

# The Supreme Court of South Carolina

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April 5, 2012

Jerry L. Finney, Esquire  
Adam L. Whitsett, Esquire  
The Finney Law Firm, Inc.  
2117 Park Street  
Columbia, SC 29201

Re: State of SC v. Gamble, Ervin

Dear Counsel:

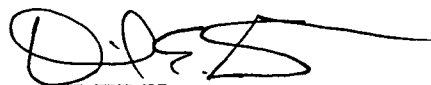
Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before May 7, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

DES/lda

cc: Assistant Attorney General William M. Blicht  
The Honorable Jenny Kitchings

# The Supreme Court of South Carolina

The State of South Carolina, Respondent,

v.

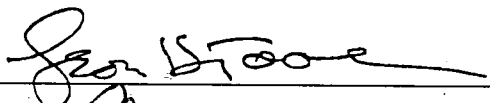
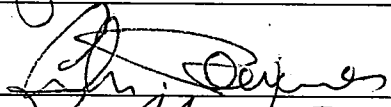
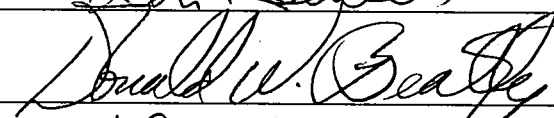
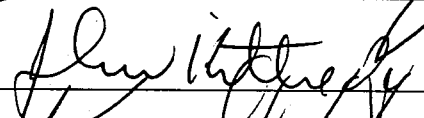
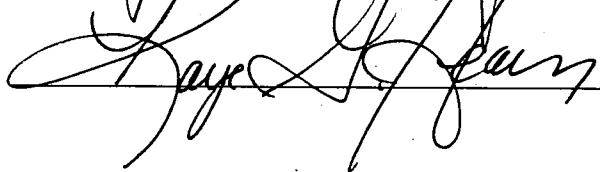
Ervin Gamble, Petitioner.

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## ORDER

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We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Gamble*, Op. No. 2011-UP-095 (S.C. Ct. App. filed March 10, 2011). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C. J.  
 J.  
 J.  
 J.  
 J.

Columbia, South Carolina

April 5, 2012

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

MAY 23 2011

APPEAL FROM HORRY COUNTY  
Court of General Sessions

**S.C. Supreme Court**

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ..... Respondent,

v.

Ervin Gamble, ..... Petitioner.

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**PETITION FOR WRIT OF CERTIORARI**

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Attorneys for Petitioner

May 23, 2011

## QUESTIONS PRESENTED

1. DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN AFFIRMING THE TRIAL JUDGE'S ERRNEOUS AND PREJUDICIAL ADMISSION OF NARCOTICS EVIDENCE INTO THE EVIDENTIARY RECORD AT THE TRIAL OF THIS MATTER OVER THE PETITIONER'S OBJECTION THAT NO FOUNDATION HAD BEEN LAID FOR THAT EVIDENCE IN THAT THE PROBABLE CAUSE FOR THE WARRANTLESS SEARCH DURING WHICH THE EVIDENCE WAS COLLECTED WAS NOT ESTABLISHED?
2. DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN AFFIRMING THE TRIAL JUDGE'S DENIAL OF THE PETITIONER'S MOTION FOR A NEW TRIAL IN THIS MATTER?

## STATEMENT OF THE CASE

This is an appeal arising from the conviction of the Petitioner, Ervin C. Gamble, Jr., that occurred at a trial on July 22, 2009 before The Honorable Benjamin C. Culbertson in the General Sessions Court in Horry County, South Carolina.

During the trial of this matter, over the objection of the Petitioner's trial counsel, the trial judge erroneously admitted the physical narcotics evidence into the evidentiary record despite no foundation for this evidence ever being laid. This disputed evidence was seized from the Petitioner during a warrantless search conducted as a result of an unlawful and unsupported arrest for which the arresting officer lacked probable cause and for which no foundation whatsoever was laid. The trial judge also erroneously declined to grant the Petitioner's motion for a new trial timely argued at the conclusion of the trial. Upon conviction, the Petitioner was sentenced to twenty-five (25) years in the South Carolina Department of Corrections, and the Petitioner is currently serving said sentence.

A timely notice of appeal to the South Carolina Court of Appeals was filed on the Petitioner's behalf. However, the South Carolina Court of Appeals dismissed the appeal with a *per curiam* decision containing no narrative discussion whatsoever and citing only two cases in support of a finding of no reversible error in the trial court's admission of evidence.<sup>1</sup> *State v. Gamble*, Op. No. 2011-UP-95 (2011).

The Petitioner timely filed a petition for rehearing; however, this petition was dismissed via Order Denying Petition for Rehearing filed by the South Carolina Court of Appeals on April 21, 2011. This petition follows.

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<sup>1</sup> *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991).

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App. 2005). “A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant.” State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *accord Preslar*, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct.App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct.App.1999); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct.App. 1999); *see State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (“The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard.”); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) (“[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown.”).

“An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); *accord State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (2007).

## ARGUMENTS

**I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF NARCOTICS EVIDENCE INTO THE EVIDENTIARY RECORD AT THE TRIAL OF THIS MATTER BECAUSE NO FOUNDATION WHATSOEVER WAS EVER ESTABLISHED FOR THIS EVIDENCE IN THAT THE RECORD IS DEVOID OF ANY PROBABLE CAUSE THAT COULD JUSTIFY THE INITIAL ARREST OF THE PETITIONER RENDERING THE SUBSEQUENT WARRANTLESS SEARCH OF PETITIONER'S VEHICLE INCIDENT TO THAT UNFOUNDED ARREST UNCONSTITUTIONAL.**

The *per curiam* decision of the South Carolina Court of Appeals finding no reversible error in the trial court's admission of evidence is a misapplication of South Carolina law and a reversal is warranted. In support of its finding of no reversible error in the trial court's admission of evidence, the South Carolina Court of Appeals cited only two cases, *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991). There is no narrative or explanation provided in support of the *per curiam* decision and is there no analysis of the arguments set forth by the Petitioner in regard to the trial court's erroneous and prejudicial admission of the only physical evidence proffered at the trial of this matter, for which no proper foundation whatsoever had been laid.

"Foundation" is defined as "[t]he basis on which something is supported; esp: evidence or testimony that establishes the admissibility of other evidence." Black's Law Dictionary 666 (7<sup>th</sup> ed. 1999). It is axiomatic that a proper foundation is required prior to the proper admission of any disputed evidence during trial, particularly physical narcotics evidence in a criminal drug trial. Prior to the admission of any evidence seized during a warrantless search of an individual, South Carolina law imposes the burden "of establishing probable cause and the existence of circumstances constituting an exception

to the general prohibition against warrantless searches...” on the prosecution. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). As such, probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless constitutes the necessary foundation that South Carolina law requires prior to the admission of such evidence in trial. Further, the lack of probable cause in this scenario would prove fatal as no proper foundation would be established for any such evidence. Accordingly, the trial court’s failure to require a proper or legally sufficient foundation for the disputed physical narcotics evidence during Petitioner’s trial constitutes a clear abuse of the trial court’s discretion. Trial court’s failure also constitutes a clearly erroneous application of the law resulting in significant prejudice to the Petitioner and the South Carolina Court of Appeal’s decision affirming the trial court’s actions should be reversed.

