

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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JUN 04 2015

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

S.C. SUPREME COURT

Theodore Cobbs, # 330717, Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR REHEARING

Petitioner, Theodore Cobbs, is serving consecutive sentences totaling thirty-eight (38) years. He respectfully asks the Court to rehear and reconsider its May 20, 2015 denial of his petition for a writ of certiorari to the post-conviction relief court that denied him relief. In support thereof, he states as follows:

1) The Court overlooked the fact that there was an expert prepared to testify without charge to Defendant that the alleged victim's hymen was still intact years after a series of alleged rapes were perpetrated upon her by Petitioner, and that defense counsel inexplicably failed to call the witness to testify in front of the jury.

Mr. Cobbs was convicted on several counts of abusing two sisters, who are the now-grown daughters of a woman he formerly lived with. At the time of the alleged incidents, the sisters were minors. A year after he left their mother and began living with another woman, the sisters came forward with their allegations.

Other than two charges relating to allegations that he waived a gun at the family one night (for which he received sentences of ten years, concurrent with the other charges), the gist of the charges is that he began “grooming” the two girls for sex at an early age, with full sexual intercourse to completion beginning with each around age nine, and continuing regularly thereafter. Each of the girls also testified that she had seen Mr. Cobbs similarly abuse her sister.

Proof that the victim’s hymen was still intact would have proved the central allegations were lies. The Court of Appeals has previously recognized the common-sense proposition that evidence of an intact hymen is important in a rape case. *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.”) *Vail* found that important, despite an alleged six to nine incidents of sexual intercourse involving a thirteen-year old. The allegations here are of repeated and regular rape over a course of years. The allegations here are of a 200-plus pound man raping a nine-year old. Mr. Cobbs had a right to have this information presented to the jury.

Proof that the central allegations were lies would have called into question the other allegations as well. Proof that the hymen was still intact after years of alleged rape should have been presented to the jury.

There was absolutely no reason provided for the failure of trial counsel to call to the stand Dr. Sara Elizabeth Schuh, who had examined the complainant when she was thirteen years old, which would have been after years of the alleged regular rapes, and who was present in the courtroom for *in camera* examination, and was available to so

testify without charge to Mr. Cobbs. The failure to present this evidence to the jury is sufficient to undermine confidence in the outcome of the trial. *See 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)) (such a showing entitles a PCR applicant to a new trial).

The entirety of the evidence against Mr. Cobbs consisted of the testimony of members this family, or of testimony based on the testimony of the family members. There was no forensic evidence.

The testimony of third parties consisted of the testimony of two law enforcement officers who each testified that he had taken a statement from the girls, or had reviewed the statements when the case was transferred from one jurisdiction to another. Neither had done any independent investigation. There was also testimony of a psychologist who testified as to reasons families may not report this type of abuse for years. None of these witnesses claimed to have any knowledge of the facts, other than what they were told by the family members.

The testimony of the family members was, most crucially, the testimony of the two alleged victims. Two of their siblings also testified but not as to sexual activity. There was also the testimony of an aunt who had lived with the family for some time, and claimed to have seen Mr. Cobbs having sex with one of the girls ten years before the allegations were made, but who never came forward to say anything until a few weeks before trial; and the testimony of the mother, who stated that although Mr. Cobbs was sleeping in one or the other girl's room many nights, and sometimes sleeping on a

mattress in the living room with one of the girls, she never went to law enforcement or other authorities.

There was thus a large amount of “evidence” against Mr. Cobbs, but it was all from the family of the jilted woman, or was testimony based on their allegations. Proof that the central allegation was a lie would have called the entire case into question.

Summation. It is difficult to conceive of better exculpatory evidence than evidence of an intact hymen in a rape case, where the allegations are of such regular and repeated rapes over such a time frame, by a large man of a pre-pubescent girl. The record is devoid of any reason the witness was not called.

2) The Court overlooked the fact that Mr. Cobbs’ timely motion to have his PCR counsel removed was never heard.

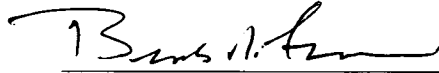
Petitioner timely filed with clerk of the lower court a motion to have his PCR counsel removed. Yet neither his counsel, nor opposing counsel notified the Court of his outstanding motion. Nor did the Court raise the question of the outstanding motion. Instead, when Petitioner attempted to raise the issue himself, he was told, “there will be no further argument;” and “The Rules provide that you have counsel, he has spoken for you.” App. 1125:3-25. The trial judge apparently thought he was trying to reargue another matter that she had just finished addressing; but regardless of what she was thinking, no hearing was held on his timely motion.

Conclusion

For the above reasons, Petitioner respectfully requests that the Court rehear and grant his petition for a writ of certiorari.

Respectfully submitted,

6/1/15



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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State of South Carolina,


Respondent.

Proof of Service

I certify that I have served a copy of the foregoing Petition for Rehearing 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

June 1, 2015



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June 1, 2015

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

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S.C. SUPREME COURT

ATTN: Ms. Janet Johnson

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

Dear Ms. Johnson,

Enclosed please find:

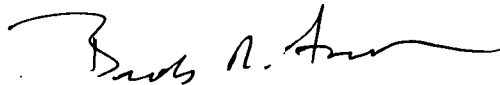
- * an original and seven copies of a Petition for Rehearing in the above case;
- * an original and a copy of the proof of service of same; and
- * a return envelope.

Please return a copy of the petition 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,



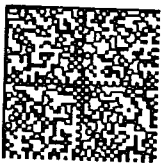
Brooks R. Fudenberg
Attorney for Petitioner

cc: Ashley R. Wilson, Esq.

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ATTN: Ms. Janet Johnson



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