

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

SC Court of Appeals

Case No. 2013-002391

The State of South Carolina, Respondent,

v.

Justin McBride, Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Argument2

THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION
IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN
AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT
STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION
WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL
TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS
FOR DEFENDANT MCBRIDE3

ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE
CIRCUIT COURT’S EVIDENTIARY RULINGS AND CONFUSING
AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE’S
DUE PROCESS RIGHTS..... 4

Where Law Enforcement Lost Key and Potentially Exculpatory
Evidence Without Explanation and Contrary to Admitted
Investigatory Norms, Due Process Was Violated, or At a
Minimum, Required That a Spoliation Charge Be Given to the
Jury. 4

Due Process and Rule 5 Required Exclusion of the Photograph
of the Victim Where The “Photograph” Was Provided to Defense
Counsel as a Black Sheet of Copy Paper, Not as the Color
Photograph Introduced Into Evidence, and Where the Actual
Color Photograph Was Not Even in the Solicitor’s File to be
Reviewed by Defense Counsel Prior to Trial. 10

THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY
INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE
CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1). 11

DEFENDANT’S MIRANDA RIGHTS WERE VIOLATED REQUIRING
EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY
MCBRIDE TO LAW ENFORCEMENT. 12

Conclusion 13

TABLE OF AUTHORITIES

CASES

<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988)	6, 7, 9
<i>California v. Trombetta</i> , 467 U.S. 479 (1974)	5, 6, 7
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964)	12
<i>State v. Batson</i> , 261 S.C. 128, 198 S.E.2d 517 (1973)	8
<i>State v. Cheeseboro</i> , 346 S.C. 526, 552 S.E.2d 300 (2001)	5, 6

STATUTES AND RULES

Rule 5, SCRCrimP	11
S.C. Code § 16-3-651 (2008)	11
S.C. Code § 16-3-655 (2008)	11
S.C. Code § 63-19-1210	3

CONSTITUTIONAL PROVISIONS

S.C. Const. Art. I § 3	4
S.C. Const. Art. I § 14	4
U.S. Const. amend. V	12
U.S. Const. amend. VI	4
U.S. Const. amend. XIV	4

OTHER SOURCES

Merriam-Webster Online Dictionary, http://www.merriam-webster.com	11
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT LACK SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, DO THE RELEVANT STATUTES PERMITTING THE EXERCISE OF SUCH JURISDICTION, WITHOUT A CASE-SPECIFIC ANALYSIS, FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE?
- II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, DID THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATE MCBRIDE'S DUE PROCESS RIGHTS?
 - A. Did Law Enforcement's Losing Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Violate Due Process, or At a Minimum, Require That a Spoliation Charge Be Given to the Jury?
 - B. Did Due Process, or Rule 5, Require Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial?
 - C. Did The Circuit Court Err in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750?
 - D. Were McBride's Due Process Rights Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination?
- III. WAS THE EVIDENCE PRESENTED BY THE STATE LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1)?

IV. WERE DEFENDANT'S MIRANDA RIGHTS VIOLATED, REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT?

ARGUMENT

Appellant, Justin McBride, provides this reply brief to address issues raised by the Respondent and to clarify the arguments provided in Appellant's Initial Brief. To the extent Appellant believes the issues were thoroughly addressed in his Initial Brief, he does not repeat or rehash those issues here, but relies on the Initial Brief for his position on the same.

This appeal raises a number of serious issues that are at the core of the process due to those who face criminal charges in our judicial system. Appellant's Initial Brief addressed legal questions regarding the proper treatment of juveniles in our criminal justice system. This case also raises significant issues regarding the handling of evidence and the fact that the State was permitted to introduce a photograph of evidence that was lost by the State, that was not available to Appellant, and which evidence could have exculpated him. This case does not present a mere loss of evidence, or a mere inability of a defendant to access evidence that may have excluded him as the perpetrator. On the contrary, this case presents a situation where evidence was photographed, eventually received by but then badly handled by law enforcement, and then lost while in the care of an officer who previously lost evidence. Then at trial – despite the inability of Appellant ever to see or analyze the evidence – a photograph of that very same piece of evidence was admitted into evidence, with testimony making speculative

statements as to what appeared in the photograph. This testimony and the photograph were admitted despite the State's actions depriving Appellant access to the shirt depicted in the photograph. This situation is even more egregious when it is clear that the entirety of the State's case rested on the credibility of the accuser and that the missing evidence – based on that accuser's own statements – would either show that the accuser was or was not accurately relaying what happened.

