THE STATE OF SOUTH CAROLINA
In The 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.

REPLY TO THE RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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I. THE ISSUE IS PRESERVED.

A. Mr. Cobbs Timely Filed His Motions Seeking To Have His PCR Counsel Removed.

Mr. Cobbs, the Petitioner here, timely filed with the lower court his motion to have counsel relieved. He also timely filed a Motion to Reconsider. (His motion to have counsel relieved was mailed two weeks before the hearing, and was filed ten days before the hearing. App. pp. 1312-13 (Motion dated May 6, 2013, and filed May 10, 2013); App. p. 1179 (Hearing was May 20, 2013); App. pp. 1317-22 (*pro se* Rule 59 Motion). Respondent's reliance on *State v. Gee*, 262 S.C. 373, 204 S.E.2d 727 (1974), is misplaced. To preserve an issue for appellate review, it is not necessary that one obtain a ruling; it suffices that one make a motion, and timely bring to the lower court's attention via a Rule 59 motion its failure to have ruled on the original motion. *E.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

B. Mr. Cobbs' Motions Fairly Raised the Issues.

Mr. Cobbs' initial motion

Mr. Cobbs' initial motion is a page and a half long. It concludes,

> At this time I would like to Ask the Court to remove Mr. Charles T. Brooks, III, from my PCR Application And Assign Another lawyer in the interest of Justice.

App. p. 1313.

The motion is entirely about the alleged failures of Mr. Brooks. In its entirety, it states [grammatical errors not corrected],

> I Theodore E. Cobbs ("Applicant") being first duly sworn, depose and say that everything stated herein is true and correct to the best of my Knowledge and belief.
>
> Applicant forwarded his Post-Conviction Relief Application to the Charleston County Clerk of Court on or About January 2012. By Order

dated filed February 27, 2012, Attorney Joshua P. Cantwell was Appointed. Shortly thereafter some how A Attorney named Charles T. Brooks, III, was brought into the picture & Mr. Cantwell moved out the picture on or About May 2012 Mr. Brooks informed he would be Assisting me with my PCR Application.

Attorney Brooks has been allegedly assigned to my PCRA since May 2012. I have been unable to call him to discuss my PCRA. He has not Came to visit me once, not even once to dis cuss my PCRA.

I wrote Mr. Brooks A letter dated Augusted 27,2012 Asking him what he issues he planed on Amending to my PCR Application, he never responded [n]or did he Amend my PCR Application. January 28, 2013 I wrote Mr. Brooks a Second letter with a Proposed memorandum of Law in Support of my PCRA. I did Ask Mr. Brooks to subpoena certain people to my PCR. I also Asked him to obtain A expert witness to assist with my allegations. I further asked him to ascertain certain medical records with the SCDC from 2008, stored at the Kirkland Correctional Institution.

Mr. Brooks has not done anything to ensure I receive due Process of law. Mr. Brooks is treating this PCR as if he has no obligations what so ever to help me. There are numerous records in Berkley County family Court and Berkley County Sheriff's office that he needs to get & review to adequately assist me.

My lawyer from North Charleston, Mr. Eduardo Curry (trial lawyer) has documents that need to be reviewed and have not been.

At this time I would like to Ask the Court to remove Mr. Charles T. Brooks, III, from my PCR Application And Assign Another lawyer in the interest of Justice.

I so state under penalty of Perjury.

App. pp. 1312-13. It is then signed and notarized.

Mr. Cobbs' Rule 59 motion

Mr. Cobbs' Rule 59 motion is five pages long, and is all about the PCR court's failure to afford Mr. Cobbs a hearing on his motion to have Mr. Brooks removed, Mr. Brooks' alleged failures, and the prejudice resulting therefrom.

