STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-210188

THE STATE, ...RESPONDENT

v.

JAMES ANDERSON, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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2. Whether the trial court properly denied Appellant's motion to strike or suppress testimony concerning fingerprint analysis, and properly denied Appellant's alternative request for a mistrial, where Appellant failed to demonstrate that: (1) evidence was suppressed by the State; (2) evidence allegedly suppressed was favorable to the accused; or (3) evidence allegedly suppressed was material to Appellant's guilt?

STATEMENT OF THE CASE

Appellant was indicted by the grand jury for Horry County for burglary in the first degree (2010-GS-26-2883). He was represented by Edward Chrisco, Esquire. (Tr.p.1). On March 12-14, 2012, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Benjamin H. Culbertson to twenty-five (25) years' imprisonment. (Tr.p.215, lines 22-25). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted an Initial Brief. This Initial Brief of Respondent follows.

STATEMENT OF FACTS

During the week of July 4, 2009, Joseph Emming, Chistian Vickery, and Allen Smith were vacationing with their families in Myrtle Beach and were staying at the Bluewater Resort hotel. (Tr.p.47, lines 18-23; p.56, lines 5-13; p.58, lines 5-6; p.63, lines 22-23). On the night of July 8, 2009, their hotel suite was burglarized. Joseph Emming testified he was lying on the couch in the living room texting some friends when he saw an African-American male come past the kitchen and into the living room. When Emming got up the man turned and ran out the door. (Tr.p.47, line 7-p.51, line 5). Emming specifically identified Appellant as the person he saw in the hotel suite during the burglary. He testified he saw Appellant come into the area where he was lying on the couch, and there was no doubt in his mind Appellant was the person he saw. (Tr.p.48, lines 17-22; p.51, lines 12-19; p.52, lines 10-12).

Christian Vickery testified that she and Allen Smith were sleeping in one of the bedrooms in the suite. Shortly after she dozed off on the night of July 8, 2009, Vickery woke up and noticed her bedroom door was open despite the fact that she had closed the door when she went to bed. She got up to shut the bedroom door and then heard the front door to the suite close. Vickery walked to the bedroom window and noticed it was wide open despite the fact that she never sleeps with the window open. She looked out the window and saw a black male wearing a pink shirt and a white hat outside the door to the suite. (Tr.p.55, line 14-p.59, line 2). Charles Allen Smith testified Vickery is his fiancée, and that on the night of July 8, 2009, she woke him up and told him someone had been in their bedroom. Smith reached down beside the bed to get his shorts; however, both the shorts and his wallet were missing. He never saw the person who had been in the suite. (Tr.p.63, line 16-p.65, line 15).

The State proffered crime scene specialist Brad Andrew McClelland as an expert witness. McClelland testified that although he was currently employed with the Federal Bureau of Prisons, he was previously employed with the Myrtle Beach Police Department as a crime scene investigator. He testified he had an undergraduate degree in biology, had completed twelve hours of continuing education credits in forensic science and law, and had taken several classes with the South Carolina Law Enforcement Division (SLED) and in North Carolina. (Tr.p.69, line 6-p.70, line 1). In regard to fingerprint analysis, McClelland testified he completed a forty-hour basic fingerprint class with SLED, a forty-hour advanced palm print class in North Carolina, and two additional trainings, including a two-day class in Columbia. (Tr.p.70, lines 2-8). He testified he had "viewed" between 300 and 500 fingerprints and had "examined" 350 prints, and he briefly described the methods and equipment used to analyze those prints. McClelland testified he became a certified AFIS[1] examiner by passing a test in Columbia. (Tr.p.70, line 9-p.71, line 7). On cross-examination, McClelland explained his AFIS certification was based on a proficiency test which required comparing "10-print" cards from known prints to unknown prints "to a hundred percent proficiency." He testified he had compared known to unknown fingerprints 300 to 500 times and had actually matched 40 to 50 of the unknown prints. McClelland testified that of those 40 to 50 matched prints, they were all correct and that he had "no error rate." (Tr.p.71, line 13-p.73, line 2). Appellant objected to McClelland's qualifications as an expert, arguing he didn't have the "proper schooling" to make him an expert in fingerprints. (Tr.p.73, lines 3-8).

