STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2010-175826

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S.C. Supreme Court

THE STATE,

Petitioner,

vs.

DANNY CORTEZ BROWN,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I.

The Court of Appeals erred in finding insufficient evidence was presented during trial to warrant the application of the inevitable discovery doctrine to Brown's case because the evidence presented established Brown's cocaine would inevitably have been discovered. However, assuming the evidence of inevitable discovery was insufficient, a remand to the trial court to allow the trial judge to address the issue of inevitable discovery would ensure Brown's case is fairly and correctly resolved without violating any of Brown's constitutional rights. Furthermore, application of the inevitable discovery doctrine in Brown's case would be entirely consistent with the policy rationales behind both the exclusionary rule and the inevitable discovery exception to it.

In his Brief of Respondent, Respondent Danny Cortez Brown contends the State failed to meet its burden of establishing his drugs would inevitably have been discovered even if the improper search had not occurred while asserting any remand for further proceedings on the inevitable discovery issue would constitute a double jeopardy violation. Brown further maintains "sound public policy" forbids the application of the inevitable discovery doctrine in his case. Initially, the State disagrees with Brown's assessment of the strength of the evidence regarding the inevitability of the discovery of Brown's cocaine. However, assuming Brown is correct, a remand on the matter would permit the trial judge to fully address the issue of inevitable discovery for the first time, would ensure Brown's case is fairly and correctly resolved, and would in no way violate Brown's constitutional rights or the guarantee against double jeopardy. Furthermore, application of the inevitable discovery doctrine in Brown's case would be fully consistent with the policy rationales behind the exclusionary rule and the inevitable discovery doctrine. For these reasons coupled with the arguments raised in the Brief of Petitioner, the decision of the Court of Appeals should be reversed and Brown's conviction should be affirmed. However, if the evidence presented during trial is found to be insufficient to

establish that Brown's narcotics would inevitably have been discovered, the matter should be remanded to the trial court to allow the issue of inevitable discovery to be fully addressed by the trial judge.

A. Necessity and Propriety of a Remand for Further Findings If the Evidence Is Not Sufficient to Establish the Inevitability of the Discovery of the Drugs

When the record is insufficient to permit review of an issue, an appellate court is permitted to remand the matter for further findings. Cook v. Cook, 280 S.C. 91, 93, 311 S.E.2d 90, 91 (Ct. App. 1984); see, e.g., Arnal v. Fraser, 371 S.C. 512, 519, n. 4, 641 S.E.2d 419, 422 (2007) ("A party can always seek a remand from an appellate court if the circumstances of the particular case require it."). Remand for an evidentiary hearing may be appropriate where the record is unclear on some issue or there is insufficient information in the record for the appellate court to rule on a particular issue. See State v. Johnson, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990) ("[I]t is not clear from this record whether oral testimony concerning the reliability of the informant was given to the magistrate. Therefore, we remand this issue to the trial court so that it may be determined exactly what information was supplied to the magistrate."); State v. Sampson, 317 S.C. 423, 426, 454 S.E.2d 721, 723 (Ct. App. 1995) (remanding for an evidentiary hearing on the validity of a search warrant).

In the case sub judice, Brown contends the evidence in the record is insufficient to establish his drugs would inevitably have been discovered even if no improper search had occurred. Although the State disagrees with Brown's assessment of the strength of the evidence in the record and reaffirms its argument on the inevitability of the discovery of Brown's narcotics from the Brief of Petitioner, Brown's argument demonstrates exactly

why his case should be remanded for further exploration of the inevitable discovery issue assuming his contentions regarding the strength of the evidence are correct.

Critically, during trial, the trial judge denied Brown's suppression motion after finding the drugs were discovered during a valid search incident to Brown's arrest. (R. pp. 151-153). Because the trial judge found the search itself to be valid, it was entirely unnecessary for him to address whether the evidence would inevitably have been discovered had no illegal search occurred as he did not find any illegalities occurred in regards to the search. For that reason, the trial judge did not make a ruling on the applicability of the inevitable discovery doctrine during trial. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It could also violate the principle that a court usually should refrain from deciding unnecessary questions."). However, subsequent to the trial judge's ruling, the United States Supreme Court issued its decision in Arizona v. Gant, 556 U.S. 332 (2009), which altered the applicable law in regards to searches incident to lawful arrests. Due to the subsequent change in the law, which directly impacted the issues in Brown's case and altered the requisite analysis for determining whether Brown's drugs were admissible during trial, the question of whether Brown's drugs would inevitably have been discovered even if the officer had not searched the duffle bag incident to Brown's arrest became critical to properly determining whether Brown's drugs should or should not have been suppressed.

