

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

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S.C. SUPREME COURT

RICKY D. CHEEKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001292

APPENDIX

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1 about four or five times. Every time it was the same -- the
2 same -- the same conversation.

3 Q. And what was that conversation?

4 A. You can't -- you can't use nobody that wasn't at the
5 house when you were busted.

6 Q. So what strategy did he say at that time was going to
7 be your defense strategy?

8 A. He didn't never tell me no defense strategy. He
9 just -- when he called me to court, I came to court, and him
10 and Mr. Wilkes was sitting at the table with us. They were
11 just -- Wilkes might have discussed something with my
12 nephew, because my nephew went to his office several times,
13 but Mr. Poole ain't never discussed nothing, no kind of
14 trial strategy with me.

15 Q. Well, what would a trial strategy have been for you?

16 A. Well, I would think it would be don't -- don't plead to
17 nothing you ain't done, I got in.

18 Q. I'm saying in terms of in the trial, what would your
19 strategy have been?

20 A. I'm innocent.

21 Q. Did you tell your attorney that?

22 A. He knowed I was innocent.

23 Q. But did you tell him?

24 A. Yeah, I did..

25 Q. Okay. Next, you have your attorney failed to properly

1 investigate and prepare your case.

2 A. We just went through that.

3 Q. What about the investigation -- outside the witnesses
4 now. I understand that, you know, people in this courtroom,
5 you said those people could have testified on your behalf.
6 What other investigation could your attorney have done that
7 you feel that he should have done?

8 A. He could have investigated at the residence where they
9 found all that dope, Markley's house. He could have went
10 around there and investigated and found out more about what
11 was going on, if you ask me.

12 Q. Anything else that he could have investigated?

13 A. He could have investigated who had all that dope,
14 because it wasn't me.

15 Q. Now, are you talking about the dope at the traffic stop
16 or the dope at the house?

17 A. They -- they all -- like on that paper you got -- I
18 mean, they were all fruit of the poisonous tree. They came
19 out of the same batch, so whoever owned one of them, owned
20 that.

21 Q. And your contention is you didn't --

22 A. It wasn't me. All -- all they got in my pocket was a
23 straight shootin steel smoker and they tell me it was over
24 six hundred and fifty grams of crack cocaine? They put me
25 in jail for twenty-five years. You know, tell me is that

1 justice? I don't think it is, ma'am.

2 Q. All right. Now, you indicated that -- you talked about
3 the search warrant. We talked about that earlier.

4 As far as you have heard what we have discussed with
5 the judge about the judicial misconduct and the due process
6 violations.

7 As to the misconduct, are you saying that your attorney
8 did not protect you against the misconduct in the course of
9 the trial, or was there something that happened outside the
10 course of the trial?

11 A. During the trial my lawyer did not perform his job
12 well. He -- I mean, you -- you could tell that he was -- he
13 was paid by the State. He was working for the State.

14 Q. Well, I mean --

15 A. He was trying to slay me instead of save me, the way I
16 see it.

17 Q. All right. But I'm asking you what happened in the
18 trial, did you feel that your attorney did not protect you
19 in terms of the rulings, what happened with the court? The
20 court -- you indicated that the magistrate approved an
21 invalid search warrant. At what point should your attorney
22 have protected you against an invalid search warrant, or are
23 you saying your attorney should have made a different
24 argument in court?

25 A. He should have made a different argument.

1 Q. So at the trial your attorney should have made a
2 different argument?

3 A. Yes.

4 Q. Now, you also indicated that there was -- the officers
5 lacked probable cause when stopping your vehicle. So that's
6 attacking the traffic stop, and you feel like your attorney
7 didn't argue as it relates to that for you, or argue well
8 enough for you?

9 A. No, what I'm -- what I'm attacking that is they had
10 reason to stop the car because he did intentionally run a
11 stop sign. I believe he was already working for them.

12 Q. The driver?

13 A. Yeah, Eric Elder. He did intentionally run that stop
14 sign and got us pulled over. But when he pulled us over,
15 they turned it into a Terry stop, where they were supposed
16 to just check his driver's license and they ain't supposed
17 to mess with me at all. I'm just a passenger in the car,
18 but yet they pulled me out of the car and toted me back to
19 the back, one on this side and one on this side and toted me
20 back to the back of the car.

21 Q. Are you saying toted?

22 A. Yeah, toted me, and then say I throwed 111 grams of
23 crack out on the ground while they was toting me back there,
24 but yet he gets out of the car and walks to the back.

25 I contend that Eric Elder throwed them drugs out of the

1 car and throwed them so hard they ended up on that side of
2 the car. They ain't never thought about that. I told them
3 that, but they wouldn't listen to me and say I did it, and
4 they ain't -- nobody saw me drop nothing until this very
5 moment. Every time anybody asked, try to find out about it,
6 nobody saw me drop nothing or throw nothing nowhere, but all
7 them drugs were supposed to be mine.

8 Q. Okay. And this is on the traffic stop, the hundred --

9 A. The 111 grams.

10 Q. Okay. So you told your attorney about it wasn't you
11 that dropped any or threw any drugs anywhere?

12 A. Yeah, the police even told them they didn't see me drop
13 no drugs nowhere, throwing them drugs nowhere.

14 And the one police had in there that say that he found
15 the drugs right there by where I was standing, when the drug
16 dog went up all the way up under the car to the middle of
17 the car and pulled the drugs out from under the car. That's
18 how it really happened. He didn't find no drugs. That dog
19 did it, and he pulled them out from under the car, the
20 middle of the car. They wasn't by my feet, so the officer
21 was actually lying on me.

22 Q. Okay. And you told your attorney that?

23 A. Yeah, I told my attorney he was lying.

24 Q. And what did he not do that you feel he should have
25 done through the course of the trial, or at some other

1 point, but I'm thinking it's in the course of the trial?

2 A. Yeah, he -- he should -- he should have attacked them
3 more, questioned them more, because he -- he got done and --
4 because they were police, they believe everything they say,
5 I guess. And the police has lied just like we do.

6 Q. I'm sorry?

7 A. I'm saying and police will tell lies like we do.

8 Q. Okay. You are saying they are average -- they are
9 people too?

10 A. Yeah, they are people. They are people, just like me,
11 and will tell a lie a lot quicker than me to save their
12 butt.

13 Q. And then did you discuss it with your attorney
14 throughout the trial what else he needed to do? I know you
15 said they were shushing you, but did you discuss with him
16 anything else?

17 A. When they were up there on the stand telling lies, I
18 was telling him then every time he told a lie, "they're
19 saying a lie." The judge would look at me and say "I don't
20 want to hear nothing else."

21 I -- I would call him and I would "look, it's a lie."
22 You know, I got a deep voice and it carries. The judge
23 would hear it every time. He threatened to throw me out of
24 my own trial.

25 Q. Well, now, you said something about testifying. Why

1 didn't you testify?

2 A. I was told it would -- it would -- it would hurt me to
3 testify is what Mr. Poole said.

4 Q. And so you agreed with that?

5 A. No, I just went with what my lawyer said and it was a
6 lie too.

7 Q. Well, how were you going to be able to point out the
8 inconsistencies? I mean, one minute you say that you wanted
9 to testify --

10 A. I did.

11 Q. -- to point out the inconsistencies of the co-defendant
12 that testified at the trial --

13 A. Yes.

14 Q. -- and then the next minute you are saying you went
15 along with your attorney because he said it wasn't in your
16 best interests.

17 A. Well --

18 Q. Explain to the court why you went along, when you felt
19 like you should have been testifying on your own behalf.

20 A. Well, I just went along. I -- I thought he knowed
21 best. That's what I guess he was getting paid for. You
22 see, I wasn't thinking that he worked for the State at that
23 time.

24 Q. And what do you mean because he worked for the State?

25 A. He worked for the State. That means he was trying to

1 get you convicted for the State.

2 Q. Even though he was your public defender?

3 A. Yes. He -- he worked so closely with my nephew's
4 lawyer Mr. Wilkes that I think he was trying to help Mr.
5 Wilkes get my nephew off and wasn't thinking about me; in
6 other words, throwing me out and helping Mr. Wilkes.

7 Q. Okay. All right.

8 Now, so all these things that you say your lawyer
9 didn't do, which makes him ineffective assistance of
10 counsel, how then did it -- how was it unfair to you in
11 terms of his being ineffective?

12 A. I think if he would have done his job better, I
13 wouldn't be standing here today. He could have got me off,
14 but if it wouldn't have been for his ineffectiveness I would
15 have gotten off that day, I think.

16 Q. So you are seeking relief --

17 A. I wouldn't --

18 Q. -- from the -- go ahead, I'm sorry.

19 A. I wouldn't have been done five years in prison now when
20 I ain't got no business being in no prison.

21 Q. Okay. And so based on that, what relief are you asking
22 the court to grant you here?

23 A. Vacate.

24 Q. Vacate your sentence?

25 A. Yes, I'm an innocent man doing time.

1 Q. Do you realize the judge can't vacate your sentence and
2 just say that you are innocent? Do you understand that,
3 right?

4 A. A judge -- a judge decided I was guilty and sent me
5 there.

6 Q. Well, you had a jury trial, right?

7 A. (Shaking head yes).

8 Q. And what was the jury supposed to do?

9 A. I also think the judge instructed the jury wrong. He
10 instructed the jury that they could convict me of both
11 111 grams and one hundred and -- and 400 grams of the same
12 drug. Now, the way I hear it, they can't do it. They ain't
13 supposed to have did that. He instructed them they could
14 convict me of all the charges, even the school charge, and
15 when I was stopped I was three miles away from the school.
16 That wasn't even in no school vicinity.

17 Q. Well, let's get back to what relief you are asking the
18 court for now. You are asking the court to vacate your
19 sentence?

20 A. Yes, I would like --

21 Q. And do you -- I'm sorry?

22 A. I would like it vacated.

23 Q. Okay. And do you realize that if the court finds your
24 lawyer ineffective assistance, that he ineffectively
25 assisted you, that the only thing he could do is vacate and

1 you start all the way over as if you were arrested for the
2 first time?

3 A. What do you mean, go back through the court?

4 Q. Yes, you go back through the court on those charges.

5 A. I was trying to get out of jail.

6 Q. Well, even if the judge found your lawyer to be
7 ineffective assistance of counsel, you do realize that this
8 judge cannot determine your guilt or innocence? You just
9 start over as if it was the first time that you had been
10 arrested?

11 A. Well --

12 Q. I'm sorry?

13 A. Then could you be my lawyer --

14 Q. I -- I --

15 A. -- because -- because I wouldn't want to go back with
16 him.

17 Q. So you are saying -- oh, you think that you have to go
18 back with Mr. Poole?

19 A. No, I -- I'm saying I wouldn't go back with him. I
20 want you to be my lawyer.

21 Q. Okay. Well, you wouldn't have to go back with Mr.
22 Poole, but you would start over.

23 A. I -- I would start over with you.

24 Q. Okay. All right.

25 So you realize that that's the extent the judge can --

1 A. Yes, but -- but I won't be locked up while you are
2 there, will I?

3 Q. No, you would be.

4 A. I would be?

5 Q. Yes, sir, you would have to start all over.

6 A. Well, I wasn't locked up when I started that the last
7 time.

8 Q. I know. You would have to start over. Like when you
9 got arrested, you realize what that process was, you got
10 arrested and you got out on bond?

11 A. I'm trying to think. Yeah, I did get out on bond.

12 Q. So you still want to go -- you still want to ask the
13 court to vacate and find your lawyer was ineffective
14 assistance?

