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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2016-001335

THE STATE,

RESPONDENT,

VS.

JUSTIN MCBRIDE,

PETITIONER.

REPLY TO THE
STATE'S RESPONSE

JUSTIN MCBRIDE, #357684
SCDC (L.C.I.) F5D-228
990 WISACKY HIGHWAY
BISHOPVILLE, S.C. 29010

PETITIONER, SELF REPRESENTED

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I N D E X

Table of Contents: i
Table of Authorities: 1
Questions Presented for Review: 1
Statement of Case: 2
Statement of Facts: 2
Arguments:

- I. Due process was violated when law enforcement lost key and exculpatory evidence contrary to admitted investigatory norms or at a minimum required that a spoliation charge be given to the jury. 5
- II. Due process and RULE 5 required exclusion of the photograph was provided to defense counsel as a black sheet of copy paper not as a colored 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. 7
- III. McBride's due process rights were 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, confusion the jury, and elevating the importance of one witness's testimony over others in contravention of McBride's right against self incrimination. 9

Conclusion: 11
Certificate of Service

TABLE OF AUTHORITIES

UNITED STATES CASE LAW:

- KAUFMAN V. U.S. 394 U.S. 217, 22 L.E.2d 227, 89;
- U.S. V. AGURS, 427 U.S. 97, 112-114 (1976);
- U.S. V. BAGLEY, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985);
- U.S. V. GRIFFIN, 765 F.2d 677 (7th Cir. 1985);
- U.S. V. FREDERICK, 78 F.3d 1370 (9th Cir. 1996);

S. CAROLINA CASE LAW:

- STATE V. STUBBS, 416 S.C. 493, 797, S.E.2d 480 (2016).

OTHER AUTHORITIES:

- ARIZONA V. YOUNGBLOOD, 428 U.S. 51 (1988);
- BRADY V. MARYLAND 373 U.S. 83 (1963);
- CALIFORNIA V. TROMBETTA 467 U.S. 479 (1984);
- KYLES V. WHITLEY, 514, U.S. 419 (1995);
- NAPUE V. ILLINOIS, 360 U.S. 264 (1959).

QUESTIONS FOR REVIEW

- I. DID THE COURT OF APPEALS ERR IN HOLDING LAW ENFORCEMENT LOSING KEY AND EXCULPATORY EVIDENCE WITHOUT EXPLANATION AND CONTRARY TO ADMITTED INVESTIGATORY NORMS, VIOLATING DUE PROCESS OR AT A MINIMUM REQUIRED THAT A SPOILIATION CHARGE BE GIVEN TO THE JURY?

II. Did the Court of Appeals err in finding no reversible error in the trial Court's ruling regarding petitioner's Motion to Suppress the color photographs?

III. Did the Court of Appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated?

STATEMENT OF CASE

December 2010, the Williamsburg County Grand Jury indicted Petitioner Mr. McBride for one count of criminal sexual conduct (CSC) with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree.

March 1, 2012, the Williamsburg County Grand Jury reindicted with the same charges: indictment no.: 2010-GS-45-0283.

October 28, 2013, Mr. McBride proceeded to jury trial before the Honorable John C. Hayes III. Attorney Derrick Mobley represented Mr. McBride at trial. Solicitor Kimberly Barr prosecuted the case for the state. The jury returned verdicts of guilty of criminal sexual conduct with a minor in the first degree and not guilty of assault with intent to commit criminal sexual conduct with a minor in the first degree.

STATEMENT OF FACTS

McBride is the cousin of the alleged victim in this case (Tr. 80) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (Tr. 91)

After returning from school on the school bus, the alleged victim found her mother was not at home. (Tr. 91) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (Tr. 91-93) In any event, she ended up at McBrides's house. (Tr. 93) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (Tr. 101) At some point after returning home - again the timeline is not clear - she disclosed some incident with McBride, her cousin. (Tr. 103, 107) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (Tr. 103, 259-260)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (Tr. 178-179) After getting the alleged victim's statement, the officer spoke with McBride. (Tr. 180) This conversation occurred in McBride's home. (Tr. 181) Two additional uniformed officers were also present during the questioning of McBride. (Tr. 181-182) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (Tr. 35-36, 181-182) The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (Tr. 37, 191)

