

J FALKNER WILKES
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February 6, 2012

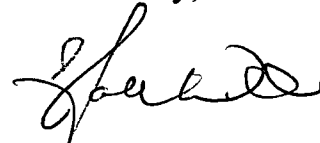
Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

Enclosed please find a Certificate for Service of the Record on Appeal on
the Respondent along with the Certificate for inclusion and redaction

Sincerely,



J Falkner Wilkes

c

Harold M Coombs, Jr
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

RECEIVED
FEB 07 2012
SC Court of Appeals

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, _____

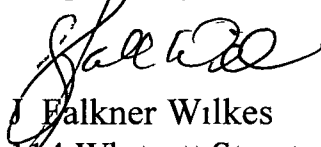
Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the RECORD ON APPEAL on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 6TH day of February, 2012, addressed as follows

Harold M. Coombs, Jr
Senior Assistant Attorney General
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Respectfully submitted,



J. Falkner Wilkes
14 Whitsett Street
Greenville, SC 29601
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SC Court of Appeals

Counsel for Respondent

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
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,

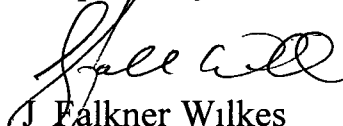
Appellant

CERTIFICATE

I certify that the Record on Appeal contains all of the matter designated by the Parties and no other matter

I further certify that the Record on Appeal has been redacted pursuant to the Supreme Court's Interim Order relating to private data and personal identifiers

Respectfully submitted,



J. Falkner Wilkes
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Counsel for Respondent

February 6, 2012

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FEB 07 2012
SC Court of Appeals

The South Carolina Court of Appeals

The State,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

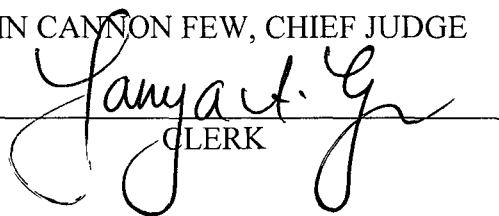
The Honorable Roger L Couch
Spartanburg County
Trial Court Case No 2009-GS-42-06452
2009-GS-42-06453

ORDER

The request for an extension to serve and file Record on Appeal is granted until February 6, 2011 Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

JOHN CANNON FEW, CHIEF JUDGE

BY


CLERK

Columbia, South Carolina

cc J Falkner Wilkes, Esquire
Senior Assistant Attorney General Harold M Coombs

FILED
1/13/12 DV

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

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January 5, 2011

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

1st
ROA
1-6-12
2-6-12

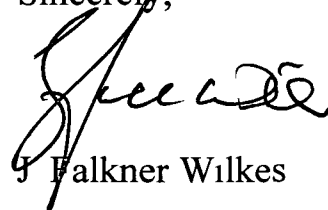
Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

According to my records the Record on Appeal is due to be served on the Respondent tomorrow, January 6, 2011. In order to prepare for a trial next week I have had to schedule a meeting in McCormick County tomorrow. As a result I will not be able to obtain the copies of exhibits from the clerk in Spartanburg as planned. As a result I do not expect that I will be able to complete assembly and copying of the Record on Appeal by the end of the day tomorrow. I am therefore requesting an additional thirty days to serve the Record on Appeal on the Respondent.

If I need to do anything else to facilitate an extension of time please let me know.

Sincerely,


J Falkner Wilkes

c
Allan Wilson, Attorney General
Salley W Elliott
Harold M Coombs, Jr
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

RECEIVED
JAN 09 2012
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L Couch, Judge

THE STATE,

Respondent,

vs

DERRICK LAMAR CHEEKS,

Appellant

PROOF OF SERVICE

I, Harold M Coombs, Jr, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, J Falkner Wilkes, Esquire, 114 Whitsett Street, Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served

This 7th day of December, 2011


HAROLD M COOMBS, JR

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

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L. Couch, Judge

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DEC 07 2011
SC Court of Appeals

THE STATE,

Respondent,

vs

DERRICK LAMAR CHEEKS,

Appellant

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal

additional trial transcript Tr pp 1-8 (title page and index)

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. Additionally, Respondent notes personal data identifiers and other sensitive information should be redacted from the transcript or other documents pursuant to the South Carolina Supreme Court Order dated August 13, 2007.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

BARRY J BARNETTE
Solicitor, Seventh Judicial Circuit

By Harold M Coombs Jr
Harold M Coombs, Jr

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
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ATTORNEYS FOR RESPONDENT

December 7, 2011



ALAN WILSON
ATTORNEY GENERAL

December 7, 2011

RECEIVED
DEC 07 2011
SC Court of Appeals

J Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

Re The State v Derrick Lamar Checks

Dear Mr Wilkes

Enclosed please find two (2) copies of the Initial Brief of Respondent and Designation of Matter along with proof of service in the above-referenced case

Yours very truly,

Harold M Coombs Jr

Harold M Coombs, Jr
Senior Assistant Attorney General

HMCjr/ab
Enclosures

cc The Honorable Tanya A Gee
(original enclosed)
Ms Trisha Allen - with enclosure

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L Couch, Judge

THE STATE,

Respondent,

vs

DERRICK LAMAR CHEEKS,

Appellant

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

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BARRY J BARNETTE
Solicitor, Seventh Judicial Circuit
Spartanburg County Courthouse
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ATTORNEYS FOR RESPONDENT

RECEIVED

DEC 07 2011

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1 The defendant says that the search warrant was facially invalid since it lacked a description of the place to be searched. The defendant then asks whether drugs seized in the home should have been suppressed. (Appellant's Statement of Issues on Appeal I)

2 The defendant asks whether it was error for the court to charge "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use." (Appellant's Statement of Issues on Appeal II)

STATEMENT OF THE CASE

The grand jury charged the defendant (Derrick Lamar Cheeks) with trafficking cocaine base and/or crack cocaine (09-GS-42-6453) and possession with intent to distribute crack cocaine within one-half mile of school (09-GS-42-6452). The defendant and his co-defendant (Ricky Dwight Cheeks) and their separate counsel came to trial in Spartanburg, SC, October 4-6, 2010, before the Honorable Roger L. Couch, Judge, and a jury. The jury found the defendant guilty, and the court sentenced the defendant to a fine and imprisonment for a term of 25 years for trafficking (09-GS-42-6453) and a fine and imprisonment for a concurrent term of 10 years for the proximity offense (09-GS-42-6452). The defendant timely moved for a new trial and, upon its denial, timely served opposing counsel a notice of appeal.