Because the trial judge did not address the inevitable discovery issue and assuming the evidence in the record is insufficient to allow for the issue to properly be reviewed on appeal, a remand to the trial court would allow the trial judge to fully

address the issue and determine if the inevitable discovery doctrine applies to Brown's case. Notably, such a decision would be consistent with the decisions of numerous state and federal appellate courts, including courts in South Carolina. See State v. Jenkins, 398 S.C. 215, 230, 727 S.E.2d 761, 769 (Ct. App. 2012) ("[W]e find it appropriate to remand to the trial court for an evidentiary hearing as to whether the inevitable discovery doctrine applies."); see also United States v. Heath, 455 F.3d 52, 62 (2nd Cir. 2006) (remanding to the trial court for further proceedings where the record was insufficient to determine if the inevitable discovery doctrine applied); McFerguson v. United States, 770 A.2d 66, 76 (D.C. Cir. 2001) (remanding for the trial judge to consider the applicability of the inevitable discovery doctrine where the trial judge did not reach the issue of inevitable discovery during trial based on his ruling on the propriety of the search and had no occasion to make findings of fact on the inevitable discovery issue); People v. Herrera, 1 P.3d 234, 239 (Colo. Ct. App. 1999) (holding the trial judge erred in finding the search to be valid but remanding to the trial court for an evidentiary hearing and further findings on alternative theories of admissibility, including the inevitable discovery doctrine); State v. Badgett, 200 Conn. 412, 433-434, 512 A.2d 160, 172 (Conn. 1986) ("In light of Nix v. Williams, we remand the case to the trial court to determine whether the inevitable discovery doctrine is applicable under the circumstances of this case."); People v. Brzezinski, 243 Mich. App. 431, 437, 622 N.W.2d 528, 533 (Mich. Ct. App. 2000) ("Because it appears from the record before us that the evidence in defendant's pockets may have been discovered despite any police misconduct, we vacate the suppression order and remand for consideration of this matter in light of the inevitable discovery rule. The prosecution shall be given the opportunity to establish that the evidence defendant claims should be suppressed would have been discovered despite any police

misconduct."); State v. McLees, 298 Mont. 15, 27, 994 P.2d 683, 691 (Mont. 2000) (finding a search to be invalid but remanding to the trial court to consider the issue of the inevitability of the discovery of the evidence); see, e.g., United States v. Richardson, 949 F.2d 851, 859 (6th Cir. 1991) (finding a search to be invalid and leaving the issues of whether the evidence would have inevitably been discovered or discovered through an independent source for determination on remand for a new trial); United States v. Campbell, 945 F.2d 713, 716 (4th Cir. 1991) ("The district court made no findings on these points, and did not specifically address the independent source issue because of its finding that exigent circumstances justified the initial entry. Accordingly, we remand for findings as to whether the subsequent search of Campbell's residence pursuant to the search warrant was, in fact, an independent source of the challenged evidence in the sense described above."); State v. Walton, 565 So. 2d 381, 384 (Fla. Dist. Ct. App. 1990) (instructing the appellate court should reverse a suppression order and remand for the trial court to determine whether a preponderance of the evidence supports the inevitable discovery theory when the record could lead to a conclusion that the suppressed evidence would have inevitably been discovered by lawful means); People v. Byrd, 408 Ill. App. 3d 71, 79, 951 N.E.2d 194, 201 (Ill. App. Ct. 2011) (remanding for a new suppression hearing to allow for the development of facts by the prosecutor and Byrd in light of the United States Supreme Court's decision in Arizona v. Gant, which was decided after the trial judge found the search in Byrd's case to be a proper search incident to arrest).

In opposition to the State's request for the matter to be remanded to the trial court to allow the trial judge to address the inevitable discovery issue, Brown claims such a remand would constitute a double jeopardy violation and violate his constitutional rights. However, that contention is entirely without merit.

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

However, the guarantee against double jeopardy does not prevent a new trial from being commenced after a defendant successfully appeals a conviction from an earlier trial. See State v. Brown, 360 S.C. 581, 591, 602 S.E.2d 392, 398 (2004) ("The Double Jeopardy Clause does not preclude the State from retrying a defendant whose conviction is set aside because of an error in the proceedings such as incorrect receipt of evidence, erroneous jury instructions, or prosecutorial misconduct."); State v. Nelson, 336 S.C. 186, 195-196, 519 S.E.2d 786, 790-791 (1999) ("It is well established that where a verdict is set aside by a defendant's own motion and a new trial granted, the defendant may be again tried for the offense. Moreover, while a determination that the evidence was insufficient to support a conviction ordinarily precludes a retrial, the Double Jeopardy clause does not preclude retrial of a defendant whose conviction was set aside because of trial error." (citations omitted)). Similarly, nothing in the Double Jeopardy Clause divests appellate courts of the authority to remand matters to the trial court for further proceedings as part of an appeal. See Nelson, 336 S.C. at 195, 519 S.E.2d at 790

(recognizing the Double Jeopardy Clause only prohibits a second prosecution for the same offense after acquittal or conviction or multiple punishments for the same offense).

If Brown's case were remanded to the trial court to allow the trial judge to address the issue of whether the inevitable discovery doctrine is applicable to Brown's case, Brown would **not** be subjected to a second prosecution for the same offense after acquittal or conviction and would not be subjected to multiple punishments for the same offense. See id. ("The Double Jeopardy clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense."). Therefore, a remand would not run afoul of the Double Jeopardy Clause or violate Brown's constitutional rights. Instead, it would simply allow the trial judge to address an important issue in Brown's case that was not previously addressed due to the impact of the trial judge's earlier ruling in regards to the propriety of the search and would ensure Brown's case was fairly and correctly resolved. See, e.g., United States v. Tateo, 377 U.S. 463, 466 (1964) ("Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."). For these reasons, the State asks this Court to remand Brown's case to the trial court to allow the trial judge to determine if the inevitable discovery doctrine is applicable should this Court find the evidence in the record is not sufficient to establish the inevitability of the discovery of Brown's narcotics.[1]

