No. 19-7461

IN THE SUPREME COURT OF THE UNITED SATES

DERRICK CHEEKS,

PETITIONER,

V.

ALFORD JOYNER,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO

THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

DERRICK CHEEKS
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990 Wisacky Highway
Bishopville, SC 29010

Petitioner Pro Se

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Petitioner.

v.

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CASE NO:
19-7461

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

IN THE SUPREME COURT

OF THE UNITED STATES

PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

Comes now Petitioner, Derrick Lamar Cheeks, Pro-Se and prays this court to grant Rehearing pursuant to Rule 44, and therefore, grant him Writ of Certiorari to review the opinion of the Fourth Circuit Court of Appeals. In support of petition, Mr. Cheeks states the following:

STATEMENT OF FACTS

Mr. Cheeks had a joint trial with his uncle Ricky Cheeks; he was convicted by a jury of possession with intent to distribute near a school and trafficking crack cocaine 400 grams or more and sentenced to twenty-five (25) years. At the first day of trial, the Court called the cases and failed to read indictment 6457, a charge that involved Ricky Cheeks allegedly trafficking 100 grams of crack cocaine. *App, P, 9.* Ricky Cheeks moved to serve the trials arguing he was at the traffic stop at the time the search warrant was executed at the residence and the evidence regarding the 400 grams at the residence would be prejudicial. Derrick Cheeks joined in the motion to have the 100 gram charge served from the case arguing the prejudicial effect of one on the other. *App, PP, 11-12.* The State argued the traffic stop was intertwined with the search warrant, and evidence would be presented that Derrick gave Ricky the 100 grams of crack cocaine found at the traffic stop. *App, PP, 13-14.*

The State's witness list included Paul Norris, Matt Hutchins, Steve Cooper, Kelvin Washington, Tracy Markley and Eric Elder. *App, PP, 24-26.* Prior to trial, Mr. Cheeks moved to warrant the search warrant form arguing it was deficient under state and federal law.

The State argued the search warrant and affidavit should be read together based on the description in the affidavit. Mr. Cheeks argued *Groh v Ramirez*, a United States case where the Supreme Court ruled a warrant was deficient when the particular things were left out. Mr. Cheeks further argued that the South Carolina Summary Bench Book for Magistrates and City Court Judges instructs the Magistrate to fill out both the place to be searched and items to be searched for with particularity. The State argued that the preprinted language at the top of the search warrant alone attached the warrant and affidavit. Mr. Cheeks argued the United States Supreme Court had already addressed that issue in *Groh v Ramirez*, 540 U.S. 551. The Court ruled that the facts of *State v Williams* were not exactly in line with Mr. Cheeks' case but the basic premise in that case was in South Carolina a warrant and affidavit could be read together to supply information upon which a warrant is based.

The Court held: Now in this particular case the warrant *itself does not have a description of the place or property to be searched in the blank provided for that.* I do note, however, the attached affidavit and states that there's reasonable grounds to believe that certain property subject to seizure, is located on the following premises, and that's where the description is omitted from the warrant itself. I have reviewed the Groh case. I did not find in the Groh case any discussion concerning whether or not the warrant is anyway referred back to the affidavit. In this case the warrant does refer back to the affidavit and I know arguably by the defense side, it does not do so with specific specificity. However, 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. So again, it is referring to the entire document. The Court found the warrant *sufficient under the Williams case.* Mr. Cheeks argued the Williams case was a ruling on 17-13-140, not the Fourth Amendment and it would not control the search warrant issue under the Fourth Amendment. *App, PP, 41-52.*

The State's opening arguments followed up the comment made during the motion sever: What the State intended to prove during this trial is that *Derrick Cheeks was the cooker and Ricky Cheeks was his runner. App, P, 62.*

