21-6975

Derrick Lamar Cheeks
#343108
LEE CORRECTIONAL INSTITUTION
990 Wisacky Highway
Bishopville, SC 29010-2021

FILED: March 22, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6975
(0:17-cv-02876-DCC)

DERRICK LAMAR CHEEKS

Petitioner - Appellant

v.

ALFORD JOYNER

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6975

DERRICK LAMAR CHEEKS,

Petitioner - Appellant,

v.

ALFORD JOYNER,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Donald C. Coggins, Jr., District Judge. (0:17-cv-02876-DCC)

Submitted: March 9, 2022 Decided: March 22, 2022

Before WYNN and HARRIS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Derrick Lamar Cheeks, Appellant Pro Se.

PER CURIAM:

Derrick Lamar Cheeks seeks to appeal the district court's order denying his Fed. R. Civ. P. 60(b) motion for relief from the district court's prior order denying relief on his 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). *See generally United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Cheeks has not made the requisite showing.* Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are

* We also conclude that the district court did not abuse its discretion in denying Cheeks' recusal motion. *See Liteky v. United States*, 510 U.S. 540, 555 (1994); *United States v. Stone*, 866 F.3d 219, 229 (4th Cir. 2017).

adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: April 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6975
(0:17-cv-02876-DCC)

DERRICK LAMAR CHEEKS

Petitioner - Appellant

v.

ALFORD JOYNER

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Harris, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Derrick Lamar Cheeks, Petitioner, v. Alford Joyner, Respondent.	)	Case No. 0:17-cv-02876-DCC **ORDER**

This matter is before the Court on Petitioner's Motion to Set Aside Judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) or, in the alternative, for Recusal and his Motion for Issuance of Show Cause and Answer Order. ECF Nos. 84, 90. In its prior Order, issued August 8, 2018, the Court adopted the Report and Recommendation of the Magistrate Judge, granted the Motion for Summary Judgment, denied the Petition, and denied a certificate of appealability. ECF No. 59. Thereafter, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e) and Motions to Compel. ECF Nos. 62, 64, 65, 66. The Court denied the Motion to Alter or Amend and found the Motions to Compel as moot. ECF No. 69. On December 20, 2018, Petitioner, through counsel, filed a Notice of Appeal to the Fourth Circuit. ECF No. 72. On September 6, 2019, the Fourth Circuit dismissed the appeal; the mandate was issued on September 30, 2019. ECF Nos. 77, 78.

In this Court, Petitioner filed a Motion to Set Aside Judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) or, in the alternative, for Recusal on May 3, 2021. ECF

Motion to Set Aside Judgment

Petitioner brought this action pursuant to 28 U.S.C. § 2254. ECF No. 8. As previously stated, the Court granted the Motion for Summary Judgment, denied the Petition, and denied a certificate of appealability. ECF No. 59. In his present Motion to Set Aside Judgment, Petitioner argues that Ground One of his Petition has been misconstrued; accordingly, Ground One as he intended to present it has not been ruled upon. ECF No. 84. The Court finds that this argument has been raised throughout this action. This Court has previously considered this assertion in ruling on the Motion for Summary Judgment and the Motion to Alter or Amend Judgment. ECF Nos. 56, 59, 62, 69. The Fourth Circuit has also considered this argument in dismissing the appeal.[2] ECF No. 77. Nevertheless, out of an abundance of caution for a pro se Petitioner, the Court has considered this issue again in light of the standard articulated in Federal Rule of Civil Procedure 60(b). Upon consideration, the Court finds that Petitioner is not entitled to relief. *See Aikens v. Ingram*, 652 F.3d 496, 500–01 (4th Cir. 2011) (en banc) (holding that a motion based on Rule 60(b)(6) requires a showing of "extraordinary circumstances").

[2] To the extent this Motion seeks to again attack the validity of Petitioner's conviction and, therefore, must be construed as a second and successive habeas motion, this Court is without authority to rule on same absent prefiling authorization by the Fourth Circuit. *See United States of America v. King*, 827 F. App'x 312 (4th Cir. 2020).

Motion for Recusal

Recusal of federal judges is generally governed by 28 U.S.C. § 455.[3] Subsection (a) of § 455 provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In the Fourth Circuit, this standard is analyzed objectively by considering whether a person with knowledge of the relevant facts and circumstances might reasonably question the judge's impartiality. *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003).

Plaintiff alleges that the undersigned should recuse himself "due to his personal interest in the outcome of this case." ECF No. 84. As Petitioner has not provided any additional allegations, it appears that Petitioner is requesting recusal based on the prior rulings of this Court. However, judicial rulings alone, "almost never constitute a valid basis for a bias or partiality motion." *See Liteky v. U.S.*, 510 U.S. 540, 555 (U.S. 1994). "In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism." *Id.* The Motion, therefore, is insufficient as a matter of law to establish any basis for recusal; accordingly, the Motion is denied.

[3] Notably, § 455 largely tracks the language of Canon 3(C) of the Code of Conduct for United States Judges, which also governs recusal of federal judges.

CONCLUSION

Therefore, Petitioner's Motion for to Set Aside Judgment or, in the alternative, for Recusal [84] is **DENIED**. Petitioner's Motion for Issuance of Show Cause and Answer Order [90] is **FOUND as MOOT**.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

June 3, 2021
Spartanburg, South Carolina

Appendix B

The Findings and Recommendations of the U.S. Magistrate Judge..

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Derrick Lamar Cheeks, Petitioner, vs. Alford Joyner, Respondent.	)	C/A No. 0:17-2876-DCC-PJG **REPORT AND RECOMMENDATION**

Petitioner Derrick Lamar Cheeks, a self-represented state prisoner, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on Respondent's amended motion for summary judgment. (ECF No. 33.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondent's motion. (ECF No. 36.) Petitioner filed a response in opposition and a supplement with exhibits[1] (ECF Nos. 46 & 49), and Respondent replied (ECF No. 47).[2] Having carefully

[1] Respondent filed a motion to strike exhibits attached to Petitioner's supplement to his response. (ECF No. 48.) The motion is denied. To the extent any exhibits improperly expand the record, see Rules Governing § 2254 Cases 7, they were not considered by the court. But see generally Fielder v. Stevenson, Civil Action No. 2:12-cv-00412-JMC, 2013 WL 593657, at *4 (D.S.C. Feb. 14, 2013) ("[T]he usual bars to hearing evidence not presented in state court may not be applicable insofar as the claims relate specifically to the PCR attorney's ineffectiveness.") (citing Cristin v. Brennan, 281 F.3d 404, 417 (3d Cir. 2002)).

[2] Petitioner also filed a sur-reply. (ECF No. 51.) The court observes that the Local Rules make no provision for sur-reply memoranda and Petitioner did not seek leave of the court to file a sur-reply. Accordingly, the sur-reply was not considered in the court's recommendation. However, consideration of the sur-reply would not have changed the court's recommendation.

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considered the parties' submissions and the record in this case, the court finds that Respondent's motion should be granted and the Petition be denied.

BACKGROUND

In November 2009, Petitioner was indicted in the Spartanburg County Court of General Sessions for trafficking in crack cocaine and possession with intent to distribute crack cocaine within one-half mile of a school. (App. at 595-98, ECF No. 32-3 at 91-100.) Petitioner was jointly tried with his uncle, Ricky Cheeks, in an October 2010 trial. (App. at 1, ECF No. 32-1 at 3.) Petitioner was represented at trial by Jeff Wilkes, Esquire. (Id.) Petitioner was found guilty as charged and sentenced to twenty-five years' imprisonment and a $200,000 fine for trafficking in crack cocaine and ten years' imprisonment and a $100,000 fine for possession within intent to distribute crack cocaine within one-half mile of a school, to run concurrently. (App. at 465, ECF No. 32-2 at 85.)