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE.

It is undisputed that McBride was only sixteen (16) years old at the time of the alleged crime. As explained in Appellant's Initial Brief, this matter should have been initiated in the Family Courts of this State. In any event, if the Circuit Court was going to retain jurisdiction, the circuit judge electing to exercise jurisdiction over a trial like this one is required to "issue an order to that effect." S.C. Code § 63-19-1210(6). The Circuit Court Judge entered no such order.

The failure of the Court to consider whether a trial in the Circuit Court was appropriate for this minor defendant, deprived McBride of the protections our statutory scheme provides to him as a minor facing these serious charges. The statutes addressing the treatment of children should be read together to provide some required analysis that trial as an adult is

appropriate. Some procedure is required before the circuit court can exercise jurisdiction over a child who would otherwise be governed by the children's code, juvenile justice and the specialized family courts.

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE'S DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; see also S.C. Const. Art. I § 3. As part of that guaranteed Due Process, the Confrontation Clause provides that a defendant in criminal cases "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. Art. I § 14. Inherent in the process due such a defendant, the State cannot be permitted both to rely on selective, surprise photographs of missing evidence, while depriving the defendant access to that evidence. And, inherent in the Confrontation Clause's protections is the right to relevant and thorough cross-examination of witnesses.

In this case, the Circuit Court erred in a number of evidentiary rulings and decisions, resulting in insufficient procedural safeguards and violations of due process. Those errors are addressed in Appellant's Initial Brief and are further discussed, as necessary, here.

A. Where Law Enforcement Lost Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Due Process Was Violated, or At a Minimum, Required That a Spoliation Charge Be Given to the Jury.

In a case such as this one – a case that turns on the credibility of the accuser -- the failure of law enforcement even to collect the shirt the victim was wearing when they arrived on the scene created an impossible situation for Appellant. (R. Vol. II pp. 189-191.) The alleged victim's statement made it clear that if the events happened as she claimed, semen would be found on the shirt she was wearing. Critical to the defense of any offense such as this one – which pits one person's statement over another's – is any evidence that could bolster or disprove one of those statements. If the shirt was available for Appellant and no semen was present on the shirt, the likelihood that a jury would have taken the word of the alleged victim is incredibly low. This conclusion is particularly clear when considering the standard of proof by which an accused guilt must be determined.

Admittedly, the standards governing lost evidence create some frustration for Appellant where Appellant may be required to show either that the State acted in bad faith or that the lost evidence had exculpatory value. State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). This standard, however, was developed as one means of determining whether the State failed to fulfill its constitutional duty to preserve evidence.¹ “[T]hat duty is limited to evidence that might be expected to play a significant role in the suspect's defense.” California v. Trombetta, 467 U.S. 479 (1984). This materiality standard is met where the evidence possesses “an

¹ Though addressing post-conviction relief proceedings, the statutory scheme of this State fully recognizes the importance of preserving physical evidence in cases where it may serve to prove one's innocence. See, e.g., S.C. Code §§ 17-28-30, 17-28-70, 17-28-300 *et seq.*

exculpatory value that was apparent before the evidence was destroyed,” and where the evidence is “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Id. (citations omitted). In South Carolina, if either of these tests is met, the defendant should have had access to the now lost evidence in order to comport with due process and to provide a level of fundamental fairness required in criminal trials. See, e.g., Cheeseboro, 346 S.C. at 538-39, 552 S.E.2d at 307.

The key distinction between earlier cases discussing lost evidence and the situation that unfolded during the trial of Appellant is this: the State did not merely lose the evidence such that neither side had access, the State photographed the evidence, admitted that photograph into evidence, was permitted to introduce testimony as to what substance appeared on the shirt in the photograph (deodorant) all in an attempt to bolster the accuser’s credibility while Appellant remained unable to provide any defense to that testimony or to effectively cross-examine the witness as to what did and did not exist on the shirt.

The State, in its Initial Brief, relies in part on Arizona v. Youngblood, 488 U.S. 51 (1988). Though that case does discuss the general standard for addressing lost evidence, key factual distinctions exist. First, the trial court in Youngblood actually gave a spoliation instruction to the jury, providing some guidance to them for their consideration of the government’s failure to preserve the evidence. This spoliation charge permitted the jury in that case

to consider the circumstances of the lost evidence under the proper legal standard. Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring) (wherein Justice Stevens makes it clear he is concurring in the Court's decision in large part due to the spoliation instruction and the jury's ability to consider this issue). Here, the jury was not given that option as the request for a spoliation charge was denied.