Mr. Cheeks stated during opening: The most important thing the State failed to point out is the reason Mr. Markley and Mr. Elder are not on trial today. The question will become *where did the crack come from, who's responsible for it, and that would be the question.* You'll hear testimony today from two people that will tell you it was the Cheek's responsibility that is belonged to them. Those two people are codefendants in this case, and they are not being tried because there are rewards given for testimony. The State objected arguing on deal had been placed on the table for Mr. Markley and Mr. Elder. They still face charges of trafficking just like Mr. Cheeks. The Court asked is there something in the discovery that indicates a deal had been struck. Mr. Cheeks argued there's nothing the State could do with a trafficking 400 grams case other than dismiss it, to reduce it to them the benefit of cooperating witnesses. *App, PP, 66-69.*

The State's first witness, Craig Hanning, testified on direct examination he was the third officer on the execution team and based on the informant's description of the inside of the house, the officers knew the suspect had lived downstairs. *App, PP, 78-80.* On cross-examination Craig Hanning testified he did not see Mr. Cheeks when he came through the door. *App, P, 96.*

The State's second witness, Matt Hutchins, testified on direct examination that he followed Elder to Wal-Mart, observed him purchasing a box of baking soda, and then followed Elder back to the previous location. *App, PP, 103-106.* Matt Hutchins further testified that he was the lead man on the execution team as the first on to go through the door, and when he entered the residence he observed Mr. Cheeks running from the kitchen area. *App, PP, 109-129.* On cross-examination Matt Hutchins testified he issued Elder a warning ticket for running a stop sign, and from the time he blue lighted Elder to the time of his arrest lasted 15 to 20 minutes. *App, PP, 139-147.*

At the second day of trial, Ricky Cheeks moved for a mistrial arguing the trial proceeded on an indictment for 100 grams of crack that wasn't called to the jury. The Court stated the charge related to Ricky Cheeks not Derrick Cheeks.

Mr. Cheeks argued he had a different concern regarding the charge because he wasn't part of the charge. The Court Replied: Well I can clearly instruct them that your client is not involved in the charge at all. That can be made abundantly clear to the jury. *App, PP, 151-167.*

The State's fifth witness, Kelvin Washington, testified on direct examination that he was the officer assigned to collect evidence and inventory it on the return part of the warrant. *App, PP,*

205-206. On cross-examination, Kelvin Washington testified that he was the fifth or sixth officer on the execution team and after a *couple of minutes after entering the residence he saw no indication of the pot boiling. App, PP, 214-216.*

The State's eighth witness, Eric Elder, testified on direct examination that his *mother was present in the courtroom during trial*, and he left the residence with Ricky Cheeks because somebody was calling and Derrick Cheeks told Ricky that he needed of get rid of something and when they left the residence, Ricky Cheeks had a couple of ounces in his possession. *App, PP, 249-259.* Eric Elder testified on cross-examination that he hadn't been promised anything to testify against Mr. Cheeks and he could go to prison just like Mr. Cheeks can. *App, P, 270.* On redirect examination, *Elder testified that Derrick was cooking crack and Ricky was running the crack. App. P, 287.* On re-cross-examination, Elder testified that a year prior to trial he spoke with the Solicitor about his testimony and when asked the question regarding him speaking to and other agents, he replied: Not about the case. Not about my case. Not this case. *App, P, 290.*

The State's ninth witness, Tracy Markley, testified on direct examination that a friend of his, James Cranfield was *buying crack from Derrick Cheeks in 2004, he would purchase crack at Mr. Cheeks residence and he didn't go inside because he didn't know Mr. Cheeks*, the State hadn't promised him any deals, he still *faced the same charges Mr. Cheeks was on trial for*, and prior to Elder and Ricky leaving his residence, he didn't see anything happen between Derrick and Ricky. *App, PP, 300-304.* On cross-examination, Tracy Markley testified that he talked to Craig Hanning about the case but continued to testify that he wasn't promised anything. Markley testified: *I even asked if I could get something in writing and they said no. App, PP, 312-313.*

