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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.

APPENDIX

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DANNY CORTEZ BROWN,

APPELLANT

RECORD ON APPEAL

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*****EXHIBIT'S HAVE BEEN TRANSPORTED TO THE COURT OF
APPEALS. *****

1 Q. Good afternoon, sir.

2 A. Good afternoon.

3 Q. What do you do for a living?

4 A. I am a police officer with the Horry County Police
5 Department.

6 Q. And about how long have you done that?

7 A. I have been with the County for about two years. I was
8 with Conway before that.

9 Q. And what is your position with the Police Department
10 now?

11 A. Currently I am in the Training Division. I train other
12 officers on primarily computer equipment and programs. I do
13 some minor figuring, and I also do patrol, still, about half
14 and half.

15 Q. So you were working for Horry County back in October
16 6th of 2005?

17 A. Yes sir.

18 Q. Could you please tell -- on that day, did you have an
19 opportunity to come across Mr. Danny Cortez Brown?

20 A. Yes sir.

21 Q. And could you please tell the jury about the
22 circumstances that gave rise to you coming into contact with
23 him.

24 A. Okay. On that day, October 6, 2005, I was on patrol in
25 the Myrtle Beach section of Horry County, and I was driving

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1 southbound on Kings Highway in the vicinity of 16th Avenue
2 South, I believe. I saw a -- I believe it was a Plymouth,
3 older model, 1972 yellow Plymouth, two occupants, right beside
4 me, and as I looked over at them I saw that the passenger was
5 drinking what appeared to be a beer, and upon seeing -- me --
6 as a passenger Mr. Brown was holding a beer, he took it,
7 tucked it down, appeared to be between his legs, and so I
8 initiated a vehicle stop at that time.

9 Q. Let me interrupt you briefly at that point.

10 A. Yes sir.

11 Q. You said that you were at Sixteen Avenue South in
12 Myrtle Beach?

13 A. Yes sir.

14 Q. Now, was that in Horry County?

15 A. Oh, indeed, I mean ---

16 Q. I just have to ask that question.

17 A. Okay.

18 Q. Now, could you give me a little detail, or give the
19 jury some detail about the circumstances surrounding that.
20 That's a pretty important point.

21 Were you in a marked patrol vehicle?

22 A. Yes sir. I was in -- basically dressed similar to I am
23 now, in a marked Horry County police patrol vehicle, yes sir.

24 Q. Now, what would you say the lighting conditions were
25 around that period of time?

1 A. Well, at that time it was -- like I said, it was around
2 seven o'clock, just a little bit thereafter. It was beginning
3 to get dark, as you say, but in my opinion it was still pretty
4 bright. My visibility was still high. I don't think the
5 street lights were on at that time. I'm not sure. But my
6 visibility was pretty -- I didn't have my headlights on yet.

7 Q. Now what relative position -- I think you indicated you
8 were driving up to the vehicle.

9 A. Yes sir.

10 Q. Could you please describe that in some more detail?

11 A. Okay. South Kings Highway has two lanes in either
12 direction. I'm in the left lane. This other vehicle was in
13 the right lane, and I was coming up from behind the vehicle,
14 and I basically came up just a hair shy of being parallel to
15 the vehicle. Upon coming up to the vehicle I could see
16 basically, kind of diagonally straight toward -- into the
17 vehicle. The vehicle has pretty large, long door, you know,
18 older two-door model car, where you have a lot of visibility,
19 because you have the large window opening. And, you know, as
20 I came up, then I saw it. Came up all the way, just about
21 parallel to them, looked over, you know, just to kind of
22 confirm, and then I backed off and initiated that stop.

23 Q. So did he make eye contact -- did the Defendant make
24 eye contact with you?

25 A. Yes sir.

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1 Q. Did he react when he saw you?

2 A. Like I said, initially upon seeing me -- and he had the
3 can in his hand, he looked back, we connected eyes, and his
4 eyes got real big like, you know, ut oh, and he put it down,
5 and then I went from there.

6 Q. Did you indicate you made a traffic stop at that time?

7 A. Yes sir.

8 Q. Please tell the jury about that.

9 A. Okay. Upon pulling behind that vehicle I initiated a
10 traffic stop. Basically I turned on my blue lights, and the
11 vehicle did stop there in the roadway. Upon the vehicle
12 stopping I approached the vehicle from the driver's side.
13 Like I said, there were two -- there was the driver and the
14 passenger. I chose the driver's side at that time for, you
15 know, just reasons of instinct, and upon approaching that
16 vehicle I primarily spoke with the passenger. The driver, you
17 know, he sat there kind of -- just not saying anything, and I
18 spoke with the passenger. I asked him about the beer I had
19 seen. I introduced myself, how are you guys doing; I'm an
20 officer with the Horry County Police Department; I see you've
21 got a beer over there; what kind is that, you know, I was
22 small-talking. He said, I -- I don't have a beer. Sure you
23 do; what's that between your legs. He pulls it up, and it was
24 a beer. I don't remember what -- exactly what kind it was,
25 but it was a beer. And so I commenced to talk and eventually

1 circled around the car to the passenger's side, and I asked --
2 I said, are there any more beers. He says, no. I said, are
3 you sure; let's see it; I'm going to be honest with you. I
4 said, okay, well, come on and step out; I want to see if
5 there's any more in there. And upon him stepping out of the
6 vehicle is when I went ahead and placed him under arrest for
7 open container, which is basically having an open beer in the
8 vehicle in South Carolina.

9 Q. Now, prior to removing him from the vehicle, asking him
10 to step out, I should say, did you observe anything in the
11 passenger floorboard area of the vehicle?

12 A. Yes sir.

13 MR. LONG: Object to the leading, Your Honor.

14 THE COURT: All right, Mr. Hixson, don't lead your
15 witness, sir.

16 MR. HIXSON: Thank you, Your Honor.

17 A. May I respond to that?

18 THE COURT: Ask -- ask another question, Mr. Hixson.

19 A. Okay.

20 MR. HIXSON: Thank you, Your Honor.

21 Q. Before asking him to come out of the vehicle, did you
22 observe anything in the vehicle?

23 A. Yes sir. Actually when I first approached the vehicle
24 from the driver's side -- and you know I'm looking in the
25 vehicle, trying to observe everything that's going on, as a

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1 safety issue -- I did observe a black -- what appeared to be a
2 black duffle bag on the passenger side floorboard, between the
3 legs of the passenger, and that's kind of why I wanted to get
4 over there on that side, and I kind of crossed over and the
5 whole time I'm sitting -- talking with him, and kind of
6 looking at the bag. It just appeared to be a closed black bag
7 at that time.

8 And as I go on I did get that passenger out of the
9 vehicle, and I did place him under arrest, placed the cuffs on
10 him and -- pardon me -- and then I did secure that bag and
11 take it and put it on the sidewalk.

12 Q. Did you ask him, Mr. Brown, anything about that bag?

13 A. I did. I asked him, I said, is this your bag, and he
14 said yes.

15 Q. All right. You indicated, I believe, you had placed
16 the Defendant under arrest.

17 A. I did.

18 Q. Could you please tell the jury more of what happened
19 during that period of time, and subsequent to that?

20 A. Okay. Of course I got him out of the car before
21 getting the bag out, and as he stepped out of the car, you
22 know, he is stepping -- just imagine, you know, a vehicle
23 right there in the roadway, and I'm basically -- there's not
24 too much room between the sidewalk and the car, basically.
25 I'm standing there. I can't recall whether I was up on the

1 sidewalk or actually in the street. But he steps out, and I
2 kind of placed him under arrest kind of quickly. I thought it
3 was a safety issue, because he looked like a pretty big guy,
4 and I didn't want to -- and being there was another subject in
5 there, if I had to go ahead and tangle with him I didn't want
6 to -- I wanted to make it quick, more or less. So he ---

7 Q. Why -- I apologize.

8 A. I'm sorry.

9 Q. Why did you remove the bag from the vehicle at that
10 time?

11 A. Because it is an unknown bag. It could -- as a safety
12 issue for me. It's a lot of options I have at that point, but
13 I would say, let me separate this bag from -- you know, there
14 could be anything there, a weapon, for instance, so I wanted
15 to separate that bag from the other person, because I didn't
16 know if it would pose a threat, so like I said, I placed it on
17 the sidewalk

18 And it was drizzling that day. It was -- just started
19 to drizzle, and it actually progressed into a rain as the time
20 went on, and there wasn't any street traffic in that vicinity.
21 As I said, it was just starting to get dark, and eventually
22 did, of course, and so throughout the whole duration of the
23 traffic stop I don't believe there was any other, you know,
24 outside people, other than when I did eventually call an
25 officer to the scene for backup, and then later they called

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1 the narcotics detective to the scene.

2 Q. Did you place Mr. Brown in your vehicle?

3 A. I did. After I got him out of the car I placed him
4 under arrest, and put that bag on the sidewalk, I did take him
5 back to my vehicle, and put him in the rear passenger
6 compartment.

7 Q. Okay.

8 MR. HIXSON: I would like to approach the witness, Your
9 Honor.

10 THE COURT: Yes sir.

11 Q. I'm going to show you what's already been marked as
12 State's Exhibit 1. It's not in evidence yet. Do you
13 recognize that item?

14 A. Yes sir.

15 Q. And what is that?

16 A. That looks like the bag that I'm just speaking about
17 that was sitting on the passenger's floorboard.

18 Q. Now, I notice that it doesn't appear that that's on the
19 sidewalk.

20 A. No, this bag -- excuse me -- this picture -- I believe
21 this picture was taken in our Horry County Police Department
22 in Detective Delpercio's office.

23 Q. And is that a fair and accurate representation of the
24 bag that you remember removing from that vehicle?

25 A. I would say so, yes.

1 Q. Now, when you first saw the bag what was -- I think you
2 indicated it was closed?

3 A. Yes sir.

4 Q. Could you please describe it's position -- or position
5 to the jury?

6 A. Like I say, it was in the passenger's side floorboard.
7 It was a -- had a zipper. I'm not exactly sure if it was
8 straight across or kind of, you know, smiley face or what have
9 you, but it was zipped shut. Upon finding -- you know, upon
10 securing him in the vehicle I returned back to the subject's
11 vehicle, basically, and I'm kind of talking to the driver,
12 kind of some small talk. I wanted to deal with him later, but
13 I just wanted to get a glance into the bag, so I did unzip the
14 bag, and look in. It was personal items like, perhaps
15 deodorant, undergarments, something to that effect, and there
16 was a bag of Fritos potato chips, corn chips, whatever --
17 however you -- and it was open, so it was kind of crumpled
18 shut, I believe, so I went and just opened it up to get a look
19 into the bag, and then I seen inside that bag a -- what
20 appeared to be a plastic bag with a white powdery substance,
21 which is -- you know, looks -- appears to be cocaine.

22 So at that time, you know, flags go up in my head. I
23 said, oh, so I just resecured it, zipped it back, didn't say a
24 word about it, started dealing with the driver of the vehicle
25 at this time.

1 MR. HIXSON: May I approach the witness also, Your
2 Honor?

3 THE COURT: Yes sir.

4 Q. Let me show you what has been marked for exhibit only -
5 - it's not in evidence yet -- as State's 2. Do you recognize
6 that?

7 A. Yes sir.

8 Q. Now, does that appear to be the substance that you saw
9 in that Fritos bag?

10 A. It appears to be.

11 Q. Now, when you first saw that, did it have that
12 packaging like that around it?

13 A. No.

14 Q. Okay. So what was the nature of the packaging again?
15 I know you already answered that question, but ---

16 A. It was a plastic bag, probably a -- you know, like
17 I'm -- I'm not sure what you call it, a little zip bag, but it
18 was a -- just a plastic bag. These are clearly evidence bags.
19 I'm familiar with them ---

20 Q. And you indicated ---

21 A. ---And it wasn't in this originally.

22 Q. You indicated you saw that inside that Fritos bag?

23 A. Yes sir.

24 MR. HIXSON: At this time the State would like to
25 publish -- we move State's 1 into evidence, Your Honor, at

1 this time.

2 THE COURT: Any objection?

3 MR. LONG: No sir.

4 MR. HIXSON: And we would like to publish that to the
5 jury, Your Honor.

6 THE COURT: Any objection to that?

7 MR. LONG: No sir.

8 THE COURT: State's 1 is in evidence without objection.

9 (PHOTO OF BLACK BAG ADMITTED INTO EVIDENCE AS STATE'S
10 EXHIBIT NUMBER 1.)

11 Q. Now, upon seeing what was in that Fritos bag, what did
12 you do at that time?

13 A. Like I said, upon seeing what was in that bag -- of
14 course what it appeared to be at that time -- I re -- I don't
15 know how I closed the bag, probably crumpled it, or whatever,
16 but I kind of -- I didn't even go in the bag with my hand. I
17 just kind of opened the bag and saw it, closed the bag, closed
18 the duffle bag back, left it there on the sidewalk, and then I
19 commenced to deal with the driver at this time, and eventually
20 I got his -- I asked for his driver's license, and ran a check
21 on that, and he did come up driving under suspension. His
22 license was suspended. So at that time he was placed under
23 arrest for that.

24 And at this time I already had called another unit, and
25 I had -- soon upon seeing that I radioed for the narcotics

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1 Detective, and Officer Delpercio is his name. He responded.
2 I'm not sure exactly what time it was.

3 Q. Now you indicated you radioed a narcotics officer?

4 A. Yes sir.

5 Q. And why, generally, would you do that?

6 A. It's just our practice, the Police Department practice,
7 that whenever I encounter something to -- that large amount of
8 drugs, you want to call a narcotics detective because he
9 specializes in that sort of thing. Similarly, if I were to be
10 called out to a homicide scene, or something like that. We
11 want to call a homicide detective so he can -- people
12 specialize in these different things.

13 Q. Now, at some point in time did Detective Delpercio
14 arrive?

15 A. Yes sir, he did. I'm not sure exactly what time it
16 was, but he came as fast -- as soon as he could.

17 Like I say, it was still light rain going on, and at
18 that -- upon his arrival I believe both subjects were in
19 police cars. One was -- Mr. Brown was in my car, and Mr.
20 Smith was -- who was the driver, was in another police car,
21 because another officer did come to the scene, and we put them
22 into separate vehicles.

23 Upon him coming I showed him the bag. I said, okay,
24 this bag appears to have some drugs in it, and then he took
25 custody of the bag.

1 Q. Now, prior to Mr. Delpercio, Detective Delpercio taking
2 custody of this stuff, did you maintain the integrity of this
3 bag?

4 A. Oh yes. As I said, I reclosed it immediately, and it
5 had no further contact from anyone, until Detective Delpercio
6 came on the scene.

7 Q. Did you tamper with that in any way?

8 A. No sir.

9 Q. Did you alter it's contents?

10 A. No sir.

11 Q. Did you protect it from everybody else, to make sure
12 that they couldn't do that?

13 A. Yes sir. Even once the other officer came on the scene
14 I told her, I said, we've possibly got some drugs in this bag;
15 I'm leaving it there on the sidewalk; just keep an eye on it
16 and protect, you know, the general security of the area, and
17 he said, hey, you know, I ain't got no problem; I don't want
18 to touch it; I don't want to be in your chain of custody. I
19 said, great. So -- and it stayed there the whole time.

20 Q. And you -- you turned custody of it over to Detective
21 Delpercio?

22 A. Yes sir, I did.

23 Q. Now prior to removing -- or during the period of time -
24 - getting back to try to reference you, when you were
25 discussing this with the Defendant, did you maintain kind of

1 visual surveillance? Did you see what was going on in the
2 car?

3 A. When I was talking with Mr. Brown?

4 Q. Right.

5 A. As I say, he stepped out the vehicle, and he -- in just
6 a normal way anyone, I guess, would step out of a vehicle. I
7 eventually placed -- well, I placed him under arrest pretty
8 quickly so if -- I mean, he had -- kind of had his back to me.
9 It wasn't totally with his back to me, but he kind of pivoted.
10 It's hard to explain but -- and I had to deal with him

11 directly. You know, I try to keep a visual what's going on on
12 the whole scenario because you have another subject in there,
13 but I can't honestly say that I watched him the whole time,
14 because Mr. Brown was my main point of interest at that time.

15 Q. Let me ask a direct question. Did you see the driver
16 of the car get into that black bag at any time?

17 A. I did not see that.

18 MR. HIXSON: I have no further questions for this
19 witness at this time, Your Honor.

20 Please ask -- answer any questions that Mr. Long may ask
21 you.

22 A. Yes sir.

23 THE COURT: Cross-examination, Mr. Long.

24 CROSS-EXAMINATION BY MR. LONG:

25 MR. LONG: Thank you, Your Honor.

DARYL WILLIAMS - CROSS BY LONG

33

1 Q. Officer Williams, did you know Danny Brown before you
2 met him on October the 6th, 2005?

3 A. Did I know him, sir?

4 Q. Yes sir.

5 A. No sir.

6 Q. Did -- you never -- you had never met him before?

7 A. No sir.

8 Q. Did you know any of his family, or his fiance, Ms.
9 Monica Brisban, before October the 6th, 2005?

10 A. I knew -- or since I know Ms. -- what's her name,
11 Brisbon?

12 Q. Brisbon.

13 A. I believe my -- I didn't know that was her last name,
14 but yes.

15 Q. Did you know she was engaged to Danny?

16 A. No sir.

17 Q. All right. Now, October the 6th of 2005, at 7:20 at
18 night, you were driving down Highway 17, southbound, correct?

19 A. Yes sir.

20 Q. And you would agree with me that, on October the 6th,
21 at 7:20, it's dark?

22 A. I would not say it's dark, no.

23 Q. And would you agree with me that the time had already
24 changed back at that point?

25 A. Like I say, I'm not sure on what day it does, but that

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1 sounds about right. But I recollect the day -- like it was a
2 year -- over a year ago, of course, but I can safely say it
3 was still enough light to see a beer can.

4 Q. Okay. Well -- and I understand you to say there's
5 still enough light, but I'm trying to figure out -- you said
6 it was still daylight and you didn't even have your headlights
7 on.

8 A. And I did not, no. It was ---

9 Q. Assuming it got dark right around -- right after five
10 o'clock -- because the time had changed, right? That's about
11 what time it gets dark ---

12 A. I'm not sure. I can't say that.

13 Q. You don't know. Well, let's -- we know it was 7:20
14 when you saw this car going down the highway ---

15 A. Okay.

16 Q. Right?

17 A. Yes sir.

18 Q. ---Because you reported that in your Incident Report,
19 right, 7:20?

20 A. Yes sir.

21 Q. So, at 7:20, with light drizzling rain, you say you
22 were in the left-hand lane, and this car was in the right-hand
23 lane, and you pull up beside it, and you were able to look
24 through the window, the driver's side window, and across to
25 the passenger window, and see a beer can in Danny Brown's

- 1 hand?
- 2 A. Yes sir.
- 3 Q. What color was the beer can?
- 4 A. It was silver.
- 5 Q. How many ounces?
- 6 A. I'm not sure.
- 7 Q. Was it one of the great big ones, or was it a regular
- 8 old beer can, twelve ounces?
- 9 A. I'm not sure. I -- if I had to guess, I would say a
- 10 smaller one, but I'm not sure.
- 11 Q. Was he holding it in his left hand or his right hand?
- 12 A. I believe it was his right hand.
- 13 Q. Okay. Did you bring the beer can with you here to
- 14 court?
- 15 A. No sir.
- 16 Q. Where is the beer can?
- 17 A. We didn't take it into evidence.
- 18 Q. You did not take it into evidence?
- 19 A. No.
- 20 Q. It's the reason why you stopped this car, and it's the
- 21 reason why you arrested Danny Brown. Why did you not take
- 22 that into evidence?
- 23 A. Because most of the time when we have a charge like
- 24 this we don't take that type of thing in evidence. It's -- I
- 25 knew it -- I knew it was beer; he knew it was beer, and he

1 affirmed, said yeah, I've got a beer, you know. I'm not even
2 sure if -- no, we did -- I did write him a blue ticket for it.
3 I want to say yes. But it was definitely the pretext for me
4 to make the stop. I would not have stopped him had he not
5 been drinking a beer can.

6 Q. I know. That's why I was wondering why you don't have
7 the beer can with you. You do not have it. Okay. The beer
8 can -- when you asked him about the beer can, and then he
9 finally pulled the beer can out, was it full, empty, half-
10 full, hot, cold? What was the condition of it?

11 A. It was not full. I want to say it was -- I want to say
12 it was still cool. Maybe it looked -- you could see some
13 condensation I believe. It wasn't full. It was -- I remember
14 when he pulled it up finally, and I kind of retrieved it, it
15 was crumpled a little bit, I guess from pressure on it.

16 Q. Okay. Now, when you retrieved it. When were -- where
17 were you standing when you retrieved the beer can?

18 A. On the passenger's side of the vehicle.

19 Q. Okay. So he held the beer can until you walked from
20 the driver's side back around to the passenger's side, right?

21 A. Yes. He kept it down between his legs.

22 Q. And before you did that you walked up to the driver's
23 side window, and the driver rolled his window down for you; is
24 that right?

25 A. I'm not -- I can't say for sure.

DARYL WILLIAMS - CROSS BY LONG

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1 Q. You didn't ask the driver for his driver's license and
2 registration?

3 A. Not at that time, no. I just told him, like, hey
4 driver; how are you doing; hold on for a minute; I'll deal
5 with you in a moment, and I commenced to talk with Mr. Brown.

6 Q. And then, without asking the driver any questions you
7 walked back around the back of the vehicle?

8 A. That is correct.

9 Q. In front of your vehicle, right?

10 A. Yes.

11 Q. Around to the passenger's side, right?

12 A. Yes.

13 Q. Now, you are in the right-hand lane of Highway 17
14 Business, 16th Avenue South, heading south, and there's a curb
15 there with the sidewalk, correct?

16 A. Yes.

17 Q. So did you ask Danny Brown to roll his window down, or
18 did he roll it down for you, or was it already down?

19 A. I don't recall.

20 Q. It was raining, right?

21 A. It was -- well, no, at the initial time of the stop it
22 was not raining yet. It was probably just very, very light
23 drizzle, if that, and like I say, it commenced to begin to
24 rain as time passed.

25 Q. So you don't know if you asked him to roll his window

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1 down, or if he rolled ---

2 A. You know what, let me -- let me clarify it. Actually,
3 upon driving -- when I first saw the two they -- I know for
4 sure the driver's side window was open. My windows were open.
5 I know that. And I looked over, that window was open, so it
6 even helped in the visibility, being able to see into that
7 car. Whether -- and so therefore, upon approaching the
8 driver's side it was already open. I can answer that. The
9 passenger's side, I don't recall. I want to say it was open,
10 because I don't recall having any obstruction in talking with
11 him from that side.

12 Q. So you walked over to the passenger's side -- and let's
13 assume that -- because we don't know for sure -- assume that
14 the window is down -- and you said what to Danny Brown?

15 A. I asked him about the beer can. Like I said, before I
16 went around I believe I said -- I asked him did he have any
17 more. He said no. Then I commenced to, you know, talking. I
18 said, well, you know, I want to see -- I want to -- what was
19 it? I can't remember the jargon, but basically I wanted to
20 find out was there any more beer cans, so then I asked him out
21 of the vehicle, yes sir.

22 Q. Okay. And he told you there were no more beer cans?

23 A. He did.

24 Q. And in fact, there were no -- there were none?

25 A. No, that was the only one.

1 Q. So did you reach in and get the beer can from him, or
2 did he hand it out to you?

3 A. I want to say neither, actually. I want to say I just
4 asked him out of the vehicle, and he probably had it in his
5 hand. Upon getting out of the vehicle probably placed it on
6 top of the car, or something like that. I don't recall
7 actually him handing me a beer, or ---

8 Q. So you don't know if he handed it to you; you don't
9 know if you took it from him?

10 A. I said he did not -- we did not exchange hands had -- I
11 don't know if he took it out of the car -- wait, let me back
12 up. He did not hand me a beer can, no. I didn't reach in and
13 get a beer can. That's against -- I'm not going to reach in
14 and get anything from a person on traffic stop. That's a
15 safety hazard. He got out of the vehicle, and when he got out
16 he may have had the can in his hand, or what have you. I
17 eventually did take the can out, but as for hand to hand the
18 can, no.

19 Q. Okay. So after he got out of the vehicle you would
20 have taken the can out of his hand, right?

21 A. If he had a can in his hand I would have probably taken
22 it out of his hand.

23 Q. Well, you said he had a can.

24 A. That's not what I said. What I said was, we did not do
25 a hand to hand thing. Okay. He had -- he had a beer can in

1 the car. Okay. I asked him out of the car, and we are kind
2 of going on some tangent, but he -- he got out of the car, and
3 upon him getting out of the car I placed him under arrest kind
4 of rapidly, okay. In that -- whether or not he had a can in
5 his hand and all I don't recall, because my main objective was
6 to go ahead and get some cuffs on this individual, for his and
7 my safety. Okay.

8 Q. Okay. So if he had a beer -- we don't know that, if he
9 did have a beer can in his hand you would have taken the beer
10 can out of his hand before you put handcuffs on him?

11 A. Possibly. It depen -- my objective was to get cuffs on
12 him.

13 Q. And you did put cuffs on him, and he did not have a
14 beer can in his hand when you finished ---

15 MR. HIXSON: Your Honor, this has be asked and answered
16 quite a few times.

17 THE COURT: I'm going to allow it. Thank you, sir.

18 MR. HIXSON: Thank you, Your Honor.

19 THE COURT: You may continue.

20 Q. That -- when he got out of the car, you would agree
21 with me that he would have stepped out of the car facing you;
22 is that correct?

23 A. How -- the manner in which he got out of the car was
24 he, of course, stepped out first with his right leg, then
25 attempted to stand up. He didn't get out directly facing me.

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1 He got out kind of sideways. He was in -- let's say he was
2 kind of facing forward, toward the front of the car, and ---

3 Q. Okay.

4 A. ---At this time, as he is getting out, I'm kind of
5 going to him, and helping him get out, more or less, and by
6 the time he stood totally up, pretty much had him handcuffed
7 at that time, and then I did turn him to face the vehicle,
8 basically.

9 Q. Okay. Were you standing up on the sidewalk or ---

10 A. As I said, I don't recall. It's a possibility, but I
11 don't recall that for sure.

12 Q. So you don't know if you were on the sidewalk before
13 you arrested him, or if he stepped out onto the sidewalk?

14 A. We were -- I'm right there at -- basically there is not
15 much space between the sidewalk and the vehicle. I could have
16 been on the sidewalk, hal -- at one point on it, back and
17 forth, but I'm standing right there in that close, give or
18 take, couple of inches.

19 Q. Okay. So you would say there were a couple of inches
20 between the car and the curb?

21 A. Yes.

22 Q. All right. So he stepped out, you arrested him for
23 open container?

24 A. Yes sir.

25 Q. And then you did what with him?

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1 A. And then I placed him into my patrol vehicle.

2 Q. Okay. And then you went back -- then you asked him --

3 after you placed him in your car you asked him whose bag it

4 was in the car?

5 A. No sir. Actually I asked him before, as we stood

6 there, before we left, right there at that passenger side

7 door. I had him -- hands on him. He was cuffed, and I had my

8 other -- right hand free, and I pointed down and said, is that

9 your bag. He said, yes, so then I reached into the bag ---

10 Q. Put it on the sidewalk?

11 A. Yes sir.

12 Q. Then you walked back to your car, with him handcuffed,

13 right?

14 A. Yes sir.

15 Q. And then you opened the door, and you put him in the

16 back seat?

17 A. Yes sir.

18 Q. And you closed the door?

19 A. Yes.

20 Q. And then you stood up and started heading back toward

21 the driver's side of the vehicle, right?

22 A. No. No sir.

23 Q. You went to the passenger's side?

24 A. Yes.

25 Q. And did what?

1 A. I went to the passenger's side, and I said some words
2 to the driver, you know, kind of -- hey, what's going on in
3 there, you know; your buddy is over here drinking, you know,
4 you know better than that; what's going on; are you drinking
5 too, you know, and stuff like that, and then I went to briefly
6 inspect the bag, as I kind of small-talked with the driver.

7 Q. So the driver wasn't under arrest for anything at this
8 point?

9 A. Not at that time.

10 Q. And you hadn't even run his driver's license and
11 registration?

12 A. Not at that time, no sir.

13 Q. And you are talking to him. Was he nervous acting?

14 A. Yes sir.

15 Q. Very nervous acting?

16 A. I would say so.

17 Q. The driver of the car was very nervous acting?

18 A. Yes sir.

19 Q. Was Danny Brown nervous acting when you were talking to
20 him about the beer can?

21 A. No.

22 Q. And when Danny Brown asked you if there are any more
23 beers in the car, and he said no, he was actually telling the
24 truth, right? (Sentence seems incorrectly worded.)

25 A. When I asked him that, I believe he was.

1 Q. And when he asked you whose black bag that was, he said
2 mine? (Sentence seems incorrectly worded.)

3 A. He did.

4 Q. Right. Now, so you -- while you talked to the driver
5 of the vehicle you went through the bag and you say you
6 found -- you opened the bag, black duffle bag -- do you have
7 that black duffle bag here with you today?

8 A. I believe we have some pictures of it.

9 Q. Do you have the bag here?

10 A. The bag -- I believe the bag was returned to him, the
11 duffle bag itself, and miscellaneous property in it, like
12 underwear and all that, but the evidence as far as narcotics,
13 that is retained, yes.

14 Q. All right. So, you are looking through the duffle bag,
15 and you say you found a Frito bag, and you looked inside the
16 Frito bag and there was a bunch of white powder?

17 A. Yes sir.

18 Q. Then at that point what did you do?

19 A. At that point I got a roaming narcotics detective -- he
20 can look into this -- and I -- then I started to talk with the
21 driver more aggressively, to find out what's going on, and of
22 course I ran his identification. He came up the driver's
23 license suspended.

24 Q. So you did not place the driver of the car under arrest
25 for possession of these drugs at that moment?

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1 A. No. At that moment -- actually I had already completed
2 taking the driver's car keys, put them on the hood, or told
3 him to, and he just -- I basically just -- I thought of it
4 like this. Here we go, we've got this one guy sitting in the
5 back there, under arrest, got a bag with drugs, two guys
6 together; I don't know their relationship -- I'm pretty sure,
7 upon me seeing this, he know -- you know, I'm thinking maybe
8 he knows this, life is going on, so I don't know what's going
9 on at this time, so I got him just remain, cool small-talking
10 it with him, until the other unit got there, and then, as soon
11 as it got there we went -- took him out to the car and placed
12 him under arrest.

13 Q. Under arrest for what?

14 A. For driving under suspension.

15 Q. So you must have run his driver's license?

16 A. We did. I just said that we did.

17 Q. Okay. You ran his driver's license before the other
18 unit got there?

19 A. Upon me talking to him I said, well, let me see your
20 I.D., and then I did run it.

21 Q. All right. Now after you placed him under arrest did
22 you go back and search the vehicle?

23 A. Upon me placing him under arrest, shortly thereafter --
24 I didn't touch the vehicle just yet. Shortly after Detective
25 Delpercio came on the scene and I basically directed him

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1 toward the bag on the sidewalk, told him what I think we got.
2 He took custody of that, and then we initiated a search of the
3 vehicle.

4 Q. Did you find anything else in that vehicle when you
5 initiated that search?

6 A. Did I find anything?

7 Q. Yes sir.

8 A. I found -- I -- upon the search -- Detective Delpercio
9 did most of the searching of the vehicle. Practically -- most
10 of the passenger compartment he searched. I probably searched
11 maybe twenty percent, at most, of it. I did look into the
12 truck, primarily, and in the truck I found a lot of, you know,
13 miscellaneous electronic equipment, and different things, but
14 Mr. -- Detective Delpercio found other things in the vehicle.
15 He did. I didn't. He did.