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals, wherein he was again represented by Wilkes. (ECF No. 32-5 at 1.) Petitioner raised the following issues on appeal:

> I. Should the drugs' [sic] seized in the home be suppressed because the Search Warrant, which did not give any description of the place to be searched, was facially invalid?
>
> II. Was it error for the trial court to instruct the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use?"

(ECF No. 32-5 at 6.) The appeal was certified for review by the South Carolina Supreme Court pursuant to South Carolina Appellate Court Rule 204(b). The Supreme Court affirmed Petitioner's convictions and sentences in a published opinion.[3] (App. at 477, ECF No. 32-2 at 97.)

[3] State v. Derrick Lamar Cheeks, 737 S.E.2d 480 (S.C. 2013).

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Petitioner filed a *pro se* application for post-conviction relief ("PCR") in the Spartanburg County Court of Common Pleas on June 21, 2013. Petitioner raised the following issues:

(a) Counsel failed to argue the probable cause to issuance of warrant.

(b) Counsel failed to challenge the veracity of warrant affidavit.

(c) Counsel failed to move for a bill of particulars requesting disclosure of confidential informant.

(App. at 487, ECF No. 32-2 at 107) (errors in original). Petitioner then retained counsel, Christopher D. Brough, Esquire, and amended his application to raise the following issues (quoted verbatim), in addition to those already raised:

(a) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in consenting to allow the Applicant's case to be tried with the case of Ricky Dwight Cheeks thereby prejudicing the Applicant's defense.

(b) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in failing to move to sever his case from the case of Ricky Dwight Cheeks.

(c) Ineffective Assistance of Counsel – The Applicants trial counsel was ineffective in failing to make a motion for a pretrial Franks hearing in order to suppress evidence of drugs based on a search warrant dated June 4, 2009, that was defective.

(d) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in failing to make a motion in limine to exclude any character and prior bad act evidence before the trial, resulting in testimony being admitted of the Applicant's prior drug dealings.

(e) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in failing to object to testimony from Eric Elder and Tracy Markley that discussed the prior drug relationship that they had with the Applicant. The Applicant's trial was also ineffective for failing to move for a mistrial based upon prosecutorial misconduct, such misconduct being the admission of prior drug dealings by an experienced prosecutor.

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1. Defense Counsel was ineffective for failing to file necessary motions with the court and law enforcement to ensure that all physical evidence in this case was preserved and that the Applicant had an equal opportunity to access the evidence for the independent testing.

2. Defense Counsel was ineffective for failing to prepare and present a defense to Applicant's charges where the benefit of retaining the right to the last argument was significantly outweighed by the need to explain the circumstances and evidence that were readily explainable and which, left unrefuted, were highly prejudicial to the defense.

3. Defense Counsel was ineffective for failing to hire an independent search warrant expert in Applicant's case.

4. Defense Counsel was ineffective for failing to move to suppress evidence that was obtained in violation of the Fourth Amendment.

5. Defense Counsel was ineffective for failing to object and challenge the Trial Judge abusing his discretion during motion to suppress.

6. Defense Counsel was ineffective for failing to adequately cross-examine state witness Craig Hanning.

7. Defense Counsel was ineffective for failing to adequately cross-examine state witness Matt Hutchins.

8. Defense Counsel was ineffective for failing to cross-examine state witness Paul Norris.

9. Defense Counsel was ineffective for failing to cross-examine state witness Lieutenant Steve Cooper.

10. Defense Counsel was ineffective for failing to cross-examine Sgt. Pharis.

11. Defense Counsel was ineffective for neglecting to investigate and produce witnesses who would have established that Eric Elder and Tracy Markley did in fact sell drugs.

12. Defense Counsel was ineffective for failing to object to prior bad act evidence of Eric Elder where the content of testimony was more prejudicial than probative.

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13. Defense Counsel was ineffective for failing to object to prior bad act evidence of Tracy Markley where the content of testimony was more prejudicial than probative.

14. Defense Counsel was ineffective for failing to research and present an argument pertaining to a defense of third party guilt where, on the demonstrable facts of this case such a defense was a viable option.

15. Defense Counsel was ineffective for failing to object to The Hands of One Hand of All Jury Charge that violated Applicant's due process by shifting burden from State to Applicant.

16. Defense Counsel was ineffective for failing to move to quash Applicant's indictments based on Selective Prosecution.

17. Appellate Counsel was ineffective in that he advised Applicant's family at Oral Argument that if the State Supreme Court affirmed the lower court's ruling he would appeal decision to The United States Supreme Court, and subsequent to Supreme Court's ruling that was unequivocally contrary to Federal Established Law he failed to do so.

18. Defense Counsel was ineffective in that he failed to object; and renew his motions to sever and mistrial based on State's failure to notify the Applicant of all charges Applicant was held to answer for.

19. Prosecutorial Misconduct in that the prosecutor's opening and closing arguments to the jury deprived Applicant of a fair trial in violation of due process.

20. Defense Counsel's failure to object to the prosecutor's opening and closing arguments to the jury constituted deficient performance.

21. Prosecutorial Misconduct in that the prosecutor failed to disclose "material" evidence in violation of Brady, cumulative effect of all "undisclosed" evidence was "favorable" to the Applicant, and favorable evidence the prosecutor failed to disclose to Applicant would have made a different result "reasonable probable" in Trafficking Crack Cocaine prosecution, and thus, non-disclosure of evidence deprived Applicant of a fair trial in violation of due process.

22. Defense Counsel's failure to object to the prosecutor's failure to disclose favorable evidence that was material to Applicant's guilt constituted deficient performance. In addition "the Applicant contends that there is evidence of

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> material facts not previously presented and heard that requires vacation" [S.C. Code Ann. § 17-22-15(C)] of his judgment and sentences. . . .
>
> 23. Applicant seeks a new trial based upon after discovered evidence based upon where the State witness Eric Elder and Tracy Markley has subsequently been given "rewards" for "testifying" from the state, and where they have subsequently pled guilty to charges of "PWID non-violent as "lesser included offenses" of "Trafficking Crack Cocaine" "100 grams or more" and "400 grams or more."

(ECF No. 32-8 at 1-6) (errors in original). A hearing was held on the application on September 3, 2015. (App. at 496, ECF No. 32-2 at 116.) The PCR court denied Petitioner's application by order dated November 2, 2015. (App. at 583, ECF No. 32-3 at 85.)

Petitioner appealed the PCR court's order by filing a petition for a writ of certiorari to the South Carolina Supreme Court on November 10, 2015. Petitioner presented the following issue in the petition:

> Trial counsel erred in failing to object to the prejudicial prior bad acts evidence and negative character testimony from drug users and dealers who aligned themselves with petitioner because the result was the denial of petitioner's right to a fair trial in the case.

(ECF No. 32-10 at 3.) The Supreme Court denied the petition and issued the remittitur on July 28, 2017. (ECF No. 32-18.)

During the pendency of his PCR appeal, Petitioner filed a second *pro se* PCR application in the Spartanburg County Court of Common Pleas on June 20, 2016. (ECF No. 32-12 at 1.) The PCR court dismissed Petitioner's second PCR application on November 6, 2017. (ECF No. 32-17 at 1.)

Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 23, 2017. Petitioner amended his petition on November 17, 2017.

