

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

James R. Barber, III, Circuit Court Judge

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SC SUPREME COURT

DERRICK LAMAR CHEEKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002310

A P P E N D I X

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

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

ALICIA OLIVE
Assistant Attorney General
Attorney Generals Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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Derrick Cheeks - Direct examination
by Mr. Brough

1 you wound please, sir.

2 (Applicant complies.)

3 DERRICK CHEEKS, being first duly
4 sworn, testified as follows:

5 THE COURT: All right. If you'll have a seat and tell
6 us your full name please.

7 THE WITNESS: Derrick Lamar Cheeks.

8 DIRECT EXAMINATION

9 BY MR. BROUGH:

10 Q Mr. Cheeks, you've filed an application asking the
11 Court to grant you relief of a new trial.

12 Is that correct, sir?

13 A Yes, sir.

14 Q Okay. And, if you could, sir, tell me who was your
15 trial counsel.

16 A Jeffery Wilkes.

17 Q Okay. And was he also your appellate counsel, sir?

18 A Yes, sir.

19 Q Okay. Now, you've filed an extensive amended
20 application alleging, among other things, that your lawyer
21 was ineffective for consenting to allow your case to be
22 tried with your codefendant, Ricky Cheeks.

23 A Yes, sir.

24 Q That your lawyer was ineffective for failing to move to
25 sever your case from Ricky Dwight Cheeks.

Derrick Cheeks - Direct examination
by Mr. Brough

1 A Yes, sir.

2 Q That your lawyer was ineffective for failing to make a
3 pretrial Franks suppression motion based on in order to
4 suppress the drugs based on a search warrant of June 4th,
5 2009.

6 A Yes, sir.

7 Q That they were ineffective for failing to make a motion
8 in limine to exclude any character and prior bad act
9 evidence before trial --

10 A Yes, sir.

11 Q -- which ultimately resulted in testimony being
12 admitted of your prior drug dealings before the offense
13 dates.

14 A Yes, sir.

15 Q And that your lawyer was ineffective for failing to
16 object to testimony from two witnesses, an Eric Elder and a
17 Tracy Markley, that discussed their prior drug relationship
18 with you and that they failed to move for a mistrial based
19 on prosecutorial misconduct for admitted that evidence.

20 Is that correct?

21 A Yes, sir.

22 (WHEREUPON, a consent order was marked as Applicant's
23 Exhibit No. 1 for identification purposes only at this
24 time.)

25 Q All right. I want to go through with you -- first of

Derrick Cheeks - Direct examination
by Mr. Brough

1 all, I show you what's been premarked for ID as Applicant's
2 Exhibit 1, sir.

3 Okay. Do you recognize that document?

4 A Yes, sir. Yes, sir.

5 Q And is that a consent order allowing your case to be
6 consolidated with that of your codefendant, Ricky Cheeks?

7 A Yes, sir.

8 Q Okay. And did your lawyer sign that document?

9 A Yes, sir.

10 MR. BROUGH: Okay. At this time I'd like to move
11 Applicant's 1 into the record.

12 MR. HUNTER: No objections.

13 THE COURT: Entered into evidence.

14 (WHEREUPON, Applicant's Exhibit No. 1 was received into
15 evidence at this time.)

16 Q Mr. Cheeks, I'm gonna ask that you tell the Court a
17 little bit about -- I'm sure the judge read the transcript.

18 But there was actually, on the same day there was a
19 transaction where Ricky Cheeks, who was your uncle, was
20 caught in a vehicle with drugs, correct?

21 A Yes, sir.

22 Q Okay. And then there -- based upon them finding that
23 and a number of other things, there's also a search warrant
24 issued after they had gone with the car to buy baking soda
25 indicating that you were supposedly manufacturing crack

Derrick Cheeks - Direct examination
by Mr. Brough

1 cocaine, correct?

2 A Yes, sir.

3 Q And you were charged in the manufacture, correct?

4 A Yes, sir.

5 Q But you weren't charged for the drugs that were found

6 in the car?

7 A Exactly.

8 Q Okay. Now, the drugs in the car that you were not

9 charged with, there was no indictment or warrant for your
10 arrest for that?

11 A Nothing.

12 Q Correct?

13 A Nothing.

14 Q But your lawyer allowed evidence to come in that talked

15 about potentially you giving drugs in the car to those
16 individuals?

17 A Exactly.

18 Q Okay. Is that, is that fair to say?

19 A Yeah.

20 Q Okay. Now, going through trial, because you went to,

21 you went to trial in this case?

22 You didn't accept the plea?

23 A No, sir.

24 Q Is that correct?

25 A Yeah, I went to trial.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Q Okay. And when you went to trial, did you think that
2 it hurt your case to have evidence being linked with you
3 about drugs in a vehicle that you weren't even charged with?

4 A Of course it did.

5 Q Okay.

6 A As a matter of fact, I got the ruling from my case from
7 the Supreme Court.

8 Can I admit that as an exhibit while you're doing this,
9 while you're talking about it?

10 THE COURT: I couldn't understand what you said.

11 THE WITNESS: I have, I have the ruling that the
12 Supreme Court made on my case. It was, it was pertaining to
13 the jury charge. I, I was successful on the jury charge.
14 But the State showed that I cooked these 400 grams from this
15 evidence that was admitted.

16 Had my lawyer objected to that evidence, I have -- I
17 wouldn't -- probably wouldn't be sitting here in front of
18 you right now. I have that -- I have the ruling from my
19 case.

20 Q Okay. And I'll give you an opportunity to put anything
21 that you want to in at the end.

22 Okay?

23 A Oh okay.

24 Q Does that sound fair?

25 A Yeah.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Q All right. Now, when your trial started, did you and
2 your lawyer discuss any pretrial issues you were gonna have
3 decided?

4 A Pertaining to the search warrant.

5 Q Okay. Well---

6 A As far as the --.

7 Q Did you have a discussion about the types of motions
8 you were gonna make before the jury was hearing evidence?

9 A Yeah, on the -- only pertaining to that search warrant
10 as far as the description of the premises. That's it.

11 Q Okay. And it was just on the description of the
12 premises?

13 A That's it.

14 Q Okay.

15 A That was all that was presented.

16 Q Okay. Now, did your lawyer ever make a motion to have
17 your trial severed from that of your codefendant?

18 A I think Mr. Poole made a motion and he joined in the
19 motion.

20 Q Okay. But your lawyer never successfully pursued that
21 issue and never really expressed why from your prospective?

22 A Exactly.

23 Q Because -- would it be fair to say that your lawyer
24 ever informed the Court that you weren't charged with the
25 drugs in the car?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A No, sir, he didn't.

2 Q Okay. And, and did the State's attorney indicate that
3 the event arose out of the same series of transactions?

4 A Exactly.

5 Q Okay.

6 A Three days, no objections. That's all the jury heard.

7 Q Did you discuss any potential prior bad act evidence?

8 A No, sir.

9 Q Were you concerned about prior bad act evidence?

10 A Of course.

11 Q Well, do you know what I mean when I say prior bad act
12 evidence?

13 A Of course I do.

14 (WHEREUPON, a search warrant was marked as Applicant's
15 Exhibit No. 2 for identification purposes only at this
16 time.)

17 Q Okay. I'm gonna show you this. This is Applicant's
18 Exhibit No. 2.

19 Do you recognize that document?

20 A Yes, sir.

21 Q What is it?

22 A A copy of the search warrant that was left at the
23 premises.

24 Q Is that the search warrant that was -- you'd received a
25 copy of in discovery?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A Yes, sir.

2 Q Okay. And that's the search warrant that ultimately
3 allowed investigators to go to a residence --

4 A Yes, sir.

5 Q -- where you were at, correct?

6 A Yes, sir.

7 MR. BROUGH: Okay. I'll have that moved into the
8 record, Applicant's 2.

9 MR. HUNTER: No objection.

10 THE COURT: So admitted.

11 (WHEREUPON, Applicant's Exhibit No. 2 was received into
12 evidence at this time.)

13 Q Okay. Now, in going through the affidavit on the
14 search warrant, does it make reference to numerous other
15 events going back into I believe February of that year even
16 about surveillance that was conducted on you and things of
17 that nature?

18 A It says in February they received information.

19 Q Right.

20 A But it don't say, say nothing about surveillance of
21 me---

22 Q Okay.

23 A ---personally.

24 Q But they received information.

25 So you, your lawyer had that document, correct?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A Exactly.

2 Q Okay. Did he ever -- and you and he ever discuss any
3 concerns that some of that evidence about other prior bad
4 dealings may come out in the trial?

5 A No, sir.

6 Q Okay. Did he ever make a motion to prevent that from
7 happening or have the judge order pretrial the State not be
8 allowed to get into that evidence?

9 A No, sir.

10 Q And ultimately, in your case, would it be fair to say
11 that there was actually evidence admitted as to your prior
12 drug dealings that were not related to the events on the
13 indictment?

14 A That's true.

15 Q Okay. And in, in saying that, I want to direct your
16 attention in the transcript if I can, sir, and, and
17 specifically the evidence I'm talking about that came
18 through two different witnesses, an Eric Elder and Tracy
19 Markley.

20 Is that correct?

21 A Yes, sir.

22 Q Do you have a copy of the transcript up there?

23 A (Witness nods affirmatively.)

24 Q You do?

25 A Yes, sir.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Q Okay. I'm gonna direct your attention, if I can, sir,
2 to that of Mr. Elder's testimony, and if you could look
3 there for me on Page 256 of the trial transcript.

4 A 256?

5 Q Yes, sir.

6 During Eric Elder's testimony beginning on Line 15, and
7 if you could read that for the Court ending on Page 259 Line
8 25.

9 A Yeah.

10 Q If you could read that out loud.

11 A On 256 -- I'm on 256 now.

12 Q Line 15, if you would---

13 A I can barely move though.

14 Q You can barely read?

15 A I can barely move.

16 Q Oh, let's see if we can -- here. Let me help you.
17 Is that better?

18 A Yeah.

19 Q Okay. Starting on Line 15 on Page 256, if you can read
20 the questions and the answers---

21 A Yes, sir.

22 Q ---and this is the direct examination of the State's
23 lawyer, correct?

24 A Yes, sir.

25 Q Okay.

Derrick Cheeks - Direct examination
by Mr. Brough

1 A You want me to read it?

2 Q Yes, sir.

3 A Have you ever been present during the manufacturing or
4 cooking of crack cocaine?

5 Yes, sir.

6 Have you yourself ever cooked crack cocaine?

7 I bought a little bit before and cooked it in a
8 spoonful myself, yeah.

9 Okay. But when you say a little bit, how much is a
10 little bit?

11 A gram or two.

12 Have you ever been present and cooked over 600 grams of
13 crack cocaine?

14 Keep on?

15 Q Yes, sir.

16 A No, sir.

17 Okay. Now, were you at the house?

18 what did you say Mr. Cheeks was doing at this point
19 when you came -- come back to the house with the baking
20 soda, what's occurring?

21 You said Mr. Cheeks. Mr. Ricky or Derrick Cheeks?

22 Okay. I start with Derrick Cheeks.

23 Okay. He was in the kitchen going down doing up the
24 crack, cooking crack.

25 Okay. Why were you driving Mr. Derrick Cheeks and

Derrick Cheeks - Direct examination
by Mr. Brough

1 Mr. Ricky Cheeks?

2 Cause a lot of times I get free dope, free crack.

3 Q And---

4 A What was your understanding that day?

5 Mostly every day.

6 Q Now -- so they're, they're talking everyday that you
7 were giving this witness free crack cocaine for driving him,
8 correct?

9 A Exactly.

10 Q And did your lawyer ever object to this testimony?

11 A Not one time.

12 Q Did he ever move for a mistrial?

13 A Not one time.

14 Q If you would keep going, sir.

15 Were you---

16 A Huh?

17 Q where, where you left off on Page 257.

18 A Every day.

19 Q Okay.

20 A Yeah.

21 And now do you stay at the house the entire time?

22 Not always.

23 And on June the 4th?

24 Yeah, I say until I usually sit out of the way until
25 everything was done.

Derrick Cheeks - Direct examination
by Mr. Brough

1 But you're there and present while he's cooking it?

2 Yes, sir.

3 who else is present while he's cooking it?

4 Keep on?

5 Q Yes, sir.

6 A Tracy was up and his uncle, Ricky Cheeks, were -- we
7 were all in the same room.

8 Is there anyway for anyone to know what's in that room
9 that crack was not being cooked?

10 No, sir.

11 Did you leave the residence?

12 Yes, sir.

13 who did you leave with?

14 Ricky Cheeks.

15 And what were y'all going to do?

16 Derrick had told him that he needs to go somewhere to
17 get rid of something.

18 Okay. And did you---

19 Q Now, I'm gonna stop you right there on Page 258 Line 12
20 where it says Derrick had told him that he needed to go
21 somewhere to get rid of something.

22 That testimony, that's the evidence right before your
23 Uncle Ricky and Eric leave in the car that gets pulled over?

24 A Exactly.

25 Q Correct?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A Exactly.

2 Q That you're not charged in that incident?

3 A Exactly.

4 Q But they're referencing you as being the person telling
5 them to get rid of something?

6 A They're my -- exactly.

7 Q Yes, sir.

8 Okay. If you could continue where you left off, Page
9 258?

10 A Derrick had told him that he needed to go somewhere to
11 get rid of something.

12 Okay. And you were -- I couldn't hear you.
13 What did you say?

14 Ricky -- Derrick told his uncle that he needed to get
15 rid of something. Somebody was calling. So he needed to
16 get rid of something.