By way of factual background, the Petitioner was arrested by Agent Mullinex of the Myrtle Beach Police Department on July 16, 2008 on two separate occasions, albeit closely connected in time. At trial, Agent Mullinax indicated that the Petitioner’s only action with regard to this initial “arrest” was that the Petitioner “**arrived** at the location of 72 Offshore Drive.” (Transcript p. 88 lns 22-25)(R. p. 90, lines 22-23)(emphasis added). Agent Mullinax went on to state that “[a]t that time, he [Petitioner] was arrested on a **separate charge**... Upon... being placed under arrest, he was searched.” (Transcript p. 89 lns 1-2)(R. p. 90, lines 24-25)(emphasis added).<sup>2</sup> There was no search warrant obtained at any time, and the warrantless search of the Petitioner conducted subsequent to his initial “arrest” on this “separate charge” led to the seizure of physical narcotics evidence

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<sup>2</sup> It is noteworthy that the Petitioner had no outstanding arrest warrants at this time.

for which the Petitioner was ultimately arrested for the second time and ultimately charged with Trafficking in Heroin. The evidence seized pursuant to this initial “arrest” was also the only physical evidence presented by the State of South Carolina against the Petitioner during the trial of this matter. However, there was absolutely no testimony or evidence whatsoever submitted to establish a legally sufficient or proper foundation for this evidence in that the State presented no evidence whatsoever regarding the lawfulness of this “initial arrest” or probable cause for this “arrest” on this “separate charge.” In fact, the nature of this “separate charge” purportedly forming the foundation for the warrantless search yielding the disputed evidence was never established at trial.

At trial, Petitioner’s trial counsel objected to the State’s first attempt to admit the disputed physical narcotics evidence stating:

[t]he foundation [for the proffered physical evidence] has not been laid.... We don’t know about - - He’s [the arresting officer] going to testify that after an arrest on a separate charged, a search... I don’t know if there is a basis for that arrest. I don’t know what the charge was. I don’t know if there was a consent to search. And I don’t believe that under the Constitution as provided by the 4<sup>th</sup> Amendment...the law of search and seizure - - that they have a right to enter this evidence at this time.

(R. p. 93, Ins. 6-7, 12-25)(R. p. 94, lines 12-25). While admittedly choppy, this objection clearly articulates a specific objection to the sufficiency of the foundation of the proffered evidence at the time it was proffered. Furthermore, this foundation argument is clearly grounded in a challenge to the constitutionality of the arrest upon which the prosecution based its sole justification for the warrantless search of the Petitioner that yielded the disputed evidence. See McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) citing Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App.1986) (an “objection should be sufficiently specific to bring

into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge.”). As it is undisputed that “[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution...”, upon the Petitioner’s objection to the proffered evidence’s foundation, South Carolina law requires that the trial judge insure that a sufficient and proper foundation in the form of probable cause for the initial arrest and probable cause for the warrantless search be established by evidence and testimony. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). However, the trial judge in this matter failed to require such foundation. Over the objection of counsel and without any justification or explanation whatsoever, the trial court admitted the physical narcotics evidence into the record. The court indicated “[o]ver objection, I’m going to go ahead and admit State’s Exhibit Number 10 into evidence over Defendant’s objection.”<sup>3</sup> (Transcript p. 94 lns. 2-4)(R. p. 95, lines 2-4). There was no further explanation whatsoever to support the admission of this evidence. This admission of evidence without a proper foundation was a clear and glaring abuse of discretion resulting in substantial prejudice to the Petitioner. The trial court’s failure to require such a foundation constitutes clear error and significant prejudice to the Petitioner. Accordingly, the South Carolina Court of Appeals erred in affirming this decision and a reversal and a remand for a new trial is warranted.

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<sup>3</sup> The disputed physical narcotics evidence, which had been previously been marked for identification purposes only.

Further, during the Petitioner's trial counsel's directed verdict argument, trial counsel again cogently articulated glaring lack of foundation issue stating,

We've got...a case where the only evidence presented to this Court...to this jury...of the reason for the search was that my client was arrested on a separate charge. There is no indication in the record of what that charge was. There is no indication in the record that it was a lawful arrest. It's my understanding of the status of the law in the 4<sup>th</sup> amendment search and seizure law is that Search incident to a lawful arrest...would be allowed. But there has to be some determination that it was a lawful arrest. In fact, our position is: It was an unlawful arrest. The truth of the matter in this case is: They made an arrest for [a separate charge]...if law enforcement were allowed to come into court every time and say: We made an arrest on another matter; and they we searched and found this.... There's got to be some finding in the record and some showing to this Court that they had a right to search my client. Just because they arrested him, does not give them the right to search him or anything else of his. They have to show this Court that it was a lawful arrest. And there is no showing at all in the record in this case. And again Your Honor: To the contrary, we believe it was an unlawful arrest. (Transcript p. 115 lns 15-25, p. 116 lns 1-14, 25, p. 117 lns. 1-12) (R. p. 116, lines 15-25, p. 117 lines 1-14, p. 118 lines 1-12).

This argument, while admittedly untimely for the purpose of challenging the evidence at the trial, is helpful substantively because the argument correctly observes that it was ultimately the prosecution's burden to establish a proper foundation for the disputed evidence prior to the proper admission of the evidence and that a proper foundation would have to come in the form of probable cause to justify the warrantless search and seizure. However, as articulated, the record is devoid of any such proper foundation for the disputed evidence.

In addition, in response to this directed verdict motion, the State acknowledged unequivocally that the record was devoid of sufficient evidence that would establish a foundation for the evidence in the form of probable cause to support the initial arrest of the Petitioner and the resulting warrantless search. In fact, the prosecution actually offered to supplement the record with in camera testimony after the directed verdict

motion stating “if it is The Court’s pleasure, the State would be more than happy, in camera, to go into those issues [the probable cause for the initial arrest], so the Court can make that ruling at this time.” (Transcript pp. 119-20 lns 24-25, 1-2)(R. pp. 120-121, lines 24-25, 1-2). This is a clear and unequivocal acknowledgment that the State had completely failed to establish a foundation for the evidence in the form of probable cause or the existence of circumstances constituting an exception to the general prohibition against warrantless searches as required by law. See State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). As such, the trial court’s admission of this disputed evidence was clearly erroneous and resulted in substantial prejudice to the Petitioner for which a reversal was warranted. However, the South Carolina Court of Appeals erroneously affirmed the trial court in this matter citing *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991).

In citing to the *Williams* case, the Court of Appeals noted that an objection must be made at the earliest opportunity to preserve an issue for appellate review. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991). This point is undisputed. However, the clear implication with this citation, particularly in light of Petitioner’s timely objection during the trial of this case, is that the Petitioner failed to preserve his right to challenge the disputed evidence by failing to make a pretrial motion to suppress the evidence.<sup>4</sup> This holding is clearly erroneous because there is absolutely no requirement for a pretrial motion to suppress in South Carolina law. Contrarily, the South Carolina Supreme Court has articulated unequivocally that, “[w]e have no rule in

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<sup>4</sup> This implication is even more apparent when the citation from *Williams* is read in connection with this Court’s quotation from *State v. Green* later in this decision. The quoted language from *Green* reads “the appropriate vehicle for challenging the admissibility of evidence based on an alleged search and seizure violation is a motion to suppress.” State v. Green, 350 S.C. 580, 585, 567 S.E.2d 505, 508 (2002).

this State requiring that a pretrial motion be made to suppress allegedly illegally obtained evidence.” State v. Goodstein, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982). To the extent that the South Carolina Court of Appeals dismissed the Petitioner’s appeal because the Petitioner failed to make a pretrial motion to suppress, this erroneous decision must be reversed because there is absolutely no requirement whatsoever that a defendant make a pretrial motion to suppress under South Carolina law. *See* State v. Goodstein, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982).

The South Carolina Court of Appeals further cited to *State v. Green* in support of the decision to affirm the trial court in this matter. 350 S.C. 580, 567 S.E.2d 505 (2002). Because the facts of *Green* are distinguishable from the case at bar, this Court’s ruling in *Green* actually serves to bolster the Petitioner’s position in regard to whether the Petitioner preserved his right to challenge the admission of the disputed evidence. In *Green*, the appellant made no attempt whatsoever “at trial to suppress any evidence on constitutional grounds. Instead, Green attempted to raise the propriety of the police actions [for the first time] in a motion for directed verdict...” which was held to be improper. *Id.* at 585. This Court noted specifically:

[a]t trial; Green did not move, either in limine or during an evidentiary hearing pursuant to *Blassingame*,<sup>2</sup> to suppress evidence.... Moreover, he failed to object at any time to its admissibility... including the cocaine, which was introduced without objection.