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FEDERAL HABEAS ISSUES

The Petition for a writ of habeas corpus raises the following issues, quoted verbatim:

Ground One: The trial court 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.

Supporting Facts: The South Carolina Supreme Court ruling that the jury charge unduly emphasized the evidence and deprived the jury of its prerogative to draw inferences and weigh the evidence and petitioner could not demonstrate prejudice due to overwhelming guilt was contrary to clearly established federal law and was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding.

Ground Two: The petitioner had a legitimate expectation of privacy in the premises searched.

Supporting Facts: The state's key witnesses Eric Elder and Tracy Markley unequivocally demonstrated by their testimony that the petitioner had a legitimate expectation of privacy in the premises searched.

Ground Three: The search warrant is defective on its face for failing to state with particularity the premises to be searched.

Supporting Facts: The South Carolina Supreme Court ruling that an affidavit may incorporate by reference the description of the premises searched where the search warrant is blank following the section titled "Description of Premises (Person, Place, or Thing) to be Searched", or an accompanying affidavit for purposes of satisfying the particularity requirement was contrary to and involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

Ground Four: 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.

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Supporting Facts: Counsel failure to investigate and introduce the arrest warrants and police reports of Paul Norris and Craig Hanning that was in his possession; subpoena Paul Norris and Craig Hanning to the hearing; investigate and fully cross examine trial counsel in regards to the petitioner being arrested and indicted for the March 3 and 16, 2009 C.I. buys in the affidavit; and file a Rule 59(e) motion during petitioner's initial collateral proceeding impeded the petitioner from complying with the state's established procedures.

Ground Five: 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.

Supporting Facts: The search warrant affidavit unequivocally reveals that the confidential informant was an active participant and counsel's failure to raise claim during petitioner's initial collateral proceeding impeded petitioner from complying with the state's established procedures.

Ground Six: Petitioner was denied his rights to equal protection and effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments 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.

Supporting Facts: During the PCR Hearing of the petitioner the state's PCR judge and petitioner's PCR counsel impeded petitioner from presenting his selective prosecution claim. Petitioner argued that he was similarly situated to his white codefendant's Eric Elder and Tracy Markley when it came to the 400 grams and half proximity to a school zone charges. Petitioner never had a chance to fully argue and present his claim because the PCR judge stated "he wasn't buying the issue". However, the judge asked PCR counsel did he know of any other issues? PCR counsel stated that "he presented what he deemed to be the most significant issues that he felt showed trial counsel was ineffective". In addition, PCR counsel stated that he had a discussion with petitioner in regards to other issues petitioner wanted to raise and he told petitioner that he

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thought that the issues raised were the most realistic in showing that trial counsel was ineffective. Petitioner asked about introducing his exhibits to support his claim and PCR counsel stated that petitioner's exhibits were a matter of the record and counsel's failure to file a Rule 59(e) motion impeded petitioner from complying with the state's established procedures.

Ground Seven: Petitioner was denied his right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments 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 toe 100 grams of crack cocaine.

Supporting Facts: During the PCR hearing of the petitioner the state PCR judge and petitioner's PCR counsel impeded petitioner from presenting his false testimony claim and introducing his exhibits in support of his claim. Petitioner asked PCR counsel at the beginning and during the hearing could he present his exhibits and PCR counsel stated that he would give petitioner the opportunity to put anything that he wanted to introduce in the record at the end of the hearing. Petitioner argued that his after discovered evidence of Eric Elder and Tracy Markley plea deals supported his claim that the prosecutor presented false testimony to the jury in opening statement and during trial. Petitioner never got the opportunity to fully argue and present his claim because the PCR judge stated "What else? What other issues?" However, the PCR judge asked PCR counsel did he know of any other issues? And PCR counsel stated that he presented what he deemed to be the most significant issues that he felt showed trial counsel was ineffective. Petitioner asked PCR counsel what about his exhibits he wanted to introduce into the record. PCR counsel stated that petitioner's exhibits were a matter of the record.

Ground Eight: 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.

Supporting Facts: 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 resgestae of the case: and failing to object to Tracy Markley 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.

(Am. Pet., ECF No. 8-1) (errors in original).

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

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In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson v. Pardus, 551 U.S. 89 (2007), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Habeas Corpus Standard of Review

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States," or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state

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court proceeding." 28 U.S.C. § 2254(d)(1), (2). When reviewing a state court's application of federal law, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v. Taylor, 529 U.S. 362, 410 (2000); see also White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (describing an "unreasonable application" as "objectively unreasonable, not merely wrong" and that "even clear error will not suffice") (internal quotation marks and citation omitted); Harrington v. Richter, 562 U.S. 86, 100 (2011); Humphries v. Ozmint, 397 F.3d 206 (4th Cir. 2005); McHone v. Polk, 392 F.3d 691 (4th Cir. 2004). Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington, 562 U.S. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)); see also White, 134 S. Ct. at 1702 (stating that " '[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement' ") (alteration in original) (quoting Harrington, 562 U.S. at 103). Under the AEDPA, a state court's decision "must be granted a deference and latitude that are not in operation" when the case is being considered on direct review. Harrington, 562 U.S. at 101. Moreover, review of a state court decision under the AEDPA standard does not require an opinion from the state court explaining its reasoning. See id. at 98 (finding that "[t]here

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is no text in [§ 2254] requiring a statement of reasons" by the state court). If no explanation accompanies the state court's decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. Id. Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Id. at 102. "If this standard is difficult to meet, that is because it was meant to be." Id. Section 2254(d) codifies the view that habeas corpus is a " 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. at 102-03 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

C. Exhaustion Requirements

A habeas corpus petitioner may obtain relief in federal court only after he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds by United States v. Barnette, 644 F.3d 192 (4th Cir. 2011); see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 471 S.E.2d 454, 454 (S.C. 1990) (holding that "when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies."). To exhaust his available state court remedies, a petitioner must "fairly present[] to the state court both the operative facts and the controlling legal principles associated with each claim." Longworth v. Ozmint, 377 F.3d 437, 448 (4th Cir. 2004) (internal

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quotation marks and citation omitted). Thus, a federal court may consider only those issues which have been properly presented to the state appellate courts with jurisdiction to decide them. Generally, a federal habeas court should not review the merits of claims that would be found to be procedurally defaulted (or barred) under independent and adequate state procedural rules. Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008); Longworth, 377 F.3d 437; see also Coleman v. Thompson, 501 U.S. 722 (1991). For a procedurally defaulted claim to be properly considered by a federal habeas court, the petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

D. Respondent's Motion for Summary Judgment

1. Claims Not Cognizable Under § 2254 (Ground One)

Respondent argues that Petitioner's Ground One fails to state a claim upon which federal habeas corpus relief may be granted because the claim raises only issues of state law. The court agrees.

A district court may only entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions."). In Ground One, Petitioner claims the trial court's jury instruction on actual knowledge of the presence of the drugs was erroneous because it was a comment on the facts and the weight of those facts. In Petitioner's direct appeal, the South Carolina Supreme Court agreed with this argument, finding it was error for

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the trial court to give that instruction, but also finding Petitioner was not prejudiced by that error. (App. at 482, ECF No. 32-2 at 102.) But such an error is one of state constitutional law. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also State v. Smith, 342 S.E.2d 600, 601 (S.C. 1986) ("The trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the accused or as to controverted facts.") Accordingly, Petitioner's claim in Ground One is not cognizable here because it presents no federal issue. See Gilmore v. Taylor, 508 U.S. 333, 342 (1993) ("Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief.") (citing Estelle, 502 U.S. at 112); Billotti v. Legursky, 975 F.2d 113, 119 (4th Cir. 1992) (finding the habeas petitioner's allegation that the state trial court erred in its jury instructions failed to raise a claim redressable under § 2254 where the petitioner failed to explain in his brief how the alleged trial error resulted in a deprivation of a federal right) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)).