Under further examination by the court, McClelland testified that the classes described were all in regard to fingerprint comparison identification. (Tr.p.73, lines 10-

[1] AFIS stands for Automated Fingerprint Identification System (Tr.p.78, lines 20-23).

22). He testified he had not previously been qualified by a court as an expert in fingerprint identification although he had been asked to provide expert testimony in the past, but this was only because the cases never went to trial and NOT because any court had found him unqualified. (Tr.p.73, line 23-p.74, line 7; p. 75, lines 4-17). Appellant again objected because he did not think McClelland had the schooling necessary, or the common practice necessary, to make him an expert. (Tr.p.76, lines 4-11). The trial court disagreed, qualified McClelland as an expert witness, and found that Appellant's objections to the sufficiency of McClelland's qualifications raised "a jury question." The trial judge noted he would give appropriate instructions to the jury in regard to the expert testimony. (Tr.p.76, lines 12-19).

When McClelland was subsequently called before the jury, the State offered him as "an expert in fingerprint analysis." Appellant renewed his objection to McClelland's knowledge, skill, experience, training, and education. The trial court noted the objection but, as previously ruled, qualified McClelland as an expert in the field of fingerprint analysis. The court gave the jury a standard expert witness charge. (Tr.p.79, line 7-p.80, line 6). McClelland described "ink prints" and "latent prints," the distinguishing characteristics of fingerprints, and why prints are left when people touch certain objects. He testified about responding to the scene of the burglary and lifting fingerprints from the inside of the window. McClelland explained how he ran the best print through AFIS and requested a list of thirty (30) known prints with similar characteristics, and how he was ultimately able to find a known print "identical" to the one left on the window. (Tr.p.80, line 9-p.91, line 20).

On cross-examination, McClelland was questioned about the AFIS identification process. He explained that AFIS does not return actual fingerprint matches. Instead, it simply returns a list of fingerprints that are similar to the unknown fingerprint, and that the examiner must then compare each print to look for a match. McClelland testified the number of responses produced by AFIS is set by the examiner, and can be anywhere between ten and fifty. He testified that in this case he set AFIS to produce 30 responses. (Tr.p.101, line 14-p.102, line 9). Based on this testimony, Appellant's counsel approached the bench after which the trial judge excused the jury to hear a matter of law. Appellant argued:

> Your Honor, back on August the 6th, 2009, I was appointed to represent Mr. Anderson. The same day that I was appointed I sent a motion for production and disclosure of all witnesses, disclosure of all evidence in the case. I never received any information that there were 30 hits from the AFIS computer, nor did I receive the fingerprints of those 30 individuals to look and compare and to determine how close some of the other individuals were on there; and therefore, I think that had I been given that it may have helped my client in the presentation of this case, Your Honor.

(Tr.p.103, lines 13-23). The solicitor responded that the State had given Appellant everything it had, including an AFIS printout screen that lists the other ID numbers showing there were different hits, and that McClelland set the number to 30. (Tr.p.103, line 25-p.104, line 4). The court framed the argument as a claim that Appellant was entitled to the 29 identified but non-matched prints to do his own analysis to determine whether they were inculpatory or exculpatory. The parties then argued the merits of whether there was a discovery violation. (Tr.p.104, line 10-p.108, line 14).

After a short break to conduct research, the trial judge noted that to grant relief for a discovery violation Appellant would have to show there is a probability that

exculpatory evidence, if produced, would have brought about a different result at trial, but that there had been no showing the evidence was exculpatory. The judge found the State complied with the rules of criminal procedure by giving Appellant the test results and denied "any motion by the Defendant to exclude the evidence or declare a mistrial or anything of that nature." Appellant specifically moved "to suppress" the fingerprint evidence and the judge restated the decision to deny Appellant's motion. (Tr.p.108, line 19-p.110, line 5). The solicitor reiterated the State's position that Appellant knew AFIS has produced 30 similar prints based on the discovery that was provided. The court marked and placed the "Latent Search Verification" screen shot that had been disclosed by the solicitor into evidence as Court's Exhibit # C-2. (Tr.p.110, lines 6-23).

