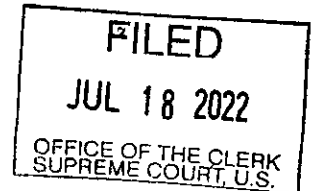


22-5173

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



Derrick Lamar Cheeks — PETITIONER
(Your Name)

vs.

Alford Joyner — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

South Carolina Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Derrick Lamar Cheeks 343108
(Your Name)

Lee CI F6b-2232, 990 Wisacky Highway
(Address)

Bishopville, South Carolina 29010
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

This petition presents two important issues concerning a state court's prejudice determination on direct review, 28 U.S.C. §2254(d); and the appropriate application of sidestepping the Certificate of Appealability Inquiry, 28 U.S.C. 2253(c), after this court's decision in *Buck v Davis*, 137 S.Ct. 759 (2017).

Since this court's decision, in *Buck v Davis*, *id.*, holding that the COA statute sets forth a two-step process. Circuit Courts of appeals have been cautioned that the initial determination on whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U.S.C. §2253(c). As a result this court held that at the first stage, the only question is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issue presented are adequate to proceed further."

In the ordinary case where someone has already filed for this first round of collateral relief this question would be raised for second and successive authorization, see 28 U.S.C. §2244. In the odd set of circumstances where a federal court declines to analyze a state court's prejudice determination under AEDPA/Brecht he is authorized to seek relief in collateral review only to reopen the final judgment.

In *Mr. Cheeks*; case the district court ruled that the state court's prejudice determination was a question of state constitutional law. After he filed for collateral relief, *Mr. Cheeks'* only recourse, to reopen the district court's final judgment, is found in Fed.R.Civ.P. Rule 60(b).

After the district court denied *Mr. Cheek's* Rule 60(b) motion, he sought a COA in the Fourth Circuit Court of appeals under 28 U.S.C. 2253(c) and the court of appeals turned a blind eye to a state court's prejudice determination during its COA inquiry. Thus, *Mr. Cheeks* presents, for resolution, the question that follows:

- 1) Has the Fourth Circuit Court of appeals effectively side stepped the COA inquiry, without expressly saying so, where the court has declined to analyze a state court's prejudice determination to narrow the circumstances under which a state prisoner can proceed under 28 U.S.C. 2253(c)?

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 follows:

RELATED CASES

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STATUTES AND RULES

The question presented implicate the following provisions of the Constitution of the United States and the United States Code.

§2253 (c)(1)(A) "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court".

§2254 (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas 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.

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue 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 2022 WL 843905; 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 B to the petition and is

☐ reported at _____; 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 SC. 329; or,

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

☐ is unpublished.

The opinion of the South Carolina Supreme court appears at Appendix E to the petition and is

☒ reported at State v Cheeks 401 S.C. 329; 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 March 22 2022.

☐ 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: April 19 2022, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was January 16 2013. A copy of that decision appears at Appendix E.

☐ A timely petition for rehearing was thereafter denied 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 _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

§2253(c)(2) A certificate of appealability may issue... only if the applicant has made a substantial showing of the denial of a constitutional right.

§2254(d) 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 with respect to any claim that was not 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.

STATEMENT OF THE CASE

On or about May 3 2021, Mr. Cheeks submitted an instant motion seeking relief from final judgment pursuant to Fed.R.Civ.P., Rule 60(b). His primary claim, although poorly particularized because of his ignorance of law, was based on one basic event: 1) he was deprived of his right to due process because the district court failed to reach the merits of ground one in his §2254 proceeding.

Mr. Cheeks raised one very specific constitutional ground for relief from final judgment which is particularized in his Rule 60(b) and made a part of the corresponding appendix. App – 84.

After a response from the respondent and a request for Issuance of Show Cause and Answer Order, the district court denied Mr. Cheeks relief under Rule 60(b) based on his argument being raised throughout his action, in a footnote the court mentioned that Mr. Cheeks' Rule 60(b) motion must be construed as a second and successive habeas motion, see the court's order issued by the district court on June 3 2021. On the same day the court issued an order denying Mr. Cheeks' motion for issuance of show cause and answer as moot and made a part of the corresponding appendix. App – B.

On or about June 24 2021, Mr. Cheeks filed a timely Notice of Appeal from the district court's denial of his Rule 60(b) motion. Within his Notice of Appeal, Mr. Cheeks notified the court that the district court denied him access to review under the First Amendment of the United States Constitution by failing to comply with the Supreme Court's long standing mandate, in *Fry v Pliler*, 87 S.Ct. 824 (2007), requires federal courts to assess the prejudicial impact of constitutional error in a state criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*, made a part of the corresponding appendix. App-94.

