19-7461 ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

******

DERRICK LAMAR CHEEKS, PETITIONER

VS.

ALFORD JOYNER, RESPONDENT

******

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT OF APPEALS

******

PETITION FOR WRIT OF CERTIORARI

******

Derrick L Cheeks
Derrick Cheeks 343108

Petitioner, Pro-se.
Lee C.I. F6B-2232
990 Wisacky Highway
Bishopville, SC 29010

Questions Presented

1) Has the Supreme Court of the United States overturned its own precedent in *Harris v. Reed*, 489 U.S. 255 109 S.Ct. 1038 103 L.Ed. 2d (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327, 8 L. Ed. 2d 231, 105 S.Ct. 2633 (1985); and *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983)? Where this court decided that a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar."

2) Does the Supreme Court decision in *Stone v. Powell*, 428 U.S. 465, S.Ct. 3037, 3052 (1976), deprive its own court of jurisdiction under the U.S. Const. Art. VI. Cl. 2 to have its constitution and laws interpreted and applied when a conflict arises between a state precedent on a federal question and supreme court precedent on the same question.

3) The Decision of the District Court of South Carolina Is In Conflict with the Decision of other Circuits.

4) Has the Supreme Court of the United States overruled *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), holding that a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."?

5) Has the holding in *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957) been overturned where this court decided where the disclosure of a confidential informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way.

6) Does a prosecutor's probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file override a defendant born or naturalized in the United States citizenship?

8) Does the text of 28 U.S.C. § 2254 (d) require District Courts around the country to adhere to congress' intent for the statute to "provide a remedy for correcting erroneous judgments"?

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

■ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as following:

1) Derrick Lamar Cheeks, Petitioner
2) Honorable Donald C. Coggins Jr., Chief Judge – United States District Court, Rock Hill Division.
3) Honorable Paige J. Gossett, United States Magistrate, Rock Hill Division.
4) Sherri A. Lydon, United States Attorney General.
5) J. Falkner Wilkes, former Trial / Direct Appeal Attorney for Petitioner.
6) Christopher D. Brough, former Post Conviction Relief Counsel for Petitioner.
7) Eduardo K. Curry, former Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

■ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is –

☐ reported at ***Cheeks v. Joyner*, 776 Fed. Appx. 796**; or

☐ has been designated for publication but is not yet reported; or,

■ is unpublished

The opinion of the United States district court appears at Appendix **C - D** to the petition and is –

■ reported at ***Cheeks v. Joyner*, 2018 WL 4523190**; or

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished

■ For cases from **state courts:**

The opinion of the Highest state court to review the merits appears at Appendix **E** to the petition and is –

■ reported at ***State v. Cheeks*, 401 S.C. at 327**; or

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished

The opinion of the **Post-Conviction** court appears at Appendix **F** to the petition and is --

☐ reported at _____; or

☐ has been designated for publication but is not yet reported; or,

■ is unpublished

JURISDICTION

■ For cases from **federal courts:**

The date on which the United States court of appeals decided my case was **September 6, 2019**. A copy of that decision appears at Appendix **A**.

■ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____, on _____, in application No. _____, and a copy of the order granting said extension appears at Appendix _____.

The Jurisdiction of this Court is invoked under **28 U.S.C. § 1254(1).**

■ For cases from **state courts:**

The date of the Highest state court to decided my case was **January 16, 2013**. A copy of that decision appears at Appendix **E** to the petition and is –

■ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____, on _____, in application No. _____, and a copy of the order granting said extension appears at Appendix _____.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Derrick Lamar Cheeks, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals, rendered in these proceedings on September 6, 2019.

OPINIONS BELOW

The Fourth Circuit Court of Appeals affirmed petitioner's conviction in its Case No. 18-7529. The opinion is unpublished, and is reprinted in the Appendix A to this petition at page V, *infra*. No timely Motion for rehearing was filed.

JURISDICTION

The original opinion of the Fourth Circuit Court of Appeals was entered September 6, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST., ART. VI CL. 2

Clause 2: Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S CONST., AMEND. IV

Unreasonable searches and seizures –

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. CONST., AMEND. VI

Rights of the accused –

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trail, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An applicant for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be stopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An applicant for a writ of habeas corpus on behalf of a person custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the

sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such a part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) a copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C.A § 2253 [§ 2253 Appeal]

(a) in a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) unless a circuit justice or judge issues a certificate of Appealability, an appeal may not be taken to the court of appeals from...

