

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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FEB 24 2016

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/Petitioner.

APPELLANT/PETITIONER'S  
PETITION FOR REHEARING

Appellant/Petitioner, Justin McBride (hereinafter "McBride") respectfully requests this Honorable Court rehear and reconsider its decision, filed February 17, 2016, in the above-captioned appeal.

On appeal, McBride raised a number of issues, particularly as it relates to the admission of evidence and inability of McBride fully to cross-examine witnesses.

The Court's February 17th opinion correctly states the law on these issues but fails to consider the totality of the circumstances and the overall impact of the trial court's erroneous decisions in determining whether McBride's Due Process rights were violated.

This is a unique case. Specifically as it relates to the missing shirt of the alleged victim, this is not merely a case where the State has destroyed, lost or misplaced evidence. Instead, the State lost evidence that “possessed an exculpatory value apparent,” State v. Cheeseboro, 552 S.E.2d 300, (S.C. 2001), to any reasonable person (i.e., the shirt either had or did not have the evidence of the crime that the alleged victim claimed would be found there) **AND** was able to use a photo of that very same evidence **AND** to elicit testimony about what was physically shown on that piece of evidence.

“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.” State v. Hornsby, 484 S.E.2d 869 (S.C. 1997) (citing 21 Am.Jur.2d, Criminal Law § 640 (1981)). As explained in McBride’s original briefing to this Court, contrary to the straightforward missing evidence case, this case involves an additional step by the State and permitted by the trial court that requires the conclusion that fundamental fairness was lacking during the trial:

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.

McBride Final Reply Brief, pp. 7-8. The trial court's decision to permit any reference to the shirt, especially the introduction of a photograph of that shirt, was a clear error rising to an abuse of discretion and violating McBride's Due Process rights.

Similarly, the Court failed fully to appreciate the totality of the circumstances surrounding the statement of McBride. McBride was under the age of 18 and was questioned by officers in his home with no alternative location to which to retreat should he have desired to do so. Nor were the circumstances such that he would have believed he had any option but to speak with officers. And, McBride disagrees that this issue was not preserved.

For the foregoing reasons, McBride respectfully requests a rehearing in this matter to fully consider whether he was granted the Process he is constitutionally Due and fully to reconsider the issues raised in this appeal.

February 23, 2016



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Via UPS 2-Day

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: The State of South Carolina v. Justin McBride  
Appellate Case No. 2013-002391

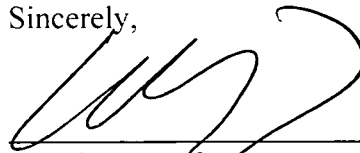
Dear Clerk:

Enclosed for filing please find an original and six copies of Appellant/Petitioner's Petition for Rehearing, along with Proof of Service of same, in the above-referenced case.

By copy of this letter I am serving same on counsel for the Respondent.

I would greatly appreciate your returning filed copies to me in the enclosed, stamped return envelope. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "WJ Keefe", is written over a horizontal line.

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PROOF OF SERVICE

I certify that I have served the Appellant/Petitioner's Petition for Rehearing, by depositing a copy of it in the United States Mail, postage prepaid, on February 23, 2016, 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.



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