16 Q. Okay. Now, this whole thing could have been video
17 taped?

18 A. Yes sir.

19 Q. Why not?

20 A. Unfortunately my tape had just ran out, and our
21 Sergeant was off that day -- I think he was sick -- and we
22 usually get some from him, so I was -- I was going to get with
23 a gun, probably one of the Corporals, and get a tape from them
24 after -- that's kind of why I was going down that way. I was
25 going in to get -- pick up some money from another officer,

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1 and get a tape. It just so happened it happened in that
2 window, after the tape ran out.

3 Q. So -- and your car is -- so it is equipped with a video
4 camera?

5 A. It is.

6 Q. And it is equipped so that when the blue lights come on
7 the video camera comes on?

8 A. Yes sir.

9 Q. And so when you flipped your blue lights on the video
10 camera did not come on. Is that because you did not have a
11 tape in there, or was it because the tape was all used up?

12 A. The tape was all used up.

13 Q. You had a tape in there?

14 A. Yes, but it was used up.

15 Q. Why did you not rewind it a little bit and capture this
16 arrest?

17 A. Well, I don't think you can do that actually.

18 Q. You can't do that?

19 A. No. I don't think so. Once it has been recorded over,
20 you can't like re-record -- you know, it's kind of a safety
21 mechanism, so it -- you don't want to like -- say you want to
22 cover something up, you can't. That system there won't allow
23 you. You probably have to take it to an outside video
24 recorder or whatever, and do something to it, but I ---

25 Q. Had you just gotten on work, or had you been on work

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- 1 for a long time?
- 2 A. I'm sorry.
- 3 Q. Had you just gotten on work that day?
- 4 A. Just got on, pretty much, starting at six.
- 5 Q. You started with yesterday's video tape?
- 6 A. Yes. I didn't finish the video -- I -- upon starting
7 that day -- I had done another stop before this, and I did see
8 that my tape ran out. Actually I think I did discover it just
9 upon that stop, but it was -- at this time it wasn't time for
10 me to run into Wal-Mart and get a tape in the middle of a
11 traffic stop, you know.
- 12 Q. Okay. So there clearly is no video tape of this
13 arrest?
- 14 A. No sir, unfortunately not.
- 15 Q. All right, now, after Danny Brown is clearly in the
16 back seat of your car, and you have gone up and searched the
17 duffle bag, and you've gone and arrested the driver, and the
18 other people have come and searched the car, you take Danny
19 Brown back to J. Reuben Long; is that correct ---
- 20 A. Yes sir.
- 21 Q. ---To the jail?
- 22 A. Yes sir.
- 23 Q. Did you talk to him on the way to the jail about
24 anything?
- 25 A. I didn't ask Danny Brown any questions. He kind of

1 made some statements here and there, but I asked him no
2 questions personally.

3 Q. When you got to J. Reuben Long did you participate in
4 an interview with Danny Brown?

5 A. I did not.

6 Q. You were not in the room when he was interviewed?

7 A. When you say he was in it -- I was in the room when
8 they searched him, and you know, some in-house things, but as
9 for him being interviewed, no. I think -- to my knowledge
10 Detective Delpercio did that.

11 Q. All right. Were you in the room when Rodney Smith, the
12 driver of the car, was interviewed?

13 A. No sir.

14 MR. LONG: That's all I have. Thank you.

15 THE COURT: Redirect.

16 MR. HIXSON: Briefly, Your Honor.

17 REDIRECT-EXAMINATION BY MR. HIXSON:

18 Q. I think you indicated -- defense counsel asked about
19 statements that Mr. Brown admitted to the beer that he had in
20 his hand?

21 A. Yes.

22 Q. Prior to that did he deny having a beer in his hand?

23 A. Yes, he did.

24 Q. So the first thing out of his -- the first thing he
25 said was that, I don't have a beer?

1 A. Yes. I asked him -- this is when I was on the driver's
2 side of the vehicle -- say, what kind of beer you got; I'm not
3 drinking a beer; I don't know what you are talking about; I
4 said sure you do, the beer right there between your legs;
5 looked down, and he said, what -- what beer; right there, and
6 he finally went oh, you know, come on, man, you know.

7 Q. Also defense counsel asked about the demeanor of the
8 occupants of the vehicle.

9 A. Yes sir.

10 Q. I believe you testified that Mr. Smith was nervous.

11 A. He was, yes sir.

12 Q. Could you please, in more detail, describe what you
13 perceived Mr. Brown's demeanor to be.

14 A. He appeared to be pretty laid back, I mean, you know.
15 I don't -- I had never met him before. I don't know how he
16 is, but he appeared to be -- it appeared to be artificially
17 laid back, more or less like a -- trying to be cool, just
18 trying to -- you know, you have one guy who is like, hey, I'm
19 nervous, you know, I'm just -- like a deer in headlights, and
20 the other guy is like, I got this, you know, let's be cool. I
21 can't say; you know, if that's not his normal demeanor, but it
22 seemed suspicious to me, personally, just as the nervousness
23 of the other occupant seemed suspicious, so I mean, I kind of
24 governed how I handled myself.

25 Q. Did he have that same demeanor when he was denying that

1 he had a beer in his hand?

2 A. Yes.

3 MR. HIXSON: That's all the questions.

4 THE COURT: Anything on those questions.

5 MR. LONG: Real quick.

6 RECROSS-EXAMINATION BY MR. LONG:

7 Q. Officer, are you saying that it seemed suspicious to
8 you that Danny wasn't nervous?

9 A. Yes. And I may explain that. Two guys, together.
10 Like I say, I don't know them, I don't know their
11 relationship. Who knows, they could have been brother, or
12 they -- you know, but one guy extremely nervous, and the other
13 guy is just, you know, acting -- what appeared to me as being,
14 you know, artificially cool. It seemed like, ho, what's going
15 on here, so I'm not saying that that in itself was meaning
16 that, you know, he was guilty of anything. It just kind of
17 made me suspicious, made me keep my eyes open a little bit
18 more.

19 MR. LONG: All right. Thank you.

20 A. You are welcome.

21 THE COURT: Solicitor.

22 MR. HIXSON: No further questions, Your Honor.

23 THE COURT: You may step down, sir.

24 A. Thank you.

25 MR. HIXSON: At this time the State would call

1 Detective Tom Delpercio.

2 MR. LONG: Before he comes back, may we approach?

3 THE COURT: Yes sir. Come around to the side, please.

4 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

5 THE COURT: Have him come on, please sir.

6 THOMAS DELPERCIO, being first duly
7 sworn, testifies as follows:

8 DIRECT-EXAMINATION BY MR. HIXSON:

9 Q. Good afternoon, sir.

10 A. Good afternoon, sir.

11 Q. What do you do for a living?

12 A. I'm a Sergeant with the Investigation Division of the
13 Horry County Police Department.

14 Q. And how long have you worked for Horry County Police
15 Department?

16 A. Approximately seven years.

17 Q. And were you working for the Horry County Police
18 Department around October 6th of 2005?

19 A. That is correct.

20 Q. And what were your duties at that time?

21 A. At that time I was a Detective agent assigned to the
22 Narcotics and Vice Division of the Horry County Police
23 Department.

24 Q. And it may be kind of obvious, but just tell the jury
25 what Narcotics -- what that Division does in Horry County.

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1 A. We handle primary illegal drug complaints, and/or vice
2 complaints, i.e., prostitution, gambling, things like that.

3 Q. You were working October 6th of 2005, that day?

4 A. Yes, I was working and then I went off, and I believe I
5 was called out to the incident.

6 Q. I'm called out, what do you mean by that?

7 A. We take in rotation as Narcotics and Vice Agents, and
8 on-call rotation about once every other month for a week, and
9 any time a patrolman or other officer needs assistance with
10 any drugs or vice related crime then we are called out if it's
11 after normal working hours.

12 Q. Were you, in fact, called out on that day?

13 A. That is correct.

14 Q. And please tell the jury about what happened after that
15 call.

16 A. Refer to -- just to my notes. It was October 6. I'm
17 not exactly sure about the hour. It was in the evening hours.
18 I was called out to make contact with an Officer Williams, at
19 which time I made phone contact and he advised me he had a
20 large quantity of what he believed was an illegal narcotic
21 known as cocaine, the drug cocaine, on a traffic stop. He
22 gave me his location and I responded out to the scene.

23 Q. You, in fact, arrived?

24 A. Yes sir.

25 Q. And then if you could please tell the jury what you did

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1 when you got there.

2 A. Sure. Upon arrival I met with Officer Williams. He
3 explained the situation and how he the stop. He showed me a
4 quantity of white powder substance that was inside a clear
5 plastic bag that was inside a Fritos bag. The Fritos bag was
6 inside a black duffle bag.

7 Q. Now I'm going to show what's already been marked -- I
8 believe it's already in evidence as State's Exhibit 1. Do you
9 recognize that item?

10 A. That is the item I'm speaking of.

11 Q. And is that a fair and accurate representation? You
12 remember that call?

13 A. Yes.

14 Q. Would you please -- could you please -- just please
15 tell the jury what happened after that.

16 A. Okay.

17 Q. Did you, in fact, take custody of the duffle bag while
18 at the scene?

19 A. I did take custody from Officer Williams of the duffle
20 bag and the contents inside, at which time -- again, asking
21 details of the nature of the stop I approached -- look at my
22 notes real quick. Officer Williams advised me that the duffle
23 bag was taken from between the Defendant's feet, I believe in
24 the car area, the passenger side area of the vehicle.

25 At that time Mr. Brown was in the custody of the Horry

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1 County police car when I got there. I approached him, advised
2 him verbally of his Miranda Rights, and asked him if he would
3 speak to me about the situation. He did not want to speak at
4 that time.

5 At that time I moved over to a second patrol car that
6 was there, and spoke to a second person, Mr. Rodney Smith, who
7 was the driver of the vehicle, and at the time -- I don't
8 believe at that point in time I advised him of his Miranda
9 Rights. I don't believe Mr. Smith said anything at that time.

10 Q. Did you have occasion to search that vehicle pursuant
11 to the arrest?

12 A. Yes. Yes sir. Under a lawful search incident to
13 arrest of the vehicle, in the passenger area, and pursuant
14 also to guidelines of doing inventory of the vehicle before
15 towing, we searched that vehicle.

16 Q. And did you find anything inside that vehicle?

17 A. I did. I did find a second smaller bag containing
18 several different types of illegal drugs.

19 Q. And where did you find that?

20 A. That bag was underneath the driver's seat.

21 Q. The driver's seat?

22 A. Yes sir.

23 MR. HIXSON: Your Honor, I would like to approach the
24 witness with Exhibit marked State's 3.

25 THE COURT: All right, sir.

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1 Q. Do you recognize that?

2 A. Yes. That is the black pouch and the contents that
3 were located on the driver's seat.

4 Q. And where was that photograph taken?

5 A. That photograph taken was on the -- on the chair at my
6 office, after we got back in a controlled environment.

7 Q. Okay.

8 A. On the night in question it was -- the weather was -- I
9 believe it was pretty bad, so we didn't do too much out on the
10 scene, plus it was on the side of the highway. We usually
11 just take the evidence and secure it.

12 Q. But could you give the jury an indication of size
13 differences in the duffle bag versus the pouch.

14 A. In comparison?

15 Q. Yes.

16 A. Okay. The pouch itself, as seen in that picture, would
17 probably be a little bit smaller, actually, than the quantity
18 of cocaine that was found in the duffle bag itself.

19 Q. Let me introduce -- move this.

20 MR. HIXSON: At this time, Your Honor ---

21 Q. Is that a fair and accurate representation of the
22 condition of the contents of that pouch at the time when you
23 saw it?

24 A. The items were in the pouch at the time I first
25 discovered it, but that is the items that were inside the

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1 pouch, spread out for the photograph.

2 Q. And that's a fair and accurate representation?

3 A. Yes sir. Yes.

4 MR. HIXSON: At this time the State would move 3 into
5 evidence, Your Honor.

6 MR. LONG: No objection, Your Honor.

7 THE COURT: In evidence without objection.

8 (PHOTO OF CONTENTS OF BLACK BAG ADMITTED INTO EVIDENCE
9 AS STATE'S EXHIBIT NUMBER 3.)

10 Q. Also I would like to approach the witness with what's
11 been marked State's 2. That's not in yet, Your Honor.

12 THE COURT: All right, sir.

13 Q. Do you recognize that?

14 A. Yes, I do.

15 Q. And what do you recognize that to be?

16 A. This appears to be the powder substance, that was
17 believed to be cocaine, that was found inside the black duffle
18 bag, in several little bags.

19 Q. And is that what was found inside the Frito-Lays bag?

20 A. That is the white substance -- I believe it as in a
21 clear plastic bag when it was inside the Frito bag, but that
22 is the substance. It appears to be the substance.

23 Q. While I think you indicated -- and I apologize for
24 interrupting you. I think you indicated something about the
25 sizes between the two of them, and I wanted to let you see

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1 that. Could you please continue testifying as it relates to
2 the size of the black pouch versus the duffle bag.

3 A. Sure. The black -- the black pouch, as seen in the
4 photograph, was maybe a little bit bigger than a cigarette
5 case, that was found on the driver's seat, that contained
6 small amounts of several different narcotics, or drugs. The
7 black duffle bag was more like a gym bag, like a small carry-
8 on bag to take on an airplane, or to a gym, and that's where
9 this was located, and it was indicated to me that that black
10 duffle bag was found between the Defendant's feet, in the
11 passenger's side of the vehicle at the time of the stop.

12 Q. Now subsequent -- you, yourself, found that black pouch
13 under the driver's seat?

14 A. The small black pouch I found, yes, under the driver's
15 seat.

16 Q. At that time did you place the Defendant, Rodney Smith,
17 under arrest for anything at that time, on D.U.S.?

18 A. Mr. Smith was already -- if I'm not -- if memory serves
19 me, he was already under arrest for driving without a driver's
20 license. So then I did -- advised him he was under arrest for
21 that.

22 As we moved to the Detention Center I, again, met with
23 Mr. Smith, again, advised him of his Miranda Rights, in
24 writing, on a form at this time, because I was able to. He
25 signed the form understanding his rights and wishing to waive

1 them, and provided me a statement stating that the drugs that
2 were found under the driver's seat were, in fact, his.

3 Q. Now after discovering -- after Mr. -- Officer Williams
4 turned those narcotics over to you, did you protect the
5 integrity of those items?

6 A. Yes, I did.

7 Q. Did you tamper with them in any way?

8 A. Did not tamper. We placed them as per procedure into a
9 "Best Kit", to be submitted through evidence to the lab to be
10 tested.

11 Q. Now, could you explain to the jury what "Best Kit" is.

12 A. Sure. A "Best Kit" is the State used kit in South
13 Carolina, or any drug -- usually for a drug or narcotic,
14 except for marijuana, to be tested by a lab. It is a brown
15 envelope that contains a plastic one-time sealing envelope, to
16 where the -- once the plastic envelope is sealed, if it is
17 attempted to be unsealed, the integrity of it will be lost,
18 and you will if it's been damages. It also has separate forms
19 to provide a chain of custody with it. So the brown envelope
20 has a sticker on it with a -- what's called a "Best Kit"
21 number, tracking number, and the envelope and the subsequent
22 forms all have the same number.

23 The first thing we do is take that "Best Kit", we make
24 sure all the numbers match, make sure there's not a problem,
25 then we take the evidence -- we do a field test kit most

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1 times, which I did on this substance here, which showed
2 positive results. We mark that into our incident report. And
3 we take the substance and we place it into the "Best Kit",
4 with the proper forms filled out for who it was taken from,
5 date time, case number, then we seal it all in that self-
6 sealing envelope, then we take it and we submit it to
7 evidence, and the only time that would be reopened is by the
8 chemist checking the substance.

9 Q. Now, what are all those safeguards for? What are they
10 intended to do?

11 A. We protect the integrity of the evidence.

12 Q. To make sure no one tampered with it?

13 A. That's correct.

14 Q. Did you prevent anybody else from tampering with this
15 also when it's in your custody and control?

16 A. Yes. Once -- Once I received this from Officer
17 Williams I am the only person until it was placed into
18 evidence. I don't know -- once we place it in evidence to a
19 secure facility then I -- they take their procedures from
20 there, but nobody else tampered with this.

21 Q. And are there any indications or markings of any kind
22 on that package to indicate ---

23 A. Yes sir. On the "Best Kit" bag itself, right here,
24 there is a place for the agency name -- it's H.C.P.D., Horry
25 County Police Department, date sealed, October 6th, '05,

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1 appears to be control number, which is 002901, which will
2 match any of the forms, and then there is a place for me to
3 print my name, and also a place for my signature.

4 Q. What did you do with that package after you took
5 custody and control of it from Officer Williams?

6 A. Okay. I secured that till we got back to the Horry
7 County Police Department. It was locked in the security of my
8 vehicle, along with several other pieces of evidence we had.
9 Once we got back to my office I carried it in. We started to
10 sort out evidence. I had this with me at all times. Any drug
11 evidence the control agent just keeps with him, just to
12 protect the integrity of the case. I submitted it into the
13 "Best Kit", and then take it across the hall, and we have the
14 evidence office, and we submit it to a lockable area, to where
15 then the Evidence Technicians will get it when they come in
16 the next day, and nobody can get in there to get to it before
17 then.

18 Q. And briefly describe your -- you indicated an evidence
19 lock-up. Just briefly describe what that is.

20 A. Okay. Well, there are several. We have a secured
21 wooden door with several locks that has a drop slot in it, and
22 then we also have lockers that you -- there's a key on the
23 outside, almost like a bus depo locker, but after you secure
24 it there's a whole, about the size of a half dollar, where you
25 take the key and drop it in, so nobody else can get into that

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1 locker, except through evidence, from the inside.

2 Q. And the Evidence Custodian then has the key to get the
3 evidence bag?

4 A. That's correct. They have a master key from the inside
5 of their office, that is secured all the way around. When
6 they come in to collect their evidence they go in from the
7 inside, open the lockers and collect what was put in from the
8 outside, so -- in fact, nobody ---

9 Q. That also protects the integrity of the evidence?

10 A. That's correct.

11 Q. Well, at some point in time did you receive a phone
12 call from your evidence technician in reference to a black
13 duffle bag and some personal items?

14 A. Yes. I don't remember the exact day. I know I was
15 contacted by, I believe, Lori Rabon, one of our Evidence
16 Technician Supervisors, reference if I -- it would be all
17 right to release some items to Mr. Brown. I know there was
18 the black duffle bag itself, a cell phone, and I believe some
19 miscellaneous clothes -- excuse me -- and I was asked if that
20 would be okay to release those.

21 At that time they -- they posed no evidentiary value.
22 We had photographed the black duffle bag. We knew that we had
23 pictures of that. The illegal drugs were in the custody of
24 the evidence area, so we knew that, so the phone and the
25 clothes really served no evidentiary purpose, so I had no

1 problem at that time. I told her it would be fine with me to
2 release that back to Mr. Brown.

3 MR. HIXSON: I have no further questions for Detective
4 Delpercio at this time, Your Honor.

5 THE COURT: Cross-examination.

6 MR. LONG: Thank you, Your Honor.

7 CROSS-EXAMINATION BY MR. LONG:

8 Q. Detective Delpercio, you searched the driver's side
9 portion of this Plymouth, and found a black -- small black
10 pouch full of drugs, right?

11 A. That's correct.

12 Q. And when was it that you asked Rodney Smith who that
13 belonged to?

14 A. I believe that was at J. Reuben Long, later on that
15 evening.

16 Q. Okay. And you just -- I believe you just testified --
17 I want to clarify -- that the white powder bag would have been
18 too large to put inside of that little white pouch, correct?

19 A. That bag in your hand probably would have fit in the
20 pouch if the other substance weren't in it, but I don't
21 believe they would have fit together.

22 Q. So with the drugs that were already in that pouch
23 underneath the driver's side, there was not room for this in
24 there?

25 A. In that pouch, I would say no, probably not.

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1 Q. Okay. Now, when you interviewed Rodney Smith back at
2 J. Reuben, did you ask him if he knew Danny Brown?

3 A. One second. Let me refer to my notes, sir.

4 I actually don't have it on my notes. I'm looking at a
5 statement of Mr. Smith. It does not say anything about Mr.
6 Brown on that statement. I don't recall if I asked him if he
7 knew Mr. Brown.

8 Q. So you -- if he told you, I don't even know that guy; I
9 was just giving him a ride; you don't remember?

10 A. I remember that Mr. Smith -- I can tell you what I
11 remember talking about. I don't recall if I asked him if he
12 was just giving him a ride, or I don't remember that
13 testimony, no. I don't remember that statement.

14 Q. Did you tape record your interview with Rodney Smith?

15 A. No. No.

16 Q. Why not?

17 A. South Carolina does not require that we do. I usually
18 just talk to somebody and have them handwrite a statement and
19 sign it. It's just not investigative technique I use.

20 Q. You don't ever record people's statements when you sit
21 down and talk to them?

22 A. Thirteen years as a policeman and I never had -- I have
23 never had the need, no.

24 Q. Do you have a tape recorder?

25 A. No. At that time I did not actually. It was hooked to

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1 my phone in my office.

2 Q. And so when you did interview him you did not tape it,
3 but you did interview him. He told he was a drug dealer,
4 right, Rodney Smith?

5 MR. HIXSON: Your Honor, I would object to that. Mr.
6 Smith is testifying. It's hearsay for the Detective to answer
7 those questions. Mr. Smith can answer those questions.

8 MR. LONG: Your Honor, actually ---

9 THE COURT: Gentlemen, you don't need to argue it. I'm
10 going to allow the question.

11 Thank you very much.

12 MR. LONG: Thank you.

13 Q. He told you he was a drug dealer?

14 A. Mr. Smith gave me a statement that he had been dealing
15 drugs for the past year.

16 Q. Did he tell you what kind of drugs he had been selling?

17 A. No, he did not, not in the statement. I mean, I know
18 what he had on him, and he confessed to those drugs, so one
19 can say he's been dealing those drugs.

20 Q. He confessed to a small amount?

21 A. That's correct, that was under his driver's seat, yes
22 sir.

23 Q. Did you interview Danny Brown?

24 A. Mr. Brown did not want to speak to me.

25 Q. Did you go into a room and ask him to be interviewed?

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1 A. No. No. He made it clear he did not want to speak to
2 me at the time. He invoked Miranda at the time at the scene,
3 and I did not ---

4 Q. So at no time at J. Reuben Long did you ever go into a
5 room with Danny Brown and ask him to make a statement?

6 A. I don't believe I talked to him at all. No.

7 Q. When you went in the room with Rodney Smith at J.
8 Reuben, did this officer go in with you?

9 A. I don't believe so. I think we were alone.

10 Q. You were by yourself?

11 A. I believe so.

12 Q. Did you ask this Officer if he had a video tape from
13 the traffic stop?

14 A. No, I did not.

15 Q. Did you take into evidence -- you are the guy who went
16 out there and took everything into evidence, right?

17 A. That's correct.

18 Q. Did you take into evidence the beer can?

19 A. I believe I remember a beer can being there, but I did
20 not take it into evidence, only because, again, I was called
21 out for the narcotic or drug part of this case. That would
22 have been an open container. That would be handled by the
23 officer. Now, I don't see it on my evidence sheet. I don't
24 recall taking it. If you will let me refer back to my
25 evidence sheet to make sure I didn't. There were several

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1 pieces of evidence taken that night.

2 Q. Okay.

3 A. I do not see anything on my chain of evidence reference
4 to the beer can.

5 Q. Okay. So, if -- well, let me ask you this way. Did
6 you know that the reason for the traffic stop that Officer
7 Williams gave was that there was a beer can?

8 A. Officer Williams advised that he had witnessed the
9 passenger in the vehicle drink. That's why he stopped him,
10 pulled him over, and subsequently arrested him.

11 Q. Arrested him for open container?

12 A. I believe that was drinking. I don't know the exact
13 charge.

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

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

20 Q. Okay. You would agree with me that the contents of the
21 small bag that Rodney Smith had under his seat were -- and
22 we've got a picture of the crack cocaine, marijuana, Xanax
23 pills, and powder cocaine; do you agree with that?

24 A. I -- give me one second. I would agree to that from
25 the picture, yes sir. There were several different drugs on

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1 that -- let me refer to my picture again.

2 Q. Did you send to S.L.E.D., or anybody else, this powder
3 cocaine, and this, to see if they were the same chemical
4 makeup?

5 A. The large amount of cocaine that was found between
6 Danny Brown's feet was placed in the "Best Kit" -- one
7 second -- was placed in "Best Kit" number H002901. The other
8 items of narcotics, which would be the cocaine and the pills,
9 and any other drug besides marijuana, was placed in "Best Kit"
10 002900.

11 Q. I understand your ---

12 A. "Best Kit".

13 Q. Did you ever ask anybody who is one of these chemist
14 people that y'all have over there, or anybody over at S.L.E.D.
15 in Columbia, to test this powder cocaine, and this powder
16 cocaine, to see if they had the same chemical makeup?

17 A. No sir. State law states powder cocaine is cocaine.
18 The different makeup would not be a concern of mine. I submit
19 it to the lab to make sure it is, in fact, cocaine.

20 Purity or same, no sir, does not play a part in the
21 case.

22 Q. Okay. I'm not asking you if it's a concern. I just
23 want to know if you did that?

24 A. No. I did not ask for that specific test.

25 Q. So these two different bags of cocaine have not been

1 tested to see if they are the same thing?

2 A. The only thing that I would say they've been tested
3 for, to see if they are, in fact, cocaine.

4 Q. Okay. Now, the black duffle bag, did you send that to
5 someone to fingerprint it, and see who had been touching it?

6 A. I don't believe the black duffle bag was fingerprinted,
7 no sir.

8 Q. Why didn't you have somebody to fingerprint that duffle
9 bag?

10 A. In truth, that's not something that is normally done,
11 especially on a porous material like that, because it's not a
12 reality that you would find usable fingerprints on that.
13 Again, in this case, the Officer states that, when he arrested
14 Danny Brown it was between his feet, okay. It had cocaine in
15 it. We took it out. I don't believe if we did have that
16 fingerprinted that any fingerprints at all of a usable quality
17 would be found on that, and that's my experience.

18 Q. So you just assumed there wouldn't be any fingerprints,
19 so you decided not to have it tested?

20 A. We don't normally fingerprint a bag, or something like
21 that, that fingerprints are not going to come out on, no.

22 Q. You fingerprinted this Fritos bag.

23 A. Yes. Fritos bag is a smooth surface that maybe prints
24 could be on. When you have a nylon or cloth substance, you
25 know, substance, fingerprints aren't going to show on those,

1 sir.

2 Q. Were Danny Brown's fingerprints found on the Fritos
3 bag?

4 A. I don't believe so. I don't believe any fingerprints
5 of usable quality were found on any of the bags, it's my
6 understanding.

7 Q. What about the little bag that the powder was in? You
8 would agree with me that this is not the bag that this powder
9 was found in?

10 A. I believe -- that's not the bag I submitted. I believe
11 that is a bag that evidence put it in after they took it out
12 of the original packaging.

13 Q. The original packaging was another clear plastic bag,
14 and you sent that for fingerprinting too, didn't you?

15 A. I believe so.

16 Q. Were Danny Brown's fingerprints found on that bag?

17 A. Not that I'm aware of.

18 Q. On the side of the road, when you got there, Danny
19 Brown was in the back of one car, and Rodney Smith, I assume,
20 was in the back of a different car, handcuffed; is that right?

21 A. That's correct.

22 Q. And did you go -- after you found all these things in
23 this car, the stuff underneath Rodney's seat and everything,
24 did you go back and talk to Rodney about what you had found?

25 A. I believe I may have told him I found the rest of the

1 drugs under the seat -- I found some drugs under the seat. I
2 don't believe I questioned him. I believe I let him know I
3 had found some more, and that he would be charged with that as
4 well as his driving under suspension, or driving without a
5 license, whatever the charge was. I don't believe I
6 questioned him until we went back to the Detention Center.

7 Q. Okay. When you told him that the drugs were found
8 under the seat, was there any change in his demeanor at that
9 point?

10 A. Not that I can recall.

11 Q. And you know that, when you were talking to him, he had
12 not been placed under arrest for the possession of this bag,
13 right?

14 A. No. At that time I didn't believe anybody was placed
15 under arrest because of that. I know that Mr. Brown was
16 placed under arrest for the open container, or drinking in
17 public, and I know Mr. Smith was placed under arrest for
18 driving without a license.

19 Q. Was Rodney Smith ever charged with possession of this?

20 A. Let me refer to my warrants. I believe he was, but let
21 me refer to my warrants.

22 Yes, he was.

23 Q. So Rodney Smith has been charged, or at least had been
24 charged, with trafficking in cocaine; is that right?

25 A. That's correct.

1 Q. And when you went back to J. Reuben you decided to go
2 into a room and talk to Rodney Smith, but not go into a room
3 and talk to Danny Brown. Now why is that?

4 A. Because at the scene, if memory serves me correct,
5 Danny Brown was not of a demeanor to speak to us -- speak to
6 me about the situation. Mr. Smith -- and again, from being in
7 investigations for a while -- seemed that he would be willing
8 to maybe communicate with me and give me a statement. Mr.
9 Brown, pretty much, was unequivocally that he was going to
10 seek an attorney, and that he didn't want to speak to police.

11 Q. Well, neither one had talked to you so far, right? You
12 went out there at the site, you went back and -- in car, you
13 talked to both of them, and ---

14 A. Not talking -- not talking, and giving off what I later
15 called qualifiers, that you don't want to speak to me, are two
16 different things.

17 Q. When you went back there and you talked to Rodney
18 Smith, what did you tell him that you could do for him?

19 A. I don't remember telling him I could do anything for
20 him, because I can't do anything for him.

21 Q. You didn't tell him, right now things look really bad
22 on you and you need to cooperate with me?

23 A. I don't remember the exact statements that I talked
24 about. I know I would have explained to him that he had -- is
25 looking at several different charges, including the drugs

1 under the seat, and that it was his option to speak to me at
2 that time, and speak to me about the truth, and that if he did
3 want to talk to me and cooperate, that that would be noted in
4 my investigation report, that he did cooperate and admit to
5 his part in what was going on, which is what we do when we do
6 an interview.

7 Q. Right. So after you told him that, if he talked to
8 you, and told you some things that were beneficial to your
9 case, then you would do what you could for him down the line.

10 A. Well, I told him to say the truth. Now if the truth is
11 beneficial to my case, well then I guess that would be
12 beneficial to my case, but I told him to speak to me the
13 truth.

14 Q. Well, how do you know if he ---

15 A. I specifically, on an interview, make sure I tell
16 people not to embellish any truth to try to get help for it.
17 That's what I do.

18 Q. Well, you don't expect anybody that -- actually that
19 you have arrested for trafficking in drugs to just tell you
20 the truth all the time anyway, right? You don't expect that?

21 A. You never know when you talk to somebody, they may.

22 Q. Okay. Do you know Rodney Smith was telling you the
23 truth?

24 A. A hundred percent, unequivocally, no. Do I believe he
25 was, yes.

1 Q. Why? Have you ever met him before?

2 A. No.

3 Q. You testified that you never took Danny Brown into a
4 room and talked to him about this case. You don't remember
5 going in there and talking to him about trying to seize some
6 money from him or something?

7 A. I -- I don't recall. I may have. I don't recall
8 talking with Mr. Brown. I know his demeanor was not of a
9 cooperating nature that I can recall.

10 Q. He wasn't uncooperative, was he?

11 A. Standoffish, if memory serves.

12 Q. Standoffish. You just arrested him and charged him
13 with trafficking in cocaine; you've got him locked up at J.
14 Reuben Long, and you are saying he was standoffish?

