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SC SUPREME COURT

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

Michael G. Nettles, Circuit Court Judge

DANNY CORTEZ BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001653

APPENDIX

JOHN H. STROM
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

JESSICA KINARD
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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bag was more like a gym bag, like a small carry-on bag to take on an airplane, or to a gym. . . ."

Additionally, Officer Williams never testified he searched the bag to find evidence of a crime. According to Officer Williams, he removed the bag from the car because it posed a "safety issue," and because he wanted to separate the bag from the driver. Officer Williams stated after he placed Brown in the patrol car, he searched the duffel bag because he "wanted to get a glance into the bag."

Viewing the evidence and testimony through the lens that the State bears the burden to prove an exception to the prohibition against warrantless searches, as we must, we conclude Officer Williams did not have probable cause to search the bag.

C. The Exclusionary Rule, Inevitable Discovery, and Inventory Search

The State urges us to accept that the drugs would have been inevitably discovered during an inventory search. We disagree.

The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded. State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975). The inevitable discovery doctrine is an exception to the exclusionary rule and states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained. Nix v. Williams, 467 U.S. 431, 443-44 (1984). The fruit of the poisonous tree doctrine, most often associated with violations of the Fourth Amendment's prohibition of unreasonable searches and seizures, prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure. Wong Sun v. U.S., 371 U.S. 471, 484 (1963).

If the police are following standard procedures, they may inventory impounded property, including closed containers, to protect an owner's property while it is in police custody. Colorado v. Bertine, 479 U.S. 367, 372-73 (1987). Standardized criteria or established routine must regulate the

opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. Florida v. Wells, 495 U.S. 1, 3 (1990).

The State provided very scant testimony, at best, that the duffel bag or car would have been taken into police custody after Brown and the driver were arrested.³ Although commonsense dictates the police would have done exactly this, we are confined by the law that the prosecution bears the burden to establish by a preponderance of the evidence that the evidence would inevitably have been discovered. Nix, 467 U.S. at 443-44. Additionally, police must follow standard procedures to conduct an inventory search and no such testimony was presented. Thus, we conclude the inevitable discovery doctrine does not apply and the trial court erred by failing to exclude the evidence. See State v. Grant, 174 S.C. 195, 177 S.E.2d 148, 149 (1934) ("The right of people to go about their business without being subjected to undue search and seizure . . . by the authorities of the law . . . are essential to an orderly government."). Consequently, we reverse Brown's conviction and vacate his sentence.

CONCLUSION

Accordingly, the trial court's decision is

REVERSED.

WILLIAMS and LOCKEMY, JJ., concur.

³ The solicitor asked an officer, "Did you have occasion to search that vehicle pursuant to the arrest?" In reply the officer testified, "Yes. Yes sir. Under lawful search incident to arrest of the vehicle (sic), in the passenger area, and pursuant also to guidelines of doing inventory of the vehicle before towing, we searched that vehicle."

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

Petitioner,

vs.

DANNY CORTEZ BROWN,

Respondent.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

Post Office Drawer 1276
Conway, SC 29526
(843) 915-5460

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUES ON APPEAL**I.**

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the challenged evidence inevitably would have been discovered regardless of the propriety of the search conducted incident to Brown's arrest?

II.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the officer conducted the search of the duffle bag incident to Brown's arrest in compliance with the controlling legal precedent in effect at the time of the search?

STATEMENT OF THE CASE

On October 6, 2005, Respondent Danny Cortez Brown was arrested following a traffic stop during which he was observed with an open container of alcohol. In March of 2006, the Horry County grand jury indicted Brown for trafficking in cocaine in an amount between 100 and 200 grams. On September 12, 2006, Brown proceeded to trial in the Horry County court of general sessions with the Honorable Steven H. John, circuit court judge, presiding. At the conclusion of trial, the jury convicted Brown as indicted. The trial judge sentenced Brown to a term of imprisonment of twenty-five years. Brown then timely filed and perfected an appeal.

Following oral argument, the South Carolina Court of Appeals issued a published opinion reversing Brown's conviction.¹ State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). Subsequently, the State petitioned the Court of Appeals for a rehearing, and the petition was denied. The State then filed a petition for a writ of certiorari in the South Carolina Supreme Court, and the petition was granted on December 15, 2011.

¹ This opinion was filed on June 14, 2010, as Opinion No. 4697.

STATEMENT OF FACTS

On the evening of October 6, 2005, Officer Daryl Williams of the Horry County Police Department was on patrol in Myrtle Beach. (R. pp. 1-2). Around 7:00 p.m., Officer Williams glanced over at a vehicle to his side and noticed the passenger, Respondent Danny Cortez Brown, was holding a beer can. (R. pp. 2-3). Brown made eye contact with the officer and quickly attempted to tuck the beer can between his legs. (R. p. 2). Officer Williams then initiated a traffic stop based on the open container violation he observed Brown committing. (R. p. 2).

After the officer activated his blue lights, the driver of the other car, Rodney Smith, stopped his vehicle in the roadway. (R. p. 4; p. 12; p. 23; p. 87). When Officer Williams approached, Smith began behaving very nervously while Brown appeared to be "artificially laid back." (R. p. 4; p. 25; p. 32). Officer Williams asked Brown about the beer can, and Brown initially denied having one. (R. p. 4). However, Brown then pulled a beer can up from between his legs and showed it to the officer. (R. p. 4; pp. 17-18). Officer Williams instructed Brown to step out of the vehicle and placed him under arrest for the open container violation. (R. pp. 4-5). As he arrested Brown, he observed a black duffle bag between Brown's legs. (R. pp. 5-6). Officer Williams then removed the bag and placed it on the sidewalk for safety reasons so the driver would not be able to access it, and Brown claimed ownership of the duffle bag. (R. pp. 6-7; p. 24; p. 26). After securing the duffle bag, Officer Williams then moved Brown into the back of his police vehicle. (R. p. 8).

Once Brown was secured in the officer's patrol car, Officer Williams returned to Smith's car and casually spoke with Smith. (R. p. 9). While speaking with Smith, he unzipped Brown's duffle bag and looked inside. (R. p. 9; pp. 24-25). Inside the bag, he

located a crumpled package of Fritos chips, opened it, and discovered a plastic bag containing 122.65 grams of cocaine hidden within. (R. p. 9; pp. 116-117). He then closed the duffle bag, walked over to Smith, asked for his driver's license, and discovered it was suspended. (R. p. 11). After other officers arrived on the scene, Officer Williams arrested Smith for driving under suspension, and Smith was placed into another police vehicle. (R. pp. 11-12; p. 27).

Meanwhile, Detective Tom Delpercio, a narcotics investigator with the Horry County Police Department, responded to the scene after being alerted cocaine had been discovered during the traffic stop. (R. pp. 34-35). He took custody of the duffle bag, advised Brown of his rights, and attempted to speak with him. (R. p. 37). Brown declined to do so. (R. p. 37). The officers then searched Smith's vehicle and discovered a smaller bag of drugs under the driver's seat containing a medley of narcotics, including crack cocaine, Xanax pills, marijuana, and powder cocaine.² (R. pp. 37-38; p. 49). Subsequently, Smith waived his rights and claimed ownership of the drugs found under his driver's seat. (R. pp. 40-41).

Sometime after his arrest, Brown was released from custody. (R. p. 45). Following his release, Brown attempted to retrieve his possessions from the police department. (R. p. 26; pp. 44-45). Upon request, an evidence technician returned the black duffle bag, various items of clothing, and a cell phone to Brown on October 12, 2005, after Brown provided a driver's license and signed for the property's release.³ (R.

² Regarding the search, Detective Delpercio testified: "Under a lawful search incident to arrest of the vehicle, in the passenger area, and pursuant also to guidelines of doing inventory of the vehicle before towing, we searched that vehicle." (R. p. 37).

³ Lori Rabon, an evidence custodian with the Horry County Police Department, testified the duties of an evidence technician generally included safely returning non-relevant personal items and property back to its owner. (R. p. 113).

p. 112). The narcotics located in the duffle bag were not returned to Brown. (R. pp. 44-45). Subsequently, Brown was indicted for trafficking in cocaine, and he proceeded to trial. (R. pp. 181-182).

During trial, Officer Williams and Detective Delpercio recounted the circumstances of the traffic stop and the ensuing discovery of the drugs. (R. p. 1; p. 34). Following their testimony, Brown moved to suppress the evidence seized from the black duffle bag. (R. p. 63). Brown asserted Officer Williams should have ended his search after performing a pat-down search and needed consent to search any further. (R. p. 64). The trial judge took the matter under advisement. (R. pp. 68-70).

Smith then testified about the circumstances of the traffic stop. (R. pp. 72-73). Smith stated he stopped at a gas station and Brown approached his vehicle. (R. pp. 72-73; p. 74). Smith indicated Brown asked him if wanted to purchase some narcotics and he told Brown he did. (R. p. 74). He testified he then attempted to give Brown a ride home so he could purchase some cocaine from him, and Brown retrieved a black duffle bag from another vehicle. (R. pp. 72-73). Smith then stated they were stopped by a police officer a short distance from the gas station because Brown was drinking a beer. (R. p. 73). Smith testified he stopped his vehicle in the middle of the highway and the officer initially asked for his driver's license, which was suspended. (R. p. 73; p. 87; pp. 90-91; p. 93). Smith indicated the officer then arrested Brown and placed him in the police vehicle. (R. pp. 90-91). Smith stated the officer searched the duffle bag and arrested him for driving under suspension. (R. p. 93; p. 95). Smith further acknowledged he was a drug dealer and user, his drugs were found underneath his seat, and he had \$250 in his pocket at the time of the traffic stop that he intended to use to purchase an "eight ball" of cocaine from Brown. (R. pp. 77-78; p. 84; p. 100).

After the State rested its case, Brown renewed his motion for the suppression of the narcotics, arguing the search was not a valid search incident to an arrest.⁴ (R. pp. 129-134). In response to Brown's motion, the solicitor asserted the search was valid under the controlling United States Supreme Court precedent of New York v. Belton, 453 U.S. 454 (1981), and Thornton v. United States, 541 U.S. 615 (2004). (R. pp. 134-143). Following the solicitor's response, the trial judge asked Brown if the drugs would have inevitably been discovered while the duffle bag, which indisputably belonged to Brown, was inventoried during the arrest and booking process. (R. pp. 143-144). Brown responded: "It may be inevitable that they be found, but it doesn't make it proper." (R. p. 144). The trial judge denied the suppression motion, finding the search to be proper under the test announced in Belton. (R. pp. 151-153). The trial judge additionally noted: "[The duffle bag] could have been inventoried at the same time [Brown] was transported to the detention center and booked and arrested." (R. p. 150). However, he noted the search in this case was not an inventory search. (R. p. 150). Subsequently, at the conclusion of trial, Brown was convicted as charged and sentenced to a term of incarceration of twenty-five years.

Following his conviction, Brown timely filed and perfected an appeal. During the pendency of the appeal, the United States Supreme Court issued an opinion in the case of Arizona v. Gant, 556 U.S. 332 (2009), which significantly limited the Supreme Court's earlier holdings in Belton and Thornton. Subsequently, applying Gant, the South Carolina Court of Appeals reversed Brown's conviction after finding the search was not a

⁴ Earlier, during the testimony of the drug analyst, the cocaine seized from Brown's duffle bag was admitted into evidence over objection. (R. pp. 118-120).

valid search incident to an arrest.⁵ State v. Brown, 389 S.C. 473, 480-481, 698 S.E.2d 811, 815 (Ct. App. 2010). The Court of Appeals further found the search was not valid under the automobile exception to the warrant requirement. Id. at 483, 698 S.E.2d at 816. Finally, the Court of Appeals rejected the contention the drugs would have inevitably been found during a routine inventory search. Id. at 483-484, 698 S.E.2d at 816. In finding the inevitable discovery doctrine did not apply to Brown's case, the Court of Appeals held:

The State provided very scant testimony, at best, that the duffel bag or car would have been taken into police custody after Brown and the driver were arrested. Although commonsense dictates the police would have done exactly this, we are confined by the law that the prosecution bears the burden to establish by a preponderance of the evidence that the evidence would inevitably have been discovered. Additionally, police must follow standard procedures to conduct an inventory search and no such testimony was presented. Thus, we conclude the inevitable discovery doctrine does not apply and the trial court erred by failing to exclude the evidence.

Id. at 484, 698 S.E.2d at 817 (footnotes and citations omitted).

Thereafter, the State petitioned the Court of Appeals for a rehearing, and the petition was denied. The State then petitioned the South Carolina Supreme Court for a writ of certiorari, and this Court granted the State's petition.

⁵ In reversing the trial judge's ruling based on the decision in Gant, the Court of Appeals acknowledged: "In fairness to the trial court, it did not have the guidance provided to us by the United States Supreme Court in the Gant case." Brown, 389 S.C. at 481, n.2, 698 S.E.2d at 815.

ARGUMENT

I.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the challenged evidence inevitably would have been discovered regardless of the propriety of the search conducted incident to Brown's arrest?

The Court of Appeals erred in not finding Brown's cocaine would have been inevitably discovered. Although recognizing common sense dictated the duffle bag inevitably would have been taken into custody after Brown and Smith were arrested, the Court of Appeals concluded there was insufficient evidence to establish the cocaine inevitably would have been discovered. To the contrary, the evidence presented showed the officers intended to perform a routine inventory search contemporaneous with the towing of Smith's vehicle. Additionally, even if an inventory search of the vehicle would not have been performed, Brown's duffle bag, which Brown claimed ownership of at the time of his arrest, would have inevitably been taken into custody and inventoried as part of the standard booking process. Therefore, as Brown's narcotics would have inevitably been discovered even if the officer had not searched the duffle bag incident to Brown's arrest, the Court of Appeals' holding was erroneous. The decision of the Court of Appeals should be reversed, and Brown's conviction should be affirmed.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005). However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary

and oppressive interference by enforcement officials with the privacy and personal security of individuals.’ ” United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment’s warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978).

The inevitable discovery doctrine has been adopted as such an exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984). If the prosecution can establish by a preponderance of the evidence that information or evidence would have inevitably been discovered by lawful means, then the discovered evidence, even if obtained by unlawful means, should not be excluded during trial. Id. “Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” Id. at 446. While the exclusionary rule is designed to ensure the prosecution will not be placed in a better position than it would have been without an illegal search or some police misconduct, the inevitable discovery doctrine ensures the prosecution is not placed in a worse position simply because of some earlier police error or misconduct. Id. at 443.

In the case sub judice, the evidence presented at trial established Brown’s cocaine would have been inevitably discovered either in an inventory search during the booking process or in an inventory search of Smith’s vehicle following his arrest. Regarding the vehicle inventory search, Detective Delpercio testified he searched Smith’s car pursuant to guidelines regarding inventory searches of vehicles before they are towed. The

evidence further established Smith's vehicle was stopped in the middle of a roadway at the time of incident. Therefore, the officers clearly would not have abandoned the vehicle in the roadway after arresting both the passenger and driver. See State v. Lemacks, 275 S.C. 181, 184, 268 S.E.2d 285, 286 (1980) (finding an inventory search to be justified after a vehicle was discovered abandoned in the roadway because the towing of a vehicle in the roadway was reasonably foreseeable). Logically, the vehicle and the personal property connected to it would have been taken into law enforcement custody and secured. See United States v. Johnson, 383 F.3d 538, 545, n.8 (7th Cir. 2004) (finding the contents of the trunk would have inevitably been discovered in an inventory search because the officers would have taken possession of the vehicle after the driver was arrested); see also United States v. Hairston, 409 F. App'x 668, 670 (4th Cir. 2011) ("In this case, if the officer had not conducted a search incident to arrest, an inventory search of the car would have been conducted, wherein the evidence in question would have been discovered. Because the items seized would have been inevitably discovered, the district court was correct in denying Hairston's motion to suppress."); United States v. Johnson, 112 F. App'x 138, 139-140 (3rd Cir. 2004) (holding, where an officer stopped a vehicle and determined the driver did not have a valid license and had outstanding warrants, a search of a duffle bag in the vehicle should not be suppressed because the drugs found inside would have inevitably been discovered during an inventory search). After the vehicle and property were secured, an inventory search would have been necessary to protect the suspects' belongings and also to protect the police department from claims of lost or stolen property. See Whren v. United States, 517 U.S. 806, 812, n.1 (1996) ("An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a

towed car), and to protect against false claims of loss or damage.”). Therefore, Brown’s duffle bag would have inevitably been searched during a routine inventory search after Smith’s car was taken into custody, and Brown’s cocaine would have inevitably been found regardless of the propriety of the search performed at the scene.

Additionally, even if Brown’s duffle bag would not have been discovered in a routine inventory search of Smith’s vehicle, it would have been discovered during a search of Brown and his property during the routine booking process that followed his arrest. See Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (“[I]t is not ‘unreasonable’ for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.”). Immediately after Brown was arrested, Officer Williams removed Brown’s duffle bag, which had been tucked between Brown’s legs, from the vehicle and placed it on the sidewalk. Brown then claimed ownership of the duffle bag. Undeniably, Brown was lawfully arrested for the open container violation and was the owner of the duffle bag.⁶ Therefore, following Brown’s arrest, Officer Williams inevitably would have transported and did transport Brown and his property to the detention center for booking as part of the arrest process. Cf. United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986) (finding cocaine discovered in a garment bag recovered from the defendant’s feet was admissible during trial regardless of the lawfulness of the search incident to arrest that was conducted because the cocaine would have inevitably been discovered when the defendant’s belongings were searched during a standard inventory search as a part of the routine booking process). Even if Brown’s cocaine had not been

⁶ Brown continued to claim ownership of the black duffle bag during his testimony at trial. (R. p. 158; p. 160).

discovered during the on-the-scene search of his duffle bag, the drugs would have been discovered when his property was inventoried, catalogued, and secured for safe-keeping at the police department. See, e.g., In re Angel R., 162 Cal. App. 4th 905, 909, 77 Cal. Rptr. 3d 905, 908 (Cal. Ct. App. 2008) (“We need not address the merits of the suppression motion because the discovery of the stickers was inevitable in this situation: Angel would have been searched at booking as incident to his arrest . . . and the stickers would have been discovered at that point.”); Manna v. State, 803 So. 2d 866, 867 (Fla. Dist. Ct. App. 2002) (“[A]s a practical matter, the marijuana would have been inevitably discovered during a routine booking search of appellant at the county jail.”); State v. Brooks, 779 So. 2d 1055, 1057-1058 (La. Ct. App. 2001) (finding the inevitable discovery doctrine applied to Brooks’ case where the officer had probable cause to arrest Brooks before discovering Brooks’ cocaine and the officer testified she was going to arrest Brooks, search him, and bring him to the police station for booking even before she discovered the drugs). Therefore, as the narcotics would have been inevitably discovered during a search of Brown’s property during the routine booking process, the evidence was properly admitted during trial.

Furthermore and critically, although the Court of Appeals found the evidence presented was insufficient to establish an inventory search would have occurred, the trial testimony clearly establishes an inventory search was performed after Brown’s arrest. Most significantly, an evidence technician testified she released Brown’s non-illegal property to Brown after he was released from custody, including his duffle bag, different articles of clothing, and a cell phone. Additionally, demonstrating the existence of protocol regarding inventory searches and the handling of suspects’ property, the evidence technician testified she released Brown’s property to him only after he was

required to verify his identity with a driver's license and sign for the items. Therefore, the testimony in this case clearly illustrated Brown's property would have been and was inventoried as part of the routine booking procedures, and the drugs would have inevitably been discovered when Brown's bag was searched and its contents were inventoried and catalogued.

Notably, during trial, Brown acknowledged to the trial judge the drugs may have inevitably been discovered, but he contended that did not make the search proper and was a moot point because an inventory search was not done in his case. (R. pp. 144-145). However, Brown misunderstood the issue because the inevitable discovery doctrine prevents the exclusion of evidence that would inevitably have been discovered regardless of the existence of an earlier improper search. The fact the cocaine was not actually first discovered in an inventory search was irrelevant if it would have inevitably been discovered by lawful means. See, e.g., Andrade, 784 F.2d at 1433, n.3 ("There was an actual inventory search conducted at the DEA facility. However, the district court correctly noted that the inevitable discovery doctrine requires only that the government show the evidence *would have been discovered* inevitably by *lawful means*. Actual discovery of the challenged evidence is not required." (italics in original)). In Brown's case, the narcotics would inevitably have been discovered during a routine and lawful inventory search of the automobile or of Brown's belongings during the booking process if they had not been first discovered in the search conducted at the scene. See, e.g., United States v. Zapata, 18 F.3d 971, 978 (1st Cir. 1994) ("Evidence which comes to light by unlawful means nonetheless can be used at trial if it ineluctably would have been revealed in some other (lawful) way so long as (i) the lawful means of its discovery are independent and would necessarily have been employed, (ii) discovery by that means is

in fact inevitable, and (iii) application of the doctrine in a particular case will not sully the prophylaxis of the Fourth Amendment.”). Brown’s acknowledgment regarding the inevitability of the discovery of the drugs demonstrates exactly why the narcotics should not have been suppressed.