FN 2. *See* State v. Blassingame, 271 S.C.44, 47-48, 244 S.E.2d 528, 530 (1978) (“Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant’s constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury *at this threshold point* to establish the circumstances under which it was seized.”) (emphasis in original), *modified by* State v. Patton, 322 S.C. 408, 472 S.E.2d 245 (1996).

*Id.* at 585 & 589 n.2. Clearly, if a defendant is entitled to an evidentiary hearing during the trial and no pretrial motion to suppress is required under South Carolina law, the South Carolina Court of Appeals' determination that the Petitioner failed to preserve his right to challenge the admissibility of evidence in failing to argue a pretrial motion to suppress is a misapplication of South Carolina law and reversal is warranted.

In this case, the Petitioner's trial counsel articulated a specific objection to the attempted introduction of the disputed evidence raising foundation arguments clearly grounded in a constitutional challenge of the search and seizure yielding the disputed evidence. This objection was made at the time that the disputed evidence was proffered into evidence by the prosecution. Not only did the trial judge fail to conduct an evidentiary hearing as required in *Blassingame*, but the trial court also failed to articulate any basis for overruling trial court's objection to the admission of the evidence. State v. Blassingame, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978); (R. p. 95).<sup>5</sup> Similarly, the South Carolina Court of Appeals failed to address or analyze the trial court's erroneous admission of evidence and the Petitioner's challenge to the lack foundation for said evidence presented at the trial at the time that the evidence was admitted into the record. As such, reversal is warranted.

Further, South Carolina law mandates that evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002) *and* Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In

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<sup>5</sup> It is worth noting once again that the prosecution went so far as offering to supplement the record with an actual foundation for the disputed evidence after the directed verdict motion was argued. (R. pp. 120-121). This can only be viewed as an acknowledgment by the prosecution that there was in fact no sufficient foundation for the disputed evidence at the time the evidence was admitted at the trial.

addition, "[g]enerally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). Accordingly, "[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). However, in the case at bar, the trial judge appears to have misinterpreted the law as espoused in *Freiburger*, which imposes the burden of establishing probable cause **upon the prosecution**. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995)(emphasis added). The trial court articulates this misinterpretation when trial court questioned defense counsel during the directed verdict arguments asking, "So, it's your position that: All evidence obtained pursuant to a lawful arrest, the State has the burden of proving that evidence is admissible; rather than the Defendant challenging it admissibility?" (Transcript p. 124 lns. 2-6)(R. p. 125, lines 2-6). The critical point at issue is that the trial court completely failed to determine the lawfulness or righteousness of the underlying "arrest" as the trial court simply proceeded as if this arrest were *per se* lawful despite the glaring lack of probable cause to support this arrest. This was clear error and constitutes an abuse of discretion that was significantly prejudicial to the constitutional rights of the Petitioner in that a proper foundation for all evidence admitted into the evidentiary record is mandated under South Carolina law.

Upholding the admission of evidence based upon the trivial and inconsequential facts and circumstances provided in this matter will completely dissolve the prosecution's burden of presenting sufficient probable cause that an exception to the warrant requirement exists as espoused in *State v. Freiburger*. 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). This cannot stand. In the event that this decision is upheld on appeal, it is imminently foreseeable that law enforcement officers will completely change their tactics altogether as a direct result of this very case. Law enforcement officers would now be able to stop an individual without any reason or justification whatsoever, charge the individual with a "crime," search the individual pursuant to the arrest for this "crime," dismiss the original charge for which the individual was arrested as it was baseless, and ultimately come to court to say the individual was "arrested on a separate matter" and was searched pursuant to that arrest yielding the evidence for which this individual now stands trial. Based upon the evidence presented in the record in this matter, the above scenario is imminently possible if not outright foreseeable. This cannot stand as it would completely dissolve the protections that the 4<sup>th</sup> Amendment to the United States Constitution provides to individuals in the State of South Carolina.

The 4<sup>th</sup> Amendment of the United States Constitution unequivocally requires the prosecution to articulate facts and circumstances on which a reasonable person would believe that a crime was being committed, or had been committed, to legitimize a warrantless search conducted pursuant to that arrest. The trial court in the case at bar failed to require the prosecution to articulate such facts and circumstances on the record in this matter, and this failure constitutes reversible error.

**II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN RULING THAT PETITIONER ABANDONED HIS APPEAL OF TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL IN THIS MATTER.**

Rather than analyzing the Petitioner's motion for new trial arguments, the Court of Appeals deemed the argument abandoned solely on the contention that an argument must be "supported by authority" citing to *State v. Tumbleston*. 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007). This assertion is incorrect as it acknowledges only one of *Tumbleston's* "either or" analysis. *Tumbleston* actually states that an issue is abandoned where an appellant fails to either argue **or** identify supporting authority in his brief. *State v. Tumbleston*, 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007). The *Tumbleston* Court cited directly to *First Sav. Bank v. McLean* on this specific issue and *First Sav. Bank v. McLean* holds that "an issue is abandoned where the appellant fails to provide argument **or** supporting authority." 314 S.C. 361, 363 444 S.E.2d 513, 515 (1994) (emphasis added); *see also* *Fassett v. Evans*, 364 S.C. 42, 45, 610 S.E.2d 841, 844 (Ct. App. 2005); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 77, 557 S.E.2d 689, 690 (Ct. App. 2001). Clearly, the Petitioner provided arguments in support of his challenge to the trial court's denial of Petitioner's motion for new trial and the issue was not abandoned on appeal. Moreover, even if supporting authority is the standard, the Petitioner clearly cited to all of the arguments and supporting authority that the Petitioner made in Arguments 1 and 2 of the Petitioner's final brief submitted in this appeal. (Final Brief of Appellant p. 15). The reference and incorporation of these arguments and authority negated the need to simply reproduce the identical arguments multiple times in the same brief and should not constitute an abandonment of this argument. As such, the

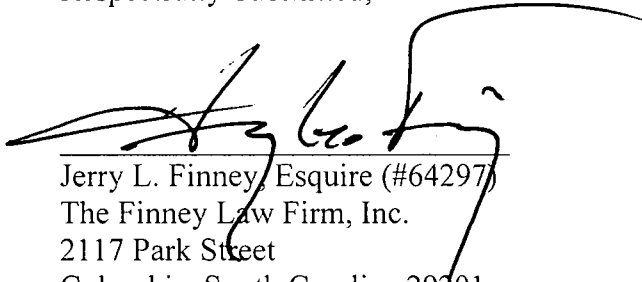
Court of Appeals' determination that Petitioner abandoned his arguments for a new trial should be reversed and the Petitioner should be granted a new trial on this matter.

All of the evidence presented at the trial of this matter lacked a proper or legally sufficient foundation in that all of the physical evidence was obtained during an unconstitutional warrantless search and seizure of the Petitioner. *See State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). As such, all of the evidence presented at the trial should have been excluded by the trial judge meaning that the prosecution had failed to present any evidence supporting the offense charged. Denying the Petitioner's motion for a new trial in light of this was clear error by the trial judge resulting in significant prejudice to the Petitioner, and this error should have been reversed by the South Carolina Court of Appeals.

**CONCLUSION**

For the reasons stated above, the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully Submitted,



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Attorneys for Appellant

May 23, 2011

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

---

The State of South Carolina, ..... Respondent,

v.

Ervin Gamble, ..... Petitioner.

---

**CERTIFICATION BY COUNSEL**

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The undersigned hereby certifies that a petition for rehearing was made and finally ruled upon by the South Carolina Court of Appeal.



