STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Michael G. Nettles, Circuit Court Judge

DANNY CORTEZ BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001653

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Petitioner Danny Brown's Appellate Counsels were ineffective, in derogation of his Sixth Amendment right to the effective assistance of counsel, for abandoning on appeal the issue of whether the search of Brown's duffle bag as incident to his arrest violated his right to be free from unreasonable invasions of privacy under Art. I, Sec. 10 of the South Carolina Constitution.

STATEMENT

Introduction

Danny Cortez Brown was sentenced to a mandatory minimum sentence of twenty-five years imprisonment for trafficking in cocaine. He was arrested during a traffic stop when a police officer observed him drinking a beer while being a passenger in a car. App. 19, l. 18 - 23, l. 12.

After handcuffing Brown and placing him under arrest, the arresting officer searched a duffle bag located on the floor of the front row of the car that Brown was riding in. App. 23, l. 21 - 29, l. 23. Inside the bag was a potato chip bag, which the officer also searched, one hundred twenty two grams of cocaine. *Id.*

Every South Carolina Court - the Horry County General Sessions Court, the South Carolina Court of Appeal, and the South Carolina Supreme Court - has held that the search of the duffle bag incident to Brown's arrest was a violation of his Fourth Amendment rights. App. 166, l. 22 - 171, l. 20; 180, ll. 6-24; App. 495 - 502; App. 566 - 576.

As Brown's case proceeded through the Court of Appeals and this Court, the United States Supreme Court decided *Arizona v. Gant*[1] and then *Davis v. U.S.*[2]. Based on *Davis*, this Court

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[1] In *Arizona v. Gant,* 556 U.S. 332 (2009), the Supreme Court held that the Fourth Amendment requires law enforcement to demonstrate an actual and continuing threat to their safety posed by an arrestee, or a need to preserve evidence related to the crime of arrest from tampering by the arrestee, in order to justify a warrantless vehicular search incident to arrest. The Court also clarified that the holding in *New York v. Belton*, 453 U.S. 454 (1982), had been widely misinterpreted as permitting a search incident to arrest of the entire passenger compartment of a vehicle regardless of whether the arrestee is restrained or whether it was reasonable to believe that evidence of the offense of arrest will be found in the compartment. The Court stated that *Belton* was a factually specific holding as the search was conducted by a single officer who had just arrested, but had not handcuffed four arrestees.

[2] In *Davis v. U.S.*, 564 U.S. __ (2011), the Supreme Court held that searches, including searches incident to arrest made pursuant to the misinterpretation of *Belton*, conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule because excluding the evidence would not deter bad police behavior.

ultimately determined that despite the search violating Brown's Fourth Amendment rights, law enforcement was acting in good faith reliance on "then binding appellate precedent" when conducting the search of the bag incident to Brown's arrest. App. 565 - 576. Thus, suppressing the cocaine was improper. *Id.*

At the onset of Brown's appeal, Appellate Counsel Franklin-Best had argued in her brief to the Court of Appeals that Art. I, § 10 of the South Carolina Constitution[3] provided heightened protections for citizens. App. 268 - 284.

For whatever reason, she failed to include the trial court's ruling on the state constitution in the Record on Appeal and then expressly waived the issue during oral arguments before the Court of Appeals. App. 464 - 466. Thus, the appellate courts were never provided with the opportunity to rule on whether the search of the duffle bag incident to Brown's arrest violated the heightened privacy protections afforded by Art. I, § 10.

On May 12, 2015, a PCR hearing was held. App. 627 - 657. Despite the trial court having ruled the cocaine admissible under both the Fourth Amendment and Art. I, § 10 of the South Carolina Constitution, PCR counsel argued that Brown was denied his constitutional right to the effective assistance of counsel based on the failure of trial counsel to argue the "South Carolina constitutional issues." App. 629, l. 18 - 631, l. 23; *see also* App. 180, l. 6-24.

To that end, PCR counsel only called trial counsel and Brown to testify at the evidentiary hearing. In actuality, appellate counsels, not trial counsel, were the attorneys that abandon the suppression argument based on Art. I, § 10. App. 180, ll. 6-24; App. 268 - 284; App. 464 - 466.