He provides background regarding Mr. Brooks on page one. App. p. 1317. On page two, App. p. 1318, among other failures by Mr. Brooks, the Applicant specifically

mentions his request that Mr. Brooks obtain "a medical expert" [to testify as to the intact hymen]. "The original victim's medical history showed her hymen was still in tact." App. p. 1318 (emphasis in original). "But Applicant never had an opportunity to present any of this evidence because Mr. Brooks felt Applicant was guilty and did not deserve proper representation at a PCR." App. p. 1319. "Applicant did manage to file a Complaint against Mr. Brooks with the South Carolina Disciplinary Board and a affidavit with the Court asking that Mr. Brooks be removed from his PCR Application." App. p. 1319. "The Judge . . . forced Applicant into a hearing and then denied the PCR as if a constitutional PCR hearing had Just taken place." App. p. 1319. "If Honorable Deadra L. Jefferson would have at a minimum inquired into Applicant's reason's for wanting Mr. Brooks removed off his PCR Application she would have discovered the above and then been able to make a informed decision." App. p. 1320.

Mr. Cobbs sufficiently raised the issues.

Respondent puts much weight on the caption of Mr. Cobb's initial *pro se* motion, in that it was captioned "Affidavit" rather than "Motion." The *pro se* litigant was apparently under the misimpression that such motions must be sworn, and that sworn documents are called "Affidavits." But even a quick glance at the document reveals it to be a motion to remove counsel. It is the substance of the relief sought, not the caption, that governs. *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 27-28, 609 S.E.2d 506, 510 (2005),[1]

[1] *See also Std. Fed. S&L Ass'n v. Mungo*, 306 S.C. 22, 25-26, 410 S.E.2d 18 (Ct. App. 1991),

> Rule 1, S.C.R.Civ.P., provides the Rules of Civil Procedure govern procedure in all South Carolina courts in all suits of a civil nature. Rule 1 further directs the Rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Rule 61, S.C.R.Civ.P., mandates: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 7 (b), S.C.R.Civ.P.,

It is proper to treat Plaintiff's written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial. *See Mickle v. Blackmon,* 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its substance and effect as opposed to how it was captioned by party); *Richland County v. Kaiser,* 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (illustrating that when court is able to discern the relief requested, "it is the substance of the requested relief that matters regardless of the form in which the request for relief was framed"); *Standard Fed. Sav. & Loan Assn. v. Mungo,* 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (explaining that civil procedure rules must be construed to secure the just, speedy, and inexpensive determination of every action, and defects which do not affect the substantial rights of the parties should be disregarded; thus, it is the substance of the relief sought that matters regardless of the form in which the request for relief was framed).

Moreover, the State was on notice of Mr. Cobb's initial motion. His sworn Certificate of Service states that he served both the Attorney General and the Assistant Attorney General handling the case. App. p. 1314 (Certificate of Service). The State should have spoken up if it believed the PCR court was unaware of the outstanding motion to have PCR counsel removed.

II. MR. COBBS DID NOT "WILLINGLY PROCEED" WITH HIS THEN-PCR COUNSEL.

The Return provides a distorted view of the hearing in stating, p. 7, "Even if this Court construes the Petitioner's 'Affidavit of Applicant' as a proper *pro se* motion to relieve counsel, the Petitioner abandoned his request to relieve counsel at the evidentiary hearing by willingly proceeding with his present post-conviction relief counsel."[2]

Much of the relevant language was quoted in the Petition for a Writ of Certiorari. Given

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provides an application to the court for an order shall be by written motion. Rule 8 (f), S.C.R.Civ.P., requires all pleadings to be so construed as to do substantial justice to all parties.

Standard sought relief by a rule to show cause. In doing so, it followed traditional practice in the courts of South Carolina prior to the adoption of the Rules of Civil Procedure. Although the better practice under the Rules would have been to make a Rule 60 (b) motion, the substance of the relief sought was the same regardless of the form in which the request for relief was framed. Accordingly, the master was correct to treat the petition as a Rule 60 (b) motion, as the above cited rules require him to do.

[2] A minor correction: the State appears to mean "with his then-present post-conviction relief counsel," Charles T. Brooks III, Esq., and not his present counsel, the undersigned. The more important error, however, is that Mr. Cobbs most certainly did not "willingly proceed" with Mr. Charles Brooks.

