The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L. Couch, Circuit Court Judge

Case No. 09-GS-42-6452, 09-GS-42-6453

State of South Carolina, Respondent,

v

Derrick Lamar Cheeks, Appellant

BRIEF OF APPELLANT

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Respondent

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L Couch, Circuit Court Judge

Case No 09-GS-42-6452, 09-GS-42-6453

State of South Carolina, Respondent,

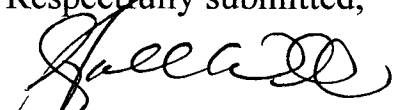
v

Derrick Lamar Cheeks, Appellant

Certificate of Redaction of Record on Appeal

I certify that the Record on Appeal has been redacted in compliance with the Supreme Court's order as to private data and personal identifiers

Respectfully submitted,



J Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Respondent

February 27, 2012

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L Couch, Circuit Court Judge

Case No 09-GS-42-6452, 09-GS-42-6453

State of South Carolina, Respondent,

v

Derrick Lamar Cheeks, Appellant

BRIEF OF APPELLANT

J Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutory Provisions

Other Citations and Authority

STATEMENT OF ISSUES ON APPEAL

I Should the drugs' seized in the home be suppressed because the Search Warrant, which did not give any description of the place to be searched, was facially invalid?

II Was it error for the trial court to instruct the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use?"

STATEMENT OF THE CASE

On October 4, 2010, Appellant, Derrick Cheeks, and a co-defendant Ricky Cheeks, were called to trial before the Honorable Roger Couch and a jury Appellant was charged with one count of trafficking in crack cocaine in excess of four-hundred grams, and one count of possession of crack cocaine with intent to distribute within a half of a mile proximity to a school Appellant was represented by J Falkner Wilkes and the State was represented by Eddie Hunter Roger Poole represented co-defendant Ricky Cheeks

The jury found Appellant guilty of all charges Appellant was sentenced to a twenty-five year sentence for the trafficking charge and a concurrent ten year sentence for the proximity charge The Appellant Derrick Cheeks filed a timely post trial motion pursuant to Rule 29 The Circuit Court denied the motion and a timely notice of appeal was filed Ricky Cheeks has also filed an appeal from his conviction and is represented by the Office of Appellate Defense J Falkner Wilkes continues in the representation of Derrick Cheeks on direct appeal

STATEMENT OF THE FACTS

On June 4, 2009, Agent Craig Hanning of SLED was conducting surveillance on Ricky Cheek's nephew, Derrick Cheeks Hanning began surveillance at a Super 8 motel in Spartanburg County R 85, l 10-12 Hanning saw Derrick Cheeks get into a car with Eric Elder and Ricky Cheeks R 85, l 24 Hanning followed the car as it drove to Tracy Markley's residence Once they arrived, Derrick Cheeks went inside while Ricky Cheeks and Elder went to Wal-Mart

Deputy Matt Hutchins followed Elder and Ricky Cheeks to Wal-Mart, while Hanning maintained surveillance on the residence R 112, l 15-23 Hutchins observed Elder go into Wal-Mart and purchase a box of baking soda while Ricky Cheeks stayed in the car R 113, l 5-22 After purchasing the baking soda, Elder drove Ricky Cheeks back to the residence After a while at the residence, Ricky Cheeks and Elder got back in Elder's car and started driving down the street Hutchins followed Elder's car

While following Elder, Hutchins observed Elder run a stop sign R 115, l 22-24 Hutchins stopped Elder's car Hutchins testified that Ricky Cheeks was sitting in the passenger seat clutching his pocket R 116, l 15-21 Hutchins got Elder out of the car and walked to Hutchin's car Deputy Travis McJunkin was

also on the scene and escorted Ricky Cheeks out of the car Ricky Cheeks had a hard time walking back to the car because of his limited use of his left leg R 210, l 3 - 211, l 6 McJunkin testified that Ricky Cheeks appeared to be reaching for his right pocket R 211, l 10-12 After Ricky Cheeks was removed from the car, a K-9 was brought in to search the vehicle Officer's found 111 31 grams of crack cocaine was found near the passenger-side rear wheel R 311, l 18-21 Ricky Cheeks was charged with trafficking in crack cocaine in excess of one hundred grams for the drugs found near Elder's car

