

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2013-001537

RECEIVED

JUL 15 2014

Theodore Cobbs, # 330717,
Petitioner,

S.C. Supreme Court

v.

State of South Carolina,
Respondent.

Motion to Include in the Appendix Material Not in the Lower Court Record

Petitioner, Theodore Cobbs, respectfully moves this honorable Court for leave to include in the Appendix material that was not in the lower court record.

Petitioner is serving a 28-year sentence.

Petitioner had timely moved to have his post-conviction relief (PCR) counsel removed, Ex. 1, but counsel conducted the PCR hearing without informing the court of the motion for his removal. When Petitioner attempted to hand up to the judge material concerning that motion, the Judge told him she had already ruled, apparently thinking the documents concerned another matter. Ex. 2 (excerpt from the transcript of the PCR hearing), p. 7, lines 3-25 (Judge denying his request to hand up material); *see also id.*, pp. 3-6 (discussing the other matter).

Motions to remove or replace counsel are, for obvious reasons, exceptions to the rule against hybrid representation. *Miller v. State*, 388 S.C. 347, 347 697 S.E.2d 527, 527 (2010).

The forthcoming Petition for Writ of Certiorari hinges on the failure to replace his PCR counsel.¹ Current counsel for Petitioner has communicated with counsel for the State in an attempt to resolve this issue. Petitioner is concerned that the State may argue (a) that even had the motion to replace counsel been heard, it would have or should have been denied, and (b) that it is the Petitioner's obligation to present sufficient evidence to establish that the motion to remove counsel would have been granted.

The record below contains Petitioner's *pro se* motion to have his PCR counsel removed. Signed May 6, 2013, two weeks prior the May 20, hearing, it is stamped "Filed" by the clerk of court on May 10, 2013, ten days prior to the hearing. Ex. 1. The record below also contains a letter from Petitioner to his prior, court-appointed PCR counsel (Joshua B. Cantwell), asking for a copy of the order by which he had been replaced by Charles Brooks, Esq. Additional documents that would be included in the Appendix pursuant to the present motion include,

- * an August 27, 2012 letter from Petitioner to his PCR Counsel Charles Brooks, Esq., almost nine months before the May 20, 2013 PCR hearing, stating the need to have an expert medical witness present at that hearing (Attachment A²);

- * a January 29, 2013 letter from Petitioner to his PCR counsel reiterating that need and further explicating the importance of the issue (Attachment B);

¹ Following the filing of notice of appeal from the order denying his PCR, this Court granted, over Respondent's objection, Petitioner's motion to appoint outside counsel for the appellate proceedings, and appointed the undersigned. The current motion concerns Petitioner's earlier, unheard, motion to have his PCR counsel relieved.

² Documents the motion seeks to include in the appendix are designated as "Attachment[s]" A- D, while documents presently in the lower court record are designated as "Exhibit[s]" 1-2.

* a May 6, 2013 letter from Petitioner to his PCR counsel complaining that he knows of no effort PCR counsel has made to prepare, and asking that PCR counsel either move for a continuance and prepare as indicated in Petitioner's prior letters, or move to be relieved (Attachment C);

* correspondence from PCR Counsel Charles Brooks, Esq., to Petitioner (Attachment D), to provide context for the letters in the above attachments.

* Additionally, Petitioner would like to include correspondence from the Petitioner to the clerk of the Charleston County Courts (Attachment E), not for the truth of the matters contained therein, but to demonstrate that Petitioner was doing all a lay litigant could think of to have the matter corrected.

This was not a matter of receiving an unfavorable result on PCR and then complaining about the representation.

One alternative might be for the Court to reserve final ruling on the present motion until the petition, return, and reply are filed, and if it believes at that time that the above material might be relevant to its determination of the case, to allow the additional material to be filed at that time.

The present motion is made in an abundance of caution, as Petitioner would hate to discover, at the conclusion of the appellate process, that he might have gained a new trial had he only timely moved to include this material.

Petitioner understands that it would be the unusual case, if ever, where it would be proper to include in an appendix material not presented to the lower court. Rule 210, SCACR, governing the Record on Appeal for direct appeals, states, "The Record shall not, however, include matter which was not presented to the lower court or tribunal."

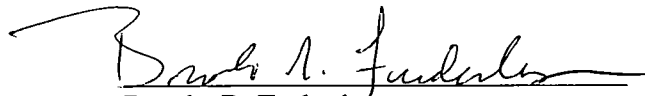
Rule 243(f), governing appendices to petitions for certiorari review of PCR actions, contains no such explicit ban,³ leaving open the possibility that, in an unusual case, material outside the lower court record might properly be included in the appendix. If such is the proper reading of the Rule, this unusual case – where counsel failed to inform the lower court of the motion that he be relieved, and the lower court denied the Applicant permission to raise his motion himself, mistakenly believing he was attempting to raise a different issue – would seem a good candidate.

Moreover, it is Petitioner’s understanding that the Court has discretion to examine material it desires, even where doing so might conflict with the literal language of a Rule.

Petitioner respectfully requests that the time for filing his petition and appendix be stayed pending the Court’s ruling on the present motion.

Respectfully submitted,

7/12/14



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Attorney for Petitioner

³ It does, however, list matters that “The Appendix shall contain,” but whether these constitute the minimum content or the only allowable content is not explicitly stated.

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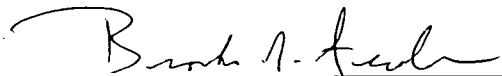
Respondent.

Proof of Service

I certify that I have served a copy of the foregoing Motion to Include in the Appendix Material
Not in the Lower Court Record on the Respondent, by depositing a copy today in the United
States Mail, proper postage pre-paid, addressed to:

Ass't Attorney General Ashleigh R. Wilson, Esq.
South Carolina Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

July 12, 2014
Mt Pleasant, SC



Brooks R. Fudenberg
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July 12, 2014

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

ATTN: Ms. Jan'et Johnson

RE: Theodore Cobbs v. State
Appellate Case No. 2013-001537

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S.C. Supreme Court

Dear Ms. Johnson,

Enclosed please find:

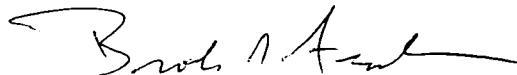
- * an original and six copies of Petitioner's Motion to Include in the Appendix Material Not in the Lower Court Record;
- * an original and a copy of the proof of service of same; and
- * a return envelope.

Please return a copy of the proof of service in the enclosed envelope.

As always, if I may provide additional information, please do not hesitate to contact me.

With kind regards, I am,

Yours very truly,



Brooks R. Fudenberg
Attorney for Petitioner

cc: Ashley R. Wilson, Esq.