When cross examination resumed, McClelland further described the process for using AFIS to try and find a matching fingerprint. He testified the probability of the print belonging to someone besides the person he matched was "zero." (Tr.p.111, line 21-p.115, line 18). McClelland testified he had no error ratio in fingerprints because he does not declare a match unless there really is a match, and that as far as he knows no one else has ever reviewed one of his findings and said it was wrong. (Tr.p.118, lines 7-16). He testified the Myrtle Beach Police Department required that whenever he found a match he was to have it verified by another examiner, and that in Appellant's case, he got verification from an Officer Ioni. (Tr.p.120, line 20-p.121, line 7). On re-direct, McClelland testified he was confident in the print he lifted from the crime scene and that there was no doubt in his mind it matched the known print he pulled from AFIS. He opined that "it's the same print." (Tr.p.129, line 3-p.131, line 9). Marilyn Sanders, AFIS coordinator and fingerprint examiner at SLED, subsequently testified that the known

print in AFIS that was matched by McClelland belongs to Appellant. (Tr.p.135, line 21-p.139, line 16).

After the State rested, Appellant took the stand in his own defense and offered an explanation for his fingerprint being at the crime scene. He testified he used to go to the Bluewater hotel all the time visiting friends, that he had been there hundreds of time, and that he thought he had been in the room where the fingerprint was found. (Tr.p.174, line 20-p.175, line 16). During closing arguments, Appellant argued his fingerprint could have been at the crime scene because he had stayed at the hotel many times. However, he also attacked McClelland's testimony by arguing that fingerprint evidence is non-scientific, subjective, and simply constitutes a person's opinion and nothing else. (Tr.p.192, lines 6-24). The trial judge charged the jury on the State's burden of proof, the presumption of innocence, the roles of the judge and jury, direct evidence, circumstantial evidence, and credibility of witnesses. (Tr.p.198, line 12-p.203, line 7). The court then charged the jury as follows:

> The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become expert in some art, science, profession or calling may state an opinion as to the relevant and material matter in which the witness claims to be an expert, and may also state the reasons for the opinion. You should consider any expert opinion received in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion, even though it is not contradicted.

(Tr.p.203, lines 8-25) (emphasis added). After the trial court finished charging the jury, the jury deliberated a little over 20 minutes before finding Appellant guilty of first degree burglary. (Tr.p.211, line 2-p.212, line 9).

ARGUMENT

I. The trial court properly qualified former crime scene investigator Brad Andrew McClelland as an expert in fingerprint analysis where his education, training, AFIS certification, and experience demonstrated he was better qualified than the jury to form an opinion on fingerprint identification.

Appellant argues the trial court's qualification of McClelland 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. The State disagrees and submits the trial court acted well within its discretion in qualifying former officer McClelland as an expert in fingerprint analysis based on his education, training, AFIS certification, and experience.

In general, the admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-206, 656 S.E.2d 359, 368 (2008). Thus, the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion. Gooding v. St. Francis Xavier Hospital, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of that discretion. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support. Morris at 206, 656 S.E.2d at 368; Gooding at 252, 487 S.E.2d at 598; Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

Specifically, the South Carolina Rules of Evidence provide that:

> 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, there are several criteria that must be considered by the court in deciding whether to admit expert testimony. First, the court must determine if the scientific, technical, or specialized knowledge purportedly held by the witness would assist the jury to understand the evidence or determine a fact in issue. Second, the court must determine if the proffered witness in fact possesses scientific, technical, or specialized knowledge to qualify as an expert. Finally, in its general gatekeeping function, the court must determine if the type of expert testimony offered meets a "reliability threshold" for the jury's ultimate consideration. White at 269-70, 676 S.E.2d at 686; State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011).

