STATE OF NORTH CAROLINA
COUNTY OF MONTGOMERY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
99 CrS 3818 & 99 CrS 3820

STATE OF NORTH CAROLINA

v.

SCOTT DAVID ALLEN

**DEFENDANT'S POST-HEARING BRIEF ON CLAIMS III H, I, J & K**

Defendant Scott David Allen submits this brief in support of his Motion for Appropriate Relief and his Supplemental Motion for Appropriate Relief pursuant to this Court's instructions at the August 25, 2017 limited evidentiary hearing.

**Introduction**

This Court asked the parties at the close of the hearing to provide a concise statement of legal arguments and portions of the transcript that apply to the one issue before the Court at the hearing. That issue, as framed in its Order of 22 August, 2016, is whether Mr. Allen "suffered any sufficient prejudice to warrant a full evidentiary hearing" on four related claims, due to the trial court's withholding of mental health and substance abuse records of prosecution witness Vanessa Smith following an *in camera* review.

The *in camera* review by Judge Anderson D. Cromer occurred during a recess in Vanessa Smith's direct testimony at trial and was conducted in chambers with only the witness' personal attorney present. TT, pp. 1546-1553.[1] The Court's review was undertaken without any testimony

[1]This excerpt from the trial transcript was marked and admitted as State's Exhibit No. 1 at the August 25, 2017 hearing. In this brief, citations to "TT, p. _" refers to the trial transcript, and "HT, p._" refers to the transcript of the hearing held on August 25, 2017.

or assistance from a mental health expert appointed by the court or engaged by the parties. Judge Cromer's ruling after the *in camera* review is memorialized in the trial transcript without a separate written Order. *Id.* In that ruling, Judge Cromer withheld the records obtained from the Black Mountain Treatment Center ("Black Mountain"),[2] which related to in-patient treatment of Ms. Smith in September and October of 1993.[3] In so ruling, the Court stated that there was no evidence of mental health issues in the records being withheld except for information about Vanessa Smith's substance abuse, which she had admitted on direct examination:

> "...what she testified to here about concerning her substance abuse is what these documents are about. And so it doesn't provide anything new." TT, p. 1548.

During the ruling, defense counsel Atkinson interjected that the defense was "interested in exploring whether there is anything in the mental health record that would disclose other problems, mental health problems other than substance abuse problems...." TT, p. 1549. Judge Cromer reiterated that they did not. TT, p. 1550.

Judge Cromer's pre-trial Order for production of the documents (Defendant's Exhibit No. 8), and his proceeding to conduct an *in camera* review upon receipt of the documents, reflect a correct interpretation of state and federal law. In conducting the review, however, he failed to correctly interpret and understand the Black Mountain records, missing or misinterpreting

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[2]The Black Mountain records were admitted at the August 25, 2017 hearing as Defendant's Exhibit No. 1. Black Mountain is also known as the Julian F. Keith Alcohol and Drug Abuse Treatment Center.

[3]Judge Cromer released Vanessa Smith's involuntary commitment records from the Stanley County Clerk of Court, but kept them under seal. The parties were required to advise the court in advance of what materials, if any, they intended to use from this collection. TT, p. 1547. The Stanley County records were admitted at the August 25, 2017 hearing as Defendant's Exhibit No. 2.

abundant evidence of mental disorders in addition to substance abuse. This was severely prejudicial to Mr. Allen's defense.

**Summary of Legal Arguments**

"It is well settled that in a criminal case an accused is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation." State v. Newman, 308 N.C. 231, 243-254, 302 S.E.2d 174, 182-188 (1983) (citing N.C. Const. Art. I, § 23 and other case law). Under North Carolina law, this right includes cross-examining an adverse witness on the witness' mental health and drug abuse. In State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1991), the defendant was granted a new trial because the trial court prevented the defendant from cross-examining a critical witness on his suicide attempts, psychiatric history, and history of chronic abuse of marijuana and cocaine. The court relied on Rule of Evidence 611(b) and noted, "While specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as 'to cast doubt upon the capacity of a witness to observe, recollect, and recount, *and if so they are properly the subject not only of cross-examination but of extrinsic evidence.*'" State v. Williams, 330 N.C. at 719, 412 S.E. 2d at 364 (emphasis supplied). Where the witness' testimony is crucial to the State's case, the court is most protective of the right to cross-examine the witness about mental health and substance abuse history: "where, as here, the witness in question is a key witness for the State, this jurisdiction has long allowed cross-examination regarding the witness' past mental problems or defects." *Id.* at 722, 412 S.E. 2d at 722-723.

The North Carolina Supreme Court allows cross-examination on mental or substance abuse history even where the history was remote in time from the crime. In State v. Newman,

308 N.C. at 243-254, 302 S.E. 2d at 182-188, the court stated that the defendant could cross-examine on the mental health and drug abuse records of a witness going back 3 to 4 years before the crime. State v. Conrad, 275 N.C. 342, 349, 168 S.E. 2d 39, 44 (1969). The court allowed evidence of a state witness' suicide attempt two years before the trial. In State v. Williams, *supra*, the court cites with approval a federal case involving mental health treatment ten years before the trial. United States v. Lindstrom, 698 F.2d 1154, 1160 (11th Cir. 1983) (new trial where trial court limited cross-examination regarding witness' mental illness: "Certain forms of mental disorder have high probative value on the issue of credibility.")