15 A. Yes.

16 Q. Is there anything else you want to tell the court here?

17 A. Yes, I would like to know how and why that y'all lock
18 up an innocent man for five years all because of the
19 nonsense and then giving so much trouble getting out,
20 vacating the sentence, when the judge even knows I didn't do
21 it.

22 THE COURT: That's not a question I can answer.

23 A. I ain't had not one little piece of drug, but yet I got
24 twenty-five years for no drugs. All I had was a straight
25 shooter in my pocket steel smoker. I was a drug addict, not

1 a drug seller. How can a drug addict sell drugs? You can't
2 do it.

3 THE COURT: Okay. That's a rhetorical question,
4 not a question that I can answer for you.

5 A. But it's -- I -- I should have never been in jail.
6 That's what I'm trying to tell to you.

7 MS. MOODY: Okay. So there is no further -- I
8 don't have any further questions for this witness.

9 THE COURT: Okay.

10 Ms. Olive, any questions?

11 MS. OLIVE: Briefly, Your Honor.

12 May it please the court?

13 THE COURT: Yes, ma'am.

14 CROSS EXAMINATION BY MS. OLIVE:

15 Q. Good afternoon, Mr. Cheeks.

16 A. Yes, good afternoon.

17 Q. You indicated that Mr. Poole did not call certain
18 witnesses on your behalf?

19 A. Yes.

20 Q. Are they here to testify today?

21 A. Quite a few of them.

22 Q. Okay. Now, your attorney, Mr. Poole, he did, in fact,
23 move to suppress the evidence that was found in the house,
24 correct?

25 A. I'm thinking he did move to suppress that.

1 Q. Okay. Did he not sustain that objection throughout the
2 entire trial?

3 A. Everything my nephew's lawyer said, he backed him up
4 one hundred percent. He never came out with none of his
5 own. He co-signed with my nephew's lawyer said the whole
6 time.

7 Q. Well, y'all were tried as co-defendants, right?

8 A. Right, but he was not charged with the stop, the car
9 stop, like I was, but I was charged with the house, like he
10 was. I couldn't understand that either.

11 Q. Okay. Let's go back to the stop for a second. You
12 testified before that the officers did have a reason to
13 stop?

14 A. Yeah, he ran a stop sign intentionally --

15 Q. Okay.

16 A. -- because he was already working for the police.

17 Q. And you refer to him as being an informant, but, in
18 fact, he just -- he testified at your trial. There is no
19 testimony at trial that he was a confidential informant,
20 isn't that correct?

21 A. Where -- where is my thing at? It's does call him a
22 confidential informant. I'm talking about the transcript.

23 Q. Well, the judge has the transcript.

24 A. He does call him a confidential informant in that
25 transcript, I'm pretty sure.

1 Q. But you were in the car with him when he was stopped,
2 correct?

3 A. Yes.

4 Q. Okay. And your attorney -- you --

5 One of your allegations, as you testified earlier, is
6 that the prosecutor made the statement about you being the
7 cook or baker?

8 A. No, he said my nephew was the cook and I was the
9 runner.

10 Q. My apologies.

11 A. And then -- but then Tracy Markley, one -- the
12 co-defendant -- confidential informant got up on the stand
13 and said that he was the cook, but Eric Elder and Chris
14 Johnson did the running, but they got me in the deal for the
15 running. I can't see that either.

16 Q. But your attorney did cross-examine him, did he not?

17 A. He -- if he did, he didn't attack him. He didn't
18 attack him.

19 Q. Back to the statement about you being the runner. Your
20 attorney did move for a mistrial based on that statement,
21 did he not?

22 A. I -- I'm not sure about that.

23 Q. I can show you the transcript if it would refresh your
24 memory.

25 A. Yeah, show me the transcript.

1 If he did, it was because Mr. Wilkes did, because he
2 didn't do nothing aside from what Mr. Wilkes did.

3 MS. OLIVE: May I approach the witness, Your
4 Honor?

5 THE COURT: Yes, ma'am.

6 MS. OLIVE: For the record, it's page 153 of the
7 trial transcript, beginning at line four.

8 BY MS. OLIVE:

9 Q. You don't have to read it into the record.

10 (Off the record).

11 (Back on the record).

12 BY MS. OLIVE:

13 Q. Mr. Cheeks, does that refresh your memory that your
14 attorney did move for a mistrial?

15 A. Yes. He did move for a mistrial. That was far and few
16 in between he did that.

17 Q. And, Mr. Cheeks, your attorney also moved for a
18 directed verdict, did he not?

19 A. I'm thinking Mr. Wilkes moved for that directed verdict
20 about -- about the -- was it about the chain?

21 Q. Well, you withdrew your allegation regarding the chain,
22 did you not?

23 He moved for a directed verdict based on all the
24 objections that he had made at trial that were not
25 sustained, did he not?

1 A. I'm not sure.

2 Q. Especially with regard to the suppression of the
3 evidence that was seized from the house?

4 A. I wasn't even at the house when it happened. And he's
5 got me telling he was guilty of them drugs too.

6 MS. OLIVE: That's all the questions that I have.

7 THE COURT: Okay. Ms. Moody, anything in
8 response?

9 MS. MOODY: No, sir.

10 THE COURT: Okay.

11 Any more witnesses?

12 MS. MOODY: No, sir.

13 THE COURT: All right. We have been running for a
14 little while. Let's take fifteen minutes and then we will
15 reconvene.

16 MS. OLIVE: Thank you, Your Honor.

17 (Whereupon, proceedings were recessed)

18 (Whereupon, proceedings were reconvened)

19 THE COURT: Ready?

20 MS. OLIVE: Yes, Your Honor, the State calls Roger
21 Poole to the stand.

22 THE COURT: Mr. Poole, come up and be sworn,
23 please.

24 MR. POOLE: Yes, sir.

25 ROGER POOLE, ESQUIRE, having been first duly

1 sworn, testified as follows:

2 THE COURT: Please be seated.

3 Tell us your name on the record.

4 THE WITNESS: My name is Roger Poole.

5 THE COURT: Ms. Olive.

6 MS. OLIVE: May it please the court?

7 THE COURT: Yes.

8 DIRECT EXAMINATION BY MS. OLIVE:

9 Q. Mr. Poole, good afternoon.

10 A. Good afternoon.

11 Q. Mr. Poole, how long have you been practicing law?

12 A. Thirty-six years.

13 Q. And what portion of that has been criminal?

14 A. I have been practicing criminal defense for thirty
15 years.

16 Q. Okay. Do you recall --

17 Well, first of all, were you appointed or retained in
18 this case?

19 A. I was appointed, in the Public Defender's office, and
20 our interviewer interviewed Mr. Cheeks in July of 2009.

21 Q. Is that when your representation began?

22 A. Yes.

23 Q. Do you recall how many times that you met with Mr.
24 Cheeks?

25 A. I don't recall the exact number. I met with Mr. Cheeks

1 on several occasions before trial.

2 Also he had a co-defendant, a Derrick Cheeks, that was
3 a relation to his -- I think it was his nephew, and he was
4 represented by Jeff Wilkes of Greenville, and I would talk
5 with Jeff about his client, and we were going to be trying
6 these cases together, and we made several -- I'm getting
7 ahead of myself, I guess, but my preparation for trial
8 involved talking with my client, talking with Mr. Wilkes,
9 going over the discovery with Mr. Cheeks and talking to him
10 about any possible defenses.

11 In speaking to him about possible defenses, he
12 maintained his innocence all the way through, and we didn't
13 have any type of affirmative defense, but basically we had
14 what I call the default position of criminal defense and
15 that -- what I mean by that, default being defined as the
16 State being unable to fulfill its obligation of proof beyond
17 a reasonable doubt. So we had to take the State's case and
18 try to show that there was sufficient reason for any jury
19 not to find him guilty beyond a reasonable doubt.

20 We did suppression motions. I moved for a mistrial,
21 and these were things that were pretty much anticipated,
22 except for the characterization that one was a baker and one
23 was a runner. I think I said at trial that the State wants
24 to propose and characterize all of this like a pizza baking
25 type of procedure.

1 There was a manufacturing of crack cocaine going on at
2 a house that was legally possessed by one Markley, to the
3 best of my memory, and there was a stop that was made on Mr.
4 Cheeks that was -- he was a passenger in a car being driven
5 by one Elder. These two individuals testified at trial.
6 And, of course, they testified right down the line what the
7 State wanted, and they were State's witnesses. We were
8 aware that they were State's witnesses, and to the best of
9 my ability, I tried to impeach them by cross-examination.

10 As I told the jury in the opening argument, and perhaps
11 in the closing argument, too, that when you have two
12 defendants being tried together, there is going to be a
13 great deal of repetitiveness and that I was going to be
14 repetitive. And when I hear a complaint about following the
15 lead of a co-defendant's counsel, well, that's what you got
16 to do. You have got to say I join in that objection. If
17 you don't, then you are going to have problems later on.

18 So these enterprises, the manufacturing and the traffic
19 stop, were connected and -- again, I think we did try to
20 move to sever the two incidences but were unsuccessful.

21 Q. Going back to the discovery, did you review all the
22 discovery in this case with Mr. Cheeks?

23 A. Yes, I did.

24 Q. And did you discuss with him all the elements of the
25 charges and what the State would be required to prove at his

1 trial?

2 A. Yes, and it's pretty self-explanatory. There are
3 amounts that carry certain legal consequences and penalties,
4 and manufacturing means just what it says, cooking, whatever
5 you want to call it. Trafficking means carrying or
6 possessing in certain circumstances and all that.

7 Q. Okay. Is it called trafficking based on the quantity
8 of the drug?

9 A. There are gradations, of course, in the code based on
10 weight.

11 Q. Did Mr. Cheeks ever provide you with potential
12 witnesses or leads for investigation purposes in his case?

13 A. I don't recall that he did. He may have. And if so,
14 if those individuals were not at the house or at the
15 location where the stop occurred, then I don't see how
16 anything could have been helpful.

17 I see that there are a lot of folks out there that are
18 friends and perhaps family that are naturally concerned
19 about their loved one, but unfortunately you can't get into
20 character or anything like that in a defense of anybody.

21 Q. So, to your knowledge, was there anyone that could have
22 testified on his behalf?

23 A. Not to my knowledge.

24 Q. Mr. Poole, I believe you testified that you did move to
25 suppress the evidence that was in the house, is that right?

1 A. I think so.

2 Q. Or that was seized as a result of the search warrant?

3 A. That's right.

4 Q. Did you feel there was any basis on which you could
5 have challenged the traffic stop?

6 A. I didn't think that there was any basis for a
7 suppression there, because the testimony that I had in my
8 discovery -- the testimony that was basically inherent in
9 the discovery was that this vehicle ran a traffic stop sign.
10 It was stopped. Both the passenger's side and the driver's
11 side were approached by law enforcement.

12 Law enforcement was keen on what was going on in the
13 house and the activities of the occupants of the car prior
14 to the stop.

15 The testimony, I believe, or at least in the discovery,
16 stated that Mr. Cheeks was acting in a furtive manner and
17 that crack cocaine was found near him, I do believe, if I'm
18 not mistaken.

19 Q. Was there -- do you recall whether there was a drug dog
20 sniff at the traffic stop?

21 A. I recall that now, yes.

22 Q. Mr. Cheeks testified prior that there was allegedly a
23 videotape in a Bronco. Do you recall --

24 A. There was -- to my recollection there was no videotape
25 available.

1 Q. Do you recall the testimony of -- the direct testimony
2 of Mr. Matheton at Mr. Cheeks trial?

3 A. No. You know, it's been six years and I do have a
4 transcript, but I have not had an opportunity to review it,
5 and my an edition of the transcript has omissions.