17 And where did you go from there?

18 Went out the driveway up the street probably about two
19 and a half, three miles, three miles from where, where we
20 were at in the opposite direction.

21 Okay. Were you pulled over?

22 Yes, sir.

23 Why were you pulled over?

24 The officers had said that I didn't fully stop at a
25 stop sign and then I proceeded without fully stopping making

Derrick Cheeks - Direct examination
by Mr. Brough

1 a clean stop.

2 And did you do that?

3 No, sir, it was raining and I came halfway to a stop
4 and then kept going.

5 So halfway, you didn't stop fully?

6 No, I didn't.

7 Q Okay.

8 A Keep reading?

9 Q So -- no, that's fine.

10 So that's talking about the fact that Eric was pulled
11 over in the vehicle?

12 A Yes, sir.

13 Q And they found crack cocaine in that vehicle, correct?

14 A Yeah, supposedly, a hundred grams, yeah.

15 Q Okay. Now, at any point in time did your lawyer do
16 anything to stop any of this testimony?

17 A Not one objection.

18 Q Do you feel as if this was incredibly inappropriate
19 testimony?

20 A Of course. That's, that's exactly why I was saying I
21 wanted my -- the ruling from the Supreme Court that you said
22 I could do later because this is the same evidence that they
23 used to show that I possessed the 400 grams of crack
24 cocaine.

25 Q Yes, sir.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Cause they were adding the amounts together, correct?

2 Is that what you're saying?

3 A (Witness nods affirmatively.)

4 No, no, no. They took the hundred grams and was saying
5 that I present that -- they took the hundred grams and I
6 guess they saying when I cooked it and give it to my
7 uncle---

8 Q Uh-huh. (Affirmative).

9 A ---they showed that. They used that to show that I
10 possessed the 400 grams in the house.

11 Q Yes, sir, we're saying the same thing. Just a
12 different way.

13 A From the uncharged offense, yeah.

14 Q Okay. Now, in terms of Tracy Markley, that was another
15 witness that was called to testify against you?

16 A Yeah.

17 Q And Tracy Markley, the, the house the search warrant
18 was executed on, whose house was it?

19 A His house.

20 Q So it was Tracy's house?

21 A Yes, sir.

22 Q All right. If I could, I want to direct your
23 attention, I'm probably gonna help you a little bit, Page
24 300 of the record, sir, from the trial transcript, beginning
25 on Line 23.

Derrick Cheeks - Direct examination
by Mr. Brough

1 All right. Beginning on Line 23, if you would read
2 that for me, sir?

3 A 23?

4 Q Yes, sir.

5 A And how did you meet Derrick Cheeks?

6 It was a long process. We knew each other at work. We
7 were -- we weren't friends. We didn't hang out. It was
8 probably a six month period before me and him actually
9 started hanging out and that was because of my friend, James
10 Cranfield. He was -- and he was going to Derrick to buy
11 crack, and, like I said, he got me started smoking and he
12 would go to his, you know, where he lived at the time to buy
13 some. But that, you know, I didn't, I didn't even go inside
14 and buy or anything cause, at that time, I still did not
15 know.

16 When did you first meet Ricky Cheeks?

17 I guess it was probably six months or a year later or
18 something like that when he had moved to another location.
19 I had, I had met him, but he was like, he was like me. He
20 was an, was an addict also.

21 Okay. And do you have an arrangement, arrangement with
22 Mr. Cheeks regarding your house?

23 No, not really. It was -- it just happened because of
24 the one car. The one car that we had loaned to his, one of
25 his lady friends had some damage done to it and I'm a

Derrick Cheeks - Direct examination
by Mr. Brough

1 mechanic by trade. So I started working on it. But in the
2 process, I wasn't thinking. I was rushing it and I
3 basically made it so, instead of the car costing say a
4 thousand dollars to fix, it ended up costing 5,000 because I
5 was rushing it and didn't do a proper job. So because of
6 that I owe him quite a bit of money.

7 And how did you repay that?

8 By letting him cook in my house.

9 Q Okay. So there's an entire dialogue about the fact
10 that, even though it's Tracy's house, that essentially he's
11 buying crack from you, getting crack from you, that he
12 somehow owes y'all money and he's gonna let you cook crack
13 at his house?

14 A Exactly.

15 Q Now---

16 A From messing up a car that's in his name.

17 Q Was, was there any objection by your lawyer during any
18 of this testimony?

19 A Not one.

20 Q Despite the fact that it has you basically being a drug
21 dealer for a substantial period of time?

22 A Not one objection.

23 Q Okay. No motions for mistrial?

24 A Not one.

25 Q Do you feel that that evidence hurt your case?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A Yes, it was highly prejudicial because it allowed the
2 jury -- it invited the jury to criminal disposition of that
3 the -- they based they ruling based on -- make a ruling
4 based on the motions rather than the evidence. The evidence
5 is that he's saying the car is in his name but it's my
6 car---

7 Q well---

8 A ---and he had -- he tore up a car in his name but he
9 had to repay me back.

10 Q And, and he saying that he's allowed you to cook crack
11 at his house?

12 A Yes, sir, from this car. Yeah, cause he tore up a car.

13 Q When, when the police executed the search warrant, was
14 Tracy Markley in the house?

15 A Yes, he was.

16 Q He was sitting right there?

17 A (Witness nods affirmatively.)

18 Q And somehow he's pinning it on you?

19 A Exactly. Actually it's two sitting -- actually it was
20 two scenes in there. It was one in the kitchen. It was one
21 at the table. And I do have pictures that should of been
22 produced into the record. But he was sitting at the table.
23 But the, but the jury never heard none of this evidence.
24 They only talked about the kitchen. It was two different
25 scenes. But we'll get to that when I, when I admit my

Derrick Cheeks - Direct examination
by Mr. Brough

1 pictures. But yes, it was, it was highly prejudicial.

2 Q Okay. And, and this is the, the bad act evidence that
3 you've referred to in your application---

4 A Yes.

5 Q ---your amended application, correct?

6 A Yes, sir.

7 Q Okay. Now, in talking about -- we're gonna go back, if
8 we can, to the search warrant. So I'm gonna -- I'll try to
9 help you out there. Let's see.

10 A It's right here. The search warrant is right here.

11 Q I got you.

12 All right. Now, the, the search warrant that, that was
13 admitted as Applicant's 2, I believe you stated that Mr.
14 Wilkes attempted to challenge the search warrant, correct?

15 A Yeah.

16 Q Now---

17 A As far as the description of the premises.

18 Q Okay. So it was just on the description of the
19 premises---

20 A Yes.

21 Q ---to be searched?

22 Was there ever any discussion about attempting to
23 challenge it based on the fact that it was deficient for
24 probable cause on its face?

25 A No, sir.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Q Did he ever make a motion for that?

2 A No, sir.

3 Q Okay. Now, if you can, I'm going to ask if you could
4 read the affidavit on Applicant's 2 into the record, sir.
5 The reason for the affiant's belief that the premises sought
6 to be subject premises.

7 If you could do that for me, sir?

8 A On, on or about February the 6th, 2009, the Spartanburg
9 County Sheriff's Office narcotic's unit---

10 THE COURT: Mr. Cheeks, if you'd back up a little bit
11 from the mic.

12 THE WITNESS: Okay.

13 THE COURT: You're causing it to crack.

14 A Okay. On or about February the 6th, 2009, the
15 Spartanburg County Sheriff's Office narcotic's unit and SLED
16 received information from a confidential reliable informant
17 that a subject by the name of Derrick Cheeks was traveling
18 to Anderson County area and bringing back large amounts of
19 cocaine to 152 Gordon Drive where he was converting it into
20 crack cocaine and distributing it throughout the Upstate.

21 On February the 24th, 2009, a confidential informant
22 was provided with \$220 in government funds and sent to Fatz
23 cafe in Boiling Springs, South Carolina, the place of
24 employment of Derrick Cheeks. The confidential informant
25 purchased one-fourth ounce of crack cocaine from Derrick

Derrick Cheeks - Direct examination
by Mr. Brough

1 Cheeks in the restroom of Fatz Cafe.

2 On March the 3rd the confidential informant was
3 provided with 220 in government funds and sent -- I'm,
4 I'm -- hold on.

5 On March the 3rd a confidential informant made a
6 controlled phone call to Derrick Cheeks and ordered
7 one-fourth ounce of crack cocaine. The confidential
8 informant was provided with 225 in government funds and was
9 told by Cheeks to meet him at the Advance Auto Parts Store
10 on Reidville Road. Cheeks was observed arriving to the
11 location with several other subjects in the vehicle. Upon
12 arrival, Cheeks was seen entering the vehicle, the Advance
13 Auto Parts Store. Upon Cheeks entering the store, Ricky
14 Williams, who is Cheeks's uncle, exited the vehicle and was
15 observed making the transaction in the parking lot with a
16 confidential informant as Cheeks was seen looking through
17 the window. Upon the completion of the transaction, Cheeks
18 exited the store and reentered the vehicle which left the
19 area.

20 On March 16th, 2009, the confidential informant
21 contacted Cheeks and ordered one-fourth ounce of crack
22 cocaine \$225. Cheeks told the confidential informant to
23 meet him at the BP Station on Reidville Road. At this time
24 surveillance showed that Cheeks was seen leaving 152 Gordon
25 Drive along with several other subjects. A short time later

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by Mr. Brough

1 Cheeks was seen arriving at the location where he exited the
2 vehicle and entered the gas station. Agents observed a
3 subject known as Ricky Williams exit the vehicle and meet
4 with the confidential informant as he conducted a narcotic
5 transaction. Cheeks was then seen reentering the vehicle
6 and leaving the area.

7 Since beginning this investigation, the confidential
8 informant has been debriefed on a regular basis. It has
9 been learned in the past the confidential informant has
10 accompanied Derrick Cheeks to Anderson County on multiple
11 occasions to make purchases of cocaine. The confidential
12 informant stated that all of the trips made to Anderson
13 County were made on either Thursdays or Fridays and occurred
14 every week or every other week and that Derrick Cheeks would
15 use two vehicles. One of the vehicles is utilized to carry
16 the currency to the transaction location and the cocaine
17 back to 152 Gordon Drive. The other vehicle is occupied by
18 Cheeks when he uses to follow behind the first vehicle
19 allowing him to -- I can't read -- see this other part.

20 Right here.

21 Allowing him to look, look like separate.

22 Q That's correct.

23 A Separate from the other vehicle and narcotics.

24 However, still offers him the opportunity to oversee the
25 operation. The confidential informant also told agents that

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by Mr. Brough

1 Cheeks buys old police cars and places antennas on the
2 trunks and fixes them to keep them looking as if they were
3 actual working police vehicles which Cheeks feels will
4 reduce the chances of being stopped by police.

5 On June the 2nd, 2009, Hannan was contacted by a
6 female who told them that her son was a close friend of
7 Derrick Cheeks. The female further stated that her son has
8 made several trips to Anderson County area and has picked up
9 large amounts of cocaine and returned to 152 Gordon Drive
10 and watched as Cheeks cooked the cocaine into powder --
11 cooked cocaine powder into cocaine base.

12 On June the 4th, SLED Agent Hannan received a phone
13 call from the female subject who told him that her son had
14 just got off the telephone with Derrick Cheeks who requested
15 that he come to Super 8 Motel on South Blackstock Road and
16 pick him up. The female stated that she was on her way to
17 drop off her son and would be at the motel in approximately
18 15 minutes.

19 At this time, surveillance was conducted and
20 Investigator Norris located Derrick Cheeks in a black Ford
21 Crown Victoria in the parking lot of Super 8 Motel and
22 occupied by Ricky Williams. Investigator Norris then
23 watched as Eric Elder arrived and met with Williams as well
24 as Derrick Cheeks in the parking lot. Further surveillance
25 revealed that Eric Elder, Cheeks, and Williams left the

Derrick Cheeks - Direct examination
by Mr. Brough

1 parking lot and were followed by -- followed to 152 Gordon
2 Drive.

3 Approximately 20 minutes later the black Ford Crown
4 Victoria was seen leaving from 152 Gordon Drive and followed
5 to Wal-Mart located at the Dorman Center. Upon arrival,
6 Elder was seen entering the store and watched as he selected
7 one box of Arm & Hammer baking soda. Agent then saw Elder
8 go to the register and pay cash. A copy of the receipt was
9 obtained from Wal-Mart management which confirmed the
10 purchase. Elder was then seen reentering the vehicle which
11 was followed back to 152 Gordon Drive. Based on the fact
12 that baking soda is a necessary precursor for manufacturing
13 cocaine base as well as the well listed fact, it is
14 affiant's belief that Derrick Cheeks is in the process of,
15 of manufacturing cocaine base.

16 Q Now, in, in reading that affidavit, and, and I know
17 it's a somewhat lengthy affidavit, but would it be fair to
18 say that all of the references to the confidential reliable
19 informant took place several months before this warrant was
20 signed or executed?