Respondent's claims, a longer excerpt is provided here.

PCR counsel began the hearing with Applicant's motion to have Judge Jefferson recuse herself. PCR Hr'g Tr. 2:2-6:25 (App. 1181:2-1184:25). That ended with the PCR judge asking the State for its position (the State was opposed to recusal) and the Judge then orally ruling, twice, that the motion was denied.

THE COURT:	What is the State's position [regarding the recusal motion]?
MS. WILSON:	Your Honor, the State strongly objects to his request for a continuance. This case was filed in January of 2012. The State has its witnesses present, we had to use State resources to get Mr. Cobbs here, and so we're ready to proceed.
THE COURT:	Mr. Brooks, I understand your client's Motion. There is really no basis for it. There is no independent, uh, or good faith presentation that this court cannot be fair, equitable and impartial. I have no independent knowledge of this case. I can assure you that I have absolutely no recollection of the facts and circumstances other than what I reviewed in the official documents that were presented as a part of the application and a part of the return, as well as the records that the State provided to the court. In addition to that, there's absolutely no case law to support how the court, having had some cursory bond hearing, would – there is no indication that this court has any extra judi–, – as a matter of fact, actually case law says that interaction that the court has with a case that contributes to or has knowledge of it is not a basis to –
MR. BROOKS:	I understand, Judge.
THE COURT:	I understand you're between a rock and a hard place. I know that, as well. We will note your Motion, and it is denied. In addition to the substantial resources that the State has expended in procuring Mr. Cobbs' presence for the purpose of this hearing, the court could not justify a waste of those resources in what is an unjustified request for continuance. The request is denied. Is the Applicant ready to proceed?
MR. BROOKS:	Beg the Court's indulgence, Your Honor, (sidebar with Applicant.)

Hr'g Tr. 5:9-7:2 (App. 1183:9-1185:2). Immediately following this, 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 you do that now.
>
> But I am not going to belabor something that I have already ruled on. The Rules provide that you have counsel, he has spoken for you and that once the court has ruled that there is to be no further argument on the issue.

Id., 7:3-25 (App. 1185:3-25) (emphasis added).

The PCR judge appears to have thought that Mr. Cobbs was trying to reargue the recusal motion. She told him she had already ruled; that there "will be no further argument," that Mr. Brooks is "ready to go forward," "The Rules provide that you have counsel," "he has spoken for you," and then again that "there is to be no further argument on the issue." This cannot be fairly characterized as Mr. Cobbs "willingly" going forward with his then-counsel. It was a direct court order: Mr. Brooks has been provided as counsel for you; he speaks for you; there is to be no further argument.

Having been told not to argue the motion, Mr. Cobbs then asked to at least have time to find out what Mr. Brooks had planned for the case.

> APPLICANT: Well, Your Honor, I have – this is my first time of seeing this man. It's been only, what? Ten minutes? And he's all ready to go to trial? I don't know what he's got prepared for my case.

Hr'g Tr. 8:1-5 (App. 1186:1-5). (The State mischaracterizes this as "the Court [giving] the Petitioner the opportunity to express his concerns about post-conviction relief counsel's representation." He had already been told not to do that. Here, he simply expressed that he wanted at least to know what his counsel had planned).

The court then asked Mr. Cobbs what witnesses he had wanted. Mr. Cobbs comes straight to the point – he wants a medical expert for the intact hymen. Hr'g Tr. 8:8-9 (App. 1186:8-9).

Two more problems then appear. First, the court then goes on, as the State writes, to articulate law governing PCRs – but she gets it wrong. At least, she gets the focus wrong. Her words may be an accurate description of PCRs generally, but are out of place in a discussion of whether an expert witness should be at the PCR. Mr. Cobbs wanted to present the expert witness testimony that he maintains would have acquitted him. It is well established that, at a PCR hearing, one may not simply rely on the failure of trial counsel to call a witness; one must present the testimony that the witness would have provided had he or she been called. Without showing what the testimony would have been, one cannot show the prejudice required to set aside the conviction. "This Court has repeatedly [so] held." *Bannister v. State* 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).[3] That is why Mr. Cobbs wanted the medical expert.