At the third day of trial during closing argument, *The State repeatedly mentioned to the jury that Derrick was the cooker and Ricky was the runner. App, PP, 388-390, 395.*

While instructing the jury on trafficking by possession, the Court stated: Now mere presence at a scene where drugs are found is not enough to prove possession. *Actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use. App, P, 435.* Mr. Cheeks objected to the strong evidence instruction arguing that is was a comment on the facts, and further argued the charge took away and nullified his mere presence defense. *App, PP, 440-443.*

On October 29 2010, Mr. Cheeks filed a post trial motion renewing his motion to suppress arguing *State v Williams* was heavily rooted in the statutory requirements of 17-13-14 not the Fourth Amendment grounds. The Court cited to *United States V Hurwitz. App, PP, 470-472. Mr. Cheeks argued the issuing Magistrate didn't incorporate the warrant by explicit words of reference. The Court replied: Well I agree he does not, that's not in this one. App, P, 473.*

REASON MERITING REHEARING

The Fourth Circuit's decision is clearly in conflict with *Slack v McDaniel*, 529 U.S. 473 (2000), emphasizing that "when the district court denies a habeas petition on procedural ground without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows at least, the jurist of reason would find it debatable whether the petition states 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, in that Fourth Circuit merely examined the opinions of the South Carolina District Court which stated that Ground One is a question of state constitutional error. *Cheeks v Joyner*, 2018 WL 4523190. For example, the district court's opinion states petitioner objects to the Magistrate Judge addressing claims not raised in his petition, reiterates his assertion that the trial court's instruction was impermissible on the facts, and states that the Magistrate Judge did not address his claim. *Cheeks v Joyner*, 2018 WL 4523190.

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 sate court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.

The Fourth Circuit completely ignored the fact that the Magistrate Judge *exchanged* Mr. Cheeks' claim *"the trial court jury instruction that actual knowledge of 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 to "the trial court's instruction*

on actual knowledge of the presence of the drugs was erroneous because it was a comment on the facts and weight of those facts." The South Carolina District Court further states that "in his direct appeal, the Supreme Court of South Carolina agreed with petitioner that it was *error for the trial court to give the challenged instruction" however is also found that petitioner was not prejudiced by the error. Cheeks v Joyner*, 2019 WL 4523190. The Fourth Circuit further ignored the fact that on *state court to hear this claim denied the claim on state constitutional law. State V Cheek*, 401 S.C. at 329.

KOTTEAKOS STANDARD

The panel also ignored the fact that the specific error at issue here is an error that is subject to the harmless error application in *Kotteakos v United States*, 328 U.S. 750, 776 (1946); *State v Cheeks*, 401 S.C. at 327; and that the "error had a substantial and injurious effect and influence in the jury's verdict." These conclusions are supported by the state court record when the South Carolina Supreme Court ruled: *"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 inference and to weigh the evidence." State v Cheeks*, 401 S.C. ay 329. This is clear by the Fourth Circuit's conclusion, "we have independently reviewed the record and conclude that Cheeks has not made the requisite showing." *Cheeks v Joyner*, 776 Fed. App, 796.

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 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 under the U.S. Const. Art. VI Cl.2.

The Fourth Circuit merely examined the opinion of the South Carolina District Court which stated in light of Ground Three petitioner raised the arguments at trial and on direct appeal. For example, the district court opinion states "upon review of the record", the court *disagrees with petitioner's argument that the state court failed to "fully consider his fourth amendment argument" or that they "willfully refused to apply the correct and controlling constitutional standards."* The Fourth Circuit completely ignored the fact that *State v Williams*, 297 S.C. 404 (1989) *Appendix C*, and *Groh v Ramirez*, 504 U.S. 551 (2004); both 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." The Fourth Circuit further ignored the fact that this court ruled 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 seize every item mentioned in the affidavit", id at 560, 124 S.Ct. 1284. The Court in Mr. Cheeks case admitted that the *"issuing Magistrate did not intentionally incorporate the affidavit into the warrant by explicit words of reference." App, P, 473.*