As the Court of Appeals noted, common sense dictated the duffle bag and Smith’s vehicle would have been taken into custody following the arrests. The evidence and testimony showed an inventory search of the duffle bag would have been and was performed. See Nix, 467 U.S. at 444 (“If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. **Anything less would reject logic, experience, and common sense.**” (emphasis added)). Therefore, Brown’s drugs should not have been suppressed based on the inevitability of their discovery by lawful means. The Court of Appeals erred in finding Brown’s narcotics would not have inevitably been discovered during an inventory search. The Court of Appeals’ decision is inconsistent with the inevitable discovery doctrine and the goals it serves, and the ruling, if permitted to stand, would result in unnecessarily high societal costs by excluding relevant evidence that would have been discovered even if no search was conducted at the scene following Brown’s arrest. See Id. at 443 (“[T]he prosecution is not to be put in a better position than it would have been if no illegality had transpired. By contrast, the derivative evidence analysis ensures the prosecution is not put in a worse position simply because of

some earlier police error or misconduct.”). Therefore, the Court of Appeals’ decision should be reversed, and Brown’s conviction should be affirmed.⁷

⁷ Additionally, under the specific facts and circumstances of Brown’s case, even if this Court were to find the evidence insufficient to show Brown’s cocaine would have inevitably been discovered based on the testimony and evidence appearing in the record, the case should be remanded for further proceedings to determine if sufficient evidence existed regarding the inevitability of the discovery of the drugs through lawful means. During trial, the trial judge found the search as conducted was proper under the applicable United States Supreme Court precedent existing at the time of trial. Therefore, the trial judge did not need to reach the issue of whether the evidence would have inevitably been discovered. Thereafter, the United States Supreme Court altered the applicable law in regards to searches incident to lawful arrests, and the Court of Appeals reversed the trial judge’s ruling based on more recent United States Supreme Court precedent not available to the trial judge at the time of Brown’s trial. If this Court finds there is insufficient evidence to determine if the cocaine would have inevitably been discovered, a remand would allow the trial judge to more fully address the inevitable discovery issue and would best serve the goals of the exclusionary rule while avoiding the unnecessarily high societal costs that would result from the suppression of Brown’s narcotics. See United States v. Griffiths, 47 F.3d 74, 78 (2nd Cir. 1995) (remanding a case for further proceedings regarding whether the cocaine would have been discovered pursuant to an established inventory procedure because the trial courts previously failed to reach the issue).

II.

Did the Court of Appeals err in reversing the trial judge's denial of Brown's suppression motion where the officer conducted the search of the duffle bag incident to Brown's arrest in compliance with the controlling legal precedent in effect at the time of the search?

Notwithstanding the inevitability of the discovery of Brown's narcotics, the Court of Appeals erred in reversing the trial judge's decision to deny Brown's suppression motion for an additional reason. Although recognizing the United States Supreme Court had not yet issued its decision in Arizona v. Gant, 556 U.S. 332 (2009), at the time the officer conducted the search of the duffle bag incident to Brown's arrest or when the trial judge considered Brown's suppression motion, the Court of Appeals determined the decision in Gant entitled Brown to a reversal of his conviction and the suppression of the narcotics discovered during the officer's search of the duffle bag. However, subsequent to the Court of Appeals' decision in Brown's case, the United States Supreme Court decided the case of Davis v. United States, ___ U.S. ___, 131 S. Ct. 2419 (2011), and held the exclusionary rule should not be applied to a search conducted by a police officer in reasonable reliance on the binding appellate court precedent in effect at the time of the challenged search.⁸ In Brown's case, the officer relied on the controlling appellate court

⁸ Because the United States Supreme Court did not issue its opinion in Davis until after the Court of Appeals decided Brown's case and the State filed its Petition for Writ of Certiorari seeking review of that decision, the issue of whether the Court of Appeals erred in reversing the denial of Brown's suppression motion in light of the decision in Davis has not yet been raised on appeal. However, an appellate court can affirm a conviction for any ground appearing in the record. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); see also Upchurch v. New York Times Co., 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record."). Although this Court is not required to consider additional sustaining grounds that have not previously been raised, the State asks this Court to consider the additional sustaining ground in this case in light of the recent decision of the United States Supreme Court in Davis, which was issued subsequent to the Court of Appeals' earlier decision in Brown's case, and affirm the trial judge's ruling. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420-421, 526 S.E.2d 716, 723-724 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. . . . While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less

precedent in effect at the time of the search and conducted the search of Brown's duffle bag in full compliance with that legal precedent. Because the officer conducted the search in a manner consistent with the controlling legal precedent at the time of the search and in light of the United States Supreme Court's holding in Davis, the Court of Appeals' erred in reversing the trial judge's denial of Brown's motion to suppress the narcotics discovered in the search based on legal precedent not available to the officer at the time of the search. Accordingly, the decision of the Court of Appeals should be reversed, and Brown's conviction should be affirmed.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. Pichardo, 367 S.C. at 96, 623 S.E.2d at 846.

South Carolina courts have recognized several exceptions to the general Fourth Amendment warrant requirement, including an exception for searches incident to arrests. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Under the "search incident

likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

to arrest” exception, “[p]olice officers may make a search of an arrestee’s person and the area within his immediate control for weapons and destructible evidence without first obtaining a search warrant.” State v. Ferrell, 274 S.C. 401, 405, 266 S.E.2d 869, 871 (1980); see State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (noting the historical rationales for the “search incident to arrest” exception are the need to disarm a suspect in order to take him into custody and the need to preserve evidence for later use at trial). Such a warrantless search is permissible so long as the search is conducted substantially contemporaneously with the arrest and is confined to the immediate vicinity of the arrest. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 885 (1986). “The sole prerequisite is that there be a prior arrest supported by probable cause.” Ferrell, 274 S.C. at 405, 266 S.E.2d at 871.

At the time of Brown’s arrest, the controlling appellate court precedent on the scope of a search incident to arrest permitted an officer who lawfully arrested the occupant of a vehicle to search the passenger compartment of the automobile contemporaneously with the occupant’s arrest. See New York v. Belton, 453 U.S. 454, 460 (1981) (“[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” (footnotes omitted)). Additionally, an officer was permitted to examine the contents of any container located in the passenger compartment regardless of whether the container was opened or closed. See Id. at 460-461 (“[T]he police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the

arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.” (footnotes and citations omitted)); see also Thornton v. United States, 541 U.S. 615, 622-623 (2004) (“The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which Belton enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.” (footnotes omitted)).

Subsequently, after Brown was convicted and while his case was pending on appeal, the United States Supreme Court decided the case of Arizona v. Gant. In Gant, the Supreme Court clarified its earlier decisions and limited the scope permitted by those decisions for a search incident to an arrest. Id., 556 U.S. at 350-351. Specifically, the Supreme Court acknowledged its earlier decision in New York v. Belton, 453 U.S. 454 (1981), was “widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” Gant, 556 U.S. at 341. However, the Supreme Court rejected such a broad reading of Belton and concluded vehicles could be searched incident to a recent occupant’s arrest “only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Gant, 556 U.S. at 351.

Following the decision in Gant and after the Court of Appeals issued its opinion in Brown’s case, the United States Supreme Court addressed in Davis v. United States the question of whether the exclusionary rule should be applied to a Fourth Amendment

violation that occurs when a police officer conducts a search in compliance with binding appellate court precedent but that precedent is subsequently overruled following the search. The Supreme Court noted the exclusionary rule was not a constitutional right and was not designed to redress an injury suffered as the result of an unconstitutional search. Davis, 131 S. Ct. at 2426. Instead, the Supreme Court instructed the exclusionary rule's sole purpose was to deter future Fourth Amendment violations and should only be applied when its application would yield appreciable deterrence. Id. at 2426-2427. Recognizing the exclusionary rule could not effectively discourage unlawful police conduct by penalizing a police officer for acting in a manner authorized by binding appellate court precedent in effect at the time of the challenged conduct, the Supreme Court held: "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." Id. at 2429.

In Davis' case, Davis was arrested during a traffic stop and secured in the back of a police vehicle. Id. at 2425. Officers then searched the passenger compartment of the vehicle Davis was seated in at the time of his arrest and discovered an illegal firearm in Davis' jacket pocket. Id. During trial, Davis challenged the admission of the firearm on Fourth Amendment grounds, and his motion was denied based on the controlling appellate court precedent in effect at the time. Id. at 2426. Subsequently, while Davis' case was on appeal, the United States Supreme Court issued its opinion in Gant. Davis, 131 S. Ct. at 2426. After granting certiorari in Davis, the Supreme Court determined Gant was retroactively applicable to Davis' case. Davis, 131 S. Ct. at 2431. However, because the police officers in Davis' case reasonably relied on binding appellate court precedent at the time of search, the Supreme Court determined the officers' "blameless police conduct" was not properly subject to the exclusionary rule. Id. at 2434.

In the case sub judice, the officer searched Brown's duffle bag substantially contemporaneously with Brown's arrest after removing the duffle bag from the passenger compartment of the car Brown was seated in immediately before Brown was lawfully arrested. During the officer's search of the duffle bag, he discovered a Fritos package, looked inside the package, and located Brown's cocaine. Cf. United States v. Robinson, 414 U.S. 218, 236 (1973) ("Having in the course of a lawful search [incident to arrest] come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." (citations omitted)). Thus, the officer conducted the search of the duffle bag incident to Brown's arrest in a manner authorized by and consistent with the binding appellate court precedent in effect at the time of the search. See Davis, 131 S. Ct. at 2425 (recognizing that five Supreme Court justices in Gant interpreted the decision in Belton to permit a search of the passenger compartment of a vehicle regardless of whether the arrested occupant of that vehicle was secured at the time of the search); see, e.g., Small v. United States, 586 F. Supp. 2d 417, 423 (D.S.C. 2007) ("It is an extremely well-settled proposition of the law that police may lawfully search an automobile if such a search is incident to an arrest.").

Thereafter, during trial, Brown objected to the admission of the narcotics discovered during the search of the duffle bag on the basis the search violated his Fourth Amendment rights. Relying on the United States Supreme Court's decision in Belton, the trial judge denied Brown's suppression motion and allowed the narcotics discovered during the search to be admitted into evidence during trial. Subsequently, the Court of Appeals reversed the trial judge's ruling based on the United States Supreme Court's decision in Gant, a case which was decided after the officer conducted the search of

Brown's duffle bag and after the trial judge considered the merits of Brown's suppression motion, and determined the narcotics discovered during the search of the duffle bag should have been suppressed.

However, just as in Davis, the officer who searched Brown's duffle bag conducted the search in a manner consistent with the controlling appellate court precedent in effect at the time of the search, and the trial judge relied upon that precedent in denying Brown's suppression motion. Cf. Narcisco v. State, ___ S.C. ___, 723 S.E.2d 369, 373 (2012) ("The circuit court in this case applied the established law to a search executed pursuant to binding precedent. Thus, Davis v. United States, and our own standard of review, commands that the circuit court's decision be affirmed."). Critically, the search of Brown's duffle bag was conducted over three years before the United States Supreme Court issued its decision in Gant. Cf. Davis, 131 S. Ct. at 2425 ("The search at issue in this case took place a full two years before this Court announced its new rule in Gant"). Therefore, the officer was blameless in conducting the search in an approved manner that was only later declared to be invalid several years after the search was conducted.

For this reason, the exclusion of Brown's cocaine would not effectively serve the exclusionary rule's sole purpose of deterring future police misconduct and, instead, would result in the high societal costs that result from the exclusion of relevant evidence of a crime while punishing a police officer for complying with the law in effect at the time of his actions. See Narcisco, 723 S.E.2d at 373 ("[E]xcluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. Moreover, exclusion of the evidence in this case would result in severe social costs, including the

articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.” (citations omitted)). Such a result is incompatible with the underlying purpose of the exclusionary rule. See Davis, 131 S. Ct. at 2434 (“It is one thing for the criminal ‘to go free because the constable has blundered.’ It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.” (citations omitted))

In light of the United States Supreme Court’s decision in Davis, the Court of Appeals erred in determining the trial judge should have granted Brown’s suppression motion. The officer in Brown’s case searched the duffle bag in a reasonable manner in reliance on binding appellate court precedent in effect at the time of the search. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”). Therefore, the trial judge did not err in declining to suppress the narcotics discovered in the search. Cf. United States v. Wilks, 647 F.3d 520, 524 (4th Cir. 2011) (“The Supreme Court’s decision in Davis is on all fours with the case currently before this court. There is no dispute that Officer O’Cain’s search of Wilks’ car was in compliance with binding Fourth Circuit precedent that was later overruled by the Supreme Court. In such a case, per Davis, the exclusionary rule does not apply.”). The Court of Appeals’ decision should be reversed, and Brown’s conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals be reversed and vacated and the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

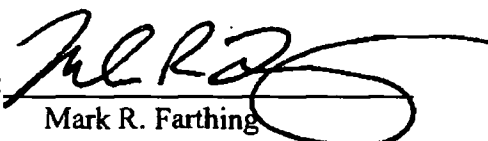
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

May 11, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

Petitioner,

vs.

DANNY CORTEZ BROWN,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Petitioner complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

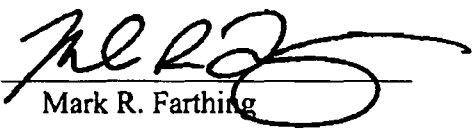
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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PROOF OF SERVICE

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

Elizabeth A. Franklin-Best, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 11th day of May, 2012.


ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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BRIEF OF RESPONDENT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals properly held that the State failed to satisfy its evidentiary burden that the illegally seized evidence would have inevitably been discovered?
- II. Whether the State is barred from raising an issue that was not included in its petition for certiorari nor preserved at trial?

STATEMENT OF THE CASE

Procedural History

On June 14, 2010, the Court of Appeals reversed Danny Cortez Brown's conviction for trafficking cocaine. State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). Brown's first trial resulted in a mistrial. After a second trial, Brown was convicted by an Horry County jury. The Honorable Steven H. John presided over the trial. Brown testified in his defense. Brown was represented by Russell Long. Scott Hixson represented the State. At trial, Judge John denied Brown's motion to suppress cocaine seized from his duffel bag.

In a published opinion by Judge Short, the Court of Appeals held that the search of Brown's duffel bag violated the Fourth Amendment's prohibition against unreasonable searches and seizures. The State's Petition for Rehearing was denied on September 24, 2010, and the State timely filed its Petition for Certiorari with this Court. The only issue in the State's petition was whether the Court of Appeals erred in holding that the inevitable discovery doctrine did not excuse the illegal search. Pet. Writ Cert. at 1. The Court granted certiorari solely on this issue. In its brief and for the first time in this case, the State claimed the "good faith" exception barred the application of the exclusionary rule. Brief of Pet. at 1.

Factual Background

Danny Brown graduated from Myrtle Beach High School and from Lees-McRae College. App. 156, l. 24 – 157, l. 5. He played football in college. App. 157, ll. 1 - 3. He worked for a real estate company that sold investments in the Myrtle Beach area to professional athletes. App. 157, ll. 13 – 23. He was engaged to be married. App. 159, ll. 12 – 19.

A week prior to his arrest, Brown's car broke down in Laurinburg, North Carolina.

App. 160, ll. 12 – 16. On October 6, 2005, a friend named Freddie Prince (“Prince”) who owned a garage took Brown to Laurinburg to retrieve his car. App. 161, l. 24 – 162, l. 7. They brought the car back from Laurinburg to a garage in Myrtle Beach. App. 162, ll. 17 – 25. Brown stayed at the garage to help Prince work on the car. App. 163, ll. 4 – 14.

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. 163, ll. 15 – 20. Brown had spent the previous night at his fiancée’s house. Brown took his overnight bag—a black duffel 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. App. 163, ll. 15 – 24.

Prince stopped for gas on the way home. App. 164, ll. 9 – 15. Brown saw Rodney Smith (“Smith”), an acquaintance from his neighborhood, at the gas station. App. 164, ll. 16 – 23. Because Prince had another errand to run, Brown decided to catch a ride home with Smith. App. 165, ll. 4 – 12. Brown got his bag and a beer he had been drinking from Prince’s truck and got into Smith’s car. App. 165, ll. 13 – 23. Smith drove and Brown sat in the passenger’s seat. Smith drove a 1976 Plymouth Fury. App. 86, ll. 5 – 7. Smith’s car had no center console separating the driver’s floorboard from the passenger’s floorboard. App. 85, l. 22 – 86, l. 1. Brown testified that he set his duffel bag on the floorboard between them. App. 164, ll. 5 – 16.

The Arrest of Brown and the Illegal Search

Officer Daryl Williams (“Officer Williams”) of the Horry County Police Department testified that he noticed Brown drinking a beer and pulled the car over to investigate. App. 6, ll. 1 – 7. After first approaching the driver’s side window and speaking with the occupants, Officer Williams then approached the passenger side window and spoke to Brown. App. 6, ll. 14 – 23. He asked Brown to step out of the vehicle and then “placed him under arrest kind of quickly.” App. 9, ll. 1 – 2. Officer Williams said, “by the time he stood totally up, pretty much had him handcuffed at that time, and then I did turn him to face the vehicle, basically.” App. 25, ll. 5 – 8.

Officer Williams testified that he 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. 20, ll. 1 – 4 (emphasis added).

Officer Williams claimed that he asked the handcuffed Brown whether the duffel bag in the car was his. According to the officer, Brown answered affirmatively. App. 26, ll. 2 – 9. Officer Williams said he took the duffel bag and placed it on the sidewalk. He then put Brown (still handcuffed) in the back of his patrol car and closed the door. App. 26, ll. 5 -19. Officer Williams then returned to Smith’s car and unzipped and rummaged through Brown’s duffel bag. He said he “just wanted to get a glance into the bag.” App. 11, l. 13. In the duffel bag, Officer Williams found cocaine inside of a crumpled Fritos bag.

Officer Williams’ justification for removing the duffel bag, opening the duffel bag, and searching the Frito chip bag changed almost overnight. This case initially was called to trial and resulted in a mistrial during the State’s case. On September 12, 2006, when the

case was again called to trial, Officer Williams again provided testimony on the issue of the duffel bag, and the trial judge had this to say:

THE COURT: All right. Well, let's look at the facts here, as testified. The Officer testified that, when he gets to the passenger side of the vehicle, said he observed the bag. Gets to the passenger side of the Defendant, gets the Defendant out of the vehicle, arrests him, handcuffs him, puts him in his car. Now, he testified to two different things today. One, that he then got the bag and put it on the sidewalk, and then he also said, when he was arresting the Defendant he got the bag and put it on the sidewalk. There was no doubt that the bag was on the sidewalk, and he hadn't looked at it at all when he put the Defendant in the patrol car. The Defendant was handcuffed and in the patrol car, couldn't get out, and the bag is on the sidewalk. *He testified this time—and he clearly—and I'll say this for a fact. 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, -- didn't give any—

MR. HIXSON: Did—

THE COURT: *No sir. No sir. That is clearly what he said, and there is no doubt about that's what he said before. He never, ever said anything about that in his prior testimony, because I made note of it when I heard this matter before, because I saw this issue coming up.*

He now, in this testimony before the Court, has raised the issue about bag safety issue, weapon poses a threat. Even with that you've got a bag that's on the sidewalk; he goes over, unzips the bag, rummages through it, sees the Frito bag that is open but crumpled shut, opens up the Frito bag and sees what he believes to be drugs. All during this point in time the driver of vehicle is not under arrest. The driver of the vehicle is on the other side of the car.

App. 68, l. 8 – 69, l. 10 (emphasis added).

The changing testimony of Officer Williams is important because it illustrates that his prime motivation for searching the duffel bag was not related to his safety concerns; a fact that Judge John clearly understood. In neither case did Officer Williams claim that the purpose of his search was to prevent the destruction of evidence.

The Arrest of Smith

Smith had the opportunity to access Brown's bag during Brown's arrest. The testimony at trial regarding the time the bag was left alone with Smith was somewhat unclear. Brown testified that the duffel bag was still in Smith's car when Officer Williams put him in the patrol car. App. 169, l. 16 – 170, l. 1. Officer Williams admitted that he did not keep his eye on the bag the entire time he was putting Brown in the back of the patrol car. App. 16, ll. 11 – 14. Smith said that Officer Williams grabbed the bag after handcuffing Brown and taking him to the back of his vehicle. App. 94, l. 1 – 95, l. 7. Regardless of the exact timing, it is undisputed that Smith was left alone with Brown's bag for some period of time and that Brown was handcuffed and sitting in the back of the patrol car when Officer Williams first searched it.