15 A. Well, in fact, he had cocaine. I arrested him by the
16 law, so I don't think that should make him standoffish.

17 MR. LONG: Okay. That's all I have. Thank you.

18 THE COURT: Redirect.

19 MR. HIXSON: Thank you, Your Honor.

20 REDIRECT-EXAMINATION BY MR. HIXSON:

21 Q. Let me show you a couple of packages that I think
22 defense counsel brought up.

23 MR. HIXSON: These have not been marked as an exhibit,
24 Your Honor.

25 Q. Detective, I believe defense counsel talked --

1 mentioned about why you didn't fingerprint the duffle bag.
2 Based on your investigative experience, can you give us some
3 indication of the difficulty of taking fingerprints off a
4 cloth surface, or a surface such as that?

5 MR. LONG: Your Honor, I would inquire, and object to
6 the question. I don't know if he has ever been trained to do
7 fingerprinting. I don't know if he's a fingerprint analyst.
8 I don't know anything about that.

9 THE COURT: Sustained at this point in time.
10 You may rephrase your question.

11 MR. HIXSON: Also there's separate packaging. It's not
12 marked as an exhibit either.

13 Q. Did you request these items be submitted for
14 fingerprint analysis?

15 A. I believe I did, verbally, with the evidence
16 technicians -- custodians.

17 Q. Did you receive a report indicating -- let me present
18 you with what's been marked as State' 6. Do you recognize
19 that item?

20 A. That is the Fritos bag that was seized that night.

21 Q. And when you first saw the Fritos bag, was it in that
22 condition?

23 A. It did not have the fingerprint dust on it, no.

24 Q. That's this material you see?

25 A. Yes sir.

1 Q. Now, generally speaking, you received training, as it
2 relates to general investigative techniques, I assume. You
3 went to the South Carolina Police Academy?

4 A. That's correct.

5 Q. Are you aware during that -- were you taught, during
6 the course of that, that there were differences in the
7 surfaces that fingerprints can be removed from?

8 A. Yes sir. I actually attended that at the base academy.
9 I am also an Investigator I. They teach a portion on
10 fingerprinting. In 1998 I also went to a week long, or two
11 week long school on how to read fingerprints, and the surfaces
12 and all that can be taken ---

13 Q. Now, is there a difference between no fingerprints and
14 unusable fingerprints?

15 A. Yes.

16 Q. Could you please just generally describe just ---

17 MR. LONG: Your Honor, I would object to that.

18 Q. ---Based on your basic training and experience, and
19 your ---

20 THE COURT: All right. I'm going to allow the answer
21 over the objection of the Defendant at this time.

22 Q. Just generally. I'm not asking for your opinion or
23 anything like that.

24 A. Yes. No fingerprints would have no residue, no showing
25 up, either using the dust or using perfuming techniques to

1 bring fingerprint, or the oils on the finger to arise.
2 Partial or unusable fingerprints -- well, you will see detail,
3 maybe a circle of the finger, or a part of a swirl, or part of
4 a loop, or anything on there, but it will be unusable to make
5 an I.D..

6 Q. I think you indicated you recognize that item?

7 A. Yes. The bag, yes sir.

8 MR. HIXSON: Your Honor, at this time the State would
9 move State's 6 into evidence.

10 THE COURT: Any objection?

11 MR. LONG: No sir.

12 THE COURT: In evidence without objection.

13 (FRITOS BAG ADMITTED INTO EVIDENCE AS STATE'S EXHIBIT
14 NUMBER 6.)

15 Q. And of course when you saw it it wasn't in this
16 plastic?

17 A. Negative. No. It was just a Fritos bag.

18 Q. I'm also -- I'll show you what's been marked as State's
19 -- not in evidence yet -- but do you recognize that item?

20 A. I do.

21 Q. And what is that?

22 A. That appears to be the plastic bag that contained the
23 cocaine that was inside the Fritos bag.

24 Q. And that -- was it in that condition when you first saw
25 it?

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1 A. Oh, no sir. It was just a clear plastic bag, and was
2 absence of the fingerprint dust.

3 Q. And that's what that black powder substance you see on
4 there?

5 A. Yes sir. That's what it appears to be.

6 MR. HIXSON: At this time the State would move State's
7 into evidence.

8 THE COURT: Any objection?

9 MR. LONG: No sir.

10 THE COURT: In evidence without objection.

11 (FRITOS BAG ADMITTED INTO EVIDENCE AS STATE'S EXHIBIT
12 NUMBER 7.)

13 Q. You say there were no usable fingerprints recovered
14 from those? That's your understanding?

15 MR. LONG: Object, Your Honor. I don't know if he has
16 any indication. He wasn't the one that did the test.

17 THE COURT: I'm going to sustain the objection at this
18 time.

19 MR. HIXSON: Thank you, Your Honor.

20 THE COURT: You may rephrase the question.

21 MR. HIXSON: Thank you, Your Honor.

22 Q. You received a report as it relates to the findings of
23 analysis of that?

24 A. I actually don't have a copy of it. I was made aware
25 that there was no usable fingerprints. I believe verbally, by

1 one of the evidence technicians.

2 Q. Okay. I think also there was some brief discussion
3 about fingerprinting the duffle bag, and things like that.
4 Did you know at the time you made the decision on forensic
5 examination of Danny Brown's statement that it was his bag?

6 A. I remember Officer Williams told me that at the scene,
7 that it was -- he stated it was his bag.

8 Q. All right. Do you usually make a practice of
9 fingerprinting items that you already know who the identity of
10 the owner is?

11 A. No. We don't normally make that a practice.

12 MR. HIXSON: I have no further questions, Your Honor.

13 THE COURT: Questions on those particular questions.

14 MR. LONG: Yes sir.

15 RECROSS-EXAMINATION BY MR. LONG:

16 Q. Officer Delpercio, if you sent the black duffle bag for
17 a fingerprint, and they found Rodney Smith's thumbprint on it,
18 would that change your opinion of the case?

19 A. No.

20 Q. Not at all?

21 A. No.

22 MR. LONG: Thank you.

23 THE COURT: Anything else?

24 MR. HIXSON: Nothing, Your Honor.

25 THE COURT: You may step down, sir.

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1 Do you wish this witness to be excused?

2 MR. HIXSON: Absolutely, Your Honor.

3 MR. LONG: Yes sir.

4 THE COURT: You are excused to go back to your regular
5 duties.

6 A. Thank you, Your Honor.

7 THE COURT: Gentlemen, y'all come and talk to me for
8 just one second.

9 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

10 THE COURT: All right, ladies and gentlemen, what we
11 are going to do is recess for the evening at this point in
12 time. I have some matters that I have to handle outside your
13 presence, so no sense in you sitting in your jury room while I
14 do that.

15 Please remember when you go home this evening, not to
16 talk about this case with anyone at home or elsewhere.
17 Unintentionally people will give you their opinion. They
18 don't have an opinion about this case. I told you, you can't
19 talk about this case, so obviously nobody else can talk to you
20 about it. If somebody would persist in trying to talk to you
21 about this case after you tell them not to, please inform the
22 Court who that person is and we will take care of that person.

23 You can't conduct any investigation on your own. You
24 can't look up anything on the internet; you can't do any kind
25 of research on your own on any matter. You must decide this

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1 case solely upon the evidence that is presented in this
2 courtroom, and from no other source, so with that I'm going to
3 ask that you be back tomorrow morning, 9:30. I'll see you
4 back in your jury room, 9:30.

5 Thank you very much.

6 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
7 JURY.)

8 THE COURT: All right, gentlemen, we are going to take
9 a short break for about five or ten minutes, then we'll come
10 in and hear the suppression motion at that time.

11 Thank you.

12 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
13 THE PRESENCE OF THE JURY.)

14 THE COURT: All right, Mr. Long, I'll be glad to hear
15 from you, sir.

16 MR. LONG: Thank you, Your Honor. Your Honor, this --
17 I am moving to suppress the evidence that was seized from a
18 black duffle bag. The basis of my motion is this. I
19 understand the facts to be as follows: Officer Williams, on
20 the dark, almost raining night, pulls up beside a vehicle,
21 looks through the driver's side window and sees what appears
22 to be a beer can in the hand of Danny Brown, the passenger of
23 the car. He pulls behind them, walks up to the driver's side
24 window, inquires about the video -- I'm sorry ---

25 THE COURT: Go ahead.

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1 **MR. LONG:** ---Inquires about the can, finds the can,
2 walks around, asks Danny to exit the vehicle, places him under
3 arrest for open container, and then searches a black duffle
4 bag. The driver of the car was not under arrest. This is not
5 an inventory search, because the car, at this point, would
6 have still been free to go, was not ready to be towed. The
7 pat-down, and the necessary search of Danny Brown, as required
8 by his arrest, was done, and that should have ended any search
9 of Danny Brown or the contents of that vehicle without
10 consent. There is no evidence in here, in this trial, that
11 consent was requested of either of the occupants of the car to
12 remove a black duffle bag from the floorboard of that car and
13 just begin searching it. That's where the items, this bag,
14 State's Number 2, that's not in evidence -- that's where that
15 bag was recovered, and Your Honor, based on the Fourth
16 Amendment, based on the requirements of the police officer out
17 there, I firmly believe that that evidence should be excluded
18 from the trial in this case.

19 **THE COURT:** All right, sir.

20 All right, Mr. Hixson, be glad to hear from you, sir.

21 **MR. HIXSON:** Your Honor, I don't think that we -- the
22 initial facts, the basis for the stop, are controverted. The
23 Defendant -- excuse me -- the Officer in this case stopped the
24 Defendant based on his observation of a misdemeanor being
25 committed in his presence. Prior to placing the Defendant

1 under arrest he inquired as to the personal belongings, and
2 indicated -- affirmatively indicated, expressly indicated that
3 those, in fact, were his personal belongings. They didn't
4 belong in that vehicle. They belonged with Mr. Brown during
5 Mr. Brown's transport from that area. Certainly he's entitled
6 to look in that area if it was a protective sweep, and for
7 officer's safety, in addition to the fact that he expressly
8 said that the search inventory to being placed under arrest --
9 Mr. Brown expressly said that's his item -- and he is allowed
10 to do that as a search incident to an arrest, and the
11 protective sweep would be after that fact if
12 (unintelligible) -- doesn't think he was allowed to go in to
13 begin with.

14 Even if the Defendant wasn't placed under arrest we
15 think there is a protective sweep issue when he is not sure;
16 he's there by himself and he's not sure what Rodney Smith's
17 situation is, to be -- for officer's safety, to make sure
18 there is no weapon or anything else that could harm the
19 officer in the stop, Your Honor, so we would respectfully ask
20 that that motion be denied.

21 THE COURT: All right. Well, let's look at the facts
22 here, as testified. The Officer testified that, when he gets
23 to the passenger side of the vehicle, said he observed the
24 bag. Gets to the passenger side of the Defendant, gets the
25 Defendant out of the vehicle, arrests him, handcuffs him, puts

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1 him in his car. Now, he testified to two different things
2 today. One, that he then got the bag and put it on the
3 sidewalk, and then he also said, when he was arresting the
4 Defendant he got the bag and put it on the sidewalk. There
5 was no doubt that the bag was on the sidewalk, and he hadn't
6 looked at it at all when he put the Defendant in the patrol
7 car. The Defendant was handcuffed and in the patrol car,
8 couldn't get out, and the bag is on the sidewalk. He
9 testified this time -- and he clearly -- and I'll say this for
10 a fact. He clearly did not testify to this at his previous
11 testimony under oath. In this time, the fact that I'm talking
12 about right now -- he said this time that it was an unknown
13 bag; there might be a safety issue; there might be a weapon;
14 it might pose a threat. The Officer never, at any point in
15 time, mentioned anything like this in his previous testimony,
16 under oath, when the Court declared a mistrial before. He
17 never said anything about that.

18 In his prior testimony, under oath, all he said was, he
19 secured the bag, put it on the sidewalk, put the Defendant
20 under arrest in his car, and then he went back and opened up
21 the bag, didn't give any ---

22 MR. HIXSON: Did ---

23 THE COURT: No sir. No sir. That is clearly what he
24 said, and there is no doubt about that's what he said before.
25 He never, ever said anything about that in his prior

1 testimony, because I made note of it when I heard this matter
2 before, because I saw this issue coming up.

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

11 I have looked at -- and I'm going to give you some cases
12 to look at over night, gentlemen, and we will revisit this
13 issue in the morning. I want y'all to look at -- and these
14 are all United States Supreme Court Decisions -- Florida
15 versus Wells, found at 495 U.S. 1, 110 Supreme Court 16-32,
16 109 LORS Edition 2nd 1 -- it's a 1990 Decision of the United
17 States Supreme Court -- United States versus Chadwick, 433
18 U.S. 1, 97 Supreme Court 24-76, and that one is a 1977
19 Decision of the U.S. Supreme Court. Then you've got
20 California versus Acevedo. I may not be pronouncing it
21 correctly, but it's spelled A.c.e.v.e.d.o., found at 500 U.S.
22 565, 111 Supreme Court 1982, and it's a 1991 Decision of the
23 U.S. Supreme Court.

24 Gentlemen, y'all need to read those Decisions. We will
25 revisit this issue in the morning.

1 MR. LONG: Thank you, Your Honor.

2 THE COURT: Mr. Hixson, Mr. Long, I want to talk to
3 y'all in my chambers.

4 Thank you very much.

5 MR. LONG: I do have one matter, Your Honor, before ---

6 THE COURT: Yes sir.

7 MR. LONG: We visited my client being out on bond
8 before ---

9 THE COURT: Yes sir.

10 MR. LONG: ---Come to a close of the testimony again
11 today. I have stayed in contact, and so has he, with the
12 bonds lady. She is till willing to stay on his bond, and we
13 are hoping, Your Honor, since Danny has always done what was
14 required of him -- he's been here, not this last week, we mis-
15 tried a case, came back this week. He helps -- looks after
16 his elderly mother here, Ms. Brown, and I'm hoping that he can
17 go home tonight and be fresh tomorrow and help me defend this
18 case tomorrow and remain out on bond.

19 THE COURT: All right. Mr. Brown, please stand, sir.
20 You remain under the bond as previously issued. You
21 understand that?

22 A. Yes sir.

23 THE COURT: The condition of those bond -- bond, is
24 that if you do not come back for trial this trial will
25 continue in your absence. You understand that?

JURY OUT/SUPPRESSION MOTION/COURT TO DEFENDANT

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1 A. Yes sir.

2 THE COURT: You further understand a bench warrant will
3 be issued for your arrest?

4 A. Yes sir.

5 THE COURT: Further, I'm giving you a direct order that
6 you shall appear tomorrow morning by 9 A.M. in this courtroom.
7 Do you understand that?

8 A. Yes sir.

9 THE COURT: If you do not obey that direct order you
10 are subject to being held in contempt of court, and that will
11 subject you to a year in the Department of Corrections,
12 notwithstanding what happened in this proceeding. You
13 understand that?

14 A. Yes sir.

15 THE COURT: Under those terms and conditions I'll allow
16 him to remain out on bond.

17 Thank you very much.

18 MR. LONG: Thank you, Your Honor.

19 (THE FOLLOWING TAKES PLACE ON THE NEXT DAY, SEPTEMBER
20 13, 2006, OUTSIDE THE PRESENCE OF THE JURY.)

21 THE COURT: All right. Mr. Long, you had made a
22 suppression motion, and I had asked y'all to look at some
23 cases, and y'all have brought some other material to me to
24 look at, so what I'm going to do at this point in time is, I'm
25 going to take the matter under advisement, and I will rule on

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1 it when the State and the defense have rested their case.

2 Is the State ready to proceed?

3 MR. HIXSON: Yes, I am, Your Honor.

4 THE COURT: All right. Is the defense ready?

5 MR. LONG: Yes sir.

6 THE COURT: Have the jury come in, please.

7 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
8 JURY.)

9 THE COURT: All right. Good morning, ladies and
10 gentlemen. We are ready to continue on with the trial of this
11 case.

12 Is the State ready to continue?

13 MR. HIXSON: I am, Your Honor.

14 THE COURT: Call your next witness, sir.

15 MR. HIXSON: Thank you, Your Honor.

16 The State calls Rodney Smith.

17 May we approach briefly, Your Honor?

18 THE COURT: Absolutely.

19 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

20 (THE WITNESS, RODNEY SMITH, IS SWORN AT THIS TIME.)

21 THE COURT: All right, ladies and gentlemen, I'm sorry.
22 You need to go back to your jury room for a minute, and I'll
23 call you back out in just a second.

24 Thank you very much.

25 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE

1 JURY.)

2 THE COURT: Madame Clerk, call Ms. Barbara Pratt and
3 tell her to come over here now, please Ma'am.

4 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
5 THE PRESENCE OF THE JURY.)

6 THE COURT: Is the State ready to proceed?

7 MR. HIXSON: Yes, we are, Your Honor.

8 THE COURT: Defense?

9 MR. LONG: Yes sir.

10 THE COURT: Ask the jury to come in, please.

11 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
12 JURY.)

13 THE COURT: All right, Solicitor. You may proceed,
14 sir.

15 MR. HIXSON: Thank you very much, Your Honor.

16 RODNEY SMITH, being first duly
17 sworn, testifies as follows:

18 DIRECT-EXAMINATION BY MR. HIXSON:

19 Q. Where do you live, sir?

20 A. Myrtle Beach.

21 Q. Myrtle Beach. And how long have you lived there?

22 A. Twenty years.

23 Q. Twenty years. And what do you do for a living?

24 A. Well, I'm disabled right now.

25 Q. All right. I can see you have a medical condition of

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1 some kind. Are you doing all right?

2 A. Yes, so so, sir.

3 Q. Were you living in Myrtle Beach around October 6, of
4 2005?

5 A. Yes.

6 Q. Okay. Do you remember that day?

7 A. Yes.

8 Q. Okay. Could you please tell the jury about that day,
9 specifically -- let me try to rephrase that -- did you see
10 Danny Brown on that day?

11 A. Yes, I saw him.

12 Q. Okay. Could you please tell the jury about that day.

13 MR. LONG: Your Honor, I'm sorry.

14 THE COURT: Yes sir.

15 MR. LONG: May we approach?

16 THE COURT: Absolutely.

17 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

18 THE COURT: Continue on, please. Thank you.

19 MR. HIXSON: I apologize.

20 Q. Do you remember seeing Danny Brown on October 6, of
21 2005?

22 A. Yes.

23 Q. Could you please tell the jury about that day.

24 A. It been in the afternoon. I had stopped to the Hess
25 station on 9th Avenue south to get some gas, and he was there,

1 and he approached me for a ride, and which we were going to
2 transact some business together, and he said I have to give
3 him a ride home in order to transact the business. I'm going
4 to buy some drugs from him. So on our way home -- he went --
5 he went and he brought a duffle bag into my car, and we left.
6 We got about six blocks down the road and we got stopped by a
7 County Police, and he noticed that Danny was drinking a beer,
8 and he stopped us and he -- they took the duffle bag out the
9 car and they had took me out and checked my license. My
10 license was suspended. So they told me to go sit back down,
11 and they been checking the duffle bag. We -- I didn't know
12 what was in it yet, until -- then they took both of us to
13 jail, and I found out he had a large sum of cocaine in the
14 bag.

15 Q. Let me -- that's basically what happened, overview?

16 A. Yes sir.

17 Q. Let's go back and talk about a little details.

18 A. Okay.

19 Q. You said you were at the Hess station?

20 A. Yes sir.

21 Q. Is that right across from Schlowsky's Deli, right near
22 there ---

23 A. Yes.

24 Q. ---And the Circle K. What did you say that Danny Brown
25 was doing there?

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1 A. He was just standing there talking to the attendant in
2 the little booth.

3 Q. Did you know Danny Brown before?

4 A. Yes, I knew him before.

5 Q. And how did you know him in the past, in what capacity?
6 Are y'all buddies?

7 A. No. We have -- no, we are associates of each other.
8 We had -- deal with each other before.

9 Q. And what do you mean by associates, and dealing with
10 each other?

11 A. I mean, I didn't buy drugs from him before.

12 Q. Okay. So did you approach Danny Brown in the Hess
13 station?

14 A. No, he approached me.

15 Q. Okay. And what did he say to you at that time?

16 A. He said he was straight.

17 Q. And what -- what does that mean?

18 A. That mean that he had something, if I need any.

19 Q. Had something, meaning Diet Coke, or what did he mean?

20 A. He had cocaine.

21 Q. And what did you say?

22 A. I said yes, I could use something.

23 Q. And did you ask him for a specific amount or anything?

24 A. Yes, a eight ball.

25 Q. Okay. I don't -- what does an eight -- what does that

1 mean?

2 A. That's three and a half grams.

3 Q. Three and a half grams?

4 A. Uh huh (indicating positive)

5 Q. And then tell me what happened. Tell the jury what
6 happened.

7 A. Well, that meant that I got in -- we got in the car --
8 well, he got his stuff out somebody else automobile.

9 Q. Okay. When you say his stuff ---

10 A. His duffle bag.

11 Q. Okay.

12 A. His duffle bag.

13 Q. Okay. Let me show you what's already been put into
14 evidence, and that's State's 1. That's in evidence. Do you
15 recognize that picture?

16 A. I recognize the duffle bag. I didn't see what was in
17 it.

18 Q. Okay.

19 A. It was closed up.

20 Q. But that looks like the duffle bag he had?

21 A. Uh huh (indicating positive)

22 Q. I think you were -- well, you said that. You went back
23 to the car. Did you see that car?

24 A. Not really. I been way on the other side, and I
25 couldn't see it, because the building had blocked the car,

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1 and it was raining at the time.

2 Q. Did you see who Mr. Brown -- was Mr. Brown with anybody
3 else in that car?

4 A. I'm not sure. Someone else had to been driving that
5 automobile, but I didn't see who it was.

6 Q. And why do you say that?

7 A. Because -- cause he went to the passenger's side, I
8 believe. He had to. If he would -- he had to went and get it
9 out that vehicle, and someone else had to have been driving
10 it.

11 Q. All right. You saw him walk across the parking lot to
12 your car?

13 A. Yes.

14 Q. And that's when I think you said he had a duffle bag?

15 A. Yes.

16 Q. Now, he gets into your Plymouth, I think; is that
17 right?

18 A. Yes.

19 Q. And then please tell us -- you already did. Just try
20 to be in a little bit more detail. I'm sorry to belabor the
21 point. Did you guys have any conversation in the car while
22 you were driving?

23 A. Not really. Just idle talk about going -- we really
24 didn't say nothing too much to each other. I didn't even
25 notice that he had a beer, because the weather was so bad. I

1 had my eye on the road.

2 Q. Okay. Now, why didn't you guys just take care of your
3 business in the parking lot of the Hess station?

4 A. I don't -- I don't know that. I didn't -- that didn't
5 come up. I didn't know he had nothing. I thought I had to
6 take him home in order to get it.

7 Q. Now, at some point in time during the course -- you
8 were arrested; is that right?

9 A. Yes.

10 Q. And they found -- were you there when they searched
11 your car ---

12 A. Yes.

13 Q. ---When the police department searched your car.

14 Let me show you what's been marked as State's 3. That's
15 in evidence. Do you recognize that?

16 A. Yes.

17 Q. And what is that?

18 A. That was the stuff I had under my seat.

19 Q. Is that your black pouch?

20 A. Yes.

21 Q. And those are your drugs in there?

22 A. Yes.

23 Q. Now, when you referred to an eight ball, what are those
24 items in the picture referred to? Is that an eye ball?

25 A. Yeah, that would be -- that's less than an eight ball,

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1 but it would be like that.

2 Q. And is that for your use, or were you going to resell
3 that?

4 A. That been for my use.

5 Q. So did you know that there were -- what appeared to be
6 crack cocaine in Danny Brown's duffle bag?

7 A. No.

8 Q. And once again, why not?

9 A. I didn't know.

10 Q. And why didn't you know?

11 A. Because he just brought the bag in the car, and he
12 didn't tell me nothing, so -- and, you know, he usually go to
13 the gym. I figured he been on his way back from the gym.

14 Q. Okay. At some point in time now you gave a -- did you
15 give a statement to law enforcement?

16 A. Yes.

17 Q. Did you give a statement to the police when you were
18 arrested?

19 A. Yes.

20 Q. And at that time did you take responsibility for the
21 drugs under the driver's seat?

22 A. Yes.

23 Q. Now you are currently charged with all your offenses;
24 is that right?

25 A. Yes.

1 Q. In fact, it -- do you know what -- all the offenses you
2 are charged with?

3 A. Not really. I know I was charged with the stuff in his
4 duffle bag too.

5 Q. Are you all right?

6 A. Yes, I'm okay.

7 Q. Do you know all the charges -- are you aware of all the
8 charges you are charged with?

9 A. No.

10 Q. Are you charged with the offenses in your pouch as
11 well?

12 A. Yes.

13 Q. And all those charges are still pending?

14 A. Yes.

15 Q. Now, at some point in time did you -- you were
16 represented by an attorney; is that right?

17 A. Right.

18 Q. And is your attorney present in the courtroom today?

19 A. Yes.

20 Q. And who is that?

21 A. Barbara Pratt.

22 Q. Now you are getting up here telling this jury
23 everything that happened. Did the State promise you anything
24 for your testimony?

25 A. No.

1 Q. Did you enter into any kind of discussion, or
2 agreement, with the State in regards to your testimony?

3 A. No. I just was going to try to clarify what happened.

4 Q. Well, did you sign some kind of proffer agreement about
5 your testimony?

6 A. I wrote a statement -- I signed a statement. That was
7 all.

8 Q. Okay.

9 MR. HIXSON: Beg the Court's indulgence, Your Honor.

10 THE COURT: Yes sir.

11 MR. HIXSON: Approach the witness with that?

12 THE COURT: Yes sir.

13 Q. Does that refresh your recollection?

14 A. Yes.

15 Q. Okay. Now, can I ask you a question if that refreshes
16 your recollection. Did you enter into any type of agreement
17 with the State in regards to your testimony?

18 A. Well, the State -- the State said there ain't nothing
19 they -- you know, they could really do for me, but to testify.

20 Q. Okay. Was your attorney with you during the course of
21 those discussions?

22 A. Yes.

23 Q. Has anybody threatened you in any way for your
24 testimony?

25 A. No.

RODNEY SMITH - CROSS BY LONG

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1 Q. And no promises have been made to you?

2 A. (NODS HEAD NEGATIVE)

3 MR. HIXSON: I have no further questions for this
4 witness at this time, Your Honor.

5 COURT REPORTER: I'm sorry. I didn't get his last
6 answer.

7 Q. All right. Could you please, for the court reporter?

8 A. No.

9 THE COURT: All right. Mr. Long.

10 MR. LONG: One moment, please, Your Honor.

11 THE COURT: Yes sir.

12 MR. LONG: Thank you, Your Honor.

13 THE COURT: Yes sir.

14 CROSS-EXAMINATION BY MR. LONG:

15 Q. Mr. Smith, I'm Russell Long. How are you doing?

16 A. All right, sir.

17 Q. We have never met before, but I think you understand I
18 represent Danny.

19 A. Yes.

20 Q. I'm going to ask you some questions about the incident
21 first, and then I'm going to ask you some questions about
22 these agreements that you signed.

23 You say -- is it true that you say that you pulled up to
24 a Hess station in Myrtle Beach, and the weather was real bad?

25 A. Yes sir.

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- 1 Q. How bad -- what was ---
- 2 A. It had been raining.
- 3 Q. Was it dark outside?
- 4 A. It was just starting to get dark.
- 5 Q. What time of day was it?
- 6 A. It had to have been about 6:30, seven o'clock, I
- 7 believe.
- 8 Q. Okay. And it was October, so the time had changed; is
- 9 that right?
- 10 A. Yes sir.
- 11 Q. And you say you just happened to find Danny Brown. He
- 12 was there in ---
- 13 A. Yes.
- 14 Q. ---As a passenger in another vehicle, right?
- 15 A. Right.
- 16 Q. And Danny -- you would agree with me that Danny asked
- 17 for a ride home?
- 18 A. Yes.
- 19 Q. And he got in the car for you to give him a ride home,
- 20 and y'all started -- headed southbound down business 17; is
- 21 that right?
- 22 A. Right.
- 23 Q. And did you have your windows up or down?
- 24 A. It was up.
- 25 Q. Your windows were up?

- 1 A. Yes.
- 2 Q. Are you sure?
- 3 A. Yes. The one -- it been raining.
- 4 Q. It was raining. So your window was up. Was Danny's
- 5 window up?
- 6 A. Yes.
- 7 Q. Okay. And did you have your lights on?
- 8 A. Yes.
- 9 Q. Did you have to have your lights on?
- 10 A. Yes.
- 11 Q. And your car -- you had an older model car so they
- 12 don't come on automatic; you have to turn them on, right?
- 13 A. You have to turn them on.
- 14 Q. Did you have your lights on when you were going to the
- 15 Hess station?
- 16 A. Yes.
- 17 Q. Okay. So you head down the highway, lights on, windows
- 18 up; it's raining, and riding down the road with Danny Brown,
- 19 and you say he got in your car and he put a black duffle bag
- 20 on the floorboard, right?
- 21 A. Yes.
- 22 Q. Now, it's true, isn't it, your car doesn't have a
- 23 center console like all of our -- almost every car nowadays
- 24 has a big center console. Your car is an older car. It's
- 25 just a big floorboard, right?

1 A. Yes.

2 Q. And he put that duffle bag in the middle, right between
3 you and him, right?

4 A. No. He put that duffle bag down between his legs.

5 Q. Down between his legs. And how big a car is it? What
6 kind of car is it?

7 A. It been a '76 Plymouth Fury.

8 Q. A classic. So he put the duffle bag down on the
9 floorboard between his legs. Y'all started down the road.
10 Your -- the pouch of drugs that you had up underneath your
11 seat, did you put those up under there at that time, or had
12 they been there for a while?

13 A. I put them up under.

14 Q. You put them up under there?

15 A. Uh huh (indicating positive)

16 Q. Is that where you usually keep them?

17 A. Yes.

18 Q. Is that the pouch you usually carry them in?

19 A. Yes.

20 Q. How long you been selling drugs?

21 A. Probably a couple of years.

22 Q. Is this the first time you got caught?

23 COURT REPORTER: Excuse me. Your answer, aloud please.

24 A. Yes.

25 Q. So, you are driving down the highway. Did you see a

1 police car behind you?

2 A. We passed -- I think we passed by the police car. He
3 was on the opposite side.

4 Q. All right. Wait a minute now. You passed by a police
5 car, and he was on the opposite side. What does that mean?
6 Does that mean he ---

7 A. He had to swing back.

8 Q. I'm sorry.

9 A. I think he had to swing back around behind us.

10 Q. Okay. So you think the police car was going in the
11 other direction?

12 A. Yes.

13 Q. And you think he did a u-turn and got behind you?

14 A. Yes.

15 Q. Were you in the -- you are going to Highway 17, there's
16 two lanes of traffic. There is what I call the center lane,
17 which is close to the median, and there's a right-hand lane
18 over here by the curb. Which lane were you driving in?

19 A. I think the outer lane.

20 Q. Well, do you know?

21 A. The answer been the outer lane.

22 Q. The right-hand lane?

23 A. Right-hand lane.

24 Q. All right. So, the police car did a u-turn and got
25 behind you, right?

1 A. I think so.

2 Q. Well, do you think -- I kind of need you to know, sir.

3 A. I'm not ---

4 Q. If you don't know, tell me you don't know.

5 A. I don't know exactly, sir.

6 Q. Okay. So you are not sure but ---

7 A. I'm not sure.

8 Q. ---But did you see a police car?

9 A. Yes.

10 Q. Okay. And did you see a police car eventually get

11 behind you?

12 A. Yes.

13 Q. Did that police car pull up beside you? I'm doing my

14 hands like this, like he was going in the same direction. Did

15 he come up beside you?

