

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 31 2017

APPEAL FROM BEAUFORT COUNTY
General Sessions Court

S.C. SUPREME COURT

The Honorable D. Craig Brown, Circuit Court Judge

Opinion No.: 2017-UP-103 (SC Ct. App. filed March 8, 2017)

The State,.....Respondent

v.

Juwan Andre Habersham.....Petitioner

PETITION FOR A WRIT OF CERTIORARI

James A. Brown, Jr.

Law Offices of Jim Brown, P.A.
1600 Burnside St, Suite 100
P.O. Box 592
Beaufort, South Carolina 29901
(843) 470-0003

ATTORNEY FOR PETITIONER

Alan Wilson, Esquire
Attorney General

Mark R. Farthing, Esquire
Assistant Attorney General

Office of the Attorney General
PO Box 11549
Columbia, SC 29211-1589
(803) 734-1890

I. McDuffie Stone III, Esquire
Solicitor, Fourteenth Judicial Circuit

Fourteenth Circuit Solicitor's Office
PO Box 1880
Bluffton, SC 29910
(843) 255-5880

ATTORNEYS FOR RESPONDENT

INDEX

Certificate of Counsel.....	1
Question Presented For Review.....	1
Considerations Favoring Review.....	1
Statement of the Facts and the Case.....	1
Argument	
THE COURT OF APPEALS FAILED TO ADEQUATELY ADDRESS THE STATE’S SUPPRESSION AND SPOILIATION OF THE VICTIM’S IDENTIFICATION OF THIRD PARTY SUSPECTS.....	3
Conclusion.....	6

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 1, 2017.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals fail to adequately address the State's suppression and spoliation of exculpatory evidence of the identity of third party suspects?

CONSIDERATIONS FAVORING REVIEW

The Supreme Court of South Carolina should grant this petition because "[t]here is an epidemic of *Brady*¹ violations abroad in the land. Only judges can put a stop to it." *US v Olson*, 737 F3d 625, at 626 (9th Cir 2013)(Kozinski, dissenting from denial of *en banc* rehearing). The suppression and spoliation of evidence is a substantial constitutional issue as envisioned by SCACR Rule 242(b)(4). A failure to firmly address the issue of destroyed and hidden evidence countenances future violations of due process.

STATEMENT OF THE FACTS AND THE CASE

During the early morning hours of June 19, 2011, two young adults were robbed at gun point as they left a food and beverage establishment in the waterfront park area of the City of Beaufort. ROA, p. 52, l. 5- p. 53, l. 21. Testimony indicated that they were approached by three males as the male victim escorted the female victim to her car. One of these males had a gun. The female victim handed over her purse with credit cards and five dollars (\$5.00). The male victim did not have any items taken.

The Petitioner was arrested on June 24, 2011. ROA, p. 15, l. 16. He was indicted for

¹*Brady v Maryland*, 373 US 83 (1963).

four charges: Armed Robbery, Attempted Armed Robbery, Possession of a Weapon During the Commission of a Violent Crime, and Unlawful Possession of a Firearm by a Person Convicted of a Crime of Violence. ROA, p 2-9.

The Petitioner was represented by the Fourteenth Circuit Public Defender Office. Petitioner's trial counsel was his second attorney on the case. ROA, p. 34, l. 14-22. The assistant solicitor was the second prosecutor on the case. ROA, p. 34, l. 23- p. 35, l. 5.

The case had been previously noticed for trial. ROA, p. 48, l. 15- p. 49, l. 24. The second public defender prepped for both of these trial dates. The assistant solicitor handling the case during the first notice changed jobs and the trial was conducted by an assistant solicitor who only had the case for a small number of months.

Petitioner's counsel raised four significant issues. First, he argued for the suppression of the statement the Petitioner made to the detective. ROA, p. 14, l. 15-17. Second, he argued that a desired stipulation as to Petitioner's prior conviction for a "crime of violence" rendered testimony regarding the details of that conviction inadmissible. ROA, p. 16, l. 10-14. Third, he argued for dismissal based upon the suppression, destruction, and late provision of exculpatory evidence related to identification evidence and missing photo lineups. ROA, p. 17-50. Finally, he argued to exclude a convenience store surveillance video and credit card purchase receipt on authentication grounds. ROA, p. 51, l. 1-2.

