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**S.C. SUPREME COURT**

**STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**Certiorari to the Court of Appeals  
Appeal from Georgetown County  
The Honorable Larry Hyman, Circuit Court Judge**

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**STATE OF SOUTH CAROLINA,**

**Respondent,**

**v.**

**JODY L. WARD,**

**Petitioner.**

**Appellate Case No. 2021-000702**

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**BRIEF OF RESPONDENT**

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## **PETITIONER'S QUESTION PRESENTED**

1. Does the "reasonable diligence" standard of Rule 29(b), SCRCrimP, require criminal defendants and their attorneys to do genealogical research on potential jurors to ensure they are not related to witnesses, and if not, did the Court of Appeals err in affirming the summary dismissal of Petitioner's Motion for a New Trial based on after discovered evidence?

## **RESPONDENT'S COUNTER-STATEMENT OF QUESTION PRESENTED**

2. Whether the Court of Appeals should be affirmed where it only imposed the reasonable diligence standard of Rule 29(b), SCRCrimP, in denying Ward's motion, and Ward's motion that Juror 19 failed to disclose an alleged relationship by marriage to a 2nd cousin of her husband through his grandfather's brother, to a minor State's witness, was reasonably discoverable within one year of trial and is further too remote and unsubstantiated to meet the standard warranting a new trial when Juror 19 otherwise answered the court during voir dire that she had read about the case in the newspaper and could be impartial; further, Ward offered no proof at the hearing on his motion that Juror 19 knew the witness was a relative of her husband by 6<sup>th</sup> degree of consanguinity, or that counsel would have struck or moved to strike the Juror had he known of this alleged tenuous relationship?

## STATEMENT OF THE CASE

Appellant Jody L. Ward (“Ward”) is serving two (2) life sentences after having been convicted of two (2) murders in Georgetown County in 2004. In this appeal, this Court granted certiorari to review the Court of Appeals Opinion, State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021), affirming the denial of Ward’s second (2<sup>nd</sup>) Rule 29(b), SCRCrimP “Motion for a New Trial Based on After-discovered Evidence” by Circuit Court Judge Larry B. Hyman. The Rule 29(b) Motion at issue was filed in 2014, ten (10) years after Ward’s trial. This Court ordered briefing by both parties. This is the Brief of Respondent.

### Procedural History

On August 3, 2002, Ward killed Wilford Brown and Elton Rutledge in Georgetown County. Ward was indicted on July 8, 2003 for two (2) counts of murder (2003-GS-22-1030 & 1031). He was represented by Margaret Ann Kneece and J. Wesley Locklair. Solicitor Greg Hembree and Assistant Solicitor Robert B. Bryan prosecuted the case. On March 15, 2004, Ward proceeded to a jury trial before Circuit Court Judge Paula H. Thomas. On March 18, 2004, the jury found Ward guilty of both murders. Judge Thomas sentenced Ward to life without parole on for both murders.

### *The Direct Appeal*

Ward directly appealed by way of an Anders v. California, 386 U.S. 738 (1967), brief and a *pro se* Response. The Court of Appeals affirmed. State v. Ward, 2007-UP-048 (Ct. App. Jan. 26, 2007). A *pro se* Petition for Writ of Certiorari was filed in this Court but Ward withdrew the petition by letter and this Court dismissed the appeal. The Remittitur was issued July 6, 2007.

*The Collateral Actions and Motions for a New Trial*

Since his direct appeal was denied, Ward has filed a total of eight (8) collateral actions challenging his convictions and sentences. He has filed four (4) PCR actions, a state habeas action, a federal habeas action, and two (2) post-trial motions for a new trial based on after discovered evidence. All eight (8) collateral actions have been denied and dismissed by the lower courts and the appellate courts to which they were raised, including two (2) by this Court.<sup>1</sup> The sole remaining appeal is this appeal from the Court of Appeals' affirmance of the denial of Ward's 2<sup>nd</sup> motion for a new trial based on after discovered evidence. The allegations in the other collateral actions were not the same as those asserted in the current action.

