THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2013-001537

Theodore Cobbs, # 330717, Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the lower court err in allowing Applicant's counsel to conduct the PCR hearing without first hearing Applicant's motion to have counsel removed?

II. Must prejudice be shown where a PCR Hearing is conducted without a hearing on a timely motion to remove counsel?

III. Where a criminal complaint testified that Petitioner had been raping her on a regular basis, and a physician, having been subpoenaed by the opposing side, testified *in camera* that her examination had shown the hymen to be intact, was it ineffective assistance to fail to call the physician to tell the jury the hymen was intact?

OVERVIEW

Background: The Criminal Case

A year after he moved out of their mother's home and began living with another woman, two teenage daughters began accusing Petitioner, Theodore L. Cobbs, Jr., of having sexually abused them on almost a habitual basis since elementary school days. They testified that he had physically and psychologically abused them as well. Petitioner urged his trial counsel to obtain a witness to testify that a gynecological examination of one of the complainants, conducted after he had allegedly begun regularly and repeatedly having sex with her, showed an intact hymen. They failed to do so.

At trial, the prosecution presented the doctor who had conducted the examination for an *in camera* examination on related issues. She testified in camera that the hymen was intact. The trial judge ruled that the defense could call the doctor to testify to the same before the jury. Defense counsel failed to do so.

The error was highly prejudicial. A hymen remaining intact through regular and repeated vaginal intercourse over a period of years is sufficiently uncommon that the evidence could and most likely would have given jurors pause as to whether that

complainant was telling the truth. Moreover, since each of the two complaining sisters testified that she had seen the Petitioner similarly abuse the other complainant, evidence that he had not in fact had sex with the one would necessarily have called into doubt the testimony of the other.

The PCR

Petitioner was represented at the hearing on his application for post-conviction relief by Charles T. Brooks, III, Esq., who had filed a motion, to which Petitioner's initially-appointed counsel consented, to be substituted as Petitioner's counsel.

Due to what he saw as Mr. Brooks' rampant failure to provide assistance of counsel, Mr. Cobbs filed a *pro se* motion to remove Mr. Brooks as counsel. Mr. Cobbs mailed his motion two weeks before the evidentiary hearing on his application; it was stamped "Filed" ten days before that hearing. Petitioner's motion detailed Mr. Brooks' failures to meet or even speak with him; to obtain documents from certain institutions and from his trial counsel, and the like; and specifically complained of Mr. Brooks' failures to obtain witnesses and documents relating to the hymen issues above.

Yet the PCR hearing was conducted without the Judge being informed that Petitioner had asked to have counsel removed.

The PCR judge orally denied the application at the conclusion of the hearing. Even before the judge issued a final written order, Petitioner sent a *pro se* motion to reconsider, citing his motion to have counsel removed and arguing that the PCR hearing should not have proceeded without at least an inquiry into that motion. The Judge denied his motion to reconsider as untimely.

Mr. Cobbs should be provided a new PCR action to count as his first (i.e., not a "successive") PCR. At the very least, any failure of PCR counsel to vigorously and effectively pursue Petitioner's claim regarding the complainant's intact hymen should not be held against Mr. Cobbs. This Court should examine the issues without deference to the lower court which never should have heard the matter, and without considering whether issues were waived by PCR counsel who never should have been in a position to "waive" issues on Petitioner's behalf, and conclude that the failure to introduce evidence of the complainant's virginity subsequent to the alleged rapes deprived Petitioner of a fair trial.

STATEMENT OF THE CASE

Appellant was indicted in Charleston County for five counts of criminal sexual conduct with a minor in the first degree; eight counts of criminal sexual conduct with a minor in the second degree; and two counts of unlawful conduct toward a child. App. 4:17- 5:24. Represented by Carl Grant and Eduardo Curry, Esquires, he was tried on September 15-19, 2008, before the Honorable J.C. Nicholson, Jr., and a jury. Judge Nicholson directed verdicts of not guilty on one count of criminal sexual conduct with a minor in the first degree and on one count of criminal sexual conduct with a minor in the second degree. App. 945:21-946:1. The jury found Appellant guilty on the other thirteen indictments. Judge Nicholson sentenced Appellant to twenty-eight years for the first count of criminal sexual conduct with a minor in the first degree, ten years, consecutive, on the first count of criminal sexual conduct with a minor in the second degree, ten years, concurrent, on each of the unlawful conduct toward a child indictments, and twenty years, concurrent, on each of the remaining charges. *Id.* at 1174:23-1175:12.

