

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal From Marion County  
Hon. William H. Seals, Jr., Circuit Court Judge  
Appellate Case Tracking No. 2015-000~~943~~

**RECEIVED**

MAY - 5 2015

**S.C. Supreme Court**

The State,

Respondent,

v.

Darrell Lee Birch,

Petitioner.

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Opinion No. 2014-UP-366 (S.C. Ct. App. filed October 29, 2014)

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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## STATEMENT OF QUESTIONS PRESENTED

- I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion to suppress evidence. (Petitioner's Questions I, II, and III combined).

## STATEMENT OF THE CASE

### **Procedural History**

The State agrees with Petitioner's procedural Statement of the Case.

### **Factual Background**

The Marion County Grand Jury indicted Petitioner on charges of possession of cocaine base (crack cocaine) with intent to distribute and possession of ecstasy. At trial, Petitioner's counsel moved to suppress drugs found on Petitioner. (T.34; R.34).

During the hearing, the State presented the testimony of Officer Grice, Agent Cribb and Agent Collins. Officer Grice observed Byron Horne and knew the Marion County Drug Unit had outstanding narcotics warrants on him. Officer Grice contacted Agent Cribb and Agent Collins and they came to the scene and arrested Horne based on the warrants. (T.35-36; 41; R. 35-36). After he was arrested, Horne gave Agent Cribb consent to search his residence. (T.36; 41-42; R. 36; 41-42). Agent Cribb wanted to search the residence to locate drugs and Petitioner. (T.44-45; R. 36; 44-45). Agent Cribb knew Petitioner lived at or frequented the residence with Horne. Horne indicated his cousin (Petitioner) was home and Agent Cribb had outstanding warrants on Petitioner. (T.41-42; R. 41-42).

Officer Grice assisted with the search of Horne's residence. When they arrived, they found four people in the residence even though Horne had indicated only one person would be there. (T.49; R. 50). As a result, the officers conducted a security sweep prior to searching the residence.

Upon entering, Officer Grice made contact with Petitioner in the front room. Petitioner had a ball cap on his head and his hand in his pocket. Officer Grice told

Petitioner to remove his hand from his pocket for officer safety. Petitioner refused to remove his hand. Officer Grice asked three or more times for Petitioner to remove his hand from his pocket. For the safety of himself and other officers, Officer Grice forcibly removed Petitioner's hand from his pocket. (T.39-40; R. 39-40). When he removed his hand, an object fell to the floor. Officer Grice also removed Petitioner's ball cap, recognized Petitioner, and knew the drug unit had narcotics warrants for Petitioner. (T.39; R. 39).

Officer Grice placed Petitioner in custody on the outstanding warrants. During a search incident to the arrest, an Icebreaker's can was found containing pills consistent with narcotics. The pills later tested positive as ecstasy. (T.126-130; R. 127-131). The object that fell to the floor when Petitioner's hand was removed from his pocket was a pill bottle and later determined to contain crack cocaine. (T.123-125; R. 124-126).

Petitioner failed to return to court for the remainder of trial on November 29 or 30, 2011. The jury found Petitioner guilty of both charges. His sentence was sealed and subsequently read on October 17, 2012. Judge Seals sentenced Petitioner to thirty years for possession of cocaine base with intent to distribute and one year consecutive for possession of ecstasy.

## ARGUMENT

### **I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion to suppress evidence. (Petitioner's Questions I, II, and III combined).**

The Court of Appeals correctly found the trial court did not err in denying Petitioner's motion to suppress the drugs found on his person. The officers had the clear authority to detain Petitioner during the search of the home, had reasonable suspicion to believe he had a weapon or other danger to the officer's safety when he refused to remove his hand from his pocket, and had the right to remove his hand from his pocket in order to ensure their security and to exercise control of the situation during the search.