16 A. I'm not sure.

17 Q. Okay.

18 A. I don't think he came up beside me.

19 Q. You don't think he came up beside you?

20 A. Uh uh (NODS NEGATIVE)

21 Q. So the police car came up behind you, and he put his

22 blue lights on right away; is that right?

23 A. Yes sir. Well, we just had drive six blocks ---

24 Q. Okay.

25 A. ---From the Hess station.

1 Q. Six blocks from the Hess station?

2 A. Uh huh (*indicating positive*)

3 Q. He got behind you, and he put his blue lights on, and
4 you stopped pretty quick, right?

5 A. Yes sir.

6 Q. You didn't turn off then into a parking lot or
7 anything?

8 A. No.

9 Q. Why did you stop in the highway?

10 A. I pulled on the side.

11 Q. You pulled to the side?

12 A. On the side of the road.

13 Q. Well, there's a curb there, right?

14 A. Yes, but he been -- that's where he been behind me.

15 Q. I'm sorry.

16 A. That's where I pulled at.

17 Q. You went up on the curb?

18 A. No. I hadn't went on the curb. I pulled right by the
19 curb.

20 Q. You just stopped in the middle of the highway?

21 A. Yes.

22 Q. You stopped in the middle of the highway?

23 A. Yes.

24 Q. My question was why? Why didn't you pull off?

25 A. I don't know why.

1 Q. All right. And when the police officer came -- is this
2 the police officer right here, Officer Williams?

3 A. Yes.

4 Q. Do you recognize him. When he came up to the car did
5 you come to your window or to Danny's window?

6 A. I think he came to my window.

7 Q. All right, and then he -- did you roll the window down
8 for him?

9 A. Yes.

10 Q. Has yours got -- you gotta roll it like this, or is it
11 electric?

12 A. Uh huh (indicating positive)

13 Q. Did you roll it?

14 A. (NODS HEAD AFFIRMATIVE)

15 Q. Okay. And what did he say to you?

16 A. He said -- he said, was that a beer -- was that's a
17 beer you -- Danny lift up.

18 Q. I'm sorry.

19 A. Was that a beer he's drinking.

20 Q. He said, was that he a beer he was drinking. Was he
21 asking you that question?

22 A. No, asking Danny.

23 Q. All right. Did he ask Danny, to Danny, is that a beer
24 you are drinking?

25 A. Yes.

1 Q. That's what he said. And then what did Danny say?

2 A. I don't -- Danny -- I'm not exactly -- Danny then
3 tucked the beer can away.

4 Q. Say that again.

5 A. He had already tucked the beer can away.

6 Q. Who had took the beer can away?

7 A. Danny. He already tucked the beer can away.

8 Q. Tucked the beer can away?

9 A. Yes.

10 Q. Okay.

11 A. And then he went to see -- went to his door, opened his
12 door, and he found the beer can.

13 Q. Okay. Wait a minute now. Officer Williams walked
14 around the car and opened Danny's door ---

15 COURT REPORTER: Excuse me. Your answer, aloud. What
16 was your answer?

17 Q. Did he walk around and open Danny's door?

18 A. Yes. Yes.

19 Q. Was Danny's window still up?

20 A. Yes.

21 Q. Did he reach into that car and grab that beer can?

22 A. I think he asked Danny to step out ---

23 Q. Okay.

24 A. ---And then he found the beer can.

25 Q. Danny found the beer can. Where was the beer can?

1 A. Right down -- he had 'em tucked down, right between the
2 seats, in his jacket.

3 Q. The beer can was tucked down between your seat and his
4 seat?

5 A. No. No. He had it already in his jacket.

6 Q. Okay. And you were pointing down to your left side.
7 Is that the side that Danny had the beer can tucked down in?

8 A. He had put it down in his jacket. He had a jacket, and
9 he had the beer can already in his jacket.

10 Q. Okay. That's good. Where Danny had tucked that beer
11 can, okay -- where that beer can was tucked, was it in what I
12 call plain view, or did -- was it hidden?

13 A. It was hidden.

14 Q. It was hidden. So the police pulled Danny out of the
15 car, and then what? Did he put the cuffs on him right away?

16 A. I believe if he found -- he found -- when he pulled
17 Danny out of the car he found the bag.

18 Q. Okay. He pulled Danny out of the car, and then he went
19 into the car, and looked around inside ---

20 A. Yes, and he had done found the beer ---

21 Q. ---Is that right?

22 A. He found the beer can. The beer can been in his coat.

23 Q. Okay. Hold on one second. I'm -- this is important.
24 Is it true that he took Danny out of the car, and then he went
25 back into the car and searched underneath the coat, and found

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1 the beer can; is that right?

2 A. Yes.

3 Q. That's the way it happened. And then when he found the
4 beer can, what did he say to Danny?

5 A. I think he handcuffed him then.

6 Q. He handcuffed him and he told him what, you are under
7 arrest?

8 A. Yes, I think he put him ---

9 Q. Did he tell him what he was under arrest for?

10 A. Yes. Open container, I think.

11 Q. And then what did the police officer do? Took Danny
12 back to his car?

13 A. Yes.

14 Q. So he took Danny back to his car, put Danny in the car.
15 What were you doing this whole time?

16 A. I was still sitting in the driver's seat.

17 Q. Sitting in the driver's seat. Just sitting there?

18 A. Yes.

19 Q. And then what did the police officer do next?

20 A. He came and got the duffle bag.

21 Q. He came back to the car, and went through Danny's door,
22 right? Was the door still open?

23 A. No. He was already ---

24 Q. He had already closed the door back?

25 A. Uh huh (indicating positive)

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1 Q. The police officer went -- when he arrested Danny for
2 open container -- after he went in the car and found the beer
3 can you are telling me he arrested Danny, cuffed him, and shut
4 the door; is that right?

5 A. Uh huh (indicating positive)

6 Q. And took Danny and placed him in his car?

7 A. Right. No, let me rephrase that. I think he had Danny
8 on the back of the car, and that's when he went and get the
9 duffle bag.

10 Q. Okay. He handcuffed Danny and took Danny away ---

11 A. No. No.

12 Q. ---Some distance?

13 A. No. He -- I don't think he had Danny handcuffed yet.
14 He just had him standing up on the back.

15 Q. Behind the car?

16 A. Had him on the -- like the trunk of my car, just had
17 him standing there.

18 Q. Could you see? It was raining. Were you looking in
19 the rear view mirror or something?

20 A. Uh huh (indicating positive)

21 Q. Could you tell if Danny was handcuffed or not? You
22 couldn't ---

23 A. I couldn't tell.

24 Q. ---Tell, could you. But he had Danny back there?

25 A. Yes.

1 Q. And then after he got Danny back there, it's true
2 that -- that -- Danny's door was closed. It's true, isn't it,
3 that he came back and opened that door again, right?

4 A. Right.

5 Q. He opened Danny's door again, and he reached in the
6 car, and he grabbed the black duffle bag, right?

7 A. Right.

8 Q. Did he ask you anything about that bag?

9 A. No, not really.

10 Q. Didn't ask you a single thing about that bag. Had he
11 asked you a single question yet?

12 A. He had asked me for my license.

13 Q. When did he do that?

14 A. That was when he first stopped us.

15 Q. When he first stopped you he asked for your license?

16 A. (NODS HEAD AFFIRMATIVE)

17 Q. So then he reached in there, he got that duffle bag,
18 and isn't it true, he pulled the duffle bag out, put it on the
19 sidewalk, unzipped it, and started looking through it, right?

20 A. Yes.

21 Q. Were you watching him do this?

22 A. I couldn't see him do it.

23 Q. You couldn't see him do it?

24 A. I couldn't see him do that.

25 Q. Why?

1 A. Because he was on that side.

2 Q. He was on the right-hand side and the door was open at
3 this point, right?

4 A. The door was -- he had done shut the door back.

5 Q. He shut the door again?

6 A. Yes. And in my glass, you know -- an old car, and the
7 windows been fogged up.

8 Q. Say it again.

9 A. The windows is fogged up ---

10 Q. The windows were fogged up.

11 A. ---On my car.

12 Q. Were the windows fogged up before he put the blue
13 lights on you?

14 A. It been -- not that foggy, because I had the defrost.

15 Q. You had the defrost on before he put the blue lights
16 on. Did you turn the defrost off when he stopped you?

17 A. I cut the whole car off.

18 Q. You cut the whole car off. I've got you. Was it hot
19 or cold outside?

20 A. Excuse me.

21 Q. Was it hot or cold outside?

22 A. It been -- it been kind of warm, because I think I had
23 the air-conditioner on.

24 Q. You had the air-conditioning and the defrost on at the
25 same time ---

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1 A. Well, I had them on cool, then I had put them on
2 defrost.

3 Q. All right. Okay. So, he pulled the bag out, searches
4 through the bag. He zipped the bag back up. Did you see him
5 do that?

6 A. I didn't see the bag no more.

7 Q. You didn't see the bag?

8 A. Uh uh (NODS NEGATIVE)

9 Q. And then what did the police officer do?

10 A. He called -- he came back to my side and he asked me to
11 step out of the car. I stepped out, and at that time he asked
12 me if I knew my license had been suspended. I said, yes. He
13 handcuffed me, and took me and put me in the car.

14 Q. In the same car that he put Danny in?

15 A. No. It was in another one.

16 Q. What car?

17 A. It was another cruiser.

18 Q. So another policeman had come by this time?

19 A. Yes.

20 Q. You would agree with me, sir, that there was a long
21 time between him looking in the black duffle bag and another
22 police car getting there?

23 A. No, it ain't been that long.

24 Q. It wasn't that long?

25 A. Uh uh (NODS NEGATIVE)

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1 Q. Okay. He didn't get you out of the car until another
2 police car got there though, right?

3 A. Yes sir.

4 Q. Okay. And when the police officer -- you got in the
5 car with the policeman, isn't it true that you told that
6 policeman, I don't even know that guy? Didn't you tell him
7 that?

8 A. No, I don't remember saying it.

9 Q. You don't remember saying that?

10 A. Uh uh (NODS NEGATIVE)

11 Q. Okay. The charges that they brought against you
12 included trafficking in cocaine, right?

13 A. Yes.

14 Q. Trafficking in a hundred and twenty-two grams of
15 cocaine, correct?

16 A. Correct.

17 Q. And you are still charged with that crime, right?

18 A. Right.

19 Q. And you've got a lawyer, Ms. Barbara Pratt, a very fine
20 lady, a good lawyer, right? That's your lawyer.

21 THE COURT: Give him your answer, sir.

22 A. Yes sir.

23 Q. And on the day that this thing happened, the policeman,
24 Mr. Delpercio, Detective Delpercio, who is not here today --
25 but he went into the jailhouse to talk to you without a

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1 lawyer; is that right?

2 A. Right.

3 Q. You didn't have a lawyer at that time?

4 A. Right.

5 Q. And Officer Williams was in there with him?

6 A. Yes.

7 Q. He was in the room too. So, Williams and Delpercio
8 went into a room with you at J. Reuben Long, and sat down with
9 you, and what did they tell you?

10 A. That's when I found out.

11 Q. When you found out what?

12 A. That's when I found out it been a hundred and twenty-
13 two grams of cocaine was in that bag.

14 Q. And what did they tell you they could do for you?

15 A. They didn't really tell me they could do nothing for
16 me.

17 Q. Okay. You signed -- you wrote out a little three line
18 statement for them. Do you remember that?

19 A. Yes sir.

20 Q. And would you -- would you agree with me that, what you
21 told them was, that the drugs under the seat were yours, and
22 you had been dealing drugs for about a year. That's what you
23 said?

24 A. Yes sir.

25 Q. Is that all you told them that day?

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1 A. Yes sir.

2 Q. That was it?

3 THE COURT: Was that a question, Mr. Russell ---

4 Q. Was that it?

5 THE COURT: ---Mr. Long?

6 A. Yes.

7 THE COURT: All right.

8 Q. Now, that was October the 6th, 2005; is that correct?

9 A. Right.

10 Q. When did you get a lawyer?

11 A. I got a lawyer the following week. I didn't get out --

12 I didn't get from incarcerated till that Monday. That was a

13 Thursday.

14 Q. Okay. Now, on August the 30th of 2006, you had a

15 meeting with your lawyer and who? August 30th. I'm talking

16 about a couple of weeks ago.

17 A. Okay.

18 Q. You had a meeting with your lawyer and who else?

19 A. The Solicitor ---

20 Q. Mr. Hixson?

21 A. Uh huh (indicating positive)

22 Q. Who else?

23 A. ---And Debecio.

24 Q. Delpercio?

25 A. Delpercio.

1 Q. Okay. And they handed you what Mr. Hixson showed you,
2 which I'm going to show you again, what's called a Proffer
3 Agreement; is that right? Do you remember that?

4 A. Yes.

5 Q. Do you understand what that document means?

6 A. No.

7 Q. You don't have a clue. In fact, sir, all you know is,
8 isn't it true, that by signing this document you agreed to
9 come in and testify, and you certainly hope that you are going
10 to get something out of it; isn't that right?

11 A. Yes sir.

12 Q. And what you hope you are going to get out of it is,
13 you are going to get out of it; isn't that true?

14 A. Yes sir.

15 Q. And you agreed in this document that you would come in
16 here and testify, and you agreed that you would take a
17 polygraph test; remember saying that?

18 A. Yes.

19 Q. Have they given you a polygraph test?

20 A. No, sir.

21 Q. No. I show you the third page of that. Is that your
22 signature?

23 A. Yes sir.

24 Q. Okay. So after you signed this, you told them that you
25 ran into Danny Brown -- his daddy's name was Johnny Brown -- I

1 just slipped up -- you ran into Danny Brown, and y'all were
2 going to do a deal; he was going to sell you cocaine. That's
3 when you told them that, right?

4 A. Right.

5 Q. That's the first time you have ever told anybody that.

6 A. Right.

7 Q. After you signed that Agreement, right? You told them
8 that you were going to buy an eight ball cocaine, you were
9 going to pay a Hundred and Fifty Dollars for it, and the
10 deal -- and it just happened -- you just happened upon him but
11 that was going to happen; isn't that right?

12 A. Right.

13 Q. If you were going to buy cocaine from Danny Brown, how
14 come you didn't have any money in your pocket?

15 A. I did had money.

16 Q. I've seen the evidence sheet here. Are you sure you
17 had money in your pocket?

18 A. Yes. I had Two Hundred Fifty Dollars.

19 Q. Two Hundred and Fifty Dollars. Okay. And the drugs
20 that you had already in your car, according to you, were not
21 enough for you; is that right?

22 A. Right.

23 Q. And you had Xanax, marijuana, cocaine and crack
24 cocaine. Do you sell all of those drugs?

25 A. I'm a user too.

- 1 Q. You are a user. What do you use?
- 2 A. I use all of them.
- 3 Q. You use them all.
- 4 A. Or I used to.
- 5 Q. I show you what's been marked as State's Exhibit Number
- 6 3. It looks like one, two, three, four little tiny ziploc
- 7 bags. You see that?
- 8 A. Yes.
- 9 Q. What is that? What are those two little tiny little
- 10 ziploc bags?
- 11 A. That's the way you sell it.
- 12 Q. That's the way you sell it?
- 13 A. Uh huh (indicating positive)
- 14 Q. What is this? What's in this bag?
- 15 A. Probably coke -- cocaine.
- 16 Q. Probably cocaine.
- 17 And then I'll show you this big -- looks like a sandwich
- 18 bag, with just a whole bunch of white stuff. What is that?
- 19 A. That's cocaine.
- 20 Q. Cocaine. And then these little brown bags, these two
- 21 little brown bags, what's that?
- 22 A. That's crack.
- 23 Q. Crack cocaine. Is that the difference between crack
- 24 and cocaine, for those of us that aren't that familiar? It's
- 25 a different color?

1 A. Sometimes.

2 Q. Sometimes. What makes it a different -- what makes it
3 a different color?

4 A. On crack they cook it.

5 Q. They cook it?

6 A. Yes.

7 Q. Okay. Were you going to do all these drugs, or were
8 you going ---

9 A. I was going to sell some.

10 Q. Sell some and do some?

11 A. Yes sir.

12 Q. You are buying, selling and using, right?

13 A. Right.

14 MR. LONG: Thank you. You have been helpful.

15 THE COURT: Redirect, sir.

16 MR. HIXSON: Thank you, Your Honor.

17 REDIRECT-EXAMINATION BY MR. HIXSON:

18 MR. HIXSON: I would like to get this marked.

19 (3 PAGE PROFFER AGREEMENT MARKED STATE'S EXHIBIT NUMBER
20 9, FOR IDENTIFICATION ONLY.)

21 MR. HIXSON: Your Honor, I have marked this Proffer
22 Agreement as State's 9.

23 THE COURT: All right, sir.

24 Q. Mr. Smith, defense counsel made much of the Proffer
25 Agreement that you talked about signing. Do you recall that?

1 Was this Agreement read to you by your attorney?

2 A. Yes.

3 Q. Did she discuss the contents of that with you during
4 the course of our discussions?

5 A. Yes.

6 Q. And so was she there to answer any questions that you
7 had about it?

8 A. Uh huh (indicating positive)

9 Q. Did you tell her that you understood?

10 A. Yes.

11 Q. I believe you indicated that was your signature?

12 A. Yes sir.

13 Q. Does that appear to be the same document that you
14 recall signing and us discussing, or a xerox copy of it?

15 You have to answer. The court reporter ---

16 A. Yes.

17 MR. HIXSON: At this time, Your Honor, the State would
18 like to move State's Exhibit 9 into evidence.

19 MR. LONG: No objection.

20 THE COURT: In evidence without objection.

21 (STATE'S EXHIBIT NUMBER 9 ADMITTED INTO EVIDENCE.)

22 MR. HIXSON: Your Honor, at this time the State would
23 not publish this to the jury. It's going to be sent to the
24 jury room for the jury to read.

25 THE COURT: All right. You can just give it to the

1 court reporter then, unless you need it.

2 MR. HIXSON: Can I just briefly ---

3 THE COURT: Yes sir.

4 MR. HIXSON: I guess I am publishing it if I'm going to
5 hand it around, Judge. It's a three-page document.

6 THE COURT: Do you wish to publish it or not?

7 MR. HIXSON: Yes -- yes, Your Honor, just ---

8 THE COURT: Any objection?

9 MR. LONG: No objection.

10 THE COURT: You may do so.

11 Q. Are there any promises contained in there?

12 A. No.

13 THE COURT: Please answer out loud, sir.

14 A. No sir.

15 Q. Defense counsel also indicated that you gave a
16 statement to law enforcement. I ask you that question also.
17 Do you remember just prior -- after your arrest?

18 A. Right.

19 Q. And you gave a written statement at that time?

20 A. Uh huh (indicating positive) Yes.

21 Q. And at that time did you indicate that -- took
22 responsibility for the drugs under your seat?

23 A. Yes.

24 Q. And you didn't know anything about the others?

25 A. I didn't know anything.

RODNEY SMITH - RECROSS BY LONG

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1 Q. And you entered into that statement prior to any
2 proffer of any kind; is that correct?

3 A. Right.

4 MR. HIXSON: Your Honor, I have no further questions.

5 THE COURT: Questions on those particular questions,
6 Mr. Long.

7 MR. LONG: Yes sir.

8 RECROSS-EXAMINATION BY MR. LONG:

9 Q. Mr. Smith, you said that, when your lawyer asked you if
10 you understood this Agreement, you said yes, but when I asked
11 you if you understood this Agreement today you said no. Why
12 would you do that?

13 A. Well, I guess I was just nervous, because I understand.

14 Q. You were nervous when?

15 A. Just now.

16 Q. Okay.

17 A. But they didn't -- they didn't promise me nothing.

18 Q. Who told you to say they didn't promise you nothing?

19 A. Sir, they didn't promise me nothing.

20 Q. Did somebody tell you to say they didn't promise you
21 nothing?

22 A. No. Uh uh (NODS NEGATIVE)

23 Q. Well, Mr. Hixson just asked you, are there any promises
24 in this document, and you said no.

25 A. Right.

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1 Q. Are you sure there aren't promises in this document?

2 A. I'm sure. They said, you know, if I testify, then I go
3 up to trial, they may be lenient on me, what-not, but there
4 ain't no promises, nothing that he can promise me.

5 Q. Isn't it true that you don't know if there are promises
6 in here or not; they told you there aren't promises in here,
7 right?

8 A. Right.

9 Q. Let me read something to you, and you tell me if you
10 think this is a promise or not.

11 A. Okay.

12 Q. Does this -- is this sound like a promise to you?
13 Because you actually have an Agreement with these people right
14 here, okay, and I'm sure, when the day comes, you are going to
15 want to enforce it, so let me ask you if think this is a
16 promise.

17 THE COURT: Mr. Long, if you would, ask questions,
18 please sir.

19 MR. LONG: I am, Your Honor.

20 THE COURT: All right, sir.

21 Q. In return for Rodney Smith's full compliance with all
22 terms stated within this Proffer, statements provided during
23 his debriefing will not be used in the criminal prosecution
24 currently pending against him by this office. Is that a
25 promise?

1 A. It sounds like it.

2 Q. All right. Let me ask you another one. Tell me if
3 this sounds like a promise. In return for Rodney Smith's full
4 compliance with all terms stated within this Proffer the State
5 shall take into consideration the materiality of his truthful
6 testimony and degree of cooperation in the election of
7 charges, and a recommendation of sentencing for your client in
8 this matter. Doesn't that sound like a promise?

9 A. Yes, it sounds like it.

10 Q. All right. I've got one more, and you tell me if this
11 sounds like a promise. The State agrees to fully inform the
12 Court of Rodney Smith's degree of cooperation, and the
13 relative benefit to the State at the time of his sentencing.
14 Does that sound like a promise to you?

15 A. Sounds like it.

16 Q. Those three things are in this Agreement, and when the
17 question was asked, are there any promises in this Agreement,
18 you said no. What do you say now?

19 A. Sounds like some promises.

20 Q. Okay. Thank you.

21 THE COURT: Anything else, Solicitor?

22 MR. HIXSON: Nothing, Your Honor.

23 THE COURT: You may step down, sir.

24 Do you wish this witness to be excused?

25 MR. HIXSON: Yes, Your Honor.

1 **THE COURT:** Any objection?

2 **MR. LONG:** I better be cautious with this witness, Your
3 Honor, and ask that he remain.

4 **THE COURT:** All right, sir. You remain under subpoena.
5 You may not leave at this point in time. Just have a seat in
6 the courtroom.

7 At the present time, Ms. Pratt, you are excused.

8 **MS. PRATT:** Thank you, Your Honor.

9 **THE COURT:** Thank you, Ma'am.

10 All right, Solicitor, your next witness.

11 **MR. HIXSON:** Yes, Your Honor. At this time the State
12 would call Deidre Faulk to the witness stand.

13 **DEIDRE FAULK,** being first duly
14 sworn, testifies as follows:

15 **DIRECT-EXAMINATION BY MR. HIXSON:**

16 Q. Good morning.

17 A. Good morning.

18 Q. What do you do for a living?

19 A. I work for the Horry County Police Department.

20 Q. And when -- in what capacity?

21 A. I work in the Property and Evidence Section.

22 Q. Okay. And what are your responsibilities in the
23 Property and Evidence Section?

24 A. I'm responsible for all the evidence that the officers
25 turn in regarding any case that they make on the road.

DEIDRE FAULK - DIRECT BY HIXSON

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1 Q. And when you say responsible for that, do you log
2 evidence in? Do you take custody and control of that
3 evidence?

4 A. Yes sir. I take custody and control of all evidence.
5 They are secured in a locker. When I come in the next morning
6 we receive it; we log it, key it in the computer and place it
7 in the appropriate location for the type of evidence that they
8 turned in.

9 Q. So it's kind of like a desk job, a little bit?

10 A. Kind of, sort of.

11 Q. Is that safe to say?

12 A. Uh huh (*indicating positive*)

13 Q. A lot of coordination?

14 A. Yes sir.

15 Q. Let me show you what's been marked as State's Exhibit

16 2. See if you recognize that item.

17 A. Yes sir.

18 Q. Did you have an opportunity to come into contact with
19 that item at some point?

20 A. Yes sir.

21 Q. Did you log that item into evidence?

22 A. Yes, I did.

23 Q. That piece of property was in your custody and control
24 for a period of time?

25 A. Yes, it was.

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1 Q. Did you tamper with it in any way?

2 A. No sir.

3 Q. Did you maintain the integrity of it?

4 A. Yes, I did.

5 Q. Did you make sure that no one else tampered with it?

6 A. Yes, I did.

7 Q. Did you place that into Horry County evidence?

8 A. Yes, I did.

9 (DRUGS IN CLEAR BAG MARKED STATE'S EXHIBIT NUMBER 2, FOR
10 IDENTIFICATION ONLY.)

11 Q. Okay. After it's in evidence, at some point in time is
12 that tested?

13 A. Yes, it is. We put it in a holding location, in a drug
14 vault, that is secure, then we transfer it to Lisa. It
15 involves a chain of custody where the officer, when they turn
16 it in I accept it, they have to sign it and date it. When I
17 go to give it to her I sign and date it again, and then she
18 signs and dates it where she receives it, in order for her to
19 test it, and then therefore she then has custody and control
20 of that evidence.

21 Q. And is it substantially in the same condition when you
22 received it to a point that you turn it over for testing?

23 A. Yes, it is.

24 MR. HIXSON: I have no further questions of this
25 witness, Your Honor.

1 THE COURT: Cross-examination.

2 MR. LONG: I do not have any questions.

3 THE COURT: All right, sir.

4 You may step down, Ma'am.

5 Is there any reason she should not be excused?

6 MR. HIXSON: None from the State, Your Honor.

7 THE COURT: You are excused and released from your
8 subpoena, Ma'am.

9 You next witness, please.

10 LORI RABON, being first duly sworn,
11 testifies as follows:

12 DIRECT-EXAMINATION BY MR. HIXSON:

13 Q. Good morning.

14 A. Good morning.

15 Q. Lori, what do you do for a living?

16 A. I'm employed by the Horry County Police Department, in
17 the Evidence Section.

18 Q. Okay. Do you have similar responsibilities to the
19 prior witness, Deidre Faulk?

20 A. I do. I'm her supervisor.

21 Q. So you work in a kind of administrative position,
22 handling evidence back and forth, things like that?

23 A. That's correct.

24 Q. Let me show you what's been marked as State's Exhibit
25 Number 4.

1 MR. HIXSON: It's not in evidence yet.

2 Q. Do you recognize that?

3 A. Yes, I do.

4 Q. Now, at some point in time did you come in contact with
5 this Defendant, Danny Cortez Brown?

6 A. Yes, I did.

7 Q. And could you please give us the facts surrounding
8 that?

9 A. Detective Delpercio made a phone call to our Evidence
10 Section, requesting that we release some personal property
11 back to a Mr. Danny Brown, and on October 12th, 2005, a Mr.
12 Danny Brown came up as Agent Delpercio had instructed us to
13 do, to release his property, and I made a copy of his driver's
14 license and had him sign for a black duffle bag, miscellaneous
15 clothes, and one cell phone.

16 Q. Did you actually see Mr. Brown come in and pick up his
17 items?

18 A. Yes, I did.

19 Q. And did he sign for those?

20 A. Yes, he did.

21 Q. This document, is that what you witnessed Danny Brown's
22 signature on?

23 A. Yes, it is.

24 Q. And did you confirm, in any way, that that was Danny
25 Brown?

LORI RABON - DIRECT BY HIXSON

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1 A. Yes, I did. I requested a copy of his driver's
2 license, and made a copy of it.

3 Q. And you did -- you did that. Is that included in that
4 packet?

5 A. Yes, it is.

6 Q. At this time the State would move 4 -- State's Exhibit
7 4 into evidence.

8 THE COURT: Any objection?

9 MR. LONG: No objection. No sir.

10 THE COURT: State's 4 is in evidence without objection.

11 (STATE'S EXHIBIT NUMBER 4 ADMITTED INTO EVIDENCE.)

12 Q. Now is it common, generally speaking as the Evidence
13 Technician, to turn over non-relevant -- or I shouldn't say
14 that -- to -- personal items back to a Defendant?

15 A. Yes, it is. When the items are collected most of the
16 time the Detectives or the Officers are not sure at the time
17 what's going to be evidence and what's not, so it's also our
18 duty to return property safely back to the owner.

19 Q. So you do have a duty to -- does the Defendant usually
20 request those items back?

21 A. Yes, it happens occasionally.

22 Q. But you would have to get permission to do so from the
23 supervi -- the investigative officer?

24 A. We have to have permission from the investigating
25 officer or the Solicitor.

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1 Q. Do you know if -- in this case, do you know if Mr.
2 Brown contacted Detective Delpercio about his personal items?

3 A. I'm unsure how the conversation initiated, but Agent
4 Delpercio called us himself and said that Mr. Brown would be
5 coming to pick the property up.

6 Q. Okay. And receive back his duffle bag and his cell
7 phone, and personal items?

8 A. That's correct.

9 MR. HIXSON: Your Honor, I have no further questions
10 for this witness at this time.

11 THE COURT: Cross-examination.

12 MR. LONG: No, Your Honor.

13 THE COURT: Do you wish this witness to be excused?

14 MR. HIXSON: Yes, Your Honor.

15 THE COURT: Any objection?

16 MR. LONG: No sir.

17 THE COURT: You are excused and released from your
18 subpoena, Ma'am.

19 Who would be your next witness?

20 MR. HIXSON: Lisa Floyd, Your Honor.

21 THE COURT: All right.

22 LISA FLOYD, being first duly sworn,
23 testifies as follows:

24 DIRECT-EXAMINATION BY MR. HIXSON:

25 Q. Good morning.

LISA FLOYD - DIRECT BY HIXSON

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1 A: Good morning.

2 Q. Lisa, what do you do for a living?

3 A. I run the Horry County Regional Lab for the Police
4 Department.

5 Q. And what -- what is that, for the people of Horry
6 County? What is that?

7 A. Officers from any agency in the Fifteenth Judicial
8 Circuit can submit anything that they think is drugs to the
9 lab, and I test it to see if it is.

10 Q. Okay. So you must have some training and experience to
11 be able to do that.

12 A. Yes.

13 Q. Could you please tell the jury about your training and
14 experience that allows you to be able to do that job?

15 A. Yes. I have a Bachelor of Science Degree in
16 Biochemistry from Clemson University, and twenty-four hours
17 toward a Master in Biochem, and I took a fourteen week
18 training course, as well, with the former S.L.E.D. agent that
19 runs the Spartanburg County Forensics Laboratory in
20 Spartanburg, South Carolina, and that included testing every
21 type of drug possible, for fourteen weeks, and some more
22 testing which you take in school, just general knowledge
23 tests.

24 And I've also been running the lab for three and a half
25 years now, and tested over twenty-five hundred, three thousand

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1 substances.

2 Q. Okay.

3 MR. HIXSON: At this time the State would move this
4 witness to be proffered as an expert witness in the area of
5 narcotics tests and analyses.

6 THE COURT: Any objection?

7 MR. LONG: Has she been -- I would ask if she's been
8 qualified in a courtroom before.

9 THE COURT: All right, sir. If you wish to voir dire
10 the witness you may ask questions you would like. Go ahead.

11 BY MR. LONG:

12 Q. Have you been qualified by a court before?

13 A. Twelve times previously.

14 MR. LONG: I would agree, Your Honor.

15 THE COURT: All right, sir.

16 She's qualified to give her opinion.

17 MR. HIXSON: Thank you, Your Honor.

18 Q. May I approach with what's been marked as State's
19 Exhibit Number 2 into evidence ---

20 It's not in evidence yet.

21 Do you recognize that?

22 A. Yes, I do.

23 Q. Okay. Can you please just give a general idea of what
24 you do when you first receive a package such as that?

25 A. When I receive it it's in the blue inner envelope you

LISA FLOYD - DIRECT BY HIXSON

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1 see through the clear package outside, and the first thing I
2 do is look at the entire package and make sure that any of the
3 tamper evidence seals have not been tampered with, that there
4 is no evidence of tampering, that the red adhesive seals at
5 the top are not tampered with as well, and if everything is in
6 good order then I will open the package, remove the evidence
7 for testing, and I make a note on it with my initials, the
8 letters "OK", and the date, that it was definitely not
9 tampered with.