2. Claims Barred by Stone (Grounds Two & Three)

Respondent argues Petitioner's Grounds Two and Three are barred pursuant to Stone v. Powell, 428 U.S. 465 (1976). The court agrees. In Stone, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494; see also Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978) (applying Stone and holding that where a state court

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provides a mechanism under state practice to litigate Fourth Amendment claims, the court "need not inquire further into the merits of the petitioner's case . . . unless the prisoner alleges something to indicate his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired").

Here, Petitioner challenges the search of the home where he was arrested pursuant to the Fourth Amendment, arguing he had a reasonable expectation of privacy in the home, and also arguing that the search warrant was defective. However, the record unequivocally shows that Petitioner made these arguments at trial when trial counsel moved to suppress the search warrant. (App. at 41-50, ECF No. 32-1 at 43-52.) Petitioner also raised these arguments in his direct appeal, and the South Carolina Supreme Court ruled on these issues. (App. at 479, ECF No. 32-2 at 99; ECF No. 32-5 at 3.) Thus, Petitioner had a "full and fair" opportunity to litigate these Fourth Amendment claims in state court, and he fails to show that his opportunity to raise these issues in state court was impaired. See Doleman, 579 F.2d at 1265. Accordingly, Petitioner's claims in Grounds Two and Three are barred by Stone.

3. Procedurally Barred Claims

Respondent argues Grounds Four through Seven are procedurally barred. As will be discussed in more detail below, the court agrees that all of these claims are procedurally barred. However, Petitioner argues he can show cause to excuse the procedural bar of these claims pursuant to Martinez v. Ryan, 566 U.S. 1 (2012).

Generally, any errors of PCR counsel cannot serve as a basis for cause to excuse a petitioner's procedural bar of his claims. See Coleman, 501 U.S. at 752. However, in Martinez v. Ryan, the United States Supreme Court established a "limited qualification" to the rule in Coleman.

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Martinez, 566 U.S. at 15. The Martinez Court held that inadequate assistance of counsel "at initial-review collateral review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 9. In describing its holding in Martinez, the Supreme Court has stated:

> We . . . read Coleman as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (citing Martinez, 132 S. Ct. at 1318-19, 1320-21); see also Sexton v. Cozner, 679 F.3d 1150, 1159 (9th Cir. 2012) (summarizing the Martinez test to require the following: "a reviewing court must determine whether the petitioner's attorney in the first collateral proceeding was ineffective . . . , whether the petitioner's claim of ineffective assistance of trial counsel is substantial, and whether there is prejudice").

Further, to excuse the procedural bar of Petitioner's claims, he must "show that [PCR] counsel's representation during the post-conviction proceeding was objectively unreasonable, and that, but for his errors, there is a reasonable probability that Petitioner would have received relief on a claim of ineffective assistance of trial counsel in the state post-conviction matter." Sexton, 679 F.3d at 1157; see also Williams v. Taylor, 529 U.S. at 391 (stating that "the Strickland test provides sufficient guidance for resolving virtually all ineffective assistance-of-counsel claims"); Strickland v. Washington, 466 U.S. 668, 687 (1984) (stating that to demonstrate ineffective assistance of counsel, a petitioner must show that (1) his counsel was deficient in his representation, *i.e.*, that

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counsel's errors were so serious that his performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution and (2) he was prejudiced as a result).

a. Ground Four

In Ground Four, Petitioner claims trial counsel was ineffective for failing to make a motion for a Franks[4] hearing. This issue was raised to and ruled upon by the PCR court. (App. at 591-92, ECF No. 32-3 at 93-94.) However, Petitioner did not raise the issue in his PCR appeal. Thus, the claim is procedurally barred from federal habeas review because it was not presented to the state appellate court in Petitioner's PCR appeal. See Lawrence, 517 F.3d at 714; see also McCray v. State, 455 S.E.2d 686, n.1 (S.C. 1995) (stating that issues not raised in a petition for a writ of certiorari from the denial of a petitioner's PCR application are not preserved for appellate review).

Petitioner argues he can show cause to excuse the procedural bar because PCR counsel failed to introduce evidence to support this claim at the PCR hearing. Specifically, he argues PCR counsel should have presented evidence that statements in the search warrant affidavit are false. But Petitioner fails to identify which statements in the affidavit are false or forecast evidence that would prove that any of the statements are false. Rather, he points out that certain information is not included in the affidavit, such as the identities of the vehicles' drivers or the fact that Petitioner did not live at the residence to be searched. And Petitioner asserts, without any supporting facts, that the confidential informant was not reliable.

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[4] Franks v. Delaware, 438 U.S. 154 (1978) (providing that a defendant may attack the presumed validity of a facially valid warrant affidavit by showing the warrant relies on a false statement made either knowingly and intentionally, or with reckless disregard for the truth).

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Consequently, Petitioner fails to provide any substantiated allegations to support his claim that trial counsel had grounds to request a Franks hearing, which would require a plausible assertion that facts sworn to in the warrant affidavit were false or made with reckless disregard for the truth. See United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990) ("In order even to obtain an evidentiary hearing on the affidavit's integrity, a defendant must first make 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.' This showing 'must be more than conclusory' and must be accompanied by a detailed offer of proof.") (quoting Franks, 438 U.S. at 155-56, 171) (internal citations omitted). Because Petitioner fails to forecast any evidence that would demonstrate that trial counsel had a basis upon which he could request Franks hearing, Petitioner fails to show trial counsel was ineffective, or that the underlying claim was "substantial." See Martinez, 566 U.S. at 14 ("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."). Thus, Petitioner fails to show cause to excuse the procedural bar in Ground Four.

b. Ground Five

In Ground Five, Petitioner argues trial counsel was ineffective for failing to move to disclose the identity of the confidential informant. While Petitioner raised this issue in his PCR application, (App. at 487, ECF No. 32-2 at 107), no evidence was submitted in support of this issue at the PCR hearing, and the PCR court did not rule on this issue. Therefore, this issue is procedurally barred from federal habeas review. See Lawrence, 517 F.3d at 714; see also Plyler v. State, 424 S.E.2d 477, 478 (S.C. 1992) (stating that issues not raised to and ruled on by the PCR court are not preserved for

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review on appeal); Marlar v. State, 653 S.E.2d 266, 267 (S.C. 2007) (stating that issues are not preserved for review where the PCR applicant fails to make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations).

Petitioner argues he can show cause to excuse the procedural bar because this claim has merit and PCR counsel failed pursue this issue at the PCR hearing. Petitioner's claim is based on the premise that the confidential informant should have been disclosed before trial because the confidential informant was the only witness who could have testified about the evidence used against him in the search warrant.

Addressing when the State is required to disclose the identity of a confidential informant, the South Carolina Supreme Court has stated,

> Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement. The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure.

State v. Humphries, 579 S.E.2d 613, 614-15 (S.C. 2003) (internal citations omitted).