Petitioner was represented on direct appeal by the Division of Appellate Defense, Joseph L. Savitz, III, Esquire. The conviction was affirmed in an unpublished opinion dated June 30, 2011.

Petitioner filed his PCR application on January 30, 2012, alleging numerous ways his trial and appellate counsel were ineffective. Joshua B. Cantwell, Esq. was appointed to represent him on February 27, 2012. App. p. 1290. On May 29, 2012, Charles T. Brooks, III, Esq. was substituted as counsel, via consent of Mr. Cantwell and Mr. Brooks. App. p. 1291.

Petitioner filed a *pro se* motion to remove Mr. Brooks as his PCR counsel, dated May 6, 2013. App. pp. 1312-14. The motion alleged various failures on the part of Mr. Brooks. The PCR hearing was conducted on May 20, 2013, before the Honorable Deadra Jefferson, without a hearing on Petitioner's motion to have his PCR counsel removed.

At the conclusion of that hearing, Judge Jefferson announced her decision denying all relief. The next day, i.e., May 21, she filed a form Order denying all relief and instructing the Attorney General to draft a proposed Order. App. p. 1315.

Three days later, on May 24, Petitioner mailed a *pro se* motion to reconsider. It was stamped "filed" on May 30. Judge Jefferson issued two orders filed on July 11; one an order dismissing the PCR, and the other an order dismissing Petitioner's *pro se* motion to reconsider. App. pp. 1328-43.

Notice of appeal of the dismissal of the PCR was timely filed by PCR counsel, and notice of appeal for the dismissal of the *pro se* motions to remove counsel and to reconsider were timely filed by Petitioner, *pro se*.

As he had asked to have his PCR counsel removed, and as he was alleging ineffective assistance of appellate counsel, Petitioner moved this Court, by motion filed August 9, 2013, to appoint outside counsel. The undersigned was appointed by Order of this Court dated September 19, 2013.

FACTS AND PROCEDURAL FACTS

The Underlying Criminal Case

A year after he moved out of their mother's home and began living with another woman, two teenage daughters began accusing Petitioner, Theodore L. Cobbs, Jr., of having sexually and physically abused them on almost a habitual basis since elementary school days. *See,. e.g.*, App. 800:5-7, 804:13 (he moved out shortly after an incident in the summer of 2004); 524:19-25 (first report to law enforcement was in August of 2005); 1144:2-6 (he was living with another woman at that time).

When notified of the warrants, he turned himself in. App. 622:20-24. He rejected a plea offer that would have allowed him to avoid incarceration, with the prosecution not objecting to probation in lieu of confinement. App. 1327. Free on bond, without ankle monitoring, App. 1120:23 - 1121:3, he showed up for trial.

He was convicted on multiple counts of sexual conduct with a minor and two counts of unlawful conduct toward a child. He was sentenced to 28 years on one count, consecutive with ten years on another, for an effective sentence of 38 years. Sentences on the remaining counts, at ten and twenty years each, were concurrent to the others. App. 1174:23-1175:12.

He had met the girls' mother in 1992 and moved in with them, although "not right away." App. 748:11-23. They lived in a variety of residences, moving from North Carolina to the Charleston area in 1994, living in several homes in the greater Charleston area. *Id.* at 749:4-751:25.

The two Complainants alleged that he had begun "grooming" them sexually when each reached approximately six years of age, quickly escalating from digital penetration to cunnilingus and fellatio, with full sexual intercourse to completion beginning with each around age nine, and continuing regularly thereafter. *See generally* App. pp. 221-366 (testimony of Child 1, the older daughter); 366-522 (testimony of Child 2, the younger complainant). The jury found this was proved beyond a reasonable doubt, and convicted him of all charges that were submitted to them. App. 1127:1129:8.