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Attorneys for Petitioner

May 23, 2011

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM Horry COUNTY  
Court of General Sessions

S.C. Supreme Court

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ..... Respondent,

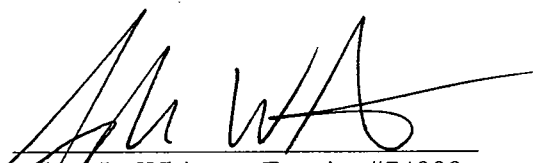
v.

Ervin Gamble, ..... Petitioner.

PROOF OF SERVICE

I, the undersigned, Adam L. Whitsett, Esquire of The Finney Law Firm, Inc, attorney for the Petitioner, do hereby certify that I have served counsel of record with a copy of the **Petition for Writ of Certiorari** by causing a copy of the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on May 23, 2011:

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May 23, 2011

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to the Court of Appeals  
Appeal From Horry County  
Hon. Benjamin H. Culbertson, Circuit Court Judge

**RECEIVED**

JUN 22 2011

**S.C. Supreme Court**

The State,

Respondent,

v.

Ervin Gamble,

Appellant.

\_\_\_\_\_  
Op. No. 2001-UP-095 (Filed March 10, 2011)

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

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**TABLE OF CONTENTS**

STATEMENT OF QUESTION PRESENTED ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 4

    I.    The Court of Appeals correctly found the objection was not timely or sufficient and even if properly preserved the trial court did not commit error in admitting the drug evidence obtained as a result of a valid search incident to a lawful arrest. .... 4

    II.   The Court of Appeals correctly found Appellant abandoned this issue by failing to provide citation to any authority related to the issue in his brief. Further, on the merits, the trial court properly denied Appellant's motion for a new trial. .... 14

CONCLUSION ..... 16

## STATEMENT OF QUESTION PRESENTED

- I. The Court of Appeals correctly found the objection was not timely or sufficient and even if properly preserved the trial court did not commit error in admitting the drug evidence obtained as a result of a valid search incident to a lawful arrest.
- II. The Court of Appeals correctly found Appellant abandoned this issue by failing to provide citation to any authority related to the issue in his brief. Further, on the merits, the trial court properly denied Appellant's motion for a new trial.

## STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant on charges of attempted distribution of heroin and trafficking in heroin. On July 21-22, 2009, Appellant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The State elected to call only the trafficking in heroin charge for trial. The jury found Appellant guilty of trafficking in heroin and, because Appellant had a prior conviction for distribution of marijuana, the trial court sentenced him to twenty-five years in prison and a \$100,000 fine.

The South Carolina Court of Appeals upheld his convictions and sentence. See State v. Gamble, Op. No. 2001-UP-095 (Filed March 10, 2011). Petitioner's Petition for Rehearing was denied April 21, 2011, and his Petition for Writ of Certiorari followed.

Prior to trial, counsel and the trial court engaged in a discussion regarding the charges against Appellant. Counsel for the State indicated the confidential informant in this case, from which law enforcement received information regarding Appellant, was deceased. As a result, the State chose not to proceed on the attempt to distribute heroin charge brought in addition to the trafficking in heroin charge for which Appellant was ultimately convicted. The State informed the judge law enforcement arrested Appellant at a specified location established as a result of the information from the confidential informant. (T.49-50; R.50-51).

Agent Mullinix testified he was employed by the Myrtle Beach Police Department and a member of the Fifteenth Circuit Drug Task Force. He indicated he worked predominately on drug cases and distribution of drug cases. (T.80-81; R.81-82). He stated

in July 2008 he was conducting an investigation regarding an individual named "Fats."  
(T.81; R.82).

As a result of the information, a tactical plan was developed specifically with regard to Appellant. Agent Mullinix testified other agents and himself were in the area and spoke with a person about having drugs delivered. (T.88; R.89). They selected a particular location and conducted a phone call. (T.88-89; R.89-90). Appellant was the only person who arrived at the location and was arrested "on a separate charge." (T.89; 99; R.88; 100). After being placed under arrest, Appellant was searched and the officers located a brown powdered substance which field tested positive for heroin. Additional amounts of a brown powdered substance were found in the console of his vehicle. The additional substances also tested positive for heroin. (T.90; R.91).

## ARGUMENT

**I. The Court of Appeals correctly found the objection was not timely or sufficient and even if properly preserved the trial court did not commit error in admitting the drug evidence obtained as a result of a valid search incident to a lawful arrest.**

The Court of Appeals correctly determined Appellant failed to properly and timely preserve the issue related to the admission of drug evidence for review on appeal. Appellant is mistaken in his belief the Court's ruling required him to make a *motion in limine* to suppress the evidence obtained as a result of Appellant's initial arrest and subsequent search. Instead, the Court's ruling correctly requires a contemporaneous objection at the first opportunity to contest the admission of the evidence, and this was not done by Appellant in this case.

First, Appellant's objection was clearly to the "foundation" of the admissibility of the evidence and not an argument there was no probable cause to arrest and therefore the evidence should be suppressed as the fruit of the poisonous tree as he maintained on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (defendant may not argue one ground below and another on appeal); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal).

Next, the Court of Appeals properly determined Appellant did not make a contemporaneous and timely objection. Agent Mullinix detailed the investigation, the stop of Appellant, the search of Appellant, and the finding of drugs that tested positive for heroin. Appellant never made a contemporaneous objection to any of this testimony nor moved to suppress any discussion of the stop, search, or finding of drugs. All of the evidence

regarding the search and seizure of the drugs as well as the fact they tested positive for heroin was admitted without objection by Appellant. The only objection made was when the State subsequently sought to admit the physical drugs into evidence. As a result, Appellant did not contemporaneously object when the evidence was first before the jury. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. Id. at 58-59, 609 S.E.2d at 523.

Nowhere in the Court of Appeals' opinion is the requirement that Appellant move to suppress in a *motion in limine* prior to being able to move to suppress at trial. The only requirement the Court imposes is the long standing requirement of a contemporaneous objection, which based on Appellant's arguments in this case, should have been made when Agent Mullinix first detailed the stop, search, and seizure before the jury. Accordingly, the Court of Appeals properly determined the issue was not preserved for review on appeal and this Court should deny the Petition for Writ of Certiorari.

Additionally, this Court should deny the Petition because, when examining the merits of Appellant's argument, the trial court properly admitted the drug evidence. "In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Moore, 377 S.C. 299, 305, 659 S.E.2d

256, 259 (Ct. App. 2008) (quoting Wilson, 345 S.C. at 6, 545 S.E.2d at 829). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002). Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). “However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. One such exception is in cases of a search incident to arrest.” State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (citing *inter alia* 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)). The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. Id.; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995) (burden is upon State to justify warrantless search).

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer’s knowledge are sufficient to lead a

reasonable person to believe that a crime has been committed by the person being arrested. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) (citing State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder)). “Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer’s disposal.” Id. (citing *inter alia* Beck v. Ohio, 379 U.S. 89, 91 (1964) (a court must consider “whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Appellant] had committed ... an offense.”)).

Prior to trial, counsel and the trial court engaged in a discussion regarding the charges against Appellant. Counsel for the State indicated the confidential informant in this case, from which law enforcement received information regarding Appellant, was deceased. As a result, the State chose not to proceed on the attempt to distribute heroin charge brought in addition to the trafficking in heroin charge for which Appellant was ultimately convicted. The State informed the judge law enforcement arrested Appellant at a specified location established as a result of the information from the confidential informant. (T.49-50; R.50-51). As a result, the trial court was clearly informed Appellant was initially arrested on the attempted distribution of heroin charge arising out of the contact with the confidential informant and subsequent investigation.

Further, at trial, the State presented further evidence establishing the validity of Appellant’s arrest and the search incident to arrest. Agent Mullinix testified he was

employed by the Myrtle Beach Police Department and a member of the Fifteenth Circuit Drug Task Force. He indicated he worked predominately on drug cases and distribution of drug cases. (T.80-81; R.81-82). He stated in July 2008 he was conducting an investigation regarding an individual named "Fats." (T.81; R.82).