Here, Petitioner was not tried for any of the drug activity purportedly witnessed by the confidential informant. Rather, to prove its case against Petitioner, the State only used evidence from witnesses who testified at trial and the physical evidence recovered from the residence where law enforcement observed Petitioner manufacturing narcotics. (See generally Hanning Testimony, App. at 75-81, ECF No. 32-1 at 77-83; Hutchins Testimony, App. at 112, 121-130, ECF No. 32-1

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at 114, 123-132.) 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 Humphries. Thus, Petitioner fails to provide any plausible allegation that trial counsel had a basis upon which to seek disclosure of the confidential informant, and accordingly, Petitioner fails to show that the underlying ineffective assistance claim was substantial such that he could show cause to excuse the procedural bar of Ground Five based on PCR counsel's failure to raise it.

c. Ground Six

In Ground Six, Petitioner argues trial counsel was ineffective for failing to quash Petitioner's indictments based on selective prosecution. Initially, while Respondent correctly argues this claim is procedurally barred, Respondent incorrectly argues it is barred because it was not raised to and ruled upon by the PCR court. In fact, the PCR court heard and denied this claim from the bench during Petitioner's testimony at the PCR hearing. (App. at 547-48, ECF No. 32-3 at 49-50.) However, the claim is procedurally barred because it was not raised in Petitioner's PCR appeal. See Lawrence, 517 F.3d at 714; see also McCray, 455 S.E.2d at n.1.

Petitioner argues he can demonstrate cause to excuse the procedural bar for this claim because PCR counsel failed to raise this issue in a Rule 59 motion to alter or amend the judgment to preserve the issue for appellate review. However, this claim was preserved for appellate review under South Carolina law because Petitioner obtained a ruling by the PCR court, and consequently, no Rule 59 motion was necessary to preserve the issue for review. See Wilder Corp. v. Wilke, 497 S.E.2d 731, 734 (S.C. 1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet

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theories that the appellate court could have relied upon in summarily denying Petitioner's petition. See Wilson v. Sellers, 138 S. Ct. 1188, 1194-97 (2018) (holding that a federal habeas court should "look through" the unexplained decision to the last related state court decision that does provide a relevant rationale, and presume that the unexplained decision adopted the same reasoning, unless the State can rebut the presumption). Therefore, the court turns to the question whether the PCR court's order unreasonably misapplied federal law or was based on an unreasonable determination of the facts. Having reviewed the PCR court's order pursuant to the § 2254 standard, the court finds for the reasons that follow that the state court did not unreasonably misapply the Strickland test in determining that no Sixth Amendment violation occurred.

At trial, Eric Elder, a witness for the State, testified about his personal knowledge of the defendants' manufacturing of crack on the day the defendants were arrested for cooking crack at Tracy Markley's house. Before Elder testified as to the specifics of the events of that day, he was asked on direct examination "Have you ever been present during the manufacturing or cooking of crack cocaine?" (App. at 256, ECF No. 32-1 at 258.) Elder responded "Yes, sir." (Id.) Elder later testified that on the day Petitioner was arrested, he was at Markley's house and he observed Petitioner cooking crack. (App. at 257, ECF No. 32-1 at 259.) Elder, who also had previously testified that he often drove the defendants in their cars, testified that he did so "[because] a lot of time I'd get free dope, free crack." (Id.) The solicitor asked Elder if that was his understanding on the day the defendants were arrested, and Elder responded that was his understanding "mostly everyday." (Id.)

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Another witness for the State, Tracy Markley, testified that he met Petitioner through a friend who bought crack from Petitioner. (App. at 300-01, ECF No. 32-1 at 302-03.) Markley testified that he and the friend would go to Markley's house to buy the crack. (App. at 301, ECF No. 32-1 at 303.)

At the PCR hearing, Petitioner testified that the State introduced evidence at trial about his history of dealing drugs that was not related to the events described in the indictment. (App. at 509, ECF No. 32-3 at 11.) Specifically, Petitioner testified that Elder and Markley testified at trial about how Elder had been present during the manufacturing of crack cocaine, how Elder got free crack from Petitioner and his co-defendant "mostly every day," and how Markley met Petitioner when Petitioner sold Markley crack. (App. at 511-12, 517, ECF No. 32-3 at 13-14, 19.)

Trial counsel testified that Elder and Markley's testimony were explanations as to what their contact with the defendants was, how they knew something, or why they were doing something. (App. at 557, ECF No. 32-3 at 59.) Trial counsel testified that "there could be some prejudice in it" but that "it was not huge," and the testimony did not seem important enough to "make an objection and draw more attention to it." Trial counsel was asked if the outcome of trial would have been different had he objected to the Elder and Markley statements, and trial counsel responded "no." (App. at 558, ECF No. 32-3 at 60.)

The PCR court found Petitioner failed to meet his burden of proving that trial counsel was ineffective for failing to object to the testimony of Elder and Markley. (App. at 592-93, ECF No. 32-3 at 94-95.) First, as to Elder's testimony that he had previously been present during the manufacturing or cooking of crack, the PCR court found trial counsel was not deficient because the testimony was not in reference to Petitioner, and thus, it did not constitute prior bad act evidence. (App. at 592, ECF No. 32-3 at 94.) Second, as to Elder's testimony that he drove Petitioner in

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application of, clearly established federal law. The PCR court's decision is supported by trial counsel's testimony that he did not object to Markley's testimony because it was not important and he did not want to draw attention to it. See McCarver v. Lee, 221 F.3d 583, 594 (4th Cir. 2000) ("In evaluating trial counsel's performance, we must be highly deferential to counsel's strategic decisions and not allow hindsight to influence our assessment of counsel's performance.") (citing Strickland, 466 U.S. at 689). And Petitioner fails to point to any evidence in the record that would undermine the PCR court's finding. Thus, the PCR court's finding that trial counsel was not deficient because he articulated a valid strategic reason for not objecting to Markley's testimony is not unreasonable.

RECOMMENDATION

For the foregoing reasons, the court recommends Respondent's motion for summary judgment (ECF No. 33) be granted and the Petition be denied.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

June 28, 2018
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

FILED: April 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX D

No. 21-6975
(0:17-cv-02876-DCC)

DERRICK LAMAR CHEEKS

v.

ALFORD JOYNER

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Harris, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

401 S.C. 322
Supreme Court of South Carolina.

The STATE, Respondent,
v.
Derrick Lamar CHEEKS, Appellant.

No. 27211. | Heard Nov. 15, 2012. | Decided Jan. 16, 2013.

Synopsis

Background: Defendant was convicted in the Circuit Court, Spartanburg County, Roger L. Couch, J., of trafficking in crack cocaine in excess of 400 grams and possession of crack cocaine with intent to distribute within proximity to a school. Appeal followed.

Holdings: The Supreme Court, Pleicones, J., held that:

[1] absence of a description in a warrant of the dwelling to be searched did not invalidate the warrant;

[2] a jury instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" is improper as an expression of the judge's view of the weight of certain evidence, and the bench is to no longer use the instruction, overruling *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540; and

[3] error in trial court's giving of the "strong evidence" instruction was not prejudicial.

Affirmed.

Attorneys and Law Firms

**481 J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie Kate Keeney, all of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

...ice PLEICONES.

...ellant was convicted of trafficking in crack ...excess of 400 grams and possession of crack with ...stribute within proximity to a school and received ... sentences of twenty-five years (trafficking) and ...proximity). On appeal, he contends the trial court ...ailing to find a search warrant fatally defective, ...ving an improper jury instruction.[1] We find no ...the warrant issue, but agree the instruction was ... Because we find appellant was not prejudiced by ...eous charge, however, we affirm his convictions and ...s.

ISSUES

...as the search warrant fatally defective because it did ...ot contain a description of the place to be searched?

*325 2) Did the trial judge err in charging the jury that "[a]ctual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use?"