6 Q. It does and I apologize for that.

7 A. That's okay.

8 Q. Okay. Would it refresh your memory if I showed the
9 transcript to you?

10 A. Maybe.

11 Q. Okay.

12 MS. OLIVE: Your Honor, may I approach the
13 witness?

14 THE COURT: Yes, ma'am.

15 What page?

16 THE COURT: Oh, I apologize. It's page 108 of the
17 transcript.

18 BY MS. OLIVE:

19 Q. And that begins at line 13.

20 A. 13.

21 Okay. Well, yeah, he did say that it was not equipped
22 with an in-camera system. This was on direct examination by
23 the prosecution.

24 Hutchens' answer was "no, mine is actually an
25 undercover vehicle. It's an SUV."

1 Q. Is that your understanding of what Mr. Cheeks is
2 referring to?

3 A. Yes.

4 Q. Do you recall whether you moved for a directed verdict
5 in this case?

6 A. I think I did. I'm confident that I did.

7 Q. I'm confident that you did also.

8 A. Okay.

9 MS. OLIVE: And I can point the court to that.

10 I thought I could point the court to that, but
11 I'll let the record speak for itself.

12 THE COURT: The record speaks for itself. I have
13 read the transcript.

14 BY MS. OLIVE:

15 Q. Mr. Poole, do you feel that there is any further
16 investigation you could have done in this case that would
17 have assisted Mr. Cheeks at trial?

18 A. Not that I'm aware of.

19 MS. OLIVE: I beg the court's indulgence for a
20 minute.

21 THE COURT: Yes, ma'am.

22 (Off the record).

23 (Back on the record).

24 BY MS. OLIVE:

25 Q. Mr. Poole, did you advise Mr. Cheeks regarding his

1 right to testify at trial?

2 A. Yes, we talked about that, as is so -- it's -- it
3 occurs in every trial. The defendant is given the
4 opportunity to speak to his lawyer about whether or not to
5 take the witness stand, and the decision is made by the
6 defendant, and solely by the defendant, and that is
7 underscored by the trial judge, who asks him series of
8 questions about that very issue.

9 Q. So that would have been his decision?

10 A. Yes, ma'am.

11 Q. What was your main strategy or theory in this case?

12 A. Mere presence.

13 Q. Do you recall whether a jury charge was given on mere
14 presence?

15 A. It was.

16 Q. Thank you. That's all the questions that I have, Mr.
17 Poole.

18 A. Thank you.

19 Q. Please answer any questions Ms. Moody may have.

20 THE COURT: Ms. Moody.

21 MS. MOODY: Thank you, Your Honor.

22 CROSS EXAMINATION BY MS. MOODY:

23 Q. Good afternoon, Mr. Poole.

24 A. Good afternoon.

25 Q. So you were the attorney for Mr. Cheeks from the

1 beginning until obviously to the end of the trial?

2 A. Yes, ma'am.

3 Q. And during that period of time did you all have an
4 opportunity to entertain any kind of plea offers?

5 A. I was looking through the file and I didn't see where
6 there might have been a plea offer given. That doesn't mean
7 that there might not have been one. If there was, I would
8 have relayed it to him.

9 Q. Okay. And so from the beginning of representing Mr.
10 Cheek, was it always his position that he was innocent?

11 A. Yes.

12 Q. And his position is that he was a drug user?

13 A. Yes.

14 Q. And did you all discuss possibly --

15 Earlier you testified about bringing character from the
16 defense standpoint. Did you all discuss his drug habit or
17 possibly presenting that to the jury?

18 A. No, we probably didn't discuss presenting the evidence
19 of drug usage to the jury.

20 Q. Meaning that he wasn't a seller. And, I guess, given
21 the charges, you talked about you explained the trafficking
22 and the basis of trafficking, what was the amount to be
23 trafficking in drugs?

24 A. Yes, ma'am.

25 Q. Okay. And so when he indicated he wasn't -- he was

1 using, but he wasn't -- you know, he was -- I guess the mere
2 presence is what you were getting at with that?

3 A. Yes, ma'am.

4 Q. Okay. And that it wasn't his drugs and he didn't throw
5 it. You all discussed that?

6 A. Yes, he maintained his innocence that it was not his
7 and he had no possession.

8 Q. And did he seem to understand kind of how you had to go
9 about handling this case in a trial?

10 A. I think he did. I mean, when we talked we had a mutual
11 conversation.

12 Q. Okay. And so in terms of the witnesses that he spoke
13 about, were those witnesses to say he wasn't there, or were
14 those witnesses to address, you know, he doesn't deal drugs,
15 you know?

16 A. I'm not sure. I was focusing on the fact of mere
17 presence and if the witnesses could not testify to that
18 issue, then I figured that there were just none out there
19 for that issue.

20 As far as drug usage is concerned, I'm not so sure it's
21 a very wise defense to put up witnesses that say "yes, he's
22 a drug user, but he doesn't go so far as to, you know, deal
23 or sell," because that can open up a whole wide open door.

24 Q. Well, did you explain that to Mr. Cheeks?

25 A. No, I didn't explain it. I'm just now thinking about

1 it, because --

2 Q. Okay. But I'm saying in terms of how he tried to
3 convey what he thought his defense was, which I'm quite sure
4 requires what they think their defense is, and it may not be
5 a defense at all, did you all have those kind of
6 conversations where, you know, you had to go through the
7 discovery?

8 A. Well, if you are asking me did we talk a lot about his
9 drug habit, I'm not sure to what extent we talked about
10 that. We went through the discovery and talked about it in
11 the context of the charges that he was facing.

12 Q. Actually what I'm getting at, he -- you say he
13 maintained that he was an innocent man?

14 A. (Shaking head yes).

15 Q. Did he just say "I'm an innocent man" and leave it at
16 that, or what did he say or convey to you when he makes the
17 statement "that I'm an innocent man"?

18 A. "That I never did have any in my possession."

19 Q. That was the extent of it?

20 A. That was about it.

21 Q. Okay. So in coming up with a defense, that was
22 basically you had to look at the case and analyze it and
23 come up with a defense?

24 A. Which was mere presence.

25 Q. Okay. All right.

1 So in terms of the investigation, I realize you talked
2 to him and went over the discovery, you talked to Mr. Wilkes
3 about the case, what other investigation did you do as it
4 relates to this case?

5 A. I'm sure that I talked to the solicitor. I don't know
6 whether or not I talked to any of the law enforcement folks
7 or -- I'm going to say I talked to Matt Hutchens.

8 Q. Did you go to the house that the --

9 A. No, I did not, no.

10 Q. The stop location?

11 A. I did not.

12 Q. I believe you testified earlier that you didn't find a
13 problem with the stop?

14 A. That was my opinion at the time.

15 Q. Okay. Did you explain that to Mr. Cheeks?

16 A. Yes.

17 Q. Okay. Did he seem to understand that?

18 A. Yes.

19 Q. Okay. So earlier you testified that your strategy was
20 mere presence and trying to suppress the evidence as it was
21 going to come in and you moved for a mistrial?

22 A. That's what the record contains.

23 Q. And as to other witnesses, you had also testified that
24 there were no other witnesses that you thought that could
25 assist in his case?

1 A. Not that I'm aware of, that's correct.

2 Q. So he didn't tell you of anybody else, other than the
3 people that he said?

4 A. Well, you know, it's been six years ago. I can't say
5 whether or not, you know, he gave me definite names or
6 whether I went out and talked to any of these individuals
7 back here, or any other ones.

8 You know, during the course of the trial sometimes I'm
9 asked by the defendant to speak, or when we are getting
10 ready for trial, there is a gathering of folks and I may
11 have talked to some then. I don't remember.

12 Q. Uh-huh.

13 MS. MOODY: Beg the court's indulgence.

14 THE COURT: Yes, ma'am.

15 (Off the record)

16 (Back on the record)

17 BY MS. MOODY:

18 Q. As to the co-defendants in the case, Markley and Elder,
19 you heard the testimony from Mr. Cheeks that he felt that
20 you should have attacked their credibility. Did you have
21 any information to attack their credibility, other than --
22 like prior record, or anything, other than what they were
23 saying from the stand?

24 A. I don't know. I just know that there were several
25 pages where I cross-examined him and whatever I had

1 available to make those questions is all I had. I don't --

2 Q. Did Mr. Cheeks provide you with any information on
3 those individuals, or you came up with that based off of
4 your review of the evidence?

5 A. I don't recall. He may have. He may have not. I just
6 don't remember.

7 Q. Okay.

8 A. I remember him saying "he's lying," I mean when we were
9 sitting together. I hear that often.

10 Q. Okay. As far as the sentencing went, can you explain
11 how -- did you --

12 You talked about the charges and what potentially Mr.
13 Cheeks was exposed to. Did you explain to him about what
14 his sentence would be on the other side of the trial if he
15 was found guilty at the trial, I'm sorry?

16 A. Yes.

17 Q. So, as far as you knew, he was clear on what he was
18 possibly facing? If he were to be found convicted, he was
19 clear on that?

20 A. Yes.

21 Q. Okay. And he still wanted to go to trial?

22 A. Yes.

23 THE APPLICANT: Because I was innocent.

24 (Off the record).

25 (Back on the record).

1 MS. MOODY: No further questions for this witness.

2 Thank you.

3 THE COURT: Anything, Ms. Olive?

4 MS. OLIVE: No, Your Honor. Thank you.

5 THE COURT: Very good.

6 Mr. Poole, you may step down. Please be careful.

7 THE WITNESS: Thank you.

8 THE COURT: Another witness?

9 MS. OLIVE: No, Your Honor, that would be the
10 State's showing.

11 THE COURT: Anything, Ms. Moody?

12 MS. MOODY: No, sir, Your Honor.

13 THE COURT: Okay.

14 All right, Mr. Cheeks, you don't know how we do
15 this, but I'm going to explain it to you. I'm going to take
16 this under advisement. I will read the record again. I
17 have listened to the arguments of the lawyers and I have
18 heard the testimony. My law clerk will then be sending out
19 instructions for an order to be drafted and she sends that
20 to your lawyer, along with the State's lawyer at the same
21 time, okay? So the government doesn't get it first and you
22 don't get it first. It's sent out on an e-mail at the same
23 time, okay? And once your lawyer has those instructions and
24 the ruling of the court, she will share that with you, okay?

25 Thank you, Mr. Cheeks. Good luck to you.

1

THE APPLICANT: Thank you.

2

THE COURT: Yes, sir.

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(END OF REQUESTED TRANSCRIPT OF RECORD)

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CERTIFICATE

I, the undersigned, Michael R. Watts, 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 the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for SPARTANBURG County, South Carolina, on the 24th day of March, 2016.

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

JULY 14, 2016

Michael R. Watts

Michael R. Watts
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Ricky D. Cheeks, #343107,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-3903

ORDER OF DISMISSAL

2016 MAY 31 AM 9:24
M. HOPE OLIVER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 6, 2014. Respondent made its return on March 5, 2015, requesting that an evidentiary hearing be held. An evidentiary hearing into the matter was convened at the Spartanburg County Courthouse before the undersigned on March 24, 2016. Applicant was present and represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, represented Respondent.