ARGUMENT

I

The court's finding that the warrant and its attached affidavit were sufficient to authorize the search is supported by both state and federal authority

In part "A" of his argument the defendant argues at length that he had a legitimate expectation of privacy when he was in Tracy Markley's home (IBOA pp 4-9) The defendant does not identify where he raised this issue during the trial for the trial judge's consideration and got a ruling Rather, it was apparently raised post-trial as a motion for new trial Before a party can raise an issue post-trial as ground for new trial, the party must have preserved the issue by raising it at trial and obtaining the court's ruling State v Smith, 383 S C 159, 679 S E 2d 176 (2009), vacating State v Smith, 372 S C 404, 642 S E 2d 627 (Ct App 2007), see Smith, 642 S E 2d 627 n 8 (Goolsby, J , dissenting)(collecting authority) The issue is not preserved for review and need not be considered further Moreover, the court found in denying the motion for new trial that the defendant had no reasonable expectation of privacy in Tracy Markley's home (Order Denying Motion for New Trial, p 5, ROA p ___), and that finding is supported by the record and applicable law Officers executed the search warrant at 152 Gordon Drive Tracy Markley's parents owned the residence Markley lived there with them and was sleeping in his part of the house when Eric Elder brought the defendant from a motel to Markley's home, and the defendant began preparing crack cocaine When the officers entered, the defendant ran from the kitchen - where there was paraphernalia used to cook crack cocaine and apparently a large amount of crack cocaine on the counter - into Markley's bedroom (Tr pp 77-83, pp 96-97, p 100, pp 265-266, pp 293-297, pp 303-304) The defendant had a key on occasion, but Markley

did not know about the day of the search (Tr pp 265-266, pp 293-297) Markley allowed the defendant to use Markley's premises for cooking crack cocaine since Markley felt a financial obligation to the defendant supposedly resulting from Markley's inept repair of a car. Further, Markley spent everything he had on crack, and Markley took advantage when Markley saw where the defendant had a stash in Markley's residence (Tr pp 300-302, 314-315). At one time, both Markley and the defendant worked at Fatz, and some of the defendant's Fatz T-shirts were at Markley's. Markley was not sure that the defendant had ever bathed or showed at Markley's premises (Tr pp 304, line 24 - p 310). When the defendant would hang out at Markley's house, Markley took the defendant home when he (defendant) got tired (Tr p 315, lines 5-16). In sum, the court found that the defendant used Markley and Markley's home for business purposes, and the defendant had no reasonable expectation of privacy in the premises searched. That finding is supported by the record and applicable law United States v Gray, 491 F 3d 138 (4th Cir 2007)(where a relationship between co-defendants is at core a business one, there is no legitimate expectation of privacy in another's apartment, the Fourth Amendment is not so broad as to encompass anyone legitimately on the premises where a search occurs, there can be no doubt that at the time of arrest, the defendant was using the co-defendant's apartment to traffic drugs, presence of "scattered personal possessions" do not transform a business relationship into a social one - especially where the record is replete with evidence of drug operations, the Fourth Circuit declines to adopt a rule according a member of an ongoing drug operation heightened constitutional protection, a defendant cannot simply co-opt another's dwelling for illegal business, the defendant's purpose at the co-defendant's apartment was patently commercial, and he had no legitimate expectation of privacy)

Since, the defendant had no reasonable expectation of privacy in Tracy Markley's premises, the present argument need not be considered further

Parenthetically, even if the appellate court could find any basis for the defendant having a reasonable expectation of privacy in the searched premises the warrant and its attached affidavit were sufficient to authorize the search. Before the jury was sworn, the defendant and co-defendant - relying primarily on Groh v Ramirez, 540 U S 551, 124 S Ct 1284, 157 L Ed 2d 1068 (2004) and the Fourth Amendment [and mentioning state law] - challenged the search warrant's sufficiency in omitting the description of the premises to be searched. Defense counsel thought the omission of the place to be searched within the warrant could not be supplied by the description within the affidavit. The state noted that the affidavit sworn before the magistrate clearly described the premises to be searched. The affidavit had given notice to the magistrate of both the premises that the state wanted to search and described the property that the state wanted to seize. The state maintained that the search warrant and affidavit should be read together as one document. (Tr pp 41- 43, 51-53)

Distinguishing Groh, the court found in the present case. The search warrant referred back to its attached affidavit, and the attached affidavit was served with the search warrant. The affidavit specifically described the place to be searched for the described property. The search warrant authorized the search of the premises for the described property based upon the whole document. The court found the search warrant was sufficient. (Tr pp 49-51)

S C Code § 17-13-140 (Westlaw 2010), in part, requires a warrant to name or to describe the place to be searched. The federal and state constitutions both require a warrant to "particularly" describe the place to be searched. U S Const Amend IV, S C Const Art

I, § 10 While the search warrant does not on its face describe the place to be searched, the warrant finds that “appearing from the attached affidavit that there are reasonable grounds to believe” the certain, described property is subject to seizure. The attached affidavit plainly describes the residence where the magistrate found reasonable grounds to search for that described property (Court Exhibit 1, R pp ___-___). The magistrate authorized the search at the house described in the affidavit for the property described in the affidavit and signed the search warrant and attached the affidavit - that had been sworn before him with the detailed descriptions of the property and the house to be searched. The trial court read the warrant with its attached affidavit and found the warrant sufficient. That reading is supported by applicable precedent State v Williams, 297 S C 404, 377 S E 2d 308 (1989)(a concurrent reading of warrant and affidavit should be permissible to establish the identification of the property to be seized), State v Ellis, 263 S C 12, 207 S E 2d 408 (1974)(warrant and affidavit may be considered together to withstand constitutional and statutory attack on particularity of premises to be searched), disapproved on other grounds State v Adams, 291 S C 132, 352 S E 2d 483 (1987), United States v Hurwitz, 459 F 3d 463 (4th Cir 2006)(Groh does not establish a two part rule for validating a warrant by incorporation of a separate document, in this circuit “it is sufficient *either* for the warrant to incorporate the supporting document by reference *or* for the supporting document to be attached to the warrant itself”)

The court charged the jury correctly

The defendant thought that the court's charging "[a]ctual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use" (Tr p 435, lines 15-17) nullified [the instruction on] mere presence and commented on the weight of the facts (Tr pp 441-443, line 3, p 445, lines 1-3) The assistant solicitor noted that the substance of the questioned instruction was found in State v Kimbrell, 294 S C 51, 362 S E 2d 630 (1987) The court found that the charge was proper and did not comment on the facts (Tr pp 445-446)

The defendant was charged with trafficking in crack cocaine established, in part, by proof that he knowingly actually or constructively possessed or knowingly attempted to actually or constructively possess the statutory quantity of substance The defendant was charged with possession with intent to distribute crack cocaine within one-half mile of a school established, in part, by proof that he possessed a quantity of crack cocaine (Tr pp 418-419)

In part, the court charged the jury The evidence was to be considered separately and independently to each defendant (Tr pp 420-421) Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal (Tr p 431) Mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding or abetting Rather, the state must prove that one either actually committed the crime or was present aiding, abetting, or assisting in the commission of the

crime (Tr p 431, line 22 - p 433, line 10) Trafficking in crack cocaine required proof that the defendant “was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of crack cocaine ” Mere presence at a scene where drugs are found is not enough to prove possession of crack cocaine Possession required proof that the defendant had both the power and the intent to control the disposition or use of the crack cocaine The possession could be actual or constructive Actual possession of crack cocaine meant that the defendant was in actual physical custody of the substance Constructive possession of crack cocaine meant that the defendant had dominion or control or the right to exercise dominion or control over either the substance or the property on which the substance was found (Tr p 434, line 12 - p 435, 15) “Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant’s intent to control its disposition or use The defendant’s knowledge and possession can be inferred when a substance is found on property under the defendant’s control However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have ” (Tr p 435, lines 15-23)

Trafficking offenses require the state to prove “knowing” actual or constructive possession of crack cocaine or knowingly attempting to become in actual or constructive possession of crack cocaine A person has possession of contraband when he has both the power and intent to control its disposition or use The challenged portion of the charge apprised the jury that evidence of actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use - “knowledge may be equated with or substituted for the intent element ” That is, possession of contraband can be established by

evidence that one has either both the power and intent to control its disposition or use or both knowledge of the presence of the drug and the power to control its disposition or use State v. Kimbrell

An appellant must present a purported error for appellate review by a statement of issue on appeal Rule 208(b)(1)(B)SCACR. The defendant assigns error – the jury instruction was supposedly an improper charge on the facts and negated mere presence – only in his argument. Assume that the appellate court may still consider the assigned error.

The challenged charge was not a charge on the facts since it identified, as a matter of law, means of proving possession of contraband.