DISCUSSION

Search warrant.

Appellant contends the search warrant which led to his ...rest w... invalid because it did not describe the place to be ...search... We disagree.

The search warrant is blank following the section titled "**Description of Premises (Person, Place, or Thing) to be Searched.**" The warrant refers to the attached affidavit, however, which contains both a description of the dwelling to be searched, including its address, and detailed directions to it. Moreover, the solicitor represented that the warrant and affidavit were served together. The trial judge held the warrant and affidavit could be read together to establish the premises description and found the description of the place to be searched met all constitutional and statutory requirements. *State v. Ellis*, 263 S.C. 12, 207 S.E.2d 408 (1974) (warrant and affidavit read together withstand constitutional and statutory

APPENDIX
E

attacks on particularity of premises) *disapproved on other grounds by State v. Adams,* 291 S.C. 132, 352 S.E.2d 483 (1987); *State v. Williams,* 297 S.C. 404, 377 S.E.2d 308 (1989).[2]

Appellant contends the warrant is "plainly invalid" because it did not comply with the Fourth Amendment's requirement that the warrant "particularly describ [e] the place to be searched...." citing *Groh v. Ramirez,* 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). *Groh* was a *Bivens*[3] suit where the warrant application that contained the particularized information was not incorporated into the warrant itself. The *Groh* Court therefore did not reach the issue whether a facially defective warrant can be salvaged by considering other ***326** related documents. The Court did acknowledge that most appellate courts have held that they "may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 557–558, 124 S.Ct. 1284; *see also U.S. v. Hurwitz,* 459 F.3d 463, 470–471 (4th Cir.2006) (in Fourth Circuit, warrant construed with supporting documents if incorporated by warrant language or if those documents accompany warrant).

Here, the warrant refers to the attached affidavit, and the solicitor represented without contradiction that the affidavit accompanied the warrant. As we read the opinion, nothing in *Groh* prohibits a court from considering an accompanying or "incorporated" affidavit along with the search warrant for purposes of satisfying the Fourth Amendment's particularity requirements.

We affirm the trial judge's ruling upholding the validity of the search warrant.

****483 2. Jury instruction.**

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[4] used in the manufacture of crack were on the kitchen counters, and a digital scale was found. In addition, 650 grams of crack,[5] 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 on "an errand" from the house where appellant was found cooking, after having sent the uncle to a store to buy baking soda. When the car in which the uncle was travelling was stopped and searched, 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.

***327** 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, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant in the, in the case both had the power and the intent to control the disposition or use of the crack cocaine. Therefore, possession, under the law, can either be actual or constructive.
>
> Now, actual possession means that the crack cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion or control or the right to exercise dominion or control over either the crack cocaine or the property on which the crack cocaine was found.
>
> Now, mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.
>
> (emphasis supplied).

Appellant objected to this "actual knowledge/strong evidence" charge, arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge. He followed up by

noting that *State v. Kimbrell,* 294 S.C. 51, 362 S.E.2d 630 (1987), upon which the judge and solicitor relied, did not involve a jury charge. The judge clarified he was also relying on *Solomon v. State,* 313 S.C. 526, 443 S.E.2d 540 (1994). We now clarify *Kimbrell* and overrule *Solomon* to the extent it approves of the "actual knowledge/strong evidence" charge.

In *Kimbrell,* appellant contended she was entitled to a directed verdict because the State failed to present evidence ***328** that she knowingly possessed the cocaine. The evidence at trial showed that appellant's ex-husband dealt drugs from his trailer. Appellant was present at the trailer when a confidential informant (CI) arrived for an arranged buy. As the ex-husband and CI left the trailer to look at the marijuana stored outside, the ex-husband had appellant leave a bedroom and go to the kitchen where cocaine was on the counter, telling her "the toot [cocaine] is laying on the table, we're going outside, watch it." In deciding the directed verdict issue on appeal, the Court noted that a "person has possession of contraband when he has the power and intent to control its disposition or use" and then held

> [t]he State produced evidence that [appellant] had actual knowledge of the presence of the cocaine. Because actual knowledge ****484** of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element.

Kimbrell, 294 S.C. at 54, 362 S.E.2d at 631.

From this language has evolved a jury charge to the effect that "actual knowledge [of the possession of drugs] is strong evidence of intent to control its disposition or use." We agree with appellant that this charge both improperly weighs the evidence, and that it largely negates the mere presence charge.

[2] [3] [4] [5] [6] Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence. *E.g., State v. Grant,* 275 S.C. 404, 272 S.E.2d 169 (1980). 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 ***329** inferences and to weigh evidence. This charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. We agree with appellant that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.

[7] Even if we did not agree with appellant that the "strong evidence" charge undermines the mere presence charge, we hold that the "strong evidence" charge is improper as an expression of the judge's view of the weight of certain evidence, and overrule *Solomon* on this point.

In his post-conviction relief (PCR) action, Solomon contended the use of the adjective "strong" was either a comment on the facts or an improper expression of the trial judge's view of the weight of the evidence and alleged his trial counsel was ineffective for failing to object to it. On certiorari to review the denial of Solomon's PCR, the Court summarily dealt with this issue, stating only that the "instruction was in accord with *Kimbrell.*" *Solomon,* 313 S.C. at 529, 443 S.E.2d at 542. *Solomon* is wrongly decided because, as appellant argues, "strong" is necessarily a comment on the weight of the evidence, and *Kimbrell* does not approve any such charge.

[8] We now overrule *Solomon* and instruct the bench to no longer use the "strong evidence" charge, which is derived from a statement on the sufficiency of the evidence in *Kimbrell.* Appellant cannot show prejudice from the charge in this case, however, as there was no evidence that he was "merely present" at Markley's house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant's guilt, he cannot demonstrate prejudice warranting reversal from the adjective "strong" used in the charge.

CONCLUSION

Appellant's convictions and sentences are

AFFIRMED.

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

Parallel Citations

737 S.E.2d 480

Footnotes

1 Appellant's codefendant (and uncle) raised virtually the same arguments in an appeal decided by the Court of Appeals. *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct.App.2012).

2 Appellant's argument rests largely on U.S. Const. amend. IV, but he also invokes S.C. Const. art. I, § 10 and S.C.Code Ann. §§ 17–13–140 and –160 (2003). Our decision disposes of all grounds.

3 *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

4 Inositol and baking powder.

5 The crack was valued at between $23,000 (wholesale) and $65,000 (retail).

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APPEAL,CLOSED,PJG-Inmate

U.S. District Court
District of South Carolina (Rock Hill)
CIVIL DOCKET FOR CASE #: 0:17-cv-02876-DCC

Cheeks v. Joyner
Assigned to: Honorable Donald C Coggins, Jr
Case in other court: 4CCA, 18-07529
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 10/23/2017
Date Terminated: 08/08/2018
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Derrick Lamar Cheeks

represented by **Eduardo Kelvin Curry**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

APPENDIX F

V.