McBride denied the actions described by the alleged victim. (Tr. 42, 183-184) His version of events was, at all times, different from the alleged victim and consisted of no wrongdoing. (Tr. 183-184) A portion of his statement - provided without being informed of his Fifth Amendment rights - was used against him at trial. (Tr. 330-333)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (Tr. 95, 99, 102-104, 130-132, 149) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (Tr. 95, 100-101) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (Tr. 97-98)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (Tr. 177, 223, 269) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (Tr. 153-155, 187, 271) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (Tr. 186)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (Tr. 200, 247) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (Tr. 247-248) The shirt was never tested to determine the presence either of semen or deodorant. (Tr. 80, 199-200, 270, 351) In fact, the shirt was never sent to SLED for any testing and was lost. (Tr. 275) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (Tr. 161, 276) The police also never tested any materials from McBride, such as his deodorant. (Tr. 213, 251) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (Tr. 277)

Despite this lack of evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor based on the State's claim that oral sex occurred. (Tr. 375-378.) This verdict was unsupported by the evidence and followed several erroneous evidentiary decisions of the Circuit Court, along with confusing jury charges, violating McBride's Due Process rights. McBride, only sixteen at the time of the incident, was sentenced to 25 years without parole.

ARGUMENT 1

DID THE COURT OF APPEALS ERR IN HOLDING LAW ENFORCEMENT, LOSING KEY AND EXCULPATORY EVIDENCE WITHOUT EXPLANATION AND CONTRARY TO ADMITTED INVESTIGATORY NORMS, VIOLATING DUE PROCESS OR AT A MINIMUM REQUIRE THAT A SPOILIATION CHARGE BE GIVEN TO THE JURY?

PETITIONER CONTINUES TO MAINTAIN CERTAINTY THAT A CONSTITUTIONAL ERROR WAS RENDERED IN NOT ALLOWING A SPOILIATION CHARGE TO BE GIVEN TO THE JURY, AND DENYING THE PETITIONER'S DISMISSAL BASED ON LOST EVIDENCE THAT HAD EXCULPATORY VALUE. "THE PROPER STANDARD OF MATERIALITY OF UNDISCLOSED EVIDENCE, AND THE STANDARD APPLIED BY THE TRIAL JUDGE, IN THIS CASE, IS THAT, IF THE OMITTED EVIDENCE CREATES A REASONABLE DOUBT OF GUILT THAT DID NOT OTHERWISE EXIST, CONSTITUTIONAL ERROR HAS BEEN COMMITTED." SEE UNITED STATES V. AGURS, 427 US 97, 112-114 (1976). THE MISSING SHIRT CREATES A REASONABLE DOUBT OF GUILT BECAUSE THERE WAS NO SEMEN STAIN IN ANY OF PHOTOGRAPHIC EVIDENCE AS ALLEGED.

CALIFORNIA V. TROMBETTA, 467 U.S. 479, 967 US. 488 (1984), "DUTY TO PRESERVE EVIDENCE MUST BE LIMITED TO EVIDENCE THAT MIGHT BE EXPECTED TO PLAY A SIGNIFICANT ROLE IN THE SUSPECT'S DEFENSE."

IN YOUNGBLOOD, SAMPLES WERE COLLECTED, THEN LOST. THE EVIDENCE WAS DEEMED MOST LIKELY INCUPIATORY. IN PETITIONER'S CASE, THE SHIRT THAT WENT "MISSING" WAS EXPECTED TO PLAY A MAJOR AND SIGNIFICANT ROLE IN THE DEFENSE OF THE PETITIONER. TO RISE TO THE LEVEL OF PLAIN ERROR, THE CLAIMED ERROR MUST NOT SERIOUSLY AFFECT A DEFENDANT'S SUBSTANTIAL RIGHTS, BUT IT MUST ALSO HAVE AN UNFAIR PREJUDICIAL IMPACT ON THE JURY'S INSTRUCTIONS. (EMPHASIS ADDED). ARIZONA V. YOUNGBLOOD
488 U.S. 51, 58 (1998).

THE PREJUDICIAL EFFECT FAR OUTWEIGHED ANY PROBATIVE VALUE. THE JURY MUST HAVE SUFFICIENT EVIDENCE TO HAVE PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT. LAW ENFORCEMENT WAS NEGLIGENT BECAUSE THEY FAILED TO PRESERVE EVIDENCE THAT WAS CRUCIAL IN DEFENDANT'S EXONERATION. PETITIONER DID NOT ALLEGED BAD FAITH BECAUSE LAW ENFORCEMENT'S NEGLIGENCE WAS FAR GREATER, THAN JUST THAT. AT THE VERY LEAST THE TRIAL COURT SHOULD HAVE GIVEN THE JURY A SPOILIATION CHARGE, SO THAT THE JURY WOULD NOT BE MISLEAD DURING PETITIONER'S TRIAL.