After seizing the drugs found at the traffic stop, Hutchins obtained a search warrant for the residence R 118, l 6-8, 444-468 The portion of the search warrant that provided for a description of the premises to be searched was left completely blank R 444-448 Upon execution of the blank search warrant at the residence, officers found 662 42 grams of crack cocaine and utensils used in the manufacture of crack cocaine R 315, l 23-24 Officers also found Derrick Cheeks and Tracey Markley inside the house at the time of the search As a result of drugs found inside the residence, Derrick and Ricky Cheeks were charged with trafficking in crack cocaine in excess of four hundred grams and possession with intent to distribute within a half of a mile of a school

ARGUMENT

I THE ADMISSION OF EVIDENCE OBTAINED BY SEARCH WARRANT VIOLATED THE APPELLANT'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE

The Appellant, Derrick Cheeks, timely moved to suppress evidence seized pursuant to a defective search warrant Over Cheeks' objection the Court allowed introduction of evidence obtained through a search warrant of a residence in which Cheeks claimed a reasonable expectation of privacy Cheeks renewed his objection by timely moving for a new trial which the trial judge denied

A THE APPELLANT HAD A LEGITIMATE EXPECTATION OF PRIVACY IN THE PREMISES SEARCHED

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures *U S Const amend IV, S C Const art I, § 10* To claim protection under the Fourth Amendment of the U S Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched Rakas v Illinois, 439 U S 128, 143, 99 S Ct 421, 430, 58 L Ed 2d 387 (1978) [1]A legitimate expectation of privacy is both subjective and objective

---

[1] Standing is not the correct standard for the Fourth Amendment issue The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine, instead, the analysis is based on substantive Fourth Amendment law Rakas v Illinois, 439 U S 128, 140, 99 S Ct 421, 429, 58 L Ed 2d 387 (1978) The use of the term "standing" has created confusion in this

in nature the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable Oliver v United States, 466 U S 170, 177, 104 S Ct 1735, 1741, 80 L Ed 2d 214 (1984) (*citing* Katz v United States, 389 U S 347, 361, 88 S Ct 507, 516, 19 L Ed 2d 576 (1967) (*Harlan, J, concurring*))

It is fundamental that Fourth Amendment rights are personal in nature and may not be vicariously asserted Rakas v Illinois (1978), 439 U S 128, 133-34, 99 S Ct 421, 58 L Ed 2d 387 A person aggrieved by the introduction of evidence secured by an illegal search of a third person's premises or property has not suffered any infringement upon his Fourth Amendment rights *Id* at 134

Consequently, a person challenging the legality of a search bears the burden of proving that he has standing The burden is met by establishing that the person has a legitimate expectation of privacy in the place searched that society is prepared to recognize as reasonable Rakas, 439 U S at 143 Overnight guests have a reasonable expectation of privacy in the home in which they are staying, while a person merely present in the home with the consent of the owner may not

---

context, and therefore "standing" is no longer appropriate to "connote the legitimate expectation of privacy in the evidence seized or the premises searched " United States v Bouffard, 917 F 2d 673, 675 (1st Cir 1990)

Minnesota v Olson (1990), 495 U S 91, 96-97, 110 S Ct 1684, 109 L Ed 2d 85, Minnesota v Carter (1998), 525 U S 83, 119 S Ct 469, 142 L Ed 2d 373

In Carter the Supreme Court opened the door to argue that not just overnight guests will be afforded Fourth Amendment protection " *See* Minnesota v Carter, 525 U S 83, 90, 91, 119 S Ct 469, 142 L Ed 2d 373 (1998), *see also id* at 99, 101-02, 119 S Ct 469 (*Kennedy, J , concurring*), id at 103, 119 S Ct 469 (Breyer, J , concurring), *id* at 106-12, 119 S Ct 469 *(Ginsburg, J , dissenting*) "[T]he defendant must demonstrate that his own reasonable expectation of privacy was violated by the action of the State " *Id* , *see also* Rakas v Illinois, 439 U S 128, 133-34, 99 S Ct 421, 58 L Ed 2d 387 (1978)

Whether a person has a reasonable expectation of privacy in a third person's place falls somewhere on the continuum between the overnight guest in Minnesota v Olson, 495 U S 91, 96-97, 110 S Ct 1684, 109 L Ed 2d 85 (1990) (overnight guests have a reasonable expectation of privacy in a third person's property), and the person who was present solely for the purpose of conducting a business transaction in Carter, 525 U S at 90-91, 119 S Ct 469 (a person legitimately on a third party's property solely for the purpose of conducting a business transaction does not have a reasonable expectation of privacy in that property)