The Judge's instructions completely miss the point.

THE COURT: What witnesses did you ask him to subpoena?
APPLICANT: Medical expert for an intact hymen and herpes disease.
THE COURT: Why would he – this is a post-conviction relief for

[3] More fully, the Court wrote there, 333 S.C. at 303, 509 S.E.2d at 809 (emphasis added),

> This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case) . . . .

ineffective assistance of counsel. This is not a retrial of your case.

APPLICANT: Well, Your Honor, —

THE COURT: This appeal is to present evidence that your counsel was ineffective. That because of that, you were prejudiced. In other words that the trial would have turned out differently but for those errors that he made.

APPLICANT: I –

THE COURT: So this is not a retrial of your case. This court is not acting in a fact-finding capacity. I am only here to determine, in a threshold manner pursuant to *Strickland,* whether your attorneys were effective or ineffective. So the facts of your case have already been determined. The court is not going to retry this case. This is a post-, a civil post-conviction relief action which is solely to determine if your lawyers were effective in representing you. The only relief that you can get is a new trial, if they in fact were ineffective. Do you understand that? This is not a Motion for a new trial –

APPLICANT: I really don't understand that, because I don't know the law.

Hr'g Tr. 8:6-9:13 (App. 1186:10-1187:9). (The State characterizes this as "The Court explains to the Petitioner the purpose of his post-conviction relief action and the legal standard that would be applied to his claims," Return at 7-8. Rather, she essentially told him that there was no place in PCRs for witness testimony.)

The remainder of the transcript, before the substantive PCR hearing begins, contains nothing else that could fairly be seen as Mr. Cobbs "willingly" going forward with Mr. Brooks. Rather, it shows the PCR court belatedly recognizing that expert witnesses can be appropriate in PCR hearings, followed by PCR counsel's pooh-poohing of the hymen issue.[4]

THE COURT: Well, you filed [*sic*] out the application for post-conviction relief, so you have some understanding of what it was that you were filing, because it was in your own handwriting that was filed. In addition to that, you have extensive typed copies

[4] In PCR counsel's view, the criminal trial was a straight ahead he said/she said (or "he said/she said/she said"). Hr'g Tr. 10:3 (App. 1188:3). If there were nothing more than he said/she said/she said, there would seem little hope for a successful relief, which makes even more questionable PCR counsel's jettisoning of the hymen issue in favor of a he said/she said/she said).

attached to that, as well as copies of decisions from the Court of Appeals. So I think that you do understand the nature of this process and I think that you do understand what you are asking for. Is there a necessity for these witnesses to be subpoenaed, Mr. Brooks?

MR. BROOKS: In my take on the case, it's basically a he said/she said/she said, who came back years later. So you've got basically – forensics were really not involved. There were some indications at the trial of whether this person still had her hymen intact, but the main crux of the case dealt with women who were adults –

THE COURT: Who –

MR. BROOKS: – saying that when they were kids X-Y-Z happened. And, uh, obviously I've tried some of those cases before and I have an opinion of how I think that the case should have been tried. I notice that my client did not testify, and it's my opinion that in a lot of those cases that no matter what the court says in terms of instructing the jury that – juries still want to hear you –

THE COURT: It depends on how credible you are.

MR. BROOKS: Well, and that may be.

THE COURT: And it depends on whether you should be subjected to cross-examination, which can be a very slippery slope.

MR. BROOKS: That's what –

THE COURT: Because he had no burden of proof.

MR. BROOKS: Right.

THE COURT: Most of the time it's in your client's best interest –

MR. BROOKS: That's what –

THE COURT: That is how the court – how the jury may interpret it.