A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Groome, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . ." U.S. Const. amend. IV. The ultimate touchstone of the Fourth Amendment is "reasonableness," and the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). One notable and relevant exception is a search for the protection of officers. Id.; Maryland v. Buie, 494 U.S. 325, 337 (1990). "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively,

justify [the] action.” Herring, 387 S.C. at 210, 692 S.E.2d at 494 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

In Michigan v. Summers, 452 U.S. 692 (1981), the United States Supreme Court held that officers executing a search warrant for contraband may “detain the occupants of the premises while a proper search is conducted.” Id., at 705. A similar conclusion should apply to a search of the home pursuant to consent of the owner when others are found to be present during the search. The United States Supreme Court “posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: ‘preventing flight in the event that incriminating evidence is found’; ‘minimizing the risk of harm to the officers’; and facilitating ‘the orderly completion of the search,’ as detainees’ ‘self-interest may induce them to open locked doors or locked containers to avoid the use of force.’” Muehler v. Mena, 544 U.S. 93, 98 (2005) (quoting Summers, 452 U.S. at 702–703). An officer’s authority to detain incident to a search is categorical; it does not depend on the “quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.” Summers, 452 U.S. at 705, n. 19.

Petitioner attempts to distinguish Summers and Mena by arguing the searches in those cases arose from a search warrant and not consent. The same “legitimate law enforcement interests” discussed in Summers and Mena exist whether the search is by warrant or by consent of the owner of the premises. Officer safety, especially when there are multiple persons beyond the homeowner within the premises to be searched who may be impacted by the search, is still a paramount concern whether the search is based on a warrant or consent of the homeowner. Further, preventing flight by one of the occupants as well as facilitating the orderly completion of the search will be just as prevalent with

the occupants of a home being searched based on someone else's consent as it would if all were subject to the search based on a search warrant. As a result, the distinction between a search conducted based on a warrant and one conducted based on consent is a distinction without a difference in analyzing the justification for the actions allowed under Summers and Mena.

“Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. Indeed, Summers itself stressed that the risk of harm to officers and occupants is minimized ‘if the officers routinely exercise unquestioned command of the situation.’” Muehler, 544 U.S. at 98-99 (quoting Summers, 452 U.S., at 703.). In Muehler, the officers effectuated the detention by placing the occupants in handcuffs during the duration of the search. The United States Supreme Court found this was a proper detention and exercise of authority during the search.

In the instant case, in order to properly exercise unquestioned command of the situation, Officer Grice was entitled to gain compliance from Petitioner. Petitioner refused after multiple commands to remove his hand from his pocket. In removing Petitioner's hand, Officer Grice was merely using reasonable force to effectuate the detention allowed under Summers and Muehler. The removal of Petitioner's hand is certainly less intrusive, and less a detention, than placing someone in handcuffs as in Muehler. Accordingly, the trial court properly refused to suppress the drugs found when Officer Grice removed Petitioner's hand from his pocket when Petitioner refused to comply with several valid commands based on officer safety.

Further, once properly detained, a protective frisk is constitutionally reasonable when a police officer “observes unusual conduct which leads him **reasonably** to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.” Terry v. Ohio, 392 U.S. 1, 30 (1968) (emphasis added). “The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence.” Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). “In assessing whether a suspect is armed and dangerous, the officer **need not be absolutely certain** the individual is armed.” State v. Blassingame, 338 S.C. 240, 248-249, 525 S.E.2d 535, 540 (Ct. App. 1999) (emphasis added). “There exists an indisputable nexus between drugs and guns, and where an officer has reasonable suspicion that drugs are present, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk.” State v. Taylor, 401 S.C. 104, 119, 736 S.E.2d 663, 671 (2013) (citing State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006)).

In the instant case, Officer Grice entered Horne’s home in order to conduct the search. The search was being conducted to look for drugs or narcotic activity. The home was a known drug house. Further, it was suspected Petitioner would be present at the house, and the officers knew Petitioner had outstanding drug warrants.