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) a certificate of Appealability, may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The Certificate of Appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr. Cheeks was convicted of distribution of crack cocaine in proximity of a school and trafficking 400 grams of crack cocaine. His conviction was affirmed on direct appeal. *State vs. Cheeks*, 401 S.C. 322 (2013) (***Appendix E***) State post-conviction proceedings were filed; relief was denied. ***App. pp. 583-594*** *Cheeks vs. State*, unpublished, Mr. Cheeks then filed a habeas corpus action under 28 U.S.C. § 2254.

The sole issue in Mr. Cheeks' case is that he was denied a COA by the South Carolina District Court. In Mr. Cheeks'§ 2254 proceeding he raised Eight (8) Grounds: (**1**) The trial court['s] jury instruction that actual knowledge of the presence of crack cocaine is strong evidence of a Defendant's intent to control its disposition or use was error that had a substantial and injurious effect and influence in the jury's verdict; (**2**) The Petitioner had a legitimate expectation of privacy in the premises searched; (**3**) The search warrant is defective on its face for failing to state with particularity the premises to be searched; (**4**) Petitioner was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendment to the United States Constitution as well as Article I, Section 14 of the South Carolina Constitution when trial counsel failed to make A Motion for a Pre-Trial Frank's Hearing; (**5**) Petitioner was denied his right to Effective Assistance of Counsel under the Sixth and Fourteenth Amendment of the United States Constitution as well as Article I, Section 14, of the South Carolina Constitution when trial counsel failed to make a pre-trial motion for Disclosure and Identity of Confidential Informant; (**6**) Petitioner was denied his rights to equal protection and effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution as well as Article I, Section 14, Article I § 3, of the South Carolina Constitution when trial counsel failed to make a motion to squash petitioner's indictments based on selective prosecution; (**7**)

Petitioner was denied his right to a fair trial under the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution when the state committed a due process violation in presenting false testimony of prosecution witnesses denying that the state had agreed to dismiss felony charges against them in exchange for their testimony: Matt Hutchins testimony that petitioner was standing in proximity of the crack cocaine when the search warrant was executed: and prosecutor's opening and closing arguments that petitioner possessed the 100 grams of crack cocaine (**8**) Petitioner was denied his right to effective Assistance of Counsel under the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 14, of the South Carolina Constitution when trial counsel failed to make a Motion in Limine and object to exclude any character and prior bad act evidence prior to and during trial where the content of testimony was more prejudicial than probative because the result was the denial of petitioner's right to a fair trial.

The South Carolina District Court denied relief on all grounds. The Court found that Ground One was not cognizable on federal habeas review; Ground Two and Three were barred by *Stone v. Powell*, 528 U.S. 465 (1976); Ground Four was procedurally barred because he could not show a reasonable probability that, but for post-conviction ("PCR") relief counsel's omission, the PCR court would have granted him relief; Ground Five was procedurally defaulted and that Petitioner failed to establish cause to excuse the default because his contention that the confidential informant should have been disclosed was insufficient to rise to the level of a plausible allegation that trial counsel had a basis upon which to seek disclosure of the confidential informant; Ground Six was procedurally defaulted because it was not raised in Petitioner's PCR appeal; Ground Seven was withdrawn from the proceeding; In Ground Eight the District Court addressed the merits and found that Mr. Cheeks failed to establish that trial counsel was ineffective for failing

to object to certain testimony from Elder and Markley. Subsequent to the District Court's ruling Mr. Cheeks was denied a COA. ***(Appendices C – D)***

Mr. Cheeks timely filed an appeal to the Fourth Circuit Court of Appeals. Reviewing the denial of habeas corpus relief by the District Court, the Fourth Circuit Court of Appeals found that Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel,* 529 U.S. 373 484 (2000) Based on that the Fourth Circuit denied Mr. Cheeks a certificate of Appealability and dismissed the appeal. ***Appendix A***

On September 18, 2019 Mr. Cheeks filed a Motion to proceed Pro Se because he had not heard from counsel Eduardo K. Curry in several months unaware that the Court of Appeals had entered a judgment on September 6, 2019. ***Appendix G*** On October 3, 2019 the Court of Appeals denied Mr. Cheeks Motion. ***Appendix H.***

On or about October 16, 2019 Mr. Cheeks's friend Xavier Carson contacted the Case Manager Richard Sewell for the Court of Appeals and was informed that the Court entered a judgment in his case on September 6, 2019 and requested the Case Manager to forward a copy of the Courts Opinion to Mr. Cheeks.