10 Then I write our -- or whatever agency's case number,
11 and I assign it a lab number, and at that point then I remove
12 the evidence for testing. It is weighed, analyzed, and then
13 repackaged, like you see it here, and this is how I repackage
14 it, and I seal, again, the lab number, my initials and the
15 date that it's sealed into the package.

16 Q. Did you have an opportunity to test that specific
17 substance?

18 A. Yes, I did.

19 Q. Did you get any results from that?

20 A. Yes, I did.

21 Q. And what were the results from that?

22 A. It was cocaine found, in the amount of one hundred
23 twenty-two point six five grams, which is one thousand eight
24 hundred ninety-two point four eight grains.

25 Q. Did you write a report contemporaneous with your

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1 findings or your analysis?

2 A. Yes, I do. I issued a report.

3 Q. I'm going to show the witness what has been marked as

4 State's Exhibit 5.

5 It's not in evidence yet.

6 See if you recognize this item.

7 A. Yes, I do. This is a copy of my report.

8 Q. Could you look at that for a second to see if that is a

9 fair and accurate xerox copy of your report.

10 A. Yes, it is.

11 MR. HIXSON: At this time, Your Honor, the State would

12 move State's Exhibit Number 5 into evidence.

13 THE COURT: Any objection?

14 MR. LONG: Your Honor, along with my objection -- my

15 previous suppression motion, I would object to that document

16 going in at this time.

17 THE COURT: I would ask that you have the witness

18 testify as to what she did, prior to the Court's ruling on

19 your motion.

20 MR. HIXSON: All right. Let me rephrase that, Your

21 Honor, and take some latitude to try to get to that point.

22 THE COURT: All right.

23 Q. You tested those substance -- the substance in the

24 baggie?

25 A. Yes, I did.

LISA FLOYD - DIRECT BY HIXSON

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1 Q. And you got results from that test?

2 A. Yes.

3 Q. And could you reiterate again what the results of that
4 test were?

5 A. It was cocaine found.

6 Q. In the amount of a hundred and twenty -- what was that?

7 A. A hundred and twenty-two point six five grams.

8 Q. And that was this, correct?

9 A. That's correct.

10 THE COURT: I'm sorry. She said a hundred and ---

11 MR. HIXSON: Hundred and twenty-two point six five.

12 THE COURT: What? Grams or grains?

13 A. Gram.

14 Q. Grams?

15 A. Grams, yes sir.

16 THE COURT: All right. I did not understand the word
17 that she stated.

18 MR. HIXSON: I apologize.

19 Your Honor, then I need to -- at this time the State
20 would move State's Exhibit Number 2 into evidence.

21 THE COURT: Any objection to State's 2 coming into
22 evidence?

23 MR. LONG: Yes sir.

24 THE COURT: All right. Subject to your previous
25 motion?

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1 MR. LONG: Yes sir.

2 THE COURT: All right, sir. Regarding State's Number 2
3 and 5, it's in evidence over the objection of the defense.

4 (STATE'S EXHIBIT NUMBERS 2 AND 5 ADMITTED INTO
5 EVIDENCE.)

6 MR. HIXSON: At this time, Your Honor, may I publish
7 State's 5 to the jury?

8 THE COURT: Any objection?

9 MR. LONG: No sir.

10 THE COURT: You may do so.

11 MR. HIXSON: Your Honor, as well as State's 2.

12 THE COURT: Is there any objection?

13 MR. LONG: Along with my previous objections, but as
14 far as publishing, no sir.

15 THE COURT: All right, sir. You may publish.

16 MR. HIXSON: Your Honor, I have no further questions
17 for Ms. Floyd at this time.

18 THE COURT: All right. Cross-examination.

19 CROSS-EXAMINATION BY MR. LONG:

20 Q. Ms. Floyd, hi.

21 A. Hi.

22 Q. I'm going to show you what's been marked, and entered
23 into evidence, I believe, as State's Number 3, which is a
24 xerox photograph, copy of a xerox photograph of some drugs.
25 One of these bags here has been determined to be -- and

1 admitted to by one of the co-defendants -- as powder cocaine.

2 Did you test that?

3 A. I would not know. It was not in that particular "Best
4 Kit".

5 Q. Okay. Part of this case, part of this arrest?

6 A. As part of Lab Number L050803, no, it was not tested.

7 Q. It was not tested?

8 A. No, it was not received.

9 Q. Tell me how the testing of cocaine works. What is it
10 that -- what is it that you use to test it?

11 A. We use a presumptive test, which is a color test, that
12 gives it -- or gives me an indication of what the drug might
13 be initially, and it's presumptively tested positive to powder
14 cocaine, which is two blue colors and a red.

15 And then at that point we do what's called a
16 confirmatory analysis, and we use a gas chromatograph with a
17 mass-selective detector, which is a really big way of saying
18 that we separate all the components using chromatography, and
19 then those components show up in the detector, which is
20 printed using a report, using software that allows me to look
21 at those different things, and in this case the fingerprint
22 was there, per se, for cocaine.

23 Q. So two tests. First you just drop something on it and
24 if it turns blue -- kind of like a pregnancy test -- if it
25 turns a blue color it's cocaine.

- 1 A. Sure.
- 2 Q. Right. I don't know why that was on my mind.
- 3 And the second test that you use is a gastro-
- 4 spectrometer; is that what you said?
- 5 A. It's a gas chromatograph with a mass selective
- 6 detector.
- 7 Q. Okay. And it breaks down the different components of
- 8 the substance; is that right?
- 9 A. Yes. It separates out anything that's in there.
- 10 Q. What are -- well, in this particular fact -- let's ask
- 11 you about that -- what are the particular components of that
- 12 substance?
- 13 A. Well, in this particular case cocaine was found as a
- 14 controlled substance, and benzocaine also showed up as a
- 15 cutting agent. It was present.
- 16 Q. Okay, now benzocaine as a cutting agent, is that a
- 17 commonly used cutting agent?
- 18 A. It's fairly common, yes.
- 19 Q. You find it often in your testing?
- 20 A. About as much as anything else, yes.
- 21 Q. Well, let me ask you about that. About as much as
- 22 anything else. What else do you find in your testing as a
- 23 cutting agent?
- 24 A. Mostly the only things that are going to show up by
- 25 this type of analysis are the other "caines", like procaine,

1 or lidocaine, caffeine will show up sometimes.

2 Q. How many "caines" are there?

3 A. A lot.

4 Q. Okay. And this test will actually tell you if it's
5 benzocaine or lidocaine, or it will tell you which one of
6 those "caines" ---

7 A. It does, yes.

8 Q. ---It is. And you run across all different kinds of
9 cutting agents in your testing, correct?

10 A. Yes. And oftentimes nothing will show up.

11 Q. Okay. Oftentimes you will test something that has no
12 cutting agent?

13 A. Well, that does not mean that a cutting agent is not
14 present. It just means that this particular method I use,
15 with this instrumentation, it may not show up.

16 Q. Got ya. Does that instrument, and that method,
17 determine what percentage of substance is cocaine, and what
18 percentage of the substance is a cutting agent, one of the
19 other "caines"?

20 A. No, it does not.

21 Q. Okay. Does any of your testing give any kind of
22 quotient, any kind of figure on purity, strength, or
23 composition of the substance that you test?

24 A. Composition, yes. Purity and strength, no.

25 Q. What do you mean by composition? The same thing we

1 just talked about?

2 A. Yes.

3 Q. So, most -- would you agree with me that most of the
4 cocaine that you test comes out with one of these cutting
5 agents?

6 A. I'd say approximately half show some type of cutting
7 agent.

8 Q. Okay. And if you had tested this cocaine, State's
9 Exhibit Number 3, would you have been able to determine if one
10 of those "caines" showed up in that cocaine?

11 A. If a "caine" was present, yes, it would show up.

12 Q. Other than knowing if the same cutting agent was used
13 in that cocaine, and this cocaine, is there another way, aside
14 from that way, to determine if they are relatively akin to
15 each other, basically have the same chemical composition?

16 A. Not in my laboratory.

17 Q. Is there a way to do that in somebody's laboratory?

18 A. Yes, there is.

19 Q. S.L.E.D. can do it?

20 A. I'm not sure. D.E.A. could do it.

21 Q. D.E.A. can do it. They have a lab in South Carolina?

22 A. Not that I'm aware of, in South Carolina.

23 Q. You don't know that S.L.E.D. can or can't; you just
24 don't know?

25 A. I don't know.

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1 Q. But you -- but it is possible to test two different
2 bags of cocaine to determine if their chemical composition is
3 identical?

4 A. Yes.

5 Q. And that was not done in this case?

6 A. No. I never received the other bag.

7 Q. Okay. Now, when you received this bag -- which I don't
8 think I'm going to hand it to you again -- but when you
9 received this bag -- actually I lied to you.

10 I'm sorry, Mr. Foreman.

11 When you received this bag, this inner bag here, it's
12 got twelve twenty -- I'm sorry -- I'm going to show you
13 State's Number 2.

14 I apologize.

15 It's got 12/29/05 on the inner bag there. Is that the
16 bag you received from someone to test?

17 A. No, this bag is not the bag I received.

18 Q. What bag -- where is the bag -- is this the bag over
19 here? Let me show you what's been marked and entered as
20 State's Number 7.

21 A. If I may refer to my notes.

22 Q. Sure. I'm going to hand you State's Number 7. You
23 tell me if that's the bag.

24 A. No. Anything that I would have received would be
25 resealed in this package, and according to my notes I received

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1 this cocaine in this other blue bag that you see on the other
2 side, that has the control number of M328390, which is
3 referenced in my notes, and it was sealed when it was
4 received.

5 Q. All right. Do you know, in your notes -- in your case
6 file or anything in there, can you tell me who it was that
7 took that cocaine out of this bag and put it in that bag?

8 A. I would have no record of that.

9 Q. Do you know who would have a record of that?

10 A. I would assume Evidence, but I don't know for sure.

11 Q. All right. Okay.

12 MR. LONG: Thank you.

13 THE COURT: Redirect.

14 MR. HIXSON: Briefly, Your Honor.

15 REDIRECT-EXAMINATION BY MR. HIXSON:

16 Q. Detective Delpercio, does he seal up the "Best Kit",
17 usually, for processing, the lead -- the investigator?

18 A. That would be a part of his job, yes.

19 Q. Now, isn't the chemical comp -- the chemical
20 composition in cocaine -- isn't all cocaine cocaine?

21 A. Yes, cocaine is. It would show up as cocaine, yes.

22 Q. I just -- try to clarify it from different strains, or
23 different things, cocaine is cocaine?

24 A. No. Even in the form of crack it would still show up
25 as cocaine.

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1 MR. HIXSON: I have no further questions, Your Honor.

2 THE COURT: Anything on those questions?

3 MR. LONG: No sir, Your Honor.

4 THE COURT: You may step down.

5 Do you wish this witness to be excused?

6 MR. LONG: I do, Your Honor.

7 MR. HIXSON: Yes, Your Honor.

8 THE COURT: You can be released from your subpoena to
9 go back to your regular duties, Ma'am.

10 All right. The next witness for the State.

11 MR. HIXSON: Your Honor, at this time the State of
12 South Carolina rests.

13 THE COURT: All right. Do you have some matters of
14 law, Mr. Long?

15 MR. LONG: Yes sir.

16 THE COURT: All right, ladies and gentlemen of the
17 jury, if you would go to your jury room, please. Thank you.

18 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
19 JURY.)

20 THE COURT: All right, Mr. Long.

21 MR. LONG: Your Honor, I understand that you have
22 admitted the drugs, and I didn't approach to talk about it,
23 but I assumed you admitted them under ---

24 THE COURT: I have not ruled on your suppression motion
25 as of yet. That is still under advisement.

1 MR. LONG: Even though they are admitted they may still

2 ---

3 THE COURT: He -- they. That's correct. That is -- I
4 want to make that clear, that I'm still -- I still have your
5 suppression motion under advisement.

6 MR. LONG: I would like to argue that suppression
7 motion now, in the light of new testimony.

8 THE COURT: All right, sir.

9 MR. LONG: But first, I want to make a directed verdict
10 for failure of the State of South Carolina to have probable
11 cause for the stop. The testimony that we just got -- we've
12 got two witnesses for this. The first witness, Officer
13 Williams, said that it was not raining, that both windows were
14 down; he pulled up beside their car; he looked through the
15 windows and he saw a beer can; he pulled in behind him and he
16 stopped; the reason for the stop was that he saw a beer can.

17 The next witness that they brought testified that the
18 weather was bad; it was real bad, the windows were up, the
19 windows were foggy, that he does not remember the police
20 officer pulling up beside them, just maybe turning around, but
21 he knows he pulled up behind them, and when he came to the
22 window the beer can was not in view, in fact, his answer to my
23 question was, it was hidden.

24 The officer then walked around the car, opened the door,
25 which he has no right to do, pulled my client out, reached

1 back in the car, which he had no right to do, searched between
2 two seats, underneath a jacket, and found the hidden beer can.

3
4 No reason for the stop, no reason to enter that car, no
5 reason for that search. Everything else is fruit of the
6 poisonous tree.

7 THE COURT: All right, sir. Regarding that directed
8 verdict motion I would respectfully decline to grant your
9 motion for the reason that you have presented to me in your
10 argument. There is a dispute in the facts. The jury is the
11 one that judges credibility and believability. Clearly the
12 officer's testimony would support a stop for open container,
13 based upon the officer's testimony. The testimony of Mr.
14 Rodney Smith would not support a stop by the police officer,
15 but that is a conflict in the testimony, and it is not for the
16 Court, at this point in time, to resolve that conflict. What
17 I have to find is that there is sufficient evidence for the
18 matter to go forward, and I certainly find that based upon the
19 officer's testimony, Officer Williams, his testimony, as to
20 the stop and the reasons for the stop.

21 MR. LONG: Okay. Your Honor, on the suppression
22 issue ---

23 THE COURT: Yes sir.

24 MR. LONG: ---The -- again, according to Rodney Smith
25 and they -- it's their witness -- they brought him here -- he

1 testifies that Danny Brown is brought out of the car, the door
2 is closed, the duffle bag is still in the car, he takes him
3 back to the back of the car, comes back, opens the door, pulls
4 the duffle bag out and starts going through it. Now that, I
5 realize, is somewhat different than what Officer Williams
6 said. But we've got issues with what -- with the way it
7 happened, the way Officer Williams says it happened. I've got
8 real serious issues with the way Mr. Smith says it happened.
9 That duffle bag, Your Honor, was a closed container that my
10 client had a sincere right to privacy on.

11 If Officer Williams had a reasonable suspicion, or
12 probable cause, that there was something in that bag, he may
13 have been able to get past and get into searching that bag,
14 but as soon as he got control of that bag, away from everyone
15 else -- which we all agree he did that. Rodney Smith agrees
16 that he took it away, and had control of it, Officer Williams
17 agrees that he took it away and had control of it, then, at
18 that point, based on the case law language, no exigency
19 exists. Based on the United States versus Robinson, and the
20 Preston versus United States case, Your Honor, once law
21 enforcement officers have produced luggage, or other personal
22 property -- this is exactly on point -- the -- to their
23 exclusive control, and there is no longer any danger that the
24 arrestee might gain access to the property, to seize a weapon,
25 or destroy evidence, a search of that property is no longer

1 incident to that arrest. It is, at that point, to be required
2 to gain a search warrant or consent, which we have neither in
3 this case.

4 Your Honor, the day I got this case I knew -- the day
5 that I got this case I knew that this was the issue in this
6 case. It's been the issue in this case ever since. I, based
7 on the information that we get as we defend these cases -- and
8 you know because you were a trial lawyer -- that we get
9 incident reports, and we get case summaries, but we don't know
10 exactly what is going to be testified to over here.

11 When I came over here to defend this case I didn't know
12 exactly how the officer was going to say he got access to that
13 bag, but I know now that he got access to that bag without a
14 right to do so. The Fourth Amendment of the United States of
15 America -- even -- just because he's riding in a car doesn't
16 mean that he gives up the right to the privacy of his closed
17 container, his luggage.

18 Every single one of these cases, Your Honor, the United
19 States versus Chadwick, California versus Acevedo, Florida
20 versus Wells, every single one of those cases, and all of the
21 cases cited within those, and every other case that I can
22 find, the only time that the Court ever allowed a police
23 officer to search a closed compartment, a closed container, a
24 piece of luggage, was if they had probable cause to believe
25 that there was contraband in that bag. Clearly not the case

1 here. He had no reason to look in that bag, other than to --
2 and the language in Wells -- "seek more criminal activity".
3 That was it. He was -- there was no reason to look in that
4 bag. He had control of it. It was closed. Danny Brown is
5 arrested. Done.

6 Now, Your Honor, I have been handed a large stack of
7 cases by the Solicitor. The Belton case, which is cited in
8 the Wells case, and the Belton case is good law for my client,
9 even though he has brought it to you. The different here in
10 the Belton case, Your Honor, is, there was probable cause.
11 Police officer -- a State Trooper comes up, four men in an
12 automobile, and he smells burned -- burning marijuana. We all
13 know that, when a police officer smells burning marijuana he's
14 got more than probable cause; he's got a reasonable suspicion;
15 he's got a strong suspicion that there is marijuana in that
16 car, which gives rise to a search of just about everything in
17 that car. That case, because of that great distinction, is
18 completely different. We don't have probable cause,
19 reasonable suspicion. There is no other criminal activity,
20 not even a driving violation, not even speeding, nothing, just
21 the allegation that there was an open container, that now
22 they've put two witnesses up. One says it wasn't in plain
23 view and one says it was.

24 Your Honor, the Brannon case that he handed to you is a
25 consent search. Clearly we don't have consent in this case.

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1 The Illinois versus Lafayette, this was an inventory of
2 the person, not of a closed bag. This is inventory,
3 subsequent to arrest, of an individual, his jacket he was
4 wearing, his clothes. Does not apply.

5 The case that he handed up to you, United States versus
6 Scone, is not even a search case.

7 The United States versus Porter, that's a T.E.R.I. stop.
8 This is not a T.E.R.I. stop. We know this is not a T.E.R.I.
9 stop. That is a completely separate set of circumstances in
10 there, and we know what we are dealing with here. We are
11 dealing with the search and seizure of a closed piece of
12 luggage in this particular case, that they had no other right
13 to search.

14 Your Honor, in the United States versus Han, H.a.n.
15 case, there was a confidential informant that told the police
16 that drugs were going to be in a bag. They had a reasonable
17 suspicion or probable cause to believe that drugs were in that
18 bag when they made that stop, and that's why that case is
19 different.

20 And Your Honor, the case of the United States versus
21 Willie Robinson, that's not a closed container case. That's
22 searching around a vehicle and finding something wide open.
23 That is not a closed container case.

24 United States versus Ross, again, a probable cause case.
25 they had probable cause to believe that there was contraband

1 in the car, therefore they searched the closed -- the closed
2 document.

3 And Thornton versus United States is not a closed
4 container case.

5 Your Honor, textbook unreasonable search and seizure,
6 violation of the Fourth Amendment. My client had a right to
7 privacy of whatever the contents were in that bag. The
8 inventory, or search incident to arrest, or whatever it is
9 that they tried to call it, what it is is a search for more
10 criminal evidence, which is not allowed under the law, and I
11 strongly, strongly, respectfully request, Your Honor, that you
12 suppress that evidence, and ---

13 THE COURT: All right, sir.

14 MR. LONG: ---Dismiss the case.

15 THE COURT: All right, sir.

16 All right, Solicitor, reply arguments.

17 MR. HIXSON: Thank you, Your Honor.

18 Listening to Mr. Long discuss these cases actually
19 helped me highlight what -- I had a difficult time
20 understanding why there appears to be some conflict in the
21 stop, and I think I finally understood it by listening to Mr.
22 Long.

23 The issue in this case is not probable cause. There --
24 once a defendant is placed under arrest a search incident to
25 that arrest flows naturally from. It is, per se, reasonable,

1 according to multiple Supreme Court Decisions -- and we will
2 get into the case law in a second -- but that is the
3 difference. Once the defendant is placed under arrest it is
4 not a probable cause issue, and it's not evaluated by the
5 Supreme Court or others under a probable cause standard, that
6 it's -- it is, per se, reasonable -- as Your Honor is well
7 aware, there are several exceptions to a warrantless search
8 requirement under our Constitution. Obviously you have to
9 stop and frisk. Specifically in this case, a search incident
10 to an arrest, hot pursuit, protective sweeps, things like
11 that, are -- and the Court -- by the cases we will cite later
12 on, expressly say that, and I think perhaps that's the
13 concern.

14 Your Honor, I didn't provide these cases to you to say
15 all these cases were on point. In fact, I did them to help me
16 understand, and then, of course, to help the Court -- try to
17 communicate to the Court my understanding of these.

18 The **Chadwick** case, as well as these other cases, such as
19 **Bertine and Wells Lafayette** -- excuse me -- **Bertine, Wells,**
20 **Lafayette to Florida**, those are all inventory search cases,
21 Your Honor. Those are all based on a defendant is in custody.
22 There is a standard procedure established because the car is
23 impounded in a lot, or the defendant is in jail, and they are
24 going through his property pursuant to the inventory search,
25 and so the policies surrounding the police department open all

1 the containers, or don't open any, are relevant in that, and
2 that is the nature of those cases. Bertine sets it up, Wells
3 continues it. But those are all not exi -- those aren't
4 searches incident to a lawful arrest. Too much time has
5 transpired. It is not contemporaneous with the arrest. It is
6 inventory. The car is in an impound lot, and at some point in
7 time they go through those.

8 So the facts of this case are distinguished from the
9 Bertine, Wells and Lafayette line of cases. That's why I
10 provided all those to Your Honor.

11 Also, the discussion about Chadwick and Ross, the
12 problem, Your Honor, appears to be that the Court decided
13 Chadwick and they -- they said, we've got probable cause based
14 on a statement that an individual is driving down I-85 and an
15 informant says he may have some drugs in the car. They
16 stopped that car based on the container in the car, not based
17 on a reasonable search incident to arrest. They stopped that
18 car under the Chadwick line, and so they have probable cause
19 for the container, but they don't have it for the car.

20 And then Ross says, we've got a stop for the car, but
21 not the container, and it was an absolute mess, and so the
22 Court, in Acevedo says, enough, this is -- we can't give any
23 instruction to law enforcement to do this; we have to figure
24 some way to help people understand what Constitution asks of
25 our law enforcement personnel, so they came down with Acevedo,

1 Your Honor. In fact, **Acevedo** expressly abrogates **Chadwick**.
2 It says, no longer. And in **Acevedo** -- Your Honor, I believe
3 it's on page seven of that Opinion -- they go through a long
4 discussion, and then on page seven they specifically point to
5 **Belton** and say, you know, we wouldn't have to do all this
6 because search incident to arrest is, per se, reasonable.
7 **Belton** applies here, and we just want to make sure no one gets
8 confused and thinks, somehow, **Belton** doesn't carry the day,
9 and that is -- I specifically want to find that cite for Your
10 Honor. I'm not sure that we all have the same copy, as we
11 should. I didn't copy **Acevedo** for the Court, so I'm not sure
12 what page that is on for you. I have **Chadwick**. I apologize,
13 Your Honor. Let me find **Acevedo**.

14 Specifically, Your Honor, it says, 'since the police, by
15 hypothesis, has probable cause to seize the property, we can
16 assume that a warrant will be routinely forthcoming in the
17 overwhelming majority of cases, and the police often will be
18 able to search containers without a warrant, despite the
19 **Chadwick** rule, as a search incident to a lawful arrest. In
20 **New York versus Belton** the Court said, quote, we hold that,
21 when a policeman has made a lawful custodial arrest, such as
22 an arrest for a beer -- saw a beer can -- that the occupant in
23 that automobile -- he may, as a contemporaneous incident of
24 that arrest, search the passenger compartment of that
25 automobile. It follows from this conclusion that the police

1 may also examine the contents of any containers found within
2 the passenger compartment, Your Honor. That's the import of
3 the **Belton** case, and made Your Honor -- maybe realize that
4 **Belton** is what's on point, and it's progeny, as you trace
5 **Belton's** lineage, and of course that's what I did, Your Honor,
6 to adequately represent the interest of the State, or tried
7 to. That's Your Honor's decision.

8 The other cases cited by -- that were distinguished by
9 defense counsel, **Han**, as well as **Porter**, **Sloan**, all stem from
10 the basic tenets of **Belton**, and that is, a per se reasonable
11 search, based on the arrest of the -- a defendant. Factually
12 Mr. Long is correct. One is not a car case, and it says the
13 police had probable cause to arrest the defendant, search of a
14 bag containing heroin was incident to that arrest, despite the
15 fact they took some time to do it. In other words, saying
16 that, whether the officer walked back to the back of the car,
17 or whether he looked at it right away, it is all
18 contemporaneous with the arrest of the defendant, based on
19 adequate probable cause to be arrested. So it's a reasonable,
20 per se, flowing from that.

21 **United States versus Porter**, that's a Court of Appeals,
22 Fourth Circuit case. That indicates that a warrantless search
23 of a carry-on bag, which was within defendant's reach, was a
24 lawful -- as an incident to a lawful arrest. That was a
25 flight coming from Miami, Your Honor. The D.E.A. had some

1 interest in her. They took her to a room, the bag was sitting
2 over there. They talked to her. They went -- arrested her
3 and looked in her bag, and there was heroin in that bag, and
4 factually that is very similar, although there is not a car
5 involved in it, very similar to our case.

6 Finally, Your Honor, as it relates to the **Belton** chain
7 of cases, the Supreme Court, in United State versus Thornton -
8 - and this came out in 2004, Your Honor -- this expands
9 **Belton**, to show Your Honor that **Belton** is still good law. It
10 indicates that the Fourth Amendment allo -- once an officer
11 makes a lawful custodial arrest of automobile's occupants, the
12 Fourth Amendment allows the officer to search the vehicle's
13 passenger compartment. That's **Belton**. But this adds, even
14 when an officer does not make contact until the person
15 arrested has already left the vehicle.

16 In that case -- the **Thornton** case, Your Honor, they
17 pulled into a parking lot, the officer started to pull up
18 behind him, the occupant got out, started to walk away from
19 it, the officer arrested him. At that point in time then went
20 back in the car and got items out of the car at that time, and
21 the Supreme Court said that was, per se, reasonable as a
22 search incident to a lawful arrest, Your Honor, and it also
23 helps show that **Belton** continues that tradition for the Court,
24 and that's 2004.

25 Also is of importance related to exigent circumstances

1 and potential risk to the officer, as well as his safety, the
2 **Thornton** case of our Supreme Court says that the stress of
3 arrest is no less merely because the arrestee exited his car
4 before the officer initiated contact, nor is the arrestee less
5 likely to attempt to lunge for a weapon, or to destroy
6 evidence. He is outside of the vehicle. That's kind of the
7 thinking behind that, Your Honor.

8 Quickly, **Robinson** just refers to the basic tenet of a
9 search incident to an arrest, just a basic, kind of seminal
10 type case, Your Honor. Really factually doesn't have much
11 import.

12 The only thing other important in **Robinson**, it indicates
13 that, this case he arrested the defendant for driving without
14 a driver's license, full custody search, found some drugs on
15 him. The officer testified, I wasn't afraid of the guy; I
16 wasn't concerned or in fear for my life at all. And the
17 Supreme Court in that said that fear is not dispositive,
18 quote, he said, we found the package of the heroin admissible,
19 even though the officer did not indicate any subjective fear
20 of the defendant; he did not suspect that the defendant was
21 armed. So the -- whether he was armed or not, or this or
22 that, according to **Robinson**, is not dispositive of the
23 reasonableness of the search. The fact he is in custody
24 already makes it reasonable.

25 And then finally, Your Honor, briefly, looking through

1 our -- our jurisdiction in South Carolina I found the State
2 versus Brannon. Now the -- Mr. Long is absolutely correct.
3 That is a consent case. The majority found on consent;
4 however, the concurrent Opinion in that by Judge Anderson is
5 telling, in fact, Judge Anderson indicates that he agrees with
6 the result, but he doesn't understand why the majority went
7 through all of that, because the automobile exception applies;
8 they wasted time on consent because it was search incident to
9 a lawful arrest, it's exigent circumstances, the car -- they
10 can search -- they can search. That's concurring, Your Honor,
11 obviously that's not the majority opinion, but it's rather
12 persuasive, and does a pretty good discussion of the, per se,
13 reasonableness of a search incident to a lawful arrest.

14 The facts of the case, briefly, Your Honor, as the
15 State's understanding, so that's the basis for my argument.
16 The Officer saw the Defendant with a beer can in the passenger
17 seat of the car. It is uncontroverted. Even the witness's
18 testimony -- Mr. Smith, said there was a beer in the car, so
19 we know he had to see that beer in order to stop the car. The
20 facts show that there was a beer can, and where he saw it, or
21 how the visibility was, the facts are uncontroverted, there
22 was a beer can in the car. That's, of course, the testimony
23 of this Officer.

24 He placed the Defendant under -- walked around the car,
25 received -- pulled the bag out of the car. Obviously there is

1 some conflicting facts as it relates to what point in time it
2 was. There is no conflicting facts, that is, a search -- he
3 was placed under arrest, then went in the bag after the
4 Defendant was placed under arrest. The Officer was by himself
5 on a street corner. He indicated in his testimony -- the
6 State recalls -- concern that the nervous nature of Rodney
7 Smith, that perhaps this -- the driver may drive off. He
8 asked the individual to put his keys on top of the car -- the
9 car, put it up on the hood, to prevent, perhaps, Mr. Smith
10 from driving away with the duffle bag in the -- in the
11 floorboard. The Officer testified multiple times as it
12 related to officer's safety, or things of that nature, called
13 for back-up, indicating his concern by himself on a street
14 corner at that time. In his prior testimony I recall him
15 saying something about he didn't know if there was a machine
16 gun in there, something of that nature. The State sees this
17 as a search incident to a lawful arrest.

18 He couldn't -- the interesting part, Your Honor,
19 briefly, is under **Ross** and the other cases. Under defense
20 counsel's theory the drugs would be admissible if he didn't
21 touch them, left them in the car, towed the car and got it,
22 but it's not admissible because he was concerned for himself,
23 he claimed the bag, picked it out, but it's not admissible
24 there. It's kind -- it sounds very close to inevitable
25 discovery type argument as it relates to that, but we still

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1 don't believe we get to that point, Your Honor. We believe,
2 on it's face, it's a search incident to a lawful arrest, Your
3 Honor, and for that reason, we would ask that the motion be
4 respectfully denied, and the drugs allowed to remain in
5 evidence, Your Honor.

6 THE COURT: All right. So your argument is that a
7 search incident to arrest allows the officer to go into a
8 closed container that he has complete custody and control
9 over?

10 MR. HIXSON: That's correct. There was no expectation
11 of privacy in that container once the Defendant is under
12 arrest. It's not based on probable cause like a warrant
13 requirement, Your Honor. Probable cause has been established
14 by the existence of an arrest. That's what **Belton** stands for,
15 **Thornton** stands for. We never get to the probable cause
16 analysis because it is, per se, reasonable because it is a
17 search incident to a lawful arrest.

18 That -- it's hard to find some cases on that, Your
19 Honor, because that has been seen as rather well settled.
20 That is one of the accepted exceptions to a -- the warrant --
21 search requirements, Fourth Amendment, in essence.