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[1] In support of his claim that a remand would constitute a violation of his constitutional rights, Brown cites to Smalis v. Pennsylvania, 476 U.S. 140 (1986). In Smalis, the United States Supreme Court instructed: "When a successful **postacquittal appeal** by the prosecution would lead to proceedings that violate the

B. Propriety of the Policy Behind the Inevitable Discovery Doctrine

In Nix v. Williams, 467 U.S. 431, 444 (1984), the United States Supreme Court adopted the inevitable discovery doctrine as an exception to the exclusionary rule. In articulating the inevitable discovery doctrine, the Supreme Court instructed:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means – here the volunteers' search – then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

Id. at 444 (footnotes omitted). The Supreme Court further explained: "Suppression, in these circumstances, would do nothing whatsoever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." Id. at 447. Thus, the Supreme Court recognized that the policy rationale justifying the application of the exclusionary rule would not be served through the exclusion of evidence that inevitably would have been lawfully discovered even if no illegal search ever occurred. See id. at 446 ("Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."); see also Jenkins, 398 S.C. at 229, 727 S.E.2d at 769 ("[T]he inevitable discovery doctrine represents an important policy determination that the 'harsh medicine'

Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a **postacquittal appeal** by the prosecution not only when it might result in a second trial, but also if reversal would translate into ' 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.' ' " Id. at 145 (citations omitted and emphasis added). Critically, unlike in Smalis, the appeal filed in Brown's case did not follow an acquittal or a finding that the evidence was insufficient to sustain a guilty verdict, and the decision of the Court of Appeals in Brown's appeal did not have the effect of acquitting Brown of the indicted offense. Instead, the Court of Appeals simply reversed the trial judge's ruling on the propriety of the search. Just as the State is not precluded from retrying Brown following the Court of Appeals' decision in Brown's case, this Court is not precluded by the constitutional guarantee against double jeopardy from remanding Brown's case for further findings on the issue of the applicability of the inevitable discovery doctrine. See Brown, 360 S.C. at 591, 602 S.E.2d at 398 ("The Double Jeopardy Clause does not preclude the State from retrying a defendant whose conviction is set aside because of an error in the proceedings **such as incorrect receipt of evidence**, erroneous jury instructions, or prosecutorial misconduct." (emphasis added))

of excluding probative evidence should be avoided when doing so does not advance the objectives of the exclusionary rule by deterring violation of constitutional rights.").

Brown contends "sound public policy" should preclude the application of the inevitable discovery doctrine to his case. In support of that argument, Brown maintains he was arrested for a "minor" misdemeanor as a pretext for his constitutional rights to be violated. Brown further asserts application of the inevitable discovery doctrine to his case would create an incentive for law enforcement officers to make custodial arrests for minor offenses and would threaten the deterrent effect of the exclusionary rule. Brown's contentions are entirely without merit and are wholly at odds with the underlying rationales behind the inevitable discovery doctrine and the exclusionary rule.

In Brown's case, Brown was lawfully and properly arrested after he was observed committing an open container violation by a law enforcement officer.[2] (R. p. 2; pp. 4-5). To the extent Brown's challenge to the application of the inevitable discovery doctrine is based on his contention that his arrest was somehow impermissibly pretextual, no such contention has ever previously been raised.[3] Significantly, the likely reason such a

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[2] Notably, Brown was arrested **before** his duffle bag was searched and his cocaine was discovered. (R. pp. 4-5).

[3] In support of his argument that his arrest was improperly pretextual, Brown claims Detective Delpercio, the narcotics officer who responded to the scene of Brown's arrest after Brown's cocaine was discovered, "admitted that open container violations usually do not lead to arrests[.]" (Resp. Br. p. 15). Significantly, no such admission from Detective Delpercio appears in the record. Instead, Detective Delpercio simply stated he did not take the beer can into evidence while acknowledging open container violations are handled in magistrate's court. (R. p. 49). Brown also claims Officer Williams, the officer who arrested Brown for the open container violation, "candidly admitted" he arrested Brown as a "pretext for the stop and search[.]" (Resp. Br. p. 14). However, Officer Williams made no such admission during trial. Instead, Officer Williams stated the "pretext" for him **initiating the traffic stop** was the fact he observed Brown committing an open container violation. (R. p. 18). Notably, nothing in the record suggests Officer Williams was even aware of Brown's duffle bag at the time the officer lawfully initiated the traffic stop. Furthermore, the officer did **not** testify he arrested Brown to get a look into his bag as Brown appears to suggest in his brief. Instead, the officer testified he arrested Brown after Brown admitted he was guilty of committing an open container violation. (R. pp. 4-5). Although unrelated to Brown's arrest, Brown also claims that his confederate, Rodney Smith, "still has not been prosecuted" for the drug offenses stemming from the traffic stop related to this case. (Resp. Br. p. 7). However, a records check with the Horry County

contention was not raised during trial was the officer unquestionably had the authority to arrest Brown after he observed Brown committing a crime regardless of whether Brown believed that crime was a "minor" one unworthy of arrest.[4] See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Because Brown's arrest was lawful and proper, any question regarding whether the arrest was a pretext for some further investigation was entirely irrelevant. See Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); see also Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (reversing a decision to suppress evidence discovered during an inventory search

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Clerk of Court's public index confirms Smith was indicted for possession with intent to distribute methamphetamine or cocaine base after he was arrested with Brown, pled guilty shortly after testifying in Brown's trial, and was sentenced to a fifteen-year term of imprisonment suspended upon the completion of a ninety-day term of monitored house arrest and a two-year term of probation. Records for Rodney Smith, Horry County Fifteenth Judicial Circuit Public Index, http://www.horrycounty.org/SCJDWEB/publicindex.