On October 21, 2019 Mr. Cheeks filed a Motion for Reconsideration to Alter or Amend Judgment for Extraordinary Circumstances. ***Appendix J*** On October 28, 2019 the Court of Appeals denied Motion. ***Appendix K***

REASONS FOR GRANTING THE WRIT

1) Has the Supreme Court of the United States overturned its own precedent in *Harris v. Reed*, 489 U.S. 255 109 S.Ct. 1038 103 L.Ed. 2d (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327, 8 L. Ed. 2d 231, 105 S.Ct. 2633 (1985); and *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983)? Where this court decided that a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar."

A. The Fourth Circuit Court of Appeals held that: Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong.

The Supreme Court held that the "adequate and independent state ground doctrine, and the problem of ambiguity resolved by *Long*, is of concern not only in cases on direct review pursuant to 28 U.S.C. § 1257, but also in federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254." *Harris v. Reed*, 489 U.S., 262

Ground One was raised in a § 2254 proceeding after Mr. Cheeks fairly presented his federal issue to the South Carolina Supreme Court. **(See *Brief of Appellant, pp. 19-20)** *Baldwin v. Reese*, 541 U.S. 27, 32 (2004) The Magistrate Judge exchanged Mr. Cheeks' claim regarding an objection he made during trial and further ruled that the South Carolina Supreme Court found that the error was one of state constitutional law. **(See *App. p 442)* (See *Appendix B – pp. 7; 14-15*)** The District Court adopted the Magistrate Judges' finding in her Report and Recommendation and exchanged Mr. Cheeks' Ground One again regarding a claim that was

raised in his appellate brief. **(See *Brief of Appellant, p. 18)*** And further held the Court will not interfere with the Supreme Court of South Carolina's determination of state law. **(See *Appendices C – pp. 3 - 4; D – p. 3*)** The District Court, however, disregarded what the Supreme Court said in *Harris*. Michigan v. Long, 463 US 1032, 77 L Ed.2d 1201, 103 S.Ct 3469 (1983) Under Long, if "it fairly appears that the state court rested its decision *primarily on federal law*," this Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' its decision rests upon adequate and independent state grounds." Id. at 1042, 77 L Ed.2d 1201, 103 S.Ct 2717, 7

Mr. Cheeks contends that the presumption of *Long and Harris* applies in this case and precludes a bar to habeas because the State court record reveals that Mr. Cheeks' *Ground One is interwoven with federal law and the Harris presumption* should have been applied to his § 2254 proceeding. On direct review the South Carolina Supreme Court cited State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) Where the court looked to the *District of Columbia Circuit Court of Appeals for guidance to resolve an error in a jury instruction.* The District of Columbia Circuit Court of Appeals held that: "evidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence. The interest of justice is perhaps best served if this matter is reserved for counsel's argument, with little if any comment by the bench." U.S. v. Robinson, F.2d at 384, 154 U.S. App. D.C. 265 at 273; U.S. v. Telfaire, 469 F.2d 552, 152 U.S. App. D.C. 152 The South Carolina Supreme Court found that the error in Mr. Cheeks' case was similar to the error in *Grant*: similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" *unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence.* **(*Appendix E*)** State v. Cheeks, 401 S.C. at 328 – 329, 737 S.E.2d at 484

B. The jury instruction error fits squarely into the category of constitutional violations characterized by the Supreme Court as "trial error."

In *Arizona v. Fulminante*, 499 U.S. 279, 307, 113 L.Ed.2d 302, 111 S.Ct. 1246 The Supreme Court held that such error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence to determine its effect on the trial. Id. at 307-308, 113 L.Ed. 2d 302, 111 S.Ct. 1246 In general, an error in a jury instruction defining a crime is a "trial error" rather than a "structural error."