Here, Appellant made no challenge to the Rule 702 criterion that testimony from a fingerprint expert would "assist the trier of fact to understand the evidence or to determine a fact in issue" in his trial. Likewise, he understandably elected not to challenge the "reliability threshold" of fingerprint identification evidence as a whole. See United States v. Crisp, 324 F.3d 261 (4th Cir. 2003) ("While the principles underlying fingerprint identification have not attained the status of scientific law, they nonetheless bear the imprimatur of a strong general acceptance, not only in the expert community, but in the courts as well."). Thus the only Rule 702 issue before the trial court, and consequently before this Court on appeal, is the trial court's decision to qualify McClelland as an expert in fingerprint analysis.

There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would

enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App.1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App.1991). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App.2003); see also Gooding at 252-53, 487 S.E.2d at 598 ("To be considered competent to testify as an expert, 'a 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.'"). An expert is not limited to any class of persons acting professionally. Gooding at 253, 487 S.E.2d at 598; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Henry at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its

admissibility. Id.; Morris, at 203, 656 S.E.2d at 366; Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001).

During the State's proffer, McClelland testified that he had an undergraduate degree in biology, had completed twelve hours of continuing education credits in forensic science and law, and had taken several classes with the South Carolina Law Enforcement Division (SLED) and in North Carolina. (Tr.p.69, line 6-p.70, line 1). Specifically in regard to fingerprint analysis, McClelland testified he completed a forty-hour basic fingerprint class with SLED, a forty-hour advanced palm print class in North Carolina, and at least two additional trainings, including a two-day class in Columbia. (Tr.p.70, lines 2-8). He testified he had "viewed" between 300 and 500 fingerprints, had "examined" 350 prints, and briefly described the methods and equipment used to analyze those prints. McClelland also testified he became a certified AFIS examiner by passing a test in Columbia. (Tr.p.70, line 9-p.71, line 7).

On cross-examination, McClelland explained his AFIS certification was based on a proficiency test which required comparing "10-print" cards from known prints to unknown prints "to a hundred percent proficiency." He testified he had compared known to unknown fingerprints 300 to 500 times and had actually matched 40 to 50 of the unknown prints. McClelland testified that of those 40 to 50 matched prints, they were all correct and that he had "no error rate." (Tr.p.71, line 13-p.73, line 2). Under further examination by the court, McClelland testified that the classes described were all in regard to fingerprint comparison identification. (Tr.p.73, lines 10-22). He testified he had not previously been qualified by a court as an expert in fingerprint identification although he had been asked to provide expert testimony in the past, but this was only

because the cases never went to trial and not because any court had found him unqualified. (Tr.p.73, line 23-p.74, line 7; p. 75, lines 4-17). Over Appellant's objection, the trial court qualified McClelland as an expert witness and found any challenge to the sufficiency of his qualifications raised "a jury question." The trial judge noted he would give appropriate instructions to the jury in regard to the expert testimony. (Tr.p.76, lines 12-19).

The State submits that in light of the evidence proffered, the trial court clearly did not abuse its discretion in qualifying McClelland as an expert in fingerprint analysis. McClelland "lifted" fingerprints from the inside window sill of the hotel room where the burglary was committed. (Tr.p.82, line 17-p.85, line 5). He then photographed the best fingerprint, analyzed the photograph and marked distinguishing points. McClelland sent the fingerprint through AFIS and requested 30 known prints with similar distinguishing points or "minutia, which are the ridge endings, bifurcations and dots or short ridges." Finally, he began manually comparing each of the 30 known prints to the lifted print in an attempt to find one "that has the same characteristics and with no discernible dissimilarities." He testified his analysis resulted in a "hit" with State Identification (SID) number "South Carolina 00410955." (Tr.p.89, line 7-p.90, line 9).