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from J. Roger Poole, Esquire. This Court also had before it the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records and the pleadings.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the November 2009 term of General Sessions for possession with

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intent to distribute crack cocaine within one-half mile of a school (2009-GS-42-6455), trafficking crack cocaine, 400 grams or more (2009-GS-42-6456), and trafficking crack cocaine, 100 grams-200 grams (2009-GS-42-6457). J. Roger Poole, Esquire, ("Counsel") represented Applicant.

Applicant proceeded to trial before the Honorable Roger L. Couch and a jury October 4-6, 2010. The jury found him guilty of all charges. Judge Couch sentenced Applicant to imprisonment for concurrent terms of twenty-five years for both trafficking charges and ten years for possession with intent to distribute within one-half mile of a school.

A timely notice of appeal was filed on Applicant's behalf. Wanda H. Carter, Esquire, perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence on October 24, 2012. State v. Cheeks, Op. No. 5042 (S.C. Ct. App. filed October 24, 2012). The Supreme Court of South Carolina granted certiorari and affirmed Applicant's conviction and sentence on May 28, 2014. State v. Cheeks, Op. No. 27390. (S.C. Sp. Ct. filed May 28, 2014). The Remittitur was returned on June 13, 2014.

II. ALLEGATIONS

Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that Counsel:
 - a. Failed to intervene and call witnesses on behalf of Applicant;
 - b. Failed to attack the credibility of confidential informant;
 - c. Failed to move to suppress evidence seized as a result of an illegal search;
 - d. Failed to object to flawed chain of custody;
 - e. Failed to seek a "video tape of the Bronco driving the day of the traffic stop";
 - f. Failed to attack the credibility of testifying co-defendants;
 - g. Failed to receive a similar sentence given to Applicant's codefendants;
 - h. Failed to object to perjury testimony of co-defendants;

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- i. Failed to move for directed verdict;
 - j. Failed to object to comments made by Solicitor Hunter;
 - k. Failed to explain or discuss a defense strategy with Applicant;
 - l. Failed to properly investigate and prepare Applicant's case;
- 2. Judicial Misconduct, in that:
 - a. Magistrate approved an invalid search warrant
- 3. Due Process Violations
 - a. Defective Search Warrant
 - b. Officer's lacked probable cause when stopping Applicant's vehicle

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court finds trial counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. This Court finds Counsel's performance was not deficient. Regarding Applicant's specific allegations, set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony Presented

Applicant's convictions arose out of the traffic stop of a vehicle in which he was the passenger and the search of a home pursuant to a search warrant. Applicant testified that Counsel should have called people to testify that the drugs were not his. Applicant testified he asked Counsel why he was not calling these witnesses and Counsel said that if they were not in the house they could not help Applicant. Applicant testified that Counsel should have attacked the testimony of his co-defendants, Eric Elder and Tracy Markley. Applicant testified that he

wanted his attorney to ask them why they were lying. Applicant referred to Markley and Elder as "informants."

Applicant testified that Counsel should have further investigated and that if he had done so he would have been able to show the drugs were not his. Applicant testified Counsel did not perform his job well and that he could tell Counsel "worked for the State."

Applicant testified that Counsel should have made a different argument regarding the search warrant of the home. Applicant testified that Counsel should have attacked the traffic stop. Applicant testified that they had reason to stop the car because the driver intentionally ran the stop sign and that the stop turned into a Terry stop. Applicant testified he told Counsel he did not drop any drugs. Applicant testified that the drug dog went under the car and pulled them out of the middle of the car. Applicant testified Counsel should have attacked the stop more.

Counsel testified that he has been practicing law for thirty-six years. Counsel testified he was appointed in July of 2009, met with Applicant several times before trial but did not recall exactly how many, and had ample time to prepare for trial. Counsel testified he reviewed discovery with Applicant, discussed the elements of the charges and what the State would be required to prove, and discussed possible defenses with Applicant. Counsel testified that Applicant maintained his innocence and Counsel's strategy at trial was to show that the State was unable to fulfill its obligation to prove him guilty beyond a reasonable doubt. Counsel also testified that his defense was mere presence.

Counsel testified that he made suppression motions. Counsel testified that he moved for a mistrial due to the mischaracterization of Applicant as the "baker" or "cook." Counsel testified that Markley possessed the home, and that Elder and Markley were State's witnesses, but were

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not informants. Counsel testified that he could not recall if Applicant gave him any leads, but that if he did, if the witnesses were not in the house or the car, their testimony would not have been useful. Counsel testified that Applicant was riding as a passenger in a vehicle that law enforcement pulled over because the driver of the vehicle ran a stop sign. Counsel testified that at that point, law enforcement already knew about the drugs that were found in the house prior to the stop. Counsel testified this was in the discovery. Counsel testified that he did not challenge the drugs seized in the traffic stop because he had no basis for a suppression motion with respect to the stop. Counsel testified, and the record reflects, that he did move to suppress the evidence that was seized from the house by challenging the search warrant at trial.

On cross-examination, Counsel testified he did not recall any plea offers from the State. Counsel testified that if there had been, he would have informed Applicant. Counsel testified on cross that it was Applicant's contention that he was just a drug user and that he was using but the drugs were not his. He testified Applicant stated he was not the one who threw the drugs, maintained his innocence the whole time, and was not interested in any plea offers. Regarding the witnesses Applicant alleged Counsel should have called, Counsel testified he was not sure what the witnesses were going to testify to other than character. He testified he did not think it was wise to put people up to say that Applicant is a drug user. Counsel testified that he had those kinds of conversations with Applicant and that he reviewed all discovery with Applicant. Counsel testified that Applicant said he never had any drugs and that he was innocent.

Counsel testified he was certain that he spoke with the solicitor during trial preparation, but that he was not sure about whether he spoke with law enforcement. Counsel testified he explained to Applicant that he had no basis to challenge the traffic stop. Counsel testified that he

focused on mere presence and that he made a suppression motion and moved for a mistrial. Counsel testified that the trial was six years ago and that he may have spoken to witnesses then but does not remember. Counsel testified he did not recall whether Markley and Elder had a record. Counsel testified he told Applicant what sentence he was facing and that he was clear on that.

B. Ineffective Assistance of Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 625 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts must strongly presume that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this

presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds Counsel met with Applicant several times, discussed charges and sentencing ranges, and reviewed discovery materials with Applicant. Counsel also testified Applicant's co-defendant—his nephew—was represented by J. Faulkner Wilkes, and that during trial preparation, he discussed the case in great detail with Wilkes. Counsel testified that it is customary when co-defendants are tried together for attorneys to work together in preparing the case, allowing one attorney to move on certain issues and to make objections and the other attorney to join in the motion or objection, so as not to present repetitive arguments to the court.

There are no plea offers in the record before the Court and counsel testified that to his recollection, there were no plea offers made. Applicant also reiterated that he maintained his innocence the whole time and was not interested in any plea offers.

Failure to explain or discuss a defense strategy

Applicant testified that Counsel would not tell him what was going on at trial, that he kept "shushing" him. Applicant testified that Counsel never told him a defense strategy. Applicant testified that Counsel should have proceeded under the theory that he was innocent. Counsel testified he met with Applicant several times, reviewed all discovery materials with Applicant and discussed possible defenses with Applicant. Applicant continued to maintain that he was a user and not a dealer. Counsel testified that putting this defense before the jury was not in Applicant's best interest and that his theory and strategy for the trial was to put forth a "mere

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presence" defense. This Court is not convinced by Applicant's testimony that Counsel failed to discuss the case with him. This Court finds that Counsel adequately conferred with Applicant and thoroughly discussed the case with him, including any available defenses he had. As Counsel testified, his defense theory was mere presence. The record reflects that Counsel's strategy was evident in the trial and that the trial judge instructed the jury on mere presence. Applicant fails to point to any other viable defense. Therefore, this Court finds that Applicant has failed to demonstrate that counsel's performance was deficient.

Further, Applicant failed to demonstrate how this alleged deficiency affected the outcome of his trial. Counsel agreed that Applicant maintained his innocence of the charges but admitted to being a drug user. Counsel testified he discussed this with Applicant. Regardless, Applicant has made no showing that his knowledge or lack of knowledge about Counsel's defense strategy had any bearing on the outcome of the trial. Therefore, this Court further finds that Applicant has failed to demonstrate that this alleged deficiency prejudiced him.

Failure to advise of right to testify

Applicant testified he did not testify at trial because Counsel told him it would hurt him to testify. Applicant acknowledged that he elected not to testify at his trial following Counsel's advice, because he believed that his Counsel "knows best." Counsel testified that he believed that it was in Applicant's best interest not to testify at trial. The trial judge inquired of his decision, and he advised the court that it was his decision not to testify. Applicant failed to offer any evidence that he sought to invoke his right to testify. Therefore, this Court finds that Applicant has presented no evidence that Counsel failed to advise him of his right to testify. Accordingly, Applicant has failed to show that Counsel rendered deficient performance in this regard.

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Furthermore, Applicant failed to provide any specific explanation or reason why his testimony was necessary at trial or how it would have changed the outcome at trial. Accordingly, this Court finds Applicant has failed to prove any prejudice resulting from this alleged deficiency.

Failure to call witnesses or properly investigate and prepare Applicant's case

To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he been more fully prepared for the trial. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorhead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Counsel testified that he discussed his strategy with Applicant and advised him that the witnesses he wanted to present would not benefit the case for two reasons. First, these witnesses were not present at the home where the drugs were seized or in the vehicle at the time of the arrest. Second, for that reason, such witnesses would only be able to provide character testimony, and counsel did not wish to present testimony of that nature and did not think it would assist in Applicant's defense. Further, Counsel testified that he was unaware of any other investigations that would be helpful. Applicant alleges that Counsel could have shown that the drugs were not his, but Applicant failed to produce any evidence to that effect apart from his own testimony. Applicant failed to call any witnesses at the PCR hearing. According to Counsel's testimony, Counsel had already explored these potential avenues.

Therefore, this Court finds that Applicant has failed to meet his burden of proving that Counsel was deficient in this regard. This Court further finds that Applicant failed to produce any evidence of how any further investigation would have affected the outcome at trial. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("[A]pplicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Accordingly, this Court finds that this allegation must be denied and dismissed with prejudice.

Failure to properly cross-examine witnesses

Applicant alleged that Counsel failed to attack the credibility of "confidential informant," failed to object to the "perjur[ed] testimony of co-defendants," and failed to attack the credibility of testifying co-defendants. The Court interprets these claims as an allegation that Counsel failed to properly cross-examine these witnesses. Cross-examination is a matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

Counsel testified, and the record reflects, that he cross-examined the witnesses presented

against Applicant. Applicant acknowledged that Counsel cross-examined State's witnesses. This Court finds Counsel adequately cross-examined all State's witnesses and pointed out inconsistencies in their testimony. Applicant has failed to produce any evidence regarding what information Counsel could have uncovered had he cross-examined the witnesses more extensively, or how it would have changed the outcome of his trial. Therefore, Applicant has failed to produce any evidence to substantiate his claim that there would have been a different outcome if counsel had been "more vigorous" in his cross-examination of the witnesses. As a result, this Court, this Court "can only speculate whether a 'better' cross examination would have helped [Applicant]." Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997).

Accordingly, this Court finds Applicant has failed to satisfy his burden of proving either prong of Strickland with regard to this allegation, and it is therefore denied and dismissed.

