STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5196 (S.C. Ct. App. filed 2/12/2014)

09-GS-26-04325

THE STATE,

RESPONDENT,

V.

JAMES ANDERSON,

PETITIONER

APPELLATE CASE NO. 2014-000812

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 21, 2014.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial judge's refusal 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 Petitioner and material to his guilt in violation of Petitioner's state and federal constitutional rights to due process?

STATEMENT OF THE CASE

An Horry County Grand Jury indicted Petitioner for burglary in the first degree during its July 2010 term. R. 101-102. Petitioner was tried before the Honorable Benjamin H. Culbertson and a jury beginning on March 12, 2012 and concluding on March 14, 2012. Lauree Richardson prosecuted Petitioner, and Edward Chrisco defended him. R. 1. The jury found Petitioner guilty as charged. R. 97, ll. 5-11. Judge Culbertson sentenced Petitioner to twenty-five years. R. 99, ll. 22-25; R.103. Petitioner filed a timely notice of appeal.

In his brief, Petitioner raised two issues before the Court of Appeals. After oral argument on September 10, 2013, the Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion. App. 1-8; State v. Anderson, Op. No. 5196 (S.C. Ct. App. filed Feb. 12, 2014). Notably, the Honorable Aphrodite Konduros concurred in result only. On February 27, 2014, Petitioner filed a petition for rehearing concerning one of the issues presented. App. 9-14. On March 21, 2014, two judges on the panel, Chief Judge John Cannon Few and Judge H. Bruce Williams, denied the petition. However, Judge Konduros would have granted the petition. App. 15.

Petitioner now seeks review in this Court.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's refusal 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 Petitioner and material to his guilt in violation of Petitioner's state and federal constitutional rights to due process.

Reasons to grant certiorari

Pursuant to Rule 242(b), this Court grants certiorari where "there are special and important reasons." The present appeal presents a novel question of law in South Carolina – whether the prosecution is required to provide fingerprint analysis is material to guilt. Although there was no dissent in the decision of the Court of Appeals, at least one judge would have granted Petitioner's petition for rehearing. Thus, answer to the legal question presented remains unsettled. Without question, substantial constitutional issues are directly involved because the legal issue concerns evidence to which a defendant is entitled under the federal constitution. Therefore, this Court should grant certiorari on the issue presented.

Relevant facts

The prosecution offered former police officer Brad McClelland as an expert in fingerprint analysis. At the time of Petitioner's trial, McClelland was employed with the Federal Bureau of Prisons as a guard. R. 13, ll. 10-12; R. 22, ll. 2-5. Prior to his employment as a prison guard, he had worked as a crime scene investigator with the Myrtle Beach Police Department between three and four years. R. 13, ll. 13-18; R. 22, ll. 6-11.[1] When asked about his education and training,

[1] During the proffer, McClelland testified he worked as a crime scene specialist for three and one-half years or four years. R. 13, ll. 13-18. Before the jury, McCelland testified he was employed with Myrtle Beach for six years. R. 22, ll. 6-11.

McClelland responded as follows: "I have an undergrad in biology. I have [twelve] or continuing credits in forensic science and law from Duquesne University of Pennsylvania. I have several classes I've taken through either SLED or private classes in North Carolina." R. 13, ll. 19-24. Relating specifically to fingerprints, McClelland had a basic fingerprint class from SLED, which was forty hours, an advanced palm class in North Carolina, which was forty hours, and a four-hour training class in Columbia. R.14, ll. 28; R. 22, ll. 12-18. Thus, McClelland had eighty-four hours, or just over two weeks, of class work and training in the area of fingerprints. Initially, McClelland testified that he had viewed between three and five hundred fingerprints. Upon further questioning, he testified he had examined three hundred and fifty. R. 14, ll. 9-14; R. 23, ll. 4-6.

According to McClelland, he was a certified Automated Fingerprint Information System (AFIS) examiner. R. 15, ll. 4-6. On cross-examination, he admitted the proficiency test to become a certified AFIS examiner consisted merely of the comparison ten print cards to unknown print cards. R. 15, ll. 20-24. McClelland claimed he had "matched" between forty and fifty known prints to unknown prints. He further boasted that all of his "matches" were correct as he had no error rate. R. 16, l. 10 – R. 17, l. 2.