After looking in Brown's bag, Officer Williams asked Smith for his driver's license. Officer Williams noticed that Smith was very nervous even before running his license through the system. App. 27, ll. 7 – 18. Brown was not nervous, according to the officer. App. 27, ll. 19 – 21. Officer Williams took Smith's car keys and placed them on the hood. App. 29, ll. 1 – 4. He called for a "roaming narcotics detective" to come to the scene because of the drugs in Brown's bag. App. 28, ll. 18 – 23. According to the police system, Smith's license was suspended. Officer Williams waited until another patrol car arrived before arresting Smith for driving with a suspended license. App. 29, ll. 9 – 20.

The narcotics officer that eventually arrived at the scene was Detective Thomas Delpercio ("Detective Delpercio"). Officer Williams told Detective Delpercio on the phone prior to his arrival that he had found cocaine. App. 37, ll. 14 – 24. After Mirandizing Brown and Smith, Detective Delpercio then searched Smith's vehicle. App. 38, l. 25 – 39, l. 15. Detective Delpercio found a small black pouch under the driver's seat that contained various illegal drugs. App. 39, ll. 16 – 22.

Smith testified as a State's witness. Smith admitted that the drugs under the driver's seat belonged to him. App. 79, ll. 19 – 22. He admitted that he used drugs. App. 80, ll. 2 – 4. He admitted that he had been selling drugs for a couple of years before this arrest and this was the first time he had been caught. App. 86, ll. 20- 24. Smith claimed that Brown approached him at the gas station and offered to sell him cocaine. Smith has still not been prosecuted for these drug offenses.

Brown emphatically testified that the drugs found in the duffel 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. 171, ll. 24 – 25. He denied knowing the cocaine was in his bag. App. 172, ll. 1 – 4. He denied offering to sell Smith cocaine. App. 172, ll. 5 – 7. The solicitor was unable to shake Brown in his denials during cross-examination. App. 181, ll. 13 – 25.

The Lack of Evidence and Argument Regarding an Inventory Search

Brown's duffel bag was taken into custody by the police. The State provided several chain of custody witnesses regarding the cocaine that was found in Brown's duffel bag. On Detective Delpercio's authority, Brown's duffel bag was returned to him. App. 114, ll. 4 – 18. At no point did either Officer Williams, Detective Delpercio, or any of the chain of custody witnesses ever testify that they inventoried the contents of Brown's duffel bag.

None of the State's witnesses provided any testimony regarding police procedures regarding the property of arrested individuals.

During the argument on whether the cocaine should be suppressed, the solicitor even attempted to distinguish the "inventory" line of United States Supreme Court cases from the case at bar. App. 137, l. 18 – 138, l. 10. He admitted that inventory cases require testimony regarding police procedures. App. 137, l. 18 – 138, l. 10. The solicitor rather relied solely on a search incident to arrest theory, saying, "The State sees this as a search incident to a lawful arrest." App. 144, ll. 16 – 17. The State declined to make an inevitable discovery argument, stating, "It's kind – it sounds very close to inevitable discovery type argument as it relates to that, but we still don't believe we get to that point, Your Honor. We believe, on its face, it's a search incident to a lawful arrest, Your Honor, and for that reason, we would ask that the motion be respectfully denied, and the drugs allowed to remain in evidence, Your Honor." App. 144, l. 24 – 145, l. 5.

Judge John agreed with the solicitor, stating, "This is not an inventory search." App. 152, ll. 7 – 8. The trial judge, despite expressing misgivings about Officer Williams' motives in looking in the bag, relied solely on the search incident to arrest exception to the warrant requirement in denying the suppression motion.¹

¹ Judge John specifically cited the search incident to arrest cases of Chimel v. California, 395 U.S. 752 (1969) and New York v. Belton, 453 U.S. 454 (1981) as supporting his ruling. App. 152, l. 9 – 153, l. 14.

ARGUMENT

The State concedes that the search of Brown's duffel bag was illegal. The Court of Appeals' ruling that the search incident to arrest exception did not apply was not appealed and is not before this Court. Therefore, the Court's analysis must begin from the premise that the police conducted an illegal search and violated Brown's Fourth Amendment rights.

The Court granted certiorari on one issue: whether the Court of Appeals erred in finding that the State had not proved that the cocaine would have been inevitably discovered. As the Court considers this issue, it should keep in mind that the trial judge specifically found that the search was not an inventory search and the State did not attempt to argue inevitable discovery. As will be shown, the Court of Appeals properly held that the State presented no evidence regarding police procedures and inventory searches as related to Brown's bag. Despite the dearth of evidence in the record, the State now asks the Court to speculate as to what the police would have done in order to cure their flagrant violation of Brown's constitutional rights.

The Court should decline to consider a second issue raised in the State's brief: whether a "good faith" exception to the Fourth Amendment can prevent application of the exclusionary rule. This ground was not raised at trial. This ground was not raised before the Court of Appeals. It was not raised in the State's Petition for Rehearing. It was not raised in the State's Petition for Certiorari. The State raises this issue for the first time in its brief in violation of Rule 226 of the South Carolina Rules of Appellate Procedure. This issue is not before the Court and the Court should not consider any argument on this issue. Out of an abundance of caution, this brief will address the lack of merit of the State's argument, but the Court should ignore this ground and affirm on the sole issue properly before it.

I. The Court of Appeals Properly Held that the State Failed to Satisfy its Evidentiary Burden that the Illegally Seized Evidence Would Have Inevitably Been Discovered

This Court should affirm the Court of Appeals' ruling that the State failed to meet its evidentiary burden of proving that the illegally seized cocaine would have inevitably been discovered. The Court of Appeals stated, "The State provided very scant testimony, at best, that the duffel bag or car would have been taken into custody after Brown and the driver were arrested." Brown, at 484, 698 S.E.2d at 817. The court's application of the law to the facts of this case were correct.

Evidence obtained from an illegal search must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). The exclusionary rule exists to deter police misconduct and constitutional violations. See Nix v. Williams, 467 U.S. 431, 442-43 (1984). Despite the illegality of an original search, "[I]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received." Id. at 444. Therefore, once it is determined that the evidence was illegally seized, the burden shifts to the State to prove that an exception to the exclusionary rule applies. If the State fails to meet its evidentiary burden then the evidence must be suppressed.

A. The State Failed to Meet its Evidentiary Burden

On appeal, the State contends that the cocaine in Brown's duffel bag would have been found during an inventory search.² In order to prove that items would be found during an inventory search, the State must present evidence of "standardized criteria" or "established routines" regulating the opening of containers during inventory searches. Florida v. Wells, 495 U.S. 1, 4 (1990). The requirement that the State present such evidence "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Id. "The policy or practice governing inventory searches should be designed to produce an inventory." Id. "The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" Id. (quoting Colorado v. Bertine, 479 U.S. 367, 376 (1987)).

Williams is instructive as to the specificity of the evidence required to satisfy the prosecution's burden. 467 U.S. at 448-49. In Williams, the defendant kidnapped and murdered a child on Christmas Eve. Police were engaged in a massive, systematic search for the child's body. While the search was ongoing, Williams led the police to the child's body. The search was halted. The evidence surrounding Williams' statements and helping police to find the body were suppressed because of violations of his Sixth Amendment right to counsel.

However, the Supreme Court held that the state met its burden of showing that the police would have discovered the child's body. See i.d. at 448-49. The prosecution presented the testimony of the agent in charge of the search. The agent testified that he had marked off two entire counties in grids and instructed the search teams to check all roads,

ditches, culverts, abandoned farm buildings or any other places where a child's body would be found. Teams of four to six persons were assigned specific parts of the grid. The child's body was ultimately found in a culvert—exactly where the searchers had been instructed to look. The agent testified that the child's body would have been found within several hours of the time it was actually found had the search not been halted. See id.

No such specific evidence was presented in this case. As the Court of Appeals held, the State failed to present any evidence of the police's inventory search procedures. The State invites the Court to speculate about what the police would have done, but such speculation is not permitted. If any standardized inventory procedures exist in Horry County, the State had ample opportunity to present such evidence through multiple witnesses. But no such evidence appears in the record.

For example, the State guesses that Smith's car would have been towed. But neither Officer Williams nor Detective Delpercio testified that the car was actually towed.³ The State asks the Court to assume that the Horry County Police Department opens all containers and bags of people arrested for open container violations. But despite calling two evidence technicians, the State did not elicit any testimony regarding police inventory

² The State did not make an inventory search argument at trial and Judge John specifically ruled that no inventory search occurred.

³ Detective Delpercio mentions that he searched the vehicle "pursuant also to guidelines of doing inventory of the vehicle before towing," but never says that the vehicle was actually towed. App. 39, ll. 10 – 15. Nor did he testify about the contents of any "guidelines."

procedures except for the bare minimum necessary to establish that the chain of custody as related to the bag of cocaine was unbroken. None of the police witnesses testified that they opened Brown's duffel bag and logged its contents.

The State misleadingly suggests that an inventory search was actually performed. Again, no evidence supports this contention. As support for this suggestion, the State cites the fact that Brown's bag was returned to him and he had to present his driver's license to claim it. This evidence has no bearing on whether the police had a procedure in place concerning the opening and logging of items in closed luggage. The first rationale of the inventory search—ensuring the safekeeping of citizens' property—could just as easily be protected by a police policy forbidding the opening and rummaging of closed luggage. The Supreme Court expressly anticipated that such policies would be commonplace in Wells. Wells, 495 U.S. at 4 (“[P]olicies of opening all containers or of opening no containers are unquestionably permissible . . .”). Just as in Wells, no evidence was presented regarding police policy concerning the opening of containers and therefore the Court of Appeals' ruling that the State did not prove the evidence would have inevitably been discovered should be affirmed.

B. Public Policy Forbids the Application of the Inevitable Discovery Doctrine Here

Sound policy reasons compel the conclusion that the inevitable discovery doctrine should not be allowed to preserve the illegal search in this case. Upholding Brown's conviction under the inevitable discovery doctrine will create an incentive for police to make custodial arrests for minor offenses. These pretextual arrests would cure Fourth Amendment violations if the inevitable discovery doctrine is applied. South Carolina should

not create a rule that will result in arrests for open containers, speeding, improper lane changes, and other minor infractions as pretexts for otherwise illegal searches.⁴

As stated in Williams, the purpose of the inevitable discovery doctrine is to place the prosecution in a position that is no worse than they would have been had the illegal search not occurred. If the Court ignores Officer Williams' illegal search, then the Court must believe that citizens and their possessions are routinely taken into custody for open container violations when they are not charged with DUI and are only a passenger. Commonly, police issue citations for open containers—what Officer Williams referred to as “a blue ticket.”⁵ App. 20, l. 2.

Officer Williams did not give Brown a field sobriety test and did not charge him with public intoxication. The police did not even take the beer can into evidence. The Court does not have to speculate that the extraordinary custodial arrest of Brown for a routine open container violation was pretext for the stop and search—Officer Williams candidly admitted it in his testimony. He said the open container violation “was definitely

⁴ A person guilty of an open container infraction “is guilty of a misdemeanor” and subject to a fine of \$100 or thirty days’ imprisonment. S.C. Code Ann. § 61-6-4020(A). Other crimes subject to the same penalty are improper use of a turn signal (§ 56-5-2150); coasting (§ 56-5-3840); and a bicyclist hanging on to the bumper of a car (§ 56-5-3450). See S.C. Code Ann. § 56-5-6190 (“It is a misdemeanor for any person to violate the provisions of [the Uniform Act Regulating Traffic on Highways]. Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days.”). Many commentators believe that custodial arrests for these sorts of crimes violate the Fourth Amendment. See e.g., Barbara C. Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 Temp. L. Rev. 221 (1989).

⁵ As an example, with all due respect to the public official involved, see the widespread news coverage given the issuance of a citation to a well-known public figure. Even though he was driving, and not a passenger as was Brown, there was no custodial arrest for an open container violation. See “SC solicitor pays open container ticket, avoids court appearance”, available at www.wistv.com/18737047/sc-solicitor-charged-with-open-container-convicted-of-dui-in-2005.

the pretext for me to make the stop” and that he “just wanted to get a glance into the bag.” App. 20, ll. 3 – 4; App. 11, l. 13.

It is clear that Brown was arrested for a minor misdemeanor so that Officer Williams could violate Brown’s Fourth Amendment rights. The Supreme Court recognized this precise problem in Gant. The Court wisely stated:

A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.

Gant, 556 U.S. at 345. The Court also noted with approval Professor LaFave’s fear that Belton creates the risk “that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.” Id. at n.5, quoting W. LaFave, Search and Seizure § 7.1(c), p. 527 (4th ed. 2004). That risk is precisely what the police admit happened in this case. Detective Delpercio admitted that open container violations do not usually lead to custodial arrests when he responded to a question about the beer can:

Q. Was it not important to you at that point to take that beer can into evidence?

A. Well, as I said, I’m assigned to Narcotics and Vice, and that would be a Magistrate level charge that would be handled by the officer in Magistrate’s – little court, so it was not necessary for me to take that.”

App. 51, ll. 14 – 19 (emphasis added). Law enforcement should not be rewarded for making needless, harassing custodial arrests as pretexts for illegal searches.

Application of the inevitable discovery doctrine in this case also threatens the

deterrent effect of the exclusionary rule. If the police know that as long as they arrest and seize a citizen for a minor infraction their possessions will be searched, then they have no incentive to obey the Constitution. Courts and commentators have criticized this doctrine's erosion of the Fourth Amendment's protections. See People v. Stith, 506 N.E.2d 911 (N.Y. 1987); State v. Crossen, 536 P.2d 1263 (Ore. Ct. App. 1975); Scott R. Grubman, Bark with No Bite: How the Inevitable Discovery Rule is Undermining the Supreme Court's Decision in Arizona v. Gant, 101 J. Crim. L. & Criminology 119 (2011) (hereinafter, "Grubman").

These courts and Grubman advocate a two-tiered approach to the application of the inevitable discovery rule. In this type of analysis, a court would distinguish between "primary" and "secondary" evidence. See Grubman at 163. Primary evidence would be defined as the exact material discovered in the illegal search. Secondary evidence would be other material discovered during the course of a lawful inventory search. Primary evidence would be excluded, but untainted secondary evidence would be eligible for the inevitable discovery exception. "This would limit the rule by only allowing evidence completely untainted by the illegal search while recognizing the deterrence rationale behind the exclusionary rule." Id. Adoption of this limitation of the inevitable discovery doctrine would be consistent with this Court's long-recognized policy that the South Carolina Constitution provides its citizens with greater Fourth Amendment protection than the Federal Constitution. See State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

Under such an analysis, the cocaine discovered as a result of Officer Williams' illegal search would be primary evidence, and therefore could not be saved from exclusion by the inevitable discovery doctrine. However, had Brown been carrying illegal drugs elsewhere on his person, this evidence would be secondary evidence and the inevitable discovery doctrine could apply. For these reasons, the Court should uphold the integrity of

South Carolinians' constitutional rights and not permit the inevitable discovery doctrine to eviscerate these important protections against unreasonable searches and seizures.

C. The State's Request for a Remand is Meritless

Mulligans may be appropriate in golf, but lawyers do not get them in our State's courtrooms. The State virtually concedes that the record made by the solicitors in this case does not support the application of the inevitable discovery doctrine and asks the Court to consider a remand so that the solicitors can have a "do-over" of the police witnesses' testimony. The Court's review is limited to the record on appeal. See Rule 210(h), SCACR. The State had its chance to present evidence of inventory procedures to support an inevitable discovery argument and failed to do so.⁶

The request for a remand would violate Brown's Federal and State Constitutional guarantees of due process and protection from double jeopardy, and the Court should ignore it. See U.S. Const. Amends. V, XIV; S.C. Const., Art. I, §§ 3, 12; see also, Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) ("[T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.").

For the reasons stated above, the Court of Appeals correctly decided that the State failed to meet its burden that the illegally seized evidence would have inevitably been discovered. Furthermore, public policy and protection of citizens' Fourth Amendment rights prevent the application of the inevitable discovery doctrine in this case. The Court should affirm the reversal of Brown's conviction.

⁶ The lone case cited as authority for a remand did not involve a conviction after a jury trial. See United States v. Griffiths, 47 F.3d 74 (2d. Cir. 1995). Griffiths involved a remand following the district court's suppression of evidence at a pretrial hearing.

II. The State is Barred from Raising a Ground on Which Certiorari Was Not Granted and Which Was Not Preserved for Appeal

A. The State Waived its Ability to Present a “Good-Faith” Argument on Appeal

For the first time at any stage in this litigation, the State raises the issue of whether a “good faith” exception to the Fourth Amendment can prevent application of the exclusionary rule. Certiorari was not granted as to this issue and therefore it is not properly before the Court. See Rule 226(i) SCACR. Furthermore, the State failed to present this argument to the Court of Appeals and to the trial court, therefore, it is not preserved for review. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). Constitutional arguments are no exception to this rule and must be raised at trial or they are waived. See State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

The State argues that it is allowed to raise this issue now because of the United States Supreme Court’s recent ruling in Davis v. United States, 131 S.Ct. 2419 (June 16, 2011). While the State is correct that Davis was decided after its petition for certiorari was filed, this does not excuse the State’s failure to preserve its good faith issue for appeal. Davis does not create a new rule of law that the State could not have raised at trial or before the Court of Appeals. The “good faith” exception discussed in Davis was available to prosecutors at least as early as 1984, when the Supreme Court decided United States v. Leon, 468 U.S. 897 (1984); see also, Davis 131 S.Ct. at 2428 (“The Court has over time applied this ‘good-faith’ exception across a range of cases.”). Nothing prevented the solicitors from presenting this issue to the trial court or the appellate court. Therefore, the Court should decline to consider any arguments made by the State other than those on which certiorari was granted and which were preserved at

trial.

B. Davis Does Not Prevent the Application of the Exclusionary Rule in Brown's Case

Out of an abundance of caution, this brief will address the State's Davis argument. This argument has no merit in Brown's case because the police did not act in subjective good faith nor did they rely on any binding appellate precedent.

1. The Police Did Not Act in Subjective Good Faith

Officer Williams did not act in good faith when he searched Brown's bag. This Court addresses the subjective beliefs of officers under its application of the "good faith" exception. See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). In McKnight, the Court held that police officers were not allowed to rely "in good faith" on an invalid warrant because they "were aware of the requirement for an affidavit to support the search warrant, but made no effort to comply with the statute." Id. at 113-14, 352 S.E.2d at 473. Similarly, in State v. Covert, the good faith exception did not apply because the officers knew they were using an unsigned warrant. 382 S.C. 205, 209-10, 675 S.E.2d 740, 742-43 (2009).

Just as in McKnight and Covert, Officer Williams did not act in subjective good faith. He admitted that his custodial arrest of Brown for the open container violation was pretext for searching his bag. He changed his testimony from the first trial to the second to make it seem as if he had safety concerns.⁷ This Court should not uphold a search based on good faith when the evidence clearly demonstrates the police had improper motives.

⁷ Judge John specifically held that Officer Williams altered his testimony between the first and second trials. App. 68, l. 8 – 69, l. 10.
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2. The Police Did Not Rely on Binding Appellate Precedent

Even if the Court chooses to analyze this case under United States v. Davis, the Court of Appeals' decision still must be affirmed. The Supreme Court stated its holding in Davis: "We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." Davis, 131 S.Ct. at 2434. Because no binding appellate precedent authorized Officer Williams' search, the exclusionary rule applies.

a. History of Searches Incident to Arrest in the United States Supreme Court

The history of the search incident to arrest exception is necessary to the understanding of why the good faith exception discussed in Davis does not apply in South Carolina state courts. The modern interpretation of the search incident to arrest exception arises from Chimel v. California, 395 U.S. 752 (1969). In Chimel, the Supreme Court stated two important reasons for this exception. First, to protect their own safety, officers are entitled to search the arrestee or the area within his immediate reach for weapons. Id. at 762-63. Second, the officer is entitled to search for evidence to prevent its concealment or destruction. Id. at 763.

Following Chimel, the next significant search incident to arrest case from the Supreme Court was New York v. Belton, 453 U.S. 454 (1981). In Belton, a lone officer pulled over a car with four occupants. Immediately upon approaching the car, the officer smelled burned marijuana. He then removed the occupants from the car and arrested them for unlawful possession of marijuana. He patted them down. Without handcuffing or otherwise securing the car's occupants, the officer entered the car and searched it for drugs and weapons. Belton, at 455-56. The evidence from the search was ruled admissible under the search incident to arrest exception.

The language in the Belton decision makes it clear that it is only an application of Chimel's rule. "Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic context. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." Belton, n.3.