Failed to move to suppress evidence seized as a result of the automobile stop

Counsel testified that he did not challenge the drugs seized in the traffic stop because he had no basis for a suppression motion with respect to the stop. Counsel testified that Applicant was riding as a passenger in a vehicle that law enforcement pulled over because the driver of the vehicle ran a stop sign. Counsel testified the stop was a legal stop due to the driver running a traffic sign. Counsel testified that at that point, law enforcement already knew about the drugs that were found in the house prior to the stop. Counsel testified this was in the discovery. This Court finds that Applicant has failed to show any deficiency in Counsel's performance with regard to this allegation. This Court further finds that Applicant has failed to show that there is a reasonable probability that the outcome would have been different had Counsel made the suppression motion. Accordingly, this allegation is denied and dismissed.

Failure to move to suppress evidence seized as result of illegal search of the home

This Court finds that this issue was properly raised and ruled upon by the trial court and that ruling was affirmed on appeal. The Court of Appeals noted that Applicant's attorney joined in Wilkes' argument for suppression at trial as to this issue. The Court also acknowledged the possibility that Applicant may not have standing to challenge the search warrant, but declined to address that issue. This Court finds Applicant has no standing to challenge the search warrant of the home because he was not the homeowner. Accordingly, this Court finds Applicant has failed to show that there was any deficiency in Counsel's conduct with regard to this allegation. Further, Applicant has failed to demonstrate that any alleged deficiency prejudiced him. Because the Court of Appeals affirmed the trial judge's denial of the suppression motion, there is no reasonable probability that the outcome of Applicant's trial would have been different.

Failure to secure video recording from law enforcement vehicle

Applicant testified that there should have been a video available from a Bronco involved in the traffic stop. At Applicant's trial, the solicitor asked Officer Hutchens whether the Bronco had a camera and he testified that it was an undercover vehicle and it therefore did not have a video camera. Similarly, Counsel testified that he advised Applicant that the law enforcement vehicle in question was not equipped with a videotape because the vehicle was used for undercover operations. Accordingly, this Court finds Applicant has failed to satisfy either prong of Strickland with regard to this allegation, and it is therefore denied and dismissed.

Failure to move for a directed verdict

Applicant testified that Counsel should have moved for a directed verdict. However, Counsel testified that he moved for a directed verdict, and the record reflects Counsel moved for

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a directed verdict. Accordingly, this allegation is without merit and is denied and dismissed.

Failure to object to comments made by Solicitor Hunter

Applicant alleged Counsel failed to object to comments made regarding statements about his and his co-defendant's respective roles as the cook and runner. However, Applicant and Counsel testified that Counsel objected to testimony and cross-examined witnesses regarding these statements. Further, Counsel testified and the trial transcript reflects that Counsel moved for a mistrial based on these statements. (Tr. p. 153, lines 4-6). Applicant also admits that he never had a conversation with Counsel regarding this issue. Applicant has failed to show either deficiency or prejudice with regard to this allegation. This Court finds this allegation is without merit, and it is therefore denied and dismissed.

Failure to receive a similar sentence given to Applicant's codefendants

The Court finds that Applicant failed to present any testimony, argument, or evidence at the hearing regarding this allegation. Accordingly, this Court finds the Applicant has abandoned this allegation.

Failure to object to flawed chain of custody

At the hearing, Applicant withdrew this allegation.

C. Judicial Misconduct

Applicant alleges that the Magistrate approved an invalid search warrant. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). "In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party's motions or objections." Al-Shabazz v. State, 338 S.C.

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M. HOPE BLACKLEY

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354, 363-64, 527 S.E.2d 742, 747 (2000). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Accordingly, issues that could have been raised at trial on direct appeal cannot be asserted in a PCR action absent a claim of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). Accordingly, this Court finds this allegation is improper for a PCR action. Therefore, this allegation is denied and dismissed.

D. Due Process Violations

Applicant alleges that his due process rights were violated. Specifically, Applicant alleged drugs were seized from the home as the result of a defective search warrant and that the officers lacked probable cause when stopping Applicant's vehicle. This Court finds these allegations are without merit. This Court notes that the issue regarding the search warrant was addressed in Applicant's direct appeal. With respect to Applicant's claim the stop was unlawful, this Court finds this issue is a direct appeal issue that cannot be raised in a PCR action. See Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). To the extent that it was couched as a claim of ineffective assistance, this Court has addressed this issue above in Part B above.

IV. CONCLUSION

Based on the foregoing, this Court concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, his application must be denied and dismissed with prejudice.

TRK

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of may, 2016.

Spartanburg
27 May South Carolina

R. Keith Kelly
R. KEITH KELLY
Presiding Judge
Seventh Judicial Circuit

M. HOPE BLACKLEY
2016 MAY 31 AM 9:25

A CERTIFIED COPY

M. Hope Blackley
CLERK OF COURT
SPARTANBURG COUNTY
BY: [Signature] D.C.
DATED: 6/2/16

M. HOPE BLACKLEY

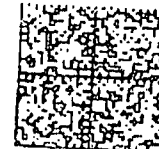
Post Office Box 3483

Spartanburg, South Carolina 29304-3483

RETURN SERVICE

RECEIVED JUN 10 2016

Pre-sort
First Class Mail
CombasFirm



ZIP CODE \$ 000.70²

Leah B. Moody
235 E. Main St., Ste 115 PO Box 1015
Rock Hill, SC 29730

K1-3903 OS

2019年1月1日 星期日

[illegible]

WITNESSES

1. SENTENCE MADE ☒2. REPORT ENDED ☒3. CARD PULLED ☒

SLED

4. INDEXED ☒5. CHECKED WARRANTS ☒6. CHECKED SIGNATURE ☒7. ASSESSMENT AND
FINE CARD MADE ☒8. TRAFFIC VIOLATION COPY ☒

Computer

Computer

ARREST WARRANT NUMBER

M087873

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 2-4-09

VERDICT

Guilty

Foreperson of Petit Jury
Date: 10-6-10

DOCKET NO. -

09-GS-42-6456

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM

THE STATE
vs.

RICKY DWIGHT CHEEKS

Indictment for

TRAFFICKING IN COCAINE BASE
AND/OR CRACK COCAINE

SC Code: 44-53-375

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2009 DEC 10 PM 12:17

MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

NOV 24 2009

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

TRAFFICKING IN CRACK COCAINE

That Ricky Dwight Cheeks did in Spartanburg County on or about June 4, 2009, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to actually or constructively possess more than (400) four hundred grams of Cocaine Base and/or Crack Cocaine, a schedule II controlled substance, in violation of §44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


ASSISTANT SOLICITOR

WITNESSES

SPTBG CO SHERIFF'S OFFICE

DOCKET NO.

09-GS-42-6457

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2009 DEC 10 PM 12:17

MARC KITCHENS

COURT OF GENERAL SESSIONS

1. SENTENCE IN

2. REPORT ENDED

3. CARD FILLED

4. INDEXED

ARREST WARRANT NUMBER

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

M087878 7. ASSESSMENT AND
FINE CARD MADE

8. TRAFFIC VIOLATION COPY

Computer

NOV 30 2009

TERM

Computer

THE STATE
VS.

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Guilty

Foreperson of Petit Jury

Date:

10-6-10

RICKY DWIGHT CHEEKS

Indictment for

TRAFFICKING IN COCAINE BASE
AND/OR CRACK COCAINE

SC Code: 44-53-375

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

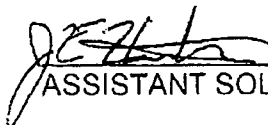
INDICTMENT

At a Court of General Sessions, convened on NOV 24 2009 the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN CRACK COCAINE

That Ricky Dwight Cheeks did in Spartanburg County on or about June 4, 2009, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to actually or constructively possess more than (100) one hundred grams of Cocaine Base and/or Crack Cocaine, a schedule II controlled substance, in violation of §44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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 ☒3. CARD PULLED ☒

SLED

4. INDEXED ☒5. CHECKED WARRANTS ☒6. CHECKED SIGNATURE ☒7. ASSESSMENT AND
FINE CARD MADE ☒8. TRAFFIC VIOLATION COPY ☒

DOCKET NO.

09-GS-42-6455

Computer

The State of South Carolina

County of

Trey Gowdy, Solicitor

Computer

COURT OF GENERAL SESSIONS

OCT 1 2010

TERM

ARREST WARRANT NUMBER

M087874 (AMENDED)

THE STATE

vs.

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 9-30-10

VERDICT

Guilty

Foreperson of Petit Jury

Date: 10-6-10

RICKY DWIGHT 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

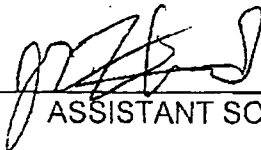
NOV 24 2009

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

DISTRIBUTION OF CRACK COCAINE
WITHIN ONE-HALF MILE

That Ricky Dwight 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 playground or park, a public vocational or trade school or a technical educational center, or a public or private college or university, to wit: Woodland Heights Elementary, 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

556
STATE OF SOUTH CAROLINACOUNTY OF SPARTANBURG
STATE VS.

Ricky Dwight Cheeks

AKA:

Race: B Sex: M Age: 50

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: Drugs / Trafficking in ice, crack or crack - 400 g or more (Felony, 25Y to 30Y) & 200k

in violation of § 44-53-0375(C) of the S.C. Code of Laws, bearing CDR Code # 0370

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

HUNTER, JAMES EDWARD

SC Bar# 77517

Defendant

Attorney for Defendant

SC Bar# 4499

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$ 200,000.00; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 65 days☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	415,000.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$ 12458.40
TOTAL	\$	\$ 421738.40

Clerk of Court/ Deputy Clerk

Court Reporter: P. Green

SCCA/217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS4206456

A/W#: M087873

Date of Offense: 6/4/2009

S.C. Code § : 44-53-0375(C)

CDR Code #: 0370

SENTENCE SHEET

PTUP days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2135

Sentence Date: 10/6/10

ARREST WARRANT

M-087873 6/9/09

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Spartanburg

THE STATE

against

Ricky Dwight Cheeks

Address:

Phone: SSN: [REDACTED]

Sex: M Race: B Height: 5 9 Weight: 178

DL State: DL #:

DOB: [REDACTED] Agency ORI #: SCLED0000

Prosecuting Agency: State Law Enforcement Division

Prosecuting Officer: Craig Hanning - 00000

Offense: Drugs / Trafficking in ice, crack or crack - 400 g or more (Felony, 25Y to 30Y)

Offense Code: 0370

Code/Ordinance Sec: 44-53-0375(C)(5)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Cheeks Ricky Dwight 6-04-09 at 10:25

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
180 Magnolia Street
P O Box 3483
Spartanburg, SC 29304

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Spartanburg

Personally appeared before me the affiant Craig Hanning who

being duly sworn deposes and says that defendant Ricky Dwight Cheeks

did within this county and state on or about 06/04/2009 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Spartanburg)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in ice, crack or crack - 400 g or more (Felony, 25Y to 30Y)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT DID KNOWING AND WILLINGLY TRAFFICK MORE THAN 400 GRAMS OF A COCAINE BASED SUBSTANCE, A SCHEDULED II CONTROLLED SUBSTANCE, HE NOT BEING AUTHORIZED BY LAW TO DO SO.

AFFIANT'S BELIEF IS BASED UPON POLICE INVESTIGATION

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Spartanburg

Affiant's Address 301 E. North St. Suite 127
Greenville, SC 29601-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/4/2009 defendant Ricky Dwight Cheeks

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Spartanburg) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in ice, crack or crack - 400 g or more (Felony, 25Y to 30Y)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 06/04/2009

Signature of Issuing Judge (L.S.)

