

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5196 (S.C. Ct. App. filed February 12, 2014)

Appellate Case No: 2014-000812

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**RECEIVED**

MAY 27 2014

**SC Court of Appeals**

State of South Carolina, ..... Respondent,

v.

James Anderson, ..... Petitioner.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion to strike or suppress testimony concerning fingerprint analysis, and the trial court's denial of Petitioner's alternative request for a mistrial, where Petitioner failed to demonstrate that: (1) evidence was suppressed by the State; (2) evidence allegedly suppressed was favorable to the accused; or (3) evidence allegedly suppressed was material to Petitioner's guilt?

## STATEMENT OF THE CASE

Petitioner was indicted by the grand jury for Horry County for burglary in the first degree (2010-GS-26-2883). He was represented by Edward Chrisco, Esquire. (R.p.1). On March 12-14, 2012, Petitioner proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Benjamin H. Culbertson to twenty-five (25) years' imprisonment. (R.p.99, lines 22-25). Petitioner timely filed a notice of intent to appeal and his conviction and sentence were affirmed in a published opinion from the Court of Appeals. State v. Anderson, Op. No. 5196 (S.C. Ct. App. filed February 12, 2014) (Shearouse Adv. Sh. No. 6 at 17) (App.p.1-p.8). Petitioner submitted a Petition for Rehearing on February 27, 2014, and by Order filed March 21, 2014, the Petition was denied. (App.p.9-p.15). On March 24, 2014, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return to the Petition for a Writ of Certiorari submitted on behalf of Respondent (the State) follows.

## STATEMENT OF FACTS

During the week of July 4, 2009, Joseph Emming, Chistian Vickery, and Allen Smith were vacationing in Myrtle Beach and were staying at the Bluewater Resort hotel. (R.p.2, lines 18-23; p.7, lines 5-13; p.8, lines 5-6; p.10, lines 22-23). On the night of July 8, 2009, their hotel suite was burglarized. Joseph Emming testified he was lying on the couch in the living room texting some friends when he saw an African-American male walk past the kitchen and into the living room. When Emming got up the man turned and ran out the door. (R.p.2, line 7-p.4, line 5). Emming specifically identified Petitioner as the person he saw in the hotel suite during the burglary. He testified he saw Petitioner

come into the area where he was lying on the couch, and there was no doubt in his mind Petitioner was the person he saw. (R.p.3, lines 17-22; p.4, lines 12-19; p.5, lines 10-12).

Christian Vickery testified that she and Allen Smith were sleeping in one of the bedrooms in the suite. Shortly after she dozed off on the night of July 8, 2009, Vickery woke up and noticed her bedroom door was open despite the fact that she had closed the door when she went to bed. She got up to shut the bedroom door and then heard the front door to the suite close. Vickery walked to the bedroom window and noticed it was wide open despite the fact that she never sleeps with the window open. She looked out the window and saw a black male wearing a pink shirt and a white hat outside the door to the suite. (R.p.6, line 14-p.9, line 2). Charles Allen Smith testified Vickery is his fiancée, and that on the night of July 8, 2009, she woke him up and told him someone had been in their bedroom. Smith reached down beside the bed to get his shorts; however, both the shorts and his wallet were missing. He never saw the person who had been in the suite. (R.p.10, line 16-p.11, line 15).

The State proffered crime scene specialist Brad Andrew McClelland as an expert witness. The trial court qualified McClelland as an expert witness, and found that Petitioner's objections to the sufficiency of McClelland's qualifications raised "a jury question." The trial judge noted he would give appropriate instructions to the jury in regard to the expert testimony. When McClelland was subsequently called before the jury, the State offered him as "an expert in fingerprint analysis." Petitioner renewed his objection to McClelland's knowledge, skill, experience, training, and education. The trial court noted the objection but, as previously ruled, qualified McClelland as an expert

in the field of fingerprint analysis. The court gave the jury a standard expert witness charge. (R.p.23, line 7-p.24, line 6).

McClelland described “ink prints” and “latent prints,” the distinguishing characteristics of fingerprints, and why prints are left when people touch certain objects. He testified about responding to the scene of the burglary and lifting fingerprints from the inside of the window. McClelland explained how he ran the best print through AFIS<sup>1</sup> and requested a list of thirty (30) known prints with similar characteristics, and how he was ultimately able to find a known print “identical” to the one left on the window. (R.p.24, line 9-p.35, line 20).

On cross-examination, McClelland was questioned about the AFIS identification process. He explained that AFIS does not return actual fingerprint matches. Instead, it simply returns a list of fingerprints that are similar to the unknown fingerprint, and that the examiner must then compare each print to look for a match. McClelland testified the number of responses produced by AFIS is set by the examiner, and can be anywhere between ten and fifty. He testified that in this case he set AFIS to produce 30 responses. (R.p.45, line 14-p.46, line 9). Based on this testimony, Petitioner’s counsel approached the bench after which the trial judge excused the jury to hear a matter of law. Petitioner argued:

Your Honor, back on August the 6<sup>th</sup>, 2009, I was appointed to represent Mr. Anderson. The same day that I was appointed I sent a motion for production and disclosure of all witnesses, disclosure of all evidence in the case. I never received any information that there were 30 hits from the AFIS computer, nor did I receive the fingerprints of those 30 individuals to look and compare and to determine how close some of the other individuals were on there; and therefore, I think that had I been given that it may have helped my client in the presentation of this case, Your Honor.

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<sup>1</sup> AFIS stands for Automated Fingerprint Identification System (R.p.22, lines 20-23).

(R.p.47, lines 13-23). The solicitor responded that the State had given Petitioner everything it had, including an AFIS printout screen that lists the other ID numbers showing there were different hits, and that McClelland set the number to 30. (R.p.47, line 25-p.48, line 4). The court framed the argument as a claim that Petitioner was entitled to the 29 identified but non-matched prints to do his own analysis to determine whether they were inculpatory or exculpatory. The parties then argued the merits of whether there was a discovery violation. (R.p.48, line 10-p.52, line 14).

After a short break to conduct research, the trial judge noted that to grant relief for a discovery violation Petitioner would have to show there is a probability that exculpatory evidence, if produced, would have brought about a different result at trial, but that there had been no showing the evidence was exculpatory. The judge found the State complied with the rules of criminal procedure by giving Petitioner the test results and denied “any motion by the Defendant to exclude the evidence or declare a mistrial or anything of that nature.” Petitioner specifically moved “to suppress” the fingerprint evidence and the judge restated the decision to deny Petitioner’s motion. (R.p.52, line 19-p.54, line 5). The solicitor reiterated the State’s position that Petitioner knew AFIS has produced 30 similar prints based on the discovery that was provided. The court marked and placed the “Latent Search Verification” screen shot that had been disclosed by the solicitor into evidence as Court’s Exhibit # C-2. (R.p.54, lines 6-23).

When cross-examination resumed, McClelland further described the process for using AFIS to try and find a matching fingerprint. He testified the probability of the print belonging to someone besides the person he matched was “zero.” (R.p.55, line 21-p.59, line 18). McClelland testified he had no error ratio in fingerprints because he does not

declare a match unless there really is a match, and that as far as he knows no one else has ever reviewed one of his findings and said it was wrong. (R.p.62, lines 7-16). He testified the Myrtle Beach Police Department required that whenever he found a match he was to have it verified by another examiner, and that in Petitioner's case, he got verification from an Officer Ioni. (R.p.64, line 20-p.65, line 7). On re-direct, McClelland testified he was confident in the print he lifted from the crime scene and that there was no doubt in his mind it matched the known print he pulled from AFIS. He opined that "it's the same print." (R.p.73, line 3-p.75, line 9). Marilyn Sanders, AFIS coordinator and fingerprint examiner at SLED, subsequently testified that the known print in AFIS that was matched by McClelland belongs to Petitioner. (R.p.77, line 21-p.81, line 16).

After the State rested, Petitioner took the stand in his own defense and offered an explanation for his fingerprint being at the crime scene. He testified he used to go to the Bluewater hotel all the time visiting friends, that he had been there hundreds of time, and that he thought he had been in the room where the fingerprint was found. (R.p.89, line 20-p.90, line 16). During closing arguments, Petitioner argued his fingerprint could have been at the crime scene because he had stayed at the hotel many times. However, he also attacked McClelland's testimony by arguing that fingerprint evidence is non-scientific, subjective, and simply constitutes a person's opinion and nothing else. (R.p.93, lines 6-24). The trial judge charged the jury on the State's burden of proof, the presumption of innocence, the roles of the judge and jury, direct evidence, circumstantial evidence, credibility of witnesses and expert witnesses. (R.p.94, line 12-p.95, line 25). After the trial court finished charging the jury, the jury deliberated a little over 20 minutes before

finding Petitioner guilty of first degree burglary. (R.p.96, line 2-p.97, line 9). This appeal followed.

### **CERTIORARI**

Petitioner argues this Court should grant certiorari because his appeal presents a novel question of law in South Carolina – whether the prosecution is required to provide fingerprint analysis to the defense as evidence material to guilt or innocence where there has been no demonstration such evidence is favorable to the accused, either as exculpatory evidence or impeachment evidence. The State disagrees with Petitioner’s characterization that this is a novel issue and submits that pursuant to Rule 242(b), SCACR, there are no “special and important reasons” for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was a straightforward exercise of applying existing precedent from this Court and the United States Supreme Court to the particular facts and circumstances of Petitioner’s case. In applying that precedent, the Court of Appeals was bound by the trial court’s factual finding that there was no proof of the existence of exculpatory evidence because that finding had evidentiary support and was not controlled by an error of law. The Court of Appeals properly concluded the exculpatory value of the unmatched fingerprints was entirely speculative because Petitioner made no showing that if he obtained the individual printouts of the unmatched fingerprints, they would constitute exculpatory or favorable impeachment evidence. Thus, Petitioner has not presented a novel issue and the State respectfully requests that Petitioner’s petition for a writ of certiorari be denied and dismissed.

## ARGUMENT

To the extent this Court finds Petitioner has raised a novel issue, the State submits certiorari should nevertheless be denied on the merits. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion to strike or suppress testimony concerning fingerprint analysis and Petitioner's alternative request for a mistrial where Petitioner failed to demonstrate that: (1) evidence was suppressed by the State; (2) evidence allegedly suppressed was favorable to the accused; or (3) evidence allegedly suppressed was material to Petitioner's guilt.

On appeal to the Court of Appeals, Petitioner argued the trial judge erred in refusing to either exclude the testimony concerning fingerprint analysis or declare a mistrial based on the solicitor's failure to disclose evidence favorable to Petitioner and material to his guilt in violation of his state and federal constitutional rights to due process. Specifically, Petitioner claimed Brady<sup>2</sup> required the solicitor to provide him with a printout of each of the thirty (30) known fingerprints identified by AFIS as having similar characteristics as the unknown print discovered at the crime scene.<sup>3</sup> He now contends the Court of Appeals erred in deciding the evidence was not material. The State disagrees and submits Petitioner's argument is without merit. First, the solicitor did not actually suppress any evidence in the State's possession. Rather, the solicitor made a sufficient evidentiary disclosure in compliance with Brady by providing Petitioner with all information entered into and produced by AFIS. Second, as specifically found by the Court of Appeals, there was absolutely no showing the evidence allegedly suppressed

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<sup>2</sup> Brady v. Maryland, 373 U.S. 83 (1963).

<sup>3</sup> There is no dispute that the solicitor provided Petitioner with a printout of the one fingerprint identified by AFIS and matched to the crime scene by the expert witness.

was favorable to Petitioner. Third, the evidence allegedly suppressed was not material to Petitioner's guilt or innocence.

The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667 (1963); Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Hyman at 45-46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, an individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

The State submits the solicitor did not suppress or otherwise fail to disclose evidence in her possession. Instead, in response to Petitioner's discovery request the

solicitor provided Petitioner's counsel with a Latent Search Verification screenshot (R.p.54; p.100), which showed AFIS had produced 30 responses to McClelland's query, and which included a partial list of the SID numbers assigned to each of the individuals identified by AFIS as having similar characteristics to the fingerprint found at the crime scene. AFIS did not produce a printout or actual copy of each print. Instead, it only produced a printed copy of the fingerprints requested by the user. (R.p.50, lines 17-22; p.55, line 21-p.58, line 22). Despite this disclosure, Petitioner never asked the solicitor for printouts of the 29 similar but non-matching fingerprints, or otherwise sought to view or analyze those prints prior to trial.

Relying on Riddle, supra, Petitioner contends the solicitor's disclosure was insufficient because it would be unrealistic to require Petitioner to make a request for printouts of the non-matching fingerprints. However in Riddle, the prosecutor failed to disclose an inconsistent statement given by a key prosecution witness to the police shortly before trial. The defendant would not have known the statement existed unless his attorney re-interviewed all officers and investigators in the days before trial. This Court found this was unrealistic, and not what Brady requires because the burden is on the solicitor to disclose material evidence which is exculpatory or impeaching. Riddle at 44, 631 S.E.2d at 73. Here, Petitioner was advised of the 30 similar fingerprints identified by AFIS but expressed no interest in obtaining printed copies of the 29 non-matching fingerprints, or in examining them himself. It certainly is not unrealistic to expect Petitioner to have made such a request when he had knowledge of their existence. The fact that AFIS is only accessible to law enforcement officers is of no moment, because Petitioner never sought access to or requested copies from the solicitor. There is

no evidence to suggest the solicitor would not have obtained that access or provided copies of the printouts upon request. In Riddle, this Court recognized that “the overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor’s responsibility for fair play.” Riddle at 46, 631 S.E.2d at 74 (quoting Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999)). Here, the solicitor’s disclosure was entirely consistent with her responsibility for fair play.

Next, Petitioner cites a case from New Jersey, State v. Feldman, 604 A.2d 242 (N.J. Super. Ct. 1992), for the proposition that information entered into and produced by AFIS is discoverable and must be provided to criminal defendants. Here, the information produced by AFIS was the list of 30 known fingerprints with similar characteristics and the printout of the single known fingerprint McClelland matched to the crime scene. Thus, the State submits the solicitor provided Petitioner with the information produced. In any event, Feldman was based on an interpretation of a New Jersey state law and is inapplicable to South Carolina. In addition, to the extent Feldman found the identification of non-matching but similar prints from AFIS is subject to required disclosure, the State submits the finding demonstrates flawed logic given the unique nature of fingerprints. Similar but non-matching fingerprints are no more exculpatory than non-similar, non-matching fingerprints. In either case, the non-matching fingerprints are non-matching fingerprints. They cannot match the crime scene fingerprint because it is unique and was manually matched to a certainty to the single fingerprint pulled from AFIS and provided to Petitioner as part of the State’s discovery response. In other words, the solicitor complied with Brady.

The State further submits, as specifically noted by the Court of Appeals, Petitioner failed to demonstrate the allegedly suppressed evidence was favorable to his case. A fingerprint was found at the crime scene. (R.p.26, line 17-p.29, line 5). Based on recognized methods of analysis and matching techniques, that fingerprint was matched to Petitioner. It was an exact match verified by a second fingerprint examiner. Fingerprints are unique. Not even identical twins have the same prints. (R.p.59, lines 8-18; p.60, lines 13-17; p.64, line 25-p.65, line 7; p.73, line 3-p.75, line 9; p.79, lines 9-10; p.82, lines 5-13; p.83, lines 12-16; p.84, lines 10-14). The State submits Petitioner utterly failed to demonstrate or articulate at trial how printouts of the 29 non-matching fingerprints would have been favorable to his case. In Hyman, the defendant argued the State's refusal to allow him to personally view a videotape of the transaction forming the basis of the charges violated its discovery obligations. However, the videotape was a recording of the drug transaction. The court noted that: "By all accounts, including defense counsel's testimony, the videotape depicted [Hyman] engaged in a drug transaction with a confidential informant. Because the evidence at issue is inculpatory, Brady is inapplicable." Hyman at 47, 723 S.E.2d at 381. Similarly, the evidence here that the unknown fingerprints do not match twenty-nine (29) people with similar distinguishing points is for Petitioner at best neutral, and at worst inculpatory. Whatever the case, it is not favorable to Petitioner.

Finally, Petitioner made no showing as to how the 29 fingerprints were material to his guilt or innocence. At trial, Petitioner's trial counsel complained that despite having filed a motion for production and disclosure of evidence he had not received information that there were 30 "hits from the AFIS computer," and had not received copies of the

other fingerprints to compare. He made an assertion that “had I been given [the printouts] it may have helped my client in the presentation of this case” (R.p.47, lines 13-23), with no explanation. Indeed, Petitioner did not move for a continuance or ask for immediate production of printouts of the other 29 fingerprints for analysis. Petitioner offered no actual analysis of those prints or an expert to articulate how an analysis of non-matching prints could have created a reasonable probability of a different result. Petitioner failed to make a sufficient showing to undermine confidence in the outcome of his trial. He claims that since the solicitor never challenged whether the 29 prints identified by AFIS were favorable or material, she conceded they were material. But there was no such concession, either express or implied. The cases make clear that the defendant must demonstrate materiality. The State has neither a burden to show otherwise, nor an affirmative duty to respond to a defendant’s unsubstantiated allegation of materiality. In a similar Brady analysis, the Florida Supreme Court held that a list of potential matches generated by AFIS, with no actual matches, was not material to the defendant’s defense. Boyd v. State, 910 So.2d 167, 179 (Fla. 2005).

In his Petitioner for Certiorari, Petitioner claims he “demonstrated the prints were favorable and material based upon the functioning of AFIS.” He contends that since AFIS returned other prints that it ranked “similar” to the unknown print, including one the algorithm ranked higher than his, he “could have impeached McClelland with specificity regarding the minutia” and “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.” However, Petitioner misses the crux of the Court of Appeals’ decision. The claim that Petitioner “would” or “could”

impeach McClelland are entirely speculative because Petitioner made no actual showing otherwise.

For all of these reasons, the State submits the trial court properly denied Petitioner's motion to strike or suppress testimony concerning fingerprint analysis, and properly denied Petitioner's alternative request for a mistrial, because Petitioner failed to demonstrate the solicitor committed a Brady violation. For the same reasons, the State submits the Court of Appeals properly affirmed the trial court's decision.

## CONCLUSION

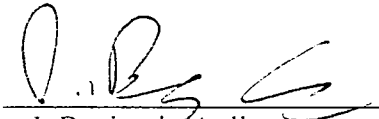
Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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Columbia, South Carolina  
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v.


James Anderson, ..... Petitioner.

**PROOF OF SERVICE**

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated May 27, 2014, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
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I further certified that all parties required by Rule to be served have been served.  
This 27<sup>th</sup>, day of May, 2014.



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May 27, 2014

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**SC Court of Appeals**

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RE: The State, Respondent, v. James Anderson, Petitioner  
Appellate Case No. 2014-000812

Dear Ms Hackett:

I am enclosing two (2) copies of the Return to Petition for a Writ of Certiorari in the above-referenced case.

Sincerely,

J. Benjamin Aplin  
Assistant Attorney General  
S.C. Bar No. 8729

JBA/ab  
Enclosures

cc: Honorable Daniel E. Shearouse  
(original and six copies enclosed)  
Victim Services