The skills and techniques used to look for fingerprints at the crime scene, to lift the fingerprints that were found, to analyze the best print and mark distinguishing points, and to compare it to the known prints produced by AFIS are not skills and techniques familiar to the average juror. Indeed, McClelland had acquired by study or practical experience such knowledge of fingerprint analysis as would enable him to give guidance and assistance to the jury in resolving a factual issue which was beyond the scope of the

jury's good judgment and common knowledge, namely whether Appellant left a fingerprint at the crime scene. Henry, supra; Goode, supra. In other words, McClelland was better qualified than the fact finder to form an opinion on the subject of fingerprint analysis and comparison. This is all that was required for the trial court to qualify him as an expert. Ellis, supra; Mizzell, supra; Gooding, supra. It was simply a judgment call – made in the trial court's sound discretion. It does not rise to the level of an abuse of that discretion because it was based on a factual conclusion with evidentiary support. Morris, supra; Gooding, supra; Seuss, supra. Furthermore, because McClelland was properly qualified as an expert witness, Appellant's subsequent objections to the amount of McClelland's qualifications went to the weight of his testimony, not its admissibility. Martin at 515-16, 706 S.E.2d at 44.

Harmless Error

To the extent this Court finds the trial court erred in qualifying McClelland as an expert witness in fingerprint analysis, the State submits the conviction should nevertheless be affirmed because that error was harmless in light of: (1) eyewitness identification testimony presented at trial, (2) Appellant's own testimony that he had been in the room where the fingerprint was found, and (3) the court's jury charge on expert testimony.

Joseph Emming identified Appellant as the person he witnessed in the hotel room during the burglary. Emming testified he saw Appellant come into the area where he was lying on the couch, and that there was no doubt in his mind Appellant was the person he

saw. (Tr.p.48, lines 17-22; p.51, lines 12-19; p.52, lines 10-12). This testimony alone is sufficient to support the jury's verdict even if the fingerprint evidence had been excluded.

Also at trial, Appellant took the stand in his own defense and offered an explanation for his fingerprint being found at the crime scene. He testified he used to go to the Bluewater hotel all the time visiting friends, that he had in fact been there hundreds of time, and that he thought he had been in the actual room where his fingerprint was found. (Tr.p.174, line 20-p.175, line 16). During closing arguments, Appellant argued in part that his fingerprint could have been at the crime scene because he had stayed at the hotel many times. However, he also attacked McClelland's testimony by arguing that fingerprint evidence is non-scientific, subjective, and simply constitutes a person's opinion and nothing else. (Tr.p.192, lines 6-24). Since Appellant acknowledged he had been in the burglarized hotel room, he could not have suffered prejudice from the discovery of his fingerprint in that room.

After the parties rested, the trial judge charged the jury on the State's burden of proof, the presumption of innocence, the roles of the judge and jury, direct evidence, circumstantial evidence, and credibility of witnesses. (Tr.p.198, line 12-p.203, line 7). The court then charged the jury as follows:

> The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become expert in some art, science, profession or calling may state an opinion as to the relevant and material matter in which the witness claims to be an expert, and may also state the reasons for the opinion. You should consider any expert opinion received in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be

> given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion, even though it is not contradicted.

(Tr.p.203, lines 8-25) (emphasis added). In light of this charge, McClelland's testimony could not have been given greater weight than that of a lay witness and, therefore, could not have been unduly prejudicial to Appellant. State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009).

For all of these reasons, the State submits the trial court's qualification of McClelland as an expert in fingerprint analysis was not an abuse of discretion. Additionally, to the extent McClelland should not have been qualified as an expert, Appellant suffered no prejudice from his testimony. Therefore, there was no violation of Appellant's right to a fair trial, and his conviction should be affirmed.

II. The trial court properly denied Appellant's motion to strike or suppress testimony concerning fingerprint analysis, and properly denied Appellant's alternative request for a mistrial where Appellant failed to demonstrate that: (1) evidence was suppressed by the State; (2) evidence allegedly suppressed was favorable to the accused; or (3) evidence allegedly suppressed was material to Appellant's guilt.