As a result of the information, a tactical plan was developed specifically with regard to Appellant. Agent Mullinix testified other agents and himself were in the area and spoke with a person about having drugs delivered. (T.88; R.89). They selected a particular location and conducted a phone call. (T.88-89; R.89-90). Appellant was the only person who arrived at the location and was arrested "on a separate charge." (T.89; 99; R.88; 100). After being placed under arrest, Appellant was searched and the officers located a brown powdered substance which field tested positive for heroin. Additional amounts of a brown powdered substance were found in the console of his vehicle. The additional substances also tested positive for heroin. (T.90; R.91).

The trial court had ample evidence from which it could conclude the drug evidence was seized as a result of a valid search incident to a lawful arrest. Appellant was initially arrested for "a separate charge," which the trial court knew was the attempted distribution of heroin. The fact the State did not proceed on the charge for which Appellant was arrested should have no impact on the validity of the search incident to arrest. See Freiburger, 366 S.C. at 133, 620 S.E.2d at 741 (fact that Freiburger was not ultimately arrested for crime which gave rise to search was not dispositive and does not vitiate the reasonableness of the underlying search incident to an arrest) (citing Devenpeck v. Alford, 543 U.S. 146 (2004)).

The State established the probable cause for the arrest for attempted distribution of heroin during which Appellant was searched.

Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime.

State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). The State's evidence demonstrated Appellant had the specific intent to distribute heroin and proceeded to an agreed upon location which constituted the overt act. See e.g., State v. Reid, 383 S.C. 285, 298-299, 679 S.E.2d 194, 200-210 (Ct. App. 2009), *cert. pending* (finding appellant's arrival at a predetermined location was an overt act sufficient to support conviction for attempted criminal sexual conduct with a minor).

Agent Mullinix testified he was investigating information related to an individual and set up a drug delivery. The trial court knew Agent Mullinix received the information from a confidential informant who was deceased. Appellant was the only person who arrived at the predetermined location for the drug delivery and was properly arrested for attempted distribution of heroin. The fact some of the information was not presented to the jury is irrelevant because the determination of the admissibility of evidence is for the court and not the jury. See Gaster, 349 S.C. at 557, 564 S.E.2d at 93 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."). The State showed Agent Mullinix had probable cause to arrest Appellant for the attempted distribution of heroin charge, and therefore, the arrest was a lawful, warrantless

arrest. Additionally, a search incident to that arrest was valid in order to search for weapons or to prevent the destruction of evidence.<sup>1</sup> The trial court clearly had sufficient evidence from which it could find the search was incident to a lawful arrest, and as a result, properly admitted the drugs and evidence related to the drugs.

Appellant also appears to be bootstrapping an argument regarding the denial of his motion for a directed verdict onto this issue. The Court of Appeals' affirmance of the denial of his motion for a directed verdict was not raised as an issue in the Petition for Rehearing and is not properly before this Court. Further, as discussed below, the issue fails on its own merits and does not support Appellant's argument that the evidence was improperly admitted at trial.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id.

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<sup>1</sup>See Chimel v. California, 395 U.S. 752, 763 (1969) ("[A] warrantless search is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence.").

First, it was improper for Appellant to attempt to argue the suppression of the drug evidence as part of his motion for a directed verdict and the issue is not properly raised on appeal. The trial court ruled on the admissibility of the drugs into evidence when Appellant objected. The only consideration for the trial court when deciding a motion for directed verdict is whether there exists any direct evidence or substantial circumstantial evidence tending to prove the guilt of the accused. Cherry, 361 S.C. at 593-593, 606 S.E.2d at 477-478. The trial court is not concerned with reconsidering the suppression of evidence previously ruled admissible or the suppression of evidence never objected to by Appellant. The same is true of this Court. Accordingly, the Court of Appeals properly found the issue raised was not proper for a directed verdict motion.

Next, the issue also fails on the merits. Section 44-53-370 of the South Carolina Code (Supp. 2008) states:

(e) Any person . . . who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:

(3) four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210 , or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as “trafficking in illegal drugs” and, upon conviction, must be punished as follows if the quantity involved is:

(a) four grams or more, but less than fourteen grams:

....

2. for a second or subsequent offense, a mandatory term of imprisonment of twenty-five years, no part of which may be

suspended nor probation granted, and a fine of twenty-five thousand dollars;

S.C. Code Ann. §44-53-370(e)(3)(a)(2) (Supp. 2008). Accordingly, the State was required to show Appellant was knowingly in actual or constructive possession of between four and fourteen grams of heroin or a mixture containing heroin.

The testimony and evidence at trial clearly indicated Appellant was in possession of between four and fourteen grams of a mixture containing heroin. Agent Mullinix testified Appellant was searched when he arrived at the arranged location for the drug delivery. (T.88-89; R.89-90). Agent Mullinix testified he found a bag containing a brown powdered substance on Appellant's person which field tested positive for heroin. In addition bundles of a brown powdery substance were located in the console of Appellant's automobile as he was removed from the vehicle. This brown powdery substance also tested positive for heroin. (T.90-91; 94-97; R.91-92; 95-98). Further, Appellant was the lone occupant of the vehicle which was a rental car. Agent Mullinix found Appellant's personal belongings in the vehicle. (T.99-100; R.100-101).

Lisa Floyd, a forensic drug analyst for the Horry County Police Department, analyzed the brown powdered substance in four items. She indicated the substance included heroin and quinine, a substance used to cut or add volume to a heroin mixture. (T.107-108; R.108-109). She testified the total weight was 4.76 grams and that she did not test the remainder because it was clear it would not exceed 14 grams. (T.108-110; R.109-111).

Appellant makes the very specious argument that "the State acknowledged unequivocally that the record was devoid of sufficient evidence that would establish a

foundation for the evidence in the form of probable cause to support the initial arrest of the Appellant and the resulting warrantless search.” (Petition.p.8). Appellant further contends the State’s offer for the court to conduct a hearing into the admissibility instead of proceeding on the motion for a directed verdict constitutes “a clear and unequivocal acknowledgment that the State had completely failed to establish a foundation for the evidence in the form of probable cause or the existence of circumstances constituting an exception to the general prohibition against warrantless searches as required by law.” (Petition.p.9). These assertions by Appellant are, to borrow a phrase from Appellant’s brief, “frighteningly inaccurate.”

The State made it clear to the trial court it did not believe the directed verdict motion was a proper vessel for Appellant to re-litigate his arguments regarding the admissibility of evidence. Further, the State asserted Appellant waived his right to argue for suppression by allowing testimony to be taken in front of the jury related to the drugs and the seizure of the drugs. Additionally, the State reiterated the admissibility of evidence is a decision for the court and not something that has to be developed in front of the jury. Finally, the State offered to conduct an *in camera* hearing to address any issues regarding the admissibility of the evidence, even though it is clear, as far as the State was concerned, the trial court already decided the issue. (T.119-121; R.120-122).

Appellant’s argument before the trial court went so far as to require the State to seek a determination on the admissibility of its evidence prior to its submission to the jury. He maintained he had no burden to even challenge the evidence at trial, but instead the State should have been required to prove its admissibility before the jury. (T.122-124; R. 123-

125). This is clearly not the law of this State. Defendants are required to make contemporaneous objections to evidence or move to suppress the admission of evidence in order to preserve an issue for review on appeal.

Therefore, the issue of the admissibility of drug evidence was not properly raised in the motion for a directed verdict; instead, the trial court should have been and clearly was concerned with whether there was evidence to support sending the charge to the jury. The State presented sufficient evidence Appellant was in actual possession of between four and fourteen grams of a mixture containing heroin.

Accordingly, because the Court of Appeals correctly determined the issue is not properly preserved and because the issue fails on its merits, this Court should deny the Petition for Writ of Certiorari.