21 A Exactly.

22 Q Would that be a fair statement?

23 A Exactly.

24 Q The last one looking at looks like in March, correct?

25 A That's what it states, yeah.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Q And this, this affidavit was signed on June the 4th---

2 A Yes, sir.

3 Q ---of 2009?

4 The last reference to the confidential informant was
5 March of 2009.

6 Is that correct?

7 A March 16th.

8 Q Okay. And, and also in looking at this, there's
9 references on June 2nd to an, an unnamed female.

10 Is that correct?

11 A Eric Elder's mother, yeah.

12 Q An unnamed female whose son is supposedly friends with
13 you?

14 A Yeah.

15 Q But that person's not named in that affidavit, correct?

16 A No.

17 Q And, and, in fact, there's no indication that that
18 person has ever provided any sort of reliable information to
19 the past to the Sheriff's Office, correct?

20 A Correct.

21 Q And in the Sheriff's Office surveillance that they
22 conducted, there's no mention of any notice of any
23 hand-to-hand transactions, drugs, or anything of that
24 nature.

25 Is that correct?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A No, sir.

2 Q So the only information from the confidential informant
3 that they really had that they said was reliable was really
4 from about three months prior to when this search warrant
5 was executed.

6 Is that accurate?

7 A Exactly and actually I -- exactly. I'm not -- I have
8 one arrest warrant for one of them but the other two have --
9 I'm not charged with them two.

10 Q Okay. Okay.

11 A For the one at Fatz. But the ones at Advance Auto
12 Parts, I don't have an arrest warrant for them charges.

13 Q Okay. Now, did Mr. Wilkes ever try to challenge the
14 warrant based on the fact that there's no reference to any
15 reliable information of you actually dealing specifically
16 with drugs from anyone that's been deemed to be reliable
17 that's even talked about in the affidavit since March, since
18 three months prior to this?

19 A No, sir.

20 Q And are you aware, if the court would of granted such a
21 motion, that the drug evidence against you would have been
22 suppressed from the search?

23 A Yes, sir.

24 Q Okay. And, in fact, the, the search was on a house I
25 guess that was owned by Tracy Markley?

Derrick Cheeks - Direct examination
by Mr. Brough

1 A Exactly.

2 Q Who was present?

3 A (Witness nods affirmatively.)

4 Q Now, I know I've gone over a number of things.

5 Is there anything that you feel like I haven't gone
6 through that you want the Court to know about, Derrick?

7 A Oh, yeah. Of course.

8 Q Okay. Well, why don't you tell me what else that you
9 feel like the Court should know about in deciding your case?

10 A I mean you already talked about the fact that it
11 doesn't state anything about the past reliability of the
12 confidential informant. But I've already mentioned that
13 these -- the March 3rd and the March 16 by -- I'm not
14 charged with these by -- if it is -- I mean you have my Rule
15 5 just as well as he had it. I'm not charged with these. I
16 have a, I have a warrant for the, the one that happened at
17 Boiling Springs. That one got nolo prossed, got dismissed.
18 But these other two I haven't seen a warrant till this day.

19 But---

20 Q Yes, sir.

21 A ---if you notice, it doesn't say nothing about the date
22 and time when these, when these transactions -- when all
23 this suppose to -- these trips to Anderson suppose to took
24 place.

25 And when you get down to it, when you get down to it,

Derrick Cheeks - Direct examination
by Mr. Brough

1 all you got -- all you have is a baking soda buy.

2 The Supreme Court have already made a ruling on this
3 and in the -- a ruling on this in State versus Missouri.
4 They corroborated him going to Greenville County -- no, he
5 went to Atlanta to get 4 kilos of crack cocaine and he came
6 back, brung it back to Greenville County. But they had an
7 informant that he was talking to the whole time he was doing
8 all this. But when they, when they got -- when he came
9 back, he ain't have no where to cook the crack cocaine, and
10 the, and the State was saying that the fact that all -- and
11 when they left -- when they got back to the premises, they
12 went and bought five boxes of baking soda, five boxes of
13 baking soda. But the State said without the, without the
14 probable presence of the crack cocaine, baking soda buy
15 didn't mean nothing.

16 Q I understand.

17 A And the facts of my case is much stronger than his case
18 cause I wasn't corroborated. They didn't see me go to
19 Anderson and get no drugs on June the, June the 4th. They
20 didn't see me -- I left the motel. I was empty-handed. I
21 ain't had nothing in my hand. I went to this man's house---

22 Q Yes, sir.

23 A Empty-handed. So, so when we go to Court, it's a whole
24 different story. But all we have is the baking soda buy.
25 That's it.

Derrick Cheeks - Direct examination
by Mr. Brough

1 Q Well, let me ask you this, Derrick.

2 On, on the things that we've gone over, do you feel
3 like, if your lawyer has kept out the testimony from Tracy
4 Markley and Eric, which really hurt your case about all your
5 prior potential drug dealings, and had then made a proper
6 motion to have the search warrants suppressed and had they
7 made a motion to sever your case from that of your uncle's
8 case, that of Ricky's case, do you feel like the result in
9 your case would of been different?

10 A Of course. I know it would of been different based on
11 the ruling that the Supreme Court gave me.

12 Q Now, let me ask you this.

13 Your, your main defense at trial factually was you were
14 merely present there, correct?

15 A Exactly.

16 Q In other words, you weren't engaging in that activity?

17 A Exactly.

18 Q But your lawyer allowed them to admit evidence from
19 other people saying you dealt crack for years?

20 A Exactly.

21 Q Okay.

22 A And the funniest thing -- it's another thing too now.
23 This testimony only came, out of seven police officers, only
24 one, one officer testified that -- he testified that he seen
25 me run from the stove everywhere these drugs -- out of seven

Derrick Cheeks - Direct examination
by Mr. Brough

1 officers, only one officer. But if we look at the case, the
2 same time, and Mr. Poole even made a reference to it in
3 his -- in -- during his motion to sever at the beginning of
4 the case.

5 while this why -- while they was executing the search
6 warrant, they, they -- the car was pulled over at a traffic
7 stop.

8 How did he see me run if he was at the traffic stop?

9 It was his evidence that put me in place of them drugs.
10 It was his testimony that put me in the place of them drugs.

11 How did he see me running?

12 He was at the traffic stop.

13 Q Right.

14 A He wasn't even at -- how -- he couldn't be in two
15 places at one time.

16 Q I understand.

17 All right. Please answer any of the State's questions.
18 Okay.

19 CROSS-EXAMINATION

20 BY MR. HUNTER:

21 Q Good morning, Mr. Cheeks.

22 A Good morning.

23 Q Now, at the beginning of the trial your counsel joined
24 in the motion for sever the indictments, isn't that correct,
25 sever the car stopping indictments from the houses

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 indictments?

2 A Exactly.

3 Q You said -- okay.

4 A He said they was remotely, but not in the sense they
5 had to be tried together.

6 Q So he attempted to get them severed.

7 Is that correct?

8 A Yes, sir.

9 Q Okay.

10 A That's --.

11 Q And he was ultimately unsuccessful on that?

12 A Yes, sir.

13 Q But he did make that motion?

14 A Yes, sir, but if you look -- hold -- but if you look at
15 Page 155, it was a, it was a motion for a mistrial. Well,
16 the judge stated I had nothing to with these hundred
17 grams -- he said the charge in no way involved me. My, my
18 argument is that he should of renewed his motion to sever at
19 that time when that judge stated I had nothing to do with
20 them charges. He should of renewed his motion right then
21 and there because it's on Page --.

22 Q 155?

23 Is that what you're saying?

24 A 156.

25 Q 156?

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 A No, let me keep turning. They objected, they objected
2 because this, this indictment wasn't read to the jury
3 during, during voir dire.

4 Q Right.

5 So they made that objection?

6 A They made that objection. But during this -- on Page
7 166, he said Mr. Poole, let me give you a moment so I can
8 confer then because I understand these charges relate
9 primarily to your client. He was talking about my uncle.
10 He say not, and not to Mr. Wilkes. He was, he was telling
11 them then that them charges didn't relate to me. So, at
12 that time, he should of made, he should of made a, a --
13 renewed his motion to sever at that time. That was my
14 argument.

15 Q I understand.

16 And are you aware that none of the crack at the car
17 counted towards the weight that you were charged with?

18 A None of it counted towards the weight that I was
19 charged with?

20 Q Right.

21 The weight you were charged with was simply what was
22 found at the house?

23 A That's true.

24 Q Right.

25 Just wanted to -- I just wanted to make sure we're on

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 the same page there.

2 A Oh, yeah, I'm on the -- yeah, as far as what I was
3 charged with. But what the jury was told was that I
4 possessed the hundred grams -- I gave my uncle the hundred
5 grams of crack cocaine. He left the house with it through
6 testimony. Had he objected to that testimony, that's my
7 argument, had he objected to that testimony I wouldn't be
8 sitting right here today cause the Supreme Court ruled in my
9 favor on the jury instructions, but they draw inferences
10 from the same, from the same evidence. I had a ruling on my
11 case right here.

12 Q Right.

13 You have the Supreme Court's opinion right there?

14 A Yes, sir, I have -- in my case.

15 Q So you see---

16 A They---

17 Q ---the last paragraph before conclusion?

18 Your Honor, this is provided in your Judge's packet.

19 THE COURT: I don't have a copy of the---

20 MR. HUNTER: You don't have a copy of the---

21 THE COURT: No.

22 MR. HUNTER: It should be with the---

23 THE COURT: I looked for it and I didn't see it.

24 MR. HUNTER: It's in the back where it says brief of
25 appellate.

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 THE COURT: Pardon me?

2 MR. HUNTER: It's in the---

3 THE COURT: I saw the brief. I didn't see a copy of
4 the decision though.

5 MR. HUNTER: It's either gonna be at the end of the
6 brief or I think we stapled all the direct appeal
7 indictments -- I mean documents together. If not, I have an
8 extra.

9 THE COURT: Okay. I'm sorry. I do see it now.

10 A Now where you at?

11 The last page?

12 Q No, the last paragraph before conclusion.

13 Do you see that where it starts with we now overrule
14 Solomon?

15 A Yeah.

16 Q Could you read the last sentence starting with further?

17 A Yeah. Further in light of the overwhelming evidence
18 against appellate, he can not demonstrate prejudice
19 warranting reversal from the -- object to strong use of
20 charge.

21 THE COURT: All right. Slow down. Slow down. The
22 court reporter has to take down what you're saying. When
23 you talk so fast, she can't---

24 THE WITNESS: Okay.

25 THE COURT: ---get it.

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 A Okay. It says further, in light of the overwhelming
2 evidence against him, evidence of appellate's guilt, he can
3 not demonstrate prejudice warranting reversal from the
4 objective strong used in charge.

5 Q Okay. So despite the fact that they did rule in your
6 favor about using strong evidence, they still found that
7 there was -- you were not prejudiced because there was
8 overwhelming guilt---

9 A Exactly.

10 Q ---overwhelming evidence of your guilt?

11 A That's exactly to my point. You went to the last page.
12 Turn to the front. Turn to the front where, where it says
13 jury instructions.

14 Q It's okay. I'll just ask the questions.

15 A Okay. No, when it says when, when---

16 THE COURT: Woa, woa, woa, Mr. Cheeks. He gets to ask
17 the questions.

18 THE WITNESS: Okay.

19 Q Okay.

20 THE WITNESS: Cause I'm --.

21 Q Now, concerning the severance motion, that wasn't made
22 just to sever you and Ricky.

23 Did you have any defense pinning, pinning Ricky saying
24 I didn't do it, it was Ricky?

25 A Did I have any defense pinning it was Ricky?

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 Q Saying -- regarding your -- what you were charged with,
2 trafficking in crack that was found inside the house --

3 A Yeah.

4 Q -- did you blame Ricky for that?

5 A Do I blame him for it?

6 Q It's yes or no.

7 A I mean no.

8 Q Okay.

9 A He wasn't in the house.

10 Q And, on his case, were you aware of any defense he had
11 where he was blaming you for the crack that was found beside
12 the car?

13 A No.

14 Q Okay. So your, your defenses didn't -- any potential
15 defenses you would of been aware of or might of been aware
16 of, those didn't clash?

17 They weren't antagonistic as we say?

18 A Nah.

19 Q Okay. I just wanted to make sure.

20 Now, with this search warrant, with these prior buys
21 that are listed on there, you said there was an arrest
22 warrant for the February 24th buy?

23 A No, there is one.

24 Q Okay.

25 A For the March 30 to March 16, I don't have an arrest

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 warrant for them.

2 Q Okay. But there is one for February 29th---

3 A Yes, that's been dismissed.

4 Q ---February 24th?

5 Okay. Are you, are you denying that all these buys
6 right here are false?

7 I mean are you, are you admitting -- are you saying
8 they're all false?

9 A March 30th -- the February 24th been dismissed. The
10 March 30th to March 16, I mean if they're not false, show
11 me.

12 Q Well, you're saying that these are false statements?

13 A Yes, sir, that's what I'm saying.

14 Q Including February 24th?

15 A That's, that charge been dismissed. I have an arrest
16 warrant for that one.

17 Q Right.

18 But you're saying this is all lies?

19 A The March 30 to March 16, yes.

20 Q But not February 24th?

21 That actually happened?

22 A Yes.

23 Q Okay. Okay. I just want to make sure.

24 A The charge been dismissed.

25 Q Okay. And you, you admit that you were at the hotel,

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 the Super 8 Motel, but you said you didn't have anything
2 with you, but you were there I believe it was June 4th?