At its most basic level, due process includes the right to defend one's self and to confront one's accuser. Fundamental fairness requires that a defendant "be afforded a meaningful opportunity to present a complete defense." Trombetta, 467 U.S. at 485. The State simply cannot be permitted to refer to and rely on photographs of physical evidence without ever giving the defense that actual physical evidence. The lack of access to this evidence not only prevented Appellant from having it analyzed for the presence of any substances – deodorant, semen or otherwise – but also limited his ability to cross-examine his accuser on her accusations.

The facts of this case are akin to a murder trial where the knife allegedly used to commit the murder is photographed and then lost. The defendant is denied access to the knife. The prosecutor then introduces a photograph of the knife (a photo not seen by defense counsel until trial) and presents testimony that a dark substance on the knife is blood. Not having had access to the knife, the defendant has little or no opportunity to cross-examine the witness on the purported substance on the knife or to present evidence in his defense that the substance is not blood or is not either his or

the victim's blood. It is difficult to conceive how one can defend himself under such circumstances. But even this troubling hypothetical lacks the added problems of a no corroboration jury instruction in the absence of an instruction on spoliation.

With absolutely no explanation, the shirt evidence in this case went missing. (R. Vol. II pp. 260-263.) Also without explanation – and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue – the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (R. Vol. II pp. 260-263.) And, that same officer, who was the evidence custodian, admittedly lost evidence before. (Respondent's Brief at 9.) The jury, at a minimum, should have been instructed on and been permitted to consider whether this history of evidence handling and the handling of the evidence in this case rose to the level that an inference should've been drawn against the State given the total and unexplained disappearance of the accuser's shirt.

It is true, as the State claims, that spoliation charges should be limited to "the most unusual of circumstances." (Respondent's Brief at 16 (citing State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973))). This case presents this most unusual of cases: police did not collect key evidence but instead relied on the accuser's family to maintain it, bring it to a forensic interview, then the same family transported it to the police, who then failed to send it for testing and lost it, all while the prosecutor relied on a photograph of just part of the shirt. This is certainly a most unusual of circumstances. The

Supreme Court also understands, in serious circumstances like this, that spoliation charges may be the only avenue to address lost evidence to ensure a fair trial for the defendant. See Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring).

This is also not the typical lost evidence case. The value of the shirt to this case was obvious. The Solicitor relied on a photograph of the shirt to claim that deodorant appeared to be present on one shoulder. No photographs show the presence of any other substance on the shirt and the photograph did not encompass the entire shirt such that Appellant himself could have relied on it; nor was there any way for Appellant to cross-examine witnesses on what substance actually appeared (or didn't appear) on the shirt.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (R.Vol. II pp. 264-265), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearance of key evidence.

It is the combination of the loss of the evidence, the permitted introduction of speculation that a photograph of that same lost evidence showed Appellant's deodorant, and the failure of the trial court to give a spoliation instruction that together violated the guaranteed fundamental

process the Due Process Clauses of the federal and state constitutions require.

Based on the totality of these circumstances, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence² or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

B. Due Process and Rule 5 Required Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial.

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (R. Vol I p. 150-152.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from

² Further review of the jury instructions in their totality, in the light of the lost evidence, demonstrates that the combination of the refusal to instruct on spoliation while providing instructions on the fact that an accuser's statement does not require corroboration, an issue discussed further in Appellant's Initial Brief, gave the benefit of the doubt to the State and the accuser. This situation is counter to the fundamental fairness required by the Due Process Clause and afforded to all criminal defendants.

McBride) on the shoulder.³ Defense counsel did not see this photograph until the first day of trial. (R. Vol. I pp. 150-151.) Indeed, the Solicitor stated that she “got the color photographs this morning.” (R. Vol. I p. 151, lines 11-19.) Not only did permitting use of this photo violate McBride’s due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

The Circuit Court admitted that things like the previously undisclosed photograph “bother judges immensely.” (R. Vol. I p. 163, lines 2-5.) The judge elaborated as follows: “I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute.” (R. Vol. I p. 163, line 25 to p. 164, line 2.) Nonetheless, the judge allowed the photo. (R. Vol. I p. 163.)