The challenged charge did not negate mere presence. Contrary to the defendant's position, the charge did not state that possession of drugs could be established by mere presence in an area containing drugs coupled with knowledge of their presence. Rather, under the challenged instruction, possession could be established by evidence of both knowledge of the presence of the drug and the power to control its disposition or use.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

BARRY J BARNETTE
Solicitor, Seventh Judicial Circuit

BY Harold M Coombs, Jr.
Harold M Coombs, Jr

Office of the Attorney General
Post Office Box 11549
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ATTORNEYS FOR RESPONDENT

December 7, 2011



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
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November 30, 2011

Senior Assistant Attorney General Harold M Coombs
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re The State v Cheeks, Derrick
2011183009

Dear Counsel

The following Order has been endorsed on your Petition For Extension Of Time In Which To File The Initial Brief Of Respondent And Designation Of Matter in the above entitled case on appeal

"Granted

John Cannon Few, C J
For the Court

By s/ V Claire Allen
Deputy Clerk

November 30, 2011 "

For good cause shown, the request for an extension to file the Respondent's Initial Brief and Designation of Matter is granted until December 28, 2011 Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys

Very truly yours

V Claire Allen
DEPUTY CLERK

VCA/dw

cc J Falkner Wilkes, Esquire

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

NOV 28 2011
SC Court of Appeals

3rd
RIB
11-28-11
12-28-11

THE STATE

Respondent,

vs

DERRICK LAMAR CHEEKS,

Appellant

**PETITION FOR EXTENSION OF TIME TO SERVE AND FILE THE INITIAL
BRIEF OF RESPONDENT AND DESIGNATION OF MATTER**

Respondent, through its undersigned counsel, would respectfully show unto this Court as follows

I

The Initial Brief of Respondent and Designation of Matter are due to the Court today, pursuant to a previous extension granted by the Court

II

Due to work required in other cases pending before this Court and the South Carolina Supreme Court, I am unable to complete this Brief on time. I would therefore request an extension of time within which to serve and file the Initial Brief of Respondent and Designation of Matter

III

This extension request is not intended for purposes of delay, but rather to ensure that the Brief is properly researched and prepared

WHEREFORE, Respondent prays that the Court extend the deadline for the service and filing of the Initial Brief of Respondent and Designation of Matter in this case for thirty (30) days, and for such other and further relief as the Court may deem just and proper

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

BY *Salley Elliott*

HAROLD M COOMBS, JR
Senior Assistant Attorney General

BY *Harold M. Coombs, Jr.*
Harold M Coombs, Jr

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

ATTORNEYS FOR RESPONDENT

GRANTED
JOHN CAMPBELL, C.J.
FOR THE COURT
By *V. Claire Allen*
(Clerk) (Deputy Clerk)

FILED
11.28 11 AM

November 28, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE

Respondent,

vs

DERRICK LAMAR CHEEKS,

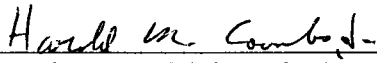
Appellant

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the Petition for Extension of Time to Serve and File the Initial Brief of Respondent and Designation of Matter on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record, J. Faulkner Wilkes, Esquire, 114 Whitsett Street, Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served

This 28th day of November, 2011



HAROLD M. COOMBS, JR.
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

November 28, 2011

J Faulkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

RE State v Derrick Lamar Cheeks

RECEIVED
NOV 28 2011
SC Court of Appeals

Dear Mr Phillips

Enclosed please find two (2) copies of the Petition for Extension of Time to Serve and File the Initial Brief of Respondent and Designation of Matter in the above case

Sincerely,

Harold M Coombs Jr

Harold M Coombs Jr
Senior Assistant Attorney General

HMCjr /ab
Enclosures

cc The Honorable Tanya A Gee
(Original and 6 enclosed)
Ms Trisha Allen

The South Carolina Court of Appeals

The State,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2009-GS-42-06452
2009-GS-42-06453

ORDER

The request for an extension to serve and file Respondent's Initial Brief and Designation of Matter is granted until November 28, 2011. Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc J Falkner Wilkes, Esquire
Senior Assistant Attorney General Harold M. Coombs

FILED



11-28-11
11-28-11
11-28-11

ALAN WILSON
ATTORNEY GENERAL

October 28, 2011

The Honorable Tanya A. Gee
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RECEIVED
OCT 28 2011
SC Court of Appeals

Re State of South Carolina v. Derrick Cheeks
2009-GS-42-6452, 9453

Dear Ms. Gee

The Initial Brief of Respondent and Designation of Matter in the above appeal are due to be served and filed today. I would respectfully request a 30-day extension in which to serve and file the brief and designation.

This extension request is not intended for the purpose of delay, but is necessitated by my heavy workload.

Sincerely,

Harold M. Coombs, Jr.

Harold M. Coombs, Jr.
Senior Assistant Attorney General

HMCjr /ab

cc J. Faulkner Wilkes, Esquire

The South Carolina Court of Appeals

The State,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No 2009-GS-42-06452
2009-GS-42-06453

ORDER

The request for an extension to serve and file Respondent's Initial Brief and Designation of Matter is granted until October 28, 2011 Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

JOHN CANNON FEW, CHIEF JUDGE

BY V. Clave Allan, Deputy
CLERK

Columbia, South Carolina

cc J Falkner Wilkes, Esquire
Senior Assistant Attorney General Harold M. Coombs

FILED

Partu 9/30/11



ALAN WILSON
ATTORNEY GENERAL

September 28, 2011

1st
RIB
9-28-11
10-28-11
RECEIVED
SEP 28 2011
SC Court of Appeals

The Honorable Tanya A. Gee
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

Re **State of South Carolina v. Derrick Lamar Cheeks**
2009-GS-42-6452, 6453

Dear Ms. Gee:

The Initial Brief of Respondent and Designation of Matter in the above appeal are due to be served and filed today. I would respectfully request a 30-day extension in which to serve and file the brief and designation.

This extension request is not intended for the purpose of delay, but is necessitated by my heavy workload.

Sincerely,

Harold M. Coombs, Jr.
Senior Assistant Attorney General

HMCjr/ab

cc J. Falkner Wilkes, Esquire



ALAN WILSON
ATTORNEY GENERAL

September 2 2011

J Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

Re The State v Derrick Lamar Cheeks

Dear Counsel

This letter is to confirm that our office received Appellant's Initial Brief and Designation of Matter in the above-referenced case and to advise you that I will be representing the State in this appeal. Please forward all future correspondence regarding this matter directly to me.

I look forward to working with you on this case.