3 A Yeah.

4 Q And that was when this female subject, that's when she
5 said that you would probably be there according to the
6 search warrant?

7 A Yeah.

8 MR. HUNTER: Okay. Beg the Court's indulgence one
9 second, Your Honor.

10 (Pause.)

11 Q Now, regarding some of these prior bad acts that were,
12 that were discussed, he says that the arrangement was, Tracy
13 I'm talking about, says the arrangement was that he owed, he
14 owed you money, had you repay that by letting him cook at my
15 house.

16 Is that incorrect?

17 A That's what he said.

18 Q Right.

19 Is that -- that's just a lie?

20 A Of course it is.

21 Q It's how the arrangement was set up?

22 A Of course. The car is in his name.

23 Why am I gonna pay -- why, why do he have to pay me for
24 tearing up a car in his name?

25 Q Okay. Did you provide Mr. Wilkes with any defenses,

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 any leads, anything to help him investigate before the
2 trial?

3 A Did I provide him with any defense?

4 Q Yes.

5 Did you help out in your trial?

6 A I mean---

7 Q Did you---

8 A I mean while -- well, of course, from the beginning of
9 this case I, I asked Mr. Wilkes to -- I asked him -- I said
10 I wanted him to investigate this traffic stop and
11 investigate this warrant. But he kept telling me I wasn't
12 in the traffic stop, I had nothing to do with the traffic
13 stop. But a consent order is decided to join these cases
14 together. That's a sign of betrayal to me.

15 Q Well, it was never alleged that you were at the traffic
16 stop.

17 Is that correct?

18 A No, it wasn't. But then it was alleged -- it was told
19 to the jury three days in a row, and during my closing
20 argument, that the drugs was mine and I wasn't charged with
21 it. That's my argument. I wasn't charged with the drugs.
22 But the jury was told the drugs was mine at the traffic stop
23 and that's the same evidence that the Supreme Court used
24 against me to show that I possessed them 400 grams. It's
25 right there in the beginning of the jury instruction.

Derrick Cheeks - Cross-examination
by Mr. Hunter

1 Q But essentially the State's evidence against you
2 concerning the trafficking was that they show up at the
3 house, based on a search warrant, they show up at the house.
4 They come in. They see you in the kitchen and run into a
5 room.

6 Isn't that what -- essentially what the State's --
7 would that be a good characterization of what the State
8 alleged happened?

9 A That's what the State alleged, yeah. But just like I
10 just told my lawyer before he sat down, this, this off --
11 just like Roger Poole said in the beginning of his
12 statement, during the time this traffic stop going on, the
13 evidence -- the search warrant was made -- executed at the
14 same time.

15 So how could he see me run?

16 He was at the traffic stop and he testified that he was
17 at the traffic stop for 20 minutes.

18 How did he see me run when the, when the search -- he
19 wasn't even at the house?

20 That testimony should of been objected to.

21 Q So you're saying the traffic stop happened exactly at
22 the same time?

23 A Right around the same, the same time.

24 MR. HUNTER: Okay. No further questions.

25 THE COURT: Anything?

Derrick Cheeks - Redirect examination
by Mr. Brough

1 MR. BROUGH: Just briefly.

2 REDIRECT EXAMINATION

3 BY MR. BROUGH:

4 Q Derrick, the testimony you're referring to, if you look
5 at that search warrant on the Applicant's 2, would it be
6 fair to say it's a no knock warrant?

7 They didn't knock first?

8 They just came in, right?

9 A (Witness nods affirmatively.)

10 Yeah.

11 Q Okay. So it's not as if the gentleman would of had
12 time to get back from Point A to Point B?

13 A Exactly.

14 Q All right. Thank you, sir.

15 A I mean when -- do I -- I do get to present my exhibits,
16 right?

17 Q You -- if you -- show me what you want to present, sir.

18 A Well, but this is what I -- this is how I just -- what
19 I was telling you to read out right here, Christopher
20 Brough, and I want to go back to Eric testimony too. I'm --
21 it's -- when you police executed a warrant at Witness
22 Markley they interrupted -- the process of cooking crack
23 cocaine---

24 THE COURT: Mr. Cheeks, again, the court reporter --
25 you're talking so fast.

Derrick Cheeks - Redirect examination
by Mr. Brough

1 THE WITNESS: Oh, okay.

2 Okay. This is what I wanted you to read out,
3 Christopher Brough. It said he'll -- he was observed
4 fleeing from the kitchen where the water was boiling used in
5 the manufacture of crack cocaine. On the kitchen counter
6 was a digital scale and---

7 THE COURT: Slow down.

8 Q Slow down.

9 A Okay. In addition, 650 grams of crack. Most of which
10 was broken up into baggies and seized from the kitchen.

11 Q Now, what you're reading from there, that's the Supreme
12 Court's decision---

13 A Exactly.

14 Q ---in your case?

15 A Exactly.

16 Q Now---

17 A Now hold up. It says -- hold on. It says moreover, on
18 the day of his arrest, appellate says---

19 THE COURT: That's not evidence.

20 A It was an error---

21 Q What I'm getting at, sir, is---

22 A ---from the house.

23 Q We're, we're here because not to talk about what the
24 Appellate Court said cause you're challenging what happened
25 at trial, correct?

Derrick Cheeks - Redirect examination
by Mr. Brough

1 A Yeah.

2 Q So you're saying that what happened at the Trial Court
3 was incorrect?

4 A Yeah, had---

5 Q Okay. So---

6 A Had this testimony been objected to---

7 Q We're, we're challenging the factual evidence today.
8 We're not gonna challenge the legal evidence. That's
9 already been decided on appeal.

10 A Okay. I understand.

11 Q You understand that?

12 A I understand that.

13 Q Okay. So we don't need to read the Supreme Court
14 decision. It's already a matter of the record and we can
15 move on.

16 Okay?

17 A As far as this inference saying that my -- the uncle
18 was delivering crack for me?

19 Q Well, and that -- again---

20 A It's talking about the crime.

21 Q ---what we're saying is that should have never been
22 allowed into evidence.

23 A Exactly. Had it been objected to.

24 Q I understand that.

25 A Exactly.

Derrick Cheeks - Redirect examination
by Mr. Brough

1 Q We've already made that argument.

2 A Oh, okay. That's exactly---

3 Q We don't need to reread the Supreme Court decision
4 because we're saying the facts were incorrectly decided at.
5 Okay?

6 A Exactly. Had---

7 Q All right.

8 A ---evidence been objected to, right.

9 Q Okay. Now what pictures do you want to show me, sir,
10 and these are all pictures that you received in discovery
11 and your Rule 5 motion, sir?

12 MR. HUNTER: I'd just like to see these pictures before
13 you---

14 MR. BROUGH: I'll, I'll show them to you beforehand.

15 A Okay. I mean I have --.

16 Q Okay.

17 A Yes, I have, I have motions that Mr. Wilkes filed in my
18 behalf and I have the police reports and---

19 THE COURT: Let me understand this.

20 My understanding is that they're three basic reasons
21 that Mr. Cheeks has filed this application.

22 One, he says that the, the -- his trial counsel failed
23 to pursue the -- a motion to sever.

24 MR. BROUGH: Yes, sir.

25 THE COURT: Two, that his trial counsel allowed highly

Derrick Cheeks - Redirect examination
by Mr. Brough

1 prejudicial testimony into the record at trial --

2 MR. BROUGH: Correct.

3 THE COURT: -- which, absent that, he believes he would
4 not have been convicted and that was with two different
5 witnesses?

6 MR. BROUGH: Correct.

7 THE COURT: And three, the sufficiency of the, of the
8 search warrant.

9 Is that correct?

10 MR. BROUGH: That's, that's my understanding.

11 Is that yours?

12 THE WITNESS: Probable cause.

13 MR. BROUGH: Yes, sir.

14 THE COURT: Is there another issue that -- all of this
15 goes to ineffective assistance of counsel?

16 MR. BROUGH: Correct. I, I don't know that there is
17 another issue and he can correct me if I'm wrong. But that
18 would be my showing if that's---

19 THE WITNESS: Yeah, of course, yeah, I want to present
20 some of my issues that's on my amended application.

21 THE COURT: Well, tell me what they are, Mr. Cheeks.

22 THE WITNESS: I have one, I have one for the selective
23 prosecution.

24 THE COURT: You have an issue saying that this is
25 selective prosecution?

Derrick Cheeks - Redirect examination
by Mr. Brough

1 THE WITNESS: Yeah, and I have one about my
2 codefendant.

3 THE COURT: Tell me how that relates to your lawyer.

4 THE WITNESS: Because he failed to make a motion to, to
5 squash my indictments due to the fact that my two defendants
6 was similarly situated to me.

7 THE COURT: All right. So---

8 THE WITNESS: And there wasn't any---

9 THE COURT: So you're saying he was ineffective for
10 attempting to quash the indictments?

11 THE WITNESS: Due to selection prosecution.

12 THE COURT: Is that right?

13 Right?

14 THE WITNESS: Yeah, here go the warrants right here.

15 THE COURT: What, what is -- what are the factual basis
16 for the selective prosecution?

17 THE WITNESS: Based on the fact that all of us were
18 similarly situated when it came to these 400 grams, and
19 these half proximity to a school zone charges. We were
20 similarly situated.

21 THE COURT: And, and they were prosecuted in different
22 ways than you are?

23 THE WITNESS: Of course they were. They had probation.
24 They got -- at home right now with probation when the State
25 testified these charges carry a mandatory 25 year sentence.

Derrick Cheeks - Redirect examination
by Mr. Brough

1 THE COURT: All right. So what else?

2 THE WITNESS: I have arrest warrants right here. I
3 have the -- my sentencing sheets.

4 THE COURT: That's, that's -- I want to know what other
5 issues you are alleging. Frankly I don't have much -- I
6 don't buy that one at all. Your lawyer couldn't stop the
7 solicitor from prosecuting anything that the solicitor
8 wanted to prosecute. Now, maybe the Court, at some point in
9 time, could of dismissed it on directed verdict or could
10 of -- the jury could of found you not guilty. But the
11 solicitor has a right to bring an indictment.

12 what, what other -- what's your other issues?

13 THE WITNESS: The after-discovered evidence of these
14 plea deals, exactly what I'm talking about now.

15 THE COURT: All right.

16 THE WITNESS: In Washington, Washington versus State,
17 the defendant declared that, in opening statement, that they
18 hadn't got no deals and they testified during Court that
19 they hadn't got no deals. But after Court they had deals.

20 THE COURT: All right.

21 THE WITNESS: They discovered that they had deals---

22 THE COURT: what else?

23 THE WITNESS: ---and the same exact thing happened in
24 my case.

25 THE COURT: what else?

Derrick Cheeks - Redirect examination
by Mr. Brough

1 What other issues?

2 Counsel, do you know of any other issues?

3 MR. BROUGH: Your Honor, he, he had a -- filed a pro se
4 amendment---

5 THE COURT: Well---

6 MR. BROUGH: ---that I incorporated in mine.

7 THE COURT: All right. Well, he's -- we have---

8 MR. BROUGH: I think that the -- I've presented what I
9 deemed to be the most significant issues, which I felt
10 showed that his lawyer was ineffective, Judge.

11 THE COURT: All right.

12 MR. BROUGH: And I think we had that discussion that he
13 wanted to discuss some other issues, but that, you know, I
14 told him that I thought that these were the most realistic
15 issues and I think would go to show that his lawyer was
16 ineffective.

17 THE COURT: All right. Anything further?

18 (No response.)

19 THE COURT: All right. Mr. Cheeks, you can step down
20 if you would please.

21 Is there anything further from the Applicant?

22 MR. BROUGH: If I might just have one moment to consult
23 with my client back at the counsel table?

24 THE WITNESS: Yeah, exactly.

25 What about my exhibits?

Jeff Wilkes - Direct examination
by Mr. Hunter

1 MR. BROUGH: Your exhibits are a matter of the record.

2 (Pause.)

3 MR. BROUGH: That's, that's our showing, judge.

4 THE COURT: All right. Anything from the state?

5 MR. HUNTER: Your Honor, the State would call Mr. Jeff
6 Wilkes to the stand please.

7 JEFF WILKES, being first duly
8 sworn, testified as follows:

9 THE COURT: All right. Have a seat and tell us your
10 full name please, Mr. Wilkes.

11 THE WITNESS: My name is Jeff Wilkes.

12 DIRECT EXAMINATION

13 BY MR. HUNTER:

14 Q Good morning, Mr. Wilkes.

15 A Good morning.

16 Q All right. Good afternoon.

17 How long have you been practicing law?

18 A 26 years I think.

19 Q How much of that has been devoted to the criminal
20 practice?

21 A All of it. Not exclusively, but I practice criminal
22 law for all 26 years.

23 Q Defense or prosecution?

24 A Four or five years as a prosecutor and then the rest in
25 defense work.

Jeff Wilkes - Direct examination
by Mr. Hunter

1 Q Okay. How did you become involved in Mr. Cheeks case?

2 A One of Mr. Cheeks's family members contacted me
3 initially and I went to see him or he may of come to see me.
4 I don't know if he was incarcerated initially. He may of
5 been on the street initially. He was shortly thereafter
6 incarcerated for a second charge. So -- but he contacted
7 me.