**II. The Court of Appeals correctly found Appellant abandoned this issue by failing to provide citation to any authority related to the issue in his brief. Further, on the merits, the trial court properly denied Appellant's motion for a new trial.**

Appellant contends the Court of Appeals erred in finding he abandoned his argument regarding a new trial. The issue was noted in the brief, but was argued solely in a conclusive manner and entirely without supporting authority. Accordingly, the Court properly deemed the issue abandoned. See State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding “[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority”); State v. Tumbleston, 376 S.C. 90, 102, 654 S.E.2d 849, 855 (Ct. App. 2007) (finding issue abandoned when Appellant failed to argue or identify supporting authority on an issue in his brief on appeal); Glasscock,

Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)  
(same).

On the merits, Appellant contends the trial court erred in denying his motion for a new trial. As discussed above, the evidence was properly admitted and there is more than sufficient evidence supporting the trial court's decision to submit the case to the jury. A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion. See State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). In this case, ample evidence exists supporting the jury's verdict finding Appellant guilty of trafficking in illegal drugs—heroin—in excess of four grams but less than fourteen grams. The trial court properly denied Appellant's motion for a new trial based on the insufficiency of the evidence.

**CONCLUSION**

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

Respectfully submitted,

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June 22, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to the Court of Appeals  
Appeal From Horry County  
Hon. Benjamin H. Culbertson, Circuit Court Judge

The State,

\_\_\_\_\_  
Respondent,

v.

Ervin Gamble,

\_\_\_\_\_  
Appellant.

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

I, ELLEN DuBOIS, 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:

Jerry L. Finney, Esquire  
Adam L. Whitsett, Esquire  
The Finney Law Firm, Inc.  
2117 Park Street  
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.  
This 22<sup>nd</sup> day of June, 2011.



\_\_\_\_\_  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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**RECEIVED**

JUL - 5 2011

**S.C. Supreme Court**

The State of South Carolina, ..... Respondent,

v.

Ervin Gamble, ..... Petitioner.

---

**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Attorneys for Petitioner

July 5, 2011

## QUESTIONS PRESENTED

1. **DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN AFFIRMING THE TRIAL JUDGE'S ERRNEOUS AND PREJUDICIAL ADMISSION OF NARCOTICS EVIDENCE INTO THE EVIDENTIARY RECORD AT THE TRIAL OF THIS MATTER OVER THE PETITIONER'S OBJECTION THAT NO FOUNDATION HAD BEEN LAID FOR THAT EVIDENCE IN THAT THE PROBABLE CAUSE FOR THE WARRANTLESS SEARCH DURING WHICH THE EVIDENCE WAS COLLECTED WAS NOT ESTABLISHED?**
2. **DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN AFFIRMING THE TRIAL JUDGE'S DENIAL OF THE PETITIONER'S MOTION FOR A NEW TRIAL IN THIS MATTER?**

## STATEMENT OF THE CASE

This is an appeal arising from the conviction of the Petitioner, Ervin C. Gamble, Jr., that occurred at a trial on July 22, 2009 before The Honorable Benjamin C. Culbertson in the General Sessions Court in Horry County, South Carolina.

Prior to July 22, 2009, the Petitioner was indicted on two charges, attempted distribution of heroin and trafficking in heroin. However, during the preliminary stages of the trial of this matter, the prosecution informed the trial court that the prosecution had elected not to pursue the attempted distribution charge. Further, during the Petitioner's actual trial for trafficking in heroin, there was no testimony or evidence presented regarding the alleged attempt crime. Rather, the only testimony regarding the Petitioner's actions in this matter was limited to an articulation that the Petitioner "arrived at the location of 72 Offshore Drive" and "was arrested on a separate charge" and upon "being placed under arrest, he [Petitioner] was searched." (R. pp. 90-91, lines 22-25, 1-2). There was no actual evidence or testimony of any kind regarding the alleged attempt charge or the basis for this charge.

Further, during the trial, the Petitioner's trial counsel objected to the initial attempt to offer the evidence seized pursuant to this "arrest on a separate charge" into the evidentiary record citing a lack of foundation for this evidence. (R. p. 94, lines 12-25). The objection was overruled by the trial judge without any explanation or basis whatsoever. (R. p. 95, lines 2-4).

## ARGUMENTS

**I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF NARCOTICS EVIDENCE INTO THE EVIDENTIARY RECORD AT THE TRIAL OF THIS MATTER BECAUSE NO FOUNDATION WHATSOEVER WAS EVER ESTABLISHED FOR THIS EVIDENCE IN THAT THE RECORD IS DEVOID OF ANY PROBABLE CAUSE THAT COULD JUSTIFY THE INITIAL ARREST OF THE PETITIONER RENDERING THE SUBSEQUENT WARRANTLESS SEARCH OF PETITIONER'S VEHICLE INCIDENT TO THAT UNFOUNDED ARREST UNCONSTITUTIONAL.**

In an attempt to articulate a legally sufficient foundation for the disputed physical evidence, the Respondent relies on discussions between the trial court and counsel that occurred during the preliminary stages of the trial, which have no factual basis or evidentiary support whatsoever in the record. (Return to Petition for Writ of Certiorari to the Court of Appeals p. 7). This reliance on attorney arguments highlights the clear error of law committed by the trial court and the clear error of the South Carolina Court of Appeals in that Respondent's argument seemingly acknowledges the lack of proper evidentiary or testimonial foundation for the disputed evidence in this matter. The trial court's admission of the disputed evidence into the record despite the glaring lack of evidentiary foundation resulted is clear error and is a supremely prejudicial and substantial affront to the Petitioner's constitutional rights warranting action by this Court.

It is axiomatic that discussions between the trial court and counsel occurring prior to the trial or during the preliminary phases of a trial cannot form the requisite legal foundation for evidence submitted during a trial. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App.

2001). It is also axiomatic that arguments made by attorneys during a trial or before a trial are not evidence in the trial itself. *Id.* As such, any “arguments” or “statements” made by the prosecutors at the trial or prior to the trial of this matter absolutely cannot form the basis for the trial court’s foundational determination regarding the admission of evidence in this matter. *Id.* Rather, a trial judge’s decision regarding the admissibility of evidence must be based upon the actual evidence and testimony presented during trial. Any and all pre-trial or preliminary discussions or conversations that the trial court may have engaged in with the trial attorneys absolutely cannot in any way form the foundational basis for the trial court’s evidentiary rulings or evidentiary decisions. *Id.* The trial court’s determination, to the extent it was based upon arguments made by the prosecution attorneys as articulated by the Respondent, is clear error of law resulting in substantial prejudice to the Petitioner warranting action by this Court.

An “abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); accord State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (2007). Accordingly, the trial court’s decision regarding the admissibility of evidence must rest on the actual evidence and testimony presented during a trial, and the trial court’s failure to require such evidence, as highlighted by the Respondent’s attempt to use the arguments proffered by the attorneys as evidence in this matter, warrants reversal of the Petitioner’s conviction and a remand of this matter. The trial court’s decision was supremely prejudicial to the Petitioner and serves as an affront to the Petitioner’s constitutional rights in this matter.

The Respondent further argues that “[t]he fact some of the information was not presented to the jury is irrelevant.” (Return to Petition for Writ of Certiorari to the Court of Appeals p. 9). This argument serves only to cloud the actual issue in this matter, which is the glaring lack of evidence or testimony that could possibly form the foundational basis for the trial court’s decision to admit the disputed evidence into the evidentiary record. What is relevant in this action is the fact that the information that Respondent uses to justify the trial judge’s foundational decision was not presented as evidence or testimony at the trial in any form or fashion. This glaring lack of foundation is determinative of the trial court’s prejudicial error warranting reversal in this matter.