Sincerely,

Harold M Coombs, Jr

Harold M Coombs, Jr
Senior Assistant Attorney General

HMCjr /ab

cc The Honorable Tanya A Gee
Victim Services

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SEP 02 2011
SC Court of Appeals

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L. Couch, Circuit Court Judge

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AUG 31 2011

SC Court of Appeals

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 APPELLANT'S INITIAL BRIEF on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 29TH day of August, 2011, 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
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(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

RECEIVED

AUG 31 2011

SC Court of Appeals

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

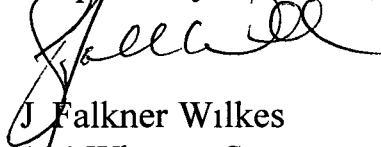
DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

The Appellant designates the following matter be included in the record on appeal

True Billed Indictments, Trial Transcript Pages 1, 41-227, 249-259, 262-291, 293-316, 319-364, 376-467, Court Exhibits 1-3, Motion Rule 29, Order Rule 29

I certify that the matter designated includes only relevant material

Respectfully submitted,



J. Falkner Wilkes
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Counsel for Respondent

August 29, 2011

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

RECEIVED
AUG 31 2011

Roger L. Couch, Circuit Court Judge

SC Court of Appeals

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

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

INITIAL BRIEF OF APPELLANT

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Constitutional Provisions

Fourth Amendment to the United States Constitution
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Statutory Provisions

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S C Code Section 17-13-140

Other Citations and Authority

South Carolina Court Administration Form, SCCA 513
Summary Court Judge's Bench Book

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 Tr 1 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 Tr 1 Roger Poole represented co-defendant Ricky Cheeks

The jury found Appellant guilty of all charges Tr 457 Appellant was sentenced to a twenty-five year sentence for the trafficking charge and a concurrent ten year sentence for the proximity charge Tr 465 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 Appellant's nephew, Derrick Cheeks. Hanning began surveillance at a Super 8 motel in Spartanburg County. Tr 76, ll 10-12. Hanning saw Derrick Cheeks get into a car with Eric Elder and Ricky Cheeks. Tr 76, 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. Tr 103, ll 15-23. Hutchins observed Elder go into Wal-Mart and purchase a box of baking soda while Ricky Cheeks stayed in the car. Tr 104, ll 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. Tr 106, ll 22-24. Hutchins stopped the Elder's car. Hutchins testified that Ricky Cheeks was sitting in the passenger clutching his pocket. Tr 107, ll 15-21. Hutchins got Elder out of the car and walked to Hutchins 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 Tr 201, l 3 - Tr 202, l 6 McJunkin testified that Ricky Cheeks appeared to be reaching for his right pocket Tr 202, ll 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 Tr 328, ll 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 Tr 109, ll 6-8, Ct Ex 1,2,3 The portion of the search warrant that provided for a description of the premises to be searched was left completely blank Ct Ex 1,2,3 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 Tr 332, ll 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. 266, 295. At times Cheeks was at the house on a daily basis. 306. Cheeks had also spent nights at the residence. 269, 315. Markley testified that Cheeks brought friends over to the house, played games, and watched television there. 306-308. At the time of the search Cheeks had let himself in, had food in the refrigerator, and had clothes at the residence. 309. 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 Ct Ex 1,2,3 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 Markley 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. Neither 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 " Tr 435, ll 15-17 Derrick's trial counsel argued that this language nullified the mere presence charge He further argued that the language was a comment on the facts and weight of the facts Tr 442, ll 12-17 Appellant joined this objection Tr 445, ll 1-2 After noting that the language was taken from "the Supreme Court's recommended charge," the trial court overruled Appellant's objections Tr 445, ll 21-22, Tr 446, ll 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 impermissible 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. However 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

However, Appellant's issue 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 Therefore 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

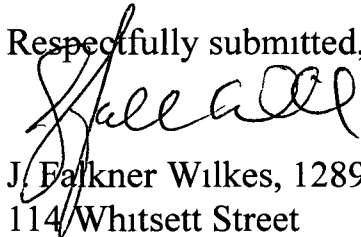
Appellant's case is distinguishable from Solomon because the question before this Court is whether the trial court erred in giving the "strong evidence" instruction, not whether counsel's failure to object to the charge was reasonable "under prevailing professional norms " See Cherry v State, 300 S C 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 Derrick Cheeks



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29101
TELEPHONE (803) 734 1890
FAX (803) 744 1800
www.sccourts.org

August 15, 2011

J Falkner Wilkes, Esquire
114 Whitsett
Greenville, SC 29601

Re The State v Cheeks, Derrick
2011183009

Dear Mr Wilkes

The following Order has been endorsed on your Petition For Extension Of Time In Which To File Initial Brief Of Appellant And Designation Of Matter in the above entitled case on appeal

"Granted

John Cannon Few, C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

August 15, 2011 "

For good cause shown, the request for an extension to file Appellant's Initial Brief and Designation of Matter is granted until August 29, 2011 Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

Very truly yours,

V. Claire Allen
DEPUTY CLERK

VCA/dw

cc Assistant Attorney General Salley W Elliott

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
2009-GS-42-06452, 2009-GS-42-06453

State of South Carolina,

v

Derrick Lamar Cheeks,

Respondent,

Appellant

MOTION

Appellant hereby moves for an extension of thirty days from the present deadline in which to file and serve the Appellant's Initial Brief and Designation of Matter

Counsel's case load and additional obligations make it impossible to complete the Appellant's Initial Brief by the present deadline Counsel is presently completing the Final Briefs and Records in Mathis v Firriolo, Reeves v Reeves, and State v Atieh for service and filing by July 15th Counsel is also completing the Record for service in Shehan v Shehan, due July 13th In addition counsel is

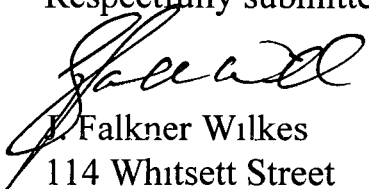
2nd
7-29-11
8-29-11

under a briefing deadline for a petition in the United States Supreme Court in the case of Reeves v Roe

Counsel presently has a group trip planned requiring out of state travel from July 18th through July 28th. The undersigned believed that he had adequately planned ahead to complete all work obligations by July 15th. Unfortunately, counsel did not anticipate being called for jury duty the week of July 11th. That despite the joy of fulfilling counsel's civil obligation, jury duty has made completing all of the tasks that were scheduled for the week prior to vacation utterly impossible.

Wherefore, the undersigned moves for an additional thirty days from the present deadline to serve and file the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

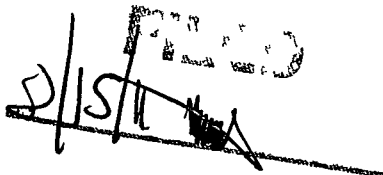
Respectfully submitted,


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

Counsel for Respondent

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By V. Claire Allen
(Clerk) (Deputy Clerk)



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. M-111926, M-087870, M-087869

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

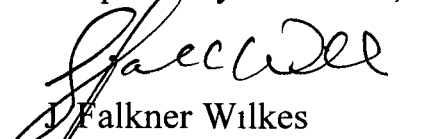
Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Appellant's Motion for an Extension of time in which to file and serve the Appellant's Initial Brief and Designation of Matter on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 13TH day of July, 2011, addressed as follows

The Honorable Henry McMaster
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

July 13, 2011

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

August 09, 2011

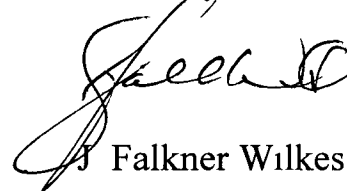
Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I am enclosing herewith a copy of the original motion, certificate and cover letter requesting a second extension. It appears that the post office did not deliver the original to your office although the copy was served on the Respondent. I can't explain it, but am enclosing the copies with original signatures. I am still working on a case for filing in the United States Supreme Court. Mr Cheeks' brief will be completed once the federal appeal has been filed. I apologize for the delay.