The trial court denied all of these motions.

Four witnesses testified for the State. ROA, p. 54-151. Two witnesses were victims of the robbery, one was a responding officer and one was the detective who worked the case. The issue at trial was one of identity. ROA, p. 155, l. 21- p. 156, l. 18.

The two victims could not identify the Petitioner. ROA, p. 18, l. 20- 19, l. 8. However, the State introduced a statement of the Petitioner admitting involvement in the crime. ROA, p. 129, l. 11- p. 133, l. 19. Further, the State also introduced a convenience store video and a credit card receipt arguing that the Petitioner used the female victim's credit card the day after the robbery in neighboring Jasper County. ROA, p. 119, l. 13-p. 123, l. 19.

During cross examination, the Petitioner's counsel brought out the fact that the detective lied to the Petitioner to induce him to confess. ROA, p. 144, l. 3-9. During interrogation, the detective told the Petitioner that the victims picked him out of a photo lineup. In contrast, the detective testified at trial that neither victim picked the Petitioner out of a lineup. ROA, p. 28, l. 8-16.

The detective testified he did not memorialize any reference to the lineup in his reports and did not preserve or enter any lineup cards into evidence. ROA, p. 44, l. 19-25. The detective was not clear as to what procedure he used, what warnings were provided or whether both victims were presented two different line up cards (one of Caucasian lineage and one of African lineage). ROA, p. 137, l. 5- p. 143, l. 23. He testified on direct that no one was picked from the lineups but on cross examination that he had no memory to dispute whether the male victim chose two or three people from the lineups. ROA, p. 124, l. 18-20 & ROA, p. 142, l. 25- p. 143, l. 18.

In contrast, both victims recalled the lineup presentation differently. The female victim did not recall picking anyone from the lineup. ROA, p. 95, l. 5-21. The male victim indicated he picked "a few" subjects out of the lineup containing suspects of African descent. ROA, p. 73, l. 22- p. 74, l. 6.

The parties stipulated that the Petitioner had been convicted of a crime of violence for purposes of one of the gun charges. ROA, p. 152, l. 22- p. 1543, l. 3

The Petitioner did not testify or present any evidence.

The jury returned guilty verdicts as to all charges on December 11, 2014. The Petitioner received concurrent sentences of 30 years, 20 years, 5 years and 5 years. ROA, p. 10-13 & ROA, p. 156, l. 1- p. 157, l. 9. The Notice of Appeal was filed on December 16, 2014. ROA, p. 160.

Following the filing of briefs, the Court of Appeals affirmed the Petitioner's conviction in a per curiam unpublished opinion filed on March 8, 2017. State v Habersham, 2017-UP-103 (SC Ct App 2017). A Petition for Rehearing was filed on March 22, 2017. This Petition for Rehearing was denied on May 1, 2017 and this Petition follows.

ARGUMENT

The Court of Appeals failed to adequately address the State's suppression and spoliation of the victim's identification of third party suspects. Absent from the Court of Appeals opinion below was any reference to the fact a presumption of bad faith arises from the destruction of irreplaceable evidence whose exculpatory value was apparent before destruction. In fact, the Court of Appeals only discussed the issue of suppression of a lineup, suggesting this lineup was disclosed to the jury.

In the brief presented to the Court of Appeals, the Petitioner argued that the trial court erred when it declined to dismiss the charges because of a violation of due process. The Petitioner did not dispute that the trial court applied the correct law. However, the Petitioner averred that trial court improperly denied relief because the trial court failed to infer bad faith from the fact that the identity of the third party picked from the lineup card by the male victim

was irretrievably lost.

In its opinion affirming the convictions of the Petitioner, the Court of Appeals first asserted that the Petitioner failed to preserve his argument for appellate review. Further, the opinion implied that the Petitioner asserted a different issue on appeal than the one argued at trial. The opinion also opined that no relief was necessary as to the argument that the “State suppressed the lineup” because the Petitioner was able to “cross-examin[e] the victims and the investigator about the lineup.” *State v Habersham*, Unpublished Opinion No. 2017-UP-103.

The Court of Appeals opinion never addressed the State’s suppression or spoliation of the identities of the third party or parties identified by the victim as the perpetrator of the crimes for which the Petitioner was convicted. This issue was squarely presented to and ruled upon by the trial court. The deprivation of due process engendered by this suppression and spoliation and the proper application of the *Youngblood* doctrine is of such substantial constitutional dynamic that this Court should address this concern.