During the jury charge, the jury was repeatedly instructed that mere presence at the scene of a crime is insufficient evidence, in and of itself, to support a guilty verdict. When charging the jury on trafficking by possession, the trial judge stated:

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 defendant's intent to control its disposition or use.*" *Cheeks*, 401 S.C. at 327

The District Court erred in concluding that the South Carolina Supreme Court's judgment rested on a state procedural bar because the State Court Record reveals that the South Carolina Supreme Court rested its judgment primarily on federal law. **(See *Appellant Brief pp. 19-20*)** *State v. Cheeks*, 401 S.C. at 328 - 329

Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

2. Does the Supreme Court decision in *Stone v. Powell*, 428 U.S. 465, S.Ct. 3037, 3052 (1976), deprive its own court of jurisdiction under the U.S. Const. Art. VI. Cl. 2 to have its constitution and laws interpreted and applied when a conflict arises between a state precedent on a federal question and supreme court precedent on the same question.

A. As argued in connection with Question 1: The Fourth Circuit Court of Appeals held that: Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong.

The Constitution plainly provides that state courts must follow the decisions of the U.S. Supreme Court on matters of federal law. U.S. Const. Art. VI, Cl. 2. The Supreme Court held that "it is the right and duty of the national government to have its constitution and laws interpreted and applied in its own judicial tribunals. In cases arising under them this court is the final arbiter." *Mayor of Nashville v. Cooper*, 73 U.S. 247, 253

The District Court found that "Mr. Cheeks' Grounds Two and Three was barred from federal habeas review by the ruling in Stone." Mr. Cheeks contends the Fourth Amendment claim should not be barred by *Stone* because *Stone didn't involve an issue with a "conflict" between a state precedent and Supreme Court precedent on the same federal question.* Just as inferior state courts look to the decisions of the state's high court for binding vertical authority on questions of state law, they look to the U.S. Supreme Court on questions of federal law. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530-531; *Chesapeake & Ohio Ry v. Martin*, 283 U.S. 209, 221 (1931)

Mr. Cheeks moved to suppress the search warrant based on the description of the premises was omitted arguing that the Supreme Court has addressed this issue in *Groh v. Ramirez*. The trial court argued in light of *State v. Williams* the warrant and affidavit could be read together to supply information upon which a warrant is based. Relying on *Williams* the trial judge held that "*an affidavit may incorporate by reference the location of the premises searched where none is contained in the search warrant*"; *Williams* haven't been overturned and found the warrant was sufficient under *Williams*. ***App. pp. 41-51***

The trial judge *mistakenly expressed the view that he must continue to follow state precedent Williams* on a federal question *despite supervening U.S. Supreme Court authority Groh* until overturned by the state high court this approach is flawed and has been underminded by other reasoning. See *Rodriquez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 484; *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 & n.4 (1981) If a state high court's decision has plainly been overruled by the U.S. Supreme Court, the lower courts fail to apply the law properly if they refuse to apply federal law as it has been set out by that court. *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989)

B. The Supreme Court has not yet addressed whether *Stone v. Powell* deprives its own court of jurisdiction under the U.S. Const. Art. VI. Cl. 2 to have its constitution and laws interpreted and applied when a conflict arises between a state precedent on a federal question and Supreme Court precedent on the same question.

***State v. Williams*, 297 S.C. 404 (1989); and *Groh v. Ramirez*, 540 U.S. 551 (2004)**

State v. Williams, and *Groh v. Ramirez*, have the same "warrant defect in *both warrants under the heading of the property to be seized the officers typed a description of the premises to be searched.*" Prior to *Groh* the Supreme Court of South Carolina held in *Williams* that the warrant and affidavit could be read together to satisfy the constitutional and statutory requirements of particularity in the place to be searched. The Supreme Court of the United States held in *Groh* that "the warrant was plainly invalid". id at 557, 214 S.Ct. 1284 Since the warrant did not describe the firearms to be seized or incorporate a list of the firearms by reference the court lacked "written assurance that the *magistrate* actually found probable cause to search for, and to seize every item mentioned in the affidavit". id at 560, 124 S.Ct. 1284 The trial judge *admitted that the issuing Magistrate did not intentionally incorporate the affidavit into the warrant by explicit words of reference.* ***App. p. 473, Lines 15-17.*** The Supreme Court has addressed this issue in *Groh v. Ramirez*, 124 S.Ct. 1284

Because the District Court of South Carolina has truncated the scope of *Groh v. Ramirez*, incorporation review, this court must grant Certiorari. Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