Respondent

Alford Joyner

represented by **Melody Jane Brown**
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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/23/2017	1	PETITION for Writ of Habeas Corpus, filed by Derrick Lamar Cheeks. (Attachments: # 1 Memo in Support, # 2 Supporting Documents, # 3 Time Stamped Cover Sheet, # 4 Envelope) (bgoo) (Entered: 10/24/2017)
11/09/2017	3	**PROPER FORM ORDER Case to be brought into proper form by 11/30/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. Signed by Magistrate Judge Paige J. Gossett on 11/9/2017. (bgoo)** (Entered: 11/09/2017)
11/09/2017	4	***DOCUMENTS MAILED 3 Proper Form Order and IFP Application placed in U.S. Mail to Derrick Lamar Cheeks. (bgoo) (Entered: 11/09/2017)
11/14/2017	5	Letter from Derrick Cheeks. (Attachments: # 1 Envelope) (bgoo) (Entered: 11/14/2017)
11/17/2017	7	Filing fee: $ 5.00, receipt number SXC300073888 (bgoo) (Entered: 11/17/2017)
11/17/2017	8	AMENDED PETITION for Writ of Habeas Corpus, filed by Derrick Lamar Cheeks. (Attachments: # 1 Memo in Support of Amended Petition, # 2 Originally filed Petition, # 3 Supporting Documents for Petition, # 4 Memo in Support of Petition, # 5 Time stamped cover page for Amended Petition, # 6 Time stamped cover page for Petition, # 7 Envelope for Amended Petition, # 8 Envelope for Petition) (bgoo) (Entered: 11/17/2017)
11/30/2017	11	MOTION to Amend/Correct by Derrick Lamar Cheeks. Response to Motion due by 12/14/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Memo in Support, # 2 Envelope) Motions referred to Paige J. Gossett. (bgoo) (Entered: 12/01/2017)
12/05/2017	12	**ORDER authorizing service of process. Directing petitioner to notify the clerk in writing of any change of address. Return and Memorandum due by 1/24/2018. Signed by Magistrate Judge Paige J. Gossett on 12/5/2017. (Attachments: # 1 Amended Habeas Petition) (bgoo)** (Entered: 12/05/2017)
12/05/2017	13	***DOCUMENT MAILED 12 Order 2254 placed in U.S. Mail to Derrick Lamar Cheeks. (bgoo) (Entered: 12/05/2017)
12/06/2017	14	ACKNOWLEDGMENT OF SERVICE Executed Acknowledgment filed by Alford Joyner. (Attachments: # 1 Certificate of Service)(Zelenka, Donald) (Entered: 12/06/2017)
12/06/2017	15	NOTICE of Appearance by Melody Jane Brown on behalf of Alford Joyner (Attachments: # 1 Certificate of Service)(Brown, Melody) (Entered: 12/06/2017)
12/14/2017	16	Case Reassigned to Judge Honorable Donald C Coggins, Jr. Judge Honorable David C Norton no longer assigned to the case. (glev,) (Entered: 12/14/2017)

12/14/2017	17	***DOCUMENT MAILED 16 Case Reassigned placed in U.S. Mail to Derrick Lamar Cheeks (glev,) (Entered: 12/14/2017)
01/24/2018	19	First MOTION for Extension of Time by Alford Joyner. Response to Motion due by 2/7/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Certificate of Service)No proposed order.Motions referred to Paige J Gossett.(Salter, William) (Entered: 01/24/2018)
01/26/2018	20	**DOCKET TEXT ORDER denying 11 Motion to Amend/Correct Amended Petition as largely duplicative. It is unclear from Petitioner's filing what he seeks to amend. Entered at the direction of Magistrate Judge Paige J. Gossett on 1/26/2018. (kkus,)** (Entered: 01/26/2018)
01/26/2018	21	**DOCKET TEXT ORDER granting 19 Motion for Extension of Time. Entered at the direction of Magistrate Judge Paige J. Gossett on 1/26/2018. (kkus,)** (Entered: 01/26/2018)
01/29/2018	23	***DOCUMENT MAILED 21 Docket Text Order on Motion for Extension of Time and 20 Docket Text Order on Motion to Amend/Correct placed in U.S. Mail to Derrick Lamar Cheeks. (bgoo) (Entered: 01/29/2018)
02/23/2018	24	RETURN and MEMORANDUM to Petition for Writ of Habeas Corpus 1 Petition for Writ of Habeas Corpus, 8 Petition for Writ of Habeas Corpus, , RETURN and MEMORANDUM to Petition for Writ of Habeas Corpus 1 Petition for Writ of Habeas Corpus, 8 Petition for Writ of Habeas Corpus, by Alford Joyner. (Attachments: # 1 State Court Documents attach no 1 - appendix - vol 1 - part 1 pgs 1-380, # 2 State Court Documents attach no 1 - appendix - vol 1 - part 2 pgs 381-500, # 3 State Court Documents attach no 1 - appendix - vol 2 pgs 501-598, # 4 State Court Documents attach no 2 - notice of appeal, # 5 State Court Documents attach no 3 - brief of appellant, # 6 State Court Documents attach no 4 - final brief of respondent, # 7 State Court Documents attach no 5 - remittitur, # 8 State Court Documents attach no 6 - amended application for PCR dated 8-27-15, # 9 State Court Documents attach no 7 - notice of appeal, # 10 State Court Documents attach no 8 - petition for writ of certiorari, # 11 State Court Documents attach no 9 - return to petition for writ of certiorari, # 12 State Court Documents attach no 10 - Successive application for PCR, # 13 State Court Documents attach no 11 - return and motion to dismiss, # 14 State Court Documents attach no 12 - response to conditional order of dismissal, # 15 State Court Documents attach no 15 - South Carolina court of appeals Order denying certiorari, # 16 State Court Documents attach no 16 - remittitur, # 17 Certificate of Service)(Salter, William) (Entered: 02/23/2018)
02/23/2018	25	MOTION for Summary Judgment by Alford Joyner. Response to Motion due by 3/9/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Certificate of Service)No proposed order.Motions referred to Paige J Gossett.(Salter, William) (Entered: 02/23/2018)

		Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Certificate of Service)No proposed order.Motions referred to Paige J Gossett.(Salter, William) (Entered: 05/07/2018)
05/08/2018	49	AMENDED RESPONSE in Opposition re 33 MOTION for Summary Judgment. Response filed by Derrick Lamar Cheeks. Reply to Response to Motion due by 5/15/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Supporting Documents, # 2 Certificate of Service, # 3 Cover Letter, # 4 Envelope) (bgoo) (Entered: 05/08/2018)
05/22/2018	51	SUR REPLY to REPLY to Response to Motion re 33 MOTION for Summary Judgment. Response filed by Derrick Lamar Cheeks. (Attachments: # 1 Cover Letter, # 2 Envelope) (bgoo) (Entered: 05/22/2018)
05/22/2018	52	RESPONSE in Opposition re 48 MOTION to Strike 46 Supplement Response filed by Derrick Lamar Cheeks. Reply to Response to Motion due by 5/29/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Cover Letter, # 2 Envelope) (bgoo) (Entered: 05/22/2018)
06/28/2018	54	**REPORT AND RECOMMENDATION recommending that the Respondent's 33 amended motion for summary judgment be granted and the Petition be denied. (Objections to R&R due by 7/12/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45.) Motion denied: 48 motion to strike. Signed by Magistrate Judge Paige J. Gossett on 6/28/2018. (bgoo)** (Entered: 06/28/2018)
06/28/2018	55	***DOCUMENT MAILED 54 Report and Recommendationplaced in U.S. Mail to Derrick Lamar Cheeks. (bgoo) (Entered: 06/28/2018)
07/16/2018	56	OBJECTION to 54 Report and Recommendation by Derrick Lamar Cheeks. Reply to Objections due by 7/30/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Cover Letter, # 2 Envelope) (bgoo) (Entered: 07/16/2018)
08/08/2018	59	**ORDER RULING ON REPORT AND RECOMMENDATION adopting 54 Report and Recommendation, granting 33 Motion for Summary Judgment, and denying a certificate of appealability. Signed by Honorable Donald C Coggins, Jr on 8/8/2018. (jpet,)** (Entered: 08/08/2018)
08/08/2018	60	SUMMARY JUDGMENT in favor of Respondent against Petitioner. Case is dismissed with prejudice. (jpet,) (Entered: 08/08/2018)
08/08/2018	61	***DOCUMENT MAILED 59 Order Ruling on Report and Recommendation, 60 Summary Judgment placed in U.S. Mail to Derrick Lamar Cheeks (jpet,) (Entered: 08/08/2018)
08/30/2018	62	MOTION to Alter or Amend Judgment in re 60 Summary Judgment by Derrick Lamar Cheeks. Response to Motion due by 9/13/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Cover Letter, # 2 Envelope) (bgoo) (Entered: 08/30/2018)
10/12/2018	64	MOTION to Compel Christopher D. Brough to Make Initial Disclosure to Interrogatories by Derrick Lamar Cheeks. Response to Motion due by 10/26/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Affidavit in Support of Motion, # 2 Declaration of Inmate Filing, # 3 Supporting Documents - Plaintiff's First Set of