[3] "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated..."

Thus, the only colorable claim of ineffectiveness was against appellate counsels for failing to pursue a preserved and arguable ground for reversal.[4]

Relevant Facts

A week prior to his arrest in Myrtle Beach, Brown's car broke down in Laurinburg, North Carolina. App. 183, ll. 12-16. On October 6, 2005, a friend named Freddie Prince who owned a garage took Brown to Laurinburg to retrieve his car. *Id.* They brought the car back from Laurinburg to a garage in Myrtle Beach. App. 193, ll. 3-11. Brown stayed at the garage to help Prince work on the car. App. 186, ll. 4-12.

The work took longer than expected. App. 163, ll. 15 – 20. Brown's fiancée arrived to pick him up, but the car was not ready. App. 200, l. 21 - 203, l. 6. Brown, a college graduate working in property management, had spent the previous night at his fiancée's house. Brown took his overnight bag—a black duffle bag—from his fiancée's car and told her that he would catch a ride home from Prince when the work on the car was done. *Id.*

Prince stopped for gas on the way home. App. 203, l. 10 - 205, l. 23. Brown saw Rodney Smith, a neighbor, at the gas station. *Id.* Because Prince had another errand to run, Brown decided to catch a ride home with Smith. Brown got his bag and a beer he had been drinking from Prince's truck and got into Smith's car. *Id.*

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[4] PCR counsel's performance fell far short of the adequate post-conviction baseline contemplated by *Martinez v. Ryan*, 566 U.S. ___, 132 S.Ct. 1309 (2012) (To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney). PCR counsel mishandled Brown's claim for the ineffective assistance of appellate counsel claim as an argument for the ineffective assistance of trial counsel.

Thus, Brown has never had his claim heard and under the highly unusual facts of this case, undersigned counsel is respectfully requesting that this Court remand the case for the limited purpose of developing the record on Brown's ineffective assistance of appellate counsel claim.

Smith drove and Brown sat in the passenger's seat. Smith drove a yellow 1976 Plymouth Fury. *Id.* Smith's car had no center console separating the driver's floorboard from the passenger's floorboard. App. 102, l. 22 – 103, l. 1. Brown testified that he set his duffle bag on the floorboard between them. App. 203, l. 10 - 205, l. 23.

Brown's Arrest and Search of his Duffle Bag

Officer Daryl Williams of the Horry County Police Department testified that around 7:00 p.m. - an hour and half after sunset - he saw Brown drinking a beer and pulled the car over to investigate. App. 21, ll. 11-24. After first approaching the driver's side window and speaking with the occupants, Williams then approached the passenger side window and spoke to Brown. App. 22, ll. 9 - 23, l. 8. He asked Brown to step out of the vehicle and quickly placed him under arrest. *Id.*

Williams placed Brown under arrest for open container, but admitted on cross-examination that he was uncertain whether Brown was ever charged with an open container violation. He said, "I'm not even sure if – no, we did – I did write him a blue ticket for it. I want to say yes. ***But it was definitely the pretext for me to make the stop.***" App. 36, ll. 1 – 4 (*emphasis added*).

Williams claimed that he asked the handcuffed Brown whether the duffle bag in the car was his. Brown purportedly answered affirmatively. App. 24, ll. 1-25. Williams said he took the duffle bag and placed it on the sidewalk. He then put Brown (still handcuffed) in the back of his patrol car and closed the door. *Id.*

Williams then returned to Smith's car and unzipped and rummaged through Brown's duffle bag. He said he "just wanted to get a glance into the bag." App. 27, ll. 6-21. In the duffle bag, Williams found cocaine inside of a crumpled Fritos bag. *Id.*

Indictment and Mistrial

On March 30, 2006, Brown was indicted for one count of trafficking in cocaine by the Horry County Grand Jury. App. 668. On September 7, 2006, Brown proceeded to trial before the Honorable Steven H. John and a jury. Russell Long represented Brown, and Assistant Solicitor Scott Hixson represented the State. Judge John declared a mistrial during the State's case.