The United States Constitution also protects a defendant's right to effective cross-examination of adverse witnesses:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood,(b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.
>
> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Alford v. United States, 282 U.S. 687, 691-692, 51 S. Ct. 218, 219-220, 75 L. Ed. 624, 627-628 (1931) (citations omitted).

Two federal Constitutional provisions protect a defendant's right to cross-examine witnesses against him: the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment. Under both, Allen should have been allowed to cross-examine Smith on the severe mental illness and substance abuse that were revealed in the sealed records.

In United States v. Robinson, 583 F.3d 1265 (10th Cir. 2009), the court of appeals ruled that the trial judge erred in reviewing a witness' mental health records *in camera* and in refusing to make the records available to the defendant. Finding a violation of the defendant's rights under the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment, the court found that the minimal evidence of substance abuse before the jury was inadequate, in light of the detail and length of the witness' problems revealed in the records.

> Had defense counsel been permitted to view the medical records and conduct a proper cross-examination, the jury would have seen a different picture. It would have learned that the CI [Confidential Informant] had been a heavy drug user since 2000 and had recently been abusing alcohol, cannabis, opioids, benzodiazepine, Valium, Klonopin, Darvocet, and Hydrocodone. The medical records contain admissions by the CI that he had smoked a half-pound of marijuana in a single day shortly before trial and that he had been smoking a pound of marijuana per week. The jury would also have heard that the CI had a "long history of mental illness" starting in 2000, which included auditory hallucinations, seeing 'things out through the window that are not really there' ... If the jury had been aware of this information, it may well have rejected the CI's testimony, without which Robinson could not have been convicted.

*Id.* at 1267. The court relied heavily on the fact that the CI's testimony was uncorroborated by

other testimony of physical evidence. *Id.* at 1271. Because there was a reasonable probability that the verdict would have been different had the jury learned of the content of the records, Robinson was granted a new trial. *Id.* at 1270.

In United States v. Lindstrom, *supra*, the defendant was entitled to use a witness' mental health records, including a psychologist's description of the witness as "'immature, egocentric, [and] manipulative,' having superficial relationships causing 'marital problems and sexual conflicts in general,' and seeing authority as something to be manipulated for self-gratification." 698 F. 2d at 1161.

*See also* Hargrave v. McKee, 2007 U.S. App. LEXIS 22956, page 20 (6th Cir. 2007) (*habeas* granted because trial court limited defendant's cross-examination of witness' ongoing psychiatric condition).

Records dealing with mental health and substance abuse are not readily interpreted by a layman, such as Judge Cromer. For that reason, North Carolina courts and the Court of Appeals for the Fourth Circuit have provided for *voir dire* of mental health witnesses to assist the court in determining the proper scope of examination. *See, e.g.,* State v. Williams, *supra*, 330 N.C. at 713, 412 S.E.2d at 362 (*voir dire* of state's witness regarding his mental illness and substance abuse); State v. Durham, 74 N.C. App. 159, 166, 327 S.E.2d 920, 925 (1985) (mental health care witness allowed to testify because defendant failed to conduct *voir dire*); United States v. Lopez, 611 F.2d 44, 46 (4th Cir. 1979) (party challenging evidence of mental impairment should make offer of proof). There could be no *voir dire* of mental health witnesses in this case, however, because the relevant records were withheld by the court.

Like the witnesses in the federal and state cases cited above, Vanessa Smith was subject

to impeachment by cross-examination. Her cursory admissions of some level of drug use did not paint an accurate portrait of her as a witness; the details of her history would have shown her to be an unreliable witness.

Impeaching Ms. Smith was crucial to Mr. Allen's defense. Smith was the only alleged eye witness to the shooting and the only witness who said that Allen had a gun and shot the victim. Her statement to law enforcement and her testimony were completely at odds with the physical evidence. Without Smith's testimony, the State had no case whatsoever. Smith's records were essential to challenge her reliability through the details of her mental illness and substance abuse.

In addition, the defense was entitled to submit extrinsic evidence on the issue of Vanessa Smith's mental health and credibility. *See* State v. Williams, *supra*, and State v. Newton, *supra.* Because the trial court denied counsel access to the Black Mountain records, counsel were unable to call defense psychologist Dr. John Warren to testify about evidence of Ms. Smith's personality disorders in those records, and evidence of her propensity to tell different stories at different times in order to manipulate the facts and achieve her own goals.

The courts in Williams, Robinson, and Lindstrom ordered new trials because the details of mental illness and substance abuse were so extreme that jurors could probably have returned a different verdict had they been properly informed. Smith's records in this case are as shocking and revelatory as the records the state and federal courts have faced.