Sincerely,



J Falkner Wilkes

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

RECEIVED
AUG 09 2011
SC Court of Appeals

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

July 13, 2011

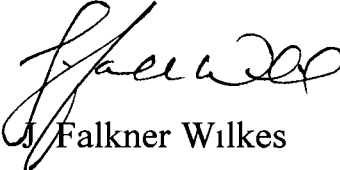
Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I have been called for jury duty this week I was scheduled for a vacation July 18th through the 28th and thought I would have this entire week to complete the many projects that I have scheduled Despite jury duty, I have still managed to finish many but not this one I am therefore enclosing a motion for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter I have asked that the present deadline be extended by thirty days

Sincerely,



J. Falkner Wilkes

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

RECEIVED
AUG 09 2011
SC Court of Appeals

The State of South Carolina
In the Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

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JUL 29 2011

State Court of Appeals

Roger L Couch, Circuit Court Judge

Attention Della White

Case No

2009-GS-42-06452, 2009-GS-42-06453

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

MOTION

Appellant hereby moves for an extension of thirty days from the present deadline in which to file and serve the Appellant's Initial Brief and Designation of Matter

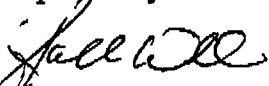
Counsel's case load and additional obligations make it impossible to complete the Appellant's Initial Brief by the present deadline Counsel is presently completing the Final Briefs and Records in Mathis v Firriolo, Reeves v Reeves, and State v Atieh for service and filing by July 15th Counsel is also completing the Record for service in Shehan v Shehan, due July 13th In addition counsel is

under a briefing deadline for a petition in the United States Supreme Court in the case of Reeves v Roe

Counsel presently has a group trip planned requiring out of state travel from July 18th through July 28th. The undersigned believed that he had adequately planned ahead to complete all work obligations by July 15th. Unfortunately, counsel did not anticipate being called for jury duty the week of July 11th. That despite the joy of fulfilling counsel's civil obligation, jury duty has made completing all of the tasks that were scheduled for the week prior to vacation utterly impossible.

Wherefore, the undersigned moves for an additional thirty days from the present deadline to serve and file the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

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 M-111926, M-087870, M-087869

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

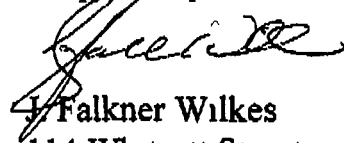
Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Appellant's Motion for an Extension of time in which to file and serve the Appellant's Initial Brief and Designation of Matter on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 13TH day of July, 2011, addressed as follows

The Honorable Henry McMaster
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

July 13, 2011



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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FAX (803) 734 1839
www.sccourts.org

July 25, 2011

J Falkner Wilkes, Esquire
114 Whitsett
Greenville, SC 29601

Re The State v Cheeks, Derrick
2011183009

Dear Mr Wilkes

The following Order has been endorsed on your Petition For Extension Of Time In Which To File Initial Brief Of Appellant And Designation Of Matter in the above entitled case on appeal

"Granted

John Cannon Few, C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

July 25, 2011 "

For good cause shown, the request for an extension to file Appellant's Initial Brief and Designation of Matter is granted until July 29, 2011 Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys!

Very truly yours,

V. Claire Allen
DEPUTY CLERK

VCA/dw

cc Assistant Attorney General Salley W Elliott



RECEIVED

JUL 20 2011

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

July 18 2011

The Honorable Tanya A Gee
Clerk South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE State v Derick Lamar Cheeks

Dear Ms Gee

I received Appellant's Motion for Extension of Time in the above-rerenced case Respondent consents to appellant's motion

Sincerely

Salley W Elliott
Assistant Deputy Attorney General

SWE/ab

cc J Falkner Wilkes, Esquire
Ms Trisha Allen

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
2009-GS-42-06452, 2009-GS-42-06453

State of South Carolina,

v

Derrick Lamar Cheeks,

Respondent,

Appellant

MOTION

Appellant hereby moves for an extension of thirty days from the present deadline in which to file and serve the Appellant's Initial Brief and Designation of Matter

Counsel's case load and additional obligations make it impossible to complete the Appellant's Initial Brief by the present deadline. Counsel is presently completing the Final Briefs and Records in *Mathis v. Firriolo*, *Reeves v. Reeves*, and *State v. Atieh* for service and filing by July 15th. Counsel is also completing the Record for service in *Shehan v. Shehan*, due July 13th. In addition, counsel is

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JUL 14 2011

SC Court of Appeals


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under a briefing deadline for a petition in the United States Supreme Court in the case of Reeves v Roe

Counsel presently has a group trip planned requiring out of state travel from July 18th through July 28th. The undersigned believed that he had adequately planned ahead to complete all work obligations by July 15th. Unfortunately, counsel did not anticipate being called for jury duty the week of July 11th. That despite the joy of fulfilling counsel's civil obligation, jury duty has made completing all of the tasks that were scheduled for the week prior to vacation utterly impossible.

Wherefore, the undersigned moves for an additional thirty days from the present deadline to serve and file the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

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

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JUL 14 2011

SC Court of Appeals

Case No M-111926, M-087870, M-087869

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Appellant's Motion for an Extension of time in which to file and serve the Appellant's Initial Brief and Designation of Matter on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 13TH day of July, 2011, addressed as follows

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

GRANTED
JOHN CANNON FEW, C J
GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By: V. Claude Allen
(Clerk) (Deputy Clerk)

Respectfully submitted,



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

Counsel for Respondent

July 13, 2011

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

July 13, 2011

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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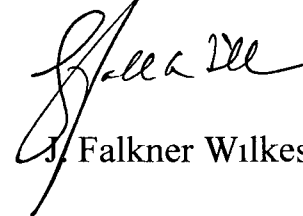
SC Court of Appeals

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I have been called for jury duty this week I was scheduled for a vacation July 18th through the 28th and thought I would have this entire week to complete the many projects that I have scheduled Despite jury duty, I have still managed to finish many but not this one I am therefore enclosing a motion for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter I have asked that the present deadline be extended by thirty days

Sincerely,



J. Falkner Wilkes

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

J FALKNER WILKES
Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

June 22, 2011

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

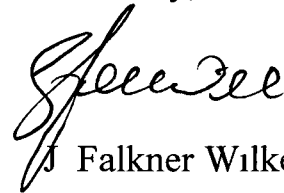
Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I am presently working on the Initial Brief of the Appellant in the above case. Due to my present case load and other work obligations it appears that I will not be able to complete the brief this week. I am therefore in need of an extension of time.

By this letter I am requesting an extension of thirty days in which to serve and file the Appellant's Initial Brief and Designation of Matter.

Sincerely,



J Falkner Wilkes

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

RECEIVED
JUN 23 2011
SC Court of Appeals

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

May 23, 2011

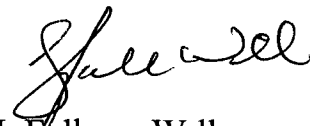
Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I am receipt of the entire transcript in this case I am calendaring the initial
brief of the Appellant due on June 22, 2011

Sincerely,



J Falkner Wilkes

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

RECEIVED
MAY 24 2011
SC COURT of Appeals

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

May 19, 2011

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I am have just discovered that the court reporter has had the trial portion of the transcript completed for some time in this case That transcript was delivered to OAD OAD is representing the co-defendant Ricky Cheeks but I will be representing Derrick Cheeks I made post trial motions which were not joined by Ricky Cheeks so OAD did not need the post trial motion transcript I am still waiting on the post trial motion transcript which the court reporter has indicated could be finished over the weekend I therefore anticipate having the entire transcript by sometime next week I will advise you next week upon its receipt

Sincerely,



J Falkner Wilkes

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

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MAY 20 2011
SC Court of Appeals

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

Telephone (864) 282 1292
Facsimile (864) 271-6035

April 15, 2011

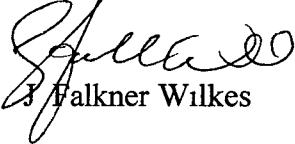
Pamala Green, Court Reporter
County Courthouse
2nd Floor, Suite 500
180 Magnolia Street
Spartanburg, SC 29306
via fax only to (864) 596-2239
ATTENTION VANESSA

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870), 2009-GS-42-06453
(M-087869)

Dear Pamela,

I am just following up on the transcript on the above case. Let me know if you have an idea of when it might be ready. I will pick it up whenever it is ready.