McClelland responded to the incident location where he lifted three fingerprints from a window sill in the hotel room. R. 26, ll. 23-25; R. 27, ll. 4-13; R. 28, ll. 1-16; R. 36, ll. 4-8; R. 36, l. 25 – R. 37, l. 7. McClelland searched for prints on the window because the victim said the suspect came through the window. R. 36, ll. 21-24. Although he recovered three prints, he only submitted one print for testing purposes because the quality of the others was too poor. R. 72, ll. 7-16. McClelland then marked all the points he saw on the print, fed it into the AFIS machine and requested thirty different prints to use for comparison purposes. R. 33, l. 17 – R. 34, l. 16; R. 46, ll. 2-9; R. 55, ll. 21-25. McClelland examined the first returned print and determined it was not a

match. He moved on to the next returned print. R. 56, ll. 1-4; R. 73, ll. 19-21. After examining the second returned print, McClelland stopped. R. 58, ll. 16-17; R. 63, ll. 15; R. 73, l. 24 – R. 74, l. 19. Ultimately, McClelland "matched" the lifted print to known prints of Petitioner, which was the second returned print through AFIS. R. 34, ll. 17-22; R. 81, ll. 11-16. According to McClelland, there was zero probability that the print could belong to someone else, and he had no doubts about the accuracy of his "match." R. 59, ll. 12-15; R. 74, ll. 20-23. All of this was based upon his one hundred percent accuracy rate. R. 62, ll. 7-13.

During the testimony of McClelland, Petitioner moved the trial court to exclude and the testimony concerning the fingerprint evidence, or in the alternative for a mistrial, because the prosecution failed to provide certain information in discovery. Specifically, Petitioner emphasized McClelland's testimony that the AFIS computer returned thirty prints, and the prosecution's failure to provide Petitioner with those prints. R. 47, ll. 13-23. The judge understood Petitioner's argument to be that he was entitled to the material so that he could conduct his own analysis to determine if the other prints provided exculpatory evidence. R. 48, ll. 5-9.

The prosecutor countered that she had provided Petitioner with an AFIS printout screen listing other ID numbers showing there were different "hits." She emphasized that AFIS returned thirty hits because McClelland set the computer to return thirty. R. 47, l. 25 – R. 48, l. 4. Further, the prosecutor argued that the onus was on Petitioner to subpoena the information or obtain a court order. R. 48, ll. 10-12; R. 51, ll. 3-4. Continuing with this line of reasoning, the prosecutor argued that Petitioner could have obtained an expert "to look into these other hits." R. 50, ll. 6-10. The prosecutor was forced to admit that the other twenty-nine prints were available in the AFIS computer, but only certified AFIS examiners – law enforcement – were permitted to examine the

prints. R. 48, l. 13 – R. 51, l. 5. However, printing images of the hits was possible and readily available as an image of the hit had been provided for court. R. 50, ll. 17-23; R. 74, ll. 17-19.

After a short break, the judge denied Petitioner's motion. Concerning Petitioner's argument that prosecutor failed to produce exculpatory evidence, the judge stated "[t]he rule for exculpatory evidence, it has to be disclosed but you have to show that there's a high probability or a probability that the exculpatory evidence if produced would have brought about a different result at trial." R. 52, ll. 22-25. According to the trial judge no one knew whether the other prints would provide exculpatory evidence. He further stated that the Rules of Criminal Procedure mandate the prosecution provide the test results, which the prosecution did. Thus, he denied Petitioner's motion to exclude the evidence or declare a mistrial. R. 53, ll. 1.14; R. 53, l. 22 – R. 54, l. 4.

At the conclusion of the prosecution's case, Petitioner renewed his objections and motions and asked for a new trial based upon the prosecutor's discovery violations. R. 85, ll. 11-24. The trial judge inquired of the prosecutor why the state did not provide, at a minimum, the first print, which McClelland testified he examined and discarded. R. 86, ll. 12-21. The prosecutor relied upon her previous argument that Petitioner failed to request the specific evidence and then attempted to claim the evidence was not in her possession such that the requirement to provide it was not invoked. R. 86, l. 22 – R. 87, l. 12. Finally, the prosecutor compared the prints to a video of a confidential informant, which the prosecution makes available for the defense, but does not provide a copy. R. 87, ll. 13-22.

Petitioner countered that nothing "in the discovery rules make[s] it incumbent upon the defense to ask for every single thing that the solicitor has." He correctly pointed out that the prosecutor cannot use the fact that the police maintained actual possession of evidence "to shield the

evidence." R. 87, l. 25 – R. 88, l. 12. Nevertheless, the judge was "persuaded by the state's argument it's like the CI video" and denied Petitioner's motion. R. 88, ll. 17-23.