3. The decision of the District Court of South Carolina is in conflict with the decision of other circuits.

In the closely analogus case of *Gamble v. State of Okl.*, 583 F.2d. 1161 (10th Cir. 1978), the court confronted a situation where *Gamble's* Fourth Amendment claim had been "afforded an opportunity for full and fair litigation within the meaning of *Stone*." Id at 1164. Because *Stone* did not define its "full and fair litigation" requirement the Tenth Circuit extensively analyzed other opinions addressing that "full and fair litigation" involves more than mere opportunity to present fourth amendment arguments but also includes "at least colorable application of the correct Fourth Amendment constitutional standards. *Gamble*, 583 F.2d at 1165 The Tenth Circuit based its holding that *Stone v. Powell* was not a bar to Gamble's Fourth Amendment claim on the fact that the Oklahoma courts had ignored controlling federal precedent, namely *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d. 416 (1975) The Oklahoma courts failed to not much less distinguish the Brown decision neither did they incorporate implicitly the factors set forth in Brown.

This case illustrate the fact that the District Court is out of step with this court in its consideration of the *Stone v. Powell*, 428 U.S. 465, S.Ct. 3037, 3052 (1976), bar. Certiorari should be granted to correct this error. Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

4) Has the Supreme Court of the United States overruled *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), holding that a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."?

A. As argued in connection with Question 1: The Fourth Circuit Court of Appeals held that: Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong.

The Supreme Court held that a "reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694

In the South Carolina District Court's prejudice analysis the court found that Mr. Cheeks was barred by procedure because he could not show a reasonable probability that, but for post-conviction relief ("PCR") counsel's omission, the PCR court *would have granted him relief.* Mr. Cheeks contends in order to find *Strickland* prejudice, the Court need not find that it is more likely that not that the defendant would have been *acquitted absent the ineffective assistance of counsel.* The claim was raised in Mr. Cheeks' § 2254 proceeding after appointed counsel Christopher D. Brough failed to adduce evidence to support the ineffective assistance claim during his initial collateral proceeding and PCR counsel failed to adduce the evidence in a Rule 59(e) Motion pursuant to the PCR Courts ruling that Mr. Cheeks failed to present evidence to support his Frank's allegation. ***App. pp. 583-594***

B. The South Carolina District Court's ruling was a misapplication of the prejudice standard of *Strickland.*

The District Court's opinion misapplied *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), test for prejudice in two important ways. First, the court held:

> "The court need not decide whether PCR counsel's performance was deficient under *Strickland* because petitioner cannot show a reasonable probability that, but for PCR counsel's omission, the PCR court ***would have granted him relief.***" This was a clearly unreasonable interpretation of *Strickland.* **(See *Appendix C, p 7*).**

Although *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984), cautions against judging the performance component of an ineffectiveness claim prior to the prejudice component and suggest that there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order, it does not dictate that a defendant has to show a reasonable probability that a reviewing court would have *granted him relief.* In *Strickland*, the court held:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* v. *Washington*, 466 U.S., at 694

Second, the court went on to hold, in Mr. Cheeks, objections he states that PCR counsel failed to investigate a police report from S/A Hanning which revealed that Paul Norris intentionally included false information and omitted exculpatory information in his affidavit. Petitioner seems to argue that Norris's affidavit included an address in a chain of events that was not included in

Hanning's police report. Petitioner further argues that, in his affidavit, Norris left out the exculpatory information that Eric Elder's mother told him that Petitioner had purchased a phone for Elder and was always buying him clothes, giving him money, and paid to have his South Carolina Drivers License reinstated. **(See *Appendix C, pp. 7-9*)** But this analysis only addressed Mr. Cheeks' objections to the Magistrate's Report & Recommendation and ignored evidence at trial and post-conviction hearing.