8 Q And, prior to trial, about how many times did y'all
9 meet?

10 A Many times. Many times. He was rearrested shortly
11 after I was retained. So he was in the detention center in
12 Pod 6 I think initially. So I visited many times.

13 Q How would you characterize the discussions that you had
14 with him pretrial?

15 A Pretrial, Mr. Cheeks was not as detailed in his
16 discussions as he is today.

17 Q So is it fair to say you're finding out some
18 information for the first time today?

19 A Well, no, I'm just -- he -- we didn't have a lot of
20 detailed conversations. I mean we had detailed
21 conversations but his -- well, he, even today, has given a
22 lot of versions.

23 Q Okay.

24 A Another version of the facts. So I guess it was
25 consistent with what you see.

Jeff Wilkes - Direct examination
by Mr. Hunter

1 Q And pretrial, you filed all correct discovery motions?

2 A I did.

3 Q You received discovery?

4 A I did.

5 Q Was there anything missing, anything that you felt
6 should of been there that wasn't there or anything that --
7 any problems you had with discovery?

8 A I don't believe so. I believe I had adequate
9 discovery.

10 Q And you shared this with Mr. Cheeks?

11 A I did. We went over the discovery information, facts
12 of the case, State's case as it developed over time,
13 charges, sentence, rights. All of that.

14 Q Okay. And I assume y'all also looked at the search
15 warrant together?

16 A We did.

17 Q Was there anything in the search warrant you found to
18 be troubling or objectionable?

19 A Well, the obvious was the deficiency of the, just
20 facial deficiency of the search warrant. It was blank on
21 one side.

22 Q Right.

23 That was actually a big part of your case that you
24 brought to the Supreme Court, correct?

25 A It was.

Jeff Wilkes - Direct examination
by Mr. Hunter

1 Q Okay. But as far as the reason for affiant's belief,
2 all those paragraphs that were read out, the controlled
3 buys, what happened on June 4th, what happened on
4 June 2nd, was there anything in there that you felt was
5 objectionable?

6 A Well, not objectionable. The question would be
7 sufficiency. As far as sufficiency, we knew that the female
8 was Eric Elder's mother. We knew that's who was telling the
9 police stuff that led them immediately to the house.

10 Q So you knew that pretrial?

11 A Yeah, I---

12 Q You discussed that with Mr. Cheeks?

13 A Yeah, Eric, Eric Elder's part in this, Derrick knew
14 that it was the mother. I mean he had said that many times,
15 that she was actually instigating a lot of trouble.

16 Q Okay. But just as far as, as far as the Franks hearing
17 is concerned, was there anything in here that, according to
18 your investigation, would of been a falsity or---

19 A No. No.

20 Q Okay.

21 A No, I didn't make a Franks hearing --

22 Q You didn't make it---

23 A -- hearing request.

24 Q ---request?

25 A Under Franks, it would require a falsity or an

Jeff Wilkes - Direct examination
by Mr. Hunter

1 inclusion of something that is false or an admission of
2 something that is exculpatory, and, in addition to that, you
3 have to have a offer of proof. So I have to be able to
4 prove what I'm saying to make that motion, and there, at the
5 time, there was nothing significant that would give me the
6 offer of proof to be able to show that there was either a
7 falsity, knowingly or recklessly made, or an admission of
8 something exculpatory.

9 Q Okay. So that's why you didn't make the motion?

10 A That's right.

11 Q Okay. Now, in your discussions with him, did he give
12 you his version of the facts, any defenses, witnesses?

13 A No. Specifically I, I recall that we had a discussion
14 and it was approaching, it wasn't right before trial, but it
15 was before trial, where I did go over the fact that it would
16 be helpful if he wanted to give me a detailed version of
17 what really happened in case he chose to testify so I would
18 be prepared for that, know what I would be arguing to the
19 jury, and he never really was able to get any other detailed
20 version of what happened other than he was just there.

21 Q And that was the basis of your defense, correct, the
22 mere presence argument?

23 A Well, that's all it could be. He was, he was there.

24 Q Okay. And he never gave you any other version about
25 not being there?

Jeff Wilkes - Direct examination
by Mr. Hunter

1 A Well, no, he, he was there.

2 Q Okay.

3 A But he did, he did stay there. I mean he, he stayed
4 there a lot. That was proven through the testimony. He, he
5 stayed at Tracy's a good bit.

6 Q Right.

7 Now, do you feel like you had enough time to prepare
8 for trial?

9 A I did.

10 Q Regarding severance, and, I guess, signing the consent
11 order to agree to have Ricky and Derrick's trials together,
12 did this seem like a bad idea?

13 A It did not at the time.

14 Q Okay. And so, there, therefore, you didn't see any
15 reason to move to sever, move to sever Ricky and Derrick?

16 A No, not at the, not at the time.

17 Q Now, you did move to sever -- join in to move to sever
18 the indictments, correct?

19 A We did, at trial, yes.

20 Q Okay. But you weren't aware of any antagonistic
21 defenses between Ricky and Derrick, correct?

22 A No.

23 Q And so even if you had made that motion, do you feel
24 that it wouldn't of been successful?

25 A I, I doubt it but I can't say, can't say.

Jeff Wilkes - Direct examination
by Mr. Hunter

1 Q I understand.

2 Now, you did move to suppress the search warrant from
3 the beginning?

4 A I did.

5 Q And did you move at all the appropriate times to make
6 the contemporaneous objections?

7 A On the search warrant?

8 Q Correct.

9 When evidence came in.

10 A Yeah, yeah, I preserved that issue all the way through.

11 Q Okay. And there were more objections including I think
12 some tazing information that you successfully suppressed,
13 correct?

14 A I, I recall that. There, there were, especially the
15 photos, that were not pleasant.

16 Q And you moved for a mistrial or I believe you and Mr.
17 Poole moved for a mistrial on the start of the second day
18 about the indictment issue?

19 A I believe so.

20 Q Essentially what I'm getting at you were, you were
21 vigorously active in this trial?

22 A I, I was. That's not to say that I might not of made a
23 mistake but I was working hard at trying to do it -- what---

24 Q I understand.

25 A ---I'm suppose to be done.

Jeff Wilkes - Direct examination
by Mr. Hunter

1 Q Now, let's go to -- regarding Mr. Elder's statements
2 that have been alleged to be prior bad acts --

3 A Uh-huh. (Affirmative).

4 Q -- at the time you did not object.

5 Did you see any -- is that a transcript up there?

6 A I've got one.

7 Q Okay.

8 A I've, I've looked at both of those. It -- at the
9 time -- and I've reread them cause I didn't recall them
10 until I reread them. The, the -- both of -- Mr. Markley and
11 Mr. Elder's testimony were leading up and giving an
12 explanation of what their contact was or how they knew
13 something or why they were doing something. The, the
14 statement of both of them was very short. It was, it was --
15 I agree with Mr. Cheeks. It, it was -- there, there could
16 be some prejudice in it.

17 But it was not huge, and in the grand scheme at the
18 time, it would of been something that, that did not strike
19 me as being extensive enough or large enough to jump and
20 make an objection and draw more attention to it. It was
21 very limited in, in what was said and it was in context to
22 an explanation. And so it was -- I did not jump up and
23 object to it. I could. Certainly could have.

24 Q So that was more of a strategic decision at the time to
25 not draw attention to the jury on something that you did not

Jeff Wilkes - Direct examination
by Mr. Hunter

1 see to be so large an issue?

2 A Just because I didn't see it to be a large issue in,
3 and the grand scheme of the trial of the moment, that's not
4 to say that it wasn't somewhat prejudicial. I could say
5 yes, it, it was. I can see that it was.

6 Q I'm sorry but I didn't catch that.

7 You were talking about Tracy's and Eric's testimony?

8 A Well, yeah, both of them. I think -- I have to look at
9 it and see. I think Markley said he was letting him or he
10 drove him and then he, he -- I think he threw in -- one of
11 them threw in the word everyday, which was certainly
12 unnecessary, and I could of objected to. And then there was
13 something -- the part about the 50 times -- seeing Derrick
14 at Tracy's 50 times, I think that was Eric Elder. That,
15 that, in and of itself, wasn't prejudicial in the sense that
16 he wasn't saying he was cooking 50 times. He just said he
17 saw him 50 times.

18 So that, that's -- I wouldn't of recognized that as
19 being problematical at that moment. But the driving
20 everyday comment by Markley, I think -- that, that one I can
21 certainly see was unnecessary for Markley to say.

22 Q Had you objected to that, do you think the outcome of
23 his trial would of been different?

24 A No.

25 Q And the -- you appealed this all the way to the South

Jeff Wilkes - Direct examination
by Mr. Hunter

1 Carolina Supreme Court. It's a pretty big published
2 opinion.

3 A Yeah.

4 Q And like we went over earlier, they said that they
5 found overwhelming evidence of guilt and do you agree with
6 that?

7 A The officer's testimony that, when he came in, Derrick
8 was the one standing -- I don't think he said right in front
9 of it. He may of said 6 feet from it. There was some
10 distance. But Derrick was the only one in proximity of the
11 kitchen to the cooking and Derrick took off and he ran
12 across and dove into a dark room according to the officer.
13 So that's -- combined, combined with the fact that you've
14 got Markley and Elder's testimony, yeah, it was pretty
15 overwhelming.

16 Q Okay. No further questions.

17 MR. BROUGH: May it please the Court?

18 CROSS-EXAMINATION

19 BY MR. BROUGH:

20 Q Mr. Wilkes, now in, in your representation of, of
21 Derrick Cheeks, would it be fair to say that essentially he
22 was charged with being a drug manufacturer and dealer for
23 all intensive lay people purposes?

24 A Yes.

25 Q Okay. Now, the, the testimony from Eric Elder and from

Jeff Wilkes - Cross-examination
by Mr. Brough

1 Tracy Markley, that testimony that, that we've already gone
2 over and I'm sure you were present here for that, that
3 paints him as being a drug dealer, does it not?

4 A It, it could with---

5 Q I mean it---

6 A ---Mr. Markley saying, you know, I drive him and I get
7 crack from him everyday. Sure.

8 Q So -- and, and, essentially, your case with Derrick is
9 the execution of a search warrant by the Sheriff's Office
10 and they come in and there's multiple people in the house.
11 But nobody from the Sheriff's Office is ever able to state,
12 at trial, that they actually saw anyone manufacturing.

13 Is that correct?

14 A That's correct.

15 Q Okay. So the only evidence really in terms of
16 manufacturing comes through the lay witnesses in this case,
17 correct?

18 A Well---

19 Q Well, the only people that actually saw him cook were
20 the lay witnesses?

21 A Well, it depends on how you interpret that. The
22 officer's testimony was he was in the kitchen and crack is
23 cooking away. So it just depends but he didn't have his
24 hand on the pot.

25 Q That's my point.

Jeff Wilkes - Cross-examination
by Mr. Brough

1 A He did not---

2 Q He did not have his hand on the pot.

3 A Exactly.

4 Q So the only people that put his hand on that pot are
5 Eric Elder and Tracy Markley, right?

6 THE COURT: You talking about direct evidence?

7 MR. BROUGH: On direct evidence.

8 A Of actually saying he could. You would have to infer
9 that the fact that he's the only one in the kitchen with
10 crack cooking he must of been cooking it, yes.

11 Q So there, there were -- existed maybe some
12 circumstantial evidence---

13 A Right.

14 Q ---that he was cooking but there was no actual direct
15 evidence of that, correct?

16 A Well, the---

17 Q Other, other than through those two witnesses?

18 A I, I think, if you're standing -- I understand what
19 you're saying. But I think, if you're asking me if there
20 was direct evidence of him cooking, he's, he's standing.
21 There's no direct evidence he had his hand on the pot. But
22 it's direct evidence that he's cooking if he's standing in
23 front of the cooking crack. I mean to me.

24 Q The only people that actually state he's cooking are
25 Eric Elder and Tracy Markley, correct?

Jeff Wilkes - Cross-examination
by Mr. Brough

1 Those are the witnesses at trial that state he was
2 cooking?

3 A I believe so, yes.

4 Q Okay. And the fact is the evidence that came in
5 through those witnesses, you allowed it, without objection,
6 evidence in that not only was Derrick was the cooking, which
7 may be relevant to this charge, but that he gives them crack
8 everyday?

9 A That's, that's correct. I did not object.

10 Q Correct?

11 A That is correct.

12 Q And there was no---

13 A That is correct.

14 Q ---motion made in limine to say, you know, to the Court
15 ahead of time I have a concern, based on the calling of
16 these witnesses, that I want to make sure they don't get
17 these things before the jury hears it and I have to try to
18 un-ring that bell?

19 A Correct. I did not file a motion.

20 Q Okay. And so, when that evidence came in, there was no
21 motion for a mistrial, right?

22 A That is correct.

23 Q And I'm sure you felt that that evidence hurt your
24 case?

25 A Well, it was certainly prejudicial. It, it tended to

Jeff Wilkes - Cross-examination
by Mr. Brough

1 show that he was, in fact, a drug dealer, yes.