Appellant argues the trial judge erred in refusing to either exclude the testimony concerning fingerprint analysis or declare a mistrial, based on the solicitor'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. Specifically, Appellant claims Brady[2] required the solicitor to provide him with a printout of each of the thirty (30) known fingerprints identified by AFIS as having similar characteristics as the unknown print discovered at the crime scene.[3] The State disagrees and submits Appellant's argument is without merit. First, the solicitor did not actually suppress any evidence in the State's possession. Rather, the solicitor made a sufficient evidentiary disclosure in compliance with Brady by providing Appellant with all information entered into and produced by AFIS. Second, the evidence allegedly suppressed was not favorable to Appellant. Third, the evidence allegedly suppressed was not material to Appellant's guilt or innocence.

The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Favorable

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[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] There is no dispute that the solicitor provided Appellant with a printout of the one fingerprint identified by AFIS and matched to the crime scene by the expert witness.

evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667 (1963); Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Hyman at 45-46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, an individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

The State submits the solicitor did not suppress or otherwise fail to disclose evidence in her possession. Instead, in response to Appellant's discovery request, the solicitor provided Appellant's counsel with a Latent Search Verification screenshot (Tr.p.110; Court's Exhibit C-2), which showed AFIS had produced 30 responses to McClelland's query, and which included a partial list of the SID numbers assigned to each of the individuals identified by AFIS as having similar characteristics to the fingerprint found at the crime scene. AFIS did not produce a printout or actual copy of each print. Instead, it only produced a printed copy of the fingerprints requested by the

user. (Tr.p.106, lines 17-22; p.111, line 21-p.114, line 22). Despite this disclosure, Appellant never asked the solicitor for printouts of the 29 similar but non-matching fingerprints, or otherwise sought to view or analyze those prints prior to trial.

Relying on Riddle, supra, Appellant contends the solicitor's disclosure was insufficient because it would be unrealistic to require Appellant to make a request for printouts of the non-matching fingerprints. However in Riddle, the prosecutor failed to disclose an inconsistent statement given by a key prosecution witness to the police shortly before trial. The defendant would not have known the statement existed unless his attorney re-interviewed all officers and investigators in the days before trial. The Supreme Court found this was unrealistic, and not what Brady requires because the burden is on the solicitor to disclose material evidence which is exculpatory or impeaching. Riddle at 44, 631 S.E.2d at 73. Here, Appellant was advised of the 30 similar fingerprints identified by AFIS but expressed no interest in obtaining printed copies of the 29 non-matching fingerprints, or in examining them himself. It certainly is not unrealistic to expect Appellant to have made such a request when he had knowledge of their existence. The fact that AFIS is only accessible to law enforcement officers is of no moment, because Appellant never sought access to or requested copies from the solicitor. There is no evidence to suggest the solicitor would not have obtained that access or provided copies of the printouts upon request. In Riddle, the Court recognized that "the overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play." Riddle at 46, 631 S.E.2d at 74 (quoting Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). Here, the solicitor's disclosure was entirely consistent with her responsibility for fair play.

Next, Appellant cites a case from New Jersey, State v. Feldman, 604 A.2d 242 (N.J. Super. Ct. 1992), for the proposition that information entered into and produced by AFIS is discoverable and must be provided to criminal defendants. Here, the information produced by AFIS was the list of 30 known fingerprints with similar characteristics and the printout of the single known fingerprint McClelland matched to the crime scene. Thus, the State submits the solicitor provided Appellant with the information produced. In any event, Feldman was based on an interpretation of a New Jersey state law and is inapplicable to South Carolina. In addition, to the extent Feldman found the identification of non-matching but similar prints from AFIS is subject to required disclosure, the State submits the finding demonstrates flawed logic given the unique nature of fingerprints. Similar but non-matching fingerprints are no more exculpatory than non-similar, non-matching fingerprints. In either case, the non-matching fingerprints are non-matching fingerprints. They cannot match the crime scene fingerprint because it is unique and was manually matched to a certainty to the single fingerprint pulled from AFIS and provided to Appellant as part of the State's discovery response. In other words, the solicitor complied with Brady.