Brown's Second Trial

On September 12-13, 2006, Brown was again tried before the Judge John and a jury. App. 49 - 314. Williams' justification for removing the duffle bag, opening the duffle bag, and searching the Frito chip bag changed almost overnight. When the case was again called to trial, Officer Williams again provided testimony on the issue of the duffle bag.

However, the trial court noticed a patently self-serving addition to Williams' testimony:

> THE COURT: He clearly did not testify to this at his previous testimony under oath. In this time, the fact that I'm talking about right now—***he said this time that it was an unknown bag; there might be a safety issue; there might be a weapon; it might pose a threat. The Officer never, at any point in time, mentioned anything like this in his previous testimony, under oath, when the Court declared a mistrial before. He never said anything about that.***
>
> In his prior testimony, under oath, all he said was, he secured the bag, put it on the sidewalk, put the Defendant under arrest in his car, and then he went back and opened up the bag. . . .

App. 84, l. 8 – 85, l. 10 (*emphasis added*). Williams' changing testimony was important because it illustrated that his prime motivation for searching the duffle bag was unrelated to any safety concern that the handcuffed Brown might somehow, from the back seat of the police car, reach the bag lying next to Smith's car and access a weapon.

Belated Arrest of Rodney Smith

Smith had the opportunity to access Brown's bag during Brown's arrest. The trial testimony about the length of time the bag was left alone with Smith was somewhat unclear. Brown testified that the duffle bag was still in Smith's car when Williams put him in the patrol car. App. 208, l. 16 – 209, l. 1. Williams admitted that he did not keep his eye on the bag while he was putting Brown in the back of the patrol car and seemed to imply on cross-examination that he did not remove the bag until after placing Brown under arrest. App. 41, l. 4 –43, l. 6.

In contrast, Smith shortened the time he was alone with the duffle bag and claimed that Williams grabbed the bag after handcuffing Brown and taking him to the back of his vehicle. App. 109, l. 2 – 111, l. 12. Regardless, Smith was left alone with Brown's bag and Brown was handcuffed and sitting in the back of the patrol car when Williams first searched it.

Williams then asked Smith for his driver's license. Williams noticed that Smith was very nervous even before running his license. App. 50, ll. 7-18. Smith's license was suspended. Williams waited until another patrol car before arresting Smith for driving with a suspended license. App. 44, l. 24- 4, l. 16. A search of Smith's vehicle uncovered a small black pouch under the driver's seat that contained various illegal drugs. App. 56, ll. 1-18.

Smith testified as a State's witness and admitted that the drugs under the driver's seat belonged to him. App. 95, ll. 19 – 22. He stated that he had been selling drugs. App. 102, ll. 20- 24. Smith stated that Brown approached him at the gas station and offered to sell him cocaine. App. 117, l. 24 - 118, l. 11. Smith was never prosecuted.

Brown emphatically testified that the drugs found in the duffle bag did not belong to him. When asked if the cocaine was his, Brown stated, "I never seen that till I got here, and it doesn't belong to me." App. 210, ll. 24-25. He denied knowing the cocaine was in his bag. App. 211,

ll. 1-7. He denied offering to sell Smith cocaine. *Id.* The solicitor was unable to shake Brown in his denials during cross-examination. App. 213, ll. 13-25.

None of the State's witnesses testified that they inventoried the contents of Brown's duffle bag or of Smith's car. Nor did any of the State's witnesses testify regarding police procedures inventorying the property of arrested individuals.