For example this analysis ignored that on the day of trial Paul Norris, Craig Hanning, and Shelly Copeland all were present. ***App. pp. 24-25; 250, Lines 10-18***. Trial counsel could have very well moved for a Frank's Hearing and cross examined Norris, Hanning, and Copeland regarding the statements in S/A Hanning's investigative report and Paul Norris's affidavit. The opinion ignores that trial counsel cross examined Craig Hanning during trial and never once questioned Hanning regarding his investigative report. ***App. pp. 91 – 96***

The opinion also ignored that during the post conviction hearing Mr. Cheeks read the affidavit into the record and testified that the affidavit omitted any sort of reliable information in the past to the Sheriff's office; omitted the dates the trips were made to Anderson, SC; the warrant contained false information about the *March 3rd, 2009* and *March 16th, 2009, CI buys*; when it came down to all the officers corroborated was a *baking soda purchase*; ***App. pp. 526-529***. The opinion also ignored that Mr. Cheeks *requested PCR counsel to adduce the police reports* into the record multiple times and counsel's stated his exhibits were already a *matter of the record.* ***App. pp. 545; 549-550***

The South Carolina District Court's emerging practice of ignoring evidence while performing a prejudice analysis under *Strickland* require the attention of this Court. This was precisely the type of review that this court condemned in *Williams (Terry) v. Taylor*, 529 U.S. 362, 397-398 (2000):

> The State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the *totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighting it against the evidence in aggravation.* Citation *omitted.* This error is apparent in its consideration of the additional mitigation evidence developed in the post-conviction proceedings.
>
> The State court failed even to mention the sole argument in mitigation that trial counsel did advance *Williams* turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not overcome a finding of future dangerousness, the graphic description of *Williams* childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability.

Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

5) Has the holding in *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957) been overturned where this court decided where the disclosure of a confidential informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way.

A. As argued in connection with Question 1: The Fourth Circuit Court of Appeals held that: Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong.

The Supreme Court held that: it was prejudicial error to permit the government to conceal the identity of its informant who was the sole participant other than the accused in that transaction charged. *Roviaro v. United States*, 353 U.S. at 65

Ground Five was raised in a § 2254 proceeding after PCR counsel Christopher D. Brough failed to pursue this issue at the PCR hearing. The District Court adopted the Magistrate Judge's finding in her Report and Recommendation that Mr. Cheeks was not tried for any of the drug activity purportedly witnessed by the confidential informant; that the State only used evidence from witnesses who testified at trial along with the physical evidence recovered from the residence where law enforcement observed Mr. Cheeks manufacturing narcotics and the information provided by the confidential informant only helped supply the officers with cause to establish surveillance and later obtain a search warrant, thus making the confidential informant more like a 'mere tipster' as described in *State v. Humphries,* 579 S.E.2d 613, 614-15 (S.C. 2003)." **(See *Appendix C, p. 9 – 10*)**

The District Court disregarded what the Court said in *Roviaro* "we believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id. at 353 U.S. at 62

The District Courts Order only addressed Mr. Cheeks' objections to the Magistrate's Report & Recommendation and ignored that prior to trial counsel filed a Roviaro Motion seeking disclosure of confidential informant (***Appendix N***) but failed to raise the claim during trial.

Trial Counsel had a basis to seek disclosure of the confidential informant. See Counsel's opening statement:

"Ladies and gentleman of the jury, the most important thing the state failed to point out is the reason that Mr. Markley and Mr. Elder are not on trial today, and that would be conspicuously obvious to you as we go through the trial." *The question will become where did the crack come from, who's responsible for it*, and that would be the question." ***App. p. 66***

The District Court erred in concluding that Mr. Cheeks failed to demonstrate that the underlying ineffective assistance of counsel claim was substantial such that he can show cause to excuse the procedural bar based on PCR counsel's failure to raise this claim because the confidential informant in Mr. Cheeks' case was an active participant.

B. Mr. Cheeks contends that the informant was an active participant and that the claim has merit under the standards of *Strickland v. Washington.*

The first paragraph of the affidavit states: "On or about February 6, 2009, the Spartanburg County Sheriff's Office Narcotics Unit and SLED received information from a confidential reliable informant, that a subject by the name of Derrick Cheeks was *traveling to the Anderson County area and bringing back large amounts of cocaine to 152 Gordon Drive* where he was converting it to crack cocaine and distributed throughout the upstate."

The fifth paragraph states:

> "Since beginning this investigation, the confidential informant has been debriefed on a regular basis. It has been learned in the *past the confidential informant has accompanied Derrick Cheeks to Anderson County on multiple occasions to make purchases of cocaine.* The confidential informant stated that all of the trips made to Anderson County were made on either Thursday or Friday and occurred every week or every other week and that Derrick Cheeks would use two vehicles. One of the vehicles is utilized to *carry the currency to the transaction location and the cocaine back to 152 Gordon Drive.* The other vehicle allowing him to be separated from the currency and narcotics." ***App. pp. 579-580***

Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

6) Does a prosecutor's probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file override a defendant born or naturalized in the United States citizenship?