Officer Grice came into contact with Petitioner in the front room of the home. Petitioner had a ball cap pulled down over his face like he was concealing his identity. Petitioner also had his hand in his pocket. Officer Grice told him more than three times to remove his hand because Officer Grice believed Petitioner could have a weapon or something to harm him or the other officers. Officer Grice had reasonable suspicion

based on the totality of the circumstance—the search being of a known drug house, officers were looking for drugs and an individual known to have outstanding drug warrants, Petitioner refusing to remove his hand from his pocket where he could have concealed a weapon—to conduct a pat-down of Petitioner’s person, which would include the removal of his hand from his pocket to ensure there was nothing dangerous in Petitioner’s reach.<sup>1</sup>

Petitioner cites Ybarra v. Illinois, 444 U.S. 85 (1979) and State v. Broadnax, 654 P.2d 96 (Wash. 1982), as authority indicating the officers did not have the right to search Petitioner. Both cases are clearly distinguishable from the facts of this case.

In Ybarra, the officers had a warrant to search a tavern. They conducted a search and pat-down of a patron merely on site. The United States Supreme Court found the pat-down of the patron to be unconstitutional. In describing the facts relied on by the State to allow the search of Ybarra, the Court explained:

When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, **Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening.** At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, **the State is unable to articulate any specific fact that would have justified a police officer at**

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<sup>1</sup> To the extent Petitioner argues the pat-down or search of his person exceeded the scope of that allowed under a Terry stop, this issue was never raised to the trial court and is not properly preserved for review on appeal.

**the scene in even suspecting that Ybarra was armed and dangerous.**

Ybarra, 444 U.S. at 93 (emphasis added). The Court stated: “The ‘narrow scope’ of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.” Id. at 94. In Ybarra, unlike the instant case, the defendant took no action which gave rise to the reasonable suspicion to believe the individual armed. Petitioner, on the other hand, refused multiple times when asked by an officer to remove his hand from his pocket which could easily contain a weapon.

In State v. Broadnax, the police were executing a search warrant at a residence. The officers were met at the door by petitioner’s father and, once inside the house, the officers encountered petitioner. Detective Roesler instructed petitioner’s father and petitioner each to put their hands on their heads. The two men complied. Petitioner was searched by an officer who testified he did not believe petitioner was armed and even after doing a pat-down of his clothing did not believe the bulge he felt was a weapon. Broadnax, 654 P.2d at 99. The Court found the search was not based on reasonable suspicion of weapons, but instead the officer was searching for and found narcotics. Id. at 100-101. The officer in the instant case, however, always maintained the search of Petitioner was based on concerns for officer safety and the fact he could have a weapon in his pocket. Petitioner refused to remove his hand and so the removal by the officer was clearly reasonable and can be distinguished from the unconstitutional search in Broadnax.

Finally, the evidence would have been inevitably discovered during a search incident to Petitioner's arrest based on the outstanding warrants. The inevitable discovery doctrine has been adopted as an exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984). If the prosecution can establish by a preponderance of the evidence that information or evidence would have inevitably been discovered by lawful means, then the discovered evidence, even if obtained by unlawful means, is admissible. Id. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id. at 446.

In this particular case, the officers had outstanding arrest warrants on Petitioner. Officers testified they believed he would be present and they were looking for him at the residence. (T.41; 44-45; 49-50; R. 41; 44-45; 50-51). Petitioner was ultimately arrested on the outstanding warrants. As a result of the arrest, he was searched and it turned up the pills for which he was charged. (T.39; R. 39). During the same search, the crack cocaine would have been located had it not previously been found based on Petitioner's failure to comply with a reasonable officer demand. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) (when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape); State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment).

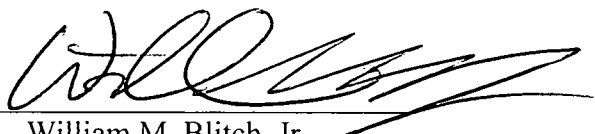
**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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May 5, 2015

STATE OF SOUTH CAROLINA

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**S.C. Supreme Court**

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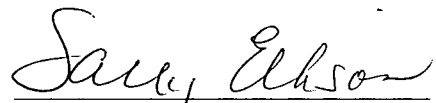
Petitioner.

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**PROOF OF SERVICE**  
\_\_\_\_\_

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.  
This 5<sup>th</sup> day of May, 2015.

  
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