**Summary of Evidence at the August 25 Hearing**

The trial court's conclusion that the withheld Black Mountain records did not contain "anything new" about Vanessa Smith, was inaccurate as to both substance abuse and other

mental health disorders. Additional information about Vanessa Smith's polysubstance abuse, the early age at which she began using some of the substances, the severity of her use (including an admission that she had no memory of an entire month), and other details were not contained in her direct testimony.

More importantly, the trial court's conclusion that there was no information in the records about Vanessa Smith suffering from mental illnesses other than substance abuse, was simply erroneous. Dr. John Warren, a forensic psychologist, testified at the hearing that the references to Ms. Smith being "spiritually bankrupt" or "completely spiritually bankrupt," have significant meaning for counselors and psychotherapists. HT, p. 60. According to Dr. Warren,

> It's a relative term of art which talks about someone who is bereft of prevailing ethical code...It's a description of someone who tells – acts however he or she needs to behave at a particular time in order to accomplish what their particular wants or needs are.

*Id.* It includes someone who is manipulative, and according to Dr. Warren, suggests that the person suffers from one or more of the "Cluster B personality disorders," which include Anti-Social Personality Disorder (formerly termed psychopathy or sociopathy) and Borderline Personality Disorder. *Id.* at 60-61. People suffering with Borderline Personality Disorder "often quickly form attachments and put others, particularly romantic partners, on a pedestal, but just as quickly to the other extreme where they villainize them, attack them." *Id.* at 62. They also have abandonment issues, and cannot accept "success and failure and ups and downs with a normal amount of resiliency." *Id.* at 62-63. "Instead, they move through the world in a much more precarious often manipulative and exploitive way...and it can shift rapidly from being the victim to the aggressor," accompanied by intense outbursts of anger at friends and family. *Id.* at 63. Deceit is also a characteristic of individuals suffering from these personality disorders. *Id.*

at 64.

Dr. Warren also found evidence of these personality disorders in the clinical notes from Black Mountain. According to Dr. Warren, a close reading of the notes shows that Ms. Smith made conflicting statements to different therapists. *Id.* at 70. In a clinical setting, as elsewhere, such behavior is consistent with an exploitative personality, "using words instrumentally to get things, to get attention, get her needs met...." *Id.* at 72. It is "within the heartland" of the concept of "spiritually bankrupt," and is consistent with both Borderline and Anti-Social Personality Disorders. *Id.* Dr. Warren noted that Black Mountain "did a good job of pointing out inconsistencies in the way [Ms. Smith] interacted with staff, the behavioral history of significant aberrant behavior and the term of art "spiritually bankrupt," and that the collateral sources of information that he was given, Defendant's Exhibits 3 through 7, "corroborate a history that would support observations that antisocial and borderline characteristics are *persistent* in this person." *Id.* (emphasis supplied).

Dr. Warren also noted that a layperson such as Judge Cromer would not necessarily understand the mental health significance of the long history of aberrant behavior reflected in the Black Mountain records, which included various behavioral "disturbances" such as drug taking, drug crimes, forgery and prostitution. *Id.* at 80.

Perhaps even more telling, Dr. Warren noted in the Black Mountain records that Ms. Smith had been previously treated at Appalachian Hall in Asheville, a "long-term residential center for people with personality disorder specializing in borderline personality," but not substance abuse. *Id.* at 81.

In sum, Dr. Warren's testimony at the August 25, 2017 hearing shows what any

competent mental health professional could have discerned from the withheld records, and how he, as the mental health professional engaged by trial counsel, could have testified. In addition, the information gleaned from these records, once imparted to trial counsel, would have greatly enhanced their ability to cross-examine and impeach Vanessa Smith.

**Additional Prejudice on Direct Appeal**

Allen's rights were further prejudiced by the absence of the sealed mental health records of Vanessa Smith, and the sealed transcript of Judge Cromer's *in camera* review, from the record on appeal. The issues on direct appeal included whether the prosecution *knew* that Vanessa Smith's testimony was false, which could have been affected by evidence that she was severely mentally ill in addition to being a habitual substance abuser. 360 N.C. 297, 304-306 (2005). Despite the incomplete record, and lack of information about Vanessa Smith's other mental illnesses, the North Carolina Supreme Court recognized that:

> "Smith was a confessed drug addict and under the influence of drugs at the time of the murder. This, along with her prior convictions *and other circumstances of her lifestyle revealed at defendant's trial*, made her a witness with less-than-perfect credibility."

*Id.* at 306 (emphasis supplied). The additional information in the Black Mountain records showing the severity of Ms. Smith's substance abuse and her abundant symptoms of Anti-Social and Borderline Personality Disorders, were not only withheld from defense counsel and the prosecution at trial, but from the North Carolina Supreme Court and the federal courts that followed. So were the records of Ms. Smith's involuntary commitment proceeding in Stanley County in 1998, just over a year before the shooting. It is not going too far to say that Mr. Allen's rights, including his right to due process, were violated at every level in his case.