[4] In arguing his arrest was pretextual, improper, and uncommon, Brown compares an open container violation to the offenses of improperly using a turn signal and hanging on to the bumper of a car while riding a bicycle based on the similarity between the penalties for those offenses. (Resp. Br. p. 14, n. 4). Notably, numerous other misdemeanor offenses that could not rationally be considered "minor" offenses **also** carry similar penalties to the penalties for an open container violation, including first-offense driving under the influence, first-offense criminal domestic violence, third-degree assault and battery, engaging in a riot, cruelty to children, placing explosives on railroad tracks, and threatening the life of a public employee. Compare S.C. Code Ann. § 61-4-100 (classifying possessing an open container in a motor vehicle as a misdemeanor and authorizing imposition of a sentence of not more than thirty days or a fine not exceeding $100); with S.C. Code Ann. § 16-3-600(E) (classifying third-degree assault and battery as a misdemeanor and authorizing imposition of a sentence of not more than thirty days and/or a fine not exceeding $500); S.C. Code Ann. § 16-3-1040(D) (authorizing imposition of a sentence of not more than thirty days and/or a fine not exceeding $500 for threatening the life, person, or family of a public employee); S.C. Code Ann. § 16-5-120 (authorizing the imposition of a sentence of not more than thirty days or a fine not exceeding $100 for engaging in a riot where a weapon is not used); S.C. Code Ann. § 16-25-20(B)(1) (classifying first-offense criminal domestic violence as a misdemeanor, authorization the imposition of a sentence of not more than thirty days or a fine between $1,000 and $2,500, and allowing the fine to be suspended upon completion of a program designed to treat batterers); S.C. Code Ann. § 56-5-2930(A)(1) (authorizing the imposition of a sentence of not less than forty-eight hours and not more than thirty days or a fine of $400 for first-offense driving under the influence and permitting the forty-eight hours sentence to be served as community service); S.C. Code Ann. § 58-15-830 (classifying placing explosives on railroad tracks as a misdemeanor and authorizing imposition of a sentence of not more than thirty days or a fine not exceeding $100); and S.C. Code Ann. § 63-5-80 (classifying cruelty to children as a misdemeanor and authorizing imposition of a sentence of not more than thirty days or a fine not exceeding $200).

conducted after Sullivan was arrested because the evidence was improperly suppressed as the fruit of an allegedly pretextual arrest); see, e.g., State v. Banda, 371 S.C. 245, 253, n. 3, 639 S.E.2d 36, 40 (2006) ("Evidence that the Greenville officers were more interested in apprehending the drug target does not factor into a probable cause analysis in the otherwise valid stop of a vehicle for stolen license tags."). Thus, the subjective intentions of the arresting officer in Brown's case are irrelevant when considering whether the inevitable discovery doctrine should have been applied.

Furthermore, to the extent Brown is contending that application of the inevitable discovery doctrine in his case would threaten the deterrent rationale of the exclusionary rule or would encourage officers to intentionally violate suspects' constitutional rights, the United States Supreme Court has specifically rejected such contentions. See Nix, 467 U.S. at 445 ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered."); see also Atwater, 532 U.S. at 353-354 ("We are sure there are [other foolish, warrantless misdemeanor arrests], but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests. That fact caps the reasons for rejecting Atwater's request for the development of a new and distinct body of constitutional law."). Contrary to Brown's assertions, the Supreme Court determined the deterrent rationale of the exclusionary rule could not rationally be served by the exclusion of evidence that would inevitably have been discovered. See Nix, 467 U.S. at 444 (instructing that application of the exclusionary rule to evidence that would inevitably have been discovered by lawful means would reject logic, experience, and common sense and have little deterrent rationale). Thus, the application of the

exclusionary rule to Brown's narcotics would itself be contrary to sound public policy if Brown's narcotics would inevitably have been discovered.

On appeal, Brown asks this Court to reject the inevitable discovery doctrine and to penalize the State by excluding the admission of his drugs during trial **regardless** of whether those drugs would ultimately have been discovered by lawful means. However, as the United States Supreme Court instructed, excluding evidence that would inevitably have been discovered is entirely at odds with the underlying purpose of the exclusionary rule. See id. at 447 ("Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage and the defendant has suffered no prejudice. Indeed, suppression of the evidence **would operate to undermine the adversary system** by putting the State in a worse position than it would have occupied without any police misconduct." (emphasis added)). Accordingly, this Court should decline to accept Brown's interpretation of how the exclusionary rule should be applied and should determine whether the Court of Appeals erred in finding the evidence in the record was insufficient to establish Brown's drugs would inevitably have been discovered.[5] If the

