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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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MAR 05 2013

SC Court of Appeals

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge  
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THE STATE,

RESPONDENT,

V.

JAMES ANDERSON,

APPELLANT

Appellate Case No. 2012-210188  
\_\_\_\_\_

FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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STATEMENT OF ISSUES ON APPEAL

I. The trial court's qualification of a police officer as an expert in fingerprint analysis violated Appellant's right to a fair trial because the officer lacked the requisite knowledge, skill, experience, training, and education to form an opinion and testify accordingly.

II. The trial judge erred in refusing to strike the testimony concerning fingerprint analysis, or in the alternative declare a mistrial, based upon the prosecutor's failure to disclose evidence favorable to Appellant and material to his guilt in violation of Appellant's state and federal constitutional rights to due process.

STATEMENT OF THE CASE

An Horry County Grand Jury indicted Appellant for burglary in the first degree during its July 2010 term. Indictment. Appellant was tried before the Honorable Benjamin H. Culbertson and a jury beginning on March 12, 2012 and concluding on March 14, 2012. Laaree Richardson prosecuted Appellant, and Edward Chrisco defended him. R. 1. The jury found Appellant guilty as charged. R. 97, ll. 5-11. Judge Culbertson sentenced Appellant to twenty-five years. R. 99, ll. 22-25; Sentence sheet.

Appellant filed a timely notice of appeal. This brief follows.

## ARGUMENT

I. The trial court's qualification of a police officer as an expert in fingerprint analysis violated Appellant's right to a fair trial because the officer lacked the requisite knowledge, skill, experience, training, and education to form an opinion and testify accordingly.

The prosecution offered former police officer Brad McClelland as an expert in fingerprint analysis. At the time of Appellant's trial, McClelland was employed with the Federal Bureau of Prisons as a guard. R. 13, ll. 10-12; R. 22, ll. 2-5. Prior to his employment as a prison guard, he had worked as a crime scene investigator with the Myrtle Beach Police Department between three and four years. R. 13, ll. 13-18; R. 22, ll. 6-11.<sup>1</sup> When asked about his education and training, McClelland responded as follows: "I have an undergrad in biology. I have [twelve] or continuing credits in forensic science and law from Duquesne University of Pennsylvania. I have several classes I've taken through either SLED or private classes in North Carolina." R. 13, ll. 19-24. Relating specifically to fingerprints, McClelland had a basic fingerprint class from SLED, which was forty hours, an advanced palm class in North Carolina, which was forty hours, and a four-hour training class in Columbia. R.14, ll. 28; R. 22, ll. 12-18. Thus, McClelland had eighty-four hours, or just over two weeks, of class work and training in the area of fingerprints. Initially, McClelland testified that he had viewed between three and five hundred fingerprints. Upon further questioning, he testified he had examined three hundred and fifty. R. 14, ll. 9-14; R. 23, ll. 4-6.

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<sup>1</sup> During the proffer, McClelland testified he worked as a crime scene specialist for three and one-half years or four years. R. 13, ll. 13-18. Before the jury, McClelland testified he was employed with Myrtle Beach for six years. R. 22, ll. 6-11.

According to McClelland, he was a certified Automated Fingerprint Information System (AFIS) examiner. R. 15, ll. 4-6. On cross-examination, he admitted the proficiency test to become a certified AFIS examiner consisted merely of the comparison ten print cards to unknown print cards. R. 15, ll. 20-24. McClelland claimed he had “matched” between forty and fifty known prints to unknown prints. He further boasted that all of his “matches” were correct as he had no error rate. R. 16, l. 10 – R. 17, l. 2.

Appellant objected to McClelland being qualified as an expert based on his lack of experience and lack of education. R. 17, ll. 3-8. The court then questioned McClelland regarding the substance of the classes he referenced previously. R. 17, ll. 12-17. According to McClelland, the classes mostly involved “comparison identification.” He claimed, “We probably went through three to [four hundred] prints through that time and he would check each one and then we’d move on to another set.” R. 17, ll. 17-22. McClelland admitted he had never been qualified as an expert in fingerprint identification in court and had never testified as to fingerprint identification. R. 17, l. 23 – R. 18, l. 3. The trial judge qualified McClelland as an expert over the objection. R. 23, ll. 14-15.