The State used this surprise evidence, a photograph of evidence the State previously lost, selectively to bolster the alleged victim’s testimony.⁴ This use was improper and violated McBride’s fundamental Due Process rights.

III. THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1).

The jury convicted McBride of first degree criminal sexual conduct with a minor in violation of S.C. Code § 16-3-655(A)(1). “Sexual battery” in this case required evidence of “fellatio,” S.C. Code § 16-3-651(h), or “oral

³ The photos did not show, nor did anyone claim they showed, any evidence of semen on the shirt.

⁴ Had law enforcement kept and tested the shirt for all substances, as was normal procedure, no photo would have been necessary.

stimulation of the penis." Merriam-Webster online dictionary (<http://www.merriam-webster.com/medical/fellatio>). The alleged victim's own recitation of events involved insufficient evidence of oral stimulation of Appellant's penis. (R. Vol. I pp. 88-89; see also R. Vol. I pp. 113-114.)

Defense counsel moved for, and should have been granted, directed verdict on this issue.

IV. DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED
REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS
MADE BY MCBRIDE TO LAW ENFORCEMENT.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V. A very brief Jackson v. Denno, 378 U.S. 368 (1964) hearing was held before the Circuit Court. (R. Vol. I pp. 18-45.) The Circuit Court excluded a portion, but not the entirety of McBride's statement. This ruling is legally perplexing. The statement was either given freely and voluntarily or it was not.

As the Circuit Court explained, "I just don't believe that someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation." (R. Vol. I p. 45, lines 14-17.)

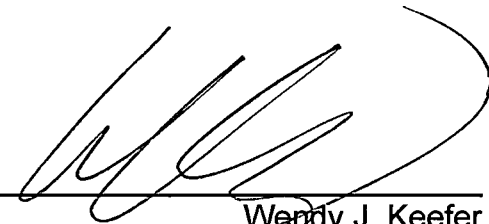
McBride, a minor at the time, had only one option -- to leave his home and go somewhere else. A sixteen year old, with no prior criminal history, cannot reasonably have been expected to know he could refuse to speak to

the officers. Just as the Circuit Court excluded a portion of the statement, the entire statement should have been excluded, as well as any reference to it.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's Initial Brief, Appellant Justin McBride respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,



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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Final Reply Brief on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on 6-25-15, 2015, addressed to attorneys of record, David Spencer and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and Ernest Adolphus Finney, III at 215 N. Harvin Street, Sumter, South Carolina 29150:



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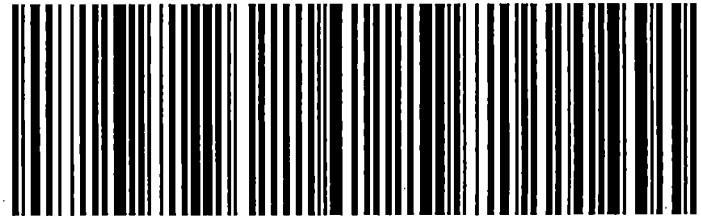
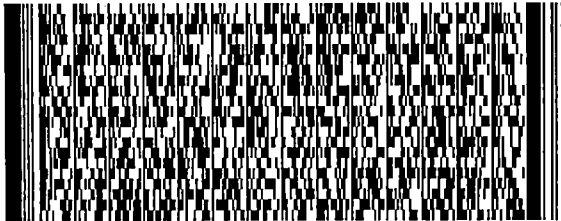
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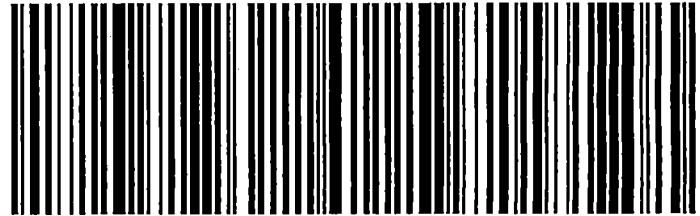
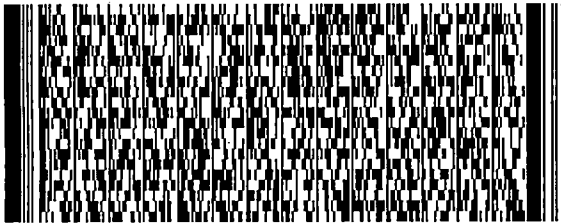
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