A. As argued in connection with Question 1: The Fourth Circuit Court of Appeals held that: Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong

The Supreme Court held that a prosecutor's discretion is "subject to constitutional constraints." One of these constraints, imposed by the equal protection component of the Due Process clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Armstrong*, 517 U.S. at 464.

Section 1 of the United States Constitution, Amendment XIV ***plainly states***:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ground Six was raised in a § 2254 petition after PCR counsel Christopher D. Brough abandoned Mr. Cheeks during his PCR hearing. In the District Court's de novo review the court found that Mr. Cheeks was barred by procedure because he attempts to relitigate this issue, but does not address the merits of the Magistrate Judge's finding. The Magistrate Judge ruled that the PCR

court heard and denied this claim from the bench during Mr. Cheeks' testimony at the PCR hearing. **(See *Appendix C, pp. 10 – 11*)**

Mr. Cheeks testified at his PCR hearing that he was alleging a claim of *selective prosecution* by the State and that trial counsel should have moved to squash the indictments against him because he was "similarly situated to his white codefendants, Elder and Markley, "when it came to the 400 grams, and the half proximity to a school zone charges and he stated that he had the dispositions regarding Elder and Markley's plea deals. **(See *App. pp. 546 – 47*)**

The PCR judge stated:

"I want to know what other issues you are alleging. Frankly … I don't buy that one at all. Your lawyer couldn't stop the solicitor from prosecuting anything that the solicitor wanted to prosecute. Now, maybe the Court, at some point in time, could [have] dismissed it on directed verdict or … the jury could of found you not guilty. But the solicitor has a right to bring an indictment." **(See *App. p. 548*)**

The PCR judge asked counsel about any other issues? Mr. Brough stated that *he has presented what he deemed to be the most significant issues, which he felt showed that Mr. Cheeks' lawyer was ineffective and stated that he and Mr. Cheeks had a discussion about other issues Mr. Cheeks wanted to raise, but I told him that these were the most realistic issues to show that his lawyer was ineffective.* **(See *App. p. 549*)**

Subsequent to the PCR hearing the PCR judge mentioned the selective prosecution claim in the Order of Dismissal **(See *App. p. 587*)** but failed to address this claim regarding the finding of Facts and Conclusions of Law. **(See *App. p. 589-593*)**

B. Elder and Markley are similarly situated to Mr. Cheeks regarding the 400 grams and half proximity of a school zone charges.

On or about June 4th, 2009, Mr. Cheeks, Tracy Markley, Eric Elder, and Ricky Cheeks all were arrested. Eric Elder and Ricky Cheeks were charged with trafficking 100 grams of crack cocaine as a result of a traffic stop. All defendants were charged with *distribution of crack cocaine in proximity of a school zone and trafficking 400 grams or more.* **(See *Appendix I*)** On March 25th, 2010, the prosecutor moved the General Sessions court to consolidate the defendant's warrants, indictments, and place *all defendants on the trial docket together.* ***App. p. 576*** On October 4th, 2010, the day of trial the two *white defendants Elder and Markley were severed from Mr. Cheeks.* ***App. pp. 66-68*** On October 6th, 2010, Mr. Cheeks was found guilty for the distribution of crack cocaine in a school zone and trafficking 400 grams of crack cocaine charges. ***App. p. 457*** Subsequent to Mr. Cheeks trial, Elder and Markley's 400 grams and half proximity of a school zone charges were dismissed. **(See *Appendix I*)** Elder plead guilty to a 100 gram charge that was reduced to a distribution charge. **(See *Appendix M*)** Markley supposedly pled guilty to the 400 gram charge that was reduced to possession of less than 1 gram of crack 2nd offense. **(See *Appendix L*)**

The PCR judge failed to make a ruling in light of the finding of Facts and Conclusion of Law during the PCR hearing or in the Order of Dismissal and PCR counsel was ineffective for failing to seek a ruling on this claim during the hearing or by filing a Rule 59 (e). Marlar v. State, 375 S.C. at 279-80 Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

8. Does the text of 28 U.S.C. § 2254 (d) require District Courts around the country to adhere to congress' intent for the statute to "provide a remedy for correcting erroneous judgments"?