2 Q Now, we were talking about jury instructions with the
3 Court at the end of the trial.

4 A I don't --.

5 Q Okay. I want to direct your attention to Page 384 in
6 the transcript.

7 A 384.

8 Q And did you not state, on Line 6, in reference to that
9 conversation dealing with the jury charge, stated, on Line 6
10 of Page 384, you said that is, that is correct. But as far
11 as the jury charge, there was testimony from Elder and
12 Markley that was -- probably exceeded the time period of
13 what we're talking about with Cheeks.

14 You remember having that conversation?

15 A I do not but I see where I said that.

16 Q Okay. So obviously you were concerned that the jury
17 was gonna be prejudiced based upon the evidence that you
18 allowed into the record without objection?

19 Am I right?

20 A That is very possibly the case, yes. Without reading
21 what comes before that, yes, it would appear so.

22 Q And in terms of the evidence that you're dealing with,
23 we've not admitted evidence without objection that
24 Mr. Cheeks deals drugs everyday, but you've also allowed
25 them to get into---

Jeff Wilkes - Cross-examination
by Mr. Brough

1 A Let me -- may I, may I -- I did -- if I can just
2 clarify that?

3 Q Go ahead.

4 A I did flip back to 383 and I'm not sure, because I
5 don't have an independent recollection, recollection of it,
6 but I see where before that we were talking about Mr. Elder
7 and Mr. Markley talking about having been addicts, using for
8 a long time, and then talking about the hand of one and the
9 hand of all and how that was somehow completely unrelated.

10 So I'm not, I'm not sure exactly what 384 referred to,
11 whether it was, you know, the, the getting drugs everyday or
12 not. I, I can't tell you if that's what I was talking
13 about. But I can tell you I do recognize the prejudice that
14 you're talking about today.

15 Q Okay. But you didn't at the time is what you're
16 testifying to?

17 A No, I recognize that I didn't like that one bit. But
18 in the grand scheme, the question was what to do about it,
19 did I need to make that objection. It did not continue. So
20 I did not perceive it as necessitating an objection and I
21 may of been wrong.

22 Q With the -- about the evidence that came in indicating
23 that Derrick was at this motel and then there was evidence
24 that he potentially is essentially telling Ricky that he
25 needs to get rid of something that came in through the lay

Jeff Wilkes - Cross-examination
by Mr. Brough

1 witnesses and then that something is they get pulled over in
2 the car with---

3 A Right.

4 Q ---Eric in the car and he needs to get rid of something
5 and they find drugs in the car.

6 A Okay.

7 Q Don't you feel like that should of not only gone to
8 prior bad act type stuff, but in terms of moving to sever
9 the case, didn't you have a concern and shouldn't you have,
10 since Eric wasn't charged with the drugs found in the car,
11 shouldn't you have moved to get any reference to that car
12 away from him since the State was essentially tying him into
13 it, but never charged him with it?

14 A I see what you're saying. I think the indictment, for
15 Mr. Cheeks, reads trafficking and I think that that event
16 occurred on the same date alleged in the indictment. So I'm
17 not, I'm not certain. Trafficking includes aiding and
18 abetting and all those factual events. It can be considered
19 part of the indictment I think.

20 Q But no one had him being present with those drugs,
21 correct, and, in fact, the trafficking weight was---

22 A Yeah, he, he was not in, he was not in the car. He was
23 at the house.

24 Q But the basis for the trafficking was from the search
25 warrant, correct?

Jeff Wilkes - Cross-examination
by Mr. Brough

1 Was the execution of the search warrant and the items
2 they found at the house?

3 A That's not what the indictment says. That's not what
4 the indictment say. The indictment just says trafficking on
5 that date, which aiding and abetting can certainly include
6 his role in sending out somebody to get rid of the drugs.
7 So I, I didn't -- if, if you're asking is there a super
8 clear distinction on that, that, that I don't see it.

9 MR. BROUGH: If I may have one moment, judge.

10 (Pause.)

11 Q Now, my last question, I guess, is, is this.

12 In terms of the trial, would it be fair to say that the
13 result could have been different if you were merely arguing
14 Derrick's present with the exclusion of testimony that he
15 was a known drug dealer for years?

16 A Say that again.

17 Q In other words, would it be fair to say the result in
18 this case could have been different understanding that your
19 argument was -- is that Derrick was merely present at a
20 house that belonged to someone else --

21 A Uh-huh. (Affirmative).

22 Q -- had the evidence been excluded from these lay
23 witnesses that he had been a drug dealer essentially for
24 years and would give them crack everyday?

25 A That's not what the testimony was I don't think. I

Jeff Wilkes - Cross-examination
by Mr. Brough

1 don't remember it being that he was a drug dealer for years
2 but---

3 Q But they---

4 A The testimony -- if you'll point that to me I could be
5 wrong.

6 Q Okay.

7 A I just -- what I recall was Markley said he drove
8 Derrick and he, he said he'd get crack from him and then the
9 last thing he said was everyday, and that, that's what he
10 said. So I guess if you --.

11 Q Okay. I'm gonna refer you to Page 300 on the
12 transcript --

13 A Okay.

14 Q -- beginning at Line 23. This is Tracy Markley's
15 direct examination by the solicitor.

16 A All right. Wait. Wait.

17 23?

18 Q Yes, sir.

19 A Yes, sir, I got it.

20 Q Q. And how did you meet Derrick Cheeks?

21 A. It was a long process. We knew each other at work.
22 We weren't friends. We didn't hang out. It was probably a
23 six month period before me and him actually started hanging
24 out and that's because of my friend, James Cranfield. He
25 was, he was going to Derrick to buy crack and, like I said,

Jeff Wilkes - Cross-examination
by Mr. Brough

1 he got me started smoking and we would go to his, you know,
2 where he lived at the time to buy some.

3 A I see that.

4 Q Okay. Do you see that?

5 A I see that.

6 Okay. So your -- let me understand your question.

7 Your question is if we have a mere presence defense,
8 then does that prejudice -- yes, that prejudices us, yes.

9 Absolutely.

10 Q Thank you.

11 No further questions.

12 THE COURT: He's asking you to opine whether, most
13 likely, the result would of been different but for that
14 testimony.

15 THE WITNESS: Well, no, sir. But it did, it -- I
16 understand you. You're correct on the prejudice.

17 Q Okay.

18 A But if you're asking my opinion, in the grand scheme of
19 things in all the testimony, would it have changed the
20 outcome of the trial, my -- I don't think so. But the
21 record, you know, the record speaks for itself.

22 Q And -- but how are you sure that your client is merely
23 present if you allow in testimony he's been a drug dealer
24 for years?

25 A I agree with you. I should of objected to that.

Jeff Wilkes - Cross-examination
by Mr. Brough

1 Q Okay.

2 A I -- no question.

3 MR. BROUGH: All right. No further questions.

4 THE COURT: Anything further from the State?

5 MR. HUNTER: I would just like to point out one more
6 thing really quickly.

7 REDIRECT EXAMINATION

8 BY MR. HUNTER:

9 Q You have the transcript?

10 Can you go to 257?

11 I'm looking at 10 through 15. It was talk of he gave
12 me crack cocaine every day.

13 What was the question, on Line 10 and 11, that prompted
14 that answer?

15 A Why were you driving Mr. Derrick Cheeks and Mr. Ricky
16 Cheeks?

17 Because a lot of times I'd get free dope, free crack.

18 What -- I, I agree. I mean the solicitor didn't try to
19 do that. He said what was your understanding that day. But
20 it was gratis that Elder threw in everyday. Mostly
21 everyday. And then the solicitor said everyday and he said
22 yes. So, that --

23 Q And Eric Elder was the driver that day?

24 A Well, he was, yeah. But, but I, I -- there's
25 prejudice. I could of objected to that.

Jeff Wilkes - Redirect examination
by Mr. Hunter

1 Q All right.

2 A I could of.

3 Q And if that was left out, would the -- if that was
4 objected to, would the trial of been different?

5 A It's just my opinion. I don't think so. But it, it
6 was prejudicial.

7 Q I appreciate it, your answers.

8 Nothing further from the State, Your Honor.

9 THE COURT: All right.

10 All right. That it?

11 THE WITNESS: Thank you.

12 MR. BROUGH: Judge, I believe---

13 THE COURT: Hold on. I'm gonna, I'm gonna let Mr.
14 Wilkes step down.

15 MR. BROUGH: Yes, sir.

16 THE COURT: All right. Thank you, sir. You can step
17 down.

18 Y'all need him for anything further?

19 MR. HUNTER: No, sir.

20 THE COURT: All right. Mr. Wilkes, you're free to go.

21 THE WITNESS: Thank you, judge.

22 THE COURT: All right. Anything further from the
23 State?

24 MR. HUNTER: No, Your Honor.

25 THE COURT: All right. Mr. Brough, anything?

1 MR. BROUGH: We admit---

2 THE COURT: Do y'all want to---

3 MR. BROUGH: We just ask the Court to consider, in
4 light of the testimony that was admitted, the failures of,
5 of counsel and that have been testified to, we think
6 amounted to prejudice in the case to the extent the result
7 would have been different in the case.

8 This was an argument factual that my client was merely
9 present. There was evidence in the record from not one, but
10 two different witnesses about the fact that my client was
11 basically a habitual drug dealer, which was highly
12 inappropriate. We feel that that testimony could have been
13 kept out and given appropriate actions for defense counsel.

14 Those actions were not taken either and attempted to
15 sever the cases and attempting to keep out and file motions
16 in limine to have witnesses warned whether a question
17 warranted it or not from the State about getting into prior
18 bad acts, which ultimately were testified to, and, and,
19 ultimately, failing to object and move for mistrial at times
20 that, quite frankly, anybody who was representing someone on
21 a drug charge should have gone and made those motions and
22 objections at that time, and whether the motion was granted
23 for a mistrial based on prosecutorial misconduct or just
24 granted for a mistrial, the reality is, is that, clearly, at
25 a minimum, had those objections been made, a circuit court

1 judge would have granted a mistrial and allowed the --
2 Mr. Cheeks a new trial in order to have a fair trial, and
3 that was not done here.

4 So we'd ask the Court to grant post-conviction relief.

5 MR. HUNTER: Your Honor, just briefly.

6 We feel that counsel's performance was not deficient
7 and just -- I know you have everything up there with you.
8 But I just want to point out one more time that the South
9 Carolina Supreme Court, in a published opinion, found that
10 he could not demonstrate prejudice because there was
11 overwhelming evidence of Applicant's guilt. Although that's
12 your factual finding to make at this time, the State feels
13 it should be the same.

14 THE COURT: Okay. Let me ask y'all something.

15 Was standing ever an issue on the, on the search
16 warrant?

17 Did, did the, did the -- Mr. Cheeks live at this place?

18 MR. HUNTER: No, I believe that was -- wasn't that
19 brought up in the---

20 MR. BROUGH: It was brought up in the Appellate Court
21 decisions and I know Mr. Wilkes did brief the fact that,
22 while he didn't live there, you know, he would of had a
23 reasonable expectation of privacy as a guest there, and I
24 know that that was brought up in the Appellate Court
25 decision, judge.

1 MR. HUNTER: I believe they found that it was a
2 business relationship type thing where he -- I think he had
3 a few shirts over there. It didn't rise to a level that
4 would warrant standing or did not have standing.

5 THE COURT: So they did address standing at some point
6 in time?

7 MR. HUNTER: Yes, Your Honor, and it was --.

8 THE COURT: Determined that Mr. Cheeks would not have
9 had the---

10 MR. HUNTER: Right, and I believe---

11 THE COURT: ---right to contest it?

12 MR. HUNTER: I apologize. I'd have to find the exact
13 language. But I believe it was found that it was simply
14 the---

15 THE COURT: Say that---

16 MR. WILKES: I could tell you, judge. That I do recall
17 very well. He did have standing. We litigated that and we,
18 we proved that he did have standing.

19 THE COURT: Okay. So that's, that's not an issue?

20 MR. WILKES: No, sir.

21 MR. HUNTER: No, Your Honor.

22 THE COURT: All right. Okay. Thank y'all very much.
23 I'll take the matter under advisement.

24 MR. HUNTER: Thank you, Your Honor.

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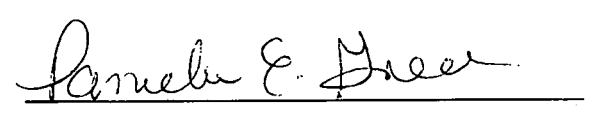
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 2nd day of September, 2015.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 25th, 2015



PAMELA E. GREEN, Court Reporter

M

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS
FOR THE SEVENTH JUDICIAL CIRCUIT

STATE,)

v.)

MOTION AND ORDER FOR CONSOLIDATION

Derrick Cheeks)

Indictments: 09-GS-42-6452 - 53 ✓

Eric Elder)

09-GS-42-6471 - 73 ✓

Ricky Dwight Cheeks)

09-GS-42-6455 - 57 ✓

Tracy L. Markley)

09-GS-42-6085 - 86 ✓

Warrant Numbers: M087869 - M087876 ✓

M087878, M087879


Defendants.)

YOUR HONOR, I move for Consolidation of the above referenced cases on the trial docket. These are criminal cases. The warrants arise out of a single incident and the State believes it would further the ends of justice and promote judicial economy to place the defendants on the trial docket together.

I respectfully request that these cases be consolidated on the trial roster.


IT IS THEREFORE ORDERED, that the above captioned matters be consolidated on the trial docket.