Dwight Smith

Judge Code: 7151

Judge's Address Spartanburg County Judicial Center

Spartanburg, SC 29306-

Judge's Telephone (864)596-2564

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

S558 OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.

Ricky Dwight Cheeks

AKA:

Race: B Sex: M Age: 50

DOB: SS#

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Drugs / Trafficking in ice, crack or crack - 100 g or more, but less than 200 g 25 y & 50k

in violation of § 44-53-0375(C) of the S.C. Code of Laws, bearing CDR Code # 0368

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

HUNTER, JAMES EDWARD

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$ 50,000.00; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation formonths/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 10/6/10☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 65 days☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP:

Total: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5%)	\$	103750.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$ 3120.90
TOTAL	\$	\$ 107150.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS4206457

A/W#: M087878

Date of Offense: 6/4/2009

S.C. Code § : 44-53-0375(C)

CDR Code #: 0368

SENTENCE SHEET

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2135

Sentence Date: 10/6/10

ARREST WARRANT

M-087878

6/9/09

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Spartanburg

THE STATE
against

Ricky Dwight Cheeks

Address:

Phone: SSN:
 Sex: M Race: B Height: 5' 9" Weight: 178

DL State: DL #:

DOB: Agency ORI #: SC0420000

Prosecuting Agency: Spartanburg County Sheriff

Prosecuting Officer: Paul Norris - 0651

Offense: Drugs / Trafficking in ice, crack or crack - 100 g
or more, but less than 200 g

Offense Code: 0368

Code/Ordinance Sec: 44-53-0375(C)(3)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant
onCheeks, Ricky Dwight
4 June 09

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
180 Magnolia Street
P O Box 3483
Spartanburg, SC 29304

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Spartanburg

Personally appeared before me the affiant Paul Norris

who

being duly sworn deposes and says that defendant Ricky Dwight Cheeks

did within this county and state on or about 06/04/2009

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/☐ Municipality of

Spartanburg

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in ice, crack or crack - 100 g or more, but less than 200 g

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:The defendant did knowingly and intentionally traffick more than 100 grams of a cocaine based substance, a schedule II controlled
substance, he not being authorized to so traffick said substance

AFFIANT'S BELIEF BASED ON POLICE INVESTIGATION

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Spartanburg

Affiant's Address 8045 Howard Street

Spartanburg, SC 29303-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/4/2009

defendant Ricky Dwight Cheeks

and violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/☐ Municipality of

Spartanburg

) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in ice, crack or crack - 100 g or more, but less than 200 g

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me

on 06/04/2009

(L.S.)

Dwight Smith

Judge Code: 7151

Judge's Address Spartanburg County Judicial Center

Spartanburg, SC 29306-

Judge's Telephone (864)596-2564

Issuing Court:

☒ Magistrate☐ Municipal☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

559

ST 560 OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.

Ricky Dwight Cheeks

AKA:

Race: B Sex: M Age: 50

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near school

in violation of § 44-53-0445(B) of the S.C. Code of Laws, bearing CDR Code # 0108

☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45 w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

HUNTER JAMES EDWARD

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$ 100,000.00; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 65 days☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$ 207500.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ 6233.40
TOTAL		\$ 21403.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS4206455

A/W#: M087874

Date of Offense: 6/4/2009

S.C. Code § : 44-53-0445(B)

CDR Code #: 0108

SENTENCE SHEET

PTUP

days/hours Public Service Employment

Obtain GED ☐Attend Voc. Rehab. or Job Corp. ☐

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2135

Sentence Date: 10/6/10

ARREST WARRANT

M-087874

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Spartanburg

THE STATE

against

Ricky Dwight Cheeks

Address:

Phone: _____ SSN: _____
Sex: M Race: B Height: 5 9 Weight: 178

DL State: _____ DL #: _____

DOB: _____ Agency ORI #: SCLED0000Prosecuting Agency: State Law Enforcement DivisionProsecuting Officer: Craig Hanning - 00000Offense: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near schoolOffense Code: 0108Code/Ordinance Sec: 44-53-0445(B)(2)This warrant is CERTIFIED FOR SERVICE in the☐ County/☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Cheeks, Ricky Dwight on 6-11-09 1930

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
180 Magnolia Street
P O Box 3483
Spartanburg, SC 29304

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Spartanburg

Personally appeared before me the affiant Craig Hanning whobeing duly sworn deposes and says that defendant Ricky Dwight Cheeksdid within this county and state on or about 06/04/2009

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

Spartanburg)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near school

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on June 4, 2009 in the county of Spartanburg, one Ricky Cheeks did within one-half mile of, a school, park or playground distribute crack cocaine.

AFFIANT'S BELIEF IS BASED UPON POLICE INVESTIGATION

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Spartanburg

Affiant's Address 301 E. North St. Suite 127Greenville, SC 29601-Affiant's Telephone (864)467-8111

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

If appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/4/2009 defendant Ricky Dwight Cheeks

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/☐ Municipality of

Spartanburg

) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near school

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 06/04/2009Signature of Issuing Judge
Dwight Smith

(L.S.)

Judge Code: 7151Judge's Address Spartanburg County Judicial CenterSpartanburg, SC 29306-Judge's Telephone (864)596-2564Issuing Court: ☒ Magistrate☐ Municipal☐ Circuit

ORIGINAL

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501

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY CHEEKS,

APPELLANT

FINAL BRIEF OF APPELLANT

TRISTAN M. SHAFFER
Appellate Defender

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

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

II.

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

STATEMENT OF THE CASE

On October 4, 2010, Appellant was called to trial before the Honorable Roger Couch and a jury. R. 1. Appellant was charged with one count of trafficking in crack cocaine in excess of one hundred grams; one count of trafficking in crack cocaine in excess of four-hundred grams, and one count of possession of crack cocaine with intent to distribute within a half of a mile proximity to a school. Appellant was represented by Roger Poole, and the State was represented by Eddie Hunter. R. 1.

The jury found Appellant guilty of all charges. R. 389, ll. 1-12. Appellant was sentenced to concurrent twenty-five year sentences for the two trafficking charges and a concurrent ten year sentence for the proximity charge. R. 396, ll. 12-21. This appeal follows.

STATEMENT OF THE FACTS

On June 4, 2009, Agent Craig Hanning of SLED was conducting surveillance on Appellant's nephew, Derrick Cheeks. Hanning began surveillance at a Super 8 motel in Spartanburg County. R. 44, ll. 10-12. Hanning saw Derrick get into a car with Eric Elder and Appellant. R. 44, l. 24. Hanning followed the car as it drove to Tracy Markley's residence. Once they arrived, Derrick went inside while Appellant and Elder went to Wal-Mart.

Deputy Matt Hutchins followed Elder and Appellant to Wal-Mart, while Hanning maintained surveillance on the residence. R. 71, ll. 15-23. Hutchins observed Elder go into Wal-Mart and purchase a box of baking soda while Appellant stayed in the car. R. 72, ll. 5-22. After purchasing the baking soda, Elder drove Appellant back to the residence. After a while at the residence, Appellant and Elder got back in Elder's car and started driving down the street. Hutchins followed Elder's car.

While following Elder, Hutchins observed Elder run a stop sign. R. 74, ll. 22-24. Hutchins stopped the Elder's car. Hutchins would later testify that Appellant was sitting in the passenger clutching his pocket. R. 75, ll. 15-21. Hutchins got Elder out of the car and walked to Hutchins car. Deputy Travis McJunkin was also on the scene and escorted Appellant out of the car. Appellant had a hard time walking back to the car because of his limited use of his left leg. R. 169, l. 3 – R. 170, l. 6. McJunkin would later testify that Appellant appeared to be reaching for his right pocket. R. 170, ll. 10-12. After Appellant was removed from the car, a K-9 was brought in to search the vehicle. Officer's found 111.31 grams of crack cocaine was found near the passenger-side rear wheel. R. 270, ll. 18-21.

After seizing the drugs, Hutchins left the scene to obtain a search warrant for the residence. R. 77, ll. 6-8; R. 400, Search Warrant Affidavit; R. 399, Search Warrant. Inside the residence, officers found 662.42 grams of crack cocaine and utensils used in the manufacture of crack cocaine. R. 274, ll. 23-24.

Appellant was charged with trafficking in crack cocaine in excess of one hundred grams for the drugs found near Elder's car. For the drugs found inside the residence, Derrick and Appellant were also charged with trafficking in crack cocaine in excess of four hundred grams and possession with intent to distribute within a half of a mile of a school.

ARGUMENT

- II. It was error for the trial court to instruct the jury that “actual knowledge of the presence of crack cocaine is *strong* evidence of a defendant’s intent to control its disposition or use.”

Introduction

As part of its mere presence charge the trial court instructed the jury that, “actual knowledge of the presence of crack cocaine is *strong* evidence of a defendant’s intent to control its disposition or use.” R. 366, ll. 15-17. Derrick’s trial counsel argued that this language nullified the mere presence charge. He further argued that the language was a comment on the facts and weight of the facts. R. 373, ll. 12-17. Appellant joined this objection. R. 376, ll. 1-2. After noting that the language was taken from “the Supreme Court’s recommended charge,” the trial court overruled Appellant’s objections. R. 376, ll. 21-22; R. 377, ll. 21-23.

Charge on the Facts

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

In *Hartley*, a defendant requested that the jury be instructed, “the absence of a motive is a circumstance to be duly considered in weighing the question of guilt.” *Hartley*, 307 S.C. at 240, 414 S.E.2d at 184. This Court found that Hartley’s requested instruction

was a charge on the facts because it instructed the jury that particular evidence was “entitled to receive weight or consideration.” *See id.* 307 S.C. at 241, 414 S.E.2d at 184.

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

Negating Mere Presence

The mere presence of a defendant in an area containing drugs, even “*coupled with knowledge of the drugs,*” is insufficient to prove possession. *Goldsmith v. Witkowski*, 981 F.2d 697, 701 (4th Cir. 1992). Evidence showed that Appellant was present in both locations where the drugs were found. Furthermore, there was some question¹ over who had dominion and control of the drugs. Therefore, Appellant was entitled to a mere presence charge. *See State v. James*, 386 S.C. 650, 653, 689 S.E.2d 643, 645 (S.C. App. 2010) (noting a “mere presence” charge is generally available in cases of accomplice liability or where the defendant was present where contraband was found).

By instructing the jury that knowledge of the cocaine is “*strong evidence*” of control, the trial court essentially eviscerated the “mere presence” charge. This language *substitutes* evidence of dominion and control with evidence of knowledge, rendering the mere presence charge *constitutionally* defective. *Cf. Goldsmith*, 981 F.2d at 701 (“[T]he due

¹ Appellant’s closing argument and *only* defense was that he did not have possession either amount of crack cocaine found. R. 344, ll. 8-12; R. 344, l. 17 – R. 345, l. 23.

process protections of *Jackson*², in our view would require invalidation of convictions based solely on evidence of mere presence”).

***Kimbrell*³ and *Solomon*⁴**

In overruling Appellant’s objection, the trial court cited *Kimbrell and Solomon*. R. 373, l. 3 – R. 377, l. 24. However the holdings in both of these cases are distinguishable from Appellant’s case.

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

However, Appellant’s issue does not deal with whether directed verdict should have been granted. Therefore the jury should *not* be viewing evidence of actual knowledge in the light most favorable to the State. Therefore the jury should not be instructed to weigh evidence of knowledge as “*strong evidence*” of control.