Despite the Supreme Court's clear instructions in Belton, lower federal courts and state appellate courts widely misinterpreted its holding. See Arizona v. Gant, 556 U.S. 332, 341-42 and n.2 (2009). A common misinterpretation was that Belton allowed the search of the entire interior of a car and containers therein whenever an occupant was arrested. See Gant, at 341. Gant reined in these overly broad misinterpretations of Belton. The Gant Court stated, "To read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the Chimel exception—a result clearly incompatible with our statement in Belton that it 'in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.'" Gant, at 343. "Accordingly, we reject this reading of Belton and hold that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Id. Therefore, according to Gant (and Belton's own language), Belton never increased the scope of the search incident to arrest exception.

b. History of Searches Incident to Arrest in South Carolina State Courts

South Carolina courts faced with a search incident to arrest case relied on Chimel and not on Belton. The first South Carolina case to cite Belton was the Court of Appeals' decision in this case. Chimel's twin rationales have been cited by South Carolina

appellate courts in their search incident to arrest jurisprudence. See State v. Crowe, 258 S.C. 258, 269-70, 188 S.E.2d 379, 384-85 (1972) (citing Chimel's "governing principles" in upholding a search incident to arrest); State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (1994) (citing Chimel's twin concerns of officer safety and evidence preservation). Counsel's research has been unable to locate any South Carolina case applying Chimel or Belton to uphold a search when the arrestee had been secured as Brown was secured.

In fact, in 1986, this Court adhered to the Chimel rule in refusing to uphold an alleged search incident to arrest. See State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). In Brown, the police searched an arrestee's motel room after the police took the room's occupants away. The police claimed the search incident to arrest exception applied. This Court quickly rejected their claim, stating, "Here, [the police] testified that Brown, Brown's brother and Shawley were arrested outside the motel room. They had been taken away at the time the search was conducted. Accordingly, the exception allowing a search incident to arrest is not applicable." Id. at 587, 347 S.E.2d 885-86. Unlike other courts, South Carolina's appellate courts never misinterpreted Belton. Therefore, at the time of the arrest in this case, the binding appellate precedent in South Carolina regarding searches incident to arrest were Chimel and Brown.

3. Application of Davis to this Case

Under Davis's holding, if the police had searched Brown's duffel bag in reliance on binding appellate precedent, then the exclusionary rule would arguably not apply. As has been demonstrated above, no binding appellate precedent from this Court or the United States Supreme Court authorized Officer Williams' search. To better understand this point, it helps to understand the procedural context of Davis.

Davis was a federal prosecution in the Middle District of Alabama. Davis, at

2425-26. Alabama federal district courts are bound by Eleventh Circuit precedent. In United States v. Gonzales, 71 F.3d 819 (1996), the Eleventh Circuit upheld a search of an automobile after the defendant had been handcuffed and placed under arrest. Davis, at 2426. Therefore, when the federal district court upheld the search in Davis, it was constrained by Eleventh Circuit precedent.

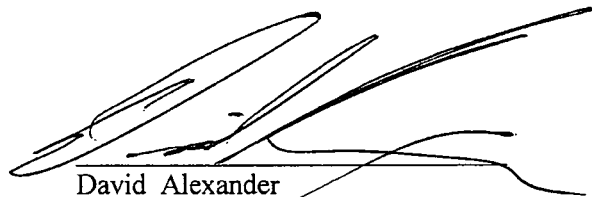
In this case, no such binding appellate precedent existed. No United States Supreme Court or South Carolina appellate decision authorized the search in this case. In fact, at the time of Brown's arrest, the controlling precedent in South Carolina expressly prohibited the kind of search made by Officer Williams. His search was not allowed under Chimel, Belton, nor South Carolina's interpretation of the search incident to arrest in the cases citing Chimel or in State v. Brown in 1986. Therefore, even if the Court chooses to apply Davis to the instant case, it cannot find that Officer Williams relied in good faith on binding appellate precedent because no such precedent existed in South Carolina.⁸

⁸ Counsel respectfully disagrees with dicta in Narciso v. State, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012). Narciso, a PCR case, applies Davis with a conclusory statement about binding appellate precedent, but at no point identifies any precedent whatsoever. As is demonstrated in this brief, no binding appellate precedent authorized Officer Williams' illegal conduct and the unsupported statement to the contrary in Narciso should be ignored.

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeals should be AFFIRMED and Danny Brown's conviction should be REVERSED.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 11th day of July, 2012.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Judge

THE STATE,

APPELLANT,

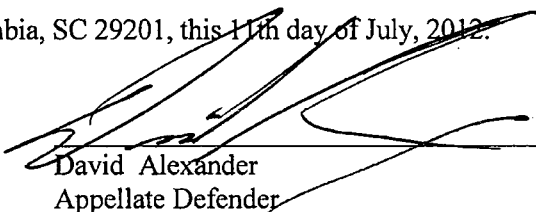
V.

DANNY CORTEZ BROWN,

RESPONDENT

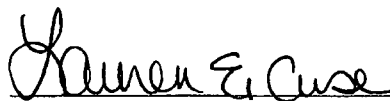
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Mark Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of July, 2012.


David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 11th day of July, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

July 11, 2012

Mark Farthing
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Danny Cortez Brown

Dear Mark:

Enclosed please find two copies of the Brief of Respondent in the above entitled case, which I have filed today with the South Carolina Supreme Court.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

David Alexander
Appellate Defender

DAA/lec

Enclosure



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

July 11, 2012

Danny Cortez Brown #317608
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your appeal

Dear Mr Brown:

Enclosed please find a copy of the Brief of Respondent in your case, which I have filed with the South Carolina Supreme Court.

I am enclosing a case cited in my brief and which we have discussed on the phone: Narciso v. State. I am also sending you an article about your case that was published in the South Carolina Law Review. While I do not think the article is very good (the author is a law student and obviously did not read the briefs or appreciate its procedural posture), I thought you would find it interesting.

The State may file a reply brief. If it does, I will forward it to you. If not, the next step will be the scheduling of oral argument by the Supreme Court.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

David Alexander
Appellate Defender

DAA/lec

Enclosure



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 21, 2012

Danny Cortez Brown, #317608
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your case

Dear Danny:

Enclosed is a copy of the opinion of the Supreme Court which we discussed today. I am working on a Petition for Rehearing which I will file shortly.

I also had a very enjoyable conversation with Thomas Jacobs. We exchanged emails. He then called me and we discussed Davis. He agrees with my analysis that the South Carolina Supreme Court erred in its application of Davis and indicated he may be willing to help with an appeal to the United States Supreme Court and was hopeful he could enlist the help of a Washington, D.C. law firm.

Sincerely,

David Alexander
Appellate Defender

DAA/lec

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Danny Cortez Brown, Respondent.

Appellate Case No. 2010-175826

RECEIVED

DEC 19 2012

SC OFFICE OF
APPELLATE DEFENSE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27202
Heard October 31, 2012 – Filed December 19, 2012

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, Assistant
Attorney General Mark Reynolds Farthing, all of
Columbia; and Solicitor John Gregory Hembree, of
Conway, for Petitioner.

Appellate Defender David Alexander, of South Carolina
Commission on Indigent Defense, of Columbia, for
Respondent.

JUSTICE BEATTY: Danny Cortez Brown was convicted of trafficking in cocaine and sentenced to twenty-five years in prison. Brown appealed, arguing the trial court erred in denying his motion to suppress the cocaine, which was seized from a duffel bag after his arrest for an open container violation during an automobile stop. The Court of Appeals reversed on the basis the search was improper under *Arizona v. Gant*, 556 U.S. 332 (2009). *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). This Court has granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals. We reverse.

I. FACTS

Shortly after 7:00 p.m. on October 6, 2005, Officer Daryl Williams of the Horry County Police Department was on patrol in Myrtle Beach, in the vicinity of 16th Avenue South and Kings Highway, when he looked over at a vehicle near him, a 1970s-model Plymouth, and noticed the passenger was drinking from a beer can. Upon making eye contact with Officer Williams, the passenger, Brown, tucked the beer can between his legs. Officer Williams then initiated a traffic stop based on the open container violation. The driver of the car, Rodney Smith, stopped the car in the roadway, near the curb, rather than pulling off the road.

When Officer Williams approached the vehicle, he asked Brown about the beer can. Brown initially denied having any beer, but upon further questioning Brown revealed the beer can that was in his lap. Officer Williams removed Brown from the car and arrested him for an open container violation. Officer Williams had previously noticed a small black duffel bag on the floorboard of the car, on the passenger's side between Brown's legs. When he removed Brown from the car, Officer Williams placed the bag on the sidewalk and then placed Brown, handcuffed, in the back of his patrol car. Officer Williams asked Brown if that was his bag, and Brown confirmed that it belonged to him.

After securing Brown, Officer Williams returned to the stopped vehicle. While talking to Smith, Officer Williams unzipped the duffel bag, which was still on the sidewalk, and looked inside. He discovered what appeared to be powdered cocaine in a plastic bag (122.65 grams) hidden inside a crumpled Fritos bag. Officer Williams closed the duffel bag and resumed his conversation with Smith and asked for his driver's license.

Upon running a license check, Officer Williams discovered Smith's driver's license was suspended, and he arrested Smith for driving under suspension and placed him in another patrol vehicle as more officers arrived at the scene. A search under the driver's seat in the car revealed a black pouch roughly the size of a

cigarette pack that contained a small amount of several drugs. Smith was advised that he was also under arrest for those drugs. Smith acknowledged the drugs under the seat belonged to him.

Brown's first trial ended in a mistrial. During the current trial, held in September 2006, Brown moved to suppress the drugs seized from the duffel bag, arguing the search and seizure violated his Fourth Amendment rights. The trial court denied the motion on the basis the drugs were discovered during a search incident to a lawful arrest, which was conducted in conformance with *New York v. Belton*, 453 U.S. 454 (1981).

On appeal, the Court of Appeals reversed Brown's conviction and vacated his sentence on the basis the search violated Brown's Fourth Amendment rights. *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The court held the search was improper under the law recently announced in *Arizona v. Gant*, 556 U.S. 332 (2009), which departed from *Belton*, although it noted, "In fairness to the trial court, it did not have the guidance provided to us by the United States Supreme Court in the *Gant* case." *Brown*, 389 S.C. at 481 n.2, 698 S.E.2d at 815 n.2. Applying the new rule pronounced in *Gant*, the Court of Appeals found the exception allowing warrantless searches incident to a lawful arrest was inapplicable here because (1) Brown could not have accessed the vehicle or the duffel bag during the arrest, and (2) there was no indication that the duffel bag contained further evidence of the open container violation. *Id.* at 480-81, 698 S.E.2d at 815.

The Court of Appeals further held that the automobile exception for warrantless searches was inapplicable because the officer did not have probable cause to search the bag, and the inevitable discovery rule was unavailing because the State did not meet its burden at trial of establishing the evidence would inevitably have been discovered during an inventory search. *Id.* at 483-84, 698 S.E.2d at 816-17. This Court granted the State's petition for a writ of certiorari.

II. STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of

discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (citation omitted).

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. *State v. Missouri*, 361 S.C. 107, 603 S.E.2d 594 (2004); *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

III. LAW/ANALYSIS

On appeal, the State contends the Court of Appeals erred in reversing Brown's conviction and vacating his sentence. Specifically, the State argues the Court of Appeals erred because (1) the officer conducted the search of the duffel bag incident to Brown's arrest in compliance with the controlling appellate precedent in effect at the time of the search, and (2) the challenged evidence inevitably would have been discovered, regardless of the propriety of the search conducted incident to Brown's arrest. Because this case turns on a determination of the applicable precedent, a brief timeline of the pertinent authorities is desirable here.

Fourth Amendment, Exclusionary Rule, & Exceptions

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; *see also Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 (stating a search warrant may be issued only upon a finding of probable cause). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting *Horton v. California*, 496 U.S. 128, 133 (1990)).

The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. *Davis v. United States*, 131 S. Ct. 2419 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. *Id.* at

2423. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.'" *Id.* at 2426 (citations omitted). "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations." *Id.* Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," the Court has stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate. *Id.* at 2427. In addition, judicially-created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule. *Id.*

"Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *Wright*, 391 S.C. at 442, 706 S.E.2d at 327. These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995); *State v. Moore*, 377 S.C. 299, 659 S.E.2d 256 (Ct. App. 2008); see also *Wright*, 391 S.C. at 444-45, 706 S.E.2d at 327-28 (discussing exigent circumstances); *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009) (same).

Rule Announced in New York v. Belton (U.S. 1981)

In the current appeal, the trial court denied Brown's suppression motion and ultimately ruled the drugs were admissible pursuant to the authority of *New York v. Belton*, 453 U.S. 454 (1981) because they were discovered during a search incident to a lawful arrest. In *Belton*, the Supreme Court, "[i]n order to establish the workable rule this category of cases requires," held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnote omitted).

"It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* (citing *United States v. Robinson*, 414 U.S. 218 (1973) and *Draper v. United States*, 358 U.S. 307 (1959)). "Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Id.* at 461. The Court observed "that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Id.* However, the Court cited its previous

decision in *Robinson* that the authority to search "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence" could have been found. *Id.* (quoting *Robinson*, 414 U.S. at 235).

Limitation of Belton in Arizona v. Gant (U.S. 2009)

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court departed from twenty-eight years of precedent and altered the rule it had announced in *Belton*.

In *Gant*, the defendant was arrested for driving with a suspended license and then handcuffed and locked in the back of a patrol car while officers searched his car. *Id.* at 335. Officers discovered cocaine in the pocket of a jacket that was on the backseat. *Id.* The question arose whether *Belton's* exception for warrantless searches of automobiles pursuant to a lawful arrest should apply to justify the search when it was undisputed that Gant could not have accessed his car to retrieve evidence or weapons at the time of the search. *Id.*

The Supreme Court stated the *Belton* "opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 341. The Court explained "[t]his reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the 'fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.'" *Id.* (quoting *Belton*, 453 U.S. at 466 (Brennan, J., dissenting)).¹

The Court stated, "The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded." *Id.* at 350. "We now know that articles inside the passenger compartment are rarely" within an arrestee's reach and that "blind adherence to *Belton's* faulty assumption would authorize myriad unconstitutional searches." *Id.* at 350-51. "The doctrine of *stare decisis* does not require us to approve routine constitutional violations." *Id.* at 351.

The Supreme Court declared the following new two-part rule:

¹ The dissent in *Gant* observes, "Contrary to the Court's suggestion, however, Justice Brennan's *Belton* dissent did not mischaracterize the Court's holding in that case or cause that holding to be misinterpreted. As noted, the *Belton* Court explicitly stated precisely what it held." *Gant*, 556 U.S. at 357 (Alito, J., dissenting).

Police may search a vehicle incident to a recent occupant's arrest *only if* [1] the arrestee is within reaching distance of the passenger compartment at the time of the search *or* [2] it is reasonable to believe the vehicle contains evidence of the arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. (emphasis added).

Supreme Court's Qualification of Gant

Thereafter, in *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011), the Supreme Court observed that *Gant* represented "a shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants" and considered the question of "whether to apply [the] sanction [of the exclusionary rule] when the police conduct a search in compliance with binding precedent that is later overruled." The Court held that, "[b]ecause suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, . . . searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.*

The Court explained that, "[f]or years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search." *Id.* at 2424. "Even after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that *Belton* still authorized a substantially contemporaneous search of the automobile's passenger compartment." *Id.*

The Supreme Court stated it had "adopted a new, two-part rule" in *Gant*. *Id.* at 2425. The Court noted the search at issue in *Davis* occurred in 2007, some two years before it announced its new rule in *Gant*. *Id.* The driver was arrested for driving while intoxicated and the passenger, Willie Davis, was arrested for giving a false name to police. *Id.* Both were handcuffed and placed in the back of separate patrol cars. *Id.* The police then searched the car and found a revolver inside Davis's jacket pocket. *Id.* The Court's opinion in *Gant* was issued while Davis's appeal from his conviction was still pending. *Id.*

The Court reasoned that the exclusionary rule's sole purpose is to deter future Fourth Amendment violations and that where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted." *Id.* at 2426-27 (citation omitted). The Court stated that "when binding appellate precedent specifically *authorizes* a particular police practice," such that the officer has acted in an objectively reasonable manner, the application of the exclusionary rule would serve only to discourage an officer from doing his duty and to deter "conscientious police work." *Id.* at 2429. The Court stated, "That is not the kind of deterrence the exclusionary rule seeks to foster." *Id.*

The Court held that *Gant* would apply retroactively to Davis because his "conviction had not yet become final on direct review." *Id.* at 2431. However, the Court distinguished the concept of a "remedy" from the question of "retroactivity" and found the exclusionary rule does not apply when the police conduct a search in accordance with existing appellate precedent. *Id.* at 2430-34. The Court stated that, in those circumstances, the police have not engaged in culpable misconduct, so the deterrent purpose of the exclusionary rule would not be served. *Id.* at 2434.

Application of Precedent in the South Carolina Courts

In *Narciso v. State*, 397 S.C. 24, 723 S.E.2d 369 (2012), this Court, in considering a belated appeal² from a conviction for trafficking in cocaine, examined the interplay of *Belton*, *Gant*, and *Davis*. The police had been investigating Osiel Narciso as part of an ongoing drug investigation, but stopped him in 2005 after receiving a report that he might be operating a vehicle in the area with an expired license tag and possibly no driver's license. *Id.* at 26-27, 723 S.E.2d at 370. A police officer conducted a traffic stop after confirming that Narciso's license tag was expired. *Id.* at 27, 30, 723 S.E.2d at 370, 372. Another officer arrived at the scene, and Narciso was arrested after the police verified that he did not possess a valid driver's license. *Id.* The police then conducted a search, including a "K-9" search, of his vehicle incident to that arrest. *Id.* at 27, 723 S.E.2d at 370. The narcotics-detection dog alerted on drug residue inside the vehicle, and the police ultimately seized cocaine from the vehicle. *Id.*

Narciso was tried in 2007 on charges of trafficking, two years prior to the United States Supreme Court's holding in *Gant*. *Id.* at 30, 723 S.E.2d at 372. The trial court, though expressing misgivings, denied the defendant's motion to

² In *Narciso*, the State consented to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Although Brown has argued against the precedent of *Narciso*, we reaffirm that its result is mandated by *Davis*.

suppress the drug evidence in reliance upon *Belton*. *Id.* After reviewing the holdings of the foregoing cases and other authority, this Court concluded on appeal that "*Davis v. United States*, [131 S. Ct. 2419 (2011),] and our own standard of review, commands that the circuit court's decision be affirmed." *Id.* at 32, 723 S.E.2d at 373. The Court stated,

In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant*. However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. *See [Davis v. United States]*, 131 S.Ct. at 2426–28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFave, "*Case-By-Case Adjudication*" Versus "*Standardized Procedures*": *The Robinson Dilemma*, 1974 Sup.Ct. Rev. 127, 142 (1974).

Id. The Court noted that the State, as the respondent, had argued that due to *Gant*, the search-incident-to-arrest ground was no longer appropriate for denying the suppression motion, and had urged the Court to find the search was justified under the automobile exception. *Id.* at 32 n.2, 723 S.E.2d at 373 n.2. The Court stated that, because the decision in *Davis* was dispositive and the exclusionary rule did not apply, it "need not reach the automobile exception, or any other grounds, for upholding the search." *Id.*

Similarly, in the current appeal, Brown's arrest and the police search incident to arrest occurred in 2005, when *Belton* was still the prevailing appellate precedent. As a result, the trial court properly denied Brown's motion to suppress at trial in 2006 after concluding the search was then legal under *Belton* as a search incident to a lawful arrest (for an open container violation).

Thereafter, on April 21, 2009, the United States Supreme Court issued its opinion in *Gant*, which declared the police may conduct a warrantless search of a vehicle incident to a recent occupant's arrest only if (1) the person is within reaching distance of the passenger compartment at the time of the search, or (2) it

is reasonable to believe the vehicle contains evidence of an arrest. *Gant*, 556 U.S. at 351.

The following year, the South Carolina Court of Appeals heard Brown's direct appeal. In its decision filed on June 14, 2010, the court applied the new rule articulated in *Gant*. *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The court held that, under *Gant*, the search of Brown's duffel bag was unlawful because Brown was handcuffed and placed in the patrol car prior to the search and, thus, he did not have access to the vehicle at the time of the search. *Brown*, 389 S.C. at 480-81, 698 S.E.2d at 815. The court then applied the exclusionary rule to bar the admission of the drug evidence and reversed Brown's conviction and vacated his sentence. *Id.* at 483-84, 698 S.E.2d at 816-17.

Since Brown's appeal was still pending on direct review, we find the Court of Appeals properly applied *Gant* and determined the search of Brown's duffel bag violated his Fourth Amendment rights because neither alternative of *Gant*'s two-part test was met so as to justify a warrantless search.