Most important for present purposes, the allegations were that he had been engaging in vaginal sexual intercourse with the older girl on a regular basis since an early age, well before the age of eleven.[1] Yet that older child had had a gynecological exam in July of 1998, when she was between 12 and 13 years of age. App. p. 200:15-22 (exam was in 1998); p. 221:4 (she was born in 1985). *See generally* App. pp. 199-208. That

---

[1] The jury made no finding as to the precise age at which this vaginal intercourse began, but it was obviously before she reached age eleven, as required for the first degree criminal sexual conduct with a minor charge. *See also* App. p. 1348 (affidavit attached to warrant, stating that he "did commit a sexual battery upon the child victim [Child 1]who is under eleven years of age. To wit: Sexual intercourse." It further alleges, *id.*, that "while she was between the ages of 9 and 10 years of age, the defendant, who was her mother's boyfriend, "was sexually assaulting her repeatedly. She described incidents in which the defendant would force her to have sexual intercourse with him.")

exam showed no bruising or tears. Yet this was inexplicably not brought to the attention of the jury.

Background Re: The Exam

Petitioner had been asking his trial counsel to obtain the results of the gynecological exam of the chief Complainant. Pursuant to pre-trial motions, the prosecution summoned to the courtroom Dr. Sara Elizabeth Schuh, who had conducted the follow-up examination, and with whom the prosecution had been communicating, although it was the defense that actually called her to the stand for the *in camera* proceedings. Tr. 200:15-22 (Dr. Schuh did the follow-up exam); 166:17-18 (prosecution met with Dr. Schuh).

Dr. Schuh was a pediatrician at MUSC during the time in question. She is now retired. At the time of her retirement, she was the director of the sexual assault center and the program for evaluation of children. Tr. 200:4-14. She conducted the follow-up examination of the older child in 1998. *Id.* lines 15-22.

She testified that she had reviewed the photographs from the exam, which allowed her to refresh her memory. Tr. 202:3-7.

Her testimony continued,

> But <u>the photographs which I reviewed show no evidence of bruising and tears</u> but lesions typical of herpes simplex virus or what would be called genital herpes.[2]

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[2] Dr. Schuh corrected herself on the type of herpes; it was actually Type One, which is present in 90% of the population. Accordingly, the Judge refused to allow in evidence of the Herpes infection. *See, e.g.*, App. 202:24 - 203:14 (Dr. Schuh testifying that a culture grown from the virus showed it to be Type One); App. 1177 (Def's. Ex. 2, p. 2) (lab report faxed to Dr. Schuh from MUSC on the morning of her testimony) (showing the virus was Type One); Tr. 164:25-165:2 (Prosecutor representing that Dr. Schuh told her

Id., lines 14-17 (emphasis added).

Defense counsel followed up, 204:22-25 (emphasis added),

> Q. Now, Doctor, just to follow up. Doctor, you said that there was no evidence of bruising or tears?
>
> A. I didn't see any, no.

Dr. Schuh's examination above was on the second day of the proceedings. Two days later, the following exchange occurred outside the presence of the jury:

> Mr. CURRY: .... Well, first of all, let me back up. Dr. Schuh in her testimony, mysteriously, I don't know why she said it, she said there was no evidence of bruising or tears.
>
> THE COURT: If you want to use Dr. Schuh, that's fine. I have no problem with that. We can go into that examination. But I'm not going to let you just throw up an exam before the jury with no follow up on it and insinuate that there was something wrong.

Tr. 854:4-23 (emphasis added.

The transcript continues:

> THE COURT: Now, if you want to do it and you bring Dr. Schuh in, that's fine. I have no problem with that.
>
> MR. CURRY: That's fine. And what we'll do is, if we're going to do it, we'll do it through Dr. Schuh. We understand.

Id. lines 14-18(emphasis added).

The failure to call Dr. Schuh is inexplicable, as trial counsel clearly recognized that such evidence goes to the question of whether they were having sex. App. 847:8-21:

> THE COURT: I understand. On the exam, the DSS exam. What does that have to do with anything?

---

that Type One is present in 90% of the population); *id.* at 182:20-21 (the Court ruling that "if it's Type One, then it's not coming in, period.")

MR. CURRY: It does not have to deal with the issue of diseases. It is dealing with the issue of when you go to an OB-GYN they'll check to see if the hymen is intact, whether or not there's a tear. It goes to that issue there as to whether or not they were having sex.

Now, if in fact that it is shown that it was normal in '98 or normal in 2000, then that's a factual analysis for the jury to make a determination as to whether or not or when it happened, with regard to credibility.