The trial court also cited to *Solomon* in support of the “*strong evidence*” charge. In that case, the Supreme Court looked at whether trial counsel *acted reasonably in failing to object* to a “strong evidence” instruction. *Solomon*, 313 S.C. at 528, 443 S.E.2d at 542. The

² *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979).

³ *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987).

⁴ *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994).

Supreme Court found that because the instruction was based on language in *Kimbrell*, trial counsel “acted reasonably” in not objecting.

Appellant’s case is distinguishable from *Solomon* because the question before this Court is *whether the trial court erred in giving the “strong evidence” instruction, not whether counsel’s failure to object to the charge was reasonable* “under prevailing professional norms.” See *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) (*noting the proper standard for ineffective assistance of counsel*). Precedent might render a decision by counsel not to object reasonable, but such a determination does *not* validate the underlying precedent. Cf. *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 152 (2004) (Similarly “An attorney is not required to anticipate changes in the law.”).

II. The drugs’ seized in the home should have been suppressed because the Search Warrant, which did not give any description of the place to be searched, was facially invalid.

Prior to trial Derrick’s trial counsel moved for suppression of all evidence seized as a result of the search. Derrick argued that because the search warrant did not describe the place to be search that it was facially invalid. Appellant joined Derrick’s motion to suppress. R. 20, ll. 6-10. However, the trial court denied the motion citing *State v. Williams*⁵. R. 17, l. 5 – R. 18, l. 23.

⁵ Finding that S.C. Code §17-13-140 does not require a warrant specifically list the place to be searched if already listed in warrant application. *State v. Williams*, 297 S.C. 404, 408, 377 S.E.2d 308, 310 (1989). However, Appellant’s argument was based on the fourth amendment not state law. R. 19, ll. 22-25.

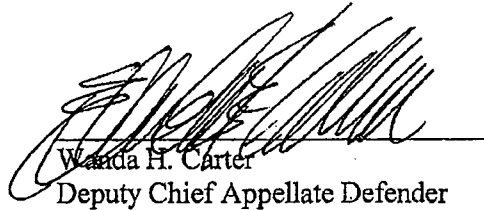
“The fact that the *application* adequately described the ‘things to be seized’ does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in a warrant, not the supporting documents.” *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 1289 (2004) (emphasis in original). Even though a supporting affidavit or document may be read with the document, the warrant itself must use “appropriate words of incorporation” See *United State v. Hurwitz*, 459 F. 3d 463, 470-471 (4th Cir., 2006) (citing *Groh*, 540 U.S. at 557-558, 124 S.Ct. at 1284).

The search warrant in Appellant’s case is void of any specific description of the place to be search. In overruling Appellant’s objection the trial court noted that the warrant did refer back to the affidavit. R. 17, ll. 14-22. However, the description of the property on the warrant does not specifically refer back to the description in the affidavit. R. 399 (Search Warrant); R. 400 (Search Warrant Affidavit). Therefore the search warrant in Appellant’s case is facially invalid and Appellant should be granted a new trial based for trafficking in excess of four hundred grams of crack cocaine and possession with intent to distribute crack cocaine within a half of a mile of a school. See *Groh, supra*.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant him a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of November, 2011.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11829
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 24, 2012

Mrs. Wanda H. Carter
PO Box 11589
Columbia SC 29211

Ms. Julie Kate Keeney
PO Box 11549
Columbia SC 29211

Re: The State v. Cheeks, Ricky
Appellate Case No. 2010-174907

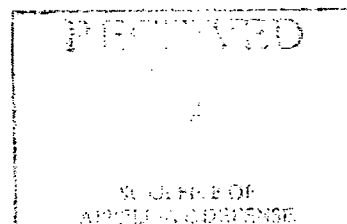
Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny d. Kitchings (JK)
CLERK

cc: Roger L. Couch



**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Ricky Cheeks, Appellant.

Appellate Case No. 2010-174907

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

Opinion No. 5042

Heard September 11, 2012 – Filed October 24, 2012

AFFIRMED

Wanda H. Carter, Deputy Chief Appellate Defender, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, and Senior Assistant
Attorney General Harold M. Coombs, all of Columbia,
and Solicitor Barry Barnette, of Spartanburg, for
Respondent.

HUFF, J.: Appellant, Ricky Cheeks, was tried for and convicted of possession with intent to distribute crack cocaine within one-half mile of a school, trafficking in crack cocaine of more than 400 grams, and trafficking in crack cocaine of more than 100 grams. The trial court sentenced Cheeks to concurrent terms of twenty-five years each on the two trafficking charges and ten years on the possession with intent to distribute charge. Cheeks appeals, asserting the trial court erred in (1) failing to suppress the drugs seized in a residence because the search warrant was

facially invalid inasmuch as it did not include a description of the place to be searched and (2) instructing the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use." We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On June 4, 2009, SLED agent Hanning was conducting surveillance on individuals Ricky Cheeks (Ricky), Eric Elder (Elder), and Derrick Cheeks (Derrick) at a Super 8 Motel. He observed a black, Ford Crown Victoria automobile with Elder and Ricky at the vehicle. Derrick came from the hotel to meet Ricky and Elder, at which time all three of the men left in the vehicle and drove to the home of Tracy Markley (Markley). Elder had gone to the motel in Derrick's automobile to pick up Derrick, because Derrick did not have a driver's license. Once the men arrived at Markley's, Derrick began cooking cocaine that he had brought with him to the home. Derrick instructed Ricky to go purchase a box of baking soda from Wal-Mart, and Elder drove Ricky because Ricky was unable to drive. Officers conducting surveillance on the vehicle observed Elder drive to Wal-Mart, with Ricky riding as a passenger. At Wal-Mart, Elder went inside to purchase the baking soda. The two men then returned to Markley's house, which had been kept under surveillance. When Elder and Ricky arrived back at the house, Derrick was in the process of cooking crack.

Elder and Ricky subsequently left Markley's residence again, after Derrick told Ricky that somebody was calling and "he needed to get rid of something." Officers observed Ricky and Elder get back in the Crown Victoria and leave the residence again, and the officers then followed the vehicle, driven by Elder with Ricky riding in the front passenger seat. When the vehicle failed to come to a complete stop at a stop sign, the officers initiated a traffic stop. According to Elder, Ricky had crack cocaine in his possession when they left Markley's residence. After Elder stepped away from the driver's side of the car, and Ricky stepped away from the passenger side, a drug detection K-9 conducted a free air sniff of the vehicle and alerted at the passenger side. As Ricky was escorted to the rear of the car, in between the passenger door and the trunk area, he kept reaching for the right side of his cargo-pocket shorts. After the K-9 alerted and a search of the vehicle began, one of the officers located a bag of off-white, rock-like substance on the ground in the "exact area" between the trunk and passenger door of the car where Ricky had been previously escorted. At no point was Elder on the passenger side of the car, and other than the officers, no one besides Ricky was in

the area where the substance was found on the ground. Subsequent analysis of the substance revealed it to be 111.31 grams of crack cocaine.

Officers then executed a search of Markley's residence after obtaining a search warrant. Upon entering Markley's home they encountered Derrick, who ran from the kitchen area into a bedroom, and Markley, who was sitting in a chair in the family room. They found a large amount of what appeared to be crack cocaine on the counter in the kitchen. They also found boiling water on the stove, indicating crack was possibly being cooked at that time, as well as scales, razor blades and plates used in the process of cooking crack cocaine. Officers additionally discovered in the kitchen a bottle of Inositol, commonly used as a cutting agent in powder cocaine. Analysis of the substances recovered from Markley's home revealed crack cocaine with a total weight of 662.42 grams.

Ricky, who was tried along with Derrick, was convicted of trafficking in crack cocaine of more than 100 grams based on the crack found during the traffic stop, and trafficking in crack cocaine of more than 400 grams for the crack cocaine found in Markley's home. He was also convicted of possession with intent to distribute crack cocaine within one-half mile of a school, based on the location of an elementary school less than one-half mile from Markley's residence.

ISSUES

1. Whether the drugs seized in the home should be suppressed because the search warrant, which did not give any description of the place to be searched, was facially invalid.
2. Whether it was error for the trial court to instruct the jury that actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When reviewing the circuit court's ruling on a motion to suppress based on the Fourth Amendment, "an appellate court must affirm if there is any evidence to support the ruling," and will reverse only when there is clear error. *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). The appellate court is not barred, however, from conducting its own review of the record to determine whether the trial judge's

decision is supported by the evidence. *Narciso v. State*, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012).

LAW/ANALYSIS

I. Search Warrant¹

The record shows trial counsel² made a pretrial motion to suppress, attacking the sufficiency of the search warrant on the basis that it was deficient under state and federal law because it completely omitted a description of the place to be searched. The solicitor countered that the affidavit included a description of the premises, and the warrant and affidavit should be read together.³ Trial counsel argued the warrant in this case was deficient pursuant to *Groh v. Ramirez*, 540 U.S. 551 (2004), and the affidavit could not be used to replace the complete omission because in order to do so, the affidavit would have to be clearly referenced and incorporated into the search warrant with words of incorporation. The trial court noted, while the warrant itself did not include a description of the place or property to be searched in the blank that was provided for that purpose, the warrant did, in the first paragraph, "refer[] back to the attached affidavit and state[d] that there's reasonable grounds to believe that certain property, subject to seizure [was] located on the following premises." The trial court noted the South Carolina Supreme Court case of *State v. Williams*, 297 S.C. 404, 377 S.E.2d 308 (1989) allows the

¹ We recognize the possibility that Ricky may not have standing to challenge the search warrant in this case. However, inasmuch as the record before us and the briefs show no indication the parties or the trial court ever addressed this issue as to Ricky, because we find the trial court's ruling on the sufficiency of the search warrant is correct, we decline to address Ricky's standing to challenge the warrant.

² The argument made for suppression was presented by counsel for Derrick, but was joined in by counsel for Ricky.

³ The warrant states, "It 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, [sic] 1976 Code of Laws of South Carolina, as amended, is located on the following premises," but fails to include any description below the notation for "DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED." However, the affidavit provides details of the residence to be searched, including the street number and name, directions to the residence, and a description of the residence.

warrant and affidavit to be read together to supply information upon which to base the warrant. The court further reviewed *Groh* and concluded there was no indication in the *Groh* case that the warrant referred back to the affidavit, while the warrant did refer back to the affidavit in this case. The court additionally observed, "it goes on to say now, therefore, you are hereby authorized to search the premises for the property described below and to seize the property if found," such that it again, "referr[ed] to the entire document." Finally, the court stated, "according to this, the affidavit was attached to the search warrant when it was served." The solicitor then confirmed it was, in fact, attached. The court therefore denied the motion to suppress.

On appeal, Ricky cites *Groh* for the proposition that the Fourth Amendment requires particularity in a warrant, not a supporting document to the warrant, such that an adequate description in the supporting document will not save a warrant that is facially invalid. He also cites *United States v. Hurwitz*, 459 F.3d 463, 470-71 (4th Cir. 2006) for the proposition that, even though a supporting affidavit or document may be read with the document, the warrant itself must use "appropriate words of incorporation." He contends the search warrant here is devoid of any specific description of the place to be searched, and though the trial court noted the warrant referred back to the affidavit, the description of the property on the warrant did not "specifically refer back to the description on the affidavit." He therefore contends, pursuant to *Groh*, the search warrant in this matter is facially invalid, and he should be granted a new trial for the trafficking in excess of 400 grams of crack cocaine charge and the possession with intent to distribute crack cocaine within one-half mile of a school charge, related to the search of Markley's home.