The Court of Appeals, however, like the trial court before it, did not have the benefit of subsequent authority. On June 16, 2011, a year after the Court of Appeals filed its decision, the United States Supreme Court issued its opinion in *Davis v. United States*, 131 S. Ct. 2419 (2011), clarifying that *Gant* would apply to pending cases on direct review, but 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. Consequently, we find the exclusionary rule should not be applied in Brown's case because it would contravene the dictates of *Davis*.³ We, therefore, reverse the decision of the Court of Appeals and reinstate his conviction and sentence.

³ We reject Brown's contention that this Court should not apply the *Davis* decision based on alleged error preservation grounds. The State filed its petition for a writ of certiorari with this Court in 2010, and the Supreme Court did not issue *Davis* until 2011, while Brown's appeal was still pending on direct review in this Court. The parties thoroughly argued this issue in their briefs. In *Narciso*, this Court applied both *Gant* and *Davis*, finding these authorities were applicable to all cases still pending on direct review. In our view, it would be incongruous to apply *Gant* to pending appeals to find the search was unlawful, but not to apply the Supreme Court's corresponding clarification in *Davis*.

Having determined that the exclusionary rule should not be applied in the circumstances present here, it is unnecessary to reach the State's second argument regarding inevitable discovery, which is an exception to the exclusionary rule. *See Narciso*, 397 S.C. at 32 n.2, 723 S.E.2d at 373 n.2 (finding where *Davis* was dispositive and the exclusionary rule did not apply to bar the evidence, exceptions to the exclusionary rule need not be considered).

IV. CONCLUSION

In conclusion, we hold the Court of Appeals properly applied *Gant* and found the warrantless police search conducted incident to Brown's arrest for an open container violation was illegal. We further hold, however, pursuant to the Supreme Court's subsequent pronouncement in *Davis*, that the exclusionary rule is not applicable to this case because the officer relied upon existing appellate precedent at the time he conducted his search. Consequently, the decision of the Court of Appeals is reversed.

REVERSED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

PETITION FOR A WRIT OF CERTIORARI

DAVID ALEXANDER
Counsel of Record
Appellate Defender
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
DIVISION OF APPELLATE DEFENSE
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330
dalexander@sccid.sc.gov

QUESTION PRESENTED

Whether the good faith exception to the exclusionary rule as interpreted in *Davis v. United States*, 131 S.Ct. 2419 (2011) can apply when a jurisdiction lacks “binding appellate precedent” specifically permitting law enforcement’s actions?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were
Petitioner Danny Cortez Brown and Respondent State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Counsel for Danny Cortez Brown petitions the Court to issue a writ of certiorari to review the judgment of the South Carolina Supreme Court affirming his conviction for trafficking cocaine.

OPINION BELOW

The opinion of the South Carolina Supreme Court (App. A1) is reported at 736 S.E.2d 263.

JURISDICTION

The South Carolina Supreme Court issued its opinion on December 19, 2012. Petitioner filed a timely petition for rehearing which was denied on January 24, 2013 (App. A13). This Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner Brown is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the United States Constitutions. The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." The Fourteenth Amendment provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case presents the Court with the opportunity to define the meaning of the phrase “binding appellate precedent” as used in *United States v. Davis*, 131 S.Ct. 2419 (2011). Justice Sotomayor’s concurrence in *Davis* specifically invited the question in this case. In *Davis*, Justice Sotomayor stated:

[W]hether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court’s answer to the former question in this case does not resolve the latter one.

Id. at 2436. The “latter” question referenced by Justice Sotomayor in the above quote is the exact question presented by this case.

The facts in this case are, for the purposes of this Court’s decision, indistinguishable from the facts in the Court’s opinion in *Arizona v. Gant*, 556 U.S. 332 (2009) and *Davis*. Every appellate judge who has reviewed petitioner’s case found that the police violated his Fourth Amendment rights. Just as the defendant in *Davis* was denied the remedy of the exclusionary rule, so was petitioner.

The distinguishing legal question from *Davis* is what happens when no “binding appellate precedent” exists in a prosecuting jurisdiction. The South Carolina Supreme Court could find no intervening decision between *New York v. Belton*, 453 U.S. 454 (1981) and petitioner’s arrest that authorized the search, yet inexplicably ruled that the police relied on “binding appellate precedent.” The result reached by the South Carolina Supreme Court accords with those of other jurisdictions who interpret *Davis* to mean that if no “binding appellate precedent” exists expressly

forbidding the police conduct or if the law is unsettled, then the police can still act in good faith.

The issue posed by this case also would resolve an ancillary question discussed in *Davis*: whether the good faith exception will prevent defendants from raising Fourth Amendment challenges. In *Davis*, petitioner argued that adoption of the good faith exception would stunt Fourth Amendment jurisprudence. *Id.* at 2432. The majority explained that counsel “will test this Court’s Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that precedent is distinguishable.” *Davis* at 2433.

As the South Carolina Supreme Court relied solely on *Belton* as the basis of the officer’s good faith, this case also presents the issue of how distinguishable a case must be from binding appellate precedent to avoid the good faith exception to the exclusionary rule. Since many commentators have observed that the good faith exception has the potential to swallow the exclusionary rule, this case presents the Court with the ability to explain the difference noted by the majority in *Davis* between cases which are distinguishable and cases in which the good faith exception applies.

Granting certiorari in this case will answer these questions about *Davis* and guide state and federal courts struggling with these issues.

STATEMENT OF THE CASE

Factual Background

Danny Cortez Brown's ("Brown"), first trial resulted in a mistrial. *Brown*, 736 S.E.2d at 265. After a second trial, Brown was convicted by a jury of trafficking cocaine between 100 and 200 grams and sentenced to twenty-five years' imprisonment. *Id.* at 264. Brown was a passenger in a vehicle stopped by a policeman who saw Brown drinking from an open container of beer. *Id.* Brown was arrested, handcuffed, and placed in the back of the police car, leaving the driver, who had access to Brown's duffel bag, unattended. *Id.* at 264-65. The policeman then returned to the vehicle and searched Brown's duffel bag, in which he found cocaine in a crumpled Fritos bag. *Id.* at 265. Before trial, Brown's motion to suppress the drugs was denied. *Id.* Brown took the stand at trial and testified that the drugs did not belong to him.

A week prior to his arrest, Brown's car broke down in Laurinburg, North Carolina. R. 160, ll. 12 – 16. On October 6, 2005, a friend named Freddie Prince ("Prince"), who owned a garage, took Brown to Laurinburg to retrieve his car. R. 161, l. 24 – 162, l. 7. They brought the car back from Laurinburg to a garage in Myrtle Beach. R. 162, ll. 17 – 25. Brown stayed at the garage to help Prince work on the car. R. 163, ll. 4 – 14.

The work took longer than expected. R. 163, ll. 15 – 20. Brown's fiancée arrived to pick him up, but the car was not ready. R. 163, ll. 15 – 20. Brown spent the previous night at his fiancée's house. Brown took his overnight bag—a black

duffel 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 finished. R. 163, ll. 15 – 24.

Prince stopped for gas on the way home. R. 164, ll. 9 – 15. Brown saw Rodney Smith ("Smith"), an acquaintance from his neighborhood, at the gas station. R. 164, ll. 16 – 23. Because Prince had another errand to run, Brown decided to catch a ride home with Smith. R. 165, ll. 4 – 12. Brown got his bag and a beer he had been drinking from Prince's truck and got into Smith's car. R. 165, ll. 13 – 23. Smith drove and Brown sat in the passenger's seat. Smith drove a 1976 Plymouth Fury. R. 86, ll. 5 – 7. Smith's car had no center console separating the driver's floorboard from the passenger's floorboard. R. 85, l. 22 – 86, l. 1. Brown testified that he set his duffel bag on the floorboard between them. R. 164, ll. 5 – 16.

Officer Daryl Williams ("Officer Williams") of the Horry County Police Department testified that he noticed Brown drinking a beer and pulled the car over to investigate. R. 6, ll. 1 – 7. After first approaching the driver's side window and speaking with the occupants, Officer Williams then approached the passenger side window and spoke to Brown. R. 6, ll. 14 – 23. He asked Brown to step out of the vehicle and then "placed him under arrest kind of quickly." R. 9, ll. 1 – 2. Officer Williams said, "by the time he stood totally up, pretty much had him handcuffed at that time, and then I did turn him to face the vehicle, basically." R. 25, ll. 5 – 8.

Officer Williams claimed that he 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.” R. 20, ll. 1 – 4 (emphasis added).

Officer Williams claimed that he asked the handcuffed Brown whether the duffel bag in the car was his. According to the officer, Brown answered affirmatively. R. 26, ll. 2 – 9. Officer Williams said he took the duffel bag and placed it on the sidewalk. He then put Brown (still handcuffed) in the back of his patrol car and closed the door. R. 26, ll. 5 -19. Officer Williams then returned to Smith’s car and unzipped and rummaged through Brown’s duffel bag. He said he “just wanted to get a glance into the bag.” R. 11, l. 13. In the duffel bag, Officer Williams found cocaine inside of a crumpled Fritos bag.

The State Appellate Decisions

This Court decided *Gant* after Brown’s conviction and before his appeal was decided by the South Carolina Court of Appeals. Applying *Gant*, a three-judge panel unanimously reversed Brown’s conviction. *See State v. Brown*, 698 S.E.2d 811 (S.C. Ct. App. 2010). The State petitioned the South Carolina Supreme Court for certiorari, which it granted. Before the South Carolina Supreme Court heard argument, this Court decided *Davis*.

All five justices of the state supreme court agreed that the search of Brown’s bag violated his Fourth Amendment rights as interpreted in *Gant*. *See Brown*, 736 S.E.2d at 269. The court then, in conclusory fashion, stated that *Davis* prevented application of the exclusionary rule. *Id.* at 269-70. Earlier in the opinion, the court stated that “*Belton* was still the prevailing appellate precedent” at the time of the

search. *Id.* at 269. At no point did the court identify a decision interpreting *Belton*—from South Carolina or any other jurisdiction—as allowing the search in this case. No South Carolina state appellate court had ever interpreted or even cited *Belton* until the court of appeals’ decision in Brown’s case. At the time of the search in this case, no South Carolina appellate decision existed giving *Belton* the broad interpretation most jurisdictions had given *Belton*. See *Gant*, at 341-43 and n.2.

REASONS FOR GRANTING THE PETITION

Because the South Carolina Supreme Court relied solely on *Belton* and no intervening decisions between *Belton* and *Brown* exist in South Carolina, the *Brown* decision allows this Court the opportunity to consider the question posed by Justice Sotomayor in *Davis* concerning whether the good faith exception can apply when the law in a jurisdiction is unsettled. It also allows the exploration of the reasoning of the *Davis* majority of whether lawyers’ traditional tool of distinguishing cases on their facts will prevent the stunting of Fourth Amendment jurisprudence.

As will be shown in this petition, other state and federal courts are struggling with how to apply the phrase “binding appellate precedent.” Most courts seem to be following the analysis as used in *Davis*. That is, the appellate court examines its own precedent for some decision that would expressly allow the police conduct at issue. Other approaches used by courts around the country expand upon or ignore the phrase “binding appellate precedent.” The first example, for purposes of this petition, would be the South Carolina Supreme Court’s approach which skips the step of the *Davis* analysis requiring identification of some controlling appellate decision. Other

approaches stray further from *Davis* and allow invocation of the good faith exception even when the court acknowledges that no precedent exists or the law is unsettled. See Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. Crim. L. & Criminology 1, 19-20 (2012) (noting that question of whether good faith exception applies when law is unsettled remains open after *Davis*). State and federal prosecutors are encouraging courts to adopt this position.

These differing interpretations of *Davis* implicate all three of this Court's reasons for granting certiorari. See U.S. Supreme Court Rule 10. Decisions of the federal courts of appeals are in conflict with each other and with the decision of the South Carolina Supreme Court in this case. The decision of the Fourth Circuit in *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012) conflicts with decisions of other federal circuit courts. The decisions of state courts other than South Carolina have conflict with the majority of states' interpretation of *Davis*.

Finally, the question of the meaning and scope of "binding appellate precedent" is vitally important to the application of the exclusionary rule and needs to be decided by this Court. Litigants will face these questions whenever this Court interprets older Fourth Amendment rules as granting broader privacy protections, such as in *Gant* or in its recent decision in *Missouri v. McNeely*, No. 11-1425 (Apr. 17, 2013). Litigants will also confront these questions whenever technological innovations are used by the police in their investigations, as with GPS devices in *Jones v. United States*, 132 S.Ct. 945 (2012), with DNA evidence, cellular telephone data, or other future advances.

I. The Majority Application of *Davis* by Federal and State Courts

Most federal courts of appeals and state appellate courts applying *Davis*' good faith exception have followed the three-step analysis used in *Davis*. First, identify the challenged police conduct. Second, determine whether a Fourth Amendment violation occurred based on current law. Third, determine whether an appellate decision in the prosecuting jurisdiction specifically authorized the challenged police conduct at the time of the search. If the third step is satisfied, then the *Davis* good faith exception applies and the defendant is not entitled to the remedy of the exclusionary rule.

An excellent example of an appellate court applying *Davis* in this fashion is the Tenth Circuit's decision in *United States v. Madden*, 682 F.3d 920 (10th Cir. 2012). *Madden* presented the Tenth Circuit with the question of whether *Davis*' good faith exception would apply after *Gant*. The Tenth Circuit examined its own precedent and found that it had previously interpreted *Belton* to authorize the search at issue in that case. *Madden*, 682 F.3d at 926-28. The prior case was decided in 2000, well before the search in *Madden*. See *United States v. Humphrey*, 208 F.3d 1190 (10th Cir. 2000) and as cited in *United States v. McCane*, 573 F.3d 1037, 1041 (10th Cir. 2009). The Tenth Circuit ruled that the good faith exception applied and the defendant's motion to suppress was properly denied.

Most federal courts applying *Davis* have used an analysis similar to that of the Tenth Circuit in *Madden*. See *United States v. Pineda-Moreno*, 688 F.3d 1087 (9th Cir. 2012) (researching own precedent in a *Jones*-style GPS case and applying good faith

exception because *United States v. McIver*, 186 F.3d 1119, 1126-27 (9th Cir. 1999) (authorized search); *United States v. Coleman*, 700 F.3d 329, 334 & n.3 (8th Cir. 2012) (researching own precedent in a traffic stop case and applying good faith exception because *United States v. Mallari*, 334 F.3d 765, 766-67 (8th Cir. 2003) (authorized search); *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013) (researching own precedent in a *Jones*-style GPS case and applying good faith exception because *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981) and Texas state law, *Davidson v. State*, 249 S.W.2d 709 (Tex. App. 2008), authorized search).

Slightly different is the Sixth Circuit's opinion in *United States v. Osborne*, 673 F.3d 508, 514 (6th Cir. 2012), a *Gant* fact pattern, which invokes *Davis*' good faith exception without citing the appropriate binding circuit precedent. In this respect, the court's opinion is like the South Carolina Supreme Court's opinion in *Brown*. Unlike *Brown*, the Sixth Circuit had recently considered the status of its *Belton* precedent and determined that it had broadly interpreted *Belton*. *United States v. Buford*, 632 F.3d 264, 268-69 (6th Cir. 2011) (citing *United States v. Patterson*, 993 F.2d 121, 123 (6th Cir. 1993) as allowing a *Gant*-style search).

The majority of state courts applying *Davis* have used this analysis. See *State v. Taylor*, 79 So.3d 876, 878 (Fla. Dist. Ct. App. 2012) (applying *Davis* although failing to cite the binding appellate precedent, *State v. Waller*, 918 So.2d 363 (Fla. Dist. Ct. App. 2005)); *State v. Johnson*, 354 S.W.3d 627, 629 (Mo. 2011) (identifying a prior state decision, *State v. Harvey*, 648 S.W.2d 87 (1983) as binding appellate precedent broadly interpreting *Belton* and applying the good faith exception);

Henderson v. State, 953 N.E.2d 639, 644-645 (Ind. Ct. App. 2011) (identifying a prior state decision, *Jackson v. State*, 597 N.E.2d 950, 957 (Ind. 1992) as binding appellate precedent broadly interpreting *Belton* and applying the good faith exception); *Commonwealth v. Parker*, ___ S.W.3d ___, 2011 WL 4502403 (Ky. Ct. App. 2011) (identifying a prior state decision, *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008) as binding appellate precedent broadly interpreting *Belton* and applying the good faith exception); *Hinkle v. State*, 86 So.3d 441, (Ala. Crim. App. 2011) (citing numerous Alabama decisions authorizing a *Gant*-style search and applying *Davis*); *People v. Hopper*, 284 P.3d 87, 90 (Colo. Ct. App. 2011) (identifying a prior state decision, *People v. Kirk*, 103 P.3d 918 (Colo. 2005) as binding appellate precedent broadly interpreting *Belton* and applying the good faith exception).

II. Alternative Applications of *Davis* by State Courts

State courts other than the South Carolina Supreme Court are using different approaches to the good faith exception and struggling with the difference between “binding appellate precedent” and cases that should be distinguished in the traditional sense.

Maryland

The Maryland Court of Appeals’ application of the good faith exception is virtually identical to that of the South Carolina Supreme Court. See *Briscoe v. State*, 30 A.3d 870, 880-84 (Md. 2011). In *Briscoe*, the police opened a locked glove compartment as a purported search-incident-to-arrest. *Id.* at 873-74. The state conceded “that there was no then-existing reported Maryland decision specifically authorizing the search of a locked glove compartment.” *Id.* at 883.

Despite the lack of binding appellate precedent, the *Briscoe* court concluded that *Davis*’ good faith exception applied. *Id.* at 883-84. The court interpreted *Davis*’ reference to binding appellate precedent “to mean that the caselaw of the jurisdiction must have been clear about whether that jurisdiction had adopted the bright-line rule of *Belton*.” *Id.* at 883. The *Briscoe* court then concluded that the officers relied in good faith on *Belton*.

While the Maryland court’s opinion contains more analysis of its own precedent than the nonexistent analysis of the South Carolina Supreme Court, the result is the same. The conclusion to be drawn is that when the law is unsettled or does not proscribe the specific police conduct, the police may still act in good faith. Like South

Carolina, Maryland's analysis allows the police's prediction of the direction of the law to serve as a good faith basis for otherwise unconstitutional searches.

Michigan

Michigan state courts are straying further from the majority of jurisdictions' approach to *Davis*. In two cases, the Michigan Court of Appeals applied *Davis* without citing the applicable binding appellate precedent. *People v. Hill*, ___ N.W.2d ___, 2013 WL 440549 (Mich. Ct. App. Feb. 5, 2013); *People v. Mungo*, 813 N.W.2d 796, 804-06 (Mich. Ct. App. 2012). In *Hill*, the police entered a man's home at midnight without a warrant to perform a "welfare check." *Hill* at p.6, (Markey, J., dissenting). The *Hill* majority failed to cite any precedent that would have allowed the search. *Id.* at 6. It concluded that "the only police conduct that is deterred by applying the exclusionary rule is conduct in which the police, having at least some indicia of need, enter a home in a good-faith effort to check on the welfare of a citizen after a concerned neighbor contacted police." *Id.* at 6.

The dissenting judge in *Hill* excoriated the majority for its use of *Davis* to uphold this search. *Id.* at 6-12. He stated:

Finally, I must strongly and respectfully disagree that this case presents a situation where the application of the exclusionary rule may be excused because the police acted in good faith, and the application of the exclusionary rule would serve no deterrent purpose. . . . The majority cannot cite a single appellate case that has upheld the warrantless midnight entry and search of a residence on the basis of the say-so of a neighbor, virtually a stranger to the home's occupant, who has simply not seen the occupant for a few days and wherein the police conduct a cursory ten-minute investigation disclosing no evidence—or even hint—of imminent threat to life or property. . . . I conclude that the police conduct in this case was at a minimum sloppy to negligent.

Id. at 12. The dissenting judge correctly pointed out that the court's *Davis* analysis differed substantially from the mainstream approach.

In *Mungo*, the Michigan Court of Appeals applied the good faith exception even though it acknowledged that state law was unsettled. *Mungo*, 813 N.W.2d at 554. *Mungo* involved a fact pattern similar to *Gant*, but with an important twist. The passenger was arrested for outstanding traffic warrants and placed in the patrol car. The officer then searched the driver's car without a warrant. The defendant strenuously contended that no prior Michigan precedent authorized such a search when a passenger was the arrestee. The court stated:

At the time of the search in this case, *Belton* was binding precedent, and, therefore, reliance on *Belton* by the police to authorize the search of defendant's car was objectively reasonable. Michigan had followed the *Belton* rule since 1983. . . . **And even if no Michigan decision had applied *Belton* in the context of a search incident to a passenger's arrest, the broad holding of *Belton* itself permitted the search.**

Id. at 805 (emphasis added).