The Direct Appeal

Petitioner was represented on direct appeal by the Office of Appellate Defense, Joseph Savitz, Esq. He filed a one-issue appeal challenging the trial court's refusal to allow the defense to show a compilation of home movie clips that, the defense maintained, would rebut the prosecution's theory that the Defendant kept the family intimidated, which was the reason the prosecution advanced to explain the long delay in reporting the alleged events. The Court of Appeals affirmed on June 30, 2011, via a one-page unpublished opinion, No. 2011-UP-355.

The Action for Post-Conviction Relief

Mr. Cobbs filed his PCR application on January 30, 2012, raising numerous issues, including the failure to prepare for the introduction of exculpatory evidence concerning the results of the examination and to present an expert medical witness to so testify. Application, p. 7, ¶ 1(d).

The Application further asked that counsel be appointed for him. Joshua B. Cantwell, Esq. was accordingly appointed on February 27, 2012. On May 29, 2012, Charles T. Brooks, III, Esq. was substituted as counsel, via consent of Mr. Cantwell and Mr. Brooks. A hearing on the application was set for a year later, May 20, 2013. Two

weeks prior to the hearing, Applicant mailed a motion asking the Court "to remove Charles T. Brooks, III, from my PCR application and assign another lawyer in the interests of justice." App. 1313 (Mot. Remove Counsel, p. 2). He complained generally that "Mr. Brooks has not done anything to ensure I receive due process of law," *id.,* and listed particulars including the failures to obtain certain records and to subpoena certain people, and the failure "to obtain a[n] expert witness" to assist with the allegations.

The Motion to Relieve Counsel

The hearing went forward before the Honorable Deadra Jefferson. PCR counsel began that hearing with Applicant's motion to have Judge Jefferson recuse herself. PCR Hr'g Tr. 2:2 - 6:25 (App. 1181:2 - 1184:25). Although she was the judge who had ordered that his electronic monitoring be turned off while he was out on bond, App. 120:23 – 121:3, Petitioner thought it better to begin anew with a judge fresh to the case. Judge Jefferson declined to recuse herself. Hr'g Tr. 6:24-25 (App. 1184:24-25).

Immediately thereafter, Petitioner attempted to broach the subject of his motion to have his PCR counsel replaced, and the Judge, apparently thinking he was attempting to continue to argue the recusal motion, refused to hear him.

APPLICANT: Your Honor, may I say something, please?

THE COURT: Briefly, yes, sir.

APPLICANT: I just want you to have this. Can I hand this to –

THE COURT: Sir, I have already entertained the Motion and denied it. So there will be no further argument, pursuant to the Rules. The court is not going to reconsider its decision. I have denied the Motion because there is no basis for it.

Now, Mr. Brooks has indicated to the court that he is ready to go forward. I suggest that if there is any additional information you need to provide to him so

> that he can be ready to question the witnesses, that <u>you do that now</u>.
>
> But I am not going to belabor something that I have already ruled on. <u>The Rules provide that you have counsel, he has spoken for you</u> and that once the court has ruled that there is to be no further argument on the issue.

Id., 7:3-25 (App. 1125:3-25) (emphasis added).

The hearing thus continued with Mr. Brooks as counsel. The Judge offered PCR counsel the opportunity, if he felt the need at the end of the hearing, to call witnesses, subpoena experts, and reconvene the proceedings. Hr'g Tr. 11:14-24 (App. 1189:14-24). He did not do so.

Judge Jefferson orally ruled against the Petitioner at the hearing. Hr'g Tr. 86:11-13 (App. 1264:11-13). Four days later, Petitioner filed a *pro se* motion under Rule 59(e) to reconsider, alter or amend, App. p. 1316, explicitly raising the failure to hear his motion to remove and replace counsel, Mot. Recon. p. 4 (App. 1319). The PCR judge denied his motion as untimely, on grounds it was filed before the final written order issued, App. p. 1342 (Order filed 7/11/13 denying Mot. Recon.), although the motion had asked that it "also cover any and all written orders of denial of his PCR application." Mot., p. 1 (App. 1316).[3]

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[3] Although the PCR judge stated that she "fully considered" the Motion, she did not address the merits.