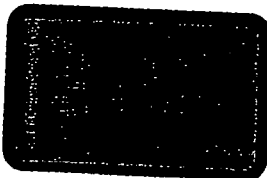
~~IT IS SO ORDERED.~~


Roger L. Couch
Circuit Court Judge
Seventh Judicial Circuit

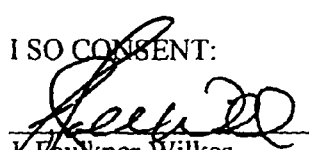
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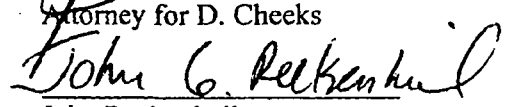
I SO MOVE:

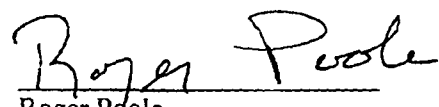

James Edward Hunter
Assistant Solicitor

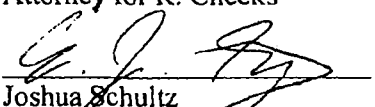


I SO CONSENT:


J. Faulkner Wilkes
Attorney for D. Cheeks


John Reckenbeil
Attorney for E. Elder


Roger Poole
Attorney for R. Cheeks


Joshua Schultz
Attorney for T. Markley

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CLERK OF COURT
SOUTH CAROLINA SEVENTH JUDICIAL CIRCUIT

M



STATE OF SOUTH CAROLINA

County of SPARTANBURG, SC

ORIGINAL

SEARCH WARRANT

Date

6-4-2009

Officer

P. NORRIS

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF SPARTANBURG COUNTY, SC

appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

~~DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED~~

Now, therefore, you are hereby authorized to search premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY SOUGHT

Cocaine Base schedule II controlled substance—records, diaries, scales, electronic media, U.S. currency, paraphernalia, and any other item related to the drug trade.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

ANY SPARTANBURG COUNTY MAGISTRATE

Within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable: in the event the identity of such person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Spartanburg, SC
6-4, 2009

[Signature] (L.S.)
Signature of Judge

COUNTY OF SPARTANBURG, SC}

AFFIDAVIT
COPY

Personally appeared before me, one Paul Norris, who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this county:

DESCRIPTION OF PROPERTY SOUGHT

~~Cocaine Base - A SCHEDULE II CONTROLLED SUBSTANCE~~
RECORDS, DIARIES, SCALES, BAGGIES, OR ANYTHING ELSE RELATED TO THE SALE OF DRUGS;
U.S. CURRENCY

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

FROM SPARTANBURG TRAVEL JOHN.B WHITE SR BLVD TOWARD I-26. TURN RIGHT ONTO SAVOY ST. THEN TURN RIGHT ONTO ST. JAMES DR. TURN RIGHT ONTO GORDON DR AND THE RESIDENCE TO BE SEARCHED IS THE SECOND RESIDENCE ON THE RIGHT. THE RESIDENCE IS DESCRIBED AS A TWO STORY BRICK DWELLING WITH WHITE TRIM. THE NUMBERS "152" ARE LOCATED TO THE RIGHT OF THE FRONT DOOR. THE NUMBERS "152" ARE ALSO LOCATED ON THE MAIL BOX IN FRONT OF THE RESIDENCE.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On or about February 6, 2009 the Spartanburg County Sheriff's office Narcotics unit and SLED received information from a confidential reliable informant, that a subject by the name of Derrick Cheeks was traveling to the Anderson County area and bringing back large amounts of cocaine to 152 Gordon Drive where he was converting it to Crack Cocaine and distributed throughout the upstate.

On February 24, 2009 a Confidential Informant was provided with \$220.00 in government funds and sent to Fatz Café in Boiling Springs, South Carolina, the place of employment of Derrick Cheeks. The Confidential Informant purchased 1/4 ounce of Crack Cocaine from Cheeks in the restroom of Fatz Cafe.

On March 3, 2009 the Confidential Informant made a controlled phone call to Derrick Cheeks and ordered 1/4 ounce of Crack Cocaine. The Confidential Informant was provided with \$225.00 in government funds and was told by Cheeks to meet him at the Advanced Auto Parts store on Reidville Road. Cheeks was observed arriving to the location with several other subjects in a vehicle. Upon arrival Cheeks was and seen entering the Advanced Auto Parts store. Upon Cheeks entering the store, Rickey Williams who is Cheeks' uncle, exited the vehicle and was observed making the transaction in the parking lot with the Confidential Informant as Cheeks was seen looking through the window. Upon the completion of the transaction Cheeks exited the store and re entered the vehicle which left the area

On March 16, 2009 the Confidential Informant contacted Cheeks and ordered 1/4 ounce of crack cocaine for \$225.00. Cheeks told the Confidential Informant to meet him at the BP station on Reedville Road. At this time surveillance showed that Cheeks was seen leaving 152 Gordon Drive along with several other subjects. A short time later Cheeks was seen arriving at the location where he exited the vehicle and entered the gas station. Agents observed a subject know as Ricky Williams exit the vehicle and meet with the Confidential Informant as he conducted the narcotics transaction. Cheeks was then seen re entering the vehicle and leaving the area.

Since beginning this investigation the Confidential Informant has been debriefed on a regular basis. It has been learned that in the past the Confidential Informant has accompanied Derrick Cheeks to Anderson County on multiple occasions to make purchases of cocaine. The Confidential Informant stated that all of the trips made to Anderson County were made on either Thursdays or Fridays and occurred every week or every other week and that Derrick Cheeks will use two vehicles. One of the vehicles is utilized to carry the currency to the transaction location and the cocaine back to 152 Gordon Drive. The other vehicle is occupied by Derrick

580

naotics, however, still offers him the opportunity to oversee the operation. The Confidential Informant also told Agents that Cheeks buys "old police cars" and places antennas on the trunks and fixes them up to keep them looking as if they were actual working police vehicles which Cheeks feels would reduce the chances of being stopped by the police.

On June 2, 2009 S/A Hanning was contacted by a female who told him that her son was a close friend of Derrick Cheeks. The female further stated that her son has made several trips to the Anderson County area and has picked up large amounts of cocaine and returned to 152 Gordon Drive and watched as Cheeks cooked the cocaine powder into Cocaine Base.

On June 4, 2009 S/A Hanning received a phone call from the female subject who told him that her son had just got off of the telephone with Derrick Cheeks who requested that he come to the Super 8 Motel on South Blackstock Road and pick them up. The female stated that she was on her way to drop off her son and would be at the motel in approximately fifteen minutes.

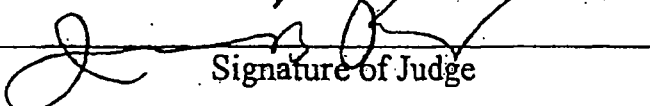
At this time surveillance was conducted and Investigator Norris located Derrick Cheeks in a black Ford Crown Victoria in the parking lot of the Super 8 Motel and occupied by Ricky Williams. Investigator Norris then watched as Eric Elder arrived and met with Williams as well as Derrick Cheeks in the parking lot. Further surveillance revealed that Elder, Cheeks and Williams left the parking lot and were followed to 152 Gordon Drive.

Approximately twenty minutes later the black Ford Crown Victoria was seen leaving from 152 Gordon Drive and followed to the Wal-Mart located at the Dorman Center. Upon arrival Elder was seen entering the store and watched as he selected one box of Arm and Hammer Baking Soda. Agents then saw Elder go to register 10 and pay cash. A copy of the receipt was obtained from Wal-Mart management which confirmed the purchase. Elder was then seen reentering the vehicle which was followed back to 152 Gordon Drive.

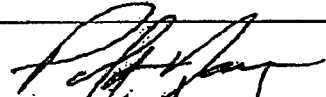
Based on the fact that Baking Soda is a necessary precursor for the manufacturing of Cocaine Base as well as the above listed facts, it is the Affiants Belief that Derrick Cheeks is in the process of manufacturing Cocaine Base.

Sworn to and Subscribed before me

nis 4 day of June; 2009


Signature of Judge

Affiant


Address 8045 Howard St
Spartanburg, SC 29301
Phone 503-41520

ORIGINAL

I received the attached Search Warrant June 4, 20 09, and have executed it as

Follows: On June 4, 20 09 at COPY 432 o'clock P M,

searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with the Residence

Name of person searched or "at the place of search" with.

Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant (1) clear plastic baggies

found in a trash can by Inv. T. McKinley in the living room. (2) Seven
Rolls of U.S. currency found in the front pocket of a black
suitcases in a back bedroom by Inv. Hutchins. (3) large off-white
Rock-like substances found on the counter in the kitchen by S. A. Hanning
(4) large off-white rock-like substance wrapped in plastic bags found on
the counter in the kitchen by S. A. Hanning. (5) white cookie shaped
substances found on microwave in kitchen by S. A. Hanning. (6) off-white
rock-like substances found on a saucer on the kitchen counter by S. A.
Hanning. (7) large scale found on the kitchen counter by Hutchins (8) small scale
found on kitchen counter by Hutchins (9) bottle of Inositol powder found on
kitchen cabinet by Hutchins. (10) box of baking soda found in trash can in
the kitchen by Raymond. (11) U.S. currency found on the person of Derrick Cheeks by

This inventory was made in the presence of Off. Cooper, Sgt Pharis, Tami Hutchins,

AND Washington, Raymond, Norris, McKinley, Sgt Gist, SA C. Hanning.

I swear this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 5

Day of June, 20 09

[Signature]
(Signature of Executing Office)

[Signature] (L.S.)
Signature of Judge

582+

RETURN

I received the attached Search Warrant June 4, 20 09, and have executed it as

follows: On June 4, 20 09 at 432 o'clock p M,

I searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with Residence

Name of person searched or "at the place of search" with

Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: Sgt Pharis. (12) box

in which the large scale come in found on weight bench by Hutchins. (13) a

glass measuring cup found on a kitchen counter by Sgt Pharis. (14) box of

plastic baggies found in kitchen by Sgt Pharis. (15) Plastic baggie found on

chair in bedroom by Javi Hutchins. (16) black digital scale found

on counter in the bedroom by Javi Hutchins. (17) three cellular

phones found on kitchen counter by Javi Raymond.

This inventory was made in the presence of Off. Cooper, Sgt. Pharis, Javi, Hutchins,

AND Washington, Raymond, Nomis N. Juarez, Sgt Gist, S.A. Stanning

I swear this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 5

Day of June 2009

[Handwritten Signature of Judge]

Signature of Judge

(L.S.)

[Handwritten Signature of Executing Office]

(Signature of Executing Office)

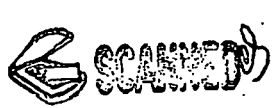
STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	OF THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
)	2013-CP-42-2654
Derrick Lamar Cheeks,)	
S.C.D.C. No. 343108,)	
)	
Applicant,)	ORDER OF DISMISSAL
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 21, 2013. Respondent made its Return on or about July 11, 2014. An evidentiary hearing into the matter was convened on September 3, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Christopher Brough, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, J. Faulkner Wilkes, Esquire, also testified. This Court had before it a copy of Applicant's records from the Spartanburg County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the November 2009 term and the indictment was amended at the October 2010 term of the Spartanburg County Grand Jury for trafficking in crack, over 400 grams (2009-GS-42-6453) and possession with intent to distribute within ½ mile of a school zone (2009-GS-42-6452). Applicant was represented by J.

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 SPARTANBURG COUNTY



Falkner Wilkes, Esquire. On October 6, 2010, Applicant proceeded to trial and was found guilty by a jury of the charges as indicted. The Honorable Roger L. Couch sentenced Applicant to concurrent sentences of imprisonment for twenty-five years with a \$200,000 fine for trafficking in crack and ten years with a \$100,000 fine for possession with intent to distribute within ½ of a school zone.

A timely Notice of Appeal was filed on Applicant's behalf by J. Falkner Wilkes, Esquire. The South Carolina Supreme Court affirmed the Applicant's conviction. State v. Cheeks, Op. No. 27211 (Sup. Ct. filed January 16, 2013). The Remittitur was issued on February 1, 2014.

Allegations

Applicant presented the following allegations for post-conviction relief:

1. Ineffective assistance of counsel, in that trial counsel was ineffective for
 - a. consenting to allow Applicant's case to be tried with the case of Ricky Dwight Cheeks thereby prejudicing the Applicant's defense;
 - b. failing to move to sever his case from the case of Ricky Dwight Cheeks;
 - c. failing to make a motion for a pre-trial Franks hearing in order to suppress evidence of drugs based on a search warrant dated June 4, 2009, that was defective;
 - d. failing to make a motion in limine to exclude character and prior bad act evidence before the trial, resulting in testimony being admitted of the Applicant's prior drug dealings;
 - e. failing to object to testimony from Eric Elder and Tracy Markley that discussed the prior drug relationship that they had with the Applicant;
 - f. and for failing to move for a mistrial based upon prosecutorial misconduct, such misconduct being the admission of prior drug dealings by an experienced prosecutor.