In the present case Cheeks had a substantial legitimate connection to the

property searched The State's key witnesses, Eric Elder and Tracey Markley, testified that Cheeks' had a key to Markley's house R 252, 280 At times Cheeks was at the house on a daily basis R 291 Cheeks had also spent nights at the residence R 255, 300 Markley testified that Cheeks brought friends over to the house, played games, and watched television there R 2991-293 At the time of the search Cheeks had let himself in, had food in the refrigerator, and had clothes at the residence R 294 Cheeks clearly had a substantial legitimate relationship to the property

Having a substantial legitimate relationship to the property searched distinguishes Cheeks' case from those where the defendants were found to lack standing For example, where a defendant had been at the residence for just a short period of time, had no key, and was one of several visitors there, the Court found that there was an insufficient connection to the property to raise a Fourth Amendment claim *See* United States v Gray, 491 F 3d 138 (4th Cir 2007) Similarly, in Minnesota v Carter, *supra*, the defendant lived out-of-state and used the lessee's apartment for the sole purpose of packaging cocaine The defendants had never visited the apartment before and on the day of the search had only been present for two-and-a-half hours In Carter the Court concluded that the defendants did not have a legitimate expectation of privacy because they were

"essentially present for a business transaction and were only in the home a matter of hours " *Id* at 90, 119 S Ct at 473 In addition, the Court was persuaded by the fact that the defendants had no "previous relationship" with the lessee and nothing "to suggest a degree of acceptance into the household " *Id* Accordingly, in a 5-4 decision, the Court held that the defendants were not entitled to Fourth Amendment protection Unlike the case in Carter and Gray, Cheeks had a substantial legitimate relationship to both Markley and the premises searched

The evidence shows that Cheeks spent the night at the premises on more than one occasion Being, or having been an overnight guest in the past is a strong factor in determining a third party's expectation of privacy And although a strong consideration, an overnight presence is not mandatory for Fourth Amendment protection Our Supreme Court has recognized that at least five members of the United States Supreme Court — the three who dissented and the two who concurred in Carter — would be willing to extend protection to guests present for social reasons and present for some time less than an overnight stay State v Missouri, 361 S C 107 (2004) If not an overnight guest at the time of the search, then the question of Fourth Amendment protection turns on the defendant's other connections with the property Evidence of having been an overnight guest in the past, as well as his having a key at the time of the search, become important

considerations in the amount of contact and the reasonableness of Cheeks' expectation of privacy

The evidence shows that Cheeks and Markley were friends for five or six years They were co-workers Markley often gave Cheeks a ride to and from work Cheeks had spent the night at Markley's residence on occasion Cheeks had a key to Markley's residence and apparently let himself and two others in the house while Markley was still asleep on the day of the search From Markley's testimony this was not uncommon, and Cheeks was welcome to do so Cheeks often washed his clothes at Markley's residence He visited the residence frequently He left clothes at the Markley residence often, and had clothes there at the time of the search Not only could he come and go as he pleased but he could invite others to the residence as well Cheeks would bring food to the Markley residence from his work to put in the refrigerator At the time of the search there were boxes of food in the refrigerator from Cheeks' work place Cheeks participated in normal activities such as playing darts, watching television and playing with the X-Box game system He took showers and baths at the residence At times, Cheeks visited the residence as often as every other day Based on these contacts with the premises, being of the type recognized by the courts under Fourth Amendment analysis, Cheeks had a legitimate expectation of privacy in the residence Cheeks

therefore has the right to raise an issue in this case as to any defect in the search warrant

B THE SEARCH WARRANT WAS DEFECTIVE FOR FAILING TO STATE WITH PARTICULARITY THE PREMISES TO BE SEARCHED

The Fourth Amendment requires that search warrants be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized " Finding these words to be "precise and clear," Stanford v Texas, 379 U S 476, 481 (1965), this Court has interpreted them to require only three things First, warrants must be issued by neutral, disinterested magistrates *See, e g* , Connally v Georgia, 429 U S 245, 250-251 (1977) (*per curiam*), Shadwick v Tampa, 407 U S 345, 350 (1972), Coolidge v New Hampshire, 403 U S 443, 459-460 (1971) Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense Warden v Hayden, 387 U S 294, 307 (1967) Finally, "warrants must particularly describe the things to be seized, as well as the place to be searched Stanford v Texas, *supra, at* 485 Dalia v United States, 441 U S 238, 255 (1979)