During the argument on whether the cocaine should be suppressed, the solicitor relied solely on a search incident to arrest theory. App. 165 l. 8 - 166, l. In ruling on the constitutionality of the bag search incident to arrest Judge John held:

> Constitution and the South Carolina Constitution that's relevant -- the South Carolina Constitution being Article 1, Section 10, regarding Searches and Seizures, Invasions of Privacy. The South Carolina Constitution does have the additional language of protecting against unreasonable invasions of privacy. That language is not within the context of the United States Constitution, ***but in looking at cases of the South Carolina Supreme Court I did not find any extension of privacy above and beyond that that is set forth in the U.S. Constitution. The South Carolina Constitution, in this regard, does not appear, in any manner, to extend any greater protections than is guaranteed by the U.S. Constitution.***

App. 180, l. 6-24 (*emphasis added*). Despite expressing misgivings about Williams' motives in looking in the bag, Judge John admitted the cocaine under the search incident to arrest exception to the warrant requirement. *Id.*

The jury found Brown guilty as charged. App. 259, ll. 10-23. The trial court sentenced Brown to the minimum term of twenty-five years imprisonment. App. 265, l. 18 - 266, l. 10.

Appellate Procedural History

On appeal Brown was initially represented by Elizabeth Franklin-Best. In her brief to the Court of Appeals, Appellate Counsel Franklin-Best argued:

> It has long been acknowledged that state courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution. *See State v. Weaver*, 374 S.C. 313, 649 S.E.2d 479 (2007); *Virginia v. Moore*, 553 U.S. _____ (2008) (2008 WL 1805745). The South Carolina Constitution provides a distinct right to privacy under Article I, §10. "The South Carolina Constitution with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 841 (2001). Under South Carolina law, these searches do not pass constitutional muster. Even if this Court concludes that the searches were reasonable under federal constitutional law, they fail under the heightened protections afforded South Carolina citizens.

App. 281. For whatever reason, Appellate Counsel Franklin-Best did not include the trial court's ruling on the South Carolina Constitution in the Record on Appeal. App. 464 - 466. Moreover, when asked by the court to discuss Art. I, § 10 during oral arugments, Franklin-Best waived the issue.

On June 14, 2010, the Court of Appeals reversed Brown's conviction for trafficking cocaine. *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). In a published opinion by Judge Short, the Court of Appeals held the search of Brown's duffle bag violated the Fourth Amendment's prohibition against unreasonable searches and seizures as stated in *Gant*. As appellate counsel had abandoned the state constitutional argument, the Court of Appeals did not address it.

Before South Carolina Supreme Court

The Supreme Court granted the State's petition for writ of certiorari on the issue of whether the Court of Appeals erred in holding that the inevitable discovery doctrine did not excuse the illegal search. App. 503 - 533.

In its brief, the State claimed, for the first time, that the "good faith" exception barred the application of the exclusionary rule. *Id.* During the pendency of the State's appeal, the U.S. Supreme Court issued *Davis* providing a good faith exception to the rule promulgated in *Gant* when police officers conducted the search in good faith reliance on then binding legal binding legal precedent. 564 U.S. __ (2011).

This Court reversed the Court of Appeals and affirmed Brown's conviction. *State v. Brown*, 401 S.C. 82, 736 S.E.2d 263 (2012). Citing to *Davis*, this Court ruled that "the exclusionary rule could not be applied in these circumstances because the officers carried out their searches in accordance with existing appellate precedent and the exclusionary rule would serve no deterrent purpose." *Id.* at 95, 736 S.E.2d at 269-270.

This Court reached its decision without reference to the South Carolina Constitution as Judge John's ruling was not included in the Record on Appeal and Appellate Counsel Alexander had not revived the state constitutional grounds in response to the attorney general's new found reliance on *Davis*. App. 534 - 564. This Court denied Brown's petition for rehearing. The United States Supreme Court denied Brown's petition for writ of certiorari on June 3, 2013.

Post-Conviction Relief Action

On August 14, 2013 Brown filed an application for post-conviction relief alleging ineffective assistance of counsel for failing to argue that the search of his duffle bag violated the privacy protections under the South Carolina Constitution. App. 615 - 621. On June 11, 2014, the State filed a Return. App. 622 - 626.

On May 12, 2015, an evidentiary hearing was held before the Honorable Michael G. Nettles. Tristan Schaffer represented Brown and Assistant Attorney General Joshua Thomas represented the

State. Brown and trial counsel, Russell Long, both testified. Appellate counsels Franklin-Best and Alexander were not present.