II. SUMMARY AND EVIDENCE PRESENTED AT PCR HEARING

Applicant's Testimony

Applicant testified that he did not want to be tried with his codefendant, Ricky Cheeks, who was indicted for trafficking in crack cocaine over 100 grams, possession with intent to distribute

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 M. HOEBSACKLEY
 STATE OF SOUTH CAROLINA
 CLERK OF COURT

crack cocaine within ½ mile of a school, and trafficking in cocaine base over 400 grams. Applicant introduced to the Court a consent order where his trial counsel, J. Faulkner Wilkes, Esquire, ("Counsel") consented to allow his case to be tried with Ricky Cheeks. Applicant testified that he was prejudiced by having his case tried with Ricky's because he was only charged with trafficking for the drugs found at the house and not for the drugs found in Ricky's car. Applicant testified that Counsel should have moved to sever his trial from Ricky's trial. Applicant also testified that he had an issue with the search warrant because the description of the premises to be searched was left blank on the face of the warrant.

Applicant further testified that Counsel did not discuss the possibility of prior bad act evidence being introduced and he believed that inappropriate testimony came in during the assistant solicitor's direct examination of Eric Elder, the driver of the vehicle that was stopped by police resulting in Ricky Cheeks' arrest for trafficking. Applicant first took issue with a portion of the testimony where the solicitor asked Elder:

Q. Have you ever been present during the manufacturing or cooking of crack cocaine?

A. Yes, sir.

(Tr. 256, 15-17).

Applicant next took issue with the following exchange from the solicitor and Elder:

Q. Okay, why were you driving Mr. Derrick Cheeks and Mr. Ricky Cheeks?

A. Cause a lot of times I'd get free dope, free crack.

(Tr. 257, ll. 10-12).

Applicant also took issue with the following exchange from the solicitor and Elder:

Q. Who did you leave the residence with?

A. With Ricky Cheeks.

Q. And what were y'all going to do?

A. Derrick had told him that he needed to go somewhere to, to get rid of something.

Q. Okay. And you were — I couldn't hear you. What did you say?

A. Ricky — Derrick told his Uncle Ricky that, that he needed to get rid of

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M. HOPE BRADKILL
SOUTH CAROLINA COUNTY

something, somebody was calling. So, he needed to get rid of something.
(Tr. 258, ll. 8-17).

Applicant also testified that he believed improper prior bad act evidence came out during the solicitor's direct examination of Tracy Markley, where the following exchange took place:

Q. And how did you meet Derrick Cheeks?

A. It was a long process, we knew each other at work, we weren't friends. We didn't hang out. It was a, probably a six month period before me and him actually started hanging out, and that was because of my friend, James Cranfield. He was, he was going to Derrick to buy crack, and, like I said, he got me started smoking, and we would go to his, you know, where he lived at the time to buy some. But that, you know, I didn't, I didn't even go inside and buy it or anything cause at that time I still didn't know—

(Tr. 300 l. 23 – 301 l. 7).

Applicant testified that he believed Counsel was ineffective for not objecting to the above testimony because it was improper prior bad act evidence that made him look like a drug dealer.

Applicant further testified that Counsel was ineffective for failing to effectively suppress the search warrant, which he believed contained unreliable information regarding the confidential informant as well as prior bad act evidence. Applicant testified that the confidential informant's purchases described as taking place March 3, 2009, and March 16, 2009, are improper and unreliable because Applicant was not actually charged with a crime as a result of those buys. Applicant further testified that the information in the search warrant was not reliable because the unnamed female who tipped the police to the motel on the date of his arrest was unidentified and because Applicant was seen at the motel empty handed. Applicant testified that the only information the police had leading to his arrest was the baking soda buy at Wal-Mart. Applicant testified that this information was insufficient to result in the search of Markley's house which led to Applicant's arrest.

Applicant testified that his defense at trial was that he was merely present at Markley's house when the police arrived and not engaging in any illegal activity. He testified that the only testimony

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 M. HOPPE BLANKLEY
 ST. LOUIS COUNTY

that placed him near the kitchen where the drugs were being manufactured was that of Markley.

On cross-examination, Applicant testified that he was in fact only charged with the drugs found at the house, and not the drugs found on Ricky Cheeks at the car stop. Applicant testified that everything in the search warrant affidavit was untrue, but later admitted that the confidential informant's purchase of crack cocaine from him at Fatz Cafe did occur.

Applicant testified that the State engaged in misconduct through selective prosecution, because his codefendants received plea deals.

Further, on cross-examination, the State introduced language from Applicant's direct appeal opinion, where the South Carolina Supreme Court found overwhelming evidence of Applicant's guilt.

Counsel's Testimony

Counsel testified that he has been in the practice of law for 26 years as a prosecutor and defense attorney. Counsel testified that he met with Applicant many times prior to his trial. Counsel testified that Applicant was not as detailed in their pre-trial discussions as he was on the stand during this hearing. Counsel testified that he filed all of the correct discovery motions and went over the discovery, charges, potential sentences, and trial rights with Applicant.

Counsel testified that he looked at the search warrant with Applicant and took issue with the lack of description of premises to be searched. He testified that this was a question of the warrant's sufficiency. Counsel testified that he did not make a motion to have a Franks hearing because he was not aware of the inclusion of any falsity or the exclusion of any exculpatory information in the search warrant.

Counsel testified that Applicant was not able to provide him with alibis or his version of the facts other than his claim that he was merely present at the scene where the drugs were found.

STATE OF SOUTH CAROLINA
 COUNTY OF HANCOCK
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 A. HOPE DEACLEY

Counsel testified that he did join in the motion to sever the indictments, moved to suppress the search warrant, and preserved his objections throughout the trial.

Regarding the alleged prior bad act testimony from Markley and Elder, Counsel testified that the statements were very short and at the time did not strike him as something he should object to, especially since the jury's attention would then be drawn to the statements which were made in the context of an explanation. Counsel testified that maybe he should have objected but explained that the outcome of the trial would not have been different had he done so. Counsel further testified that there was overwhelming evidence of Applicant's guilt because he was the only one in proximity to the kitchen where the cooking of crack was taking place.

III. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id.

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 M. HOPE LACKEY
 CLERK OF COURT

Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds the testimony of Counsel to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Additionally, as the South Carolina Supreme Court found in Applicant's direct appeal, this Court finds there is overwhelming evidence of Applicant's guilt, and therefore Applicant cannot prove prejudice. *See State v. Cheeks*, 401 S.C. 322, 329, 737 S.E.2d 480, 484 (2013).

Failure to Move for a Severance

This Court finds that Applicant failed to meet his burden of proving that his trial counsel was ineffective for consenting to having Applicant's case tried with Ricky Cheeks and for not moving to

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sever their two trials.

"Criminal defendants who are jointly tried [...] are not entitled to separate trials as a matter of right." State v. Dennis 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). "Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence, (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced." State v. Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). A court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." Id. at 282, 523 S.E.2d at 176.

This Court finds that Ricky Cheeks' counsel, Mr. Roger Poole, first made a motion to sever the two defendants' trials, to which Counsel joined and also moved to sever Ricky Cheeks' distribution charge. The record reflects that the State contended that one consolidated trial was necessary because the charges arose out of the same chain of circumstances, and the trial court denied the defendants' motion. This Court finds that Counsel was not ineffective for failing to move to sever because he moved to sever Ricky Cheeks' distribution charge and Applicant provided no evidence to show that his trial rights were compromised or that he and Ricky presented antagonistic defenses. Likewise, this Court finds that the charges resulted from the same chain of circumstances because Ricky Cheeks was pulled over almost immediately after leaving the house where Applicant was found.

Applicant has failed to prove prejudice because he cannot show that the outcome of the trial would have been different had Counsel moved to sever Ricky Cheeks' case. Ricky Cheeks' counsel,

M. HOPE B. ADNEY
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 SUPERIOR COURT
 COUNTY

Roger Poole, made a motion to sever the two defendants' trials, which was joined in by Counsel. It is undisputed that Applicant was charged with manufacturing over 400 grams of crack cocaine – the drugs found in Markley's house where Applicant was standing when police arrived – and not charged with trafficking or manufacturing the drugs that were found on Ricky Cheeks at the car stop. Moreover, Applicant has failed to show that a motion to sever his case from Ricky Cheeks' would have been successful. In all likelihood, such a motion would have been denied just as Counsel's motion to sever Ricky Cheeks' distribution charges was also denied. Accordingly, this allegation is denied and dismissed.

Failure to Request a Franks Hearing

This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to request a Franks hearing to suppress the search warrant. Counsel testified that he did not request a Franks hearing because he had no grounds to do so. This Court finds that Applicant presented no evidence regarding whether false information supporting the affidavit had been recklessly or intentionally included in the affidavit, or whether exculpatory information was recklessly omitted from the affidavit under Franks v. Delaware, 438 U.S. 154 (1978). Franks holds:

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-56. Applicant failed to articulate that Counsel was ineffective for failing to successfully suppress the search warrant under Franks. Applicant failed to produce any evidence that

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 BLANKLEY

any deliberate or reckless falsehoods appear in the arrest warrant. Accordingly, a Franks hearing was unnecessary. See State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999) (a defendant's attack on a search warrant affidavit must be more than conclusory; there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof).

Failure to Exclude Character or Prior Bad Act Evidence

This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to make a motion to exclude character and prior bad act evidence before the trial. Applicant's first complaint regarded statements elicited from Elder. When asked if he had ever been present during the manufacturing or cooking of crack cocaine, Elder answered that he had. This Court finds that Counsel was not ineffective for failing to object to this statement because it is not an example of a prior bad act by Applicant because it does not refer to Applicant. Next, when asked why he drove the Cheeks' car, Elder answered that he had hoped to get free crack. This Court finds that Counsel was not ineffective for failing to object to this statement because it is part of the res gestae of the case and not a prior bad act. When the statement is read in context, the solicitor was asking Elder about what was occurring during the day in question and why he was driving the car that was later pulled over by police. Later in the trial, Elder was asked why he left the residence with Ricky Cheeks and he responded that it was because Applicant told him to go somewhere to get rid of something. This Court finds that Counsel was not ineffective for failing to object to this statement because it describes the res gestae of the case and explains why Elder left the house before was pulled over by police. Lastly, Applicant took issue with Markley's statement that he met Applicant through a friend who was buying crack from Applicant.

Counsel testified at the hearing that he did not object to these because he did not believe them

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to be objectionable and an objection would have unnecessarily drawn the jury's attention to the statements. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Here, Counsel articulated a valid strategy in that he did not want to draw even more attention to the subject statements. Accordingly, this Court finds Applicant has not demonstrated that Counsel's performance in this respect was unreasonable or that such performance prejudiced him.

Additionally, this Court finds that Applicant's related allegation that Counsel was ineffective for failing to move for a mistrial based upon prosecutorial misconduct must be dismissed. This Court finds that Applicant has failed to present any actual evidence of prosecutorial misconduct by the State.

All Other Allegations

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

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing

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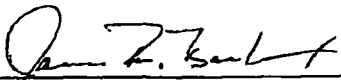
professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 2nd day of NOVEMBER, 2015.


 JAMES R. BARBER, III
 Presiding Judge
 Seventh Judicial Circuit

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Columbia, South Carolina

595

WITNESSES

1. SENTENCE MADE

by

2. REPORT MADE

Computer

3. REPORT PULLED

by

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND FINE CARD MADE

8. TRAFFIC VIOLATION COPY

by

Computer

ARREST WARRANT NUMBER

M087870

Amended

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: *9-30-10*

VERDICT

Guilty

Shirley Land

Foreperson of Petit Jury

Date:

10-6-10

DOCKET NO.

09-GS-42-6452

The State of South Carolina

County of

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 11 2010

TERM

THE STATE

VS.

DERRICK LAMAR CHEEKS

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE CRACK COCAINE WITHIN
ONE-HALF MILE OF SCHOOL

SC Code: 44-53-445

CDR Code: 0892

Class MIS/C

STATE OF SOUTH CAROLINA)
COUNTY OF)

INDICTMENT

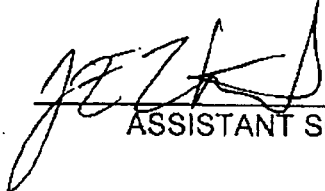
SEP 30 2010

At a Court of General Sessions, convened on _____, the
Grand Jurors of County present upon their oath:

**POSSESSION WITH INTENT TO DISTRIBUTE
CRACK COCAINE WITHIN ONE-HALF MILE**

That Derrick Lamar Cheeks did in Spartanburg County on or about June 4, 2009, distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute, a quantity of Crack Cocaine, a schedule II controlled substance, while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle or secondary school; a public vocational or trade school or a technical educational center; or a public or private college or university, to wit: Woodland Heights Elementary School, under provisions of §44-53-445 of *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended, such possession not having been authorized by law.

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



ASSISTANT SOLICITOR

WITNESSES

1. SENTENCE MADE

2. REPORT ENDED

SLED CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND PRECART MADE

8. TRAFFIC VIOLATION COPY

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ARREST WARRANT NUMBER

M08Z869

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: *[Signature]* 09

VERDICT

Guilty

Therice Sanford
Foreperson of Petit Jury

Date: 10-6-10

DOCKET NO.

09-GS-42-6453

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 5 11 2009

TERM

THE STATE

vs.

DERRICK LAMAR CHEEKS

Indictment for

TRAFFICKING IN COCAINE BASE
AND/OR CRACK COCAINE

SC Code: 44-53-375

STATE OF SOUTH CAROLINA

2009 DEC 10 11:12:11

MARC KITCHENS