22 THE COURT: Before -- Mr. Long, be glad to hear from
23 you. Before you do that, let me ask you a question. Assume
24 the Officer -- you know, he had sat that bag on the side, and
25 he took complete custody and control over it. There is no

1 question that it is the Defendant's bag, I mean, that's the
2 evidence; it's the Defendant's bag. He takes custody and
3 control over it, puts it in the trunk of his police car, takes
4 it to the jail. When the Defendant is booked, and the items
5 then are of the Defendant, aren't they then, at the jail,
6 inventoried? Would not the drugs have been found at the jail
7 at that point in time? Was it not inevitable that the drugs
8 would be found?

9 MR. LONG: It may be inevitable that they would be
10 found, but it doesn't make it proper. If -- if -- if they had
11 to -- if they had taken that closed duffle bag to a Judge ---

12 THE COURT: He didn't have to take it to a Judge. All
13 he had to do was take it to the jail ---

14 MR. LONG: Well, but if they had ---

15 THE COURT: ---Because it's the Defendant's bag. All
16 he had to do was take -- put the -- take the bag, put it in
17 the trunk, take the bag and the Defendant to jail. The bag is
18 looked at, inventoried at the time the Defendant is booked.
19 That's all he had to do.

20 MR. LONG: All of these -- that would have happened the
21 same way in all these cases, Your Honor, but ends doesn't
22 justify the means. They've got -- in the Brannon case that he
23 says that Judge Anderson says that the automobile exception
24 applies, that's not what Judge Anderson said. In the last
25 sentence of the Brannon case, in his concurring, but slightly

1 dissenting Opinion, he says, law enforcement officers had
2 probable cause to believe that Brannon and Mayberry were
3 transporting drugs from the tips they got from a confidential
4 informant, accordingly, the warrantless search of the vehicle
5 was proper.

6 Judge, the Belton case is a 1981 case. The Wells case,
7 and the California versus Acevedo cases are '90 and '91.
8 Those -- that's newer law. In Acevedo -- clearly, in Acevedo,
9 they -- it's held that -- and it cites Sanders, that the
10 heightened privacy expectation and personal luggage -- and
11 that case concluded that the presence of luggage in an
12 automobile did not diminish the owner's expectation of privacy
13 of his personal items.

14 Now, whether they've got a right to take that bag -- and
15 because he said it was his -- and take it along with them to
16 the jail, and have someone else search it, is -- that actually
17 -- Your Honor, the point is moot. The point here is, this
18 Officer did what the Constitution says he can't do, and he
19 just went into a closed bag and searched it. He did not
20 search it for an inventory, because if these cases hold -- and
21 especially in the Wells case, I believe it was, that there was
22 evidence in here, that they tried to claim it was an inventory
23 search, but it actually wasn't any inventory done. He didn't
24 go in to inventory that bag. He opened it up to see if there
25 was anything in it. He found what he wanted to found and he

1 zipped it back up. That's an unlawful search.

2 And again, if they went to a Judge with that closed bag
3 and said, okay, Judge, here's what we've got; we've got Danny
4 Brown with an open container of alcohol, and we want a warrant
5 to search that bag -- I'm not a judge, but I see -- fail to
6 see the reason, probable cause to give a warrant to search
7 that bag in that instance, and that is an even stronger
8 standard at that point. Your Honor ---

9 THE COURT: What do you say about the Solicitor's
10 argument about a search incident to arrest?

11 MR. LONG: These cases here, these exact cases, hold
12 that a search incident to arrest does not apply to closed
13 containers, period.

14 The Belton case indicated that they went into a closed
15 container, a zipper pocket in a jacket, but Belton is
16 different. They had reasonable suspicion, they had burned
17 marijuana, and that's 1981. These two new cases, not at all.
18 That is not -- search incident to arrest, Your Honor,
19 indicates the body -- the items that are on that person -- and
20 by the facts of this case he was taken, put into custody,
21 either placed in the car or put behind the car, case over. Go
22 deal with the driver. That's it. That is not a search
23 incident to arrest.

24 And Your Honor, I ---

25 THE COURT: All right.

1 MR. LONG: ---I feel stronger about this than any
2 suppression motion I've ever made.

3 THE COURT: I -- well, I understand that. Obviously
4 you do, and the State ---

5 MR. HIXSON: May I very briefly address one point, Your
6 Honor, briefly?

7 THE COURT: ---Yes sir. All right.

8 MR. HIXSON: Specifically, the quote that -- referring
9 to **Acevedo**, **Acevedo** has taken care of the issues that we have
10 here. That's the import of that case. Specifically, I wanted
11 to address this to the Court, because I think it addresses one
12 of Your Honor's questions to Mr. Long. I had already
13 indicated the holding of **Belton** that said it falls from this
14 conclusion that the police may also examine the contents of
15 any containers found within the passenger compartment after a
16 lawful custodial arrest.

17 In the language in **Sanders** -- that's what **Acevedo** wanted
18 to do, was to get rid of this confusion. It says, finally,
19 the search of a paper bag -- which, in this case, was a paper
20 bag in the car, they had found it -- defense counsel claimed
21 that -- just like Your Honor did, that you have to take the
22 paper bag and go get a warrant. You can search the car, under
23 **Carroll**, but you can't open up that paper bag; they've got to
24 take that paper bag to the warrant -- get a warrant. And the
25 Court, in **Acevedo** says, finally, the search of a paper bag

1 intrudes far less on an individual's privacy than does incur
2 in sanction long ago in **Carroll**. In **Carroll** they cut up the
3 upholstery of a car to search -- hunt for drugs. The Court
4 says that, "Destroying the interior of an automobile is not
5 unreasonable; we cannot conclude that looking inside a closed
6 container is. In light of the mental protections we hold that
7 the Fourth Amendment does not compel separate treatment for an
8 automobile search, but extends only to a container within the
9 vehicle."

10 And they state **Chadwick** and **Sanders** have confused Courts
11 and law enforcement, and repeatedly affected law enforcement,
12 that's why **Acevedo** said, this is too confusing; if you have
13 search incident to arrest, that's a container, that's his, you
14 can take care of it all at one time, Your Honor. That's the
15 import of **Acevedo**, Your Honor.

16 THE COURT: All right. Thank you.

17 We will take a break.

18 Thank you very much.

19 MR. LONG: Thank you, Your Honor.

20 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
21 THE PRESENCE OF THE JURY.)

22 THE COURT: All right, Mr. Long, regarding your
23 suppression motion that you made earlier, and I took under
24 advisement, and that you have now renewed, and made further
25 arguments at the end of the State's case, so it's clear for

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1 the record, the facts that I see in this particular matter are
2 one, that there was a lawful custodial arrest made by the
3 Officer of the Defendant. After that, or in that arrest, it's
4 clear that he secured the Defendant, first with handcuffs, and
5 then by placing him in the back of his patrol car before he
6 searched the black bag. The black bag was in the floorboard,
7 in the area controlled by the Defendant, the person arrested.
8 The Officer did, this time, in this particular proceeding,
9 testified to some facts about the rationale and reason for
10 going into the bag, as far as officer's safety, posing a
11 threat, those types of things. It's clear that, when the
12 Officer came back to the bag, it was on the sidewalk, on the
13 passenger's side of the vehicle. The driver of the vehicle
14 was on the other side of the vehicle, opposite the Officer and
15 the bag. The Officer unzipped the bag, looked through it,
16 opened a Frito bag, found some, what appeared to be illegal
17 narcotics, contraband, resealed that, and zipped the bag back
18 up, and thereafter called the narcotics officer.

19 The Officer initially, upon stopping the vehicle and
20 seeing the bag, which he said he did, at the very beginning,
21 could have -- assuming he had probable cause for the stop --
22 and he did -- there is an open container -- there is no
23 question about that he had probable cause to stop the car --
24 searched that item for -- under exigent circumstances. Also,
25 at the time he had secured the Defendant in the back of the

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1 car, in handcuffs, and the driver of the vehicle was not in
2 the vehicle at the time, but on the opposite side of the
3 vehicle, he could have picked up the bag and put it in his --
4 trunk of his patrol car, secured it, and it could have been
5 inventoried at the same time the Defendant was transported to
6 the detention center and booked and arrested. Both of those
7 would have been fine under the prevailing law. He did neither
8 of those. This is not an inventory search.

9 With all that, and despite my misgivings as to the
10 actions of the Officer in this particular case, I am looking
11 at the U.S. Supreme Court case of the State of New York versus
12 Roger Belton. This case has been the subject of great
13 discussion by Appellate Courts in the Federal system and the
14 State system. As an example, the State of Ohio. Soon as
15 **Belton** was announced, had a Decision whereby their Supreme
16 Court declined to follow **Belton**. Under their Constitution and
17 other matters they found fault with **Belton**, as set forth in a
18 case, and there have been plenty of commentators that have
19 criticized **Belton**. The State of Ohio, approximately ten years
20 after that Decision, found that they had committed an error in
21 not following **Belton**, and saying that **Belton** established a
22 bright line tests. Numerous other states in the United States
23 have also found that **Belton** establishes a simple bright line
24 test.

25 In **Belton** the U.S. Supreme Court says, "In order to

1 establish the workable rule, this category of case requires we
2 read..." -- and **Chimel** was a previous U.S. Supreme Court
3 Decision -- definition of the limits of the area that may be
4 searched in light of that ruling, indicated that they hold
5 that, "When a policeman has made a lawful custodial arrest of
6 the occupant of an automobile..." -- that is, as is clear here
7 -- there is no question that there was a lawful arrest of the
8 Defendant in this matter for the open container -- "...he may,
9 as a contemporaneous incident of that arrest, search the
10 passenger compartment of that automobile. It follows, from
11 this conclusion,..." that the policy may -- that the police --
12 I'm sorry -- "...the police may also examine the contents of
13 any containers found within the passenger compartment, for if
14 the passenger compartment is within the reach of the arrestee,
15 so also will containers in it be within his reach. Such a
16 container may, of course, be searched, whether it is open or
17 closed, since the justification for the search is not that the
18 arrestee has no privacy interest in the container, but that
19 the lawful custodial arrest justifies the infringement of any
20 privacy interest the arrestee may have. It is true, of
21 course, that these containers will sometimes be such that they
22 could hold neither a weapon, nor evidence of the criminal
23 conduct for which the suspect was arrested. The authority to
24 search the person incident to lawful custodial arrest, while
25 based upon the need to disarm and/or to discover evidence,

1 does not depend on what a Court may later decide was the
2 probability in a particular arrest situation, that weapons or
3 evidence would, in fact, be found upon the person of the
4 suspect. A custodial arrest of a suspect, based upon a
5 probable cause, is a reasonable intrusion under the Fourth
6 Amendment. That intrusion being lawful, a search incident to
7 the arrest requires no additional justification."

8 "In Belton..." -- and they were talking about the lower
9 Court Decision -- "...it seems to have been the theory of the
10 Court of Appeal..." -- the lower court -- "...That the search
11 and seizure in the present case could not have been incident
12 to the respondent's arrest because Trooper Nicott, by the very
13 act of searching the respondent's jacket, and seizing the
14 contents of his pocket, had gained exclusive control of him,
15 but under this fallacious theory, no search or seizure
16 incident to a lawful custodial arrest would ever be valid by
17 seizing an article, even on the arrestee's person, or an
18 officer may be said to have reduced that article to his
19 exclusive control."

20 In Belton the person was arrested,
21 and detained, and not near the items where the officer went in
22 the car. After he arrested him, and the person was in a
23 different area, he went in the car. He then searched a coat
24 that was in the area where he found the arrestee. He went
25 inside and unzipped the coat, and went into a pocket and found
contraband that was not the reason he arrested the defendant

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1 for. Those facts are clearly the same as here.

2 The Supreme Court went on to say, "It is not questioned
3 that the respondent was the subject of a lawful custodial
4 arrest." That's the same as here. "The search of the
5 respondent's jacket followed immediately upon that arrest, so
6 that..." -- in that case that defendant was also already under
7 arrest and removed from the area. "The jacket was located
8 inside the passenger compartment of the car in which the
9 respondent had been a passenger just before he was arrested.
10 The jacket was thus within the area which we have concluded
11 was..." -- and it's in quotes -- "...within the arrestee's
12 immediate control, within the meaning of the **Chimel** case. The
13 search of the jacket, therefore, was a search incident to a
14 lawful custodial arrest, and it did not violate the Fourth and
15 Fourteenth Amendments."

16 As I said, though I have concerns about the Officer's
17 conduct in this particular case, it is clear that the U.S.
18 Supreme Court set forth a bright line test. The Officer's
19 conduct falls within that bright line test. The motion to
20 suppress is denied.

21 Is the defense ready to proceed?

22 MR. LONG: Yes sir.

23 THE COURT: All right, sir. Is the State ready to
24 proceed?

25 MR. HIXSON: Yes, Your Honor.

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1 A. That's correct.

2 Q. ---Is that right. Did you go to lunch that day in your
3 car?

4 A. Yes.

5 Q. And so when you left A.V.X. to go out to the parking
6 lot, your car was in the parking lot?

7 A. That's correct.

8 Q. And your -- it was your understanding that Danny was
9 gone to Laurinburg with Freddie?

10 A. Yes.

11 MR. LONG: All right. That's all I have. Thank you.

12 THE COURT: Anything on those questions, Solicitor?

13 MR. HIXSON: Nothing, Your Honor.

14 THE COURT: You may step down.

15 MR. LONG: Danny Brown, Your Honor.

16 THE COURT: All right. Come around to be sworn, sir.

17 DANNY CORTEZ BROWN, being first
18 duly sworn, testifies as follows:

19 DIRECT-EXAMINATION BY MR. LONG:

20 Q. How old are you, Danny?

21 A. I'm thirty-eight.

22 Q. From Myrtle Beach?

23 A. Yes sir.

24 Q. Graduated from Myrtle Beach High?

25 A. Graduated from Myrtle Beach High.

1 Q. Went to college?

2 A. Went to Lees McCrea Junior College, playing football
3 there.

4 Q. Did you graduate from college?

5 A. Yes sir.

6 Q. What do you do for a living?

7 A. I work for Johnson Coastal Consulting, consulting
8 company. I deal with the professional athletes that come
9 through the business. I know some athletes that I went to
10 college with that played in the pros, and I know some as of
11 now.

12 Q. Back up just a little bit. Go ahead. I'm sorry.

13 A. I work for Johnson Coastal Consulting. I consult with
14 the professional athletes that they have coming in town.

15 Q. You can stop, Danny. We heard you. I just didn't want
16 you spitting. It kind of -- when you do "p"s it makes a loud
17 noise, and everybody kind of cringes.

18 What is it that Johnson Consulting does?

19 A. It's a real estate company. They do land development,
20 and real estate deals, and my basically job is to consult with
21 the athletes, due to the fact that I'm a athlete myself, and
22 has played with professional athletes that I went to school
23 with, and that still play professional ball now.

24 Q. Who is the owner of the company?

25 A. Mark Johnson.

1 Q. Do y'all actually have athletes, professional athletes
2 that come to Myrtle Beach and buy property?
3 A. All the time, yes.
4 Q. Would you have examples of that?
5 A. I have Charles Shackelford, Raymond Felton, Butchie
6 Wallace, just to name a few names -- that I have dealt with.
7 Q. Okay. And how long have you done that?
8 A. I've been doing that around three years now. I haven't
9 done it recently because of some problems with my family, my
10 mother.
11 Q. All right. You mother was here in court with you
12 yesterday; she is not today; is that right?
13 A. Correct. Correct.
14 Q. What kind of problems have you been having with her?
15 A. She recently had a stroke, and she has dialysis three
16 times per week.
17 Q. Is that where she is today?
18 A. Correct.
19 Q. And you help take care of your mama?
20 A. Yes.
21 Q. Your father is deceased?
22 A. My father is deceased.
23 Q. And she lives over in Myrtle Beach?
24 A. She has a Myrtle Beach address.
25 Q. Does she still live in the home you all grew up in?

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1 A. Yes.

2 Q. And that's over on what street?

3 A. That's on -- at 1203 Dunbar Street.

4 Q. Okay. And your family used to own a funeral home over
5 there, right?

6 A. Correct.

7 Q. Now, October 5th, right before this incident that we
8 are going to talk about -- talk a lot about. October 5th,
9 that night, where did you sleep?

10 A. I went to Green Sea, South Carolina, to stay with
11 Monica Brisbon.

12 Q. All right. And how are you related to Monica?

13 A. She's my girlfriend. She was my girlfriend then, and
14 she's my fiance as of now.

15 Q. Do you plan on marrying her?

16 A. Yes.

17 Q. When -- don't want to get you in trouble. When are you
18 going to marry her?

19 A. Soon.

20 Q. She lives out there, and you went to stay with her?

21 A. Yes.

22 Q. And did you take that black duffle bag with you?

23 A. Yes.

24 Q. What was in it?

25 MR. HIXSON: Your Honor, this is his witness. I

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1 believe he is leading the witness quite a bit at the present
2 time.

3 THE COURT: All right, sir. Don't lead your witness,
4 please sir. Thank you. Go ahead. Continue on.

5 Q. Did you take a change of clothes?

6 A. Yes, I did.

7 Q. What did you take it in?

8 A. I took it in the black duffle bag.

9 Q. What -- exactly what was in there?

10 A. Change of clothes, toothpaste, toothbrush, some
11 cosmetics maybe, personal hygiene stuff.

12 Q. Okay. And then you spent the night there and -- what
13 happened to this vehicle? What happened to your car?

14 A. Well, a week prior we went to Laurinburg, North
15 Carolina, to a friend of mine. He had a black and white party
16 that me and Monica attended, and my car broke down there.

17 Q. Okay. And then -- so how did y'all get home from out
18 there?

19 A. My friend brought us back.

20 Q. And how about Freddie Prince? Who is he?

21 A. He's a mechanic who owns a mechanic shop on Third
22 Avenue. On October the 6th -- you want me to tell you my
23 reason for ---

24 Q. Yes. Go ahead.

25 A. Well, I went to stay in Green Sea on the 5th, due to

1 the fact, you know, she is my girlfriend, and we were going to
2 go that way the next day anyway to pick up my car, so I
3 figured I would just go there and stay with her that night,
4 have them pick me up the next morning, and continue going to
5 Laurinburg to pick up my car.

6 Q. Have Freddie pick you up?

7 A. Right.

8 Q. All right. Go ahead.

9 A. But that morning we couldn't get in touch -- I couldn't
10 get in touch with him, so therefore I had to come back to
11 Myrtle Beach, because I would have been stuck there, in Loris,
12 and Monica had to get to work, so therefore we continued to go
13 back to Myrtle Beach.

14 Q. So you rode with Monica, in Monica's car, back to
15 Myrtle Beach?

16 A. I drove her back to Myrtle Beach to her job, and
17 dropped her off.

18 Q. What did you do with your duffle bag while you were
19 driving back to Myrtle Beach?

20 A. My bag was in the back seat of the car.

21 Q. Okay. And when you drove back, you dropped off at
22 A.V.X., where did you go?

23 A. I was headed home, and then I got a phone call.

24 Q. Okay. And -- you got a phone call from Freddie?

25 A. I got a phone call from Freddie, saying that he could

1 take me.

2 Q. All right. Then what did you do?

3 A. I knew that I probably wouldn't have been back by the
4 time Monica got off, so therefore I turned around and went
5 back to drop her car off, called her and told her that I will
6 be going to Laurinburg, and I'll be dropping her car off and
7 leaving her keys under her seat.

8 Q. Okay. And did you take her car back to A.V.X. and
9 leave the keys under the seat?

10 A. Yes, I did.

11 Q. And what about the black duffle bag? What did you do
12 with it?

13 A. It was still in the back seat of the car.

14 Q. When you left that black duffle car in the back seat of
15 her car at A.V.X., were there drugs in it?

16 A. No.

17 Q. Okay. And then you went to Laurinburg?

18 A. Right, went to Laurinburg.

19 Q. And -- so what happened in Laurinburg?

20 A. I went to Laurinburg, we put my car on a -- I don't
21 know how to explain -- a roller, or a roll-back, or whatever
22 you pronounce it.

23 Q. A trolley.

24 A. Yes. That the drive with -- up upon, put it on that
25 and then came back to Myrtle Beach.

DANNY CORTEZ BROWN - DIRECT BY LONG

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1 Q. All right. And then when you got back to Myrtle
2 Beach -- so Freddie was driving you with his truck?

3 A. Right.

4 Q. When you got back to Myrtle Beach where did y'all go?

5 A. We went to Third Avenue, which is where his mechanic
6 shop is at.

7 Q. Okay. And what was going on there?

8 A. Nothing but us dropping the car off so that he can
9 start working on it.

10 Q. Okay. And then what happened?

11 A. He had some -- some other issues that he had to handle,
12 and my car was till on the car lift, and he needed me to help
13 him get it off, so I just waited around for him so I can help
14 him take my car off of the lift.

15 Q. Okay. And what about -- what happened when Monica got
16 off work?

17 A. Well, she got off from work and I was going to have her
18 to give me a ride home, but it was taking Freddie and I so
19 long that I just let her go, cause she had some other things
20 that she had to do.

21 Q. So she -- when she came to the -- Freddie's shop and
22 then left, that left you with no ride, right?

23 A. Yes. No ride. I mean, I had a ride, but she was going
24 to be my initial ride.

25 Q. Okay. And when you finally got the car off the truck

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1 what did you do?

2 A. We got the car off the truck and then I got in the
3 truck with Freddie and he was going to take me home, Freddie
4 and another guy that works with him, and his daughter,
5 Freddie's daughter, and we were going home. He was going to
6 take me home.

7 Q. And then -- so did he start to take you home?

8 A. Yes.

9 Q. And then what happened?

10 A. We headed down Third Avenue toward U.S. 17 Business.
11 Once you come to U.S. 17 Business and Third Avenue it's a
12 redlight there, so we had to come to the stop, take the right
13 to get back on U.S. Business 17 and started heading south, and
14 then he went to the Hess gas station to put some gas into his
15 truck.

16 Q. Okay. And then what happened? Who did you see when
17 you got to the gas station?

18 A. Well, when I got to the gas station I saw Rodney Smith
19 at an adjacent gas pump.

20 Q. How did you know Rodney Smith?

21 A. He's from the Booker T. Washington area, which is the
22 neighborhood that I live in. He's been -- I knew him all my
23 life basically.

24 Q. The neighborhood you live in, or the neighborhood you
25 were raised in?

1 A. The neighborhood that I was raised in ---

2 Q. So you know him ---

3 A. ---And live in, as of now.

4 Q. Okay. And then -- so what did you say to him?

5 A. I asked him which way was he going, and he told me that
6 he was going south, so I asked him would he mind giving me a
7 ride home.

8 Q. And why did you ask him for a ride?

9 A. Because Freddie had another guy in the car that he had
10 to take home, and it was a long day -- it was raining all of
11 that day -- and I was just tired, and I was just ready to get
12 home as soon as I could.

13 Q. Okay. So then when Rodney said yes he could give you a
14 ride, what did you do?

15 A. I went to Freddie's -- Freddie's truck, gave him some
16 money for gas, and then got my bag out and went and got in
17 Rodney's car.

18 Q. Okay. Did you have a beer?

19 A. Yes, I had a beer.

20 Q. Where did you get the beer?

21 A. I got it from Freddie's shop.

22 Q. Okay. You were drinking beer at Freddie's shop?

23 A. Yes.

24 Q. And after you gave Freddie the money for gas, you still
25 had you beer in your hand, and you grabbed your bag; is that

1 right?

2 A. I got the beer and my bag out of his car.

3 Q. Okay. And when you got in Rodney's car, what did you
4 do with the bag?

5 A. I got in and I sat it on the floor.

6 Q. Down in the floorboard?

7 A. Yes.

8 Q. Front seat floorboard?

9 A. Front seat floorboard.

10 Q. Where?

11 A. Right between him and I.

12 Q. And would you say it was between your legs as been said
13 in here earlier, or was it more toward the middle?

14 A. It was not between my legs.

15 Q. So -- but it was certainly beside you?

16 A. Yes. It was beside me.

17 Q. All right. And then you started heading down Highway
18 17, and what happened?

19 A. Heading down Highway 17, just heading south -- I don't
20 know how far it was, but I was drinking the beer -- I did
21 drink the beer -- and as -- coming down from drinking the beer
22 I looked over, through the driver's side door, and I saw a
23 police officer pull up beside me.

24 Q. And then what?

25 A. I kind of like, damn -- excuse my French, but I was

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1 like, damn, he saw us -- saw me drinking the beer; I know he's
2 going to pull us over.

3 Q. Did you say that out loud?

4 A. Yes.

5 Q. And then he pulled in right behind y'all and put the
6 blue lights on?

7 A. Yes. He got behind us and pulled us over.

8 Q. And did -- what did the police officer do?

9 A. Came to the driver's side door, asked Rodney to roll
10 his window down, which he did, and asked me did I have a beer.

11 Q. What did you say?

12 A. I kind of nonchalantly said, what beer.

13 Q. Where was the beer can at that point?

14 A. Between my legs.

15 Q. Okay. And then eventually picked the beer can up and
16 showed it to him?

17 A. Yes.

18 Q. Then what did he do?

19 A. He came around to my side of the car, opened the door
20 and took me out of the car.

21 Q. And then what did he do with you?

22 A. He took me to the back of Rodney's trunk.

23 Q. Before he took you to the back of Rodney's trunk, did
24 he leave the door open, or did he close the door?

25 A. The door was closed.

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1 Q. He closed the door?

2 A. Yes. Took me out and closed the door behind me.

3 Q. Okay. And he took you to the back of Rodney's car?

4 A. Correct.

5 Q. What did he do with you at the back of Rodney's car?

6 A. Patted me -- patted me down.

7 Q. Okay. So he patted you down. Frisked you?

8 A. Yes.

9 Q. How long did that take?

10 A. Maybe two minutes, maybe, two or three minutes, maybe.

11 Q. And after he patted you down, what did he do?

12 A. He proceeded to handcuff me.

13 Q. So he handcuffed you back behind Rodney's car?

14 A. Correct.

15 Q. And did he tell you you were under arrest?

16 A. I don't recall, but honestly telling you, I don't think

17 he did at that particular time.

18 Q. Okay. And then after he handcuffed you, what did he

19 do?

20 A. He took me from the back of his car to his patrol car,

21 and put me in the back of that car.

22 Q. From the back of Rodney's car, back to the back seat of

23 the patrol car?

24 A. Yes.

25 Q. Did he open the door for you and put you in?

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1 A. Yes.

2 Q. And then shut the door?

3 A. Yes.

4 Q. And then what did he do?

5 A. He went back to the -- Rodney's car.

6 Q. Driver's side or passenger's side?

7 A. To tell you the honest truth, I don't know which side
8 he went to at that particular time, cause I was handcuffed,
9 and the handcuffs was real tight. I was much bigger then.

10 Q. Was it light or dark out?

11 A. It was dark.

12 Q. Was it raining?

13 A. Raining, yes. It was real hard. It was raining all
14 over the State that day, I think, cause it was raining even in
15 Laurinburg.

16 Q. Okay. So after he took you out of the car and closed
17 the door, and took you back and frisked you, and handcuffed
18 you, and then put you in his car, you don't really know -- do
19 you know, or do you not know what was happened up there in
20 Rodney's car?

21 A. I don't know what was happening.

22 Q. When he took you out of your car -- out of Rodney's
23 car, and closed the door, where was the black duffle bag?

24 A. Still in the car.

25 Q. Still on the floorboard?

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1 A. Yes.

2 Q. And then -- so eventually, did the Officer come back to

3 the car and talk to you about something?

4 A. No, he didn't.

5 Q. Another officer did?

6 A. Yes.

7 Q. And they ended up telling you that they had found drugs

8 in the car?

9 A. Correct.

10 Q. And did they ask you questions about that?

11 A. Yes, they did.

12 Q. Did they ask you questions on the scene about it?

13 A. Yes.

14 Q. What type of questions did they ask you?

15 A. By the other arresting officer?

16 Q. Yes.

17 A. Asked me was that my stuff in the bag, and I didn't

18 know what we was talking about. I said no.

19 Q. You told him -- did you say no, or did you say, I don't

20 know what you are talking about?

21 A. I said, I don't know what you are talking about. I

22 said, I don't have -- I don't have nothing in my bag.

23 Q. Okay. And then they took you to J. Reuben Long?

24 A. Yes. I went to J. Reuben Long then.

25 Q. Were you interviewed, or at least attempted to be

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1 interviewed out there by a police officer?

2 A. J. Reuben Long, yes.

3 Q. Who?

4 A. Delpercio and Officer Williams.

5 Q. Delpercio and Officer Williams?

6 A. Correct.

7 Q. They were both in the room when they interviewed you?

8 A. Both in the room.

9 Q. And did they ask you -- what did they ask you?

10 A. They asked me how long did I know -- do I know Rodney
11 Smith, and I said yes.

12 Q. What did they say about that? Why did they ask that
13 question? Did they tell you?

14 A. They asked me did I know him, and I said yes, and then
15 they made a response as if though -- he didn't know me, so
16 therefore they were not going to ask me any more questions,
17 because they will feel as though they are trying to trick me.

18 Q. Okay. And then did they end up asking you any
19 questions?

20 A. No more questions.

21 Q. Okay. Those drugs -- I'm going to show you what's been
22 marked, and is now in evidence as State's Number 2. Does that
23 belong to you?

24 A. I never seen that till I got here, and it doesn't
25 belong to me.

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1 Q. Was that in your duffle bag ---

2 A. No.

3 Q. Did you know that was in your duffle bag?

4 A. No.

5 Q. Did you tell Rodney Smith that he -- that you could
6 sell him some cocaine?

7 A. No, I did not.

8 Q. The Solicitor is going to have an opportunity to ask
9 you some questions, and he's going to ask you about a criminal
10 record. You do have a criminal record; is that correct?

11 A. Yes, fourteen years ago.

12 Q. Fourteen years ago. Did you have a trial, or did you
13 plead guilty?

14 A. I pled guilty to a conspiracy.

15 Q. Conspiracy.

16 A. Yes.

17 Q. Fourteen years ago?

18 A. Yes.

19 Q. Are you telling the truth, Danny?

20 A. All -- absolutely, I am.

21 Q. Are you a drug dealer?

22 A. No.

23 MR. LONG: Answer any questions Mr. Hixson may have.

24 THE COURT: Cross-examination.

25 MR. HIXSON: Thank you, Your Honor.

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1 CROSS-EXAMINATION BY MR. HIXSON:

2 Q. So you used to be a football player, or an athlete? I
3 heard you say athlete. That's ---

4 A. Yes. I played football.

5 Q. Football. Play for Conway -- in this area ---

6 A. I played in Myrtle Beach.

7 Q. ---Myrtle Beach?

8 A. I played at Myrtle Beach High, yes.

9 MR. HIXSON: I just have to get myself acquainted also.

10 Q. Now, we talked a little bit about -- I think your
11 defense counsel said something about -- what kind of an active
12 sentence did you serve on that conspiracy charge?

13 A. How many years did I serve?

14 Q. Yes.

15 A. I served sixty months.

16 Q. Okay. Did you have any supervised release after that?

17 A. Yes.

18 Q. Now I notice -- of course you had an opportunity to
19 talk to Ms. Brisbon back there. I heard you say something
20 about, she's my fiance as of now. Isn't that true you said
21 that?

22 A. Yes.

23 Q. So as of now means -- does that mean that she wasn't
24 just prior to trial?

25 A. No. I meant she wasn't during the time that I got

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1 arrested.

2 Q. Okay. Well, when did you guys break up?

3 A. Ain't never broke up.

4 Q. Never broke up?

5 A. No.

6 Q. So when she said that she did, was she lying then?

7 A. No, she wasn't.

8 Q. You also said something about the contents of the black
9 bag. You said -- isn't it true you said that you had
10 cosmetics, toiletries, you know, things like that; isn't that
11 correct?

