



SCCID

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

April 23, 2013

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

Re: State of South Carolina v. Danny Cortez Brown

Dear Mr. Shearouse:

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

Sincerely,

David Alexander
Appellate Defender

DA/kam

Enclosure

cc: Mark Farthing, Esquire

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S.C. SUPREME COURT.

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April 23, 2013

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

Re: State of South Carolina v. Danny Cortez Brown

Dear Mr. Suter:

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

Sincerely,


David Alexander
Appellate Defender

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APR 24 2013

DA/kam

Enclosure

cc: Honorable Daniel E. Shearouse
Mark Farthing, Esquire

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April 23, 2013

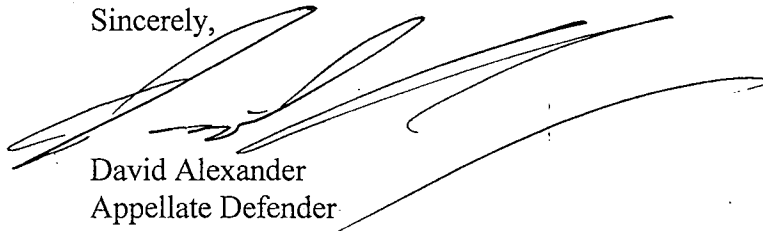
Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: State of South Carolina v. Danny Cortez Brown

Dear Mr. Suter:

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

Sincerely,



David Alexander
Appellate Defender

DA/kam

Enclosure

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

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

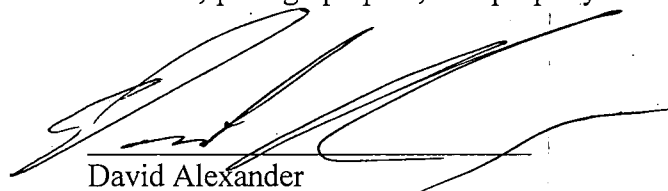
v.

STATE OF SOUTH CAROLINA, Respondent.

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


CERTIFICATE OF FILING BY MAIL

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



David Alexander
Counsel of Record

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

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

In the Supreme Court of the United States

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

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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

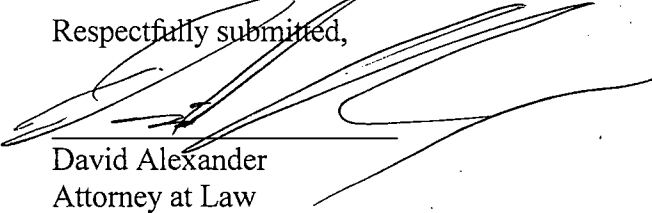
Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

South Carolina Court of Appeals; South Carolina Supreme Court

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

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

Respectfully submitted,



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

April 23, 2013

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

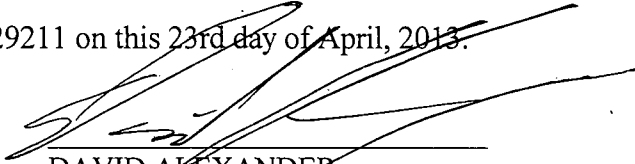
v.

STATE OF SOUTH CAROLINA, Respondent.

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


CERTIFICATE OF SERVICE

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



DAVID ALEXANDER
Counsel of Record

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

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

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Danny Cortez Brown, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0	\$ _____	\$ 0	\$ _____
Self-employment	\$ 0	\$ _____	\$ 0	\$ _____
Income from real property (such as rental income)	\$ 0	\$ _____	\$ 0	\$ _____
Interest and dividends	\$ 0	\$ _____	\$ 0	\$ _____
Gifts	\$ 0	\$ _____	\$ 0	\$ _____
Alimony	\$ 0	\$ _____	\$ 0	\$ _____
Child Support	\$ 0	\$ _____	\$ 0	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ 0	\$ _____	\$ 0	\$ _____
Disability (such as social security, insurance payments)	\$ 0	\$ _____	\$ 0	\$ _____
Unemployment payments	\$ 0	\$ _____	\$ 0	\$ _____
Public-assistance (such as welfare)	\$ 0	\$ _____	\$ 0	\$ _____
Other (specify): _____	\$ 0	\$ _____	\$ 0	\$ _____
Total monthly income:	\$ 0	\$ _____	\$ 0	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A <i>unemployed</i>			\$ _____
			\$ _____
			\$ _____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$ _____
			\$ _____
			\$ _____