As to the preservation issue, the Petitioner moved, pre-trial, for a dismissal because of the suppression of the identification evidence. ROA p. 22, l. 13-19. At that time, the Petitioner was not aware that any third party had been identified. The third party identity information was only revealed during the State’s case in chief. ROA, p. 73, l. 22- p. 74, l. 6; p. 82, l. 12-14; & p. 137, l. 25- p. 138, l. 9.

At the close of the State’s case², the previous motions, including the motion to dismiss because of the spoliation of the identification evidence, were renewed. Supplement ROA, p. 174, l. 14-18. In turn, the trial court reaffirmed the same ruling. Thus, the issue of the violation

²The Petitioner presented no evidence.

of due process through suppression and spoliation was repeatedly raised and ruled upon, preserving this issue for appellate review.

As to the Court of Appeals' assertion that the Petitioner attempted to argue a different ground at trial than on appeal, the Petitioner craves reference to the fact that the pre-trial motion made by the Petitioner's trial counsel unequivocally referred to "spoliation," "exculpatory," "Brady v Maryland," "Kyles v Whitley," "bad faith," and "suppressed" on nearly every page of the ten pages of transcript in which this argument was made. ROA, p. 17- 27. While it is true that no one knew, pre-trial, that any third parties had been identified, the fact remains that the trial court was well aware of the suppression and spoliation issues concerning the identification process. Petitioner's trial counsel can not be held to knowledge of information that law enforcement hid even from the prosecutors. ROA, p. 29, l. 2-4 ("...the victims will both say we didn't pick anybody out...")³

Finally, as to the Court of Appeals' assertion that the availability of cross-examination provided an avenue to obtain the suppressed identity information, the record speaks for itself. Neither the detective nor the male victim could recall who was selected during the lineup and the female victim could not recall if she picked anyone. Sadly, cross examination revealed for the first time that any third party was ever selected during the identification process; a fact even lost upon the assistant solicitor.

Thus, the Court of Appeals' opinion hyper-scrutinized the preservation issue, ignored the repeated references to spoliation during the presentation of the argument to the trial court, and

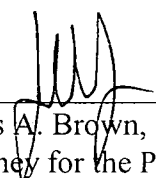
³As noted earlier in this Petition, this statement by the assistant solicitor turns out to be false as the male victim did pick out at least one if not more individuals. See ROA, p. 73, l. 22- p. 74, l. 6; p. 82, l. 12-14; & p. 137, l. 25- p. 138, l. 9.

overlooked the fact that cross examination only revealed that the third party identification information was irretrievably lost.

CONCLUSION

Therefore, this Court should grant this Petition, allow briefing on this issue, and ultimately vacate the convictions and sentences and dismiss the charges against the Petitioner for a violation of due process.

Respectfully Submitted by:



James A. Brown, Jr.
Attorney for the Petitioner

May 29, 2017
Beaufort, SC

Law Offices of Jim Brown, PA
1600 Burnside St, Suite 100
PO Box 592
Beaufort, SC 29901
(843) 470-0003

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
General Sessions Court

The Honorable D. Craig Brown, Circuit Court Judge

Opinion No.: 2017-UP-103 (SC Ct. App. filed March 8, 2017)

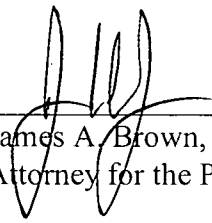
The State,.....Respondent

v.

JuJuan Andre Habersham.....Petitioner

PROOF OF SERVICE

I certify that a copy of the Petition for a Writ of Certiorari and a copy of the Appendix in the above-captioned matter was served upon the Respondent's counsel by mailing a copy, postage prepaid, on May 30, 2017 to its counsel of record, Mr. Mark R. Farthing, Assistant Attorney General, at PO Box 11549, Columbia, SC 29211.



James A. Brown, Jr.
Attorney for the Petitioner

May 30, 2017
Beaufort, SC

Law Offices of Jim Brown, P.A.
1600 Burnside St, Suite 100
P.O. Box 592
Beaufort, South Carolina 29901
(843) 470-0003