The *Mungo* court's reasoning mirrors that of the South Carolina Supreme Court. *Mungo* makes a conclusory assumption about the breadth of *Belton* unwarranted by its own precedent. Allowing police to stray from the specific authorization of an appellate court is a risk foreseen by this Court in *Davis* which should be addressed in this case.

Illinois

An Illinois appellate court conducted a conclusory *Davis* analysis similar to that in this petition. *People v. Tyus*, 960 N.E.2d 624 (Ill. App. Ct. 2011). In *Tyus*, an

Illinois appellate court confronted a warrantless vehicle search after an arrest. As in this case, the Illinois court cited *Davis* and concluded that the search at issue complied with *Belton*. *Id.* at 638. The court did not cite to any Illinois authority on which the police could have relied.

Had the court performed the analysis of its own jurisprudence similar to that used in *Davis* in which the Court analyzed prior circuit precedent, it would have found that Illinois law was unsettled on how to interpret *Belton*. In a 1994 decision, the Illinois Supreme Court found that *Belton* approved a search when a defendant was handcuffed and placed in a patrol car. *People v. Bailey*, 639 N.E.2d 1278, 1281-82 (Ill. 1994). However, by 2002, the Illinois Supreme Court's interpretation of *Belton* had changed. *People v. Stehman*, 783 N.E.2d 1, 4-7 (Ill. 2002). By *Stehman*, Illinois had placed limitations on the state's wide-ranging ability to search a vehicle incident to an arrest. *Id.* at 6. In *Stehman*, the court invalidated a search when the officer's first contact with the defendant was after the defendant exited his vehicle and was some distance away. *Id.* at 6-8. The court stated, "[W]here searches occur beyond the scope of *Belton*'s bright-line intent, the factors of *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful." *Id.* at 8. "[B]ecause the passenger compartment of defendant's vehicle was beyond the area within defendant's immediate control and into which defendant might have reached at the time [the police] stopped and arrested him, we conclude that the search of that vehicle's passenger compartment was not incident to defendant's arrest." *Id.*

Later decisions in Illinois confirmed that its search-incident-to-arrest jurisprudence was in flux, especially after this Court's decision in *Thornton v. United States*, 541 U.S. 615 (2004). See *People v. Dieppa*, 830 N.E.2d 870, 872-76 (Ill. App. Ct. 2005); *People v. Neff*, 867 N.E.2d 980, 985-86. Therefore, just as in South Carolina, the *Tyus* court failed to follow the steps mandated by *Davis* and search its own unsettled precedent. If it had done so, it would have confronted whether the good faith exception applied when no binding appellate precedent existed authorizing the search.

III. Alternative Applications of Davis by Federal Courts

The use of *Davis* that is the biggest outlier thus far is the Fourth Circuit's application in *United States v. Davis*, 690 F.3d 226 (2012) (hereinafter, "*Davis 4th*" to avoid confusion with this Court's *Davis*). *Davis 4th* is an excellent example of how this issue will arise when courts are confronted with new technology. The facts are complicated, but the essence is that the defendant's DNA profile was wrongfully maintained by police in a database. Police had obtained the defendant's DNA years earlier when he was a victim of a crime. The Fourth Circuit assumed, for purposes of its good faith analysis, that the testing of the defendant's DNA constituted an unconstitutional search. *Id.* at 250.

Despite its acknowledgment that "the general issue of a person's reasonable expectation of privacy in his DNA is a developing and unsettled area of the law," the Fourth Circuit found that the good faith exception applied. *Id.* at 240. The court used not only *Davis*, but also *United States v. Leon*, 468 U.S. 897 (1984) and *Herring*

v. United States, 555 U.S. 135 (2009) to reach its conclusion. The court first conducted a cost-benefit deterrence analysis and found that application of the exclusionary rule was unwarranted.

The court then bootstrapped this conclusion with the following *Davis* analysis:

Likewise, there is no evidence before us that the analyst acted with the knowledge that she should not retain the [DNA] profile. Like the conduct at issue in *Herring* and *Davis*, then, the conduct here stands in stark contrast to the cases in which the exclusionary rule has been applied, described by the *Herring* Court as “patently unconstitutional conduct.” Moreover, **given the evolving and unsettled law governing DNA searches and seizures (as amplified by the district court’s lengthy decision in this case, the briefs on appeal, and the lack of controlling Fourth Circuit or Supreme Court precedent)**, the conduct of the officers entering and retaining Davis’ DNA profile can hardly be characterized as brazen or reckless.

Davis 4th at 255-56 (internal citations omitted) (emphasis added). The emphasized phrase shows the Fourth Circuit expressly acknowledged the lack of binding appellate precedent. *Id.* Despite this express finding and an acknowledgment that the law was unsettled, the Fourth Circuit’s application of *Davis* sends the message to police that as long as no case forbids their conduct, they are free to act.

The dissent in *Davis* 4th exposed the majority’s departure from a mainstream analysis. Judge Davis stated that “the majority’s application of the good-faith exception to preclude suppression in this case marks a departure from the Supreme Court’s exclusionary rule precedents and represents a new, freestanding exception never sanctioned by the Court or by precedent in this Circuit.” *Id.* at 278 (Davis, J., dissenting). Judge Davis lamented the “long slow death of the exclusionary rule” and

feared “that a measurable lessening in liberty will result from this freeing of law enforcement from the constraints of the Fourth Amendment.” *Id.* at 281.

The United States Government recently advocated an expanded view of “binding appellate precedent” in the First Circuit. *United States v. Sparks*, ___ F.3d ___, Nos. 11-1134, 11-1143, 2013 WL 1197741 (1st Cir. Mar. 23, 2013). *Sparks* is a *Jones*-style GPS case. The court stated, “[T]he government suggests that, in the absence of directly applicable circuit precedent, law enforcement officers may reasonable rely on the decisions of appellate courts outside the circuit.” While the First Circuit lacked any precedent on GPS devices, it found that a prior decision allowing “beepers” controlled the good faith inquiry. *Id.* at *8 (relying on *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977)).

Importantly, even though it found the officers acted in good faith, it rejected the broad application of *Davis* used by the Fourth Circuit in *Davis 4th*. *Id.* at *5. The *Sparks* court stated, “[W]here judicial precedent does not clearly authorize a particular practice, suppression has deterrent value because it creates an incentive to err on the side of constitutional behavior.” *Id.* (internal quotations omitted). This part of the court’s reasoning is important because it shows that courts will continue to fact the government’s attempts to broaden the good faith exception. It also shows that the result could have been different had the government’s position been pushed in a different circuit.

The expansion of the good faith exception by these courts essentially allows police a grace period during which they do not need to seek warrants when they use a

new technology. These rules give the police little incentive to seek the approval of a magistrate because they know that an appellate court must give them explicit warning that their behavior violates the Fourth Amendment before the exclusionary rule will apply. *See generally* Wayne R. LaFare, 1 *Search & Seizure* § 1.3(h) (5th ed. 2012); Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A comment on Camreta v. Greene and Davis v. United States*, 2011 Cato Sup. Ct. Rev. 237 (2011). Therefore, the question of whether “binding appellate precedent” means police behavior must be sanctioned or proscribed is vital and recurring in this nation’s courts.

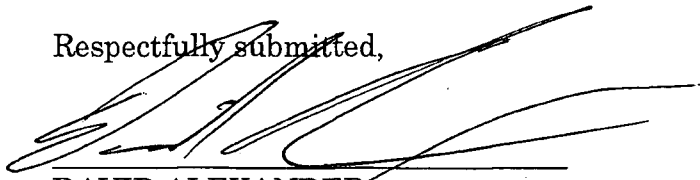
CONCLUSION:

This Case Presents a Simple Factual Record and Narrow Question

This case narrowly presents the opportunity for this Court to decide the meaning of "binding appellate precedent." It is undisputed that Brown's Fourth Amendment rights were violated. Needlessly complicating factual concerns about the negligence of police officers as encountered in *Leon* or *Herring* are not present. The state and federal decisions cited above show that this issue has had sufficient time to percolate in courts throughout the nation and is now ready for this Court.

An affirmance or a reversal in this case will definitively decide the question asked by Justice Sotomayor in *Davis* of whether the good faith exception can apply when no binding appellate precedent exists in a jurisdiction. It will also allow the Court to provide guidance on the difference between traditional analysis distinguishing prior precedent and the good faith exception. For these reasons, the Court should grant the writ of certiorari and decide this important Fourth Amendment question.

Respectfully submitted,



DAVID ALEXANDER
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

April 23, 2013

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

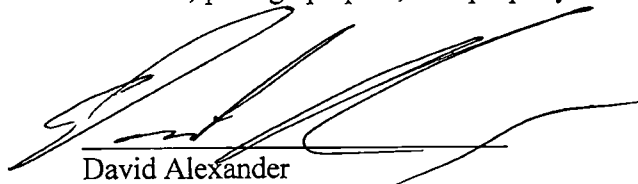
v.

STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on April 23, 2013, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis with accompanying affidavit, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.



David Alexander
Counsel of Record

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

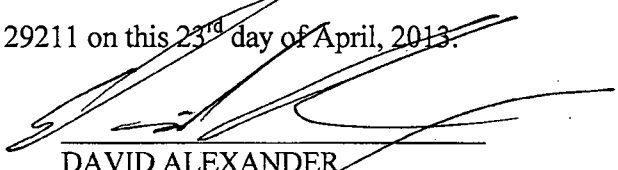
v.

STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

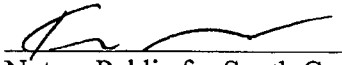
CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Mark Farthing, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 23rd day of April, 2013.



DAVID ALEXANDER
Counsel of Record

SWORN TO BEFORE me this 23rd
day of April, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

***ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT***

A P P E N D I X

DAVID ALEXANDER
Attorney at Law

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2013

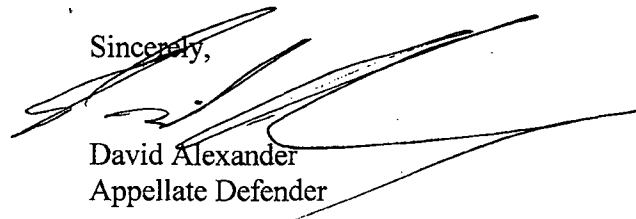
Honorable William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: State of South Carolina v. Danny Cortez Brown

Dear Mr. Suter:

Enclosed are the petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of Danny Cortez Brown in support of motion to proceed *in forma pauperis*. The certificate of service is attached to the original petition. Representing the State of South Carolina is Mark Farthing, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3970. I represent Petitioner Danny Cortez Brown. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,



David Alexander
Appellate Defender

DA/kam

Enclosure

cc: Honorable Daniel E. Shearouse
Mark Farthing, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2013

Mark Farthing, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: State of South Carolina v. Danny Cortez Brown

Dear Mark:

Enclosed is a copy of petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of Danny Cortez Brown in support of motion to proceed *in forma pauperis*, which I have filed today in the United States Supreme Court. Please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "David Alexander", is written over the typed name and title. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Alexander
Appellate Defender

DA/kam

Enclosures

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State of South Carolina v. Danny Cortez Brown

Dear Mr. Shearouse:

Enclosed is a copy of petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of Danny Cortez Brown in support of motion to proceed *in forma pauperis*, which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

David Alexander
Appellate Defender

DA/kam

Enclosure

cc: Mark Farthing, Esquire



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2013

Mr. Danny Cortez Brown, #317608
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your appeal

Dear Danny:

Enclosed is a copy of the petition for writ of certiorari to the South Carolina Supreme Court and appendix I filed on your behalf today with the United States Supreme Court. Keep your fingers crossed.

Please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

David Alexander
Appellate Defender

DA/kam

Enclosures



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2013

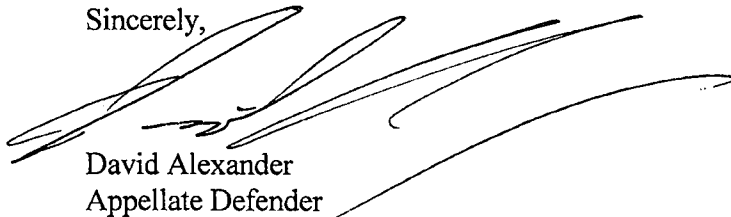
Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: State of South Carolina v. Danny Cortez Brown

Dear Mr. Suter:

Enclosed is Petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,



David Alexander
Appellate Defender

DA/kam

Enclosure

cc: Mark Farthing, Esquire
Honorable Daniel E. Shearouse, Clerk

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,
v.
STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Danny Cortez Brown asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

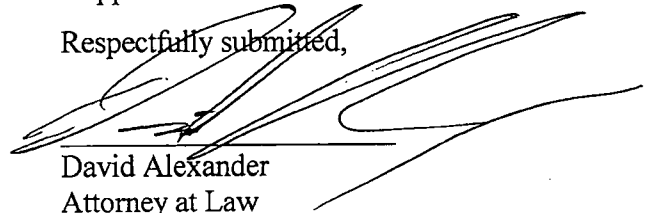
[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

South Carolina Court of Appeals; South Carolina Supreme Court

[] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Respectfully submitted,



David Alexander
Attorney at Law
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

April 23, 2013

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

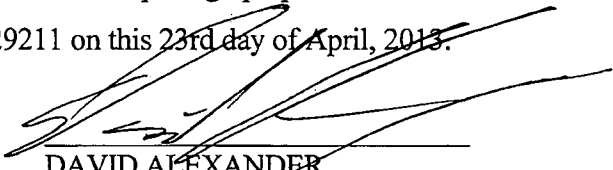
v.

STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

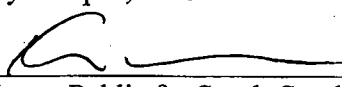
CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis together with the affidavit of Danny Cortez Brown have been served upon opposing counsel, Mark Farthing, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 23rd day of April, 2013.



DAVID ALEXANDER
Counsel of Record

SWORN TO BEFORE me this 23rd
day of April, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Horry)Danny Cortez Brown 317608)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

13 APPLICATION FOR

POST-CONVICTION RELIEF

5621

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber C.I. Ridgeway S.C.
2. Name and location of Court which imposed sentence General Sessions (Horry County)
3. Name(s) of co-defendant(s) (if any) Rodney Smith
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2006-MS-26-1349
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 12, 2006
 - (b) Term of imprisonment of twenty-five years

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
from the judgment of conviction
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals
- ii. S.C. Supreme Court
- iii. U.S. Supreme Court
- (b) the result in each such Court to which you appealed:
- i. Overturned case
- ii. reinstated
- iii. Writ denied
- (c) the date of each such result:
- i. June, 14, 2010
- ii. Dec 20, 2012
- iii. June 3, 2013
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Brown 389 SC 473 698 SE 2d 811 Cct App 2010
- ii. Opinion NO 27202
- iii. Brown v State NO 12-9957
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of counsel for failure to raise
~~the~~ the South Carolina Constitution
 (c) Ineffective assistance counsel

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Failure to raise the South Carolina Constitution
 (b) _____
 (c) Failure to argue suppression motion before state introduce evidence

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. _____
 ii. _____
 iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is my first time claiming ineffective

(b) assistance of counsel

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Russell Long (Myrtle Beach S.C)
 - ii. { David Alexander } South Carolina Commission
 - iii. { Elizabeth A. Franklin Best } of Indigent Defense
- (b) the proceedings at which each such attorney represented you:
- i. General Sessions
 - ii. Court of Appeals, S.C Supreme Court, U.S
 - iii. Supreme Court

19. State clearly the relief you seek in filing this application:

Vacation of sentence and conviction

20. Are you now under sentence from any other court that you have not challenged?

No

2013 5621

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

DannyCB reum

SWORN to and subscribed before me this 9th
day of August, 2013.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

FILED
Horry County
2013 AUG 14 PM 4:03
MELANIE HUGGINS-WARD
CLERK OF COURT

215 5621

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Danny C Brown
Applicant

SWORN or affirmed to and subscribed before me this
9th day of August, 2013.

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

FILED
CLERK OF COURT
2013 AUG 14 PM 4:08
MELANIE HUGGINS-WARD

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Danny Cortez Brown, #317608,	)	Case No. 2013-CP-26-5621
Applicant,	)	
v.	)	RETURN
State of South Carolina,	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed August 14, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In March 2006, the Horry County Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-26-1349). Russell B. Long, Esquire, represented Applicant. On September 12, 2006, Applicant proceeded to trial before the Honorable Steven H. John and a jury. On September 13, 2006, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal. Elizabeth A. Franklin-Best, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals reversed Applicant's conviction on June 14, 2010. State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The Court of Appeals denied the State's petition for rehearing on September 24, 2010, and the South Carolina Supreme Court granted the State's petition for writ of certiorari. The Supreme Court reversed the Court of Appeals and affirmed Applicant's convictions on December 19, 2012.

State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). The Supreme Court denied Applicant's petition for rehearing and the remittitur was returned to the circuit court on January 24, 2013. The United States Supreme Court denied Applicant's petition for writ of certiorari on June 3, 2013.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel for failure to raise the South Carolina Constitution"
 - a. "Failure to raise the South Carolina Constitution"
2. "Ineffective assistance of counsel"
 - a. "Failure to argue suppression motion before the state introduce evidence"

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this Return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of trial counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v.

Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

V.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

June 11, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

DANNY CORTEZ BROWN, #317608)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

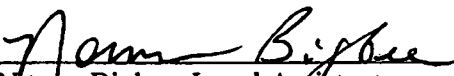
2013-CP-26-5621

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan Michael Shaffer, Esquire
4701 Oleander Drive
Myrtle Beach, SC 29577

DATED this 11TH day of June, 2014.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2014-CP-26-05621

DANNY CORTEZ BROWN,)

Plaintiffs,)

vs.)

STATE OF SOUTH CAROLINA,)

Defendant.)

Transcript of Record

May 12, 2015

B E F O R E:

Honorable Michael G. Nettles
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Tristan M. Shaffer, Esquire
Attorney for Applicant

Joshua L. Thomas, Esquire
Attorney for the Respondent

Kay H. Richardson
Circuit Court Reporter

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Brown v. State - 2014-CP-26-05621
BY THE COURT

3

1 **(MAY 12, 2015)**

2 MR. THOMAS: May it please the Court, the next case is
3 Danny Cortez Brown versus the State of South Carolina. It's
4 case number 2013-CP-26-5621. This was a March 2006 indictment
5 for trafficking cocaine between 100 and 200 grams. He was
6 represented on that charge by Russell Long. He went to trial
7 September 12th through 13th of 2006. The jury convicted him
8 as indicted. The Honorable Steven H. John sentenced him to
9 twenty-five years on that conviction. He did file a direct
10 appeal that was perfected by Betsy Best and David Alexander of
11 the Office of Appellate Defense. The Court of Appeals
12 initially reversed his conviction. However, the Supreme Court
13 reversed the Court of Appeals and reinstated the conviction
14 and that was 401-SC-82, that was a 2012 opinion. He filed
15 this PCR in August of 2013 alleging various grounds of
16 ineffective assistance of counsel. He is represented by
17 Tristan Shaffer and the State is ready to proceed.

18 MR. SHAFFER: Your Honor, before we begin, there's two
19 very brief things I'd like to bring up. First of all is given
20 the nature of this case, once we're finished with it, I
21 believe that it might be helpful for the Court for me to
22 actually be allowed some time to brief it, maybe fifteen,
23 twenty days, something like that so that I can write a really
24 brief memorandum in support of our position on this case.
25 Originally -- this is a case that originally, the Court of

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BY THE COURT

4

1 Appeals had reversed back on a search issue. The Supreme
2 Court then went back and reversed the Court of Appeals, its
3 finding, saying -- basically holding that it was not a -- the
4 rule was not retroactive, it had to do with the search. And,
5 Your Honor, as a result, what I would like to do is just have
6 maybe a little bit of time to brief it. I could be really
7 brief today in just putting forth the record but I would like
8 to submit my actual argument in writing just due to the
9 complexity of this case.

10 THE COURT: All right. Be glad to hear from you. And
11 you -- is it purely a legal argument or do you need testimony?

12 MR. SHAFFER: Your Honor, there is some testimony that is
13 needed.

14 THE COURT: Okay. Well, let's go forward with that.

15 MR. SHAFFER: It's on one of the issues which is that the
16 ---

17 THE COURT: What's your pleasure? Do you want to go over
18 an outline of the legal issues or do you want to call your
19 witness?

20 MR. SHAFFER: Your Honor, the main thing that we're
21 arguing is that the, the search in this case was violative
22 under the U.S. Constitution because that's already been ruled
23 upon and actually was but they didn't hold it -- they
24 basically, they said it was not held retroactive. The -- but
25 we're saying that the search was actually violative of the

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BY THE COURT

5

1 South Carolina Constitution and may be in a position that the
2 South Carolina Constitution is more restrictive or allows for
3 greater protection than the U.S. Constitution in this matter.