On or about July 19 2021, Mr. Cheeks filed his pro-se "Informal Brief for Issuance of a Certificate of Appealability" in the Fourth Circuit of the United States Court of Appeals. Within his brief to the court of appeals, Mr. Cheeks notified the court that reasonable jurists would find debatable that ground one in his §2254 proceeding, is entitled to review under *Brecht v Abrahamson*, 113 S.Ct. 1710 (1993).

On or about March 22 2022, the Fourth Circuit Court of Appeals denied Mr. Cheeks a certificate of appealability and dismissed his appeal, made a part of the corresponding appendix. App-A.

On or about May 5 2022, Mr. Cheeks filed a timely motion for rehearing and or rehearing en banc. The court of appeals denied Mr. Cheeks' motion and noted that no judge requested a poll under Fed.R. App p35, see the panels order issued by the Fourth Circuit Court of Appeals on April 19 2022, made a part of the corresponding appendix. App-D.

Now after raising ground one in his Rule 60(b) motion, Mr. Cheeks questions if the Fourth Circuit Court of Appeals joined the Fifth Circuit Court of Appeals in side stepping the COA process where the court declined to analyze a state appellate court's factual determination under AEDPA/Brecht.

REASON TO GRANTING THE PETITION

- 1) Has the Fourth Circuit Court of appeals effectively sidestepped the C.O.A. inquiry, without expressly saying so, where the court of appeals has declined to analyze a state court's prejudice determination to narrow the circumstances under which a state prisoner can proceed under 28 U.S.C. §2253(c)?
 - A. The panel improperly sidestepped the C.O.A. process by denying a certificate of appealability based on Mr. Cheeks failing to make the requisite showing when the panel itself declined to analyze a state court's prejudice determination.

In reviewing the facts and circumstances of Mr. Cheeks' case, the Fourth Circuit panel "paid lip service to the principles guiding issuance of a C.O.A." *Tenard v Dretke*, 542 U.S. 274, 283 (2004), but in actuality the panel held Mr. Cheeks to a more stringent standard. Specifically, the Fourth Circuit panel "sidestepped the threshold C.O.A. process by first turning a blind eye to a state court's prejudice determination, and then justifying its denial of a C.O.A. based on Mr. Cheeks failing to make a requisite showing, thereby in essence abandoning its duty of judicial review " *Miller-El*, 537 U.S. at 340 (2003).

As the Supreme Court noted in *Miller-El*, even in the context of federal habeas, deference does not "imply abandonment or abdication of judicial review." *Miller-El*, 537 U.S. at 340. In Mr. Cheeks' case however, that is exactly what the panel did.

In a recent case, *State v Stewart*, 433 S.C. 382 (2021), the South Carolina Supreme Court held: "The inference charge in Stewart's case had the same prejudicial effect that the court described in Mr. Cheeks' case." *Stewart* 433 S.C. at 392. In a footnote, the Court expressed that despite finding, error, in Mr. Cheeks' case on direct review, the court did not reverse his conviction because "the overwhelming evidence was that Mr. Cheeks was actively cooking crack cocaine when the warrant was served.: *Cheeks* 401 S.C. at 329. See footnote 8. This factual determination is binding on federal courts. 28 U.S.C. §2254(d)(1)(2).

Mr. Cheeks filed a pro-se brief in the Fourth Circuit seeking a certificate of appealability, so that he may appeal the district court's denial of his Rule 60(b) motion. The panel however, determined that it had independently reviewed the record. Thus, the panel concluded that Mr. Cheeks should be denied a C.O.A. because he had not made the requisite showing.

The panel impermissibly sidestepped the C.O.A. inquiry in this manner by denying a certificate of appealability because the court itself was responsible for Mr. Cheeks failing to make the requisite showing when it turned a blind eye to a state court's factual determination. The panel's assessment of the record is patently wrong. The panel could not possibly expect Mr. Cheeks to meet the requisite showing standard pursuant to 28 U.S.C. §2253(c)(2) when the panel itself abandoned it's duty of judicial review. Moreover, reasonable jurist would debate that Ground One in Mr. Cheeks' §2254 proceeding is entitled to plenary review under AEDPA/Brecht

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Derrick L. Cheeks

Date: July 18, 2022