Prior to taking testimony, PCR counsel explained his theory of the case:

> Your Honor, the main thing that we're arguing is that the, the search in this case was violative under the U.S. Constitution because that's already been ruled upon and actually was but they didn't hold it -- they basically, they said it was not held retroactive. ***The -- but we're saying that the search was actually violative of the South Carolina Constitution*** and may be in a position that the South Carolina Constitution is more restrictive or allows for greater protection than the U.S. Constitution in this matter. . . .

App. 630, l. 20 - 631, l. 17 (*emphasis added*).

Testimony of Russell Long

Trial counsel testified that he and Brown were friends growing up and had played football together in high school. App. 632, ll. 7-25. Counsel believed that the search of Brown's duffle bag "seemed like a bad search." *Id.* He also recollected that "[t]here was no reason in the world for that officer to unzip that bag." App. 633, ll. 22-23.

Counsel further testified that at the second trial, the officer claimed - for the first time - that he searched the bag out of concern for officer safety. App. 634, l. 2 - 635, l. 13. When asked by PCR counsel if he raised the privacy protections afforded by the South Carolina Constitution, trial counsel stated that he did not recall if specifically identified the differences between the U.S. Constitution and the South Carolina Constitution. *Id.*

On cross-examination, the State had counsel read the portion of the trial transcript where Judge John discussed the differences between Art. I, § 10 and the Fourth Amendment. App. 640, l. 7 - 641, l. 21.

Testimony of Petitioner Danny Brown

Brown also testified about Officer Williams' shifting justification for the search of the bag between the first and second trial. App. 647, l. 2 - 650, l. 3. Brown further stated that Smith had ample opportunity to place the drugs in the duffle bag while Williams was taking Brown into custody. *Id.* PCR counsel interrupted and ended Brown's testimony when he began to explain how the South Carolina Constitution was applicable to his case. App. 650, ll. 1-10.

During summation arguments, the State stressed that Judge John had relied on both the South Carolina and United States Constitutions when denying the defense's motion to suppress the cocaine. App. 650, l. 22 - 652, l. 19. Citing to Judge John's ruling, the State then contended that the right to privacy and freedom from unreasonable searches in the two constitutions were "basically coterminous". *Id.*

PCR counsel countered that the South Carolina Constitution was more protective than the U.S Constitution. App. 653, l. 15 - 655, l. 11. Counsel then requested the opportunity to submit a written brief on the applicability of the South Carolina Constitution. The trial court refused to allow further briefing on the issue. App. 655, l. 14-17.

Order of Dismissal

On June 16, 2015, Judge Nettles issued a written order denying Brown's application for post-conviction relief. App. 659 - 667. The PCR court ruled that "trial counsel did argue, on numerous occasions, that Applicant had a privacy interest in the bag in which drugs were found. . . Thus, trial counsel properly articulated his position that the search and seizure of the drugs violated Applicant's right to privacy, including the right to privacy found in the South Carolina Constitution." App. 663 - 664.

The court continued, "because the right to privacy was raised to and rule upon by Judge John, trial counsel was not deficient in this regard. Furthermore, because this issue was addressed at trial, it cannot now be raised as a ground for relief in post-conviction relief." *Id.*

ARGUMENT

Petitioner Danny Brown's Appellate Counsels were ineffective, in derogation of his Sixth Amendment right to the effective assistance of counsel, for abandoning on appeal the issue of whether the search of Brown's duffle bag as incident to his arrest violated his right to be free from unreasonable invasions of privacy under Art. I, Sec. 10 of the South Carolina Constitution.

Appellate Counsel Franklin-Best waived the argument that the search of the duffle bag as incident to Brown's arrest for an open container violation violated his right to privacy under Art. I, § 10 of the South Carolina Constitution and did not adequately complete the Record on Appeal so as to include Judge John's ruling on Art. I, § 10 of the South Carolina Constitution. Appellate Counsel Alexander then declined to revive the state constitutional argument in response to the State's reliance on *Davis*.