4. How much cash do you and your spouse have? \$ 0
 Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		\$ _____	\$ _____
		\$ _____	\$ _____
		\$ _____	\$ _____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

- Home Value 0
- Other real estate Value 0
- Motor Vehicle #1 Year, make & model 0 Value _____
- Motor Vehicle #2 Year, make & model 0 Value _____
- Other assets Description 0 Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
0	\$ 0	\$
	\$	\$
	\$	\$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>imputed</u>	\$
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$	\$
Home maintenance (repairs and upkeep)	\$	\$
Food	\$	\$
Clothing	\$	\$
Laundry and dry-cleaning	\$	\$
Medical and dental expenses	\$	\$

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ _____	\$ _____
Life	\$ _____	\$ _____
Health	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ _____	\$ _____
Installment payments		
Motor Vehicle	\$ _____	\$ _____
Credit card(s)	\$ _____	\$ _____
Department store(s)	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ _____	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____
Total monthly expenses:	\$ _____	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

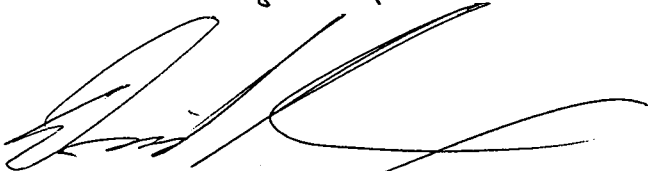
12. Provide any other information that will help explain why you cannot pay the costs of this case.

Because I'm incarcerated

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 2, 2013, 20

Sworn to before me
this 2nd day of April, 2013.



M. ... 4/30/2013

Danny Brown
(Signature)

No. 12-_____

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDINGS BELOW

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

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

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

Factual Background

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

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

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

duffel bag—from his fiancée’s car and told her that he would catch a ride home from Prince when the work on the car was finished. R. 163, ll. 15 – 24.

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

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

Officer Williams claimed that he placed Brown under arrest for open container, but admitted on cross-examination that he was uncertain whether Brown was ever charged with an open container violation. He said, “I’m not even sure if – no, we did –

I did write him a blue ticket for it. I want to say yes. **But it was definitely the pretext for me to make the stop.** R. 20, ll. 1 – 4 (emphasis added).

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

The State Appellate Decisions

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Alternative Applications of *Davis* by State Courts

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

Maryland

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

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

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

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

Michigan

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

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

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

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

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

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

Id. at 805 (emphasis added).

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

Illinois

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

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

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

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

III. Alternative Applications of Davis by Federal Courts

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

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

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

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

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

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

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

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

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

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

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

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

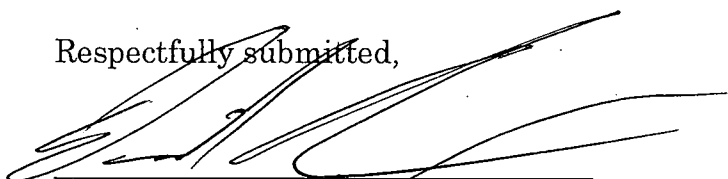
CONCLUSION:

This Case Presents a Simple Factual Record and Narrow Question

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

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

Respectfully submitted,



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ATTORNEY FOR PETITIONER

April 23, 2013

In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

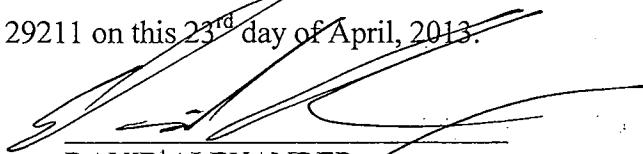
v.

STATE OF SOUTH CAROLINA, Respondent.

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

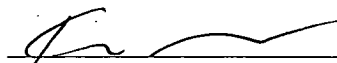
CERTIFICATE OF SERVICE

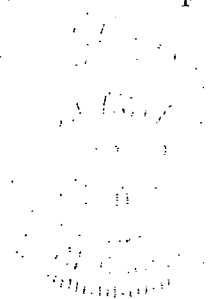
I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Mark Farthing, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O.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



DAVID ALEXANDER
Counsel of Record

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

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



In the Supreme Court of the United States

DANNY CORTEZ BROWN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

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

A P P E N D I X

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ATTORNEY FOR PETITIONER

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Danny Cortez Brown, Respondent.