[5] Under Brown's interpretation of the appropriate way to apply the inevitable discovery doctrine, Brown suggests any "primary" evidence discovered as the result of an illegal search should be excluded regardless of whether it would inevitably have been discovered. However, Brown's suggested inevitable discovery doctrine analysis entirely ignores the underlying rationale behind **not** applying the exclusionary rule to cases where inevitable discovery would have occurred and would place the prosecution in a worse position than it would have been in had no illegal search occurred. See Nix, 467 U.S. at 443 ("[T]he prosecution is not to be put in a better position than it would have been if no illegality had transpired. By contrast, the derivative evidence analysis ensures the prosecution is not put in a worse position simply because of some earlier police error or misconduct."). Brown's interpretation of how the exclusionary rule should be applied in cases of inevitable discovery is directly at odds with the rationales behind the inevitable

Court finds Brown's narcotics would inevitably have been discovered, it should reverse the decision of the Court of Appeals and affirm Brown's conviction. If the Court finds there is insufficient evidence in the record to establish Brown's narcotics would inevitably have been discovered, it should remand the matter to allow the trial judge to address that issue following an evidentiary hearing. Such a result would ensure Brown's case was fairly and correctly resolved while avoiding the heavy societal costs associated with the suppression of Brown's cocaine. See id. at 447 ("Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.").

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discovery doctrine and the exclusionary rule and should be rejected. See Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("Exclusion is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." (citations omitted)); Jenkins, 398 S.C. at 229, 727 S.E.2d at 769 ("[T]he inevitable discovery doctrine represents an important policy determination that the 'harsh medicine' of excluding probative evidence should be avoided when doing so does not advance the objectives of the exclusionary rule by deterring violation of constitutional rights."). Perhaps most significantly, under Brown's theory of the how the inevitable discovery doctrine should be applied, the evidence discovered in Nix would have been "primary" evidence and should have been excluded since it was discovered as a result of a violation of Williams' constitutional rights. Nix, 467 U.S. at 437-438. However, the United States Supreme Court found exclusion under the facts of Williams' case would not serve the goals of the exclusionary rule and would unacceptably conflict with logic, experience, and common sense. See Id. at 447 ("Suppression, in these circumstances, would do nothing whatsoever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.").

II.

The trial judge's decision to deny Brown's suppression motion should be affirmed pursuant to Rule 220(c), SCACR, because the officer who arrested Brown properly conducted a search of Brown's duffle bag incident to Brown's arrest while acting in objectively reasonable reliance on binding appellate precedent.

In his Brief of Respondent, Brown contends the State is barred from raising any argument regarding whether the arresting officer's good-faith reliance on binding appellate precedent at the time of the search precluded application of the exclusionary rule to Brown's cocaine. Brown further maintains no binding appellate court precedent authorized the search of his duffle bag at the time the search was carried out. For that reason, Brown asserts the United States Supreme Court's holding in Davis v. United States, 131 S. Ct. 2419 (2011), and this Court's holding in Narcisco v. State, 397 S.C. 24, 723 S.E.2d 369 (2012), which Brown characterizes as "unsupported" and "conclusory," are not applicable to his case. Initially, under the specific circumstances of Brown's case, including the fact the United States Supreme Court had not yet issued its decision in Davis at the time the Court of Appeals decided Brown's case, this Court can and should exercise its discretion to consider the applicability of Davis as an additional sustaining ground and should affirm the trial judge's ruling denying Brown's suppression motion. Furthermore, contrary to Brown's contentions, the decisions in Davis and Narcisco apply to Brown's case because the arresting officer conducted a search of Brown's duffle bag in objectively reasonable reliance on binding appellate precedent. Accordingly, the trial judge's denial of Brown's suppression motion should be affirmed.

A. Propriety of Considering the Applicability of United States v. Davis to Brown's Case on Appeal

Pursuant to our appellate court rules, "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

Rule 220(c), SCACR. Based on Rule 220(c), SCACR, this Court has specifically recognized it has the authority to affirm the rulings of a **trial judge** for any reason appearing in the record. See Law v. South Carolina Dep't of Corr., 368 S.C. 424, 440, n. 3, 629 S.E.2d 642, 651 (2006) ("This Court may affirm **the trial court** based on any ground found in the record." (emphasis added)); Upchurch v. New York Times Co., 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm **the trial judge** for any reason appearing in the record." (emphasis added)). The logical basis for the rule permitting appellate courts to affirm the ruling of a trial judge for any ground appearing in the record is that it would be nonsensical, injudicious, and inefficient to reverse a correct result reached by a trial judge simply because the trial judge reached the right conclusion for the wrong reasons. See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) ("[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." (citations omitted)).

In the case at bar, Brown asserts this Court should refuse to consider whether the United States Supreme Court's holding in Davis precludes the application of the exclusionary rule to the cocaine discovered in his duffle bag. Brown contends certiorari was not granted on that issue while asserting the issue could have been raised to both the trial court and the Court of Appeals. Although the issue of the applicability of Davis to Brown's case was not previously raised, the State raised the issue as an additional reason to sustain the trial judge's ruling at the first opportunity to do so following the United

States Supreme Court's decision in Davis. Based on the specific circumstances of Brown's case, this Court can consider the issue pursuant to Rule 220(c), SCACR, and should exercise its authority to do so.