These failings greatly prejudiced Brown. Appellate counsels' objectively unreasonable decisions constituted ineffective assistance of counsel and prevented the appellate courts from considering the greater privacy protections afforded by Art. I, § 10 of the South Carolina Constitution. Ultimately, Brown was deprived of a potential ground for reversal, independent of the Fourth Amendment.

He was also denied the compelling argument that our appellate courts never adopted the overly broad misinterpretation of *Belton* because Art. I, § 10 does not permit such broad searches incident to arrest; thus also explaining why our State's appellate courts had - prior to Brown's case - relied exclusively on the earlier Supreme Court decision in *Chimel v. California*.[5]

[5] In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court held that when an arrest is made, it is reasonable for the arresting office to search the person arrested and the area into which the arrestee might reach prior to being restrained in order to remove any weapons that may later be used to resist arrest. *Chimel* also reiterated that a valid search of the immediate area surrounding the unrestrained arrestee may also be undertaken to prevent the destruction of evidence of the crime which the person is being arrested for. 395 U.S. at 763-764.

Discussion

A criminal defendant is entitled to the effective assistance of appellate counsel on his direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). In analyzing a claim of ineffective assistance of appellate counsel, this Court applies the same test as it would when analyzing a claim of ineffective assistance of trial counsel. *See Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999).

Therefore, to establish ineffective assistance of counsel, Brown must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 117-18, 386 S.E.2d at 625 (internal citations omitted).

Here, appellate counsels were ineffective for failing to complete the Record on Appeal so that the trial court's application of the Art. I, § 10 could be challenged on appeal. *See Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001) (appellate counsel ineffective for failing to adequately complete record to challenge hearsay statements). Counsels were also ineffective waiving the state constitutional argument when invited to address that issue by the Court of Appeals during oral arguments. *See Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) (appellate counsel ineffective for inadequately briefing issue when directed to do so by the Court of Appeals).

At a minimum, appellate counsel could have simply relied on the points already raised in her brief and then supplemented the Record on Appeal to include Judge John's ruling. Because of the highly unusual circumstances of Brown's appeal, Appellate Counsel Alexander had an opportunity to rectify prior appellate counsel's error when the State introduced the *Davis* argument for the first time in their brief to the Supreme Court. App. 503 - 533. However, he failed to do so.

In both instances, appellate counsels' deficient performance fell well below objectively reasonable professional standard expected of appellate criminal defense attorneys.

Prejudice

There is a reasonable probability that, but for appellate counsels' unprofessional errors, the result of the Brown's appeal would have been different. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. The trial court ruled that the South Carolina Constitution "does not appear, in any manner, to extend any greater protections than is guaranteed by the U.S. Constitution." App. 180, l. 6-24.

Respectfully, this is incorrect. Article I, § 10 of the South Carolina Constitution affords individuals a higher level of privacy protection than the Fourth Amendment.[6] *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 841 (2001). In *Forrester*, a police officer working on a drug interdiction team at the Florence train station became suspicious of Forrester because she appeared

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[6] In *Forrester*, the Court also noted that South Carolina is one of six states that have state constitutional provisions for the right to privacy in the section prohibiting unreasonable search and seizures. 343 S.C. at 644, 541 S.E.2d at 841. Arizona is another such state and the U.S. Supreme Court adopted Arizona's jurisprudence in *Gant*:

"Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California*, and applied to vehicle searches in *New York v. Belton* did not justify the search in this case. We agree with that conclusion." 556 U.S. at 335 (*internal citations omitted*); *see also State v. Gant*, 162 P.3d 640 (Az. 2007).

to be nervous while on a public telephone. 343 S.C. at 640, 541 S.E.2d at 839.

The office approached and asked to search her luggage. Forrester consented but tightly clutched her purse. *Id.* When the officer requested to search her purse, Forrester did not turn it over, but instead held it open for the officer to see inside. *Id.* The officer then physically took the purse from Forrester without permission and tore out the bottom lining, revealing crack cocaine. *Id.* at 641, 541 S.E.2d at 839.