12 A. Yes.

13 Q. Personal items?

14 A. Did I have personal items in the bag?

15 Q. Yes. Isn't that what you said -- cell phone?

16 A. Yes. Toothpaste -- so yes. No, the cell phone was not
17 in the bag.

18 Q. It wasn't in the bag?

19 A. No. It was on my person. They put it in the bag, the
20 officers did.

21 Q. Okay. Okay. And I'm sure it's a kind of a -- is it a
22 shocking event to be arrested like that?

23 A. Was it shocking ---

24 Q. Yes.

25 A. ---To be arrested like ---

DANNY CORTEZ BROWN - CROSS BY HIXSON

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1 Q. Yes, you are riding ---

2 A. I was caught with an open container. It wasn't
3 shocking for what I was doing. I was drinking the open
4 container. That was not shocking.

5 Q. Well, isn't it true that you knew when you were
6 arrested you were arrested for open container?

7 A. Yes sir.

8 Q. Okay. And you said -- testified that Officer Williams
9 took you into the back of the car.

10 A. Yes.

11 Q. You testified -- I believe you testified -- isn't it
12 true -- that you didn't see Officer Williams going through
13 your bag?

14 A. I didn't see him going through the bag?

15 Q. Uh huh (*indicating positive*)

16 A. No, I didn't.

17 Q. Okay. So you didn't see Officer Williams when he
18 opened up the Fritos bag and looked in and saw powder cocaine
19 in that bag?

20 A. No, I didn't.

21 Q. Didn't see that?

22 A. No.

23 Q. Then when the other Officer asked you that, why did you
24 say, that stuff in the bag is not mine? You didn't even know
25 there was drugs in it.

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1 A. Because he came and asked me -- because he came and
2 asked me was it my stuff.

3 Q. Right. And you said no?

4 A. Right.

5 Q. But it's just personal items. It's just personal items
6 in the bag.

7 A. He didn't ask me about no personal items. He asked me
8 about some cocaine.

9 Q. So, let me rephrase. Isn't it true that you packed you
10 bag with the overnight stuff?

11 A. Right.

12 Q. With underwear, with cosmetics, with toiletries, with
13 whatever you would need to go over to spend the night at Green
14 Sea on the night before. Isn't that what you testified?

15 A. That's -- yes, correct.

16 Q. Is there anything in there that you wouldn't want to
17 tell a police officer that isn't yours?

18 A. Is anything -- correct that.

19 Q. Would you want to tell the police office -- lie to the
20 police officer and say, that's not my underwear?

21 A. No. If it was my underwear I would tell them it's my
22 underwear.

23 Q. But you didn't see the Officer find the cocaine in the
24 bag.

25 A. No, I didn't.

1 Q. And according to your testimony right here, you didn't
2 know it was in the bag.

3 A. I didn't.

4 Q. So when the Officer asked you if that's your stuff in
5 the bag you go, no, that's not mine.

6 A. I said no, that is not mine -- that the cocaine was not
7 mine.

8 Q. But you hadn't seen the Officer discover it yet.

9 A. The Officer -- other Officer asked me ---

10 MR. LONG: I object. He's confusing him, in that the
11 question -- he's already ---

12 THE COURT: Mr. Long, it's cross-examination. I'm
13 going to allow the question. He may answer it. If he doesn't
14 understand the question he can tell the Solicitor he doesn't
15 understand it, and you certainly have the right to redirect.

16 Continue on.

17 MR. HIXSON: I'm not trying to confuse you. You may
18 think I am, but I'm not. Let me be as clear as I can be.

19 Q. Isn't it true your testimony was that you packed that
20 duffle bag?

21 A. Correct.

22 Q. Isn't it true your testimony was that you put personal
23 items in that duffle bag?

24 A. Correct.

25 Q. Isn't it true your testimony is that you did not put

1 drugs, and don't know anything about any drugs in the bag?

2 A. Correct.

3 Q. Isn't it true you just testified that you weren't
4 concerned, or worried about an arrest because it was just an
5 open beer?

6 A. I wasn't concerned about just an open container, no, I
7 wasn't.

8 Q. All right. So there is no reason for you to face any
9 kind of concern at that time, other than a misdemeanor offense
10 for open beer -- container of beer?

11 A. I mean, it was still a concern.

12 Q. I'm not -- okay. You testified that you did not see
13 Officer Williams search your bag.

14 A. Correct.

15 Q. You testified you had no idea that there was anything
16 improper in that bag. You didn't know there was anything
17 improper?

18 A. Correct. Right.

19 Q. But when asked if the stuff in the bag was yours -- not
20 if the powder cocaine was yours, not if illegal narcotics was
21 yours -- the stuff in your bag, you denied it?

22 A. No.

23 Q. You just testified you did.

24 A. I did not ---

25 MR. LONG: Your Honor, again I object. There was never

1 any question about the stuff in the bag.

2 THE COURT: All right, Mr. Long -- Mr. Long. Thank
3 you.

4 Solicitor, allow the witness to fully answer his
5 question. Do not interrupt him.

6 Thank you, Your Honor.

7 MR. HIXSON: Thank you, Your Honor.

8 THE COURT: The witness -- you may fully answer the
9 question if you -- or respond if you choose to do so.

10 Continue on.

11 A. The Officer did not ask me about any personal items.
12 He asked me about the drugs that was in the bag.

13 Q. Okay.

14 MR. HIXSON: Well, that's fine. That's fine. That's
15 fine.

16 Q. Also, there was some testimony relating to where you
17 live. You were raised in Booker T. Washington community, I
18 think was your testimony.

19 A. Correct.

20 Q. That your mom is there.

21 A. Right.

22 Q. That -- I think -- isn't it true you said yes, my mom
23 lives there; I live there?

24 A. Right.

25 Q. I believe your driver's license ---

1 A. It's 1203 Dunbar Street ---
2 Q. ---Which is in evidence ---
3 A. It's 1203 Dunbar Street.
4 Q. Yes. So that -- Dunbar Street, isn't that kind of
5 off -- behind the Convention Center?
6 A. It's between 21st Avenue and 10th Avenue.
7 A. North?
8 A. Yes.
9 Q. Okay. The Hess station, isn't that 7th Avenue -- naah,
10 7th -- 9th Avenue South -- 13th Avenue South. I apologize. I
11 believe -- around the teens of the south avenues?
12 A. Yes sir.
13 Q. Isn't that right?
14 A. Yes sir.
15 Q. Didn't you testify that you told -- asked Rodney Smith
16 to take you home?
17 A. Yes, I did.
18 Q. But when you got in the car, isn't it true that you
19 went south?
20 A. I was living south then.
21 Q. You were living south then?
22 A. Yes.
23 Q. Okay. But your driver's license, at the time, says
24 Dunbar Street?
25 A. Right.

1 Q. Okay. Isn't it true you said, I'm going home, but you
2 went the other direction?

3 A. I wasn't living there then. I was living in Cape
4 Landing, which is in -- behind the back gate of the Air Force
5 Base, so I was headed home. That's -- that was my residence
6 at that particular time.

7 Q. Okay. But you just testified that you lived with your
8 mom on Dunbar Street.

9 A. I live with her now. As of now I do live with her. I
10 don't live there anymore, which is ---

11 Q. You've got your driver's license at Dunbar Street?

12 A. Yes.

13 Q. So, you indicated -- I think you answered directly that
14 you don't sell drugs.

15 A. No, I don't.

16 Q. During the course of your real estate transactions,
17 dealing with those athletes and stuff like that, to try to get
18 them involved in it, you don't deal anything with those
19 professional athletes or any of those folks you are dealing
20 with?

21 A. No.

22 Q. You don't supply Rodney Smith?

23 A. No, I don't.

24 Q. Do you know what, I'm straight, means?

25 A. No, I don't know what I'm straight means.

1 Q. You don't know what that means?

2 A. No. I don't use that term.

3 MR. HIXSON: Beg the Court's indulgence, Your Honor.

4 THE COURT: Yes sir.

5 Q. At some point in time you mentioned also, when we

6 talked about your fiance, things like that, like -- Mr. Long

7 was trying to be endearing and asked you when you were going

8 to marry that young lady back there. At some point in time

9 are you going to buy her an engagement ring?

10 A. She has it on as of now.

11 Q. Okay. Is that your mom's?

12 A. Is what my mom's?

13 Q. Is that your mom's? I didn't -- I just didn't know if

14 that was your mom's engagement ring. It's a hand-me-down.

15 MR. LONG: Your Honor, again, I would object to the

16 relevancy ---

17 THE COURT: Sustained.

18 MR. LONG: ---Whose ring ---

19 THE COURT: Sustained.

20 Further questions, Solicitor?

21 MR. HIXSON: Nothing from the State, Your Honor.

22 Thank you.

23 THE COURT: Redirect.

24 MR. LONG: No. sir.

25 Come on down, Danny. Thank you.

WITNESSES

Tom Delpacio/HCPD

ARREST WARRANT NO. CAW200602012

CDR: 0280 644-53-0370(e)(2)(c)

DOA: 10-07-05

ACTION OF GRAND JURY

TRUE BILL

[Signature] MAR 30 2006
Foreman of Grand Jury

VERDICT
See verdict
Tom
9/13/06

Foreman of Petit Jury Date:

DOCKET NO. 2006-GS-26-1349

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SRH 79036-2

COURT OF GENERAL SESSIONS

MARCH TERM 2006

THE STATE
VS

DANNY CORTEZ BROWN M/B

DOB: 12/8/67

SS#: *[Redacted]*

ATTORNEY: RUSSELL LONG

INDICTMENT FOR:

TRAFFICKING COCAINE (100-200 GRAMS)

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

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[Handwritten notes and signatures]
9-13-06
SRH

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 §44-53-370(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.

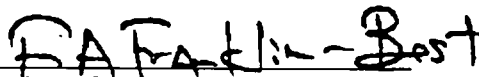
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with 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."

March 26th, 2009


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANNY CORTEZ BROWN,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the police officer go on a mere fishing expedition when he searched a potato chip bag that was contained in a duffel bag that was located on the sidewalk next to a car pulled over for open container? The police officer was not justified in searching Brown's Fritos bag, and Brown should have his conviction reversed. ¹

¹ The undersigned calls to this Court's attention the case Arizona v. Gant (07-542) which is currently before the United States Supreme Court. Oral arguments are scheduled for October 7, 2008, and the question certified is: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured? The undersigned submits this case is relevant to the issues submitted in this brief.

STATEMENT OF THE CASE

Danny Brown was indicted by the Horry County Grand Jury for Trafficking Cocaine between 100 and 200 grams. (2006-GS-26-1349). He was tried before the Honorable Steven H. John and a jury on September 12th and 13th 2006. He was represented by Russell Long, Esquire. He was found guilty, and sentenced to twenty-five (25) years incarceration.

This appeal timely follows.

ARGUMENT

The police officer went on a mere fishing expedition when he searched a potato chip bag that was contained in a duffel bag that was located on the sidewalk next to a car pulled over for open container.

Riding home with an acquaintance from the neighborhood, Rodney Smith, whom he had just encountered at a convenience store, Danny Brown was drinking a beer on a rainy afternoon. Williams, an officer with the Spartanburg Public Safety Department for 2 years, caught sight of this infraction as he was passing by on the highway. (ROA. page 1, lines 4-8; page 1, line 21 to page 2, line 8). Williams pulled the car over to investigate.

After first approaching the driver's side window and speaking with the occupants, Williams then approached the passenger side window and spoke to Danny, whom he described as "calm." He asked Danny to step out of the vehicle and then "placed him under arrest kind of quickly." (ROA. page 7, lines 1-2). Williams claimed he wanted to "find out if there were any more beer cans." (ROA. page 5, lines 4-5). Danny was removed from the car and handcuffed, and Williams looked down at the floorboard to see a zipped duffel bag. Williams asked Danny if the bag belonged to him, and Danny said it did. (ROA. page 6, lines 12-14). As Danny was being cuffed, the duffel bag was left alone with the driver of the car, and Williams did not keep his eye on it the whole time. (ROA. page 14, lines 11-17).² After handcuffing him, Williams then placed the bag on the sidewalk, and took Danny

² But on cross-examination Williams testified differently: "Actually I asked him before, as we stood there, before we left, right there at that passenger door. I had him—hands on him. He was cuffed, and I had my other—right hand free, and I pointed down and said, is that your bag. He said, yes, so then I reached into the bag—" (ROA. page 24, lines 6-9). Smith, also a State's witness, placed the duffel bag in the car for an even

and secured him in the patrol car. Williams walked back to the passenger side of the car, where the bag was located on the sidewalk, and "want[ing] to get a glance into the bag", unzipped it and looked inside. (ROA. page 9, line 13). Among the deodorant, underwear, and other personal effects, was a "crumpled up" bag of Frito chips. (ROA. page 9, lines 17-19). Still curious, he opened the bag of chips and found what he believed to be drugs. At that point, Williams ran the drivers license of Smith, who had been sitting alone in the car this entire time, and found that it was suspended. Smith was arrested and Williams called for back-up. (ROA. page 11, lines 18-23).³

Although William's patrol car was outfitted with video equipment, apparently his tape had "just ran out." Smith, a confessed drug dealer (ROA. page 47, lines 13-14), still has not been prosecuted for the drugs that belonged to him, and today Brown is serving a 25 year prison sentence. Brown was subjected to an illegal search, and the fruits of that search should be suppressed as fruits of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

Prior testimony of Officer Williams

longer period of time. Smith said that Williams grabbed the bag after he had taken Brown back to his patrol car. (ROA. page 89, line 17 to page 92, line 9).

³ Williams testified on cross-examination that Smith was very nervous acting even before he had run his drivers license through the system. (ROA. page 25, lines 10-21). When the officers searched the vehicle, they found a bag containing several different types of illegal drugs under the driver's seat. (ROA. page 37, lines 17-21) where Mr. Smith had been sitting. Mr. Smith ultimately claimed ownership of those drugs. (ROA. page 41, lines 1-2).

Officer William's 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, 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.

(ROA. page 65, line 21 to page 67, line 10) (emphasis added).

The changing testimony of Williams is important because it illustrates that Williams's prime motivation for searching the duffel bag was not related to his safety concerns; a fact that the judge clearly understood. In neither case did Williams claim that the purpose of his search was to prevent the destruction of evidence. These factors, of course, are the fundamental bases for allowing the temporary exception to the Fourth Amendment's prohibition against warrantless searches and seizures as contemplated by the United States Supreme Court in Chimel v. California, 395 U.S. 752 (1969) and New York v. Belton, 453 U.S. 454 (1981).

The Searches

Despite his misgivings about the motivation of Williams, the trial judge ruled that that the search in this case was justified by the holding in New York v. Belton, *supra*. This was error.

As I said, though I have concerns about the officer's conduct in this particular case, it is clear that the U.S. Supreme Court set forth a bright line test. The officer's conduct falls within that bright line test. The motion to suppress is denied.

(ROA. page 153, lines 16-20).

The judge's ruling was predicated on his belief that Belton created a bright-line test, and that this test applies in Brown's case. This ruling was erroneous, and Brown should have his conviction reversed.

There are three (3) distinct searches present in this case—(1) removing the bag from the car, (2) searching the duffel bag, and (3) searching the Frito bag located in the duffel bag. Each search should be analyzed separately to determine whether William's actions in this case were justified. Additionally, no South Carolina search and seizure case is properly analyzed without reference to our independent state grounds as embodied under Article I, Section 10 of the South Carolina Constitution. Thus, the judge's decision was erroneous for two reasons: (1) By concluding that Belton was applicable to *the* search and thereby failing to consider and separately analyze three separate searches, and (3) By failing to analyze the conduct under South Carolina law.

Why *New York v. Belton* Does Not Apply

As an initial matter, the seminal search incident to arrest case for automobiles does not apply in this particular case for two reasons: (1) there were no exigent circumstances present, and (2) there was no nexus between the cause of arrest and the search of the duffel bag. Belton is clearly distinguishable.

In Belton, the 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. Then he entered the car. At the time he smelled the marijuana, the officer had probable

cause to arrest them for that offense. He also had probable cause to *believe there were drugs in the car* because he smelled the burning marijuana. In Belton, there was a clear exigency present that justified the search—the possible destruction of evidence. In this case, there were no exigent circumstances.

The language in the Belton decision, *supra*, makes it quite clear that it is an extension of law as propounded in Chimel, *supra*. “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 basis scope of searches incident to lawful custodial arrests.” Belton, *n.3*.

In Chimel, searches incident to arrest are limited by the existence of exigent circumstances. Without this limiting factor, “Fourth Amendment protection in this area would approach the evaporation point.” Id. at 765. These exigent circumstances are (1) officer safety, and (2) destruction of evidence.

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control—’ construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id. at 762-63.

Without exigent circumstances, a warrantless search is presumptively unreasonable under the Fourth Amendment of the Federal Constitution and our State Constitution and laws. See S.C. Code Ann. §17-13-14- (1976) (search warrant statute), and Article I, Section 10 of the South Carolina Constitution.

In the case *sub judice*, the officer had probable cause to arrest Danny for an open container, but he did not have any reasonable belief as to any other illegal activity taking place that would have provided the necessary exigency. There was nothing about Danny's behavior that aroused any suspicion of illegal activity. There was no smell of drugs, for example. Williams testified that he was searching for more beer cans (even though if Danny had more beer in the duffel bag, that would not have been a crime) (ROA. page 5, lines 4-5). There was nothing to give rise to the belief that there were drugs in the duffel bag, or that there were any safety concerns. That Williams had no concern for his safety is evidenced by the fact that he allowed the driver to remain in the car throughout the entirety of this transaction, notwithstanding the testimony he presented the second time he was asked to justify the searches. This fact should not be allowed to constitute any "exigency" in this case. As Justice Scalia points out in his concurrence in Thornton v. United States, 541 U.S. 615 (2004): "Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures." *Id.* at 627 (emphasis in original). Rodney Smith's suspicious actions did not justify the search of Brown's property when Brown was detained in the back of a patrol car and the officer allowed Smith free rein during Brown's arrest.

A second reason why this case falls beyond the purview of Belton is that there was no nexus between the cause of the arrest and the duffel bag.⁴ In Danny's case, Williams had no reason to believe that evidence relative to the traffic infraction was contained in the bag. The traffic violation was that Brown had an open container while seated as a passenger in the vehicle. As noted earlier, even if Brown had a case of beer in his duffel bag, this would not have been relevant to his open container charge as it would not have been illegal.

⁴ Limiting a search for evidence relevant to the crime that precipitated the arrest ("the nexus") was advanced by Justice Scalia in his concurrence in Thornton, *supra*:

"In Chimel v. California, we held that a search incident to arrest was justified only as a means to find weapons the arrestee might use or the evidence he might conceal or destroy. We accordingly limited such searches to the area within the suspect's "immediate control", "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." In New York v. Belton, we set forth a bright-line rule for arrests of automobile occupants, holding that, because the vehicle's entire passenger compartment is "in fact generally, even if not inevitably," within the arrestee's immediate control, a search of the whole compartment is justified in every case.

When petitioner's car was searched in this case, he was searched in this car, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer's squad car. The risk that he would nevertheless "grab a weapon or evidentiary item" from his car was remote in the extreme. The Court's effort to apply our current doctrine to this search stretches it beyond its breaking point . . ." (citations omitted). *Id.* at 625.

After exploring various arguments purporting to justify the searches for officer safety, Justice Scalia concludes: "If Belton searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because *the car might contain evidence relevant to the crime* for which he was arrested." *Id.* at 629 (emphasis added).

Importantly, in response to the Scalia concurrence, Justice Rehnquist in Footnote 4 of the opinion states: "Whatever the merits of Justice Scalia's opinion concurring in the judgment, this is the wrong case to address them. Petitioner has never argued that Belton should be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle . . ." *Id.* at 624. And as Justice O'Connor stated: "While the approach Justice Scalia proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak on its merit." *Id.* The significance of this discussion in Thornton is that it implicitly rejects a claim that *all* searches incident to arrest, whatever the scope the search, are subsumed by the reasoning in Belton.

All of the evidence necessary to secure a conviction for open container was apparent immediately upon approaching the car. See Knowles v. Iowa, 525 U.S. 113 (1998):

Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Id. at 118.

Of course, the officer did not even bother to collect the evidence relative to the detention in the first place (ROA. page 17, line 13 to page 18, line 15), but in any event, there was no nexus between the crime and the duffel bag.

For these reasons, this case is significantly different from Belton. The search into the duffel bag was unjustified and therefore a violation of the 4th Amendment and South Carolina law.

Search #1—Removing the Duffel Bag from the Car

Williams had no basis to remove, or seize, the duffel bag from the car. Williams articulated no reason to believe any illegal activity was afoot, and Brown was secured at the time the duffel bag was removed. The fundamental bases for a warrant search—officer safety and/ or destruction of evidence -- were utterly lacking. The State's position would essentially grant officers a general right of entry into any vehicle that commits even a *de minimis* traffic infraction. The 4th Amendment and the South Carolina Constitution demand more.

Search #2—Opening the Duffel Bag

As Williams proceeded to dig deeper and deeper into Brown's personal belongings, the justifications for the warrantless search still needed to be present. If Williams was justified in removing the duffel bag from the car, he still needed a reason to then open the bag. Arguably, having removed a bag which may have contained a weapon (although the record does not reflect any such belief on the part of the officer), that safety justification would have been dissipated by its removal from the vehicle and the driver who, after all, was allowed to remain in the car. Additionally, by the time the bag was opened, Brown was secured in handcuffs, and ensconced in Williams's patrol car.

Search #3—Opening the Fritos Potato Chip Bag

The most illustrative fact in support of the claim that Williams's was merely fishing for a crime is his rooting through the closed Fritos bag that was contained inside of the closed duffel bag, located on a sidewalk, next to the car pulled because the passenger had an open container. At this point, any conceivable justifications for conducting a warrantless search were entirely dissipated. Again, the record is devoid of any reasonable belief that criminal activity was afoot, and the bag, which may have contained a weapon, was removed from the car, and searched. Brown was still secured in the patrol car, and the officer elected to leave the driver in the vehicle. There is simply no argument available to support the search at this point. If Williams believed that evidence of a crime was present, he was obligated to contact a magistrate and obtain a warrant. Williams's search of Brown's Fritos bag was improper, and the fruits of that search should be suppressed. Wong Sun, supra.

South Carolina Analysis

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

CONCLUSION

For the preceding reasons, Brown respectfully asks this Court to reverse his conviction.

Respectfully submitted,

Elizabeth A. Franklin-Best
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 15th day of April, 2009.

CERTIFICATE OF COUNSEL

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


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STATE OF SOUTH CAROLINA
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Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANNY CORTEZ BROWN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Norman Mark Rapoport, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 15th day of April, 2009.

EA Franklin-Best
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 15th day of April, 2009.

Secretary of State (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA
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Appeal From Horry County
Steven H. John, Circuit Court Judge

THE STATE,

Respondent,

vs.

DANNY CORTEZ BROWN,

Appellant.

FINAL BRIEF OF RESPONDENT

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<u>State v. Pierce</u> , 263 S.C. 23, 207 S.E.2d 414 (1974)	9
<u>State v. Prioleau</u> , 345 S.C. 404, 548 S.E.2d 213 (2001)	9
<u>State v. Shumpert</u> , 312 S.C. 502, 435 S.E.2d 859 (2003)	8
<u>State v. Weaver</u> , 374 S.C. 313, 649 S.E.2d 479 (2007)	16
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001)	10
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<u>Thornton v. United States</u> , 541 U.S. 615 (2004)	14
<u>United States v. Robinson</u> , 414 U.S. 218 (1973)	13-15
<u>United States v. Ross</u> , 456 U.S. 798 (1982)	17, 18
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 497 S.E.2d 731 (1998)	7
<u>Wyoming v. Houghton</u> , 526 U.S. 295 (1999)	18
 <u>Other Authorities:</u>	
U.S. Const., amend. IV	7, 10-12, 14, 16
Rule 208(b)(1)(B), SCACR	10
Rule 220 (c), SCACR	16
Jean Hoefar Toal et al., <u>Appellate Practice in South Carolina</u> 57 (2d ed. 2002)	8

STATEMENT OF ISSUES ON APPEAL

I.

Is Brown's Issue available for appellate review?

II.

Did the trial judge err by denying Brown's motion to suppress evidence seized from his duffel bag incident to his arrest?

III.

Was the search of the duffel bag proper under the automobile exception to the exclusionary rule?

IV.

Was the search of the duffel bag proper as an inventory search?

STATEMENT OF THE CASE

Respondent concurs with the procedural Statement of the Case of Appellant Danny Cortez Brown.

ARGUMENT

Brown's Issue is not available for appellate review. The trial judge did not err by denying Brown's motion to suppress evidence seized from his duffel bag incident to his arrest. The search of the duffel bag was proper under the automobile exception to the exclusionary rule. The search of the duffel bag was proper as an inventory search. (Brown's Issue; Respondent's Issues I-IV).

Around 7:20 p.m. on October 6, 2005, Officer Daryl Williams was patrolled Kings Highway in Myrtle Beach, when he observed two individuals in a vehicle. He testified that Brown, the passenger, was drinking a beer. Williams said Brown then took the beer and appeared to tuck it between his legs when Brown saw him. (R. 1-4, 15-17).¹

Williams stopped the vehicle and approached the driver's side. Williams testified he spoke to Brown about the beer. Brown first denied possession of a beer, but then pulled it up. (R. 4, 31-32). Williams said he circled around to the passenger's side of the vehicle and asked if there were more beers inside. Brown said there were none. (R. 4-5, 18-20). Williams then asked Brown to step out of the vehicle, handcuffed him, and placed him under arrest for the open container violation.² (R. 5). Williams admitted he wanted to find out if there were any more beers in the vehicle. (R. 5, 20). Williams stated:

Of course I got him out of the car, you know, he is stepping -
- just imagine, you know, a vehicle right there in the roadway,
and I'm basically - - there's not too much room between the

¹William explained that, although it was close to dark at the time, there was enough light for him to see into the vehicle. (R. 2-3, 15-16).

²Williams testified he took possession of the beer can from Brown, but he did not preserve it as evidence because of the subsequent drug charge. (R. 17-18, 21).

sidewalk and the car, basically. I'm standing there. I can't recall whether I was up on the sidewalk or actually in the street. But he steps out, and I kind of placed him under arrest kind of quickly. I thought it was a safety issue, because he looked like a pretty big guy, and I didn't want to - - and being there was another subject in there, if I had to go ahead and tangle with him I didn't want to - - I wanted to make it quick, more or less . . .

(R. 6-7). Williams recalled Brown's demeanor as "artificially laid back, more or less like a -
- trying to be cool . . . it seemed suspicious to me, personally, just as the nervousness of the other occupant seemed suspicious, so I mean, I kind of governed how I handled myself." (R. 32-33).

Williams also testified that he observed a black duffle bag on the floorboard in front of Brown when he first spoke to him from the driver's side of the vehicle. (R. 5-6). When Brown was arrested, Brown admitted the bag belonged to him. (R. 5, 26). Williams said he had the bag removed once Brown was taken from the vehicle. Williams explained why he removed the duffle bag.

. . . it is an unknown bag. It could - - as a safety issue for me. It's a lot of options I have at that point, but I would say, let me separate this bag from - - you know, there could be anything there, a weapon, for instance, so I wanted to separate the bag from the other person, because I didn't know if it would pose a threat, so like I said, I placed it on the sidewalk . . . As I said, it was just starting to get dark, and eventually did, of course, and so throughout the whole duration of the traffic stop I don't believe there was any other, you know, outside people, other than when I did eventually call an officer to the scene for backup . . .

(R. 7).

Williams testified that after Brown was secured in his patrol vehicle, he returned to

the vehicle and briefly spoke to Rodney Smith, the driver.³ Williams said he then went to look inside the duffle bag. He unzipped it and found deodorant, underwear, and other personal effects. There was also a "crumpled up" bag of Frito chips. (R. 9, 23-24). Williams testified he then opened the bag of chips and found what he believed were drugs. (R. 9). At this point, Williams ran the driver's license of Smith and found that it was suspended. Smith, too, was arrested, and Williams requested back-up. (R. 11-12, 27).

After Smith's arrest, other officers further searched the vehicle. They discovered a small pouch "maybe a little bit bigger than a cigarette case" under Smith's seat that contained several different types of illegal drugs. (R. 37-40). Smith ultimately admitted the drugs belonged to him. (R. 41, 45). Smith further claimed he had been dealing drugs for the past year. (R. 47).

When the trial concluded after the first day, defense counsel moved to suppress the drugs seized from the duffel bag. He argued Brown was already in custody, and that Williams could not thereafter remove the duffel bag from the car and then search it without consent. Defense counsel stated, "the driver of the car was not under arrest. This is not an inventory search, because the car, at this point, would still have been free to go, was not ready to be towed." (R. 64). The State contended the officer could search the duffel bag for his safety under the circumstances, and also to inventory Brown's personal belongings once he admitted the duffel bag belonged to him. (R. 64-65).

The trial judge recalled Williams' testimony from Brown's prior trial which ended

³Contrary to Brown's demeanor during the stop, Williams stated Smith acted very nervous when he spoke to him. (R. 25, 31).

were drugs inside Brown's duffel bag. (R. 78, 104).⁴

The State's last witness testified there were 122.65 grams of cocaine inside the duffel bag. (R. 117). When the State requested the admission of the drug report, defense counsel stated: "... along with my objection - - my previous suppression motion, I would object to that document going in at this time." (R. 118). The State then moved to admit the drugs. Defense counsel again objected subject to his previous motion. (R. 119-20). Both the drug report and the drugs were then admitted into evidence. (R. 120).

Then, after the State rested its case, defense counsel specifically renewed his suppression motion and requested the trial judge to dismiss the case. Following lengthy arguments by counsel, the trial judge ruled the drugs were admissible pursuant to Chimel v. California, 395 U.S. 752 (1969), and New York v. Belton, 453 U.S. 454 (1981). (R. 147-71).

On appeal, Brown argues the trial judge erred by denying his motion to suppress the drugs seized from his duffel bag, because the search was not valid incident to his arrest. Brown further argues that even if the search was constitutional under the Fourth Amendment, it violated the heightened protections afforded him pursuant to the South Carolina Constitution.

A. Error preservation

The preservation of Brown's issue is dubious. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004); Wilder Corp. v.

⁴Smith stated Brown was ultimately charged with trafficking the drugs discovered inside the duffel bag and under his seat. At the time of Brown's trial, however, he had not been tried on these charges. (R. 78-79, 96-97).

Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003); Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). Error preservation requirements are intended “to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000); see also State v. Nelson, 331 S.C. 1, 501 S.E.2d 716, 718 n.6 (1998)[“the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court”].

Here, when defense counsel moved to suppress the drugs the trial judge decided to take the matter under advisement and indicated he would rule on it at the conclusion of the State’s case. When the State later introduced the drugs, however, defense counsel not only needed to renew his objection to the introduction of the drugs, which he did, but he was also required to obtain a final ruling from the trial judge before they were admitted. Defense counsel could not wait until the directed verdict stage of the trial to obtain a ruling from the trial judge. Brown’s Issue must be dismissed. See State v. Burton, 356 S.C. 259, 589 S.E.2d 6 (2003)[noting that, because the defendant only raised the propriety of the police action in a motion for a directed verdict and after the evidence pertaining to the search and seizure had been admitted, he could not challenge the search on appeal]; State v. Green, 350 S.C. 580, 567 S.E.2d 505 (Ct. App. 2002)[holding the appropriate vehicle for challenging the admissibility of evidence based on a search and seizure violation is to obtain a ruling on a motion to suppress before it is introduced and not at the time of a motion for a directed verdict]; see also State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (2003)[unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not

preserved for appellate review]; State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974)[a defendant must timely object and ask for a ruling to preserve error]; State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005)[noting the trial judge's earlier statement to the defendant was not a ruling on the admissibility of the defendant's prior criminal record].