Appellate Case No. 2010-175826

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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

REVERSED

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

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

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

I. FACTS

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

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

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

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

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

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

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

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

II. STANDARD OF REVIEW

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

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

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

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

III. LAW/ANALYSIS

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

Fourth Amendment, Exclusionary Rule, & Exceptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

Supreme Court's Qualification of Gant

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

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

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

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

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

Application of Precedent in the South Carolina Courts

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

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

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

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

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

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

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

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

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

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

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

The Court of Appeals, however, like the trial court before it, did not have the benefit of subsequent authority. On June 16, 2011, a year after the Court of Appeals filed its decision, the United States Supreme Court issued its opinion in *Davis v. United States*, 131 S. Ct. 2419 (2011), clarifying that *Gant* would apply to pending cases on direct review, but that the exclusionary rule could *not* be applied in these circumstances because the officers carried out their searches in accordance with existing appellate precedent and the exclusionary rule would serve no deterrent purpose. Consequently, we find the exclusionary rule should not be applied in Brown's case because it would contravene the dictates of *Davis*.³ We, therefore, reverse the decision of the Court of Appeals and reinstate his conviction and sentence.

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

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

IV. CONCLUSION

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

REVERSED.

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

The Supreme Court of South Carolina

The State, Petitioner,

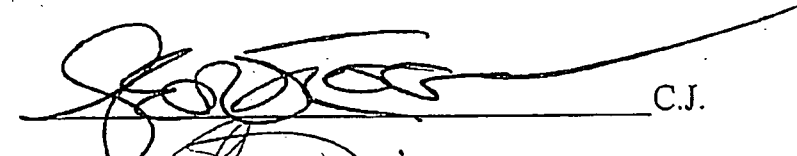

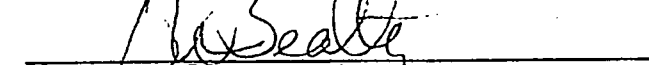

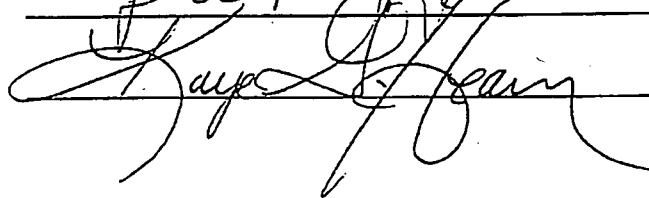
v.

Danny Cortez Brown, Respondent.

Appellate Case No. 2010-175826

ORDER

The petition for rehearing filed in the above entitled matter is denied.

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

Columbia, South Carolina

January 24, 2013

cc:

John Gregory Hembree
Mark Reynolds Farthing
David Alexander

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

DANNY CORTEZ BROWN,

APPELLANT

APPELLATE CASE NO. 2010-175826

Appeal from Horry County

Steven H. John, Circuit Court Judge

Opinion No. 27202

PETITION FOR REHEARING

This Court's opinion erroneously analyzes the good faith exception in Davis v. United States, 131 S.Ct. 2419 (2011). Davis requires a court to determine whether "binding appellate precedent" exists in its jurisdiction. This Court cited New York v. Belton, 453 U.S. 454 (1981) as the "existing appellate precedent" on which the police supposedly relied in good faith. State v. Brown, No. 27202, p. 10 (Dec. 19, 2012). Belton cannot be the "binding appellate precedent" contemplated by Davis.

As the Court correctly found, the search of Brown's duffel bag was illegal under Arizona v. Gant, 556 U.S. 332 (2009). Especially after Gant clarified Belton, it is clear that the search of Brown's bag was also illegal under Belton.¹ Belton cannot be the "binding appellate precedent" contemplated by Davis if the search is illegal under Gant and Belton. In order for Davis's good faith exception to apply in this case, the Court must identify some precedent of its own that interpreted Belton to authorize the search in this case. The Court's opinion identifies no such intervening precedent because it does not exist.

The analysis in Davis conclusively demonstrates that Belton cannot be the "binding appellate precedent" in this good faith inquiry. Davis arose from a federal prosecution in Alabama. Davis at 2425. The Davis Court specifically examined Eleventh Circuit precedent to see if it had interpreted Belton to allow the search at issue. Id. at 2428. The Supreme Court said:

The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485, and the Eleventh Circuit had interpreted our decision in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 468, to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. [United States v. Gonzalez, 71 F.3d [819, 825 (11th Cir. 1996)]]. **The search incident to Davis's arrest in this case followed the Eleventh Circuit's Gonzales precedent to the letter.** Although the search turned out to be unconstitutional under Gant, all agree that the officers' conduct was in strict compliance with **then-binding Circuit law** and was not culpable in any way.