> The Applicant's Motion is untimely, as a Final Order has not yet been issued by the Court. It is premature for the Court to consider the merits of the Applicant's Motion until a Final Order is issued. Having fully considered the Plaintiffs Motion for Reconsideration filed May 24, 2013, as well as the untimeliness of the Motion, the Plaintiff Theodore Cobbs' Motion for Reconsideration is hereby <u>dismissed as premature</u>.

App. 1342 (Order on *pro se* motion to amend, p. 1) (emphasis added).

Petitioner timely filed a pro se notice of appeal of the order denying his motion to reconsider, and PCR counsel timely filed a notice of appeal of the order denying the application for post-conviction relief.

ARGUMENT

PETITIONER SHOULD BE GRANTED A NEW PCR OR A NEW TRIAL

I. PETITIONER SHOULD BE GRANTED A NEW PCR WITHOUT BEING REQUIRED TO SHOW PREJUDICE.

Motions to relieve counsel are, for obvious reasons, an exception to the rule that *pro se* motions will not be considered if the party is represented by counsel. "Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel." *Miller v. State*, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) (emphasis added).

PCR hearings held without a hearing on a timely-made motion to have counsel removed should automatically result in a remand. It is akin to "structural error" in criminal cases. Prejudice need not be shown for such errors. *See, e.g.*, *Edmond v. State*, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000) (citing *Arizona v. Fulminante,* 499 U.S. 279, 306-10, 111 S. Ct. 1246, 1263-65, 113 L. Ed. 2d 302, 329-32 (1991)),

> a "trial error" occurs during the presentation of case to jury and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial; these are distinguished from structural defects in the constitution of the trial mechanism, which defy harmless error analysis.

As the Court explained, "These are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and which affect[] the

framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

This Court has noted the unfair difficulties of proof that would occur if one were required to show "prejudice" in such instances.

> We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry. *See Gonzalez-Lopez*, 548 U.S. at 150 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.' . . . Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.")

Id. at 247-48, 741 S.E.2d at 706 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The Court reiterated the point, *id.* at 248, 741 S.E.2d at 706, quoting *Luce v. United States,* 469 U.S. 38, 41-42, (1984) for the proposition "that ascertaining prejudice requires 'the court [to] know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify' and finding an 'appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying.'"[4]

These difficulties apply to refusals to hear motions to remove PCR counsel. How is one supposed to show the appellate court that there were good reasons for removing his

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[4] The Court also noted in *Rivera* that the federal Supreme Court has found errors to be structural "only in a very limited class of cases," *id.* at 247, 741 S.E.2d at 705. However, included among these are "erroneous disqualification of counsel of choice," *id.* at 247, 741 S.E.2d at 705-06, which is directly analogous to refusal to consider a timely motion to remove unwanted counsel. Moreover, in the cases cited, the result was the setting aside of a conviction, which is a weighty step; whereas here, the result would be simply the setting aside of a PCR result.

PCR counsel, when the Petitioner's very attempt to argue the matter to the lower court, and thus show the reasons, was denied by the judge? In such appeals, as the Court has ruled in this case, Order of 08/07/2014, one is restricted to the record as developed in the lower court. It would be a Catch-22 to deny one relief on grounds that the lower court's refusal to allow him to make his case prevents there being a sufficient record to maintain an appeal.

Similarly, in many cases, as here, there would be inordinate difficulties placed upon Petitioners such as Mr. Cobbs, who sought to have his counsel replaced because he believed counsel was not properly preparing the issues, were they to be required to show "prejudice" in the sense that the outcome of the PCR would have been different had the motion to relieve counsel been granted.

Third, this Court's time and resources would be spared were it to adopt such a rule.

Nevertheless, if the Court prefers to consider the issue of prejudice, Mr. Cobbs believes he can make out a case of prejudice, as argued in the next section.

II. THE ERROR WAS PREJUDICIAL.

> To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

At trial, the <u>prosecution</u> presented the doctor who had conducted the examination for an *in camera* examination on related issues. She testified *in camera* that the hymen was intact. The trial judge ruled that the defense could call the doctor to testify to the same before the jury. Defense counsel failed to do so.

The error was highly prejudicial. An intact hymen may not prove with 100% accuracy that a person has never had sex, but a hymen remaining intact through regular and repeated vaginal intercourse over a period of years is sufficiently uncommon that the evidence could and most likely would have given jurors pause as to whether that complainant was telling the truth. *See Vail v. State*, 402 S.C. 77, 90-91, 738 S.E.2d 503, 510 (Ct. App. 2013) (finding it important that "Victim's hymen was fully intact" despite an alleged <u>six to nine</u> incidents of sexual intercourse).