This Court reversed Forrester's conviction on the grounds that the officer exceeded the scope of consent. The Court began by noting that Art. I, § 10 of the South Carolina Constitution clearly contemplated providing privacy protections in excess of those afforded under the Fourth Amendment.

Applying the state constitution, this Court narrowly interpreted the boundaries of Forrester's consent so that by "merely offering the officer a restricted view of the inside of the container while retaining possession, a reasonable police officer would not assume that this guarded action also granted permission to take possession of, search thoroughly, and even partially destroy the container itself."

This Court has also found that Art. I, § 10, requires police to have reasonable suspicion prior to initiating a "knock-and-talk" encounter as a person's residence. *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015) (conducting a lengthy analysis of our state constitutional jurisprudence). The heightened privacy protections of Art. I, § 10, afforded Brown with a second layer of constitutional protections, beyond those afforded by the Fourth Amendment.

Without being able to draw on the additional privacy protections of Art. I, § 10 Brown was denied the ability to present a strong ground for reversal, independent of the evolving fourth amendment jurisprudence. *See State v. Austin*, 306 S.C. 9, 16-17, 409 S.E.2d 811, 815 (1991) ("It is

firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution . . . . ***For reasons unknown to us, Mr. Austin does not argue for reversal of his conviction based on the State Constitution. Although his exception asserts a violation of Article I, § 10, nowhere in his brief does he mention the State Constitution.***") (*emphasis added*).

Moreover, Brown's brief to this Court argued that South Carolina had never adopted the misinterpreted *Belton* standard and, instead, exclusively relied on *Chimel* when faced with a search incident to arrest. App. 555 - 564. This meant that police were limited to searching the area in the immediate control of an unrestrained arrestee for officer safety and to prevent the arrestee from destroying evidence of the crime for which he was being arrested. *Id.*

Thus, the exception created by *Davis* was inapplicable as *Belton* was never relied on by our courts, let alone misinterpreted. *Id.* However, without raising Art. I, § 10, Brown had no explanation for ***why*** *Belton* had never been adopted. App. 558 - 559.

Therefore, had either appellate counsel simply maintained the already briefed argument that the search of Brown's bag incident to his arrest violated Art. I, § 10's amplified privacy protections, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *see Strickland*, 466 U.S. 668; *see also Austin*, 306 S.C. 9, 409 S.E.2d 811.

Conclusion

Our courts have unanimously ruled ruled that the search of Brown's duffle bag as incident to his arrest violated his Fourth Amendment rights. Because appellate counsels abandoned the state constitutional argument Brown was deprived of the opportunity to argue that the exception, which permitted the evidence found as a result of the unconstitutional search to be presented at trial, did

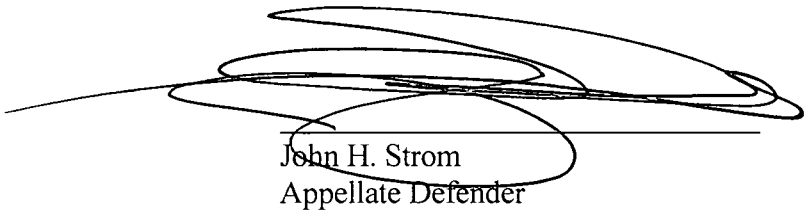
not circumvent the additional privacy protections he was entitled to under Art. I, § 10 of the South Carolina Constitution.

Undersigned counsel understands that requests to remand post-conviction relief applications for additional testimony are not favored, but the highly unusual facts of Brown's case present a compelling reason to provide him with the opportunity to develop the record on the narrow issue of why appellate counsel abandon the state constitutional argument.

CONCLUSION

Based on the foregoing reason, Petitioner Danny Cortez Brown respectfully requests that this Court remand his PCR application to allow him the opportunity to take testimony and present evidence on the limited issue of whether appellate counsels were ineffective for abandoning on appeal the argument that Art. I, § 10 of the South Carolina Constitution provided a basis for suppressing the cocaine found in Brown's duffle bag, independent of the Fourth Amendment.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2016.

STATE OF SOUTH CAROLINA

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001653

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire this 22nd day of February, 2016.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.