4 The other issue is failure to -- ineffective assistance
5 of counsel for failure to request a continuance in the case.
6 The continuance matter involves -- there was a mistrial in the
7 case. The officer testified originally -- his testimony is
8 somewhat inconsistent or was inconsistent with his testimony
9 in the second trial. No continuance was requested so that he
10 could get the transcript to impeach the officer with.

11 Going back to my first legal issue, obviously, this Court
12 knows you can challenge the PCR or a PCR can be brought on a
13 constitutional ground saying that there is a violation of a
14 constitutional right. It can also be brought on ineffective
15 assistance of counsel. We're saying that trial counsel was
16 ineffective in failing to argue the South Carolina
17 constitutional issues.

18 Your Honor, my client also wants me allege that he was
19 ineffective in failing to request a suppression hearing and I
20 understand that the nature of the case with a previous charge
21 that there's some issue with having previously held the court
22 term immediately before that with a mistrial being held but
23 there was no suppression hearing on the second case.

24 THE COURT: All right.

25 MR. SHAFFER: Applicant would call Russell Long.

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RUSSELL B. LONG - DIRECT BY SHAFFER

6

1 THE COURT: Mr. Long, please come forward. And I'd ask,
2 if you could, place your left hand on the Bible and raise your
3 right hand as the Clerk administers the oath.

4 RUSSELL B. LONG, HAVING BEEN DULY SWORN,
5 TESTIFIES AS FOLLOWS:

6 DIRECT EXAMINATION OF RUSSELL B. LONG BY MR. SHAFFER:

7 Q: Good morning, Mr. Long.

8 A: Good morning.

9 Q: You represented Daniel Brown, correct?

10 A: Yes, sir.

11 Q: When did you start representing him prior to trial?

12 A: Well, probably six or eight months before trial, at least.

13 Q: What was your strategy going in to trial?

14 A: Well, we -- you know, we clearly thought -- the facts of
15 the case, Judge, were that Danny, who was a long-time friend
16 of mine, family friend of mine, his father and my father were
17 good friends, we played Little League ball together. I think
18 the world of Danny and wanted to do everything I could to help
19 Danny. And it really seemed like a bad search. Danny was a
20 passenger in a vehicle. The allegation was that the driver
21 had an open can of beer between his legs or center console
22 somewhere. It was dark out and a police officer pulled up
23 beside them, saw the beer can, stopped the driver. Walked
24 around to the passenger side for no reason based on the
25 testimony at the first trial, or both trials.

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RUSSELL B. LONG - DIRECT BY SHAFFER

7

1 THE COURT: What was the reason for the stop?

2 A: The reason for the stop was an open car of beer between
3 the driver's legs.

4 THE COURT: How did they see, how did they see the beer?

5 A: The police officer pulled up -- testified that he pulled
6 up beside the vehicle in traffic and looked in the window and
7 saw a can of beer at night, in the rain. We thought it was --
8 you know, it was hard to believe that that in fact was a
9 reason but that was the reason that was given. The officer
10 then went around after speaking with the driver and taking the
11 driver -- I believe taking the driver out of the vehicle and
12 putting him in some kind of detention, then walked around to
13 the passenger side. Danny did not have an open can of beer,
14 did not -- there was nothing suspicious about the way he was
15 sitting in the car or anything, there was nothing articulated
16 in that regard. Danny was asked to get out of the vehicle.
17 He got out and then the officer reached in and grabbed a
18 duffle bag off the floorboard that had been between Danny's
19 legs, put it on the sidewalk, put Danny in detention and then
20 began to search the duffle bag, unzipped it and searched the
21 contents of it. Well, the strategy of the case was that was a
22 bad search. There was no reason in the world for that officer
23 to unzip that bag. Danny wasn't under arrest for violating
24 the law. He was just being placed, you know, in detention, I
25 guess, to determine or to make certain that the officer was

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RUSSELL B. LONG - DIRECT BY SHAFFER

8

1 safe, which was the difference in the two testimonies. In the
2 first trial, officer safety wasn't mentioned at all. We had a
3 mistrial. We had to come back I think the very next week and
4 try the case again. Judge John was our trial judge both
5 times. And that testimony changed for the second trial and
6 they included officer safety as a reason for going into the
7 duffle bag and, of course, we argued you had -- you know,
8 handcuffs on two guys, one that had an open container of beer
9 and one that hadn't done anything wrong, you should've been
10 safe. There was no reason to unzip this bag. Judge John
11 broke court at 2 o'clock in the afternoon and we -- to send us
12 off to research and brief a little bit harder. Don't take
13 offense to this Judge, but I got the feeling Judge John wanted
14 to rule against me and he was giving -- he was giving us some
15 time to figure out if he could and that's what happened. We
16 came back after the suppression motion and the Judge ruled
17 against me. That was in the first trial before we got the --
18 before we got the, the mistrial.

19 Q: At any point, did you request a continuance in-between the
20 two trials so that you could get a copy of the transcript?

21 A: We did discuss it, you know, in chambers or with the
22 Solicitor in that we needed to get a little bit of time in-
23 between here but, honestly, not for me to get a transcript.
24 That wasn't my thinking at all. The other thought was we'd
25 just had it, we were just hot on in it, I was as prepared as I

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RUSSELL B. LONG - DIRECT BY SHAFFER

9

1 possibly could be and had just tried most of the case once, I
2 was ready to go again but I did not consider, honestly, asking
3 for time to get a copy of the transcript so I'd have that
4 transcript at the second trial.

5 Q: Okay. At any point, did you raise the South Carolina
6 Constitution, the grounds?

7 A: I was looking through there -- when you mentioned that, I
8 was reading through the transcript trying to see -- clearly,
9 when we make motions and we refer to the constitution, we
10 throw that word around a lot and I don't know, you know, which
11 constitution I was referring to but specifically to point out
12 the differences in the U.S. Constitution and the State
13 Constitution during the suppression motion, I did not.

14 Q: But I imagine you did a great deal of research on the
15 suppression issue?

16 A: Yeah, the Court of Appeals reversed it based on that on --
17 I mean, I was actually -- Judge, I was actually pretty proud,
18 I had a case to, you know, go up and based on the record that
19 I perfected, got reversed, and I love Danny to death and I got
20 the phone call from him that it had gotten reversed and we
21 kind of celebrated on the phone together and we were trying to
22 figure out when he was gonna come home, come by the office and
23 see me, that kind of thing, and then we got notice that the
24 State had actually filed a notice of intent or actually
25 requesting that the Supreme Court look at it and then, of

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RUSSELL B. LONG - DIRECT BY SHAFFER

10

1 course, I got more bad news from Danny on that and then I
2 think the U.S. Supreme Court or at least cert was applied for
3 to the U.S. Supreme Court. And then -- and the law in the
4 area was changing the whole time as well. And then, of
5 course, the U.S. Supreme Court refused to hear it so, now
6 Danny is stuck with the twenty-five-year sentence.

7 Q: And the research that you did prior to his actual trial, a
8 lot of it was state related, I imagine, is that fair to say?

9 A: Correct. Most -- honestly, most of that case law is U.S.
10 Supreme Court -- U.S. Supreme Court rulings, but yeah, there's
11 some state law decisions that we cited.

12 Q: Okay.

13 MR. SHAFFER: Your Honor, I believe that's all the
14 questions I actually have. I think we're gonna admit
15 something through stipulation which is the trial transcript of
16 the -- of the mistrial or the -- portions of it, I think, it's
17 the officer's testimony in the mistrial.

18 MR. THOMAS: No objection to that, Your Honor. I think
19 it might actually be the entire mistrial.

20 MR. SHAFFER: And, Your Honor, I take -- I would actually
21 take back what I said about no questions. I have two or three
22 more, if that's okay?

23 THE COURT: All right. The trial of the transcript is
24 in the record.

25 MR. SHAFFER: Yes, Your Honor.

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RUSSELL B. LONG - DIRECT BY SHAFFER

11

1 THE COURT: As Applicant's Exhibit Number One. You might
2 want to give it to the Court Reporter and get her to mark it
3 and admitted.

4 MR. SHAFFER: Thank you, Your Honor.

5 THE COURT: Mr. Thomas, have you seen it?

6 MR. THOMAS: I have, Your Honor, and if I may approach, I
7 have an extra copy. I did not put one in your packet but I
8 have an extra copy.

9 THE COURT: Okay. Good.

10 APPLICANT'S EXHIBIT NUMBER ONE

11 ADMITTED INTO EVIDENCE

12 BY MR. SHAFFER:

13 Q: Do you recall having a suppression hearing during the
14 second trial?

15 A: We -- I would've gone back and read that, honestly, that
16 was the one issue that I thought we were here on and it's an
17 interesting record. I was surprised to read that we argued --
18 I argued the suppression motion or tried to argue the
19 suppression motion. Judge John kinda indicated that he had
20 ruled on it but that he would rule on it again -- he would
21 rule on it again at the close of the State's case. And that
22 was exactly what happened. We -- and I didn't see in the
23 transcript where the drugs were ever admitted into evidence
24 but I did argue that they shouldn't have been. And, you know,
25 with the understanding and raising it to the Judge's attention

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RUSSELL B. LONG - BY THE COURT

12

1 that we had this suppression motion in full once and here we
2 were again under the same set of facts. And then, of course,
3 he ruled against me at the close of the State's case.

4 Q: I have no further questions.

5 BY THE COURT:

6 THE COURT: Mr. Long, do you feel as though you were able
7 to point out the differences in what their position was in the
8 mistrial versus the second trial?

9 A: Definitely, we made, you know, questioned the officer
10 about, didn't you just testify here last week and say that --
11 and I've even got in my file that -- I saw my notes, actually
12 trial notes, where I had, you know, sort of a -- you know,
13 this trial, second trial differences brought up and certainly
14 brought up in closing and everything.

15 THE COURT: So, you felt like you were able to set out
16 the differences between their position in the second trial
17 versus the first trial?

18 A: I definitely did.

19 THE COURT: And did you argue that before the jury?

20 A: I did, yes, sir.

21 THE COURT: Do you think that having the transcript
22 itself would've made a tremendous amount of difference?

23 A: Judge, again, I'm gonna be honest, I wish I could say yes
24 because I want to help Danny, I really do, I think you can
25 probably tell that but I doubt it. I doubt that the -- that

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RUSSELL B. LONG - BY THE COURT

13

1 the -- you know, this was the -- this was one officer, Officer
2 Darryl Williams, you know. It was -- it would've been --
3 there were slight differences in his testimony and I pointed
4 out probably the most important one that, you know, and raised
5 officer safety in the second but those were issues for the
6 Judge during the suppression motion more so than jury issues.
7 You know, that's not a jury question really or even ---

8 THE COURT: Most juries don't want to hear that.

9 A: --- a concern in my mind for my jury trial going. It was
10 more along the lines of a suppression motion and even though
11 Judge John handled the suppression motion the way he did
12 during the second trial, you know, he was -- he was clearly
13 taking the first suppression motion and my new arguments on
14 the new testimony and the difference in testimony, he clearly
15 took all that into consideration before he ruled to suppress
16 the cocaine in the case.

17 THE COURT: All right.

18 Mr. Shaffer, you're recognized.

19 MR. SHAFFER: Thank you, Your Honor. There is -- Court's
20 indulgence. Perhaps, Mr. Thomas, might want to go ---

21 THE COURT: Are you done is what I'm asking?

22 MR. SHAFFER: Your Honor, there might -- I'm done with my
23 direct. There might be a couple of follow-up questions.

24 THE COURT: Okay. Well, I was asking, are you through
25 with your direct?

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RUSSELL B. LONG - CROSS BY THOMAS

14

1 MR. SHAFFER: Yes, Your Honor.

2 THE COURT: Very good.

3 Mr. Thomas?

4 MR. THOMAS: Thank you, Your Honor. May it please the
5 Court.

6 CROSS EXAMINATION OF RUSSELL B. LONG BY MR. THOMAS:

7 Q: Mr. Long, I just want to reference you to a couple of
8 things in the transcript here. May I approach, Your Honor?

9 THE COURT: Yes.

10 A: I've got a -- are you talking about the actual trial?

11 Q: Yes. The transcript of the trial.

12 A: I have it here. If you'll just give the page number and
13 we'll get right to it.

14 Q: If you look on Page 84, starting about Line -- about Line
15 14 on Page 84. Do you recall Judge John specifically talking
16 about how he recalled the testimony being different in the
17 first trial?

18 A: Yes

19 Q: Okay. And do you recall -- skip ahead a little bit, Page
20 180, starting on about Line 6. Do you recall Judge John
21 talking the differences in the State and the United States
22 Constitution?

23 A: I don't recall that, but I read it here, yes.

24 Q: You discussed the search issue with Mr. Brown?

25 A: Oh, yes.

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RUSSELL B. LONG - REDIRECT BY SHAFFER

15

1 Q: And at the second trial, the first trial was just still
2 fresh in your mind?

3 A: There's no doubt about it. Fresher, really, you know,
4 when you get a chance to play the first quarter of a game and
5 then come back and start the game all over again, you get a
6 new first quarter, you've got a better understanding about --
7 especially when you're defending, you know, how are they gonna
8 present this, what are they gonna say. You don't really know
9 until you get that officer's first testimony exactly what was
10 in his mind and what he's gonna say to the jury and then --
11 so, you really get a better, you know, it was -- I almost
12 looked at it and I remember talking to Danny about it kind of
13 like a gift, you know. We get a look at that he's gonna say
14 and how he's gonna say it and be ready to deal with it in a
15 better way, which -- I actually felt like it was an advantage,
16 but I can see where not having that transcript there to waive
17 around could be seen as a disadvantage.

18 Q: But at the time, you didn't feel a need to order it at the
19 time?

20 A: I did not.

21 Q: Okay. Thank you.

22 THE COURT: Redirect?

23 MR. SHAFFER: Yes, Your Honor.

24 REDIRECT EXAMINATION OF RUSSELL B. LONG BY MR. SHAFFER:

25 Q: Even though the Court might've mentioned the South

1 Carolina State Constitution, did you ever make a specific
2 objection under the South Carolina Constitution?

3 A: I don't remember doing that and I've read -- I've looked
4 through the transcript -- I'm not gonna tell you I sat here
5 and read the full transcript but I tried to, you know, when
6 this many years go by and you work on different cases every
7 day, even though I think I remember almost everything about
8 Danny's trial, there are things that you have to refresh your
9 mind on. And, so, I've done that. I've scanned through there
10 and I don't see anywhere in the transcript where I did. And
11 to be honest with you, I don't ever recall in practice at
12 making a different suppression arguments for state and federal
13 constitutional issues. I don't know if I've ever actually
14 split those out in any trial.

15 Q: And the jury asked the question at the end of the case,
16 and I'll refer you to, I guess it's around 255 of the
17 transcript. Do you have that?

18 A: Yes, sir.

19 Q: What was the question that they had asked about? Do you
20 recall?

21 A: They wanted to hear a playback of testimony of Officer
22 Williams. The transcript says, Solicitor, Mr. Long, we have a
23 note from the jury regarding the police officer's testimony.
24 I responded to them in writing as we discussed that they had
25 heard all the evidence, that I could not answer the question.

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RUSSELL B. LONG - REDIRECT BY SHAFFER

17

1 I honestly don't remember the question. Is it a part of the
2 Court's record?

3 Q: I don't think it made it into the record on appeal but I
4 believe it was a Court's exhibit.

5 A: And then we -- they -- then they played the testimony
6 again, the Court Reporter played the testimony for the jury.
7 I don't -- I honestly don't remember the question. I might
8 have in my trial notes, surely I would somewhere in there but
9 if it's a Court's record, we would have it.

10 Q: After you had not -- I apologize -- after you lost the
11 suppression motion, after the drugs came in in front of the
12 jury, what was your strategy and what did you argue to the
13 Jury as to why he should not be convicted?

14 A: Well, you know, we didn't know whose duffle back it was.
15 The duffle bag -- Danny was removed from the vehicle and the
16 duffle bag was left in the vehicle. And I -- again, I need to
17 -- I can't remember if the driver of the vehicle was still in
18 the vehicle, I think he was, actually. I think my testimony
19 earlier might've been wrong. That the officer actually took
20 Danny out of the car first and placed him in detention and
21 left the duffle -- left the vehicle with the driver in the
22 vehicle, that's more -- that's what happened. And, so our
23 position was Danny was taken out of -- Danny got a ride with
24 this guy, that was the guy's testimony, I remember, Danny
25 asked for a ride, got in the car and then the question

1 would've been whose duffle bag was it and it's at least a
2 fifty-fiftier, and obviously, the fellow testified, it was a
3 codefendant and represented by Barbara Pratt, but that
4 would've been the only, you know, what's -- because this was
5 clearly, you know, if you had to break up part of the trial
6 and say, okay, what are the issues here, ninety percent of
7 this thing was pretrial suppression motion and does this come
8 in, was this a bad search or not. And then the last part was,
9 whose bag is it. There were other identifiers and indicators
10 that caused us problems with the bag. But that was the only
11 thing left for a jury is, you know, whose bag was it and even
12 if it was Danny's bag, the other guy had a little -- at least
13 a moment of access to it before the officer took it into
14 custody.

15 Q: All right. So, there was a question of whether the bag
16 stayed in the car or Danny got taken out of the car?

17 A: Yes.

18 Q: And had you been able to impeach him with prior
19 inconsistent testimony in front of the jury, do you think that
20 that might've helped your issue involving whether or not the
21 bag was in the car at the time?

22 A: If his -- I don't remember or recall, and you've got those
23 two transcripts so maybe you can tell me, but I don't remember
24 or recall if that was a difference in the two testimonies, bag
25 in the car or bag out of the car.

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RUSSELL B. LONG - REDIRECT BY SHAFFER

19

1 Q: Okay.

2 A: If it was, then yeah.

3 Q: All right.

4 A: And if I failed to raise that, even without the transcript
5 is something I -- if it was, then I would've raised in
6 argument at least.

7 Q: Okay. No further questions.

8 THE COURT: All right. You may step down.

9 A: Thank you, Judge.

10 MR. SHAFFER: Court's indulgence for about thirty
11 seconds.

12 THE COURT: Yes.

13 MR. SHAFFER: Applicant would call Danny Cortez Brown.

14 THE COURT: Yes, sir. Please come forward.

15 MR. SHAFFER: Your Honor, may he take a transcript up
16 there with him?

17 THE COURT: He can.

18 MR. SHAFFER: Thank you.

19 THE COURT: Yes, sir. Please come forward and place your
20 left hand on the Bible and raise your right hand as the Clerk
21 administers the oath.

22 DANNY CORTEZ BROWN, HAVING BEEN DULY
23 SWORN, TESTIFIES AS FOLLOWS:

24 THE COURT: Have a seat in that witness chair, pull up
25 real close to that microphone, speak loudly, clearly and

1 slowly in order that we can hear everything that you've got to
2 say. Let's start with your full name, please, sir.

3 MR. BROWN: How you doing this morning, Your Honor?

4 THE COURT: Doing good.

5 DIRECT TESTIMONY BY MR. BROWN:

6 MR. BROWN: Danny Cortez Brown. Just like to state a
7 little -- like Russell has said, me and him have been
8 childhood friends since we were little. He is my quarterback,
9 I was a receiver, his dad was our coach. When I finished
10 playing for his dad, his dad came to me and said, if you ever
11 needed me for anything in your life, come to me. And this was
12 the first time I needed his dad and his dad wasn't there for
13 me because he had passed. So, I left that burden onto his
14 son, Russell.

15 Russell did a great job in my trial. We all know trial
16 lawyers do good jobs but there sometimes they miss certain
17 things. And he missed a few things that my lawyer addressed
18 such as not having -- he had a suppression hearing during my
19 trial but I didn't have a pretrial suppression hearing. I
20 actually was -- had a warrant out for my arrest because he
21 wasn't in contact with me. He got in contact me, took me in
22 front of the Solicitor and got the bench warrant lifted
23 because of him not getting in contact to me to let me know
24 that I had roll call because I never went to not one roll
25 call.