ARGUMENT II

DID THE COURT OF APPEALS ERR IN FINDING NO REVERSIBLE ERROR IN THE TRIAL COURT'S RULING REGARDING PETITIONER'S MOTION TO SUPPRESS THE COLOR PHOTOGRAPHS?

THE TRIAL COURT, IN PETITIONER'S TRIAL, ERR IN FAILING TO WEIGH THE PROBATIVE VALUE AGAINST THE PREJUDICIAL EFFECT OF MISLEADING THE JURY TO BELIEVE THE "JUNK SCIENCE" OF WHAT THE STAIN WAS ALLEGED TO HAVE BEEN. THE HOLDING IN BRADY V. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 245 (1963), REQUIRES DISCLOSURE ONLY OF EVIDENCE THAT IS BOTH FAVORABLE TO THE ACCUSED AND "MATERIAL" EITHER TO GUILT OR TO PUNISHMENT, REGARDLESS OF WHETHER THE DEFENDANT MAKES A SPECIFIC REQUEST.

THE BRADY DISCLOSURE RULE IS GROUNDED IN THE DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL MANDATED BY THE DUE PROCESS CLAUSE OF THE (5th) FIFTH AND (14th) AMENDMENTS. IT ALSO REQUIRES THE PROSECUTION TO DISCLOSE EVIDENCE THAT IS; 1.) IN ITS POSSESSION; 2.) FAVORABLE TO THE ACCUSED; AND 3.) MATERIAL TO GUILT OR PUNISHMENT. UNITED STATES V. BAGLEY, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

THIS RULE EXTENDS TO EVIDENCE THAT IS NOT IN THE ACTUAL POSSESSION OF THE PROSECUTION, BUT KNOWN BY OTHERS ACTING ON THE

GOVERNMENTS BEHALF IN THE PARTICULAR CASE, INCLUDING, LAW ENFORCEMENT.

KYLES V. WHITLEY 514 U.S. 419, 115 S.C.T. 1555, 131 L.Ed.2d 490 (1995). "FAVORABLE" EVIDENCE INCLUDES BOTH EXCULPATORY AND IMPRACHMENT EVIDENCE. EVIDENCE WITHHELD BY GOVERNMENT IS "MATERIAL" AS WOULD REQUIRE REVERSAL OF THE CONVICTION, THERE IS PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED TO DEFENSE, RESULT OF PROCEEDING WOULD HAVE BEEN DIFFERENT. BAGLEY SUPRA. THE STATE'S FAILURE TO ASSIST PETITIONER BY DISCLOSING INFORMATION THAT MIGHT HAVE BEEN HELPFUL IN CONDUCTING CROSS-EXAMINATIONS, AMOUNTS TO CONSTITUTIONAL VIOLATION. ONLY IF IT DEPRIVES DEFENDANT OF A FAIR TRIAL, CONSTITUTIONAL ERROR OCCURS AND CONVICTION MUST BE REVERSED. IN PETITIONER'S CASE THE EVIDENCE IS MATERIAL IN SENSE THAT ITS SUPPRESSION UNDERMINES CONFIDENCE IN OUTCOME OF TRIAL.

THE PROPER STANDARD IS ONE OF REASONABLE PROBABILITY AND THAT THE FAILURE TO APPLY THIS STANDARD NECESSITATES REVERSAL; IF DISCLOSED AND USED EFFECTIVELY IT MAY MAKE THE VERY DIFFERENCE BETWEEN CONVICTION AND ACQUITTAL. NAPUE V. ILLINOIS 360 U.S. 264, 269, 79 S.C.T. 1173, 1177, 3 L.Ed.2d 1217

ARGUMENT III

DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S CHARGE THAT A VICTIM'S TESTIMONY NEED NOT BE CORROBORATED?

"FAILURE TO BRING AN ISSUE ON DIRECT APPEAL BARS RAISING THAT ISSUE IN A § 2254 MOTION UNLESS GREAT CAUSE FOR NOT RAISING THAT MATTER ON DIRECT APPEAL IS DEMONSTRATED," (SEE) U.S. V. GRIFFIN 765 F.2d 677 (7th Cir. 1985) ?