MR. BROOKS: But that's for the purposes of my plan for the post-conviction relief hearing, because I think –

THE COURT: Well, I tell you what we are going to do. If after speaking with him further, once we conclude this hearing, you feel the necessity to call these witnesses or to subpoena any experts, I will let you supplement the record.

MR. BROOKS: Thank you.

THE COURT: And we will reconvene at another time and you can supplement the records with those additions.

MR. BROOKS: Thank you, Judge.

THE COURT: Sir, is there anything else that you want to tell me?

APPLICANT: No.

THE COURT: Okay, let's proceed. State ready

MS. WILSON: Yes, Your Honor.

THE COURT: You may take your seat.

Hr'g Tr. 5:9-7: 2 (App. 1187:14–1190:12).

The State's final attempt to argue lack of preservation is to take the fourth- and fifth- to last lines above out of context. Having been told that he is not to argue his motion to have counsel removed, having been told that his counsel speaks for him, having been told that he must misunderstand PCRs if he thought there was a point to having an expert witness testify, he had nothing to say that would be both allowable and relevant.

That does not mean he willingly acceded to having Mr. Brooks conduct his PCR hearing.

III. THE ERROR IS REVERSIBLE.

The PCR Judge should have at least conducted an inquiry to determine whether Mr. Cobbs had grounds for wanting Mr. Brooks removed. Respondent relies on *Richardson v. State,* 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008), but *Richardson* declares "the basis for the complaint should be explored," *id.* at 107, 659 S.E.2d at 495. The PCR judge should not have responded to Mr. Cobbs' request to hand up materials by informing him that it has already been decided, that his attorney speaks for him, and that he is not to argue about it.

A. Respondent's Reliance on *Graddick* Cuts Against It.

Respondent relies most heavily on *State v. Graddick*, 345 S.C. 383, 548 S.E.2d 210 (2001) (overruled in part on other grounds, *State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475 (2004)). *Graddick* does Respondent no good. There, the defendant apparently mailed a letter to the trial judge a mere four days before trial; whereas here, the motion was mailed two weeks in

advance. (*Graddick* does not state when the letter arrived at the judge's chambers; presumably it would have been two days before trial, or even later, if the letter was mailed from behind bars. Here, the motion, mailed from behind bars, was received at least ten days before the hearing, as that is the date of the Clerk's stamp on the filed copy.) There, the letter was apparently not filed with the clerk of court; here, the motion was filed with the clerk, and opposing counsel was served. App. p. 1314.

Perhaps more importantly, the *Graddick* litigant made "only the most conclusory" statements as to why counsel should be relieved. 345 S.C. at 386, 548 S.E.2d at 211. (The entirety of Graddick's reasons for wanting counsel removed were "'Mr. Runyon is not representing my interests and is not fully prepared for this case. I do not feel comfortable going to court with him as my lawyer.'" *Id.* (quoting Graddick's letter).) Mr. Graddick did not indicate in any manner the ways in which he believed his counsel was not "fully prepared." Mr. Graddick did not indicate in any manner the specifics of what was lacking from 'full prepar[ation]." Mr. Graddick did not indicate in any manner what steps, if any, he had taken to cure the deficiencies in the attorney's less-than-full preparation. Mr. Graddick did not indicate in any manner any communications he had made to the attorney to attempt to resolve the problems.

In contrast, Mr. Cobbs did all of these in his motion. Mr. Cobbs explained that he has been unable to speak with Mr. Brooks on the phone, and Mr. Brooks has not visited him. Mr. Cobbs explained that he wrote Mr. Brooks asking what issues he planned to introduce, and Mr. Brooks "never responded." (He provides the date of that letter, August 27, 2012—months in advance of the hearing). App. pp. 1312-13.

Mr. Cobbs then detailed specific material and witnesses he considered important, that he had informed Mr. Charles Brooks about, and had asked Mr. Brooks to obtain—and heard

nothing about from Mr. Brooks. Mr. Cobbs listed, among other things, an "expert witness," subpoenaing of certain people, "medical records [which are] stored at the Kirkland Correctional Institution," documents in the Berkeley County family court, additional documents in the possession of Mr. Cobb's trial lawyer "that need to be reviewed and have not been." *Id.* This is a highly detailed accounting of reasons for removing counsel. This is the opposite of mere conclusory allegations. This is more than sufficient to trigger the need for the court to explore the reasons for the motion.