Significantly, at the time of the Brown's arrest, the arresting officer conducted the search of Brown's duffle bag in objectively reasonable reliance on the appellate precedent controlling at the time. Subsequent to the search, the discovery of Brown's cocaine, and Brown's trial and conviction, the United States Supreme Court issued its decision in Arizona v. Gant and altered the permissible scope of a search performed incident to the arrest of a recent occupant of an automobile. Critically, that decision applied retroactively to Brown's case and directly led the Court of Appeals to reverse the trial judge's ruling on the propriety of the search. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); see also State v. Brown, 389 S.C. 473, 480-481, 698 S.E.2d 811, 815 (Ct. App. 2010) (applying Gant in reversing the trial judge's ruling on the propriety of the search). Following the Court of Appeals' decision, the State filed a petition for a writ of certiorari in this Court. Subsequent to the filing of the petition for a writ of certiorari, the United States Supreme Court concluded in Davis that the exclusionary rule should not be applied to cases where searches were conducted in reliance on binding appellate precedent in effect prior to the decision in Gant.[6] Based on that decision and in light of the fact that

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[6] Brown contends the rule announced in Davis was not a new rule and was simply an application of the United States Supreme Court's earlier decision in United States v. Leon, 468 U.S. 897 (1984), meaning the rule from Davis allegedly could have been raised as early as during trial. To the contrary, although the Supreme Court followed the reasoning of Leon and subsequent cases in reaching its decision in Davis, the Supreme Court applied the good-faith exception in an entirely new manner in Davis. See Davis, 131 S. Ct.

the officer in Brown's case conducted the search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule did not require the suppression of Brown's cocaine, and the Court of Appeals erred in reversing the trial judge's ruling. Under those circumstances, it would be inefficient and injudicious for this Court to decline to affirm the trial judge's ruling, which was ultimately correct but correct for different reasons than those articulated by the trial judge. Accordingly, the State asks this Court to exercise its authority pursuant to Rule 220(c), SCACR, and affirm the trial judge's ruling based on the grounds appearing in the record confirming its correctness.

B. Existence of Controlling Legal Precedent in Effect at the Time of Brown's Arrest Authorizing the Search of Brown's Duffle Bag

Decisions of the United States Supreme Court constitute binding precedent and are the supreme law of the land on federal questions. See State v. Waitus, 224 S.C. 12, 19, 77 S.E.2d 256, 259 (1953) (recognizing that decisions of the United States Supreme Court construing the United States Constitution are binding on South Carolina appellate courts in cases addressing questions involving the United States Constitution); see also State v. George, 119 S.C. 120, 122, 111 S.E. 880, 880 (1921) ("State Courts are not bound to follow the Federal decisions, except in cases involving a Federal question[.]"). Significantly, the precedent of the United States Supreme Court is binding in regards to questions requiring an interpretation of the Fourth Amendment of the United States Constitution. See Sullivan, 532 U.S. at 772 (instructing that state courts cannot interpret

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at 2427-2428 (reviewing the manner in which the good-faith exception had previously been applied before considering whether "to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent"). Notably, prior to the decision in Davis, the dissent in Gant concluded the new rule announced in that case would result in the suppression of evidence regardless of whether the officers conducting the challenged searches incident to arrests were acting in good-faith reliance on binding appellate precedent at the time of the searches, which demonstrates the rule announced in Davis was a new application of the good-faith exception to the exclusionary rule that the Supreme Court had never previously applied or recognized. See Gant, 556 U.S. at 356 (Alito, J., dissenting) ("The Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law[.]").

the Fourth Amendment of the United States Constitution to provide greater protections than those provided by the precedent of the United States Supreme Court); see also Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as far as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." (citations omitted)).

In the case sub judice, Brown contends the exclusionary rule applies because there was no binding appellate precedent authorizing the search of his duffle bag. Brown further asserts this Court's decision in Narcisco is not applicable to his case because this Court made a "conclusory" and "unsupported" statement about binding appellate precedent without specifically identifying any precedent "whatsoever." (Resp. Br. p. 23, n. 8). Contrary to Brown's contentions, the arresting officer in Brown's case acted in objectively reasonable reliance on controlling United States Supreme Court precedent when he searched Brown's duffle bag. Accordingly, this Court should find the Court of Appeals erred in reversing the trial judge's ruling on Brown's suppression motion.

At the time of the search of Brown's duffle bag, the controlling United States Supreme Court precedent on the scope of a search incident to an arrest permitted an officer who lawfully arrested the occupant of a vehicle to search the passenger compartment of the vehicle contemporaneously with the occupant's arrest.[7] See New

[7] In challenging the search of his duffle bag, Brown argued his rights pursuant to the Fourth Amendment of the United States Constitution were violated. (R. p. 64; p. 131; p. 134). However, Brown did **not** argue his rights pursuant to the South Carolina Constitution were violated by the search. See, e.g., State v. Weaver, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007) ("[T]his Court may interpret the **state protection** against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." (emphasis added)). Because Brown asserted only his Fourth Amendment rights were violated, the appellate precedent of the United States Supreme Court was the controlling authority in his

York v. Belton, 453 U.S. 454, 460 (1981) ("[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (footnotes omitted)). Critically, pursuant to the controlling precedent, the permissible scope of a search of a vehicle incident to an arrest was **not** limited by or dependent on differing estimates on what items were or were not accessible to the person arrested. See Thornton v. United States, 541 U.S. 615, 622-623 (2004) ("The need for a clear rule, readily understood by police officers **and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment**, justifies the sort of generalization which Belton enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." (emphasis added and footnotes omitted)).