Article I, Section 10 of the Constitution of South Carolina, as amended, and the Fourth Amendment to the United States Constitution, are practically identical, and as to searches and seizures provide that " no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, "

Pursuant to S C Code Section 17-13-160 a search warrant must be on the form prescribed by the Attorney General A search warrant must identify the property and naming or describing the person or place to be searched S C Code Section 17-13-140 South Carolina Court Administration provides SCCA 513 as the standard search warrant form for use in South Carolina On the face of the search warrant form SCCA 513, there is a section conspicuously identified as DESCRIPTION OF PREMISES (PERSON OR THING) TO BE SEARCHED followed by four lines on which to describe the premises to be searched To satisfy the provisions of the Fourth Amendment, Article I, Section 10, and S C Code Section 17-13-140, the portion on the warrant describing the premises to be searched must be completed The South Carolina Bench Book for Summary Court Judges, in the provision applicable to search warrants states *(3) The Particularity Requirement* - "Both the affidavit and the search warrant must particularly describe the place to be searched and the objects to be seized "

The search warrant at issue, which the State contends to authorize the search of the Markley residence, fails to provide any description of the premises to be searched R 444-468 It further does not appear to be the proper SCCA 513 as provided by Court Administration on line in the Magistrate's Bench Book, nor does it indicate on its face that it is a form approved by the Attorney General It is important to note that the search warrant for the Markely residence did not simply fail to describe the place to be searched *with particularity*, it failed to give any description of the premises *whatsoever* The search warrant for the Markely residence is therefore defective on its face and fails to satisfy the provisions of the Fourth Amendment, Article I, Section 10, S C Code Sections 17-13-140, and 17-13-160

In the present case the trial court held that information in the affidavit was sufficient to overcome the search warrant's complete failure to identify the place to be searched Although some cases, even under a Fourth Amendment analysis, have held that information in the affidavit may *supplement* the information in the warrant, none have gone so far as to hold that a search warrant can be blank on its face *See* State v Ellis, 263 S C 12, 207 S E 2d 408 (1974) The holding of Ellis however does not cure the defect in this case Ellis does not hold that the affidavit alone may substitute for the lack of any description in the search warrant itself

Ellis specifically provides that "the description in the caption of the warrant *when taken in connection with* the affidavit was sufficient to sustain the warrant as against the attack that it was constitutionally deficient for not particularly describing the place to be searched " Ellis *at* 19 *Emphasis added* In Ellis the search warrant identified the location as "88 Columbus Street, up and down stories Charleston, South Carolina " The ambiguity which the information in the affidavit helped clarify in Ellis was the specific location within the property generally identified by the search warrant

Cases cited by the Court in Ellis likewise pertain to the use of information in the affidavit to identify specific sub-units of multi-occupancy structures identified in the search warrant and do not support the Court's holding in this case In State v Crane, 296 S C 336 (1988), which cites to Ellis, the search warrant describing the premises as "the residence" was held adequate where it described the premises to be searched by giving directions to it along with a description As in Ellis, information in the affidavit in Crane merely added specificity to the description contained in the search warrant itself There is no case in South Carolina which supports an argument that the affidavit can be used to satisfy the particularity requirement of a search warrant that completely fails to identify the premise to be searched

The Court in this case has held specifically that an affidavit may provide the location of the premises searched where none is contained in the search warrant It has done so on a finding that the search warrant at issue contained specific language incorporating the description in the affidavit so as to satisfy the statutory requirements of S C Code Sections 17-13-140 and 17-13-160 To support its decision the Court relied on the case of State v Williams, 297 S C 404, 377 S E 2d 308 In doing so the Court has erred as there is no specific language of incorporation that will meet Fourth Amendment scrutiny Nor is Williams decided on Fourth Amendment grounds Any reference to a Fourth Amendment or Article 10 analysis in Williams is *dicta*, as the case was clearly decided by an interpretation and application of S C Code Section 17-13-140 Niether Williams nor Ellis support a finding that the search warrant in this case meets Fourth Amendment requirements as to particularity

The traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant United States v Johnson, 541 F 2d 1311, 1315 (8th Cir 1976) The general rule is not without exception and an affidavit may supplement the search warrant if properly referenced in the body of

the search warrant

"An affidavit may be referred to for purposes of providing particularity if the affidavit accompanies the warrant and the warrant uses suitable words of reference which incorporate the affidavit " United States v Klein, 565 F 2d 183, 186 n 3 (1st Cir 1977), *See also*, Groh v Ramirez, 540 U S 551, 557-58, 124 S Ct 1284, 157 L Ed 2d 1068 (2004) (listing cases from multiple circuits which have allowed warrants to be construed with reference to an incorporated affidavit)

In considering whether under the Fourth Amendment the information in an affidavit can supplement an incomplete description in a search warrant, the federal courts have found that two conditions must first be met First, the search warrant and affidavit must be physically attached to one another This requirement is not met unless the record shows affirmatively that the search warrant and the affidavit were physically attached at the time of execution Second, "*the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference* " United States v Williamson, 1 F 3d 1134 (10th Cir 1993) (*quoting* 2 Wayne R LaFave, Search and Seizure Section 4 6(a), at 241 (2d ed 1987) *Emphasis added*

Most importantly, the issue presented is not one of the affidavit adding specificity to the description in the search warrant Nor is it an issue of expressly

referring to the affidavit and incorporating it by reference by use of suitable words of reference This case presents the issue of a complete lack of the search warrant to identify the place to be searched In addressing the issue of a complete lack of information as to particularity in a search warrant the Supreme Court has stated

> This warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items Nor did it make what fairly could be characterized as a mere technical mistake or typographical error Rather, in the space set aside for a description of the items to be seized, the warrant stated that the items consisted of a "single dwelling residence blue in color " In other words, the warrant did not describe the items to be seized at all *In this respect the warrant was so obviously deficient that we must regard the search as "warrantless" within the meaning of our case law See* Leon, 468 U S , at 923, *cf* Maryland v Garrison, 480 U S 79, 85 (1987), Steele v United States, 267 U S 498, 503-504 (1925)

Groh v Ramirez, 540 U S 551, 557-58, 124 S Ct 1284, 157 L Ed 2d 1068 (2004) *Emphasis added*

In this case it is clear that the search warrant failed to provide any description of the place to be searched and further failed to expressly refer to the affidavit and incorporate it by reference Under both state and federal law, the warrant in this case is so deficient as to make the search in this case a warrantless search

A warrantless search is presumptively unreasonable In Groh the Court reiterated that the presumptive rule against warrantless searches applies with equal

force to searches whose only defect is a lack of particularity in the warrant

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 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)

In this case, the search warrant was so deficient on its face (failing to particularize the place to be searched or things to be seized) that the police officers executing the warrant could not reasonably presume it to be valid United States v Leon,468 U S 897 (1984) The good faith exception to the exclusionary rule therefore does not apply in this case

The United States Supreme Court in Groh held that given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid *See* Harlow v Fitzgerald, 457 U S 800, 818-819 (1982) As a result, the evidence from the search of the Markely residence must therefore be excluded

II IT WAS ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY THAT "ACTUAL KNOWLEDGE OF THE PRESENCE OF CRACK COCAINE IS STRONG EVIDENCE OF A DEFENDANT'S INTENT TO CONTROL ITS DISPOSITION OR USE "

As part of its mere presence charge the trial court instructed the jury that, "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use " R 407, l 15-17 At trial, counsel argued that this language nullified the mere presence charge It was further argued that this language was a comment on the facts and weight of the facts R 414, l 12-17, R 417, l 1-2 After noting that the language was taken from "the Supreme Court's recommended charge," the trial court overruled Appellant's objections R 417, l 21-22, R 418, l 21-23

Charge on the Facts

"Judges shall not charge juries in respect to matters of fact but shall declare law " S C Const Art V § 21 A judge cannot comment on the weight or sufficiency of evidence without violating the constitutional prohibition as to charging upon the facts State v Hartley, 307 S C 239, 241, 414 S E 2d 182, 184 (Ct App 1992) (*citing* State v Bagwell, 201 S C 387, 23 S E 2d 244, 249 (1942))

In Hartley, a defendant requested that the jury be instructed, "the absence of

a motive is a circumstance to be duly considered in weighing the question of guilt " Hartley, 307 S C at 240, 414 S E 2d at 184 This Court found that Hartley's requested instruction was a charge on the facts because it instructed the jury that particular evidence was "entitled to receive weight or consideration " *See id* 307 S C at 241, 414 S E 2d at 184