Sincerely,



J Falkner Wilkes

c
Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
via facsimile also to (803) 734-1839

Salley W Elhott
Office of the Attorney General
P O Box 11549
Columbia, S C 29211
via facsimile also to (803) 734-4113

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APR 18 2011

SC Court of Appeals

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

February 15, 2011

Pamala Green, Court Reporter
c/o M Hope Blackley
CLERK OF COURT
PO Box 3483
Spartanburg, SC 29304-3483
via facsimile only to (864) 596-2239

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FEB 17 2011

SC Court of Appeals

ATTENTION VANESSA

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870), 2009-GS-42-06453 (M-087869)

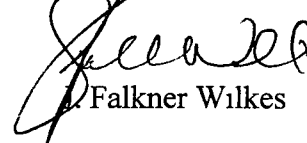
Dear Ms Green,

I represented Mr Derrick Cheeks at trial in the above cases I am enclosing the sentencing sheets for his convictions I have asked my client to fill out and return the affidavit of indigent status so that the Office of Appellate Defense can pick up his case He has not filled out and returned the form as requested, placing me in a bit of a bind

Fortunately, his family indicated that should be able to provide funds to purchase the transcript in this case I have explained that it would be very expensive but I did not know exactly how much it would be Please call me right away and let me know how much you estimate the transcript to be in this case so that I can notify the family and obtain the funds immediately There is a critical deadline running and time is of the essence

Please call me on the cell phone as soon as you have an estimate of the cost (864) 421-4618

Sincerely,



J. Falkner Wilkes

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Robert M Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIR ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29701
TELEPHONE (803) 734 1890
FAX (803) 734 1839
WWW SCCOURTS.ORG

January 19, 2011

J Falkner Wilkes, Esquire
638 East Washington Street
Greenville, SC 29601

Re The State v Cheeks, Derrick
2011183009

Dear Mr Wilkes

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/dw

cc Chief Appellant Defender Robert M Dudek
Assistant Attorney General Salley W Elliott
James Edward Hunter, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

January 19, 2011

J. Falkner Wilkes, Esquire
638 East Washington Street
Greenville, SC 29601

Re The State v. Cheeks, Derrick

Dear Mr. Wilkes:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Please be advised that pursuant to Rule 602, SCACR and the order to the Chief Justice dated December 12, 1997, if you expect the Office of Indigent Defense to pursue this appeal, you must provide that office with all information required to proceed with this appeal, failing which, this office will consider you counsel of record.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within thirty (30) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,

V. Clause Allen, Deputy
Tanya A Gee
CLERK

TAG/dw

cc Chief Appellant Defender Robert M Dudek
Assistant Attorney General Salley W Elliott
James Edward Hunter, Esquire

2011183809

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

January 5, 2011

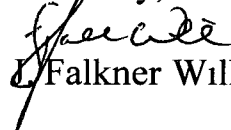
Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
via facsimile also to (803) 734-1839

Re State v Derrick Lamar Cheeks, 2009-GS-42-06452 (M-087870),
2009-GS-42-06453 (M-087869)

Dear Ms Gee,

I am enclosing an Amended Notice of Appeal I had only placed the warrant numbers on the Notice of Appeal and not the indictment numbers I have replaced the warrant numbers with the corresponding indictment numbers Also, I have reviewed the Clerk's records and one of the charges shows as having been nolle prossed so I have removed that charge from the Amended Notice of Appeal The Amended Notice is intended to include all charges for which the Appellant was convicted and sentenced If the Clerk's records reflect the correct indictment numbers, then the Amended Notice should be correct as to its information

Sincerely,


J. Falkner Wilkes

c

James Edward Hunter, Asst Solicitor
SEVENTH CIRCUIT SOLICITOR'S OFFICE
180 Magnolia Street
Spartanburg, SC 29306

M Hope Blackley
CLERK OF COURT
PO Box 3483
Spartanburg, SC 29304-3483

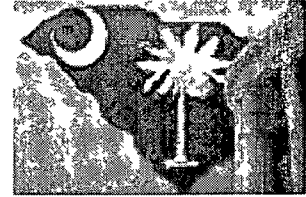
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JAN 07 2011
SC Court of Appeals

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Robert M Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201



Spartanburg County Seventh Judicial Circuit Public Index



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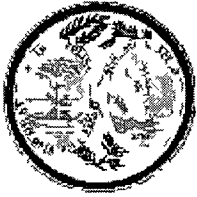
The State of South Carolina VS Derrick Lamar Cheeks

| | | |
|------------------------------------|--|--|
| Case Number M087870 | Court Agency General Sessions | Filed Date 06/09/2009 |
| Case Type Criminal Clerk | Case Sub Type 180 Day Track | |
| Status Appeal | Assigned Judge Smith, Dwight | Disposition Judge Couch Roger L |
| Disposition Trial Guilty | | |
| Disposition Date 10/07/2010 | Date Received 06/09/2009 | Arrest Date 06/04/2009 |
| Law Enf Case 34 09 4029 | True Bill Date 11/24/2009 | No Bill Date |
| Prosecutor Case | Indictment Number 2009GS4206452 | Waiver Date |
| Probation Case | | |

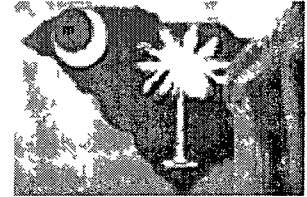
[Parties](#) | [Charges](#) | **[Sentencing](#)** | [Associated Cases](#)

Sentencing

| And/Or | Description | Amount Units | Begin Date | End Date | Completion Date | Consecutive or Concurrent |
|--------|---|--------------|------------|----------|-----------------|---------------------------|
| | 10 YEARS AND \$100 000 FINE CONC/ CFTS 298 DAYS | | | | | |
| | Drivers License Suspension | | 10/07/2010 | | | |



Spartanburg County Seventh Judicial Circuit Public Index



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The State of South Carolina VS Derrick Lamar Cheeks

| | | |
|------------------------------------|--|---|
| Case Number M087869 | Court Agency General Sessions | Filed Date 06/09/2009 |
| Case Type Criminal Clerk | Case Sub Type 180 Day Track | |
| Status Appeal | Assigned Judge Smith Dwight | Disposition Judge Couch, Roger L |
| Disposition Trial Guilty | | |
| Disposition Date 10/07/2010 | Date Received 06/09/2009 | Arrest Date 06/04/2009 |
| Law Enf Case 34 09 4029 | True Bill Date 11/24/2009 | No Bill Date |
| Prosecutor Case | Indictment Number 2009GS4206453 | Waiver Date |
| Probation Case | | |

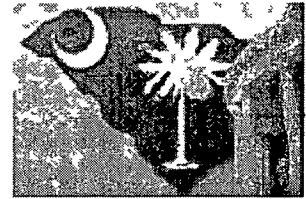
[Parties](#) |
 [Charges](#) |
 [Sentencing](#) |
 [Associated Cases](#)

Charges

| Name | Charge Code | Charge Description | Original Charge Code | Original Charge | Disposition Date |
|----------------------|-------------|---|----------------------|---|------------------|
| Cheeks Derrick Lamar | 0370 | Drugs / Trafficking in ice crack or crack 400 g or more (Felony 25Y to 30Y) | | Drugs / Trafficking in ice crack or crack - 400 g or more (Felony 25Y to 30Y) | 10/07/2010 |