Additionally, an appellant has "the responsibility to identify errors on appeal, not the court." Kennedy v. South Carolina Ret. Sys., 349 S.C. 531, 564 S.E.2d 322, 322-23 (2001). An objection should be addressed to the trial judge in a sufficiently specific manner that brings attention to the exact error. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213, 216 (2001); State v. Funderburk, 367 S.C. 236, 625 S.E.2d 248, 250 (Ct. App. 2006); see also State v. Byram, 326 S.C. 107, 485 S.E.2d 360, 362-63 (1997)[holding a constitutional argument is not preserved for appeal where a defendant failed to argue the constitutional basis for his request at trial]; State v. Patton, 322 S.C. 408, 472 S.E.2d 245, 247 (1996)[holding a defendant must articulate specific factual and legal grounds to support his claim that evidence was obtained by conduct violative of his constitutional rights]. If a party fails to properly object, he is procedurally barred from raising the issue for the first time on appeal. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996); see State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)[party may not argue one ground at trial and an alternate ground on appeal]; State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994)[to preserve error for appellate review, a defendant must make a contemporaneous objection on a specific ground]. "An issue that was not preserved for review should not be addressed by the Court of Appeals." State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 693-94 (2003).

In the present case, defense counsel's argument was based upon federal grounds only.

Nowhere in the record does he cite or make reference to the South Carolina Constitution. He likewise failed to specifically argue the South Carolina Constitution afforded more expansive rights than the rights conferred by the Fourth Amendment. Patton, 472 S.E.2d at 247; see also Dunbar, 587 S.E.2d at 694 [holding the Court of Appeals improperly addressed the state's warrant statute in the suppression of drugs, because nowhere in the record did defendant cite or make reference to the warrant statute]. Brown's assignment of error in this regard, therefore, cannot be addressed for the first time on appeal. Id.⁵

B. Search incident to arrest

The admission of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). An abuse of discretion occurs when the conclusions of the trial judge either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

In criminal cases, an appellate court only reviews errors of law. State v. Butler, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003)[citing State v. Wilson, 345 S.C. 1, 545 S.E.2d 827, 829 (2001)]. The appellate court is bound by the trial judge's factual findings unless it finds that they are clearly erroneous. This standard of review also applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Id. The appellate court is limited in its review of Fourth Amendment search and seizure cases to

⁵Further, no point may be considered which is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR; State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000). Brown failed to set forth this assignment of error in his Statement of Issue on Appeal. (BOA at 3). It cannot, therefore, be addressed on appeal. Id.

determining whether there is any evidence to support the trial judge's finding. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). An appellate court may reverse only when clear error exists. Id.

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002)[citing Mapp v. Ohio, 367 U.S. 643 (1961)]. Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement. Id. One such exception is in cases of a search incident to arrest. State v. Ferrell, 274 S.C. 401, 266 S.E.2d 869, 871 (1980)[once probable cause exists for an arrest, "[p]olice officers may make a search of an arrestee's person and the area within his immediate control for weapons and destructible]; see also Chimel, 395 U.S. at 762-63 [when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape]. The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995)[burden is upon State to justify warrantless search].

There are two historical rationales for the "search incident to arrest" exception to the warrant requirement: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. State v. Freiburger, 366 S.C. 125, 620

S.E.2d 737, 740 (2005)[citing Knowles v. Iowa, 525 U.S. 113, 116, (1998)]. A search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986).

As noted by the trial judge, the instant case is controlled by Belton. Belton involved the police stop of a speeding car on the New York Thruway. The policeman smelled marijuana and observed an envelope marked "Supergold," which he associated with marijuana, on the floor of the car. He ordered its four male occupants out of the car and placed them under arrest for unlawful possession. "He patted down each of the men and 'split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other.' " Id., 453 U.S. at 456. Then, the policeman searched the passenger compartment of the car. On the back seat he found a leather jacket belonging to Belton. He unzipped one of the pockets of the jacket and discovered cocaine. The Court of Appeals of New York held that the warrantless search of the zippered pockets of the inaccessible jacket violated the Fourth Amendment.

The USSC reversed. It established a "bright line" rule. In so doing, the Court clarified the application of the rule in Chimel to the search of the interior and contents of an automobile incident to the lawful custodial arrest of its recent occupants. It said:

When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that

area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." Chimel, [395 U.S. at 763.] In order to establish the workable rule this category of cases requires, we read Chimel's definition of the limits of the area that may be searched in light of that generalization. Accordingly, we 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.

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. United States v. Robinson [414 U.S. 218 (1973)]; 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. (footnotes omitted.)

Belton, 453 U.S. at 460-61. The Court defined a "container" as "any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." Id. at 461 n.4.

Even more applicable to the present case, the USSC stated:

It is true, of course, 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. However, in [Robinson], the Court rejected the argument that such a container - there a "crumpled up cigarette package" - located during a search of Robinson incident to his arrest could not be searched: "The authority to search the person

incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.” [Robinson,] 414 U.S. at 235.

Belton, 453 U.S. at 461.

Belton concludes with the following summary;

It is not questioned that the respondent was the subject of a lawful custodial arrest on a charge of possessing marihuana. The search of the respondent’s jacket followed immediately upon that arrest. The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was “within the arrestee’s immediate control” within the meaning of the Chimel case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments. (footnote omitted.)

Belton, 453 U.S. at 462.

In the present case it is not even suggested that Brown’s custodial arrest was unlawful.⁶ The search of the duffel bag from the passenger compartment of the vehicle was contemporaneous with his arrest. It did not matter whether Brown was already confined in the patrol car.⁷ See Thornton v. United States, 541 U.S. 615, 617, 623-24 (2004) [“Belton

⁶Brown testified at trial, and he admitted possession of the open container. (R. 163-65).

⁷In a related argument, Brown notes that the USSC recently granted certiorari in Arizona v. Gant, ___ U.S. ___, 128 S.Ct. 1443 (2008), to review the decision by the Arizona Supreme Court in State v. Gant, 216 Ariz. 1, 162 P.3d 640 (2007). In Gant, the state court invalidated a search of a vehicle incident to arrest, because the physical restraint on the arrestee precluded any threat to officer safety or the destruction of evidence. However, this Court

governs even when an officer does not make contact until the person arrested has left the vehicle.” As long as the arrestee is a “recent occupant” of the vehicle, “officers may search that vehicle incident to arrest”]. It further made no difference whether Smith remained inside the car, because Williams had already removed the duffel bag from the passenger compartment when he arrested Brown and placed it on the ground until he secured Brown.

Additionally, there is no distinction of any legal significance between the zippered pocket of the defendant’s jacket in Belton, and Brown’s duffel bag and its contents. Brown contends that, under Belton, the police were not entitled to open the Frito bag.⁸ The Belton Court rejected this argument in favor of a bright-line rule permitting the search of all “containers” in the passenger compartment. See also Robinson, 414 U.S. at 235 [“crumpled up cigarette package”]. Indeed, the Frito bag at issue fell within the USSC’s definition of a “container.” The manner in which the drugs were hidden in the “container” was irrelevant. Finally, the search of the vehicle did not violate Belton because the initial search was to discover evidence of the unlawful container offense for which Brown had been arrested. Brown’s characterization of the duffel bag search as three separate searches is patently without merit.

Belton is dispositive in this case. The search of Brown’s duffel bag and its contents by the police did not violate the Fourth and Fourteenth Amendments.

should still apply the law as it currently exists until it is directed to apply a different rule. In light of the precedent in the USSC, the State strongly doubts the USSC will seek to limit Belton. To the contrary, the USSC will likely either reaffirm its precedent or expand Belton. The State notes the USSC heard oral arguments in this case on October 7, 2008.

⁸The Frito bag is in the possession of this Court. It is about the size of a sheet of paper and was certainly large enough to conceal evidence of the crime.

C. Automobile exception

As an additional sustaining ground,⁹ the search of the duffel bag was lawful pursuant to the automobile exception to the exclusionary rule. A warrantless search of a vehicle may be made if: (1) there is probable cause to believe the vehicle contains evidence of a crime; and (2) there are exigent circumstances arising out of the mobility of the vehicle and its consequently likely disappearance if the search is not executed immediately. This is commonly referred to as the Carroll Doctrine. See Carroll v. United States, 267 U.S. 132, 149 (1925)[holding “the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure is valid”]. If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more. Pennsylvania v. Labron, 518 U.S. 938 (1996); State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007).

The two bases for the exception are: (1) the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles which are subject to governmental regulation. State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986). When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception

⁹Rule 220(c), SCACR; Ion, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)[an appellate court may affirm a ruling of the trial judge upon any grounds appearing in the record on appeal].

come into play. California v. Carney, 471 U.S. 386 (1985).

First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Id. Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. Chambers v. Maroney, 399 U.S. 42 (1970). The opportunity to search an automobile is fleeting since a car is readily movable. Id. An immediate intrusion is necessary because of the nature of an automobile in transit. United States v. Ross, 456 U.S. 798 (1982). The mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. South Dakota v. Opperman, 428 U.S. 364 (1976); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001). Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulations inapplicable to a fixed dwelling. Carney, supra; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995).

Further, the automobile exception allows law enforcement officials to conduct a search of an automobile based on probable cause alone due to the lessened expectation of privacy in motor vehicles traveling on public highways. Brannon, supra. The Supreme Court, in Cox, examined the principle of "probable cause" as it relates to the automobile exception as follows:

The [Carney] Court makes clear that under the automobile exception, probable cause alone is sufficient to justify a warrantless search. As the Court stated, "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of vehicles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." That is, the inherent

mobility of automobiles provides the requisite exigency.

Cox, 351 S.E.2d at 571-72 (citation omitted).

Additionally, the USSC in Wyoming v. Houghton, 526 U.S. 295 (1999) reasoned that, under the automobile exception, if probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and every container within a vehicle and its contents. Houghton, 526 U.S. at 301-02; see Brannon, 552 S.E.2d at 777; Bultron, 457 S.E.2d at 621.

The automobile exception was applicable to the case at bar. Williams stopped the vehicle and lawfully arrested Brown for the open container violation. Because Williams wanted to ascertain whether there were more beers in the vehicle, he could, therefore, lawfully search the vehicle and/or the duffel bag and its contents. It was not unreasonable for him to believe further evidence of the violation was concealed in the duffel bag or hidden in any container. Houghton, 526 U.S. at 302. Therefore, the search of Brown's duffel bag was not outside the scope of a lawful search pursuant to the automobile exception. State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992). After Williams inspected the duffel bag and the Frito bag, it would have defied common sense to require him to overlook incriminating evidence because this evidence did not relate to the initial purpose of the search. United States v. Ross, 456 U.S. 798, 825-26 (1982).

D. Inventory search

In State v. Morris, 312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993), this Court held that once the defendant was lawfully stopped, the open container of alcohol in plain view gave the officer probable cause to arrest him. Consequently, the crack cocaine discovered

during the resulting inventory search was not the product of an illegal stop and was admissible as evidence.

In the present case, Williams observed the open container of alcohol in plain view. He had probable cause to stop the vehicle and arrest Brown. Williams was, therefore, justified in making a routine inventory to secure the bag and its contents after he arrested Brown for the violation. State v. Lemacks, 275 S.C. 181, 268 S.E.2d 285 (1980). Further, it does not invalidate the inventory search even if Williams' subjective intent was to find other evidence rather than to safeguard Brown's property. See Colorado v. Bertine, 479 U.S. 367, 371 (1987).¹⁰

¹⁰The inevitable discovery doctrine is also an exception to the exclusionary rule. The rationale behind the exception is that where evidence inevitably would have been discovered by lawful means the exclusionary rule should not be applied, because the goal of deterrence is so attenuated. Nix v. Williams, 467 U.S. 431, 444 (1984). Here, once Brown and, subsequently, Smith, had been lawfully arrested, the contents of the duffel bag would have been inevitably discovered by the police during the routine inventory of the items in the vehicle.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

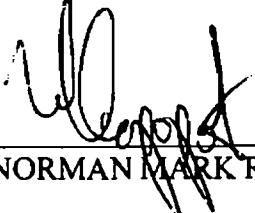
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May 5, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DANNY CORTEZ BROWN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

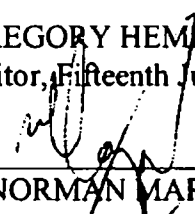
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ATTORNEYS FOR RESPONDENT

May 5, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DANNY CORTEZ BROWN,

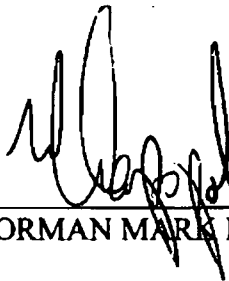
Appellant.

PROOF OF SERVICE

I certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Elizabeth A. Franklin-Best, Esquire, Appellate Defender, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 5th day of May, 2009.



NORMAN MARK RAPOPORT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Danny Cortez Brown,

Appellant.

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

Opinion No. 4697
Heard March 2, 2010 – Filed June 14, 2010

REVERSED

Appellate Defender Elizabeth A. Franklin, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,
Senior Assistant Attorney General Norman Mark
Rapoport, Assistant Attorney General Suzanne H.
White, all of Columbia; and John Gregory Hembree,
of Conway, for Respondent.

SHORT, J.: Danny Brown was charged with trafficking cocaine. Following a jury trial, he was convicted and sentenced to twenty-five years incarceration. He appeals, arguing the trial court erred by denying his motion to suppress the drugs seized after his arrest for an open container violation. We reverse.

FACTS

Officer Daryl Williams was on patrol in Myrtle Beach, South Carolina. While traveling down a road, he observed a 1976 Plymouth next to him and saw a passenger drinking what appeared to be a beer. The passenger, Brown, saw Officer Williams and tucked the beer can between his legs. Officer Williams pulled the car over and noticed a small duffel bag on the floorboard between Brown's legs. Officer Williams testified he was suspicious of the occupants because the driver acted nervous while Brown appeared "artificially laid back."

Initially, Brown denied having a beer, but then he pulled the can up from his lap. Officer Williams removed Brown from the car, recovered the beer can, arrested him for an open container violation, and placed his duffel bag on the sidewalk. He handcuffed Brown and placed him in a patrol car. After securing Brown, Officer Williams returned to the car to make "small talk" with the driver. He returned to the duffel bag, searched it, and found cocaine concealed inside a Fritos bag. Officer Williams stated he closed the duffel bag and resumed conversation with the driver. He ran the driver's license, discovered it was suspended, and placed the driver under arrest for that offense.

During trial, Brown moved to suppress the drugs on a violation of his Fourth Amendment rights. The trial court denied the motion to suppress, finding there was probable cause to stop the car, and Brown's arrest was lawful. The trial court held the search was proper because it was a search incident to a lawful arrest. Brown was found guilty and sentenced to twenty-five years imprisonment. This appeal followed.

STANDARD OF REVIEW

When reviewing a Fourth Amendment search and seizure case, we do not review the trial court's ultimate determination de novo, rather we apply a deferential standard. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002). This court reviews the trial court's ruling like any other factual finding, and we will reverse only if there is clear error. Id. Therefore, we will affirm if any evidence exists to support the trial court's ruling. Id.

LAW/ANALYSIS

On appeal Brown argues the trial court erred by denying his motion to suppress the drugs in violation of his Fourth Amendment rights. We agree.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. amend. IV. Any evidence seized in violation of the Fourth Amendment must be excluded. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

It is well established that warrantless searches and seizures by the police are per se unreasonable, unless they fall within one of several recognized exceptions. State v. Weaver, 361 S.C. 73, 80-81, 602 S.E.2d 786, 790 (Ct. App. 2004). These exceptions include: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) plain view doctrine; (6) consent; and (7) abandonment. Id.

A. Search Incident to Arrest¹

Under the search incident to arrest exception, if the arrest is supported by probable cause, police officers may search an arrestee's person and the area within his or her 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). However, this doctrine does not allow law enforcement officers to conduct a warrantless search of an arrestee's automobile after the arrestee has been handcuffed or otherwise prevented from regaining access to the car, unless it is reasonable to believe (1) the arrestee might access the vehicle at the time of the search, or (2) that the vehicle contains evidence of the offense of the arrest. Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1723-24 (2009) (limiting New York v. Belton, 453 U.S. 454 (1981) and Thornton v. U.S., 541 U.S. 615 (2004)).

The burden of establishing the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the State. Weaver, 361 S.C. at 81, 602 S.E.2d at 790.

In the present case, neither of the exceptions stated in Gant apply. Officer Williams testified he had Brown exit the car to be handcuffed and arrested for the offense of open container. He took the duffel bag from the car, placed it on the sidewalk, and then put Brown in the back of his patrol car. After securing Brown, Officer Williams returned to the car and made "small talk" with the driver. He testified:

¹ Initially, the State argues this issue is not preserved for review. We disagree. Trial counsel asked the trial court to suppress the evidence, and the trial court denied this request. This issue was raised to and ruled upon by the trial court and is properly before this court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. ").

I wanted to deal with him later, but I just wanted to get a glance into the bag, so I did unzip the bag, and look in. It was personal items like, perhaps deodorant, undergarments . . . and there was a bag of Fritos potato chips, corn chips, whatever . . . and it was open, so it was kind of crumpled shut, I believe, so I went and just opened it up to get a look into the bag, and then I seen inside that bag a -- what appeared to be a plastic bag with a white powdery substance, which is -- you know, looks -- appears to be cocaine.

It is clear from Officer Williams' testimony that Brown was handcuffed and securely placed in the patrol car prior to Officer Williams searching the duffel bag. During Officer Williams' search, Brown could not have accessed the vehicle or the duffel bag. Thus, it was impossible that Brown could have accessed the vehicle at the time of the search, making the first exception in Gant inapplicable.

As to the second Gant exception, Officer Williams was not looking for evidence for the offense charged. There was no evidence presented that Officer Williams had a reasonable belief that the duffel bag or Frito bag held further evidence of the open container violation. Brown told Officer Williams he did not have any more beer. More to the point, when asked if the beer can was taken into evidence, Officer Williams explained, for this type of charge "we don't take that sort of thing in evidence." We therefore conclude the search incident to arrest exception does not apply in the present case.²

B. The Automobile Exception

Because of its mobility and the lessened expectation of privacy in motor vehicles, a motor vehicle may be searched without a warrant based solely on probable cause. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570,

² 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.

571-72 (1986). Just like a driver of an automobile, passengers possess a reduced expectation of privacy with regard to the property that they transport in cars. Wyoming v. Houghton, 526 U.S. 295, 303 (1999). The standard for probable cause to make a warrantless search is the same as that for a search with a warrant. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

Articulating precisely what probable cause means is not possible. Ornelas v. U.S., 517 U.S. 690, 695-96 (1996). Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Id. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. Id. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Id. The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that the object may be found. State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. Houghton, 526 U.S. at 301-02. This rule applies to all containers within a car, without qualification as to ownership of a particular container and without a showing of individualized probable cause for each container. Id.

As noted above, Officer Williams placed Brown under arrest for an open container. Officer Williams had already recovered the beer can, which interestingly he did not take into evidence, prior to searching the duffel bag. Based on this, the only evidence Officer Williams could have been searching for was more beer. The bag in question was not a grocery bag where one would expect to find beer. Rather, the bag was a zipped-up duffel bag that would be used to carry clothes. One of the officers stated, "The black duffel

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 COURT OF APPEALS

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

THE STATE.

Respondent,

vs.

DANNY CORTEZ BROWN,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On June 14, 2010, this Court issued an opinion in which it reversed the decision of the trial judge in a case involving the denial of motion to suppress seized narcotics. State v. Brown, Op. No. 4697 (S.C. Ct. App. filed June 14, 2010). Pursuant to Rule 221(a), SCACR, Petitioner (the State) respectfully petitions for rehearing on the following points the State believes were possibly misapprehended or overlooked by this Court.

Inevitable Discovery and Inventory Searches

Petitioner respectfully submits the Court may have overlooked its argument regarding the inevitable discovery doctrine. As the Court noted common sense suggests standard police protocols would have been followed. If followed, Appellant's narcotics would have inevitably been discovered. Further, evidence in the record suggests the police would have performed an inventory search as opposed to leaving a vehicle resting in a roadway and Appellant's personal property abandoned on the side of the road. Petitioner respectfully submits the Court should

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reconsider the applicability of the inevitable discovery exception to the exclusionary rule to Appellant's case, and, if necessary, should consider the possibility of a remand for further findings on this issue.

The inevitable discovery doctrine serves as an exception to the exclusionary rule. "If the prosecution can establish by a preponderance of the evidence that 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." Nix v. Williams, 467 U.S. 431, 444 (1984). "Anything less would reject logic, experience, and common sense." 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.

The evidence in this case strongly shows Appellant's cocaine inevitably would have been discovered. As the Court noted in its opinion, common sense dictates routine police protocols most likely would have been followed in securing and inventorying the arrestees' property. Officer Delpercio's testimony, which was quoted by the Court, suggests the officers had guidelines in place regarding the search of a vehicle before it is towed. (R. p. 37). The vehicle in which Appellant was discovered was stopped in the roadway and its driver had been arrested. (R. p. 4; p. 6; p. 23). Clearly, the vehicle and the personal property connected to it would not have been merely abandoned in the street when the officers removed the arrested parties from the scene. 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). Thus, an inventory search would have been necessary to protect the suspects' belongings and to protect the officers from later claims of missing property.

Additionally, notwithstanding an inventory search of the vehicle, Appellant's duffel bag would have been searched during a routine search pursuant to his arrest and booking. Appellant claimed ownership of the bag and it was removed from the vehicle directly after him. (R. pp. 6-7). Unquestionably, Appellant was lawfully arrested for the open container violation. Clearly, his property would have been transported with him, and a search would have been performed to protect the police department from potentially hazardous or dangerous materials contained inside and from claims of lost or stolen property. The officers certainly would not have abandoned Appellant's property on the sidewalk after he was arrested. Therefore, Appellant's cocaine would have inevitably been discovered during a routine inventory search of the vehicle or of Appellant's belongings during the booking process.

Furthermore, the procedure followed regarding the duffel bag supports a finding the officers and the Horry County Police Department typically secure and protect a suspect's belongings. In Appellant's case, his duffel bag and property was secured, protected, and eventually returned to him by the police department's evidence administrator, albeit without Appellant's illegal narcotics. (R. p. 112). The fact his property was secured in order to be returned to him further illustrates the unlikelihood his property would have been simply abandoned if the drugs had not otherwise been discovered. It is indisputable Appellant was arrested prior to the search of the duffel bag. Likewise, the officer had already collected the driver's license information and ultimately would have arrested him regardless of the search. (R. p. 93; p. 95). Petitioner respectfully suggests this court should reconsider its decision regarding the inevitability of the discovery of the drugs. See United States v. Johnson, 383 F.3d 538, 545, n.8 (7th Cir. 2004) (finding the contents of the trunk would inevitably have been discovered in an inventory search because the officers would have taken possession of the

vehicle after the driver was arrested): United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986) (finding a garment bag recovered from the defendant's feet would have inevitably been searched during a routine booking and inventory search and thus should not be suppressed); see also United States v. Johnson, 112 Fed. Appx. 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 drug found inside would have inevitably been discovered during an inventory search).

The societal costs of the application of the exclusionary rule in Appellant's case far outweigh any possible goals of deterrence as common sense dictates Appellant's substantial quantity of narcotics would have inevitably been discovered. See, e.g., Watson v. State, 302 Ga. App. 619, 624, 691 S.E.2d 378, 383 (Ga. Ct. App. 2010) ("The rationale behind the exclusionary rule is to prevent the State from capitalizing on police misconduct to put the prosecution in a better position than it would have been if no illegality had occurred. 'At the same time, the prosecution is not to be put in a *worse* position simply because of some earlier police error or misconduct.' " (citations omitted and emphasis in original)). Petitioner respectfully asks the Court to reconsider the fact the drugs would have inevitably been discovered during a routine booking or inventory search after the vehicle was towed and the parties and their belongings were processed after their arrest. Appellant's conviction should be affirmed based on the inevitability of the discovery of the drugs. ¹

¹ Moreover, the State submits that it is questionable whether the suppression issue was properly preserved for appeal because Brown failed to receive a timely ruling on his motion to suppress. "In criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e. the issue has been raised to and **ruled on by the court.**" State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (emphasis added). Brown failed to obtain a ruling from the trial judge at the appropriate time. See State v. ShumPERT, 312 S.C. 502, 435 S.E.2d 859 (2003) ("Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." (emphasis added)); see also

However, in the alternative, Petitioner respectfully requests this Court to reconsider the possibility of a remand for further findings regarding the inevitability of the discovery. As the Court noted, common sense strongly suggests standard police procedures would have been followed, which would entail an inventory search and the protection of Appellant's property from theft, loss, or subsequent claims of loss while he was in custody. Although this Court found the State failed to establish the inevitability of the discovery by a preponderance of the evidence, the trial court focused his decision and based his ruling on the perceived lawfulness of the search. Since the routine procedures following an arrest were not necessary for the decision reached during Appellant's trial and were not fully explored, a remand would allow for a more full and fair examination of this issue without resulting in unnecessary societal costs. 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). If the Court finds the evidence in the record was lacking regarding the inevitability of the discovery, a remand would best served the goals of the exclusionary rule to the greatest extent without imposing an unnecessarily heavy societal cost and without placing the officers in a worse position than they would have been without the illegal search. See Nix, 467 U.S. at 443 ("[T]he prosecution is not to be put in a better position than it would have been in if no illegality had transpired. By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct."). An exclusion in Appellant's case would add nothing to the integrity or fairness of a criminal trial.

State v. Pierce, 263 S.C. 23, 28-29, 207 S.E.2d 414, 417 (1974)(ruling a party must contemporaneously object and ask for a ruling to preserve an issue).

Therefore, Petitioner respectfully asks this Court to reconsider the evidence in the record and the virtual certainty the evidence would have been secured during routine arrest procedures and affirm Appellant's conviction based on the inevitable discovery doctrine, or, in the alternative, remand the case for further evidentiary findings on this issue.

Conclusion

Based on the foregoing, Respondent requests that the panel rehear this matter, and affirm Appellant's conviction and sentence, or, in the alternative, remand for further proceedings.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOT
Assistant Deputy Attorney General

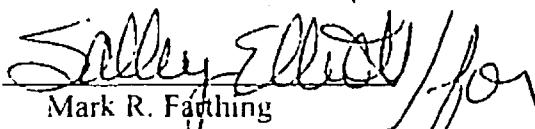
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ATTORNEYS FOR PETITIONER

June 29, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DANNY CORTEZ BROWN,

Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the Respondent's Petition for Rehearing on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.

This 29th day of June, 2010.


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APP'X 245

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DANNY CORTEZ BROWN,

APPELLANT.

RETURN TO PETITION FOR REHEARING

On June 14, 2010, this Court rendered its opinion in State v. Brown, Op. No. 4697. The state then filed its petition for rehearing on June 29, 2010. This return to the petition for rehearing is respectfully submitted in response to the Court's June 30, 2010 request.

The state argues that the Court misapprehended or overlooked the application of the inevitable discovery doctrine to this case. They also ask this Court to remand the case for further development of the record regarding the inevitability of the discovery. Respectfully, appellant asks this Court to decline the state's invitation.

The state does not point to any additional fact(s) that the Court of Appeals may have overlooked when deciding this issue. The opinion, in fact, directly addresses this issue in Part C: The Exclusionary Rule, Inevitable Discovery, and Inventory Search. The Court also cites South Carolina law, in addition to applicable United States Supreme Court precedent, in support of its finding that the state failed to meet its burden on this issue. The state, instead, appeals to decisions rendered in the 7th, 9th, and 3rd circuits in an attempt to have this Court

simply change its mind. Importantly, the Court made the specific finding that the state provided "very scant testimony" that either the car or the duffel bag would have been taken into custody after appellant's arrest. This finding is the linchpin of the analysis. The Court correctly notes that the burden was on the state to prove by a preponderance of the evidence that the drugs would have inevitably been discovered. The state failed to meet their burden on this issue. Indeed, the state conceded at trial that Colorado v. Bertine, 479 U.S. 367 (1987) and Florida v. Wells, 495 U.S. 1 (1990) were not implicated by this case:

The Chadwick case, as well as these other cases, such as Bertine and Wells Lafayette—excuse me, Bertine, Wells, Lafayette to Florida, these are all inventory search cases. Your Honor. Those are all based on a defendant is in custody. There is a standard procedure established because the car is impounded in a lot, or the defendant is in jail, and they are going through his property pursuant to the inventory search, and so the policies surrounding the police department open all the containers, or don't open any, are relevant in that, and that is the nature of those cases. Bertine sets it up, Wells continues it. But those are all not exi—those aren't searches incident to arrest. Too much time has transpired. It is not contemporaneous with the arrest. It is inventory. The car is in an impound lot, and at some point in time they go through those.

So the facts of this case are distinguished from the Bertine, Wells and Lafayette line of cases.

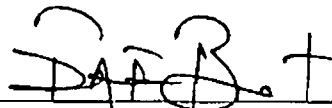
App. 135, l. 18- p. 136, l. 10 The Court did not misapprehend or overlook this issue—the decision is consistent with established South Carolina law and United States Supreme Court precedent.

The state is also asking this Court to remand this case for additional findings regarding the inevitability of the discovery. This is the first time they have done so. The state did not request a remand when they filed the Respondent's Brief, nor did they request a remand at oral argument. The state did not request a remand when Arizona v. Gant, __ U.S.

___, 129 S.Ct. 1710 (2009) was decided on April 21, 2009. The Court should decline to do so now.

Additionally, a remand at this point is improper. As the Court noted in its opinion: "Although common sense 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." Brown, Part C. The state did not produce any evidence of the standardized procedures they may have attempted to follow to secure the vehicle pursuant to an inventory search. See Colorado v. Bertine, supra, Florida v. Wells, supra. The state had the burden of proof at trial, and the witnesses were called to the stand to justify this search, if they could. They failed to put forth the evidence which the Attorney General's office assumes must exist. Indeed, with Bertine and Wells in hand, the state declined to argue inventory search at the time they argued to have these drugs admitted into evidence. Respectfully, the state understood its burden at the time of trial, but failed to put forth evidence showing the search was made pursuant to an inventory search. It is illogical to suppose that they are now in a better position to make that showing 5 years after these events occurred. Respectfully, appellant asks this Court to decline to rehear this case.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

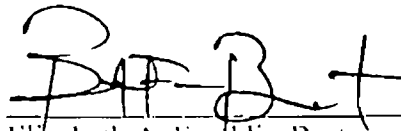
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CERTIFICATE OF SERVICE

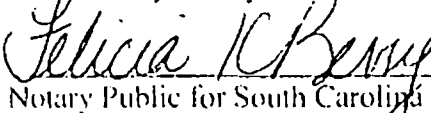
The undersigned attorney hereby certifies that a true copy of the return to petition for rehearing in the above referenced case has been served upon Suzanne H. White, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 12th day of July 2010.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of July, 2010.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020

APP'X 249

The South Carolina Court of Appeals

The State,

Respondent,

v.

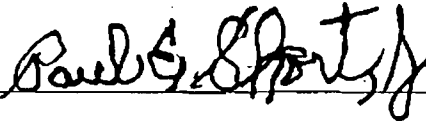
Danny Cortez Brown,

Appellant.

The Honorable Steven H. John
Horry County
Trial Court Case No. 2006-GS-26-01349

ORDER DENYING PETITION FOR REHEARING

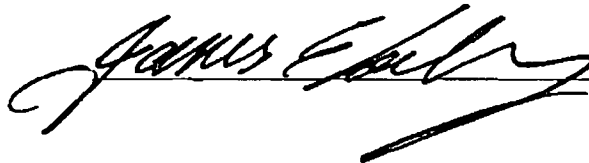
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.



Short, J.



Williams, J.



Lockemy, J.

Columbia, South Carolina

FILED

24 Sept. 2010

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