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Sep 21 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

APPELATE CASE NO. 2019-001008

THE STATE,RESPONDENT

v.

TIMOTHY RAY JONES, JR.....APPELLANT

**RESPONSE TO APPELLANT’S MOTION TO UNSEAL
TRANSCRIPT AND EXHIBITS**

The Respondent makes this response to Appellant’s motion to unseal the transcript and exhibits received during the proffer of testimony from Dr. Adriana Flores. The testimony and exhibits were sealed by the trial court. Respondent does not oppose the unsealing of the transcript; Respondent will leave the matter to the discretion of the Court. In exercise of this discretion, the Court should be aware of the following:

“Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications, Inc.* 435 U.S. 589, 598, 98 S.Ct. 1306 (1978). The United States Supreme Court has addressed the issue of the sealing of transcripts and evidence. Constantly their reasoning is that this information should not be sealed due to the fact that “[o]penness ... enhances both the basic fairness ... and the appearance of fairness” to the public. *Press-Enterprise v. Superior Court of*

California, 464 U.S. 501, 508, 104 S.Ct. 819 (1984). According to this Court's case of *Ex Parte Capital U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), in considering sealing documents a court must consider, among other things, "ensuring **the parties' right** to a fair trial," "the need for witness cooperation," and "**the perceived harm to the parties from disclosure.**" 369 S.C. at 12, 630 S.E.2d at 470. (emphasis added). Dr. Flores, by affidavit and proffered testimony in the penalty phase, has indicated she should raise ethical allegations against Dr. Kimberly Kruse. Dr. Kruse conducted testing for the forensic psychiatrist Dr. Richard Frierson, and testified in the guilt phase. Dr. Kruse would not further participate to allow potential reply when the threat of filing a professional complaint against her were laced within this late proffered defense testimony and exhibit. The trial judge found the proffered testimony not only constituted unfair surprise, but also that the testimony raised a threat against a witness, and the testimony, in part, constituted improper pitting. The trial court acted appropriately in considering these several reasons to disallow the testimony and exhibits to be presented to the jury, and to seal these items to prevent harm to a witness. Contrary to Appellant's assertion that there was no basis to seal below, the record supports the sealing.

One major factor in the analysis still exists – the jeopardy that could come to Dr. Kruse upon release of accusations made though the testimony of Dr. Flores. These allegations were of such a serious nature that the trial court decided to seal this testimony, "out of an abundance of caution." (Tr. p. 5604). Again, the trial court found that the expressed intent to file a complaint was a threat. (Tr. p. 5644). The threat was so intimidating that Dr. Kruse could not even respond. This demonstrates the impact of the specific threat.

Even so, Appellant now seeks to unseal the matter before this Court. In his motion, Appellant cites the case of *Ex Parte Greenville News*, 326 S.C. 1, 482 S.E.2d 556 (1997). Within

that case this court decided that the depositions of jurors should be released with a redaction of the juror's personal information. Any redaction of the transcript does not cure this matter due to the fact it would be obvious that the doctor being accused of unethical and unprofessional behavior would be Dr. Kruse.

Appellant also cites the Nevada Supreme Court case of *Howard v. State*, 291 P.3d 137 (2012). In *Howard*, the appellant's attorneys wished the court seal records regarding their being relieved as counsel. Appellant attempts to apply *Howard* to the present case. It is Appellant's position that the solicitor only wished the testimony sealed to save some embarrassment for Dr. Kruse as the attorneys did in *Howard*. This goes way beyond embarrassment, and it also does not equate to a "battle of the experts" as stated within the Appellant's motion. This is an accusation that Dr. Kruse is being unethical and intentionally withholding evidence from the defense. These allegations, if they become public, could negatively affect Dr. Kruse without cause. Cross-examination of an expert about her expert opinion is one thing; threats affecting livelihood are wholly different.

Dr. Kruse was initially brought into this case by Dr. Richard Frierson who was the court appointed psychiatrist. He was assigned to conduct an examination of the Appellant to make a determination as to criminal responsibility. He requested and received permission from the trial court to hire Dr. Kruse to conduct certain testing to determine if Appellant's skull fracture had an impact on his cognitive abilities. This was known to the defense.

After review of the results, among other things, Dr. Frierson ultimately determined that Appellant did not meet all the criteria to support a finding of insanity at the time of the crimes. He testified that though there was some over exaggeration of symptoms, he did not think Applicant was malingering. In her testimony Dr. Kruse stated that the results of the raw data showed

malingering. She thought that her opinion would be different to that of Dr. Frierson due to his opinion being based on collecting information, history, and looking at patterns. Dr. Kruse testified that her opinion was generated by objective testing data gathered only to assist Dr. Frierson in his diagnoses. The final opinion always remained with Dr. Frierson.

In summation, there has been some level of intimidation leveled against Dr. Kruse in order for her to feel unable to defend herself against the threat of accusations of unethical behavior. A more chilling effect is difficult to imagine. To be clear, this was not impeachment, this was intimidation by threatening a future complaint. Again, the trial court recognized this as the threat that it was. (Tr. p. 5644). Although Respondent does not object to the motion to unseal, it recognizes that no harm can be done to the reputation of Dr. Kruse if this information remains sealed with only this court being allowed to view its contents. As Appellant points out, Dr. Kruse is not a party to the litigation and cannot file for her own protection.

CONCLUSION

Based on the foregoing, Respondent does not object to the motion given that the sealed transcript and documents do not have personal identifiers or the like that this Court's *Revised Order Concerning Personal Identifying and Other Sensitive Information in Appellate Court Filings* of April 15, 2014, would expressly address; however, Respondent urges the Court to consider the ramifications to Dr. Kruse (a non-party) if the material is unsealed against any harm that would occur if the matter remains sealed.

Respectfully submitted,

[signatures on next page]

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September 21, 2020

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