Appellant maintained his objection to McClelland’s qualification based upon his lack of experience and education. R. 20, ll. 4-11. Nevertheless, the judge qualified McClelland as an expert with no explanation of his reasoning. The trial judge held “it’s a jury question” and he would instruct the jurors they could disregard McClelland’s testimony if the jurors determined he lacked sufficient education or his conclusions were not supported by other evidence. R. 20, ll. 12-19. When the prosecution offered McClelland as an expert in fingerprint analysis before the jury, Appellant renewed his objection. R. 23, ll. 7-13.

McClelland testified that he responded to the incident location where he lifted three fingerprints from a window sill in the hotel room. R. 26, ll. 23-25; R. 27, ll. 4-13; R. 28, ll. 1-16; R. 36, ll. 4-8; R. 36, l. 25 – R. 37, l. 7. McClelland searched for prints on the window because the victim said the suspect came through the window. R. 36, ll. 21-24. Although he recovered three prints, he only submitted one print for testing purposes because the quality of the others was too poor. R. 72, ll. 7-16. McClelland then marked all the points he saw on the print, fed it into the AFIS machine and requested thirty different prints to use for comparison purposes. R. 33, l. 17 – R. 34, l. 16; R. 46, ll. 2-9; R. 55, ll. 21-25. McClelland examined the first returned print and determined it was not a match. He moved on to the next returned print. R. 56, ll. 1-4; R. 73, ll. 19-21. After examining the second returned print, McClelland stopped. R. 58, ll. 16-17; R. 63, ll. 15; R. 73, l. 24 – R. 74, l. 19. Ultimately, McClelland “matched” the lifted print to known prints of Appellant, which was the second returned print through AFIS. R. 34, ll. 17-22; R. 81, ll. 11-16. According to McClelland, there was zero probability that the print could belong to someone else, and he had no doubts about the accuracy of his “match.” R. 59, ll. 12-15; R. 74, ll. 20-23. All of this was based upon his one hundred percent accuracy rate. R. 62, ll. 7-13.

The qualification of a witness as an expert and the subsequent admission of that witness’s opinion testimony are matters within the sound discretion of the trial judge. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995); Manning v. City of Columbia, 297 S.C. 451, 453, 377 S.E.2d 335, 336-337 (1989); Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988). Therefore, an appellate court reviews a trial judge’s ruling concerning an expert witness’ qualification and the admission of opinion testimony for an abuse of discretion.

Strange v. South Carolina Dep't of Highways & Pub. Transp., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992); Honea, 295 S.C. at 530; 369 S.E.2d at 849. “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); see also, Suess, 318 S.C. at 285, 457 S.E.2d at 345. If the ruling is “manifestly arbitrary, unreasonable, or unfair,” then the trial court abused his discretion. Id.

Rule 702 of the South Carolina Rules of Evidence governs when the admission of expert testimony is appropriate and supplies the bases by which an expert may be qualified to give an opinion. Specifically, the Rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Thus, several criteria must be met prior to the admission of expert testimony. First, the trial court must determine that such evidence will assist the jury to understand the evidence or determine a fact in issue. Second, the witness must be qualified as an expert due to experience or training. Third, the trial court must determine whether the proposed expert testimony satisfies a reliability threshold for the jury's ultimate consideration. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

The first criterion requires the trial judge to determine whether the proffered testimony, which is based upon specialized knowledge, will assist the jury in understanding evidence or determining a fact. A matter understood without any specialized knowledge does not require the witness to be qualified as an expert. Additionally, if the testimony will not assist the jury's understanding of a relevant matter, then no expert testimony is needed. See Manning, 297 S.C. at 453-454, 377 S.E.2d at 337 (holding that “[t]o qualify as an

expert, a person must have acquired by study or practical experience a special knowledge of a subject matter about which the jury's good judgment and average knowledge is inadequate"); Honea, 295 S.C. at 531, 369 S.E.2d at 849. The third criterion requires the trial judge to ensure the proffered testimony "meets a reliability threshold for the jury's ultimate consideration." White, 382 S.C. at 270, 676 S.E.2d at 686. As explained by the South Carolina Supreme Court, "[r]eliability is a central feature of Rule 702 admissibility." Id.

The second criterion, which is at issue in Appellant's case, requires that the expert's proffered testimony be based upon "knowledge, skill, experience, training, or education." In order for a witness to be competent to testify as an expert, the "witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995). Qualification as an expert "depends on the particular witness' reference to the subject." Gooding v. St. Francis Xavier Hospital, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997); Suess, 318 S.C. at 285, 457 S.E.2d at 346. "[A]n expert is not limited to any class of persons acting professionally." Gooding, 326 S.C. at 253, 487 S.E.2d at 598 (citing Botelho v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)). In addition, our courts place no exact requirement regarding how that knowledge or skill must be acquired by the witness. Honea, 295 S.C. at 531, 369 S.E.2d at 849. In fact, "[e]ven where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter." Id.