The State further submits Appellant failed to demonstrate the allegedly suppressed evidence was favorable to his case. A fingerprint was found at the crime scene. (Tr.p.82, line 17-p.85, line 5). Based on recognized methods of analysis and matching techniques, that fingerprint was matched to Appellant. It was an exact match verified by a second fingerprint examiner. Fingerprints are unique. Not even identical twins have the same prints. (Tr.p.115, lines 8-18; p.116, lines 13-17; p.120, line 25-p.121, line 121, line 7; p.129, line 3-p.131, line 9; p.137, lines 9-10; p.143, lines 5-13;

p.144, lines 12-16; p.145, lines 10-14). The State submits Appellant utterly failed to demonstrate or articulate at trial how printouts of the 29 non-matching fingerprints would have been favorable to his case. In Hyman, the defendant argued the State's refusal to allow him to personally view a videotape of the transaction forming the basis of the charges violated its discovery obligations. However, the videotape was a recording of the drug transaction. The court noted that: "By all accounts, including defense counsel's testimony, the videotape depicted [Hyman] engaged in a drug transaction with a confidential informant. Because the evidence at issue is inculpatory, Brady is inapplicable." Hyman at 47, 723 S.E.2d at 381. Similarly, the evidence here that the unknown fingerprints do not match twenty-nine (29) people with similar distinguishing points is, for Appellant, at least neutral and at worst inculpatory. Whatever the case, it is not favorable to Appellant.

Finally, Appellant made no showing as to how the 29 fingerprints were material to his guilt or innocence. At trial, Appellant's trial counsel complained that despite having filed a motion for production and disclosure of evidence he had not received information that there were 30 "hits from the AFIS computer," and had not received copies of the other fingerprints to compare. He made an assertion that "had I been given [the printouts] it may have helped my client in the presentation of this case" (Tr.p.103, lines 13-23), with no explanation. Indeed, Appellant did not move for a continuance or ask for immediate production of printouts of the other 29 prints for analysis. Appellant offered no actual analysis of those prints or an expert to articulate how an analysis of non-matching prints could have created a reasonable probability of a different result. Appellant failed to make a sufficient showing to undermine confidence in the outcome of

his trial. He claims that since the solicitor never challenged whether the 29 prints identified by AFIS were favorable or material, she conceded they were material. But there was no such concession, either express or implied. The cases make clear that the defendant must demonstrate materiality. The State has neither a burden to show otherwise, nor an affirmative duty to respond to a defendant's unsubstantiated allegation of materiality. In a similar Brady analysis, the Florida Supreme Court held that a list of potential matches generated by AFIS, with no actual matches, was not material to the defendant's defense. Boyd v. State, 910 So.2d 167, 179 (Fla. 2005).

Based on these reasons, the State submits the trial court properly denied Appellant's motion to strike or suppress testimony concerning fingerprint analysis, and properly denied Appellant's alternative request for a mistrial, because Appellant failed to demonstrate the solicitor committed a Brady violation. As a result, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
January 14, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-210188

THE STATE, ...RESPONDENT

v.

JAMES ANDERSON, ...APPELLANT.

DESIGNATION OF MATTER

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

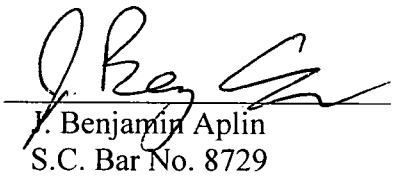
(1) Trial Transcript pages; 47-48; 51-52;55-56; 58-59; 63; 65; 110; 143-145; 174-175; 192; 198; 203; 211
(2) Court's Exhibit C-2.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY: 

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PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated January 14, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
S.C. Commission on Indigent Defense
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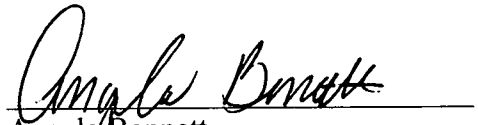
I further certified that all parties required by Rule to be served have been served. This 14th, day of January, 2013.



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