STATE PRECEDENT / SUPERVENING U.S. AUTHORITY

The panel also ignored the trial court's expressed view that he must continue to follow state precedent *Williams* on a federal question despite supervening authority *Groh* because *State v Williams* had not been *overturned by the State Supreme Court.* This Court ruled the "same year" *Williams* was decided that "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 had been set out by that court. *Asarco Inc. v Kodish*, 490 U.S. 605, 617 (1989). The South Carolina Supreme Court's decision is clearly in direct conflict with *Gamble v State of Okl*, 583 F.2d. 1161 (10th Cir. 1978), which case is so strikingly similar, both legally and factually, that the same result reached in *Gamble* must also be reached in this case.

4) Has the Supreme Court of the United States overruled *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 3d 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."?

The Fourth Circuit merely examined the opinions of the South Carolina District Court which stated in light of Ground Four *"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."* The Fourth Circuit completely ignored that this court never ruled in *Strickland* that a defendant has to show a reasonable probability that a *"reviewing court would have granted him relief."* 446 U.S. at 694. The Fourth Circuit further ignored the fact that the district court's opinions only addresses Mr.

Cheeks' objection to the Magistrate's Report and Recommendation and ignored the evidence at post-conviction and trial testimony. *Cheeks v Joyner*, 2018 WL 4523190.

CI BUYS / POLICE REPORTS

The panel also ignored Mr. Cheeks' post-conviction testimony that the affidavit omitted any sort of reliable information in the past to the Sheriff's Office; omitted the dates and times the trips were made to Anderson South Carolina; the warrant contained false statements regarding the march 3rd 2009 and March 6th 2009 CI buys; and Mr. Cheeks' repeated request for counsel to admit the police reports into the record to support his ineffective assistance claim. *App, PP, 526-529, 545, 549-550.* The investigative report of S/A Craig Hanning reveals that Mr. Cheeks' case involves both an act of commission and an act of omission by Officer Norris in drafting the affidavit. S/A Hanning's report clearly reveals the female never stated that her son returned to 152 Gordon Drive with Mr. Cheeks and watched as he cooked cocaine powder into cocaine base, and omitted the female stated Mr. Cheeks had purchased a cell phone for Elder, was always buying him clothes, giving him money, and paid to have his South Carolina license reinstated. *Appendix D.*

5) Has the Supreme Court of the United States overturned its own precedent in *Roviaro v United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957)? 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.

The Fourth Circuit merely examined the opinions of the South Carolina Supreme Court in light of Ground Five which sated "petitioner fails to assert any allegations that call into question the reasonableness of the conclusion that the *confidential informant was a mere tipster." Cheeks v Joyner*, 2019 WL 4523190. The Fourth Circuit completely ignored the fact that the search warrant affidavit in Mr. Cheeks' case reveals that the confidential informant was an active participant in Mr. Cheeks' drug transactions. *Appendix E.* The Fourth Circuit further ignored the fact that the district court's opinions only addressed Mr. Cheek's objections to the Magistrate's Report and Recommendation; and trial counsel's question during opening *"Where did the crack come from? Who's responsible for it?" App, P, 66.*

ORIGINAL PCR APPLICATION

The panel also ignored the fact that Mr. Cheeks raised in his original PCR Application and PCR counsel Christopher D. Brough failed to raise this claim during initial collateral proceeding. Therefore, this case is subject to federal habeas review pursuant to *Martinez v Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2112).

6) Has the Supreme Court of the United States overturned its own precedent in *U.S. v Armstrong*, 517 U.S. 456, 116 S.Ct. 1480 134 L.Ed. 2d 687? Where this court decided that for a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races.

