trial, which was covered extensively by the media, including via livestream over Facebook by multiple news outlets. The general expectation of all involved was that the public was immediately aware of what transpired in the courtroom due to the real time aspect of the livestream feed over Facebook. Appellant's capital murder trial was significant to the public as the state sought the death penalty in the name of the citizens of South Carolina, and sealing the transcript only hides from the public's eye what was done in its name.

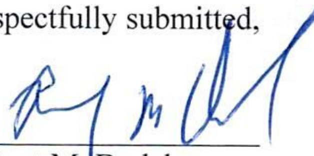
Dr. Kruse testified as an expert witness for the state. In doing so, she exposed her opinion and her credentials to challenge – through cross-examination and from other experts. Admittedly, the proposed testimony by Dr. Flores questioned the opinion drawn by Dr. Kruse due to the flawed

methodology she employed. However, there was nothing unusual in one expert contesting the opinion of another expert. Many cases involve "a battle of the experts."

This motion is filed in good faith, and not for purposes of delay. Counsel has spoken with opposing counsel, Melody Brown, about this motion, and counsel understands the state will file a return to this motion in the near future.

WHEREFORE, undersigned counsel respectfully moves that this Court unseal the portion of the transcript and accompanying exhibits pertaining to the proffer of the testimony of Dr. Adriana Flores so that they may be cited to in the briefs and contained in the Record on Appeal to be filed with this Court. Counsel also respectfully requests this Court hold the time limits in abeyance until seven days after its ruling on this motion for the filing of the initial brief of appellant and designation of matter.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

September 10, 2020.