Spartanburg County Seventh Judicial Circuit Public Index



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The State of South Carolina VS Derrick Lamar Cheeks

| | | |
|--|--|---|
| Case Number M111926 | Court Agency General Sessions | Filed Date 06/09/2009 |
| Case Type Criminal Clerk | Case Sub Type 180 Day Track | |
| Status Disposed | Assigned Judge Turner David James | Disposition Judge Solicitor / Master In Equity G S And C P |
| Disposition Nolle Prosequi Indicted | | |
| Disposition Date 10/07/2010 | Date Received 06/09/2009 | Arrest Date 06/04/2009 |
| Law Enf Case | True Bill Date 11/24/2009 | No Bill Date |
| Prosecutor Case | Indictment Number 2009GS4206454 | Waiver Date |
| Probation Case | | |

[Parties](#) | [Charges](#) | [Sentencing](#) | [Associated Cases](#)

Charges

| Name | Charge Code | Charge Description | Original Charge Code | Original Charge | Disposition Date |
|----------------------|-------------|---|---|-----------------|------------------|
| Cheeks Derrick Lamar | 3014 | Drugs / Manufacture distribution etc of methamphetamine cocaine base, 1st | -Drugs / Manufacture distribution etc of methamphetamine cocaine base 1st | | 10/07/2010 |



The State of South Carolina
In the Court of Appeals

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JAN 07 2011
SC Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L. Couch, Circuit Court Judge

Case No M-111926, M-087870, M-087869

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 5TH day of January, 2011, addressed as follows

James Edward Hunter, Asst Solicitor
SEVENTH CIRCUIT SOLICITOR'S OFFICE
180 Magnolia Street
Spartanburg, SC 29306

M Hope Blackley
CLERK OF COURT
PO Box 3483
Spartanburg, SC 29304-3483

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Robert M Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

Respectfully submitted,



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

Counsel for Respondent

January 5, 2011

pos 12 29 10
pm 12 29 10

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SC Court of Appeals

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 M-111926, M-087870, M-087869

State of South Carolina,
Derrick Lamar Cheeks,

v


Respondent,
Appellant

NOTICE OF APPEAL

Appellant appeals from the conviction and sentence in the above case Sentence was imposed on the 6th day of October, 2010 by the Honorable Roger L Couch, Judge A timely Motion for New Trial pursuant to Rule 29 was filed on the 12th day of October, 2010

On December 21, 2010, Appellant's counsel received an email indicating that an Order denying the Appellant's post trial motion had been signed

Respectfully submitted,


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

Counsel for Respondent

Other counsel of record

James Edward Hunter, Asst Solicitor
SEVENTH CIRCUIT SOLICITOR'S OFFICE
180 Magnolia Street
Spartanburg, SC 29306

The State of South Carolina
In the Court of Appeals

RECEIVED
DEC 31 2010
SC Court of Appeals

Appeal from Spartanburg County
Court of General Sessions

Roger L. Couch, Circuit Court Judge

Case No M-111926, M-087870, M-087869

State of South Carolina,

Respondent,

v

Derrick Lamar Cheeks,

Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 29TH day of December, 2010, addressed as follows

James Edward Hunter, Asst Solicitor
SEVENTH CIRCUIT SOLICITOR'S OFFICE
180 Magnolia Street
Spartanburg, SC 29306

M Hope Blackley
CLERK OF COURT
PO Box 3483
Spartanburg, SC 29304-3483

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Robert M Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

Respectfully submitted,



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

Counsel for Respondent

December 29, 2010

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

December 29, 2010

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

via facsimile also to (803) 734-1839

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DEC 31 2010
SC Court of Appeals

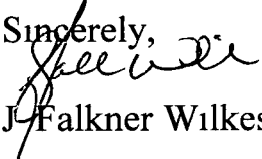
Re State v Derrick Lamar Cheeks, M-111926, M-087870, M-087869

Dear Ms Gee,

I am enclosing a Notice of Appeal on the above cases I have not received a copy of the Order denying my post trial motions however, I received an email indication that an order had been signed Therefore, I feel compelled file a Notice of Appeal at this time

My client is indigent and I am therefore copying this letter to the Office of Indigent Defense After the holidays I will be in contact with them to determine whether they will be able to handle this appeal I will not request a transcript until I have discussed the case with Appellate Defense

If you need anything else from me regarding the appeal please let me know I am presently on vacation but expect to return after the New Year

Sincerely,

J Falkner Wilkes

c
James Edward Hunter, Asst Solicitor
SEVENTH CIRCUIT SOLICITOR'S OFFICE
180 Magnolia Street
Spartanburg, SC 29306

M Hope Blackley
CLERK OF COURT
PO Box 3483
Spartanburg, SC 29304-3483

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Robert M Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

J FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville South Carolina 29601

(864) 282 1292
facsimile (864) 271 6035

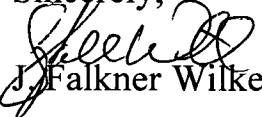
December 30, 2010

Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
via facsimile also to (803) 734-1839

Re State v Derrick Lamar Cheeks, M-111926, M-087870, M-087869

Dear Ms Gee,

I am enclosing the Order denying post trial motions in the above case A notice of appeal was mailed out on this case yesterday

Sincerely,

J. Falkner Wilkes

c
James Edward Hunter, Asst Solicitor
SEVENTH CIRCUIT SOLICITOR'S OFFICE
180 Magnolia Street
Spartanburg, SC 29306

M Hope Blackley
CLERK OF COURT
PO Box 3483
Spartanburg, SC 29304-3483

The Honorable Henry McMaster
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

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DEC 31 2010

SC Court of Appeals

Robert M Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201



State of South Carolina
The Circuit Court of the Seventh Judicial Circuit

Roger L Couch
Judge

Post Office Box 2614
Spartanburg SC 29304-2614
Phone (864) 596-2285
Fax (864) 562-4734
rcouchcl@sccourts.org

FAX COVER SHEET

To Jeff Wilkes
Company Name Law Firm
Fax Number 864-271-6035
From 864-562-4235
Date December 21, 2010

Comments

State of South Carolina v Derrick Lamar Cheeks
M-111926
M-087870
M-087869

Jeff,

Please find attached the Order Denying the Defendant's Motion for New Trial

Reed

The information contained in this facsimile message is privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you.

| | |
|----------------------------------|----------------------------------|
| IN THE STATE OF SOUTH CAROLINA) | IN THE COURT OF GENERAL SESSIONS |
|) | SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG) | |
|) | ORDER DENYING MOTION FOR |
| STATE OF SOUTH CAROLINA) | NEW TRIAL |
|) | |
| VS) | M-111926 |
|) | M-087870 |
| DERRICK LAMAR CHEEKS) | M-087869 |
|) | |
| DEFENDANT) | |
| _____) | |

WHEREAS, the Court has reviewed the Defendant's Motion for New Trial in this case and this Court hereby **DENIES** the Defendant's motion

In pretrial motions certain evidence obtained during the search of the premises in question revealed incriminating evidence against the Defendant, Mr Cheeks His attorney sought to suppress that evidence but the evidence was deemed admissible for trial Defense counsel seeks a new trial claiming the admissibility of such evidence was incorrect This Court reaffirms its ruling at trial based on the following reasons

I Did the Defendant, Derrick L Cheeks, have a reasonable expectation of privacy in the premises searched?