At the conclusion of the defense case, Petitioner renewed his motions regarding the fingerprint testimony based upon the prosecutor's violations. R. 91, l. 13 – R. 92, l. 7. Based upon his reasoning expressed previously, the judge denied the motions. R. 92, ll. 8-15. Finally, ensuring the preservation of this claim, Petitioner renewed his motions and objections. R. 98, ll. 10-12. The trial judge again denied the requests. R. 98, ll. 13-14.

The Court of Appeals explained that an individual asserting a Brady violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the state; and (4) material to the accused's guilt or innocence, or was impeaching. App. 1. Thereafter, the Court concluded the prosecution was not required to "turn over the unmatched prints" to Petitioner because Petitioner made "no showing that if he obtained the individual printouts of the unmatched fingerprints, they would constitute exculpatory or favorable impeachment evidence." The Court held "the exculpatory value of the unmatched prints was entirely speculative," and therefore, the prosecution was not required to disclose them in discovery. Thus, the Court of Appeals held the evidence was favorable to the accused, in the possession of or known by the prosecution, and suppressed by the state. However, the Court refused to find the prints were material to Petitioner's guilt or innocence or impeaching. App. 9. The Court of Appeals erred in his decision that the evidence was not material, and this Court should grant the petition for certiorari to correct this error.

Discussion

In Brady v. Maryland, 373 U.S. 83 (1963), 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 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 Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), this Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle's trial, police officer interviewed a key witness in the case who provided a statement inconsistent with his previous statement. The prosecutor failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. This Court disagreed, holding "[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires." As explained by this Court, "[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Id.

Relevant to the issue presented in Petitioner's case, a New Jersey Superior Court held that AFIS information is discoverable. State v. Feldman, 604 A.2d 242 (N.J. Super. Ct. 1992). The New Jersey court confronted an argument similar to the one made by the prosecutor in Petitioner's case and concluded that evidence that is subject to discovery is not limited to evidence that will or

may be produced at trial. Like Petitioner, Feldman sought the l ist generated by AFIS of candidates whose fingerprints may have matched the print recovered at the scene. The New Jersey court held such evidence must be provided to criminal defendants. Id. at 244. Although the New Jersey court rendered its decision based upon state law concerning discovery in criminal matters, the analysis is equally valid under Brady.

The prosecutor never challenged whether the twenty-nine prints produced by AFIS were favorable to Petitioner or material to the case. Rather, the prosecutor only challenged whether the prints were available to Petitioner 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 Petitioner. 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 Petitioner could, and should, have requested to view the prints. The trial judge relieved the prosecutor of her duty to provide Petitioner with the favorable and material evidence by placing an onus on Petitioner to ask for the material. This holding flies in the face of Brady and its progeny.

Based upon the mechanics of AFIS, Petitioner 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 Petitioner because AFIS determined it was more similar and more likely a match to the unknown print than the second print, which was Petitioner'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.

Petitioner did not suggest a mere possibility that the twenty-nine prints returned by AFIS and not provided to Petitioner, or at a minimum the print examined and rejected by McClelland, may have been helpful to his defense; rather, Petitioner demonstrated the prints were favorable and material based upon the functioning of AFIS. The Court of Appeals' determination that the prints did not fall under Brady because the exculpatory value was speculative was 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 Petitioner's print. Brady reaches beyond exculpatory evidence and includes impeaching evidence. Had Petitioner had access to the prints, particularly the first print, then Petitioner could have impeached McClelland with specificity regarding the minutia based upon McClelland's arbitrary rejection of the print. Additionally, had Petitioner had access to the prints, Petitioner 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 Petitioner or material to the case. Rather, the prosecutor only challenged whether the prints were available to Petitioner 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 Petitioner. 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 Petitioner could, and should, have requested to view the prints. The trial judge relieved the prosecutor of her duty to provide Petitioner with the favorable and material evidence by placing an onus on Petitioner to ask for the material.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari to review the erroneous decision by the Court of Appeals concerning whether Petitioner was entitled to the fingerprints returned by AFIS under Brady.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 24th day of March, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES ANDERSON,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals, this 24th day of March, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

SCCID
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April 24, 2014

J. Benjamin Aplin, Esquire
Assistant Attorney General
Office of the Attorney General
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Re: The State v. James Anderson

Dear Ben:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals