STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

On Petition for Writ of Certiorari to the South Carolina Court of Appeals
Opinion No. 5232 (re-filed July 9, 2014)

The State.....Respondent,

v.

Clarence Williams Jenkins.....Petitioner.

Appellate Case No. 2014-002046

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. The Court of Appeals erred affirming the trial court's decision not to strike the testimony of a prosecution witness, or in the alternative grant a mistrial, where the prosecution failed to disclose material evidence in a timely manner in violation of Petitioner's state and federal constitutional right to due process and a fair trial.

III. The Court of Appeals erred in affirming the trial court's refusal to grant a recess to permit Petitioner to engage the services of an expert to review materials ... where the prosecution failed to disclose material evidence in a timely manner in violation of Petitioner's state and federal constitutional right to due process and a fair trial.

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals, reviewing this pre-*Logan* trial, correctly upheld the trial judge's denial of Petitioner's request to charge the *Edwards* "reasonable hypothesis" language in the circumstantial evidence charge as this Court has found the *Edwards* language confusing and directed that it should not be used; and, reasonably determined that the any error in failing to give a circumstantial evidence charge with language similar to that announced in *Logan* was harmless beyond a reasonable doubt.

II. Whether the Court of Appeals erred in upholding the trial judge's ruling that neither a motion to strike, nor a mistrial, nor a lengthy recess was warranted regarding time to review the victim's finger print analysis evidence where the victim's identity was not contested, particularly where defense counsel was aware of the fingerprint analysis for years prior to trial.
[Petitioner's Questions II and III].

STATEMENT OF THE CASE

The Greenville County grand jury indicted Petitioner, Clarence Jenkins, in November 2008 for the murder of Mekole Harris. (R. p. 317). On December 23, 2008, the State filed a Notice of Intent to Seek the Death Penalty. (R. p. 329). In September 2011, the Greenville County grand jury also indicted Petitioner for the kidnapping of Ms. Harris, the murder victim. (R. p. 319). On March 27, 2012, the State filed a withdrawal of the notice of intent to seek the death penalty. (R. p. 330).

A jury trial was held April 9-13, 2012, before the Honorable Edward W. Miller. Solicitor Walt Wilkins, with Assistant Solicitors Betty Strom and George Campbell, represented the State. Public Defender John Mauldin and Susannah Ross, Esq., along with volunteers from the Washington D.C. law firm of Akin Gump, Mark McDougal, Esq., Conner Mullin, Esq., Katherine Creely, Esq., and Karen[1] Williams, Esq., represented Petitioner. The jury convicted Petitioner as charged. (R. p. 309, lines 16-22). The judge sentenced Petitioner to life imprisonment for the murder.[2] (R. p. 314, line 1). Petitioner appealed.

After full briefing, and oral argument, the South Carolina Court of Appeals affirmed, on May 21, 2014. (App. pp. 1-13). Petitioner sought rehearing, which the Court of Appeals denied on July 9, 2014. (App. p. 28). The Court of Appeals issued a substituted opinion that same day. (App. pp. 29-42).[3] Petitioner again petitioned for rehearing, which the Court of Appeals denied on August, 25, 2014. (App. p. 57). Petitioner filed a petition for writ of certiorari with this Court on September 24, 2014. This Return follows.

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[1] The transcript cover sheet reflects a typographical and/or scrivenor's error listing Ms. Williams as "Katherine." Ms. Williams stated her first name was "Karen."(R. p. 2, lines 17-18).

[2] The judge did not sentence Petitioner for kidnapping pursuant to S.C. Code § 16-3-910.

[3] Published *State v. Jenkins*, 408 S.C. 560, 759 S.E.2d 759 (Ct.App. 2014).

RESPONDENT'S STATEMENT OF FACTS

The jury convicted Petitioner of the murder Mekole Harris. The evidence at trial established that Petitioner, with wife Carmen Jenkins, together killed Ms. Harris. Petitioner and Carmen Jenkins then severed Ms. Harris' hands, feet, and fingers, and delivered those body parts to the homes of Sue Bostic and Judon Burnside as part of a scheme to gain the return of Grace Davis who had joined the Jenkins' intimate relationship. The following evidence places the events and scheme in some context.

On April 7, 2008, officers responded to a report of the receipt of a threatening letter and a garbage bag with unknown contents. Upon opening the bag, officers discovered a hand, foot, and severed toes. (R. p. 11, lines 12-24; p. 14, lines 13-23).

Sue Bostic had discovered the letter on her car windshield, and the bag next to her apartment door. She called the police. (R. p. 12, line 20 – p. 13, line 2; p. 17, line 12 – p. 18, line 18). Ms. Bostic had received another letter the week before. That letter was addressed to Grace Davis, indicated a demand for $10,000, that someone was "in trouble," that someone "had lost the protection of an organization" and that "if they didn't comply with the letter, ... bad things would happen to them." (R. p. 16, lines 6-13; p. 26, lines 6-12). Ms. Bostic's sister, Judon Burnside, had also received a strange letter demanding money, (R. p. 36, lines 9-24), and a bag was deposited at her home, as well. The bag at Ms. Burnside's home similarly contained body parts. (R. p. 50, line 23 – p. 54, line 15).

Further, both Ms. Bostic and Ms. Burnside received strange telephone calls to their homes prior to receipt of the body parts. Ms. Burnside testified that "some girl said that I know who writing the letter. Then she said, I got to go, I believe he done followed me." (R. p. 37, lines 9-24). The girl also referenced "Willie Davis." (R. p. 21, lines 13-18). Ms. Bostic testified

she understood "some woman was crying and going on" during the call to her home. (R. p. 19, line 23 – p. 20, line 21). Marquise "Meko" Burnside was in Ms. Bostic's home when the call came in. He testified the woman was "saying that somebody about to get killed. Saying that Willie Davis was involved." (R. p. 38, lines 5-10).

The common thread in these events is Grace Davis. Ms. Davis is Ms. Burnside's daughter, Ms. Bostic's neice, and Marquise's mother. (R. p. 15, lines 12-22; p. 35, lines 10-11). Ms. Davis had been married to Willie Davis. (R. p. 110, line 25 – p. 111, line 1). Ms. Davis' family was aware that Ms. Davis had been involved with Petitioner and his wife, Carmen Jenkins. The family did not approve. (R. p. 22, lines 16-25; p. 35, lines 7-25; p. 172, lines 9-24).

Ms. Davis explained the relationship at trial. She testified that she became involved with Petitioner in August 2007 after she had left her husband. (R. p. 111, line 5 – p. 112, line 22). Ms. Davis eventually met Carmen, and the three began an intimate relationship, exchanged vows and signed an "intimate covenant" to formalize their relationship. (R. p. 126, lines 7-13). They lived together with the Jenkins' children and the Davis children. (R. p. 120, lines 1-25; p. 163, line 15 – p. 164, line 8).

In late February 2008, DSS removed Ms. Davis' children, placing them in Ms. Bostic's home. (R. p. 127, lines 17-24; p. 175, lines 3-10). On March 15, 2008, in an attempt to get her children back, Ms. Davis left. (R. p. 128, line 2 – p. 129, line 15). Ms. Davis testified that as she left, Petitioner appeared with a machete in hand, but ultimately stated he could not kill her. (R. p. 130, line 3 – p. 131, line 3). Carmen Jenkins was also upset about her leaving, but Ms. Jenkins testified she understood the need to regain custody of the children. (R. p. 129, lines 9-11; p. 176, line 18 – p. 177, line 14).

Ms. Davis further testified that, during the time she was with the Jenkins, she and the Jenkins sought money from her father, Marvin Poole, and her father's money manager, Eric Harris. (R. p. 115, line 2 – p. 117, line 10; p. 141, lines 11-14). In April 2008, Mr. Poole also received a threatening letter addressed to Ms. Davis and containing a demand for $10,000. (R. p. 141, line 15 – p. 146, line 5).

Petitioner's wife, Carmen Jenkins, pled guilty to Ms. Harris' murder prior to Petitioner's trial. (R. p. 160, lines 2-7). As part of her agreement, and in hopes of reducing her fifty (50) year sentence, she testified at his trial. (R. p. 160, line 13 – p. 161, line 25). Ms. Jenkins testified that Petitioner was upset with Ms. Davis leaving, and began a plan to force her back. The plan included letters to Ms. Davis's family. (R. p. 177, line 16 – p. 179, line 6). Ms. Jenkins further testified that Petitioner brought Ms. Harris to the home on April 4th or 5th. Petitioner took Ms. Harris into a room separate from Ms. Jenkins. When he called Ms. Jenkins' to come into the room, Ms. Jenkins entered the room and found Ms. Harris naked and handcuffed. Petitioner advised Ms. Harris "that she's under arrest for prostitution and possession of crack." (R. p. 188, line 24 – p. 190, line 18). Ms. Harris agreed to help them in order to avoid possible incarceration. (R. p. 190, lines 18-24). Ms. Jenkins testified that Petitioner wrote a "script for her to read over the phone to Grace's family members." (R. p. 190, line 24 – p. 191, line 1). One of the "scripts" recovered from the home read, "Hi, my name is Mekole. I'm Willie's girlfriend," and goes on to discuss money. (R. p. 191, line 23 – p. 192, line 20). Ms. Jenkins testified that Petitioner later ordered her to kill Ms. Harris. She testified that she attempted to choke Ms. Harris, but lacked sufficient strength. Petitioner helped and eventually placed a bag over Ms. Harris' head. (R. p. 201, line 23 – p. 203, line 6). The Jenkins then took Ms. Harris' body into a bathroom at the home. Petitioner used a variety of tools, including a machete, to begin to sever

the hands, feet, and toes, storing them in containers. (R. p. 203, line 19 – p. 204, line 1; p. 206, line 19 – p. 208, line 9). Those severed parts Ms. Jenkins delivered to Ms. Bostic's home and Ms. Burnside's home, with letters, at Petitioner's direction. (R. p. 209, line 13 – p. 212, line 18). The torso and remaining body parts were disposed of separately in remote area. Ms. Jenkins testified that she and Petitioner packaged the remains, drove to the remote area in their van, and Ms. Jenkins set fire to the remains. (R. p. 208, line 8 – p. 209, line 10).

Investigators took fingerprints and DNA samples from the severed hands in an attempt to identify the victim. (See R. p. 47, lines 1-2; p. 79, line 16 – p. 80, line 3). The prints were matched to known prints of Mekole Michelle Harris. (R. p. 82, line 9 – p. 84, line 19). DNA samples from the hands, then identified as Ms. Harris' hands, were matched to samples from the feet, samples from the bathroom in Petitioner's home, and samples from a glove in Petitioner's van. (R. p. 266, line 8 – p. 267, line 7; p. 268, line 16 – p. 271, line 15). The investigation also revealed that an online credit application from April 4, 2008 in Mekole Harris' name was declined on April 9, 2008. All correspondence for the event, though addressed to Ms. Harris, reflected the Jenkins' home address, phone number, and e-mail. (R. p. 147, line 3 – p. 149, line 24; p. 150, line 15 – p. 153, line 25). The employment was listed as "Labor Finders." (R. p. 152, lines 23-25).

Vivian Young provided transportation for her boyfriend to his job at Labor Finders. She testified she saw Petitioner with Ms. Harris, whom she knew previously from school and from being around Simpsonville, in April 2008 at Labor Finders. On April 1, 2008, Ms. Harris was sitting on Petitioner's lap outside Labor Finders. On April 3, 2008, Ms. Young saw Petitioner with Ms. Harris in a bathroom at Labor Finders. Ms. Young testified that she never saw Ms. Harris again. (R. p. 102, line 23 – p. 109, line 21).

Ms. Jenkins, in exchange for dropping the notice of intent to seek the death penalty against her, eventually guided the officers to the remote area where she set fire to the remains at Petitioner's direction. (R. p. 209, lines 6-10; p. 219, lines 7-23). Officers recovered a number of burned artifacts and human bones. (R. p. 260, line 17 – p. 263, line 3).

At sentencing, Petitioner denied killing Ms. Harris, and stated he was simply guilty of helping his wife, Carmen Jenkins, clean up and dispose of the body. (R. p. 310, line 5 – p. 313, line 24).

ARGUMENT

I.

The Court of Appeals, reviewing this pre-*Logan* trial, correctly upheld the trial judge's denial of Petitioner's request to charge the *Edwards* "reasonable hypothesis" language in the circumstantial evidence charge as this Court has found the *Edwards* language confusing and directed that it should not be used; and, reasonably determined that the any error in failing to give a circumstantial evidence charge with language similar to that announced in *Logan* was harmless beyond a reasonable doubt.

Relevant Facts:

Applicant submitted the following request to charge:

Request No. 10:

> When the state relies on circumstantial evidence, you may not convict a defendant unless every circumstance relied on by the state is proven beyond a reasonable doubt, and all of the circumstances so proven are consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that the circumstances create a probability, even if it is a strong one. If, assuming the circumstances are true, there is a reasonable hypothesis which does not include the guilt of the accused, the proof has failed.
>
> State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989).

(R. p. 326).

Defense counsel "forcefully request[ed]" the charge, and argued "the recent case that dealt with the analysis of circumstantial evidence in the South Carolina Supreme Court ...

renews the ongoing debate, if you will, about the appropriateness of the Edward charge versus the Grippon charge." (R. p. 273, lines 5-20). The State objected to the request. (R. p. 275, lines 4-7). The trial judge declined to charge the language stating, "State v. Cherry clears that up." (R. p. 275, line 8). The trial judge instructed the jury as follows:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eye witness. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty.

(R. p. 281, line 10 – p. 282, line 5). [4]

After the judge's charge to the jury, defense counsel "took exception" to the requested language not being included. (R. p. 288, line 23– p. 289, line 4).

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[4] *See State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997). The language almost precisely follows the approved instruction in *Grippon*:

> There are two types of evidence which are generally presented during a trial-direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. at 83-84, 489 S.E.2d at 464.

In the Court of Appeals, Petitioner argued in light of recent decisions in this Court, particularly *State v. Hernandez*, 382 S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n.2 (2009) and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011), the *Grippon* charge is no longer sufficient. (FBOA, p. 13). He argued the failure to give the charge "violated [his] right to require the prosecution to prove his guilt beyond a reasonable doubt." (FBOA, p. 13). The State argued, as an initial matter, that the allegation the judge's charge offended a constitutional right was not preserved for review[5]; and, at any rate, the trial judge charged the current and correct law of the State. The Court of Appeals found the issue preserved as the reference to state law was sufficient "[g]iven the constitutional foundation on which our state's circumstantial evidence jurisprudence is based," and in resolving questionable preservation in favor of Petitioner. (App. p. 34, n.7). The Court of Appeals then resolved that failure to give the "reasonable hypothesis" charge was not error as this Court has disapproved the "reasonable hypothesis" language, and continues to "exclude[] the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan.*" (App. p. 38). The Court of Appeals further resolved, like this Court had in *Logan*, that "any error in the omission of other language from the [now announced] *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law." (App. p. 39).

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[5] Defense counsel requested the charge based on state law and argued the particular language requested was sanctioned by a change in state law. Counsel did not argue that the charge given was constitutionally infirm. Having failed to make the constitutional argument to the trial judge, the issue is procedurally barred from review. *See State v. McWee*, 322 S.C. 387, 391, 472 S.E.2d 235, 238 (1996) ("this issue is not preserved for review because at trial, appellant never cited any constitutional basis for his request"). *See also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). The procedural bar could support an alternative basis for denying relief. See Rule 220 (c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

Discussion:

Petitioner argues the Court of Appeals erred as the *Edwards* "reasonable hypothesis" language is not barred as burden shifting and this Court found in *Logan* that additional instruction on consideration of circumstantial evidence is necessary. (Petition, pp. 10-11). His argument lacks merit.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011), *quoting Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). In *State v. Cherry*, 361 S.C. 588, 601-602, 606 S.E.2d 475, 482 (2004), this Court held "that the recommended language in *Grippon* is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction." This Court approved that language once again in *State v. Logan*, 405 S.C. 83, 100, 747 S.E.2d 444, 452-453 (2013), though the Court announced that an additional charge (not containing the "reasonable hypothesis language" requested here) must be given if requested. Nevertheless, this Court denied relief in *Logan* finding no error in giving the *Grippon* charge, noting that the instructions when reviewed as a whole, "properly conveyed the applicable law," so that "any conceivable error was harmless beyond a reasonable doubt." 405 S.C. at 94, 747 S.E.2d at 449 and n. 8. Petitioner is essentially requesting relief under this Court's *Logan* precedent that Logan was not entitled to receive, and did not receive. In short, this Court has previously resolved relief was not warranted in *Logan.* It is not warranted here.

Moreover, the *Logan* charge is specifically tailored to a case relying upon circumstantial evidence. 405 S.C. at 99, 747 S.E.2d at 452 ("*to the extent the State relies on circumstantial evidence*, all of the evidence must be consistent with each other, and when taken together, point

conclusively to the guilty of the accused.") (emphasis added). Clearly the *Logan* charge is most applicable in cases where circumstantial evidence is center stage. *Id.* This is not such a case. To the contrary, Petitioner's wife testified in detail to Petitioner's direct involvement. The impact of the circumstantial evidence is not as keen in such a case. *See, for example, State v. Salisbury*, 343 S.C. 520, 525, 541 S.E.2d 247, 249 (2001) ("the direct evidence in this case is sufficient to establish the elements of the crime and the identity of the perpetrator such that the trial court did not abuse its discretion in refusing a circumstantial evidence charge").

At any rate, the trial judge gave the jury a current and correct charge on circumstantial evidence. He did not err in declining to give the disfavored "reasonable hypothesis" language as found in *Edwards*. Any conceivable error would be harmless beyond a reasonable doubt in these circumstances. The petition for certiorari on this issue should be denied.

II.

The Court of Appeals correctly upheld the trial judge's ruling that neither a motion to strike, nor a mistrial, nor a lengthy recess was warranted to allow time to review the victim's finger print analysis evidence where the victim's identity was not contested, particularly where defense counsel was aware of the finger print analysis for years prior to trial. [Petitioner's Questions II and III].

Relevant Facts:

Investigating officers used fingerprints from the severed hands to aid in the identification of the victim. (See R. p. 47, lines 1-2; p. 79, line 16 – p. 80, line 3). The prints were matched to known prints of Mekole Michelle Harris. (R. p. 82, line 9 – p. 84, line 19). DNA samples from the hands, then identified as Ms. Harris' hands, were matched to samples from the feet, samples from the bathroom in Petitioner's home, and samples from a glove in Petitioner's van. (R. p. 266, line 8 – p. 267, line 7; p. 268, line 16 – p. 271, line 15). Carmen Jenkins testified the individual she and Petitioner killed and subsequently dismembered in their bathroom was

Mekole Harris. (R. p. 189, lines 7 – p. 192, line 20; p. 201, line 22 – p. 204, line 3; p. 206, line 19 – p. 208, line 13; p. 226, line 4 – p. 229, line 23). Petitioner's challenge on appeal goes to the initial identification of the victim by the fingerprint impressions from her severed hands.

During pre-trial, defense counsel asserted they had received only a one page fingerprint report. Counsel complained they did not know if the expert(s) "simply used a computerized program to identify matches," but, if so, "we can't cross-examine AFIS, or a computer program." (R. p. 2, line 17 – p. 3, line 17).

The Solicitor noted their fingerprint experts "don't do a lengthy report stating, specifically what ridge matches what ridge," rather, they only report a match. (R. p. 3, lines 21-24). The Solicitor also noted that the experts would, of course, be available for cross-examination. (R. p. 3, lines 24-25). He further noted that "these witnesses have been available for four years" for the defense to contact, but, at any rate, he had "tripled checked" and found "[t]here's no reports other than the conclusory statements that were given to defense counsel that these knowns match these prints." (R. p. 4, lines 1-10).

Defense counsel again argued the one page report was "inadequate to cross-examine the witnesses," and requested the witnesses "bring any copies of the prints that they consulted in making their verification...." (R. p. 4, lines 17-21).

The Solicitor additionally stated the "fingerprint cards that have been in latent up until this morning," would be introduced in the trial and provided to the defense "[i]f they want to get their own expert while we are trying this case...." (R. p. 4, line 22 – p. 5, line 4). The trial judge, at that point, deemed the issue settled, with defense counsel receiving what was requested. (R. p. 5, lines 5-18). However, defense counsel pressed further and clarified that they were seeking notes of the comparison to ensure a computer generated program was not used as a program

could not be cross-examined. (R. p. 5, line 21 – p. 7, line 17). The defense further argued the fingerprint match led to the identity of the victim, the identification accepted for purposes of the DNA matches, all of which should be suppressed if the print identification is suppressed. (R. p. 8, line 1 – p. 9, line 22).

The Solicitor responded that the fingerprint expert did an examination and declared a match. The Solicitor added that the defense could cross-examine the expert, Jackie Kellet. (R. p. 9, line 24 – p. 10, line 3).

On the second day of trial, just prior to the State's fingerprint expert being called to testify, the defense requested the trial judge "determine the admissibility" *in camera* before the jury returned to the courtroom. Upon the judge's request for clarification, defense counsel asserted Petitioner did not wish to review the witness's qualifications, but to determine her trial testimony. Defense counsel stated: "We have no notes, no discovery at all other than the report." (R. p. 60, line 4 – p. 61, line 5). The solicitor noted that "the report is the result[]." (R. p. 61, lines 6-7). The judge allowed *in camera* examination.

Jackie S. Kellet, Captain of the Forensic Division, Greenville County Department of Public Safety, testified that she "used the AFIS, which is Automated Fingerprint Identification System ... a computerized database maintained by" SLED, as a "tool ... to search unknown prints or latent prints against a known database." (R. p. 64, lines 15-22). The captain explained the database simply "sends back a list," as many as is requested, in this case twenty-five, and a fingerprint examiner must determine if there is a match. (R. p. 64, line 15 – p. 65, line 5). Captain Kellet testified, at that point, "it's a mental observation that I use. We don't write anything down ... its going to be the same whether I do it two years ago or last month or today. Those points are still there in those prints." (R. p. 65, lines 17-22). Having prints from all ten

fingers to compare, Captain Kellet testified that she identified the prints as belong to Mekole Michelle Harris. (R. p. 65, line 23 – p. 67, line 19). She testified that AFIS did not match the prints, but merely provided her a pool of samples to draw from – only an examiner can declare a match. (R. p. 68, lines 14-24).

The defense objected to the testimony pursuant to Rule 703, South Carolina Rules of Evidence. (R. p. 74, lines 19-20). Defense counsel argued that the rule allows for the disclosure of the "facts or data in a particular case upon which an expert bases his opinion or inferences," and, since there were no notes to disclose, the witness should not be allowed to testify. (R. p. 74, line 21 – p. 75, line 5). The trial judge declined to exclude the testimony recognizing the defense's ability to cross-examine and impeach the witness, and argue those points to the jury. (R. p. 75, lines 6-14).

The State offered Captain Kellet as an expert in fingerprint analysis. The defense had no objection to her qualification. (R. p. 78, lines 3-7). She testified the prints from the severed hands matched the known prints of Mekole Michelle Harris. (R. p. 82, lines 9-17). On cross-examination, defense counsel asked how many of the twenty-five AFIS possible matches that she reviewed, to which the captain responded just one, as that one matched. (R. p. 85, line 22 – p. 86, line 1). She confirmed to defense counsel that she did not keep notes of her comparisons. (R. p. 87, lines 1-3). Defense counsel noted that the witness had a file with her and asked if the defense could examine the file before the witness was excused. (R. p. 87, lines 8-10). The trial judge sent the jury out. (R. p. 87, lines 20-25). At defense counsel's request, the trial judge also sent the witness out, subject to recall. (R. p. 88, lines 3-8).

Defense counsel argued there had been a "serious breach" in discovery, as the file contained three sheets that were not disclosed. When asked about potential prejudice, defense

counsel responded "had we had this in hand and had an opportunity to look at it, and, perhaps, raise some questions for cross-examination to support our objection" but they did not have such opportunity. (R. p. 89, lines 12-20). The Solicitor advised the Court:

> Mr. Mauldin filed motions regarding the fingerprint analysis, point by point analysis. I called Captain Kellet and conferred with her regarding what she had in her file. And I told Mr. Mauldin there may be some AFIS stuff in there, that's all I know. He said he didn't want it. So we had this conversation. And it's been available in latents for four years now. And all it is is - - what she just described is how she ran the fingerprints through AFIS and they got a list of 20 people to check. So it's not going to be introduced. And we never knew anything about it until he filed a motion making an issue with it. And I talked to Mr. Mauldin about it. I said you can have anything you want. I'm trying to track down everything we've got.

(R. p. 89, line 23 – p. 90, line 11).

Mr. Mauldin acknowledged speaking with the solicitor, and having the "one page that they had provided us." (R. p. 90, lines 12-14). The trial judge immediately thereafter took a "10-minute break," to allow for review of the documents and argument on prejudice. (R. p. 90, lines 15-17).

When the proceedings resumed, Defense counsel complained that had they had the AFIS results they may have been better prepared for cross-examination, and further stated:

> And here's why it's so important in the context of the case, Your Honor. As we laid out in our previous motion, this fingerprint evidence is the heart of the forensic case. They're only able to identify these remains as a result of these fingerprints. If they couldn't do this, they wouldn't have DNA, they wouldn't have serology, they wouldn't have anything. Our job is to challenge that evidence. And you can't challenge that evidence if we don't have information like this, which we've asked for repeatedly.

(R. p. 91, lines 7-22).

Counsel also complained that since they did not know what was not disclosed beforehand, "we can't be prepared to establish legitimate prejudice for it on the spot...." (R. p.

92, lines 22-23). Counsel ultimately moved to either strike the testimony or for the trial judge to grant a mistrial. (R. p. 94, lines 23-25).

The Solicitor asserted that the defense was aware of the process for "four years," specifically, they knew "there was an AFIS run. They have the report on that." (R. p. 95, lines 1-10). The only thing they did not have was the list of people for potential comparison, which they could have asked for. (R. p. 96, lines 3-6).

The trial judge noted that in multiple discovery conferences prior to trial in this matter, he was informed the State had given the defense "everything," and expressed that "it is important to produce all of the documents." (R. p. 96, lines 7-17).[6] He also noted that defense counsel had a point about arguing "prejudice on the spot without having an opportunity to mull it over and examine it." (R. p. 96, lines 19-21). The judge then considered the fact the expert testified that she did not use the remaining AFIS suggestions; rather, "she only examined one, and found the match." (R. p. 96, lines 21 –25). The judge denied the requested relief:

> ... even though there is this failure to disclose, I don't find that this failure to disclose rises to the level which would necessitate striking the testimony or the more onerous remedy of a mistrial.

(R. p. 96, line 25 – p. 97, line 4).

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[6] The trial judge also "cautioned the Solicitor's office that beginning now, that they make sure that every single document in your position [sic] or in law enforcement's possession has been produced. Because if this is a pattern, then some form of deterrence has to come into play." (R. p. 97, lines 4-9). The Solicitor duly noted the caution. Further, the Solicitor advised the trial judge of his pre-trial attempts to gather all necessary materials, and his intent to avoid any impropriety by revisiting the issue with his staff: "just so you know, on two separate occasions, we sent letters to every law enforcement witness, please, give us everything that you have in your file. And I will certainly review our policies with my office to make sure that this does not become a pattern. It's important to me as an officer of the court and as a longstanding prosecutor as well." (R. p. 97, lines 11-18). Respondent notes there was no allegation of a pattern. Respondent further notes that defense counsel, in making the motion, stated he was "not claiming any bad faith here. This is not a bad faith question on the part of either side." (R. p. 92, lines 18-19).

After the ruling, defense counsel requested, as alternate relief, "a delay in trial until we can have an opportunity to have an expert examine these records and determine whether or not it's appropriate that he testify to the invalid dependency on that particular report." (R. p. 98, lines 19-23). The Court likewise declined to delay finding "you can pursue that without delaying the trial." (R. p. 98, line 24 – p. 99, line 1). The trial judge again noted the witness "testified she only examined one, the top one, it was a match. There's been no question about that in her testimony." (R. p. 99, lines 4-6). The judge further reasoned "the significance of having someone else talk about maybe it's a better practice to examine the top two or top three as an attempt to attack the credibility of this witness or the Greenville County forensic division might be of some benefit, but I don't think it undermines the reliability of the testimony that's been presented or the findings of Captain Kellet." (R. p. 99, lines 7-13).

The documents at issue are three pages from Captain Kellet's file, which were copied and marked as Court's Exhibit 3 – a one page computer screen shot of the AFIS results, a worksheet showing one item with the name and general information for Mekole Michelle Harris, and copy of a print with similar information handwritten on the copy. (R. p. 99, lines 12-24; p. 321 [Court Exhibit 3]).

In the Court of Appeals, Petitioner argued the trial judge erred in not striking the testimony, granting a mistrial, or allowing a lengthy recess. (FBOA, pp. 20-21). He argued the evidence was material to impeach Captain Kellet on a "failure to examine more than one respondent print, the quality of the prints produced, and the likelihood that other respondent prints possessed the same unique identifying characteristics as the latent print." (FBOA, p. 20). Petitioner also asserted the failure to timely disclose denied an opportunity for counsel to retain

and/or consult with a fingerprint expert "to challenge Kellet's finding altogether based upon the AFIS results." (FBOA, p. 20).

The Court of Appeals found the record showed "for approximately four years prior to trial, [the] defense team was aware that fingerprints from the severed hands had been run through AFIS," and was offered access to the latent print section. (App. p. 41). Further, Petitioner did not contest the identity of the victim, so there could be no unfair prejudice to him. (App. p. 41).

Discussion:

Petitioner argues the Court of Appeals ruling should be construed as finding a failure to disclose material evidence. (Petition, p. 19). Further, he argues again that the failure to disclose prevented the opportunity to obtain his own expert to challenge the print. (Petition, p. 21). Petitioner fails, though, to address the critical finding that the prints at issue were used to identify the victim. His argument lacks merit.

The Court of Appeals ruling may not be fairly construed as finding a failure to disclose material evidence. While the trial judge found that the Solicitor's office failed to disclose the three pages from Captain Kellet's file, he found those documents were not material, *i.e.* there was no showing of a probability sufficient to undermine confidence in the proceedings. (See R. p. 99). Therefore, no violation of substance occurred. The Court of Appeals properly affirmed.

Rule 5(a)(D), SCRCrimP, provides, in relevant part, that upon request, "the prosecution shall permit the defendant to inspect and copy ... scientific tests ... or copies thereof ... which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial." The definition of "material" in Rule 5 has been found to be the same as in the *Brady*[7] line of cases. *State v. Moses*, 390 S.C. 502, 516, 702 S.E.2d 395, 402 (Ct.App. 2010).

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[7] *Brady v. Maryland,* 373 U.S. 83 (1963).

"Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *State v. Frazier*, 394 S.C. 213, 223-224, 715 S.E.2d 650, 655 (Ct.App. 2011) (*quoting United States v. Bagley,* 473 U.S. 667, 682 (1985)). The inquiry is not whether a different result would have obtained, but whether there is "'a probability sufficient to undermine confidence in the outcome'" of the proceedings. *Id.* Reversal may only be granted on a Rule 5 violation upon a showing of prejudice. *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (*citing State v. Trotter*, 317 S.C. 411, 453 S.E.2d 905 (Ct. App. 1995), *aff'd in result* 322 S.C. 537, 473 S.E.2d 452 (1996)). Where the trial record supports the trial judge's decision, the reviewing appellate court should affirm. *See State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct.App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.").

The critical facts are these: 1) the defense knew before trial that the fingerprint expert utilized AFIS to generate a pool of possible matches and, specifically, that the expert had "some AFIS stuff" in addition to the disclosed report, (R. p. 89, line 23 – p. 90, line 11); 2) the defense, before trial, declined production and/or copies of the "AFIS stuff," 3) AFIS does not match any print to any person for identification but is merely an investigative tool to select possible matches for comparison; 4) the AFIS possibilities at issue here, other than the first suggestion which was matched by actual comparison, were not evaluated or relied upon; and 5) the identification at issue is for the victim, whose identity was established by other evidence. In short, based on the

record in this particular case, there was no basis for finding the documents at issue material or that the failure to disclose was prejudicial.[8]

Clearly the defense was aware there was an AFIS run. Such information formed the basis for their pre-trial motions, and there is evidence in the record that the Solicitor specifically advised defense counsel of the AFIS materials. (R. p. 89, line 23 – p. 90, line 11). Even so, the AFIS materials were inconsequential in this setting.

The trial judge correctly found that the match opinion at issue was based on personal comparison. Captain Kellet did not rely on a match generated by a computer system. (R. p. 81, lines 9-15; p. 83, line 8 – p. 84, line 19). Moreover, Captain Kellet specifically testified that AFIS does not match prints. (R. p. 64, line 23 – p. 65, line 5; p. 68, lines 14-15). Given these facts, there could only be limited (if any) impeachment value from the AFIS document and print.

At the heart of the disclosure prejudice analysis is "whether the appellant's right to a fair trial has been impaired." *State v. Proctor*, 358 S.C. 417, 423, 595 S.E.2d 476 (2004) (*quoting State v. Taylor*, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998)). *See also United States v. Agurs*, 427 U.S. 97, 108 (1976) ("the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial"). The trial judge correctly noted the minimal value – perhaps impeachment concerning records, but not a challenge to the method or match of identification.

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[8] There is, in fact, questionable basis for finding a failure to disclose as the defense was aware before trial of the use of the AFIS database and an offer was made for the inspection of those documents; however, the trial judge found a failure but no prejudice. Therefore, this matter may be affirmed on the lack of prejudice alone. *See State v. Hughes*, 336 S.C. 585, 593, 521 S.E.2d 500, 504 (1999) (reviewing Rule 5 issue, "We need not determine here whether the report in question is exempt since we agree with the trial judge's ruling that appellant has shown no prejudice from the failure to disclose."). Further, though a *Brady* issue was not specifically raised below, because the materiality test is the same, any such issue would be without merit. *Id*, n.4.

Given the minimal value, if any, the failure to obtain paper copies could not have impaired the defense. *See Proctor*, 358 S.C. at 423-424, 595 S.E.2d at 479-480 (finding nondisclosure of DNA lab proficiency tests results was not material where information goes to proficiency only, and, even if probability estimate was reduced, the number would still be decidedly inclusive *of defendant's* profile). *See also Gilday v. Callahan*, 59 F.3d 257, 272 (1st Cir. 1995) (finding "no remediable *Brady* violation" where "the evidence here taken cumulatively sheds no new light on the crime or petitioner's involvement in it."); *United States v. Glaze*, 643 F.2d 549, 552 (8th Cir. 1981) (failure to disclose unrecorded inconclusive field test for drugs did not offend appellant's rights or prejudice his defense where formal testing results reported and disclosed).

Further, it should not be lost that the prints at issue are *the victim's prints*. There was no contest to the victim's identity. Further still, there was evidence in the record independent of the prints establishing the victim's identity – not the least of which was Carmen Jenkins' testimony specifically identifying the victim. (See generally R. p. 189, lines 7-15). Of note, the DNA testing corroborated Carmen Jenkins' description of the dismemberment and disposal of the body by linking the body parts and the blood in the home. Also, Vivian Young, who knew Ms. Harris from the Simpsonville area, testified she saw Ms. Harris with Petitioner at Labor Finders on April 1, 2008 and April 3, 2008, before the dismembered body parts were delivered on April 7, 2008. (R. p. 103, lines 4-16; p. 104, lines 2-14; p. 106, line 7 – p. 109, line 21; p. 11, lines 12-24). Even with the total discounting of the fingerprints match, identity of the victim was well established. *Compare State v. Feldman*, 604 A.2d 242 (N.J.Super.L. 1992) (AFIS relevant as

basis for identification and discoverable where AFIS operator determines if candidate's fingerprints match, and may be evidence related to *misidentification of defendant*).[9]

At any rate, the record well supports that the defense was aware that the fingerprint evidence would be introduced and had ample time to obtain their own expert, whether to challenge the match to victim's prints or the lack of notes.[10] *See generally Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2002) ("information that is not merely available to the defendant but is actually known by the defendant would fall outside of the *Brady* rule."). Moreover, the defense specifically knew, before trial, that the AFIS database was used in the initial process. This alone shows the lack of materiality for purposes of this inquiry. *Id. See also State v. Garris*, 394 S.C. 336, 347, 714 S.E.2d 888, 894 (Ct.App. 2011) (finding "the omission of Santiago's photos was not material because nothing indicates Garris was unaware of the extent of Santiago's injuries."). But critically, and as decided by the trial judge, the AFIS documents and prints that were not copied and provided to the defense simply did not go to any impeachment or defense. *See Boyd v. State*, 910 So.2d 167, 179 -180 (Fla. 2005) ("A list of potential matches, with no actual matches, was not material to Boyd's defense."); *Marshall v. Hedgepeth*, 2012 WL 1292493, *13 (E.D. Cal. 2012) (finding that AFIS is "a computerized system" and matches are made by expert comparison of prints to prints, not a computer generated match. Further, the court found: "No

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[9] In *State v. Feldman,* not only did the state court focus on the right to present evidence of third party guilt under their state law in considering the necessity of disclosure, the court also noted that the process at issue involved an "AFIS operator" who did a visual inspection of the prints before selecting the possible matches. 604 A.2d at 244. This process would appear to be different than the purely computer generated list of possibilities which is the case here.

[10] Again, the defense never contested Captain Kellet's qualification as an expert, and, in fact, had no objection to her being qualified as an expert at trial. (R. p. 77, line 24 – p. 78, line 7). Further, Petitioner admitted at sentencing that he knew the victim was Mekole Harris. (R. p. 312, lines 15-20). He challenged who had killed Ms. Harris, not the fact Ms. Harris was the victim. (R. p. 313, lines 6-24). Thus, identity should not have been an issue. Respondent submits the value of a competing expert is not readily discernible on this record.

federal court, let alone the Supreme Court, has ever held that, in the context of the confrontation clause, it was necessary to introduce testimony concerning the method of using AFIS."). Merely showing three pieces of paper were available does not establish materiality, or, for that matter, a violation of the duty to disclose. *See United States v. Agurs*, 427 U.S. at 106-108 ("there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor" and "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial"); *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (declining to find a *Brady* violation on information concerning an early lead where eyewitnesses were later found and provided identification: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."). Additionally, the lack of materiality and prejudice correctly guided the trial judge's decision regarding relief.

Rule (5)(d)(2), SCRCrimP provides for a variety of appropriate remedies concerning a failure to comply with the discovery dictates:

> ... the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. ...

The trial court also has discretion to declare a mistrial. *State v. Garris*, 394 S.C. at 345, 714 S.E.2d at 893. It is well established, however, that the court should fully exhaust other methods before declaring a mistrial. *Id. See also State v. Frazier*, 394 S.C. 213, 223, 715 S.E.2d 650, 655 (Ct.App. 2011) ("mistrial should not be granted unless absolutely necessary"). A defendant seeking such radical relief "must show error and resulting prejudice to receive a mistrial." *Id* (*citing State v. Council,* 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999)).

Here, the trial judge, in light of the limited impeach value (if any) of the information, fashioned an appropriate measure of relief in allowing the defense to receive paper copies of the three pages and taking a brief break to allow counsel an opportunity to review and consider what, if any, prejudice may be argued. *See State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423-424 (Ct.App. 1991) ("the trial judge did not abuse his discretion in not suppressing the statement for failure to respond" where "[t]he sanction the trial judge chose ... recessing the trial and affording Newell's counsel an opportunity to interview the officer to whom Newell allegedly made the incriminating oral statements, was an appropriate sanction under the circumstances.") (*citing State v. Patterson,* 290 S.C. 523, 351 S.E.2d 853 (1986), *cert. dismissed, sub nom. Patterson v. South Carolina,* 482 U.S. 902, 107 S.Ct. 2490, 96 L.Ed.2d 382 (1987)). The three pages, (available for this Court's review at R. pp. 321-323), did not require longer to adequately consider.

In short, the defense's argument was constrained by the limited value of the documents, not the limited time for review. Further, Petitioner's argument that time was necessary to obtain an expert is contradicted by other actions of the defense. As noted above, the defense knew that the prints had been identified, and no expert was presented to challenge the identification. (See R. p. 98, lines 10-23). It seems illogical that an expert would not be warranted for attacking the actual match, but would be necessary to establish that other prints came close, or that the report was insufficient.[11] Petitioner has failed to show prejudice sufficient to warrant striking the

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[11] Of course, whether the report was sufficient could have been challenged by a defense expert (assuming such an expert would disagree with the sufficiency of the report) without the AFIS listing, worksheet with the victim's general information, or the copy of the print card. Respondent notes, however, that the second fingerprint expert who testified at trial also testified she similarly did not take notes. (See R. p. 264, line 16 – p. 265, line 19). At any rate, the fact the assertion of the possibility of impeachment *based on the sufficiency of the disclosed report* was the focus of the defense request for additional time after receipt of the AFIS listing supports

testimony on victim identification where identification was not at issue, granting a mistrial on such, or even a "lengthy" recess. Petitioner has shown no error in the Court of Appeals' opinion on this matter. The petition for certiorari on this issue should be denied.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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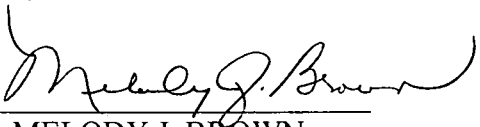
BY: 
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that further delay was unnecessary as *the existence of the report was known well before trial.* (See R. p. 98, lines 19-23, defense argument after disclosure and review: "we're asking for a delay in the trial until we can have an opportunity to have an expert examine these records and determine whether or not its appropriate that he testify to the invalid dependency on that particular report.").

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

On Petition for Writ of Certiorari to the South Carolina Court of Appeals
Opinion No. 5232 (re-filed July 9, 2014)

The State.....Respondent,

v.

Clarence Williams Jenkins.....Petitioner.

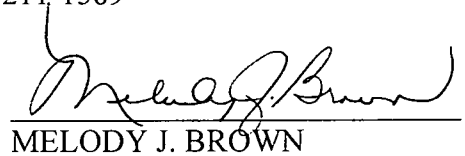
Appellate Case No. 2014-002046

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two copies of 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
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 3rd day of November, 2014.



MELODY J. BROWN
Senior Assistant Attorney General
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ALAN WILSON
ATTORNEY GENERAL

November 3, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Clarence Jenkins
Appeal from Greenville County
Appellate Case No. 2014-002046

Dear Mr. Shearouse:

Enclosed please find the original plus six (6) copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv
Enclosures

cc: Susan B. Hackett, Appellate Defender
The Honorable William W. Wilkins, III, Thirteenth Circuit Solicitor
Trisha Allen, Victim Services