

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT, SC Court of Appeals

V.

JAMES ANDERSON,

APPELLANT

Appellate Case No. 2012-210188

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5196

PETITION FOR REHEARING

On February 12, 2014, this Court affirmed Appellant's conviction of first-degree burglary rejecting two issues presented on appeal. Pursuant to Rule 221(a), SCACR, Appellant files this petition for rehearing concerning the second issue raised in his brief because this Court overlooked or misapprehended the nature and character of the evidence suppressed and the governing legal principles.

The second issue raised by Appellant was whether the trial judge erred in refusing to strike the testimony concerning fingerprint analysis, or in the alternative declare a mistrial, based upon the prosecutor's failure to disclose evidence favorable to Appellant and material to his guilt in violation

of Appellant's state and federal constitutional rights to due process. In discussing this issue, this Court acknowledged that Brad McClelland, the state's expert witness regarding fingerprint analysis and comparison, testified that when he submitted the unknown print, AFIS returned thirty prints that were similar to the unknown print, and that these prints were not provided to Appellant. McClelland then examined the first print, which AFIS had ranked as the print having the most similarities to the unknown print. Based upon his subjective examination, McClelland rejected the first print. Turning to the second print, which was ranked by AFIS as the print having the second most similarities to the unknown print, McClelland concluded it was a match to the unknown print. He examined no additional prints. This Court also acknowledged that Petitioner would have no way to obtain the prints on his own because only law enforcement officers could view and compare the fingerprint results on AFIS. Nevertheless, this Court held "Brady does not require the state to turn over the unmatched prints" to Appellant because Appellant "ma[de] no showing that if he obtained the individual printouts of the unmatched fingerprints, they would constitute exculpatory or favorable impeachment evidence." This Court found the unmatched fingerprints did not fall within the rule enunciated in Brady¹ "[b]ecause the exculpatory value of the unmatched prints was entirely speculative." Therefore, the state was not required to provide the prints, even the one examined and rejected by McClelland, to Appellant.

In Brady, the United States Supreme Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment. See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Evidence is favorable to the accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at

¹ Brady v. Maryland, 373 U.S. 83 (1963).

356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

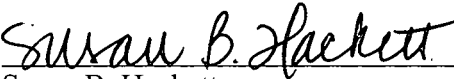
In affirming Appellant's conviction, this Court overlooked or misapprehended the evidence of the prints themselves and how the AFIS worked. Based upon the mechanics of AFIS, Appellant demonstrated that if he obtained the individual printouts of the unmatched fingerprints, or at a minimum, the first print that was examined and rejected by McClelland (who was testifying as an expert for the first time), those prints would constitute exculpatory or favorable impeachment evidence. AFIS ranked the prints based upon similarity with the unknown print. R. 100. The first print was ranked highest because the computer used an algorithm to determine it contained the greatest similarity with the unknown print found at the crime scene. R. 100. Additionally, AFIS gave the prints a "score," which was the numerical measure of the probability of a match, to indicate the close degree of similarity. The printout that was provided by the state showed the score for the first print was 2655, which was thirty points higher than the score for the second print, which McClelland opined was a "match." Therefore, the first print was favorable and exculpatory to Appellant because AFIS determined it was more similar and more likely a match to the unknown print than the second print, which was Appellant's. The third print had a score of 2580, which was forty-five points lower than the second print, indicating it was an excellent candidate for a match as well. R. 100.

Appellant did not suggest a mere possibility that the twenty-nine prints returned by AFIS and not provided to Appellant, or at a minimum the print examined and rejected by McClelland, may have been helpful to his defense; rather, Appellant demonstrated the prints were favorable and material based upon the functioning of AFIS. This Court's determination that the prints did not fall under Brady because the exculpatory value was speculative was, respectfully, in error. As an initial matter, the functioning of AFIS demonstrated the exculpatory value of at least the first print because the computer's algorithm determined that someone else's print was more similar to the unknown print than Appellant's print. Brady reaches beyond exculpatory evidence and includes impeaching evidence. Had Appellant had access to the prints, particularly the first print, then Appellant could have impeached McClelland with specificity regarding the minutia based upon McClelland's arbitrary rejection of the print. Additionally, had Appellant had access to the prints, Appellant could have obtained an expert witness who would have impeached McClelland's testimony regarding the "match," his rejection of the first print, and his failure to look at the other twenty-eight prints.

Importantly, the prosecutor never challenged whether the twenty-nine prints produced by AFIS were favorable to Appellant or material to the case. Rather, the prosecutor only challenged whether the prints were available to Appellant by other means and whether the prints were within the possession of the prosecutor. Thus, the prosecutor conceded the prints were material and favorable to Appellant. Likewise, the trial judge never questioned whether the prints were favorable or material. Instead, the trial judge was persuaded that the prints were like a video and Appellant could, and should, have requested to view the prints. The trial judge relieved the prosecutor of her duty to provide Appellant with the favorable and material evidence by placing an onus on Appellant to ask for the material.

Appellant respectfully requests this court grant his petition for rehearing concerning the second issue of whether the trial judge erred in refusing to strike the testimony concerning fingerprint analysis, or in the alternative declare a mistrial, based upon the prosecutor's failure to disclose evidence favorable to Appellant and material to his guilt in violation of Appellant's state and federal constitutional rights to due process.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 27th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

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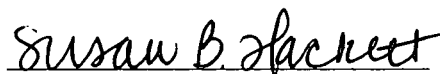
V.

JAMES ANDERSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. James Anderson, #260010, at Lieber Correctional Institution, Po Box 205, Ridegville, SC 29472, this 27th day of February, 2014.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.