Id. at 2428 (emphasis added). If, as this Court's opinion holds, Belton could serve as "binding appellate precedent," then the Davis Court unnecessarily researched Eleventh Circuit jurisprudence to determine whether the police complied with Gonzales. The Supreme Court could simply have

¹ The search was also illegal under Belton without the later clarification of Gant. In Belton, the officer was faced with four unsecured arrestees. In both Gant and this case, the arrestee was handcuffed in the back of a police car during the search.

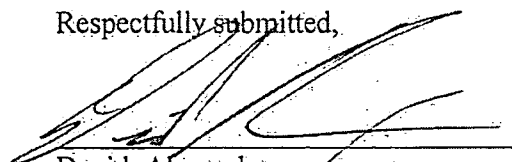
cited Belton and omitted this analysis. The Supreme Court's investigation into Eleventh Circuit precedent makes it clear that Belton cannot serve as the "binding appellate precedent" allowing application of Davis's good faith exception. Further research into a jurisdiction's Fourth Amendment jurisprudence is required.

Other federal and state courts have recognized that Davis requires them to examine their own decisions for misinterpretations of Belton. In a federal prosecution, the Fourth Circuit looked back at its own precedent pursuant to the command of Davis. United States v. Wilks, 647 F.3d 520, 522 (4th Cir. 2011). The Fourth Circuit found that the search in Wilks violated Gant, but because its prior decision in United States v. Milton, 52 F.3d 78, 80 (4th Cir. 1995) allowed the search, the court used Davis's good faith exception to bar application of the exclusionary rule. Id. at 522-24.

State courts applying Davis look back at their own precedent to determine whether the good faith exception applies. See, e.g., United States v. Debruhl, 38 A.3d 293, 295 n.11, 296 n.20, 297-306 (D.C. Ct. App. 2012) (examining 1989 and 1992 District of Columbia opinions when conducting a Davis analysis); People v. Hopper, 284 P.3d 87, 90 (Co. Ct. App. 2011) (stating that defendant conceded that search was proper under existing Colorado precedent when conducting a Davis analysis); State v. Oram, 266 P.3d 1227, 1235 (Kan. Ct. App. 2011) (stating "[W]e need to review Kansas caselaw and [statutes] to determine if the deputies' actions were reasonable when the search was made," when conducting a Davis analysis); Henderson v. State, 953 N.E.2d 639, 645 (Ind. Ct. App. 2011) (stating "[T]he search of Henderson's vehicle was valid under Belton and our supreme court's interpretation of Belton, as reflected in cases such as Jackson v. State, 597 N.E.2d 950, 957 (Ind. 1992)," when conducting a Davis analysis); State v. Johnson, 354 S.W.3d 627, 635 (Mo. 2011) (stating that officers relied on Missouri case of State v. Harvey, 648 S.W.2d 87, 89-90 (Mo. 1983) in conducting Davis analysis).

Just as these state and federal courts have followed the United States Supreme Court's instructions in Davis and examined their own Fourth Amendment cases, this Court, respectfully, should do the same. In doing so, the Court will find that unlike these other state and federal courts, South Carolina never misinterpreted Belton to allow the search of Brown's bag.² Therefore, the police could not have relied on binding South Carolina precedent when they conducted this search. This Court should correct the error in its opinion, affirm the decision of the Court of Appeals in its entirety, and reverse Brown's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

This 2nd day of January, 2013.

² Indeed, there is no indication that this Court would have misinterpreted Belton given South Carolina's emphasis on its citizens' privacy rights. See S.C. Const. Art. I, § 10. Given this history, there is every reason to believe this Court, like others, would have properly interpreted Belton in this factual scenario. See, e.g., United States v. Green, 324 F.3d 375, 379 (5th Cir. 2003); United States v. Edwards, 632 F.3d 633, 643-44 (10th Cir. 2001); United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987).

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

DANNY CORTEZ BROWN,

APPELLANT

APPELLATE CASE NO. 2010-175826

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

Opinion No. 27202

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Norman Mark Rapoport, Esquire, this 2nd day of January, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
of January, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

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.

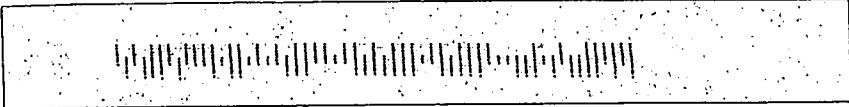
CONCLUSION

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."



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