KAUFMAN v. U.S. 394 US 217, 22 L.E.2d 227. 89 (1969)

THE INEFFECTIVENESS OF PETITIONERS APPELLATE COUNSEL CAUSED THIS ISSUE TO NOT BE INCLUDED IN THE PETITION FOR REHEARING. PETITIONER, UNDER THE IMPRESSION HE WAS PRO SE, BECAUSE HIS COUNSEL WROTE AND EXPRESSED THAT SHE NO LONGER WORKS FOR HIM. THEREFORE, THE PETITIONER ATTEMPTED TO AMEND THE PETITION FOR REHEARING TO ADD STATE V. STUKES. 416 S.C. 493, 787, SE.2d 480 (2016).

IN STUKES, AS CORROBORATING EVIDENCE, MULTIPLE WITNESSES TESTIFIED TO THE ASSAULT'S PHYSICAL AND EMOTIONAL IMPACT ON THE VICTIM. A WITNESS, TESTIFIED THERE WAS A HANDPRINT ON THE VICTIM'S FACE OR NECK AFTER THE ATTACK, MATCHING THE VICTIM'S VERSION OF THAT SAID ATTACK. DESPITE THE EVIDENCE OF ASSAULT THE SUPREME COURT RULED THAT THE ERROR IN THE

CHARGING OF THE NO-CORROBORATION RULE TO THE JURY IS NOT A HARMLESS ERROR.

IN PETITIONER'S CASE, DURING THE CLOSING ARGUMENT, THE STATE EXPLAINED TO THE JURY THAT THE "COLOGNE" WAS USED TO MASK THE SCENT OF THE ALLEGED ANAL RAPE, A CHARGE IN WHICH PETITIONER, WAS ACQUITTED OF. ANY TYPE REFERENCE TO THE "COLOGNE" CAN NOT POSSIBLY BE USED AS CORROBORATING EVIDENCE <ROA pg 328 L's (15-25)> AFTER SPEAKING TO THE VICTIM, DETECTIVE HAMLET, SPOKE WITH PETITIONER, TO HEAR HIS SIDE OF THE ALLEGED EVENTS <ROA pg 168-171>. AT ALL TIMES PETITIONER'S STATEMENT WAS CONTRARY TO THE VICTIMS. NOT ONCE WAS A CONFESSION MADE TO LAW ENFORCEMENT NOR VICTIM'S MOTHER.

ON, MAY 25, 2016, THE COURT OF APPEALS WITHDREW ITS OPINION AND SUBSTITUTED A NEW ONE FINDING ERROR FOR THE NO-CORROBORATION INSTRUCTION IN PETITIONER'S CASE, BASED ON STUKES, BUT FINDING THAT SAID ERROR HARMLESS, BY ITSELF.

INADVERTENTLY, DUE TO THE ERROR IN LOSING KEY AND EXCULPATORY EVIDENCE, AND THE TRIAL COURT'S RULING TO ADMIT THE COLOR PHOTOGRAPHS OF A SHIRT THAT THE PROSECUTOR CLAIMED, EXPLAINED TO THE JURY, HAD DEODORANT ON IT WITHOUT ANY TESTS TO PROVE THAT ALLEGATION, IT IS NOT HARMLESS TO CHARGE THAT A VICTIM'S TESTIMONY NEED NOT BE CORROBORATED, ESPECIALLY WHEN OTHER PREJUDICIAL ERRORS ARE INVOLVED. ACCORDINGLY, CERTIORARI SHOULD BE GRANTED.

CONCLUSION

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED, BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A PRIOR DECISION OF THE SUPREME COURT, AND ONCE GRANTED, PETITIONER ASK THE COURT FOR A NEW TRIAL.

RESPECTFULLY SUBMITTED,

Justin M. McBride

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OCTOBER 20, 2010

STATE OF SOUTH CAROLINA
In The Court of Appeals

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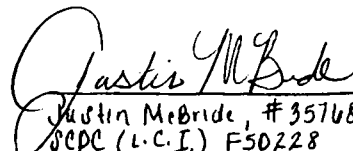
AFFIDAVIT OF SERVICE

I, CERTIFY THAT I HAVE SERVED A COPY OF THE
"REPLY TO THE STATE'S RESPONSE" ON THE RESPONDENT
IN THE ABOVE-REFERENCED CASE BY DEPOSITING ONE
COPY OF THE SAME IN THE SCDC (L.C.I.) MAILROOM,
ADDRESSED TO THE FOLLOWING:

Office of Attorney General
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P.O. Box 11549
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THE HONORABLE DANIEL E. SHEARISE
CLERK OF COURT (S.C. SUPREME COURT)
P.O. Box 11330
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This 20th Day of October, 2016


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