In McDill v. Mark's Auto Sales, 367 S.C. 486, 491, 626 S.E.2d 52, 55 (Ct. App. 2006), this Court held the trial judge did not err in refusing to qualify a state trooper as an expert in accident reconstruction. Although the trooper had experience in investigating accidents and took a six-week accident reconstruction course along with updating courses, the trooper was not a member of the Highway Patrol's accident reconstruction team. The trooper did not use any particular reconstructive techniques in making his determination of the car speeds; rather, he relied upon statements from the drivers as to their speeds. The trooper had testified in federal court previously concerning his opinion as to accident investigation, not reconstruction. Id. As this Court noted, "if investigating an accident qualified an officer as an expert in accident causation, then every highway patrolman would qualify as an expert." Id.

On the other hand, in Gooding, 326 S.C. at 252, 487 S.E.2d at 597, the South Carolina Supreme Court held an emergency medical technician (EMT) and paramedic, was qualified to testify as an expert in intubation. The EMT testified that in addition to being a certified paramedic, he had intubated over one hundred patients, and instructed and tested physicians on intubation and extubation procedures. Id. at 251, 487 S.E.2d at 597.

In State v. Ellis, 345 S.C. 175, 177-178, 547 S.E.2d 490, 491 (2001), the Supreme Court held a police officer, who was qualified to testify as an expert in crime scene processing and fingerprint identification exceeded the scope of his expertise when he testified as to his conclusion drawn from the measurements and observations he made. In Ellis, the victim was found dead as a result of gunshot wounds near his bicycle and a knife. The defendant admitted to shooting the victim, but claimed he acted in self defense when the victim dropped his bike and approached the defendant with the knife. When the victim

refused to stop, the defendant shot the victim. The prosecution's theory of the case was that the defendant shot the victim while the victim remained on the bike. Id. at 176, 547 S.E.2d at 491. The police officer testified that the victim was on his bike when he was shot based upon his measurements and observations of the crime scene. Id. at 177-178, 547 S.E.2d at 491. Further, the Court held the error in allowing the officer to testify was not harmless in light of the defendant's contention that he was acting in self defense. Id. at 178, 547 S.E.2d at 491. The Court held the prosecutor was free to argue that the evidence supported an inference that the victim was on the bicycle at the time of the shooting, and the jury could have concluded as such, but the officer "was not qualified to give such an 'expert' opinion." Id.

In the instant matter, former police officer McClelland lacked the required knowledge, skill, experience, training, and education to be qualified as an expert in fingerprint analysis. McClelland received approximately two weeks of training in the area of fingerprint analysis. Although the state presented evidence that McClelland had viewed hundreds of fingerprints, the state presented no evidence concerning McClelland's ability to examine the fingerprints and determine whether two prints presented sufficient similarities to be considered originating from the same source. In fact, based upon McClelland's testimony regarding the total number of fingerprints he had examined and the number of prints he examined in his classes, it seems unlikely that McClelland examined any prints outside of the classroom.

II. The trial judge erred in refusing to strike the testimony concerning fingerprint analysis, or in the alternative declare a mistrial, based upon the prosecutor's failure to disclose evidence favorable to Appellant and material to his guilt in violation of Appellant's state and federal constitutional rights to due process.

During the testimony of McClelland, Appellant moved the trial court to exclude and the testimony concerning the fingerprint evidence, or in the alternative for a mistrial, because the prosecution failed to provide certain information in discovery. Specifically, Appellant emphasized McClelland's testimony that the AFIS computer returned thirty prints, and the prosecution's failure to provide Appellant with those prints. R. 47, ll. 13-23. The judge understood Appellant's argument to be that he was entitled to the material so that he could conduct his own analysis to determine if the other prints provided exculpatory evidence. R. 48, ll. 5-9.

The prosecutor countered that she had provided Appellant with an AFIS printout screen listing other ID numbers showing there were different "hits." She emphasized that AFIS returned thirty hits because McClelland set the computer to return thirty. R. 47, l. 25 – R. 48, l. 4. Further, the prosecutor argued that the onus was on Appellant to subpoena the information or obtain a court order. R. 48, ll. 10-12; R. 51, ll. 3-4. Continuing with this line of reasoning, the prosecutor argued that Appellant could have obtained an expert "to look into these other hits." R. 50, ll. 6-10. The prosecutor was forced to admit that the other twenty-nine prints were available in the AFIS computer, but only certified AFIS examiners – law enforcement – were permitted to examine the prints. R. 48, l. 13 – R. 51, l. 5. However, printing images of the hits was possible and readily available as an image of the hit had been provided for court. R. 50, ll. 17-23; R. 74, ll. 17-19.