The Fourth Circuit merely examined the opinions of the South Carolina Supreme Court which stated in light of Ground Six "in his objections, petitioner attempts to re-litigate this issue, but does not address the merits of the Magistrate Judge's ruling. For example the district court's opinion states "the Magistrate Judge concluded that petitioner failed to overcome the procedural bar because PCR counsel could not have been deficient as this claim was preserved for appellate review. *Cheeks v Joyner*, 2018 WL 4523190. The Fourth Circuit completely ignored the fact that the PCR Court failed to make a *ruling on the finding of facts and conclusion of law in regards to the selective prosecution claim during the hearing or in the Order of Dismissal. App, PP, 583-594.* These conclusions are supported by the PCR Court's ruling during the hearing: *"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 of dismissed it on direct verdict or could of found you not guilty. But the Solicitor has a right to bring an indictment. App, PP, 546-548.*

ELDER / MARKLEY PLEA DEALS

The panel also ignored Mr. Cheeks' post-conviction testimony regarding his selective prosecution claim. The PCR Court states: "The panel further ignored the fact that the PCR Court questioned PCR Counsel did he know of any other issues." PCR Counsel replied: "Your Honor, he had filed a pro-se amendment that counsel incorporated in his. I think that I've presented

what I deemed to be the most significant issues, which I felt showed that his lawyer was ineffective, and I think that we had that discussion that he wanted to discus some other issues, but that, you know, I told him that I thought that these were the most realistic issues and I think would go to show that his lawyer was ineffective. *App, P, 549.*

The Fourth Circuit completely ignored the fact that Elder and Markley had the same prosecutor Mr. Cheeks had that made the different prosecutorial decision as the Elder and Markley were all prosecuted by Spartanburg County authorities who according to the record stated there were no deals placed on the table for Elder and Markley and they still faced charges of trafficking just like Mr. Cheeks. *App. P, 67.* The Fourth Circuit further ignored the fact that the record strongly implicates all three defendants with respect to the offenses they were charged as relevant to 44-53-445 distributing crack cocaine while in proximity of a school zone, 44-53-375 trafficking 400 grams or more, Mr. Cheeks, Elder, and Markley each have that status, and were identically situated in that regard. *Appendix F, Appendix G.*

The Fourth Circuit's decision is clearly in conflict with *Slack v McDaniel*, 529 U.S. 473, 484 (2000), emphasizing that "when the district court denies relief on the merits, a prisoner satisfies the COA standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims debatable or wrong, in that the Fourth Circuit merely examined the opinions of the South Carolina District Court in light of Ground Eight which stated: "The PCR Court's denial of the petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent." For example, the district court's opinion states: "First, the PCR Court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR Court confirmed a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court precedent." *Cheeks v Joyner*, 2018 WL 4523190.

8) Has the Supreme Court of the United States overruled *Miller-El v Cockrell*, holding that deference does not imply abandonment of abdication of judicial review?

The Fourth Circuit completely ignored the fact that the South Carolina District Court analyzed Mr. Cheek's ineffective assistance claim in light of 28 U.S.C. § 2254(d)(1) and disregarded 28

U.S.C. § 2254(d)(2). The district court further stated the "record supports the PCR Court's determination."

The Fourth Circuit further ignored the fact that the district court only addressed the testimony of trial counsel regarding his failure to object to Elder and Markley testimony I light of them driving Mr. Cheeks around. These conclusions are supported by the state court record and the district court's opinions stating, *"At the PCR hearing trial counsel testified that the witness' statements, in the grand scheme of things at the time, it would have been something that did not strike me as being extensive enough or large enough to jump and make an objection and draw more attention to it."*