Both the United States Constitution and the South Carolina Constitution provide a safeguard against unlawful searches and seizures, guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and avowing no warrants shall issue except upon probable cause, supported by oath or affirmation, "and particularly describing the place to be searched," as well as the persons or things to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10.⁴ Evidence that is obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *State v. Gentile*, 373 S.C. 506, 512, 646 S.E.2d 171, 174 (Ct. App. 2007).

⁴ Our warrant statute also requires "a warrant identifying the property and naming or describing the person or place to be searched." S.C. Code Ann. § 17-13-140 (2003).

The specific requirement that a search warrant particularly describe the person, place, or thing to be searched is aimed at preventing general warrants—those authorizing a general, exploratory rummaging in a person's belongings. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560-61 (Ct. App. 2005) (citations and quotations omitted).

In *Williams*, our supreme court specifically noted it has "held that a warrant may be read in connection with the supporting affidavit to satisfy constitutional and statutory requirements of particularity in the description of the place to be searched." *Id.* at 406, 377 S.E.2d at 309.

Ricky relies on *Groh* for the proposition that the facially invalid warrant cannot be saved by the description in the affidavit. The *Groh* case involved a search warrant which failed to identify any of the items intended to be seized pursuant to the warrant. Though the application for the warrant, which was supported by a detailed affidavit, described the contraband expected to be found, the warrant itself was less specific, it failed to identify any of the items intended to be seized, and it did not incorporate by reference the itemized list contained in the application. *Id.* at 554-55. The United States Supreme Court found the warrant, which provided no description of the type of evidence sought, was "plainly invalid" under the Fourth Amendment. *Id.* at 557. The court further found the fact that an application for the warrant "adequately described the 'things to be seized' [did] not save the *warrant* from its facial invalidity," as "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Id.* (emphasis in original). However, the court refused to hold "that the Fourth Amendment prohibits a warrant from cross-referencing other documents," noting "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of

incorporation, and if the supporting document accompanies the warrant." *Id.* at 557-58.⁵

In *Hurwitz*, also relied upon by Ricky, the Fourth Circuit Court of Appeals determined, pursuant to *Groh*, "[t]he particularity requirement of the Fourth Amendment may be satisfied by cross-reference in the warrant to separate documents that identify the property in sufficient detail." *Id.* at 470. Although the court in *Hurwitz* also acknowledged *Groh* provided that "a supporting affidavit or document may be read together with (and considered part of) a warrant that otherwise lacks sufficient particularity 'if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant,'" the court concluded *Groh* did not establish a two-part rule — that both words of incorporation be used AND that the incorporated document accompany the warrant. *Id.* 470-71. Rather, while recognizing a majority of sister Circuit Courts of Appeals appear to require both conditions before allowing a separate document to be read as part of the search warrant, the court nonetheless held it was sufficient in that circuit "either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself." *Id.* at 471. Thus, the search warrant was sufficient in that case, regardless of whether the attachment accompanied or was appended to the search warrant, because the warrant cross-referenced the attachment to a supporting affidavit. *Id.* at 471-72.

Here, Ricky has not challenged, either at the trial level or on appeal, the trial court's determination and the solicitor's confirmation that the affidavit, which described in particularity the place to be searched, was attached to the search warrant when it was served. Thus, it is the law of the case. *See State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (noting appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case). As noted, *Hurwitz* provided that a search warrant will be considered sufficient if it either incorporates a supporting document by reference which provides the requisite particularity, or if such supporting document is attached to the warrant itself. Here, the affidavit showing the requisite

⁵ It should be noted that *Groh* did not involve the suppression of evidence obtained pursuant to an invalid search warrant in a criminal matter, but was a civil action raising a claim of violation of Ramirez's Fourth Amendment rights by Agent Groh. *Id.* at 555. The court ultimately held, because Agent Groh did not have in his possession a warrant that particularly described the things he intended to seize, his action in proceeding with the search was clearly unreasonable under the Fourth Amendment. *Id.* at 563.

particularity was attached to the warrant. Accordingly, the supporting affidavit supplied the description of the property to be searched with sufficient particularity, the affidavit was attached to the warrant, and under *Hurwitz* and *Williams*, this was sufficient to comply with both federal and state constitutional mandates. At any rate, Ricky has failed to show the warrant was deficient in providing the appropriate words of incorporation, citing no authority for his position that the description of the property on the warrant must "specifically refer back to the description on the affidavit." Here, the warrant states as follows: "*It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure . . . is located on the following premises.*" (emphasis added). Thus, the warrant clearly included words of incorporation, cross-referencing the attached affidavit which described with particularity the place to be searched.

II. Jury Charge⁶

In its instruction to the jury concerning the law regarding possession, the trial court charged the jury as follows:

Now, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant . . . in the case both had the power and the intent to control the disposition or use of the crack cocaine. Therefore, possession, under the law, can either be actual or constructive.

Now, actual possession means that the crack cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion or control or the right to exercise dominion or control over either the crack cocaine or the property on which the crack cocaine was found.

Now, mere presence at a scene where drugs are found is not enough to prove possession. Actual knowledge of the presence of the crack cocaine is strong evidence of a

⁶ The State appears to contend that Ricky's statement of issue on appeal in this regard is insufficient under Rule 208(b)(1)(B), SCACR. We do not find it to run afoul of this rule.

defendant's intent to control its disposition or use. The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

Trial counsel thereafter objected to the court's language in the charge that a defendant's knowledge of the presence of crack cocaine is strong evidence of the defendant's intent to control its disposition or use. Counsel argued such a charge "takes away and nullifies the mere presence" portion of the charge, and "seems to comment on the facts and the weight." Relying on *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987) and *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994), the trial court found the charge was proper.

On appeal, Ricky argues *Kimbrell* and *Solomon* are distinguishable from the case at hand. He contends *Kimbrell* dealt with a directed verdict motion wherein our supreme court commented that actual knowledge was strong evidence of intent to control. He further maintains *Solomon* was a post-conviction relief (PCR) action where the issue was whether trial counsel's failure to object to a "strong evidence" charge was reasonable under prevailing professional norms. He argues, given that the supreme court in *Solomon* noted the instruction was based on *Kimbrell*, the court simply found trial counsel acted reasonably in not objecting to the charge. Under these circumstances Ricky argues, while it may have been reasonable for trial counsel not to object to the strong evidence charge, such did not "validate the underlying precedent."

Ricky contends the "strong evidence" charge here was an impermissible charge on the facts and comment on the weight of the evidence, as the trial court not only instructed the jury to consider actual knowledge in determining if he was merely present, but also demanded the jury consider actual knowledge as strong evidence of constructive possession. Ricky further argues the "strong evidence" charge negated the mere presence charge to which he was entitled. He cites *Goldsmith v. Witkowski*, 981 F.2d 697, 701 (4th Cir. 1992) for the proposition that "[t]he mere presence of a defendant in an area containing drugs, even 'coupled with knowledge of the drugs,' is insufficient to prove possession."

In *Kimbrell*, our supreme court, in finding Kimbrell was not entitled to a directed verdict on her drug trafficking charge, noted that one has possession of contraband when he has both the power and intent to control its disposition or use. *Id.* at 54, 362 S.E.2d at 631. The court then stated as follows:

Here, the State produced evidence that Kimbrell had actual knowledge of the presence of the cocaine. Because actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element. Possession may be inferred from circumstances.

Id. (citation omitted). Thereafter, in *Solomon*, our supreme court addressed Solomon's assertion that the PCR judge erred in its determination that trial counsel was not ineffective in failing to object to the court's charge that actual knowledge of the presence of a controlled substance is strong evidence of intent to control disposition, arguing the trial judge's use of the word "strong" amounted to a comment on the facts or an opinion on the weight of the evidence. *Id.* at 529, 443 S.E.2d at 542. Finding the trial judge's instruction was in accord with the court's previous holding in *Kimbrell*, that actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use and that knowledge may be equated with or substituted for the intent element, our supreme court concluded the PCR judge properly held that trial counsel acted reasonably in not objecting to this charge. *Id.* Accordingly, our supreme court has specifically approved this "strong evidence" jury charge in the face of an argument that such a charge is a comment on the facts and weight of the evidence. Additionally, Ricky acknowledges in his argument on appeal that such a charge is "precedent," even though he contends a PCR determination that the charge was not unreasonable given the precedent "does not validate the underlying precedent." Yet, Ricky has not made a motion to argue against this precedent and, in any case, this court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."),

We would further find the instruction, read as a whole, did not negate the mere presence charge to which he was entitled. Importantly, in making this argument and citing to *Goldsmith*, Ricky omitted a portion of the court's statement on the matter. There, the Fourth Circuit Court of Appeals noted South Carolina law provides that a conviction for the crime of possession with the intent to distribute

requires proof of possession of drugs, either actual or constructive, and the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. *Id.* at 701. The court went on to state, "Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; *the State must also prove dominion and control.*" *Id.* (emphasis added). Ricky failed to include this emphasized portion of the court's statement in his argument. Thus, it is clear the *Goldsmith* court simply determined that presence, coupled only with knowledge of the drugs, is insufficient to prove possession, because the State must also prove dominion and control over the drugs.

As noted above, while charging the law in regard to possession in conjunction with its charge that actual knowledge of the presence of the drug is strong evidence of a defendant's intent to control the drug's disposition, the trial court specifically charged the jury that mere presence at a scene where drugs are found is not enough to prove possession. Further, the trial court charged the jury here that in order to prove possession, the State was required to prove the defendant had the power and the intent to control the disposition or use of the drug. Accordingly, the trial court instructed the jury that more was needed to prove possession than simply presence and knowledge, but that the State was also required to prove power and intent to control disposition of the drug. Thus, the trial court properly charged the jury on mere presence as Ricky contends he was entitled pursuant to *Goldsmith*.

Thus, considering the charge as a whole, we hold the trial court properly charged the jury on mere presence, and its charge that actual knowledge was strong evidence of a defendant's intent to control its disposition or use did not negate the mere presence charge. *See State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

For the foregoing reasons, Ricky's convictions are

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ricky Cheeks, Petitioner.

Appellate Case No. 2012-213690

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27390
Submitted May 20, 2014 – Filed May 28, 2014

AFFIRMED AS MODIFIED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant
Attorney General Julie Kate Keeney and Assistant
Attorney General Mary Shannon Williams, all of
Columbia, for Respondent.

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MAY 28 2014

SC OFFICE OF
APPELLATE DEFENSE

PER CURIAM: Ricky Cheeks seeks review of the Court of Appeals' opinion in *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012), affirming his convictions and sentences and finding the trial judge did not err in charging the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use." Based on earlier precedent of this Court, the Court of Appeals determined the jury charge did not negate the mere presence charge that Cheeks was entitled to. *See State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987); *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994).

Following the issuance of the Court of Appeals' opinion, this Court, in *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013), affirmed co-defendant Derrick Cheeks' convictions and sentences; however, this Court held the "strong evidence" charge unduly emphasized the evidence, and deprived the jury of its prerogative to draw inferences and to weigh evidence. This Court stated the charge converted all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug and largely negated the mere presence charge, and erroneously conveyed that a mere permissible evidentiary inference was, instead, a proposition of law.

Based on *State v. Derrick Cheeks*, we find the same charge was improper in the case at hand. However, we also find petitioner was not prejudiced by the charge. There was no evidence that petitioner was "merely present;" rather, petitioner provided financial assistance to the drug operation, aided and abetted the operation, and was in actual possession of the drugs. Accordingly, the Court of Appeals' opinion is

AFFIRMED AS MODIFIED.

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