Respondent indicates that “[p]rior to trial, counsel and the trial court engaged in a discussion regarding the charges against the Appellant” and Respondent asserts that these discussions can form the evidentiary basis and foundation required by South Carolina law. (Return to Petition for Writ of Certiorari to the Court of Appeals pgs. 2, 7). These pre-trial discussions, preliminary discussions, and attorney arguments can no more form the basis for an evidentiary legal decision than discussions between attorneys and judges regarding holiday vacations or sporting events. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933); Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). Simply stated, arguments set forth by attorneys cannot form a legally sufficient foundation for evidence, regardless of the nature or substance of the arguments. If an prosecutor’s arguments could form the necessary foundation, actual evidence and live testimony from witnesses would prove unnecessary in every case as prosecutors would be want to ever call live witnesses subject to cross examination in lieu of arguing the facts and evidence as the prosecutor believes it to be.

“Foundation” is “[t]he basis on which something is supported; esp. evidence or testimony that establishes the admissibility of other evidence.” Black’s Law Dictionary 666 (7<sup>th</sup> ed. 1999). It is axiomatic that the evidence or testimony sufficient to form the foundation, i.e. to establish the admissibility of the proffered evidence, must come from the actual evidence and testimony proffered on the record during the trial itself, and any arguments proffered by attorneys at any time or discussions between the attorneys and the trial court that occur before the trial simply cannot form the required evidentiary foundation for physical evidence under South Carolina law. McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933); Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). In fact, as the trial judge correctly instructed the jury at the outset of this matter,

[w]hat the attorneys tell you during the opening statements is not evidence in this case. It is only their contention as to what the issues or they perceive the issues to be. The evidence in this case will be presented to you by the testimony of sworn witnesses from the witness stand and/or any other exhibits that I deem to be admissible during the trial of this case.

(R. pp. 70-71, lines 24-25, 1-6). This statement of law rings true for arguments made by attorneys during pre-trial discussions as well. *Id.*

Further, when removing the “arguments of trial counsel” and the “discussions between the attorneys and the trial court,” the record is completely devoid of any legally sufficient foundation for the disputed physical narcotics evidence. The only facts and circumstances presented at the trial that could have possibly formed the required foundation for the physical evidence submitted by the State of South Carolina are as follows.

Agent Chad Mullinax of the Myrtle Beach Police Department testified that on July 16, 2008 he and other members of the 15<sup>th</sup> Circuit Drug Task Force “were -- uh -- conducting a -- an investigation -- uh -- that day. We were able to -- uh -- uh -- gain information of **a person**. I -- We had the name of ‘Fats.’” (R. p. 82, lines 8-12)(emphasis added). There was no other mention of a “Fats” before, during, or after the trial nor was there any connection or association of this nickname to any individual whatsoever. There was also no mention as to how the police obtained this name, what context the name was obtained in regard to, or any other information of any kind about this name. Further, there was absolutely no link whatsoever between someone named “Fats” and the Petitioner. The Respondent’s attempt to do link this name with the Petitioner is pure and abject speculation, which simply cannot form the basis or justification for the trial court’s evidentiary decisions in this matter.

Further, there was no additional testimony presented on the record at the trial of this case as to the source of this “information” or as to the legitimacy of any purported “information” provided to Agent Mullinax or obtained by Agent Mullinax. In fact, the record is devoid of any further testimony about any “information” known to law enforcement at this time.

Agent Mullinax next stated that he and the other agents had previously developed a “tactical plan” with regard to the Petitioner. This “tactical plan” was that law enforcement “[p]lanned on -- uh -- speaking with **a person** in regards to -- uh -- drugs.... The drugs were to be -- uh -- be delivered.” (R. p. 89, lines 5-8)(emphasis added). There was no further testimony indicating whether or not the police actually spoke with anyone regarding any alleged drugs or drug activity. There was also no further evidence or

testimony that law enforcement actually spoke with anyone regarding anything else for that matter. In addition, there was no further explanation of the need or justification for any "tactical plan" regarding the Petitioner nor was there any indication as to what the plan consisted of; who or what was the basis of the plan; or who or what the plan was supposed to accomplish. There was also no time frame for this "tactical plan" nor was there anything further about any plan presented at this trial. Any link to law enforcement actions regarding the Petitioner and a "tactical plan" is again pure and unabashed speculation.

Further, there was also no indication as to the existence of or identity of the "person" that the agents had planned on speaking to. There is no indication as to what, if any, information was sought; as to what, if any, information was actually provided; or as to anything further with regard to any "person" or to any drugs whatsoever. There is certainly no connection whatsoever between this agent's testimony that the officers "planned on speaking with an individual" and the Petitioner.

Agent Mullinax went on further to state that he and the other agents went to "72 Offshore Drive in the Murrell's Inlet section of Horry County..." at "approximately -- uh -- 6:15" on July 16, 2008. (R. p. 89, lines 22-23, 25). There was no information provided as to why the agents went to this particular location; where the address for this location came from; or what, if anything, was supposed to happen at this location. The agent testified solely that they went to 72 Offshore Drive in Murrell's Inlet as a result of their "tactical plan" with no other reason or justification whatsoever. There was no testimony in the record whatsoever to suggest that any criminal activity of any kind was

happening, or that any criminal activity of any kind was about to happen, at this particular location. It would be impermissible to speculate or guess otherwise.

While the agents were located at 72 Offshore Drive in Murrell's Inlet, Agent Mullinax testified that he came into contact with the Petitioner when he "**arrived at the location of 72 Offshore Drive.**" (R. p. 90, lines 22-23)(emphasis added). There is no indication of any action taken by the Petitioner other than that he simply "**arrived**" at 72 Offshore Drive in Murrell's Inlet, South Carolina. Clearly, the simple act of "arriving" at 72 Offshore Drive in Murrell's Inlet is not - in and of itself - a crime. Nor is the simple act of arriving at this particular location, without any further information, evidence of the commission of or connection to any previous crime.

There was also no evidence of any phone calls regarding the Petitioner. As such, the Petitioner's sole action in this matter, his act of simply **arriving** at a location where law enforcement happened to be cannot form the probable cause that is required to support a lawful arrest pursuant to the protections of the United States Constitution, which would be the necessary foundation required prior to the admission of the physical evidence into the evidentiary record in this matter. There is absolutely no mention of any connection of Petitioner to anything that the agent had previously testified about and no such connection can legitimately be inferred in an attempt to justify the initial "arrest" in this matter. Put simply, there was absolutely no foundation or probable cause whatsoever to believe that Petitioner had committed, or was in the act of committing any crime whatsoever as is required before law enforcement can arrest an individual and search that individual pursuant to that arrest. *See State v. Moultrie*, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct. App. 1994).

Based upon the testimony presented during the trial of this matter, there was not even so much as reasonable suspicion to believe that any crime had been committed by anyone at all, much less by the Petitioner. As such, there was no legitimate justification for Agent Mullinax to arrest the Petitioner nor was there any legitimate basis to search his person or his vehicle incident to that arrest. Such justification or legitimate basis was absolutely required to constitute the necessary foundation for the evidence that the trial court admitted into the record over the Petitioner's trial counsel's objection. (R. p. 95, lines 2-4). The trial court's failure to require a proper foundation is clear error.

The fact that the Respondent speciously attempts to link the evidence and testimony presented on the record with the Petitioner through arguments that the prosecutors may have articulated to the trial judge prior to the any live testimony or submission of any actual evidence highlights the complete and utter lack of legally sufficient evidence that could form the required foundation for the disputed physical evidence. Similarly, the fact that the prosecutors may have engaged in discussions about this matter with the trial judge prior to the trial is simply irrelevant and clouds the ultimate issue as nothing discussed by the prosecutors prior to the trial can possibly form the requisite foundation required by South Carolina law.

The 4<sup>th</sup> Amendment of the United States Constitution unequivocally requires the prosecution to articulate facts and circumstances on which a reasonable person would believe that a crime was being committed, or had been committed, to legitimize a warrantless search conducted pursuant to that arrest. This actual evidence and testimony on the evidentiary record at the trial of this matter would be the necessary foundation that is absolutely required prior to the admission of the proffered evidence.

The trial court's failure to require the prosecution to articulate such facts and circumstances on the record in this matter constitutes clear and reversible error as this error was supremely prejudicial to the Petitioner. Accordingly, action by this Court is warranted and certiorari should be granted in this matter.