TRIAL COUNSEL TESTIMONY

The panel also ignored the fact that the South Carolina District Court's opinions fail to address Trial Counsel's post-conviction testimony regarding his failure to object to Markley's testimony regarding Mr. Cheeks being a *drug dealer for years in which counsel stated: "That's not what the testimony was I don't think. I don't remember it being that he was a drug dealer for years." "If you'll point that to me I could be wrong." "I just recall Markley said he drove Derrick and he said he's got crack from him and the last thing he said was every day." PCR Counsel pointed Trial Counsel to App, P, 300 regarding Markley's testimony at trial. Trial Counsel replied: "I got it." "It was a long process. We knew each other at work. We weren't friends. We didn't hang out. It was probably a six month period before me and him actually started hanging out and that's because my friend James Cranfield. He was going to Derrick to by crack and like I said he got me started smoking and we would go to his, you know, where he lived at the time to buy some." Trial Counsel admitted that his failure to object to Markley's testimony was prejudicial to Mr. Cheeks' case. App, PP, 566-568.*

SUGGESTIONS IN SUPPORT OF REHEARING

The South Carolina Supreme Court decision that Mr. Cheeks could not demonstrate prejudice warranting reversal from the objective "strong" is in the charge resulted I both an unreasonable determination of the facts in light of the evidence presented and an unreasonable application of *Kotteakos v United States*, 328 U.S. 750, 776, 66, S.Ct. 1239, 90 L.Ed 1557 (1946), because the Court's opinion that Mr. Cheeks was actively cooking crack when the warrant was served was

unreasonable, and the Court's opinion that the error unduly emphasized the evidence and deprived the jury of its prerogative to both draw inference and weigh the evidence met the harmless error standard under *Kotteakos*. The question for this Court to answer is whether the error had a substantial and injurious effect of influence in determining the jury's verdict.

The State court held that the evidence against Mr. Cheeks was "overwhelming." This conclusion is likewise and unreasonable determination of the facts in light of the evidence presented, because the South Carolina Supreme Court's opinion states: *"when the police executed the warrant at witness Markley's house, they interrupted appellant in the process of cooking crack cocaine. He was observed fleeing from the kitchen, where water was boiling, materials used in the manufacturing of crack were on the counters, and a digital scale found. In addition, 650 grams of crack, most of which was broken up into baggies, was seized from the kitchen where appellant had been found cooking. Moreover, on the day of his arrest, appellant sent his uncle to a stare to buy baking soda, two ounces of crack were found, the inference being that the uncle was delivering the crack for appellant. In short, there was overwhelming evidence that appellant both trafficked in more than 400 grams of crack and possessed it with intent to distribute." State v Cheeks*, 401 S.C. at 726.

The Fourth Circuit panel ignored the fact that on the second day of trial, the court instructed the jury that the *100 gram trafficking charge in no way involved Mr. Cheeks, Mr. Cheeks wasn't initially arrested, charged, or indicted for the 100 grams offense and although trial counsel failed to object to the State repeatedly telling the jury that Mr. Cheeks' issue on direct appeal didn't involve trial counsel's failure to object, it was based on the trial court's jury instruction error during charging the jury on trafficking by possession an error that was subject to harmless error review. State v Cheeks*, 401 S.C. at 727. Therefore, the South Carolina Supreme Court played the role of second jury in drawing inferences from a charge Mr. Cheeks wasn't involved in to determine that Mr. Cheeks possessed and trafficked the 400 grams of crack cocaine. *Appendix H.*

The panel also ignored *Kelvin Washington trial testimony that the eye was turned off and a couple minutes after entering the residence, he saw no indication of the pot boiling. App, PP, 214-216.* Therefore, Mr. Cheeks couldn't have been actively cooking crack cocaine at the time the officers entered the residence.

The South Carolina Supreme Court's decision that an *affidavit may incorporate by reference the location of the premises searched where the warrant is completely blank following the section titled "Description of premises (person, place, or thing) to be searched"* resulted in an unreasonable application of *Groh v Ramirez*, 540 U.S. 551 (2004), because this Court has addressed this issue I *Groh*. The question for the Court to answer is whether *Stone v Powell*, 428 U.S. 465, S.Ct. 3037, 3052 (1976), in conflict with U.S. Const. Art. VI, Cl.2 in depriving this court of jurisdiction to have its constitutional and statutory requirements citing *State v Williams*, 297 S.C. 404, 377 S.E.2d 308 (1989). This conclusion is likewise an unreasonable interpretation of *Groh* and its progeny. *Groh*, emphasizing that the warrant itself must have explicit words of reference for the Magistrate's assurance to search for and seize items mentioned in the affidavit. 504 U.S. at 560, 124 S. Ct. at 1284.