B. Respondent's Remaining Arguments Are Erroneous.

1. Respondent confuses *ex poste* and *ex ante.*

Respondent's argument on page 10 of its Return that Applicant's claims are "equal to giving the Petitioner a second 'bite of the apple' with new counsel merely because he expressed dissatisfaction with the outcome of his proceeding" confuses *ex poste* and *ex ante.* Mr. Cobbs did not wait until he received an unfavorable result in his PCR and then say "I want to do it again with other counsel." He timely moved well in advance to have his counsel removed, providing detailed reasons why he quite reasonably understood he would not receive a proper hearing with this counsel—reasons that were ultimately proven correct.

2. Respondent cannot have things both ways (re: the Rule 59 motion).

Respondent argues that the PCR court should not have considered Mr. Cobbs' *pro se* motion to reconsider, as the only motions to be accepted from litigants who have counsel are motions to relieve counsel. Return, at 9-10 & n.1. However, Mr. Cobbs' *pro se* motion to reconsider was all about the PCR court's failure to hear and consider his motion to have counsel removed. Undersigned counsel is unaware of any reported decision directly ruling on whether a *pro se* motion to relieve counsel may be followed up with a *pro se* motion to reconsider the

ruling on that motion; however, it seems to make sense that if one may properly so move, one may similarly move to reconsider—especially if the lower court did not rule on the initial motion. The same logic that requires courts to consider *pro se* motions to relieve counsel would seem to apply here.

However, if Respondent is correct, and lower courts are not to consider motions to reconsider a failure to hear or rule on motions to relieve counsel, it would appear that filing the initial motion would suffice for issue preservation purposes.[5]

3. Respondent cannot have things both ways (re: PCR counsel).[6]

Respondent's complaint, Return p. 11 n.2, that the performance of PCR counsel is simply irrelevant makes sense only if Respondent intends to concede that Applicant need not show that a proper PCR hearing should have resulted in a new trial. Yet Respondent also argues on the same page that a failure to consider an applicant's motion to relieve counsel is not structural error. "There is no question from this Court's holding in *Graddick* that under this factual circumstance the Petitioner has the burden of proving an abuse of discretion and a satisfactory cause to remove counsel." Return, p. 11. Respondent appears to be arguing that Applicant must simply show that he had grounds pre-hearing to have his counsel removed, and need not show

[5] The requirement stated in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) that one must file a Rule 59 motion to preserve such motions would not apply. It would be nonsensical to have a rule requiring one to file a Rule 59 motion to preserve a motion or argument that was not ruled on, and simultaneously prevent the litigants from filing such a motion. Nor should the litigant be compelled to rely on the counsel he believes is inadequate and whom he is trying to replace to file such a motion.

[6] Nor can Respondent have things both ways (re: ineffectiveness of trial counsel). Respondent declares itself "unable to ascertain how **trial counsel's** performance at trial could be used to support the Petitioner's claim that the lower court erred by not entertaining the Petitioner's pro se motion to relieve **post-conviction relief counsel**." Return, at 11 (bolding in original). If Respondent means to concede that Petitioner need not show prejudice resulting from the PCR court's failure to remove PCR counsel, then Respondent is correct. However, if Respondent maintains that Petitioner must show prejudice resulting from the failure to remove PCR counsel—that is, that Petitioner must show that proper representation at the PCR hearing could have resulted in a new trial—then Respondent is incorrect. Respondent appears to want the Court to rule that Petitioner must show such prejudice, and simultaneously, that Petitioner is not allowed to show such prejudice.

that a proper representation at the PCR hearing would have resulted in a new trial and/or grounds for reversal if a new trial was denied. If so, Petitioner would agree, with one modification: The question is whether he provided sufficient grounds to have a hearing into his reasons for wanting counsel removed. He was entitled to provide additional factual support and argument in support of his motion at a hearing on that motion. [7]

4. An Important Omission from Respondent's Return: The "strategic reason" for not telling the jury about the intact hymen.