A person seeking to have evidence suppressed on Fourth Amendment grounds must establish that his own rights have been violated State v Crane, 296 S C 336, 372 S E 2d 587 (1988) Fourth Amendment rights are personal rights which cannot be asserted vicariously Thus a defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search Id The burden of establishing a legitimate



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 CLERK OF COURT
 SPARTANBURG COUNTY

expectation of privacy is on the person challenging the search Rawlings v Kentucky 448 U S 98, 100 S Ct 2556, 65 L Ed 2d 633 (1980) An overnight guest has sufficient expectation of privacy in premises to assert Fourth Amendment standing Minnesota v Olsen, 495 U S 91 110 S Ct 1684, 109 L Ed 2d 85 (1990) However, a person who is merely present with the consent of the owner may not Minnesota v Carter, 525 U S 83 119 S Ct 469, 142 L Ed 2d 373 (1998) See State v Missouri, 361 S C 107, 603 S E 2d 594 (2004) (the defendant had a reasonable expectation of privacy where the owners of the home chose to share the privacy of their home with the defendant on several occasions in the past and on the occasion in question), Kulle v State, 386 S C 578, 690 S E 2d 73 (2010) (where the person who leased the apartment befriended the defendant and permitted him to stay for an extended period of time at the residence, the defendant had a reasonable expectation of privacy in the apartment and, therefore, had standing to challenge the search) A guest in an apartment has no legitimate expectation of privacy where the relationship between the guest and the tenant is a business one U.S. v Gray, 491 F 3d 138 (4th Cir 2007) cert denied 552 U S 1190 128 S Ct 1226, 170 L Ed 2d 77 (2008)

As to the facts of this case, Cheeks had access to the residence searched due to his relations with a resident of the house, Tracey Markley However, at the time of the search, the home was owned by the parents of Tracey Markley, and Cheeks was only a visitor to the residence At trial, testimony was presented that Cheeks possessed a key to the house in question and may have actually used this key to enter the residence on the day of the search Additionally the testimony states that Cheeks was seen at the house on 50 different occasions, but there was no indication of the length of time between each of these visits Moreover no evidence offered that these visits occurred over one month one year or five years Furthermore

Handwritten signature/initials

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 COURT REPORTERS
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 M HOPE BLACKLEY

additional evidence set forth that Cheeks stayed overnight on occasions, helped clean the home, played XBOX and watched television left several work t-shirts at the home brought food to the home and associated with the resident, Tracey Markley, in a social and business setting

On the morning of the search, Cheeks was picked up from a hotel and carried to the residence in question. He was not an overnight guest on the day in question. Founded on this fact this Court finds most credible the evidence displaying that Cheeks lived at a motel. Based on the testimony and the reasonable inferences that can be drawn from it, this Court finds Cheeks intentionally set-up the arrangement with the occupant of the searched residence in order that he would have no legitimate connection with the crack-house at times when he was not present. Likewise, the fact that Cheeks' work shirts were located at the residence in question but no other types of clothing persuades this Court that he did not fully reside there and had no legitimate expectation of privacy in the house. A person expecting privacy in a location would have an entire wardrobe or work outfit located at the home, however, in this case Cheeks had merely a few shirts and no additional pieces of clothing. Therefore, this evidence helps the Court conclude that Cheeks had no reasonable expectation of privacy in the location searched.

Additionally, although Cheeks presented evidence demonstrating a social relationship with the residence searched additional testimony indicated that Cheeks' relationship with the residence was strictly business in nature. The following questioning between Solicitor Hunter and Mr. Markley (resident of the house) elicits testimony of a business relationship.

Mr. Hunter: Okay. Does Mr. Cheeks Derrick Cheeks have a key to your house?

Mr. Markley: At one point he did, but that particular day I don't know if he did or not.

Mr. Hunter: Okay. Why did Mr. Cheeks have a key to your house?

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CLERK OF COURT
SPARTANBURGH COUNTY
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M HOPE BLACKLEY

Mr Markley It was - I guess you could say I was a heavy sleeper and cause I did so many drugs When I finally go to sleep, I was real hard to wake up So, it was, I guess, so he could come in and wake me up because I was pretty much like a chauffeur to him I drove him everywhere

In addition to the statement that Markley acted as Cheeks' chauffeur, Markley testified that he allowed Cheeks to use his house to cook crack as a method of repayment

Mr Hunter Okay did you have an arrangement with Mr Cheeks regarding your house?

Mr Markley No, not really It was -- it just happened because the one the one car that we had loaned to his, one of his lady friend had, had some damage done to it and I'm a mechanic by trade So, I started working on it But the process I wasn't thinking, I was rushing, and I basically made it so instead the car, it costing say a thousand dollars to fix, it ended up costing him \$5,000, because I was rushing it and didn't do a proper job So because of that I owed him quite a bit of money

Mr Hunter And how did you repay that?

Mr Markley By letting him cook (crack) at my house

Furthermore, Markley also testified that Cheeks would pay him with crack for services rendered

This Court finds the above mentioned facts most credible in holding that Cheeks used Markley and his home for business purposes Markley drove Cheeks in exchange for crack and allowed Cheeks to use his home as repayment of a debt owed and in exchange for additional crack U.S. v. Gray held that a guest had no expectation of privacy when his relations with the

M HOPE BLACKLEY
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SPRINGFIELD COURT
CLERK

tenant were business in nature, and, here Cheeks and Markley's relationship was business in nature 491 F 3d 138 (4th Cir 2007) cert denied, 552 U S 1190, 128 S Ct 1226, 170 L Ed 2d 77 (2008) Therefore, Mr Cheeks had no reasonable expectation of privacy in the premises searched and the evidence was properly admitted at trial

Even if the Defendant had proper standing, the evidence was still properly admitted and this Court's ruling at trial is hereby reaffirmed based on the following analysis

II Was the description of the premises included in the attached affidavit sufficient to meet the search warrant particularity requirement required by the Constitution?

The place to be searched and the things to be seized must be stated with particularity in the warrant U S Const amend IV, S C Const art I, §10, S C Code Ann § 17-13-140 The warrant and affidavit may be read together to determine if the place to be searched and the things to be seized are set forth with sufficient particularity State v. Williams, 297 S C 404, 377 S E 2d 308 (1989) (things to be seized) State v. Crane 296 S C 336, 372 S F 2d 587 (1988) (place to be searched) Additionally, " it is sufficient either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself U S v. Hurwitz 459 F 3d 463 471 (4th Cir 2006)

Here the search warrant and the affidavit were attached to each other The search warrant, under ' description of premises to be searched' portion did not describe the premises searched However the affidavit attached to the search warrant did describe the premises searched with particularity Furthermore, the warrant referred directly to the "attached affidavit" for support Therefore, this Court reaffirms its ruling that an affidavit may incorporate by reference the location of the premises searched where none is contained in the search warrant to satisfy S C Code Sections 17-13-140 and 17-13-160 This Court relies on the language from

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M HOPE BARNETT
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SOUTH CAROLINA

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P 5

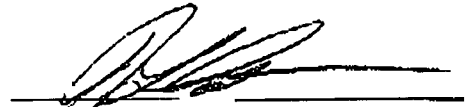


State v Williams, which holds the warrant and affidavit may be read together in order to meet the particularity requirement Williams, 297 S C 404. Additionally, this Court relies on the language from Hurwitz, a Fourth Circuit case, which holds that the particularity requirement is met when the affidavit is incorporated by reference or when the supporting affidavit is attached to the warrant Hurwitz, 459 F 3d 463. In this case, it was evident that at the least, the affidavit with the description of the premises was attached to the search warrant, therefore, the search warrant was valid and the evidence was properly admitted at trial.

For the previous mentioned reasons the Court DENIES the Defendant's Motion for New Trial.

IT IS SO ORDERED

December 21 2010



Judge Roger L. Couch
Seventh Judicial Circuit

M HOPE BLACKLEY
2010 DEC 21 PM 4 03
SPARTANBURG COUNTY
CLERK OF COURT
FILED