As was the case in *Gamble*, the issue is not only whether Mr. Cheeks had a mere opportunity to present his Fourth Amendment arguments, but whether also includes at least a *colorable application of the correct Fourth Amendment constitutional standards. The Fourth Amendment interposes a Magistrate between citizens and police officers when it comes to the issuance of search warrants and based on the fact that the trial court's ruling that the Magistrate in Mr. Cheeks' case did not intentionally "incorporate the affidavit into the warrant by explicit words of reference."* This case should not be barred by *Stone*; the Court should grant rehearing and issue a Writ of Certiorari because the failure to do so would allow the Fourth Circuit to continue to apply the wrong standard in deciding the *Slack* standard, and deny justice to those it is entitled to.

This Court has an ethical duty by the United States Constitution to establish the law of the land and to assure the citizens of the United States of America that the lower courts apply the law. When they do not, it is this Court's obligation to **HOLD THAT COURT ACCOUNTABLE** and see to it that justice is administered fairly. This Court must hear this case and hold the Fourth Circuit accountable for failing to properly apply law of this Court and relief where relief is do.

CONCLUSION

For the reasons stated, this Court must grant rehearing if its judgment entered on March 20 2020 and issue a Writ of Certiorari to hold the Fourth Circuit accountable for failing to properly apply the law of the Court and grant Mr. Cheeks relief; may this Court also cry and not be heard "For whoever shut their ears to the cry of the poor will also cry themselves and not be heard." Proverbs 21:13

Respectfully Submitted,

Derrick Cheeks

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this **15th** day of **May, 2020.**

Derrick L Cheeks

Derrick L. Cheeks, #343108
Lee Correctional Institution F6B-2232
990 Wisacky Highway
Bishopville, South Carolina 29010

CERTIFICATE OF SERVICE

The undersigned hereby certifies the grounds stated above are confined to (intervening circumstances of substantial and controlling effect / substantial grounds available to petitioner but not previously presented, and he has served the petition for rehearing and certificate of service in compliance to the Clerk's letter dated May 1 2020 by depositing a copy of it this **15th** day of **May 2020** in the Lee correctional Institution's internal mail system to be delivered via United States First Class Certified Mail Return receipt requested is being prepaid either by me or by the institution on my behalf.

Derrick L Cheeks

Petitioner

IN THE SUPREME COURT

OF THE UNITED STATES

DERRICK LAMAR CHEEKS, #343108 **Petitioner.**	**CASE NO:** **19-7461**
v.	**CERTIFICATION OF GOOD FAITH**
ALFORD JOYNER **Respondent.**	

Comes not the Petitioner, Derrick Lamar Cheeks in Pro-Se, in necessity, and makes certification that his petition for rehearing is presented to a nine (9) panel Court in good faith pursuant to Rule 44. Mr. Cheeks further states the following:

1. This Court entered its judgment denying Petitioner a Writ of Certiorari on March 20 2020. Petitioner believes that he presented this Court with adequate grounds to justify the granting of rehearing in this case and said petition is brought in good faith and not for delay.

Furthermore, Petitioner believes that based upon the law of this Court and facts of this case, Mr. Cheeks is entitled to relief which has been unjustly denied him. He further believes that if the Fourth Circuit Court of Appeals is continually allowed to apply *Slack* standard improperly, a number of American citizens will be denied their Constitutional right to due process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the **15th** day of **May, 2020.**

Derrick L Cheeks

Derrick L. Cheeks, #343108
Lee Correctional Institution F6B-2232
990 Wisacky Highway
Bishopville, South Carolina 29010

Additional material from this filing is available in the Clerk's Office.