

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

JUL 22 2014

Appeal from Charleston County  
Honorable Deadra L. Jefferson, Circuit Court Judge

**S.C. Supreme Court**

Appellate Case No. 2013-001537

THEODORE COBBS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO MOTION TO INCLUDE IN THE APPENDIX  
MATERIAL NOT IN THE LOWER COURT RECORD**

In response to the Petitioner's Motion to Include in the Appendix Material not in the Lower Court Record, the Respondent submits the following:

1. This Court should deny the Petitioner's request to include in the appellate record documents that were not presented to the lower court for review. The Respondent submits the appellate court rules explicitly prohibit the inclusion of matters in the record on appeal that were not presented to the lower court.
2. Rule 243(f), SCACR, states an Appendix for a post-conviction relief matter on appeal shall contain: (1) the entire lower court record, (2) a copy of the final order entered after the post-conviction proceeding, and (3) an index setting forth the principal matters contained in the index (emphasis added). Contrary to the Petitioner's assertion, Rule 243

explicitly prohibits the inclusion of matters not contained in the lower court record when it states the Appendix shall contain “the entire lower court record.”

3. Rule 210(c), SCACR, states the Record on Appeal shall not “include matter which was not presented to the lower court or tribunal.” The Respondent submits and the Petitioner concedes that the documents he wishes to include in the Appendix were not presented to the post-conviction relief court for review.

4. The Respondent submits the South Carolina Appellate Court Rules explicitly prohibit the inclusion of matters in the appellate record that were not presented to the lower court below. The Petitioner has failed to present any valid argument in support of his claim that the Petitioner’s case is an “unusual case” wherein this Court should create an exception to the appellate rules.

5. The Respondent submits further, the Petitioner would not be prejudiced in any way by this Court prohibiting the inclusion of these matters in the Appendix, since the issue the Petitioner seeks to raise on appeal- the post-conviction relief court’s failure to replace PCR counsel- was not preserved for appellate review. Based on the Petitioner’s presentation of facts, it is clear the lower court never ruled on any motion to relieve counsel and the issue is not properly before this Court.

6. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction.

Gee, 262 S.C. 373, 204 S.E.2d 727. In Herron v. Century BMW, this Court held “an issue cannot be raised for the first time on appeal.” 395 S.C. 461, 719 S.E.2d 640 (2011). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Id.

7. If new matters not presented to the post-conviction relief court are included in the Appendix, this Court would be forced to review matters presented by the Petitioner that were not reviewed by the lower below. The Respondent submits this Court should not create for the Petitioner an exception to the rules. Carving out such an exception, would allow the Petitioner and others in the future to circumvent the issue preservation rules this Court has put in place for appellate review.

### CONCLUSION

The Respondent submits this Court should deny the Petitioner’s request to include matters in the Appendix that were not presented to the post-conviction relief court.

Respectfully submitted,

ALAN WILSON  
Attorney General

ASHLEIGH R. WILSON  
Assistant Attorney General

BY: Ashleigh R. Wilson  
Ashleigh R. Wilson

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ATTORNEYS FOR RESPONDENT

July 22, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Charleston County  
Honorable Deadra L. Jefferson, Circuit Court Judge

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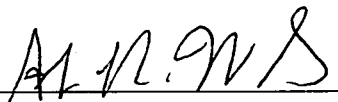
**PROOF OF SERVICE**

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I, Ashleigh R. Wilson, certify that I have served the within Return to Motion to Include in the Appendix Material not in the Lower Court Record by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Brooks R. Fudenberg, Esquire  
Law Office of Brooks R. Fudenberg, LLC  
1004 Anna Knapp Blvd, Suite 3  
Mount Pleasant, SC 29464

I further certify that all parties required by Rule to be served have been served. This 22nd day of July 2014.

  
\_\_\_\_\_  
Ashleigh R. Wilson  
Assistant Attorney General

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Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
#100269



ALAN WILSON  
ATTORNEY GENERAL

July 22, 2014

RECEIVED

JUL 22 2014

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
Post Office Box 11330  
Columbia SC 29211

S.C. Supreme Court

**Re: Theodore Cobbs v. State, 2013-001537**

Dear Mr. Shearouse:

Enclosed for filing is the Respondent's Return to Motion to Include in the Appendix Material not in the Lower Court Record. Included is the original and six (6) copies of the Return along with an affidavit of service on the opposing party.

Sincerely,

Ashleigh R. Wilson  
Assistant Attorney General

Attorney for the Respondent

*Cc: Brooks Fudenberg, Esquire*