Subsequently, **after** the search was conducted in Brown's case, the United States Supreme Court altered the applicable appellate precedent on the scope of searches incident to arrests through its decision in Gant. Specifically, while recognizing New York v. Belton, 453 U.S. 454 (1981), was widely understood to permit a vehicle search regardless of whether the person arrested could gain access to the vehicle, the Supreme Court rejected that interpretation of Belton and concluded vehicles could be searched incident to a recent occupant's arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 556 U.S. at 351. However,

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case. See Waitus, 224 S.C. at 19, 77 S.E.2d at 259 (recognizing that decisions of the United States Supreme Court construing the United States Constitution are binding on South Carolina appellate courts in cases addressing questions involving the United States Constitution).

significantly, prior to the decision in Gant, the majority of the Supreme Court understood the decision in Belton to permit a vehicle to be searched after an occupant was arrested **regardless** of whether the occupant could gain access to the vehicle. See Davis, 131 S. Ct. at 2425 (recognizing that five Supreme Court justices in Gant interpreted the decision in Belton to permit a search of the passenger compartment of a vehicle regardless of whether the arrested occupant of that vehicle was secured at the time of the search); see also Gant, 556 U.S. at 351 (Scalia, J., concurring) (indicating the rule set forth in Belton and Thornton is "that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons"); Gant, 556 U.S. at 354 (Breyer, J. dissenting) (stating the decision in Belton "is best read as setting forth a bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant – regardless of the danger the arrested individual in fact poses"); Gant, 556 U.S. at 356 (Alito, J., dissenting) ("Although the Court refuses to acknowledge that it is overruling Belton and Thornton, there can be no doubt that it does so.").

At the time of Brown's arrest prior to the issuance of the decision in Gant, the arresting officer conducted the search of Brown's duffle bag incident to Brown's arrest in a manner entirely consistent with the understanding of a majority of the justices of the United States Supreme Court regarding the scope of a search authorized by Belton. Furthermore, the officer conducted the search in a manner approved by federal courts in South Carolina with no controlling precedent of South Carolina state courts holding to the contrary.[8] See Small v. United States, 586 F. Supp. 2d 417, 423 (D.S.C. 2007) ("It is

[8] To the extent Brown is contending the South Carolina Supreme Court's decision in State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986), established that South Carolina courts declined to follow the reasoning of Belton in analyzing searches incident to arrests, that contention is without merit. Significantly, in Brown,

an extremely well-settled proposition of the law that police may lawfully search an automobile if such a search is incident to an arrest."). Under those circumstances and based on the then-controlling precedent of Belton and Thornton, it was not objectively unreasonable for the officer to conduct the search of Brown's duffle bag incident to Brown's arrest even after Brown was secured in the officer's police vehicle. Accordingly, pursuant to Davis, the Court of Appeals erred in reversing the trial judge's decision to deny Brown's motion to exclude his narcotics from trial. See Davis, 131 S. Ct. at 2429 ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

Significantly, this Court recently recognized that the exclusionary rule should not be applied in cases where a law enforcement officer conducted a subsequently-invalidated search pursuant to binding appellate precedent. See Narcisco, 397 S.C. at 32, 723 S.E.2d at 373 ("[E]xcluding evidence against Petitioner would not deter police

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Brown and his confederates were arrested outside of their **hotel room** after they were coaxed outside by law enforcement officers and removed from the scene. Id., 289 S.C. at 586, 347 S.E.2d at 885. Officers then searched the hotel room and discovered incriminating evidence inside. Id. On appeal, the Supreme Court rejected the State's argument that the search of the hotel room was a valid search incident to Brown's arrest because Brown was arrested outside of the hotel room and taken away before the search of the hotel room was conducted. Id. at 586, 347 S.E.2d at 885-886. Although the Supreme Court found the search in Brown did not conform to the requirements of a proper search incident to an arrest, the decision in Brown involved a hotel room as opposed to an automobile. See Belton, 453 U.S. at 460 ("While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' **when that area arguably includes the interior of an automobile and the arrestee is its recent occupant**. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' In order to establish the workable rule **this category of cases** requires, we read Chimel's definition of the limits of the area that may be searched in light of that generalization." (emphasis added, citations and footnotes omitted, and brackets in original)). For that reason, the United States Supreme Court's decision in Belton did not apply to the factual scenario presented in Brown and, accordingly, was not addressed in that case. Thus, the decision in Brown does not constitute evidence that South Carolina courts declined to recognize the scope of a search undertaken incident to the arrest of a recent occupant of an automobile permitted by the decision in Belton. Instead, it simply constituted evidence that South Carolina courts were continuing to apply the principles established in Chimel to cases falling outside of the "category of cases" to which the rule announced in Belton applied. See Belton, 453 U.S. at 460, n. 3 ("Our holding today does no more than determine the meaning of Chimel's principles in **this particular and problematic context**. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." (emphasis added)).

misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent."). In Narcisco, Narcisco was stopped for a traffic violation based on an expired license tag, arrested for operating a motor vehicle without a driver's license, and was removed from his vehicle. Id. at 27, 723 S.E.2d at 370. Subsequently, officers searched Narcisco's vehicle and discovered a substantial quantity of cocaine inside. Id. During the ensuing trial, Narcisco challenged the lawfulness of the search of his vehicle. Id. at 30, 723 S.E.2d 372. Relying on the decision in Belton, the trial judge denied Narcisco's suppression motion, and Narcisco was convicted. Id. Following Narcisco's trial, the United States Supreme Court issued its decision in Gant and limited the scope of searches incident to arrests permitted by Belton. Id. Thereafter, this Court concluded the search performed incident to Narcisco's arrest violated his Fourth Amendment rights. Id. at 29, 723 S.E.2d at 371. However, recognizing that the law enforcement officers who performed the search of Narciso's vehicle and the trial judge who reviewed that search relied upon binding appellate precedent in effect at the time of the search, this Court affirmed the denial of Narcisco's suppression motion. Id. at 32, 723 S.E.2d at 373. In reaching that decision, this Court cited to the United States Supreme Court's decision in Belton and noted the trial judge relied upon Belton in denying the suppression motion. Id. at 29-30, 723 S.E.2d at 371-372. Thus, contrary to Brown's contentions, this Court's decision in Narcisco was neither conclusory nor unsupported, and it clearly confirms the Court of Appeals erred in reversing the trial judge's decision to admit Brown's cocaine.

The arresting officer in Brown's case conducted the search of Brown's duffle bag incident to Brown's arrest in objectively reasonable reliance on the binding appellate precedent of Belton and Thornton. Accordingly, just as this Court recognized in

Narcisco, exclusion of the cocaine discovered in the officer's objectively reasonable search would not serve the goals of the exclusionary rule. See id. at 32, 723 S.E.2d at 373 ("[E]xclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."). Brown's contentions that no controlling appellate precedent authorized the search of his duffle bag are wholly without merit and ignore the decision in Belton, Thornton, and Narcisco.[9] For the foregoing reasons coupled with the reasons identified in the Brief of Petitioner, the Court of Appeals erred in reversing the trial judge's decision to deny Brown's suppression motion. Therefore, the decision of the Court of Appeals should be reversed, and the trial judge's ruling along with Brown's conviction should be affirmed.

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[9] In arguing the holding of Davis v. United States should not be applied to his case, Brown also claims the arresting officer did not act in "subjective good faith" and "admitted that his custodial arrest of Brown for the open container violation was pretext for searching his bag." (Resp. Br. p. 19). However, Brown does not identify in the record where such an admission was made. The likely reason Brown did not identify the alleged admission's location in the record is because Officer Williams, the arresting officer, did **not** testify he arrested Brown as a pretext to search Brown's bag. Instead, Officer Williams testified he arrested Brown for an open container violation after Brown admitted he was guilty of the offense and produced the open beer can he was attempting to hide from the officer. (R. pp. 4-5). Regardless, the subjective intentions of Officer Williams are irrelevant to Brown's case. See Sullivan, 532 U.S. at 772 (reversing a decision to suppress evidence discovered during an inventory search conducted after Sullivan was arrested because the evidence was improperly suppressed as the fruit of an allegedly pretextual arrest); see, e.g., State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803-804 (1997) ("In Leon, the Supreme Court carved out a good faith exception to the exclusionary rule. The Court held that when an officer acting in **objective good faith** has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." (emphasis added)). The appropriate standard for analyzing Officer Williams' conduct involves looking to whether the officer was acting in **objectively** reasonable reliance on binding appellate precedent, which he was when he searched Brown's duffle bag. See Davis, 131 S. Ct. at 2434 ("[W]hen the police conduct a search in **objectively reasonable reliance** on binding appellate precedent, the exclusionary rule does not apply." (emphasis added)).

CONCLUSION

For all the foregoing reasons coupled with arguments articulated in the Brief of Petitioner, it is respectfully submitted that the decision of the Court of Appeals be reversed and vacated and the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

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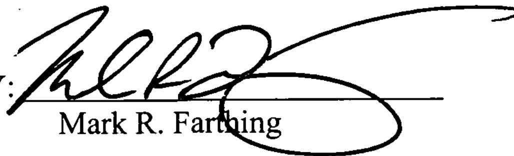

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August 30, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2010-175826

THE STATE,

Petitioner,

vs.

DANNY CORTEZ BROWN,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Petitioner 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."

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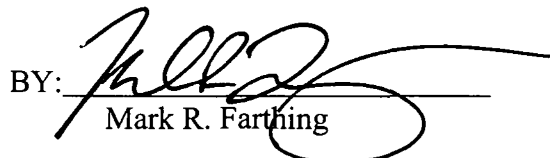
BY: 
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PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Reply Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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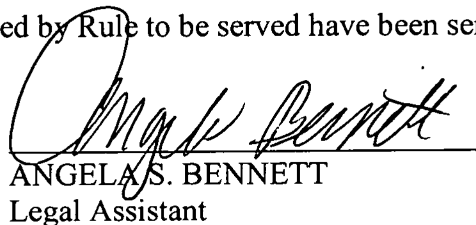
I further certify that all parties required by Rule to be served have been served.
This 30th day of August, 2012.



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August 30, 2012

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RE: State v. Danny Cortez Brown – Appellate Case No. 2010-175826

Dear Mr. Alexander:

I am enclosing two (2) copies of the Reply Brief of Petitioner, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/erd
Enclosures

cc: Honorable Daniel E. Shearouse (original and fourteen enclosed)
Victim Services