Respondent argues that the trial attorneys provided a sound strategic reason for not calling a medical expert to testify to the intact hymen. This Court has made clear that does not suffice for trial counsel to claim a sound strategic reason; the reason must actually be both strategic and sound. *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014) (citing *Wood v. Allen*, 558 U.S. 290, 304, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010), for its "emphasizing the distinction between the issue of whether counsel made a strategic decision in the first place and the issue of whether a strategic decision is a reasonable exercise of professional judgment under *Strickland*"). *See also id.* at 236-37, 761 S.E.2d at 768-69 (noting other cases that have refused to take claims of "strategic decisions" at face value).

Respondent does not quote a single word of trial counsels' testimony on this issue. Instead, Respondent writes, Return at 12,

> At the evidentiary hearing, both of the Petitioner's attorneys articulated a valid strategic basis for their decision not to call the doctor as a witness at trial. They stated they spoke to the Petitioner about the issue, had concerns about the hymen evidence backfiring, and had problems finding factual evidence to support the Petitioner's claims about the victim's previous medical history. Counsel also testified he did not see a need to hire an expert witness to testify about the victim's hymen and herpes. (App. 1125:2-1226:6, 1233:18-1234:13,

[7] Although he maintains he has provided sufficient support in the Record that a refusal to remove his counsel would have been reversible error, he also maintains in the alternative that if not, he should not be penalized for the PCR judge's failure to hold such a hearing. To argue that his motion should be rejected for lack of evidentiary support, where he was denied an evidentiary hearing on the motion, would be an unfair "Catch-22."

1246:10-15).

Speaking to the Petitioner about the issue is not a "sound strategic reason." As for the possibility of evidence of an untorn hymen "backfiring," how could any possible backfiring be of more import than the evidence that a girl who was supposedly raped on a regular basis by a grown man from age nine on still had an unbroken hymen as a teenager? As for problems finding factual evidence: While trial counsel may have been entitled to ignore Petitioner's pre-trial pleas that they obtain the evidence, while they may have been entitled to disbelieve him that an examination done around the year 2000 showed an intact hymen, while they may have been entitled not to lift a finger to investigate their client's claim, once Dr. Schuh's testimony fell into their laps, these excuses were no longer valid.

As noted in the petition, Dr. Schuh was summoned to the courtroom by the prosecution. She testified *in camera* regarding a gynecological exam of the chief complainant years after the rapes allegedly began, which showed the hymen was intact, as trial counsel recognized. E.g., App. 204:23-25. At that point, Mr. Cobbs was vindicated: he had told his trial attorneys the examination had shown the hymen to be intact, and he was right. And although they should have hired a medical expert, as it turned out, there was no need to do so—if only they had called Dr. Schuh to testify. Nor do the transcript sections Respondent cites provide any sound strategic reasons for their failure to do so.

CONCLUSION

For the reasons above, and the reasons provided in the Petition, the Court should grant the writ of certiorari and reverse the lower court.

Respectfully submitted,

3/18/15

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THE STATE OF SOUTH CAROLINA
In The 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.

Proof of Service

I certify that I have served a copy of the foregoing Reply to the Return to the Petition for Writ of Certiorari today on Respondent, by placing a copy in the US Mail, proper postage pre-paid, addressed to:

Ashleigh R. Wilson, Esq.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

March 18, 2015

Brooks R. Fudenberg
LAW OFFICE OF BROOKS R. FUDENBERG, LLC
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March 18, 2015

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

Dear Ms. Johnson,

Enclosed please find:

* an original and six copies of a Reply to the Return to the Petition for Writ of Certiorari

* an original and a copy of the proof of service of same; and

* a return envelope.

Please return a copy of the pettion and 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.