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DANNY CORTEZ BROWN - DIRECT TESTIMONY

21

1 THE COURT: Right.

2 MR. BROWN: And once the trial started, he came and he
3 asked me how we gonna win this case, they found the drugs in
4 your bag. I said I understand that, the bag is mine, I
5 claimed the bag but the drugs in the bag are not mine. All
6 right. He stated that the beer can was with the driver, I was
7 the one with the beer can. The officer saw me with the beer
8 can. He comes to the driver's side of the car, talks to me
9 through the driver's side of the car, sees -- they come around
10 to my side of the car, opens the car, takes me right out the
11 car, pats me down, takes me to the patrol car and puts me in
12 the patrol car. All this time, my bag was still in the car.
13 He doesn't go back and get that bag until he goes back and
14 gets -- he doesn't go back and get that back until he goes
15 back to the car. All this time, the driver is still in the
16 driver seat, okay. He tries to raise the safety issue in the
17 second trial, which he never raised in the first trial. And
18 I'll read Page 83, Line 21, where the Judge addresses, he
19 says, all right, well, let's look at the facts here as
20 testified. The officer testified that when he gets to the
21 passenger side of the vehicle, says he observes the bag. Gets
22 to the passenger side of the Defendants, get the Defendants
23 out of the vehicle, arrests and handcuffs and puts him in car.
24 Now, he testifies to two different things. One, that he then
25 got the bag and put it on the sidewalk but then he also said

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DANNY CORTEZ BROWN - DIRECT TESTIMONY

22

1 when he was arresting the Defendant, he got the bag, put it on
2 the sidewalk. There was no doubt that the bag was on the
3 sidewalk and he hadn't looked at it at all when he put the
4 Defendant in the patrol car. The Defendant was handcuffed,
5 and in the patrol car, couldn't get out, and the bag was on
6 the sidewalk. He testified this time that he clearly, and
7 I'll say this for a fact, he clearly did not testify to this
8 at his previous testimony under oath. And this time, the fact
9 that I'm talking about right now, he said this time that it
10 was an unknown bag, there might be a safety issue, there might
11 be a weapon, it might pose a threat. The officer never at any
12 point at this time mentioned anything like this in his
13 previous testimony under oath when the Court declared a
14 mistrial. He never said anything about this. In his prior
15 testimony under oath, all he said was he secured the bag, put
16 it on the sidewalk, put the Defendant under arrest, in his car
17 and then he went back and opened up the bag, didn't give any
18 -- Mr. Hixson, which was prosecutor at the time, tried to
19 intervene, he didn't get one word in before the Judge cut him
20 back off, he said did, the Judge came back in and said no, no,
21 sir. That is clearly what he said and there is no doubt about
22 that what he said before. He never ever said anything that,
23 in his previous testimony, because I made a note of it when I
24 heard this matter before, because I saw this issue coming up.
25 He now in his testimony before the Court has raised the issue

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DANNY CORTEZ BROWN - DIRECT TESTIMONY

23

1 about the bag safe issue, weapons posing a threat. Even with
2 that, you've got a bag us on the sidewalk, he goes over,
3 unzips the bag, rumbles through it, sees a Fritos bag that is
4 open but crumbled shut. Opens up the Fritos bag and sees what
5 he believes to be drugs. All during this point in time, the
6 driver of the vehicle is not under arrest. The driver of the
7 vehicle is on the other side of the car. He was actually
8 still in the driver seat. So, when you take me to the police
9 car, come back, with a guy sitting in the driver's seat and
10 you're going to try to raise safety issues. There's no way he
11 was raising the safety issue. And then the second trial, he
12 comes in raises the safety issue. The issue that I'm talking
13 about with the testimony and the conflict and everything about
14 the jury wanting -- they wanted to know when the door was
15 opened and when the door was shut and when that bag was left
16 in that car. They wanted to know if the bag was left in the
17 car when he took me out of the car or was the bag left in the
18 car when he took me out, closed the door and then went back
19 and put me in the patrol car. Okay. I feel as though my
20 lawyer should've objected to his testimony. His testimony,
21 the whole testimony came into play after the mistrial. I felt
22 my lawyer should've objected to his testimony because he
23 changed the whole testimony. And the Judge had a problem with
24 it, he had a note, he made a note about that issue and I feel
25 as though my lawyer should've had an issue with it. That's

1 the one issue. In the end the Constitution that he brought up
2 as far as the South Carolina Constitution and him not raising
3 the South Carolina Constitution that gives you protection even
4 ---

5 MR. SHAFFER: And, Your Honor, is that sufficient, I
6 mean, did you have any questions that you wanted me to ask?

7 THE COURT: I think I have a good understanding of what
8 transpired. Do you have any further questions?

9 MR. SHAFFER: No, Your Honor, I think I can do the rest
10 with briefing.

11 THE COURT: All right. Cross examination?

12 MR. THOMAS: No cross examination, Your Honor.

13 THE COURT: All right. You may step down. Thank you,
14 sir.

15 MR. SHAFFER: Applicants would rest, Your Honor.

16 THE COURT: Be glad to hear from the State. Do you have
17 anything else you would like to tender?

18 MR. THOMAS: Nothing to add, Your Honor. I'd just ---

19 THE COURT: I would like to hear what you have to say
20 about the merits of the application with specificity.

21 ARGUMENT BY MR. THOMAS:

22 MR. THOMAS: Yes, Your Honor. As far as the first
23 allegation about the search violating the South Carolina
24 Constitution, number one, I would just say that Judge John did
25 clearly to into consideration, he talked about it, that was on

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ARGUMENT BY THOMAS

25

1 I believe Page 180 or thereabouts in the transcript. So, I
2 guess -- that could be -- a direct appeal issue could've been
3 raised at that time and would not be proper in this context.

4 As to the merits of it, I'm not aware of any case law. I
5 think Judge John outlines it pretty well when he talks about
6 it. It's always been my understanding that the South Carolina
7 constitutional provisions relate to search and seizures are
8 basically coterminous with the United States Constitution. I
9 don't think that there are any extra protections afforded by
10 the South Carolina Constitution that aren't afforded by the
11 United States Constitution. So, I would just submit that
12 again, it would be violative, I don't think there's any
13 question about that, but then we have *Arizona v. Gant* and
14 *Melton* and all those cases that basically say we're not going
15 to apply that retroactively. In this case, the case law at
16 the time the stop happened, it was allowed, the officer was
17 allowed to do that. Regarding the second issue, about failing
18 to request a continuance to get the transcript, I think we
19 have here, Mr. Long's testimony was the case was fresh in his
20 mind, he remembered what the testimony was. He thought about
21 getting the case continued but not necessarily to get a
22 transcript but at the end of the day he said he didn't think
23 the transcript would have helped him any. And I think that's
24 pretty clear from the fact that Judge John clearly remembered
25 the prior testimony. Judge John clearly took issue with the

1 officer changing his testimony. And, again, I -- as far as
2 the merits of it, I would just submit that the officer added
3 stuff, added issues in his testimony about officer safety.
4 That still doesn't include search incident to arrest, just
5 evidence of the crime. Even if we were to disregard the
6 additional justification for the search, the new justification
7 if you will, there's still the original justification which
8 was the search incident to arrest. Judge John clearly knew
9 about this and it was an issue for the judge, not so much for
10 the jury, so again I don't think -- I understand the case law
11 says you can be deficient for failing to get a transcript of
12 the mistrial but you also have to show prejudice and I think
13 in this case he hasn't shown prejudice because Judge John
14 clearly took that into consideration.

15 The third issue, I'm not sure -- I have as failure to
16 request a suppression hearing and there was clearly a
17 suppression hearing in this case. It takes up a large portion
18 of the transcript. It's something that he works through, so I
19 don't know that there is any merit to that.

20 THE COURT: You're saying that there was actually a
21 suppression hearing in the second trial?

22 MR. THOMAS: Absolutely, Your Honor. That, from what I
23 have, that starts on Page 81. And I think they let some of
24 the testimony -- the way Judge -- I think the way it happened,
25 Judge John clearly had heard the suppression hearing at the

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ARGUMENT BY SHAFFER

27

1 first trial, he knew what the testimony was gonna be, so he
2 let them put the testimony up and then made a -- they had
3 arguments on it at that point. And that, that's -- it's
4 pretty clear on the record --

5 THE COURT: Did that actually take testimony in the
6 second trial or just argued it?

7 MR. THOMAS: Absolutely.

8 THE COURT: So, they had the same testimony again?

9 MR. THOMAS: Absolutely.

10 THE COURT: Oh, okay.

11 MR. THOMAS: Well, aside from the differences
12 highlighted.

13 THE COURT: Right. Yes, sir.

14 ARGUMENT BY MR. SHAFFER:

15 MR. SHAFFER: Your Honor, I would actually -- really
16 briefly, first of all, I believe the South Carolina
17 Constitution involving search and seizures is more protective
18 than the federal Constitution. I think there's good cases I
19 would point out and I think they also had -- there is
20 additional language included which I will spell out a little
21 bit more in my brief. Furthermore, related to the *Gant* issue
22 and whether or not it's retroactive, obviously, they found
23 that *Gant* was not retroactive in this specific case. That
24 being said, the -- our position is, is that *Gant* wasn't a
25 change in South Carolina law. Our position is, is that prior

1 to that, that same search under South Carolina law would've
2 been inappropriate. So, even if, even if prior to *Gant* and
3 even if at the time of this trial, the Fourth Amendment, as
4 interpreted under South Carolina Courts was the same as the, I
5 guess, as Article -- the same as the South Carolina
6 Constitution, Article I, Section 10. Even if it was the same
7 at the time of this trial as interpreted by South Carolina
8 Courts, I would think that the South Carolina Court
9 interpretation would be this would be an improper search at
10 the time. You know, obviously, when you're dealing with cases
11 throughout the country, as the US Supreme Court deals with,
12 some areas of the country might have one position on how a
13 search -- of whether or not the search violates the
14 Constitution. Other areas might have another. And their
15 position is, is that it was a new rule under the -- under the
16 Fourth Amendment jurisprudence. Our position is, is that a
17 South Carolina Court prior to this, would have interpreted it
18 the exact same way as it is an impermissible search. And I
19 believe that certainly if we were looking at it purely in a
20 state law point that that would be it, that's if you're
21 looking at only under the state law jurisprudence prior to
22 *Gant* that this would be inappropriate. Your Honor, the
23 attorneys mentioned that it might be a direct appeal issue.
24 We actually take issue with that as well because obviously he
25 said he never made the objection. In order for it to be an

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ARGUMENT BY SHAFFER

29

1 appeal issue, it has to be raised and ruled upon. He never
2 once cited the State Constitution, trial counsel did not. He
3 never once said, Judge, we are also including our objection
4 under the South Carolina Constitution. We take issue with
5 your sua sponte reference to the South Carolina Constitution.
6 He never said anything like that. All the, you know, all the
7 -- all that happened was the Judged referenced the South
8 Carolina Constitution. That's inadequate grounds to raise a
9 direct appeal by Appellate Counsel. You can't raise that on
10 direct appeal. As such, I would argue that is properly
11 brought now as a PCR issue.

12 THE COURT: Anything further from the State?

13 MR. THOMAS: Nothing to add to that, Your Honor.

14 THE COURT: I think I have a pretty good understanding of
15 what the issues are. I don't really think it's necessary to
16 have a brief. Is there anything else you want to tell me with
17 regard to the law?

18 MR. SHAFFER: Your Honor, I would just put forth the
19 position that, you know, obviously that the South Carolina
20 Constitution is more restrictive. I can cite to, even though
21 it's not applicable in this particular situation, a good
22 discussion of it would be in *State v Weaver*, 374 S.C. 313,
23 2007 South Carolina Supreme Court case. There is also
24 involving the way traffic stops were interpreted at the time,
25 I would cite to South Carolina Court of Appeals case which is

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BY THE COURT

30

1 *State v. Ricardo* and it dealt with a traffic stop at the time
2 as well. It's a 2005 Court of Appeals case. It's 367 S.C.
3 84. Your Honor, I would -- I actually could probably lay it
4 out in an argument to but if the Court is ready to rule, I
5 certainly -- I believe I have properly made a record.

6 THE COURT: Very good. Anything further from the State?

7 MR. THOMAS: Nothing further, Your Honor.

8 BY THE COURT:

9 THE COURT: All right. Mr. Brown, I'm going to take
10 these matters under consideration. I will make a ruling on it
11 and you'll receive an order and your lawyer will discuss with
12 you about that. Good luck to you.

13 MR. BROWN: Yes, sir. Thank you, Judge.

14

15 (ADJOURNED - 11:07 A.M.)

16

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24

25

September 21, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
	)	
	)	
DANNY CORTEZ BROWN, #317608	)	2013-CP-26-5621
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan Michael Shaffer, Esquire
4701 Oleander Drive
Myrtle Beach, SC 29577

DATED this 6th day of July, 2015.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Danny Cortez Brown, #317608,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-26-5621

ORDER OF DISMISSAL

HORRY COUNTY
JUN 26 PM 1:33
MELANIE HUGHES-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 14, 2013. Respondent made a timely Return on or about June 11, 2014. The Court convened an evidentiary hearing into the matter on May 12, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Russell B. Long, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings, and portions of the transcript from Applicant's initial trial that ended in a mistrial. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In March 2006, the Horry County

copy

Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-26-1349). Russell B. Long, Esquire ("trial counsel"), represented Applicant. On September 7, 2006, Applicant proceeded to trial before the Honorable Steven H. John and a jury. Judge John declared a mistrial after beginning testimony in that trial. On September 12, Applicant again proceeded to trial before Judge John and a jury. On September 13, 2006, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal, and Elizabeth A. Franklin-Best, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals reversed Applicant's conviction on June 14, 2010. State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The Court of Appeals denied the State's petition for rehearing on September 24, 2010, and the South Carolina Supreme Court granted the State's petition for writ of certiorari. The Supreme Court reversed the Court of Appeals and affirmed Applicant's conviction on December 19, 2012. State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). The Supreme Court denied Applicant's petition for rehearing and the remittitur was returned to the circuit court on January 24, 2013. The United States Supreme Court denied Applicant's petition for writ of certiorari on June 3, 2013.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel for failure to raise the South Carolina Constitution"
 - a. "Failure to raise the South Carolina Constitution"
2. "Ineffective assistance of counsel"

a. "Failure to argue suppression motion before the state introduce evidence"

At the evidentiary hearing, Applicant proceeded on the allegations in his application, as well as an allegation of ineffective assistance of counsel for failing to request a continuance to obtain a transcript of the prior trial.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Trial counsel testified he represented Applicant for six to eight months prior to trial. He testified his trial strategy was to attempt to suppress the drug evidence because of an illegal search. He recalled discussing this strategy with Applicant. Trial counsel testified Applicant's first trial on these charges ended in a mistrial. He recalled discussing with Applicant the possibility of seeking more time before the re-trial, but did not think about ordering a copy of the transcript from the mistrial. He testified he did not think he needed a copy of the transcript because the re-trial occurred soon after the mistrial and the mistrial was fresh in his mind.

Trial counsel testified the arresting officer's testimony was different at the second trial. He recalled the officer did not testify at the first trial that he was searching the vehicle for reasons of officer safety, but did in the second trial. However, he also testified Judge John recalled the officer's testimony in the initial trial and pointed out the testimony had changed.

Trial counsel testified he raised the issue of the changing testimony to Judge John when arguing to suppress the drugs.

Trial counsel testified he did not recall making an objection to the search under the South Carolina Constitution. He testified he generally does not make separate suppression arguments under the United States and South Carolina constitutions. However, he recalled Judge John ruling the search and seizure of the drugs did not offend the South Carolina Constitution.

Applicant testified trial counsel did not have a pre-trial suppression hearing in the second trial. He also testified the officer lied in his testimony at the second trial, and trial counsel should have objected to his testimony.

B. Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Because the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland,

466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. South Carolina Constitution

The Court finds Applicant failed to meet his burden to prove trial counsel ineffective for failing to argue the drugs should be suppressed based on the South Carolina Constitution. Applicant posits trial counsel should have argued the drugs should have been suppressed because the search of his duffel bag violated the privacy provision of S.C. Const. art. I, § 10, which states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against [...] unreasonable invasions of privacy shall not be violated[.]" However, the record indicates trial counsel did argue, on numerous occasions, that Applicant had a privacy interest in the bag in which the drugs were found. (Sept. 12, 2006 Trial Tr. p. 148, line 10; p. 149, lines 14-17; p. 152, lines 6-7; p. 163, lines 6-13). 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. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it,

but it must be clear that the argument has been presented on that ground.” (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001))). Furthermore, Judge John cited the South Carolina Constitution when denying the motion to suppress. (Sept. 12, 2006 Trial Tr. p. 180, lines 6-24). Because the right to privacy was raised to and ruled 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. See S.C. Code Ann. § 17-27-20(b) (post-conviction relief “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”).

Regardless, the Court would find the search in this case did not violate the South Carolina Constitution. Although the South Carolina Constitution may afford a greater degree of privacy protection than the United States Constitution, State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), it still requires the reviewing court to analyze the reasonableness of the invasion of privacy. See State v. Drayton, 411 S.C. 533, 549, 769 S.E.2d 254, 263 (Ct. App. 2015), reh'g denied (Mar. 19, 2015) (requiring defendant to show he had a reasonable expectation of privacy to challenge search). At the time of Applicant’s trial,¹ authorities were allowed to search his bag once he was placed under arrest. New York v. Belton, 453 U.S. 454, 460 (1981). Thus, the search of Applicant’s bag was not an unreasonable invasion of privacy. Id. at 461 (“[T]he justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may

¹ The Court notes the law regarding searches incident to arrest changed after Applicant’s trial. Brown, 401 S.C. at 94, 736 S.E.2d at 269.

have.”). Because the search of Applicant’s bag was not unreasonable under the law at the time of the arrest, it did not offend the privacy provision of the South Carolina Constitution. Therefore, Applicant has not shown he was prejudiced by trial counsel not further arguing to suppress the drug evidence on this ground.

2. Suppression Motion at Second Trial

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to make a suppression motion at the second trial. The record clearly indicates trial counsel moved to suppress the drug evidence at the second trial. (Sept 12, 2006 Trial Tr. p. 81). Judge John indicated he would take the motion under advisement and rule on it at the close of all of the evidence. (Sept 12, 2006 Trial Tr. 87, line 21-p. 88, line 1). Although the motion hearing was not held before trial, all issues relating to the motion were addressed. Accordingly, the Court finds trial counsel was not deficient in this regard.

3. Mistrial Transcript

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to move for a continuance to obtain a copy of the transcript from the prior trial. The Court finds very credible trial counsel’s testimony he did not think he needed a copy of the transcript because the trial was fresh in his mind. The Court notes the initial trial occurred on September 7, 2006, and the retrial occurred on September 12, 2006. Counsel’s memory of events five days earlier was presumably sufficient for him to prepare for the second trial. Accordingly, the Court finds trial counsel articulated a valid strategic reason for not asking for a continuance to request a transcript from the mistrial. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (“Where, as here, counsel articulates a valid reason for employing certain

strategy, such conduct will not be deemed ineffective assistance of counsel.” (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Furthermore, the fact the re-trial occurred five days later militates against a finding Applicant was prejudiced by not having a copy of the mistrial transcript. See Harris v. State, 377 S.C. 66, 78, 659 S.E.2d 140, 146 (2008) (no prejudice from lack of mistrial transcript where “counsel believed the events of the first trial were fresh in his mind during the second trial”). Furthermore, Judge John was clearly aware of the differences in testimony between the first and second trial. (Sept 12, 2006 Trial Tr. p. 84, line 9-p. 85, line 10). Therefore, Applicant has not shown how a copy of the mistrial transcript would have changed Judge John’s ruling on the suppression motion.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established by a preponderance of the evidence any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

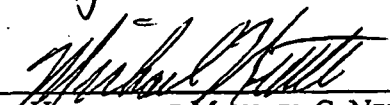
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel’s receipt of written notice of entry of judgment to secure the appropriate

appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 16 day of June, 2015.


 THE HONORABLE MICHAEL G. NETTLES
 Presiding Judge

Winn, South Carolina

DOCKET NO. 2006-GS-26- 1349
 THE STATE OF SOUTH CAROLINA
 COUNTY OF HORRY
 SRH 79036-2
 COURT OF GENERAL SESSIONS
 MARCH TERM 2006

[Signature]
 'THE-STATE
 VS

DANNY CORTEZ BROWN M/B
 [REDACTED]
 MYRTLE BEACH, SC 29577
 DOB: [REDACTED]
 SS#: [REDACTED]

ARREST WARRANT NO. CAW200602012
 CDR: 0280 844-53-0370(e)(2)(c)
 DOA: 10-07-05

ACTION OF GRAND JURY

TRUE BILL

[Signature] MAR 30 2006
 Foreman of Grand Jury

VERDICT
[Signature]
 9/13/06

Foreman of Petit Jury Date:

ATTORNEY: RUSSELL LONG

INDICTMENT FOR:

TRAFFICKING COCAINE (100-200 GRAMS)

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

[Handwritten notes and signatures at bottom of page]

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:
TRAFFICKING COCAINE (100-200 GRAMS)

At a Court of General Sessions, convened on March 30, 2006, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE (100-200 GRAMS)

CDR: 0280 §44-53-0370(e)(2)(c)

That Danny Cortez Brown, did in Horry County on or about October 6, 2005, knowingly sell, deliver, purchase or bring into this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of more than one hundred grams but less than 200 grams, the same being a controlled substance all within the meaning of Section §44-53-370, et. seq., S. C. Code of Laws (1976), as amended, such possession not having been authorized, and being in violation of Section §44-53-370(e)(2)(c), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. Gregg Seal
SOLICITOR