This is especially so considering that Mr. Cobbs was a 290-pound man, Tr. 340:14-25, and the victim was a young girl. (Indeed, according to the Complainant's testimony, he had been having vaginal intercourse with her all along since she was nine years old, through and including the time of the pelvic example, when she was going on thirteen years old).

Moreover, since each of the two complaining sisters testified that she had seen the Petitioner similarly abuse the other complainant, e.g., App. 251:4-25 (testimony of older sister); 473:8-476:11 (testimony of younger sister), evidence that he had not in fact had sex with the one would have necessarily have called into doubt the testimony of the other.

The final Order holds, regarding the hymen issues,

> This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to present expert witness testimony on the victim's herpes and intact hymen. This Court finds

> counsel provided credible testimony that they made a strategic decision not to present this evidence at trial. The Applicant has presented no good faith basis for counsel to have presented evidence of the victim's untorn hymen at trial and it is unlikely their decision to not present such testimony affected the outcome of the Applicant's trial. This Court finds credible counsel's testimony that the Applicant had no independent corroboration on this issue and only had his memory and no basis for scientific support.

Order dismissing PCR, p. 11 (App. 1338).

The court thus provides three rationales. [1] "This Court finds counsel provided credible testimony that they made a strategic decision not to present this evidence at trial." [2] "[I]t is unlikely their decision to not present such testimony affected the outcome of the Applicant's trial." [3] "The Applicant has presented no good faith basis for counsel to have presented evidence of the victim's untorn hymen at trial;" "This Court finds credible counsel's testimony that the Applicant had no independent corroboration on this issue and only had his memory and no basis for scientific support." Each is flawed.

As to [1], the Court is apparently relying on testimony by trial counsel at the PCR, hearing, which went unchallenged by PCR counsel, "we [counsel and Petitioner] spoke personally about, you know, hymen issues and how they can work for you and against you." Tr. Hr'g 47:4-6 (App. 1225:4-6). But this just begs the question: How could it possibly hurt one defending himself against claims of rape to show that the victim's hymen was intact? The counsel Mr. Cobbs had asked to have replaced never raised the issue in cross-examination. He let it go unchallenged. Mr. Cobbs should not be stuck with that result.

As to [2], in a case involving horrid accusations of rape on a repeated and regular basis, it would be highly probative to find out that the alleged victim's hymen is intact.

The Order appears to put greatest weight on [3]. But [3] is refuted by the transcript of the criminal trial. The Order states, "The Applicant has presented no good faith basis for counsel to have presented evidence of the victim's untorn hymen at trial." It similarly states, "This Court finds credible counsel's testimony that the Applicant had no independent corroboration on this issue and only had his memory and no basis for scientific support." This testimony, too, went unchallenged by PCR counsel. But Dr. Schuh was there at the trial, with photographs, and had been cleared to testify.

RELIEF REQUESTED

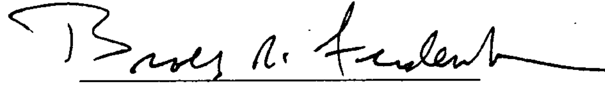
Mr. Cobbs has been incarcerated since 2008. He has been under indictment since 2005. To send this back for a new PCR, followed by an appeal of the PCR, followed by a new trial, would likely place several additional years between Mr. Cobbs and his release. The Court should find that it is highly likely that such a process would ultimately result in a new trial, and order a new trial now. In the alternative, the Court should remand for a *de novo* PCR hearing, with new counsel, and with instructions that if Dr. Schuh is not available, funds be made available for a medical expert to testify, and that counsel is to subpoena the necessary medical records from MUSC.

CONCLUSION

The Court should grant the writ of certiorari and reverse the lower court.

Respectfully submitted,

9/8/14



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Proof of Service

I certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari today to opposing counsel, by placing a copy in the US Mail, proper postage pre-paid, addressed to:

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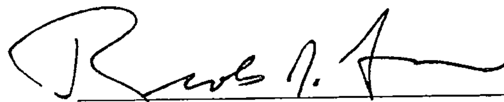
September 8, 2014



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