After a short break, the judge denied Appellant's motion. Concerning Appellant's argument that prosecutor failed to produce exculpatory evidence, the judge stated "[t]he rule for exculpatory evidence, it has to be disclosed but you have to show that there's a high probability or a probability that the exculpatory evidence if produced would have brought about a different result at trial." R. 52, ll. 22-25. According to the trial judge no one knew whether the other prints would provide exculpatory evidence. He further stated that the Rules of Criminal Procedure mandate the prosecution provide the test results, which the prosecution did. Thus, he denied Appellant's motion to exclude the evidence or declare a mistrial. R. 53, ll. 1.14; R. 53, l. 22 – R. 54, l. 4.

At the conclusion of the prosecution's case, Appellant renewed his objections and motions and asked for a new trial based upon the prosecutor's discovery violations. R. 85, ll. 11-24. The trial judge inquired of the prosecutor why the state did not provide, at a minimum, the first print, which McClelland testified he examined and discarded. R. 86, ll. 12-21. The prosecutor relied upon her previous argument that Appellant failed to request the specific evidence and then attempted to claim the evidence was not in her possession such that the requirement to provide it was not invoked. R. 86, l. 22 – R. 87, l. 12. Finally, the prosecutor compared the prints to a video of a confidential informant, which the prosecution makes available for the defense, but does not provide a copy. R. 87, ll. 13-22.

Appellant countered that nothing "in the discovery rules make[s] it incumbent upon the defense to ask for every single thing that the solicitor has." He correctly pointed out that the prosecutor cannot use the fact that the police maintained actual possession of evidence "to shield the evidence." R. 87, l. 25 – R. 88, l. 12. Nevertheless, the judge was "persuaded

by the state's argument it's like the CI video" and denied Appellant's motion. R. 88, ll. 17-23.

At the conclusion of the defense case, Appellant renewed his motions regarding the fingerprint testimony based upon the prosecutor's violations. R. 91, l. 13 – R. 92, l. 7. Based upon his reasoning expressed previously, the judge denied the motions. R. 92, ll. 8-15. Finally, ensuring the preservation of this claim, Appellant renewed his motions and objections. R. 98, ll. 10-12. The trial judge again denied the requests. R. 98, ll. 13-14.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment. See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Evidence is favorable to the accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

In Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), the South Carolina Supreme Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle's trial, police officer interviewed a key witness in the case

who provided a statement inconsistent with his previous statement. The prosecutor failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. Our Supreme Court disagreed, holding “[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires.” As explained by the Court, “[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching.” Id.

Relevant to the issue presented in Appellant’s case, a New Jersey Superior Court held that AFIS information is discoverable. State v. Feldman, 604 A.2d 242 (N.J. Super. Ct. 1992). The New Jersey court confronted an argument similar to the one made by the prosecutor in Appellant’s case and concluded that evidence that is subject to discovery is not limited to evidence that will or may be produced at trial. Like Appellant, Feldman sought the list generated by AFIS of candidates whose fingerprints may have matched the print recovered at the scene. The New Jersey court held such evidence must be provided to criminal defendants. Id. at 244. Although the New Jersey court rendered its decision based upon state law concerning discovery in criminal matters, the analysis is equally valid under Brady.

The prosecutor never challenged whether the twenty-nine prints produced by AFIS were favorable to Appellant or material to the case. Rather, the prosecutor only challenged whether the prints were available to Appellant by other means and whether the prints were within the possession of the prosecutor. Thus, the prosecutor conceded the prints were material and favorable to Appellant. Likewise, the trial judge never questioned whether the prints were favorable or material. Instead, the trial judge was persuaded that the prints were

like a video and Appellant could, and should, have requested to view the prints. The trial judge relieved the prosecutor of her duty to provide Appellant with the favorable and material evidence by placing an onus on Appellant to ask for the material. This holding flies in the face of Brady and its progeny.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and order a new trial.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 5<sup>th</sup>, 2013

Susan B. Hackett

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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of March, 2013.

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 5th day of March, 2013.

Emily Bryan (L.S.)  
Notary Public for South Carolina

My Commission Expires: November 16, 2022.