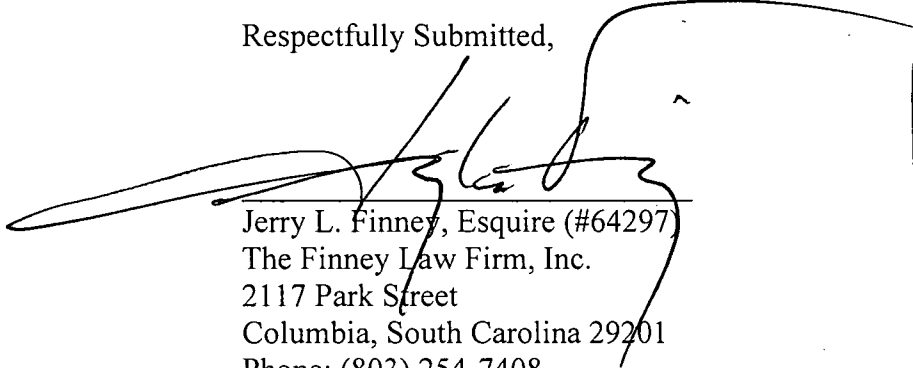
**II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO RULE ON PETITIONER'S APPEAL OF TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL AS A NEW TRIAL IS WARRANTED IN THIS MATTER.**

In light of the prosecution's offer to supplement the evidentiary record after the directed verdict arguments in the trial of this matter, it is clear that a new trial on this matter is warranted and the trial court committed reversible error in failing to grant the Petitioner a new trial. After the Petitioner's directed verdict motion, the prosecution noted, "if it is The Court's pleasure, the State would be more than happy, in camera, to go into those issues [the probable cause for the initial arrest], so the Court can make that ruling at this time." (Transcript pp. 119-20 lns 24-25, 1-2)(R. pp. 120-121, lines 24-25, 1-2). This offer to supplement the record evidences a failure to establish a proper foundation required prior to the admission of evidence into the evidentiary record in this matter. As such, a new trial affording all parties the opportunity to present evidence was warranted and both the trial court and the South Carolina Court of Appeal erred in failing to grant the Petitioner a new trial. Accordingly, action by this Court is warranted and certiorari should be granted in this matter.

**CONCLUSION**

For the reasons stated above, the Petitioner respectfully requests that this Court grant the  
Petition for Writ of Certiorari.

Respectfully Submitted,



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Phone: (803) 254-7408

Attorneys for Appellant

July 5, 2011

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

JUL - 5 2011

S.C. Supreme Court

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APPEAL FROM Horry COUNTY  
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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The State of South Carolina, ..... Respondent,

v.

Ervin Gamble, ..... Petitioner.

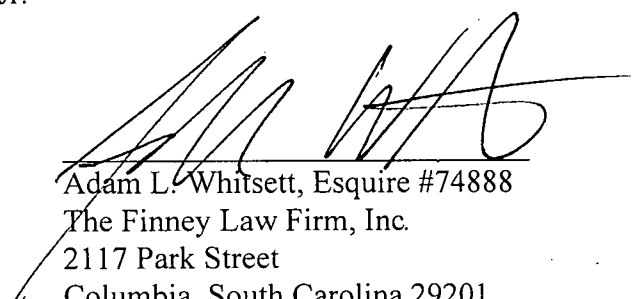
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PROOF OF SERVICE

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I, the undersigned, Adam L. Whitsett, Esquire of The Finney Law Firm, Inc, attorney for the Petitioner, do hereby certify that I have served counsel of record with a copy of the **Reply to Return to Petition for Writ of Certiorari** by causing a copy of the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on July 5, 2011:

Assistant Attorney General William M. Blich, Jr.  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

  
Adam L. Whitsett, Esquire #74888  
The Finney Law Firm, Inc.  
2117 Park Street  
Columbia, South Carolina 29201  
Phone: (803) 254-7408

July 5, 2011

**THE FINNEY LAW FIRM, INC.**

*Attorneys and Counselors at Law*  
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JERRY LEO FINNEY

ADAM L. WHITSETT  
STEPHANIE R. FAJARDO

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RETIRED CHIEF JUSTICE  
SOUTH CAROLINA SUPREME COURT  
ERNEST A. FINNEY, JR.  
OF COUNSEL

July 5, 2011

Reply to Columbia Office

**Via Hand Delivery**

The South Carolina Supreme Court  
The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

**RECEIVED**

JUL - 5 2011

Re: The State of South Carolina v. Ervin Gamble  
Case Tracking No.: 2011-192246

**S.C. Supreme Court**

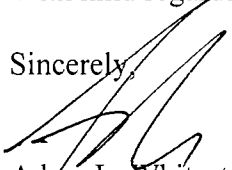
Dear Clerk of Court:

I hope this letter finds you well. Enclosed please find the original and seven (7) copies of the **Reply to Return to Petition for Writ of Certiorari** in the above matter. In addition, I have enclosed the original and one copy of the **Proof of Service** in this matter. I would greatly appreciate your filing the required documents and returning the additional copies to me.

If you should have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

  
Adam L. Whitsett  
Attorney at Law

Enclosures – listed in text

Cc: Assistant Attorney General William M. Blich, Jr. – Attorney for the Respondent



ALAN WILSON  
ATTORNEY GENERAL

S.C. Supreme Court

JUN 22 2011

RECEIVED

June 22, 2011

Jerry L. Finney, Esquire  
Adam L. Whitsett, Esquire  
The Finney Law Firm, Inc.  
2117 Park Street  
Columbia, South Carolina 29201

Re: State v. Ervin Gamble

Dear Mr. Whitsett or Mr. Finney:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case.

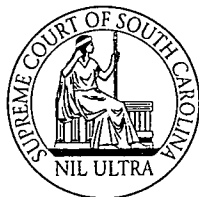
If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blich, Jr.  
Assistant Attorney General

WMB:erd  
Enclosures

cc: ~~Honorable Daniel E. Shearouse (original and six enclosed)~~  
Victim Services (enclosure)



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 24, 2011

Jerry L. Finney, Esquire  
Adam L. Whitsett, Esquire  
The Finney Law Firm, Inc.  
2117 Park Street  
Columbia, SC 29201

Re: State of SC v. Gamble, Ervin  
Case Tracking No. 2011-192246

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/lda

Enclosure

cc: Assistant Attorney General William M. Blich  
The Honorable Tanya Gee

**THE FINNEY LAW FIRM, INC.**

*Attorneys and Counselors at Law*  
thefinneylawfirm.com



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RETIRED CHIEF JUSTICE  
SOUTH CAROLINA SUPREME COURT  
ERNEST A. FINNEY, JR.  
OF COUNSEL

May 23, 2011

Reply to Columbia Office

**Via Hand Delivery**

The South Carolina Supreme Court  
The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

**RECEIVED**

MAY 23 2011

**S.C. Supreme Court**

Re: The State of South Carolina v. Ervin Gamble  
Indictment No(s).       2008-GS-26-4184  
                                      2008-GS-26-4185  
Court of Appeals Case #: 2009125406

Dear Clerk of Court:

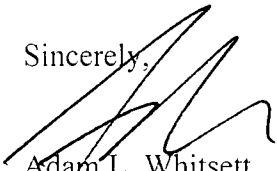
I hope this letter finds you well. Enclosed please find the original and seven (7) copies of the **Petition for Writ of Certiorari** in the above matter. In addition, I have enclosed the original and one copy of the Proofs of Service in this matter. I would greatly appreciate your filing the required documents and returning the additional copies to me.

Also enclosed are two copies of the **Appendix** for the above matter, which I herewith file in this matter.

If you should have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

  
Adam L. Whitsett  
Attorney at Law

Enclosures – listed in text

Cc: Assistant Attorney General William M. Blich, Jr. – Attorney for the Respondent

*South Carolina Court of Appeals*