A. As argued in connection with Question 1: The Fourth Circuit Court of Appeals held that: Mr. Cheeks had not made the requisite showing that reasonable jurist would find the District Courts assessment of the constitutional claims debatable or wrong.

28 U.S.C. § 2254 (d) states:

An applicant for a writ of habeas corpus on behalf of a person custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court held that if the state court denies the claim on the merits the claim is barred in federal court unless one of exceptions to § 2254 (d) set out in §§ 2254 (d)(1) and (2) applies. *Harrington v. Ritcher*, 562 U.S. at 103

Ground Eight was raised in § 2254 petition after the PCR court unreasonably determined the facts in light of the evidence presented in the State Court proceeding. The claim was raised as PCR court ruling trial counsel wasn't ineffective for failing to make a motion to exclude

character and prior bad act evidence prior to trial and object to the testimony of Eric Elder because it was the *res gestae* of the case: and failing to object to Tracy Markley's testimony to be objectionable because an objection would have drawn unnecessary attention to the jury was contrary to and involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States and was based on an *unreasonable determination of facts in light of the evidence presented in the state court proceeding.* **(See *Appendix B, pp. 9 – 10*)**

In the South Carolina District Court's de novo review the court found that the PCR court's denial of Mr. Cheeks's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Moreover, the record supports the PCR court's determination. At the PCR hearing, trial counsel testified that the witnesses' statements "in the grand scheme of things at the time, it would (have) been something that, that did not strike me as being extensive enough or large enough to jump and make an objections and draw more attention to it." Thus, *trial counsel provided a valid strategic reason for his decision to decline to object to the witnesses' statement.***(See *Appendix C, pp. 13-14*)** The court's ruling only addressed Mr. Cheeks, claim pursuant to § 2254(d)(1) and failed to address Ground Eight pursuant to § 2254 (d) (2). **(See *Appendix C, pp. 11-15*)**

B. The District Court's failure to analyze Mr. Cheeks' prior bad act claims under § 2254(d)(2) warrants this courts attention.

28 U.S.C. § 2254(d)(2) provides that a state court decision must be reversed and relief must be granted if the state court proceeding "resulted in a decision that was based on an *unreasonable determination of the facts in light of the evidence presented in the state court proceeding.*" Miller-El v. Cockrell, 537 U.S. 322 The PCR courts conclusion of the facts was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The PCR court's conclusion that Mr. Cheeks failed to meet his burden of proving that counsel was ineffective for failing to make a motion to exclude character and prior bad act evidence before trial was unreasonable. During a motion to sever the prosecutor stated that "evidence would be presented that *Derrick Cheeks gave Ricky Cheeks the crack cocaine that was found in the car stop and told him to deliver it to someone.*" ***App. p. 14, Lines 14-20***

The PCR court's conclusion that counsel was not ineffective for failing to object to Elder's statement that he left the residence with Ricky Cheeks because *Mr. Cheeks told him to go somewhere to get rid of something because it describes the res gestae of the case and explains why Elder left the house before he was pulled over by the police is unreasonable.* The trial court instructed the jury that *Mr. Cheeks wasn't any way involved in the 100 gram crack cocaine charge at all.* ***App. pp. 167-168***

The PCR court's conclusion that counsel did not object to Markley's statement that he met "Mr. Cheeks through a friend who was buying crack from Mr. Cheeks" because *he did not believe them to be objectionable and an objection would have drawn the jury's attention to the statement*

is clearly unreasonable. It is clear from the context of the PCR transcript that counsel was only "testifying in regards to *Elder and Markley's testimony of them driving Mr. Cheeks around*, and when asked about Markley's statement trial counsel stated that he *didn't even remember Markley making the statement*. ***App. pp. 566, Lines 11-25; 567, Lines 1-10*** Mr. Cheeks has demonstrated that jurists of reason would find it debatable whether his petition state a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.

CONCLUSION

Mr. Cheeks respectfully pleads that this court grant his petition for a writ of certiorari and permit briefing and argument on the issues contained herein.

Executed on: January 22, 2020.

Respectfully submitted,

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