The instruction given in Appellant's case is even more of a charge on the facts than the requested instruction in Hartley The trial court not only instructed the jury to consider actual knowledge in determining if Appellant was merely present, but also demanded that the jury consider actual knowledge as "strong evidence" of constructive possession This charge was an impermissive comment on the weight of the evidence against Appellant

Negating Mere Presence

The mere presence of a defendant in an area containing drugs, even "coupled with knowledge of the drugs," is insufficient to prove possession Goldsmith v Witkowski, 981 F 2d 697, 701 (4th Cir 1992) Evidence showed that Appellant was present in both locations where the drugs were found Furthermore, there was some question over who had dominion and control of the drugs Therefore, Appellant was entitled to a mere presence charge *See* State v James, 386 S C 650, 653, 689 S E 2d 643, 645 (S C App 2010) (noting a "mere

presence" charge is generally available in cases of accomplice liability or where the defendant was present where contraband was found)

By instructing the jury that knowledge of the cocaine is "strong evidence" of control, the trial court essentially eviscerated the "mere presence" charge This language substitutes evidence of dominion and control with evidence of knowledge, rendering the mere presence charge constitutionally defective *Cf* Goldsmith, 981 F 2d at 701 ("[T]he due process protections of Jackson , in our view would require invalidation of convictions based solely on evidence of mere presence")

In overruling Appellant's objection, the trial court cited Kimbrell and Solomon Tr 442, l 3 - Tr 446, l 24 The holdings in both of these cases are distinguishable from Appellant's case

In Kimbrell, the Supreme Court examined whether the trial court erred in denying Kimbrell's motion for directed verdict The State "produced evidence that Kimbrell had actual knowledge of the presence of cocaine " Kimbrell, 294 S C at 54, 362 S E 2d at 631 Viewing this evidence in the light most favorable to the State, the Court held that the evidence of knowledge was sufficient *Id* , but see Goldsmith, *supra* In affirming the trial court, the Supreme Court commented that actual knowledge was "strong evidence of intent to control " Kimbrell, 294 S C

at 54, 362 S E 2d at 631

Appellant's issue however does not deal with whether directed verdict should have been granted Therefore the jury should not be viewing evidence of actual knowledge in the light most favorable to the State As a result, the jury should not be instructed to weigh evidence of knowledge as "strong evidence" of control

The trial court also cited to Solomon in support of the "strong evidence" charge In that case, the Supreme Court looked at whether trial counsel acted reasonably in failing to object to a "strong evidence" instruction Solomon, 313 S C at 528, 443 S E 2d at 542 The Supreme Court found that because the instruction was based on language in Kimbrell, trial counsel "acted reasonably" in not objecting

Appellant's case is distinguishable from Solomon because the question before this Court is whether the trial court erred in giving the "strong evidence" instruction, not whether counsel's failure to object to the charge was reasonable "under prevailing professional norms " *See* Cherry v State, 300 S C 115, 118, 386 S E 2d 624, 625 (1989) (noting the proper standard for ineffective assistance of counsel) Precedent might render a decision by counsel not to object reasonable, but such a determination does not validate the underlying precedent

Cf Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 152 (2004) (Similarly "An attorney is not required to anticipate changes in the law.")

CONCLUSION

Based on the foregoing the Appellant's conviction should be reversed.

Respectfully submitted,

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

Counsel for Appellant

February 27, 2012

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L Couch, Circuit Court Judge

Case No 09-GS-42-6452, 09-GS-42-6453

State of South Carolina, Respondent,

v

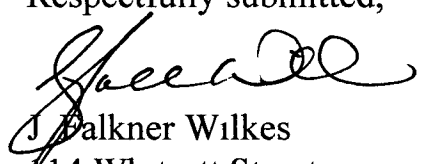
Derrick Lamar Cheeks, Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Brief of Appellant on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 27th day of August, 2012, addressed as follows

Salley W Elliott
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Respectfully submitted,



J Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Respondent

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L Couch, Circuit Court Judge

Case No 09-GS-42-6452, 09-GS-42-6453

State of South Carolina, Respondent,

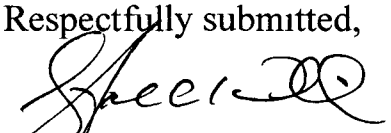
v

Derrick Lamar Cheeks, Appellant

Certificate

I certify that the Brief of Appellant is in compliance with Rule 211(b)

Respectfully submitted,



J Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Respondent

February 27, 2012