		Interrogatories, # 4 Cover Letter, # 5 Certificate of Service, # 6 Envelope) (bgoo) (Entered: 10/12/2018)
10/12/2018	65	MOTION to Compel J. Falkner Wilkes to Make Initial Disclosure to Interrogatories by Derrick Lamar Cheeks. Response to Motion due by 10/26/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Affidavit in Support of Motion, # 2 Declaration of Inmate Filing, # 3 Supporting Documents - Plaintiff's First Set of Interrogatories, # 4 Cover Letter, # 5 Certificate of Service, # 6 Envelope) (bgoo) (Entered: 10/12/2018)
10/22/2018	66	MOTION to Compel James E. Hunter to Make Initial Disclosure to Interrogatories by Derrick Lamar Cheeks. Response to Motion due by 11/5/2018. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Affidavit in Support of Motion, # 2 Declaration of Inmate Filing, # 3 Plaintiff's First Set of Interrogatories, # 4 Certificate of Service, # 5 Cover Letter, # 6 Envelope) (bgoo) (Entered: 10/22/2018)
10/26/2018	67	RESPONSE in Opposition re 66 MOTION to Compel, 65 MOTION to Compel, 64 MOTION to Compel Response filed by Alford Joyner.Reply to Response to Motion due by 11/2/2018 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Certificate of Service)(Salter, William) (Entered: 10/26/2018)
11/16/2018	69	**ORDER denying Petitioner's 62 motion to alter or amend and denying Petitioner's request for a certificate of appealability. Petitioner's 64 65 66 motions to compel are moot. Signed by Honorable Donald C. Coggins, Jr. on 11/16/2018. (bgoo)** (Entered: 11/16/2018)
11/16/2018	70	***DOCUMENT MAILED 69 Order placed in U.S. Mail to Derrick Lamar Cheeks (bgoo) (Entered: 11/16/2018)
12/20/2018	71	NOTICE of Appearance by Eduardo Kelvin Curry on behalf of Derrick Lamar Cheeks (Curry, Eduardo) (Entered: 12/20/2018)
12/20/2018	72	NOTICE OF APPEAL as to 69 Order,, Terminate Motions, by Derrick Lamar Cheeks. - Filing fee $ 505, receipt number 0420-8173619. The Docketing Statement form, Transcript Order form and CJA 24 form may be obtained from the Fourth Circuit website at www.ca4.uscourts.gov (Attachments: # 1 Exhibit Order)(Curry, Eduardo) (Entered: 12/20/2018)
12/21/2018	73	Transmittal Sheet for Notice of Appeal to USCA re 72 Notice of Appeal, The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (bgoo) (Entered: 12/21/2018)
12/21/2018	74	Letter from Derrick Lamar Cheeks providing a copy of documents mailed to the Fourth Circuit Court of Appeals. (Attachments: # 1 Supporting Documents, # 2 Envelope) (bgoo) (Entered: 12/21/2018)
12/26/2018	76	ASSEMBLED INITIAL ELECTRONIC RECORD TRANSMITTED TO FOURTH CIRCUIT COURT OF APPEALS re 72 Notice of Appeal per request of the Fourth Circuit, Electronic record successfully transmitted. (bgoo) (Entered: 12/26/2018)
09/06/2019	77	USCA OPINION for 72 Notice of Appeal, filed by Derrick Lamar Cheeks. Appeal Dismissed. (bgoo) (Entered: 09/06/2019)

09/30/2019	78	USCA MANDATE and JUDGMENT as to 72 Notice of Appeal, filed by Derrick Lamar Cheeks (Attachments: # 1 4CCA Judgment) (bgoo) (Entered: 09/30/2019)
03/02/2021	79	Letter Re: copies from Derrick Cheeks. (Attachments: # 1 Envelope) (mmcd) Modified on 3/3/2021 to correct filing date (mmcd). (Entered: 03/03/2021)
04/29/2021	82	Letter from Derrick Cheeks RE: Copies. (Attachments: # 1 Envelope) (mmcd) (Entered: 04/29/2021)
05/03/2021	84	MOTION to Set Aside 60 Judgment or, in the alternative, for Recusal by Derrick Lamar Cheeks. Response to Motion due by 5/17/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Envelope) (mmcd) Modified on 5/5/2021 to edit docket text (mmcd). (Entered: 05/03/2021)
05/13/2021	85	Letter from Derrick Cheeks Re: copies. (Attachments: # 1 Envelope) (mmcd) (Entered: 05/13/2021)
05/14/2021	87	RESPONSE to Motion re 84 MOTION to Set Aside Judgment Response filed by Alford Joyner.Reply to Response to Motion due by 5/21/2021 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Certificate of Service)(Salter, William) (Attachment 1 replaced on 5/14/2021 with corrected scan of document provided by filing user) (mmcd). (Entered: 05/14/2021)
05/26/2021	89	REPLY to Response to Motion re 84 MOTION to Set Aside Judgment Response filed by Derrick Lamar Cheeks. (Attachments: # 1 Cover letter, # 2 Envelope) (mmcd) (Entered: 05/26/2021)
05/26/2021	90	MOTION for issuance of Show Cause and Answer Order by Derrick Lamar Cheeks. Response to Motion due by 6/9/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 cover letter, # 2 Certificate of Service, # 3 Envelope) (mmcd) Modified on 5/26/2021 to edit docket text (mmcd). (Entered: 05/26/2021)
06/03/2021	92	**ORDER denying Petitioner's 84 Motion to Set Aside Judgment or, in the alternative, for Recusal and mooting Petitioner's 90 Motion for Issuance of Show Cause and Answer Order. Signed by Honorable Donald C. Coggins, Jr on 6/3/2021. (mmcd)** (Entered: 06/03/2021)
06/04/2021	93	***DOCUMENT MAILED 92 Order placed in U.S. Mail from Columbia Clerks Office to Derrick Lamar Cheeks at LEE CI FGB 2232 990 Wisacky HWY Bishopville, SC 29010. (mmcd) (Entered: 06/04/2021)
06/24/2021	94	NOTICE OF APPEAL as to 92 Order by Derrick Lamar Cheeks. - The Docketing Statement form, Transcript Order form and CJA 24 form may be obtained from the Fourth Circuit website at www.ca4.uscourts.gov (Attachments: # 1 Envelope) (mmcd) (Entered: 06/24/2021)
06/24/2021	95	Transmittal Sheet for Notice of Appeal to USCA re 94 Notice of Appeal. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (mmcd) (Entered: 06/24/2021)