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<sup>1</sup> Beginning in 2007, Ward filed his 1<sup>st</sup> collateral action, a PCR application. It was denied and dismissed by Judge Stephen H. John. This Court denied certiorari. Ward filed his 2<sup>nd</sup> PCR action in 2009 which was dismissed by Judge Benjamin Culbertson and this Court dismissed the appeal for not having a sufficient Rule 243(c), SCAR, explanation. Ward filed a 3<sup>rd</sup> PCR action in 2010 which Judge Culbertson denied and dismissed; and, from which this Court denied certiorari. Ward filed a state habeas corpus petition in this Court in 2011, which this Court denied based upon the failure to meet the appropriate standard. In 2011, Ward also filed a federal habeas corpus petition which was denied and dismissed by the District Court. The Fourth Circuit Court of Appeals affirmed in an unpublished *per curium* opinion. Ward v. Warden of Leiber Corr. Inst., 538 Fed.Appx. 257 (4th Cir. 2013), and the U.S. Supreme Court denied certiorari. Ward v. McCabe, 572 U.S. 1019 (2014). In 2012, Ward filed his 1<sup>st</sup> Rule 29(b), SCRCrimP, Motion for a New Trial Based on After Discovered Evidence which was denied by Judge Culbertson and the Court of Appeals denied the appeal in an unpublished Opinion. State v. Jody Lynn Ward, 2014-UP-402 (Ct. App. filed Nov. 12, 2014). In 2014, Ward filed his 2<sup>nd</sup> Rule 29(b), SCRCrimP Motion for a New Trial Based on After-Discovered Evidence, **which is the subject of this appeal**. In 2018, Ward filed a 4th PCR action alleging "newly discovered evidence § 17-27-45(C) . . . Juror Misconduct McCoy v. State." Ward alleged Juror 19 failed to disclose a business relationship with 1 or more potential witnesses. This action was dismissed by Judge William Seals as untimely, successive, barred by *res judicata*, and for failing to set forth a prima facie case of newly discovered evidence. In regards to the newly discovered evidence allegation, Judge Seals found Ward had been "ferreting out new reasons well enough known to him, or which could have been known to him, through the process in order to try and secure new hearings as soon as the prior effort is defeated," and further declining to "enable Applicant in his pattern of harassing the jurors who convicted him." Ward v. State, (Order of Dismissal, Jan. 7, 2019). This Court dismissed the appeal for failing to give a sufficient Rule 243(c) explanation. The Remittitur was issued on July 15, 2019.

*The 2<sup>nd</sup> Rule 29(b) motion currently before this Court / What occurred below*

On September 22, 2014, Ward filed a motion to stay his appeal of the denial of his first (1<sup>st</sup>) Rule 29(b) motion pending in the Court of Appeals, to file this 2<sup>nd</sup> Rule 29(b) motion. On October 8, 2014, the Court of Appeals denied the stay to file this Rule 29(b) motion but noted in its Order that the Circuit Court could proceed with matters not affected by the pending appeal pursuant to Rule 205, SCACR. On October 30, 2014, Ward filed his 2<sup>nd</sup> Motion for a New Trial Based on After Discovered Evidence pursuant to Rule 29(b), SCRCrimP. According to this motion:

1) Juror Number 19 [name omitted] was, at the time of trial, related by marriage to one of the state's witnesses, Kevin Cooper, and failed to disclose this relationship to the Court during voir dire.

(Supp. R. 2-5).<sup>2</sup> On November 12, 2014, the Court of Appeals affirmed the denial of the 1<sup>st</sup> Rule 29(b) motion. Judge Culbertson denied the 2<sup>nd</sup> Rule 29(b) motion "on the defendant's brief and affidavits in support of the motion without oral arguments" in a Form 4 Order dated September 4, filed September 11, 2015. (R. 471-72). After counsel requested a hearing on the motion, a hearing was held in December of 2015, where Ward's first 29(b) counsel, Natasha Hanna, was removed and Ward was sent for a competency evaluation on whether he could represent himself. On September 8, 2017, the State filed a Motion to Dismiss Ward's 2<sup>nd</sup> Rule 29(b) motion. (R. 542-44). Through new counsel Tristan Shaffer, Ward filed a memorandum in support of his Rule 29(b) motion and opposing the motion to dismiss. (R. 545-60). Ward was found competent to represent himself, but insisted he be represented by Mr. Shaffer. Ultimately, Ward's Rule 29(b), motion and Respondent's motion to dismiss were heard on **October 2, 2017** by Circuit Court Judge Larry B.

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<sup>2</sup> In his 29(b) Motion, Ward raised claims against other jurors and a grand juror but those allegations were abandoned on appeal leaving only this claim.

Hyman. (R. 498-540). Mr. Shaffer represented Ward and Deputy Solicitor Scott Hixson represented the State. (R. 498-99). After a lengthy hearing, Judge Hyman directed the parties to submit post-hearing briefs. (R. 498-540). By Order of December 7, 2017, Judge Hyman granted the State's motion to dismiss and denied the Rule 29(b) motion for a new trial based on after-discovered evidence. (R. 561-64).

Ward appealed and filed a Brief of Appellant. The State filed a Brief of Respondent. On May 19, 2021, the Court of Appeals affirmed. State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021). A Petition for Rehearing was denied June 4, 2021.

Ward then filed his Petition for Writ of Certiorari in this Court. The State filed its Return to the Petition for Certiorari. On February 22, 2002, this Court issued an Order granting the Petition for Writ of Certiorari to review the Court of Appeals opinion and ordered the parties to brief the issue raised. Ward filed his Brief of Appellant on May 3, 2022. This is the Brief of Respondent.

## RESPONDENT'S STATEMENT OF FACTS

In August of 2002, appellant Ward, who lived in Georgetown County, was seeing 2 different women, a girlfriend Denise Cox, and his estranged wife Beverly Ward. Ward resided with each woman from time to time. (App. 389-422; 465-76).<sup>3</sup>

On Saturday morning, August 3, 2002, Ward borrowed his wife's green *Suzuki Sidekick* and eventually met up with the victims, Wilford Brown ("Brown") and Elton Rutledge ("Rutledge"). Ward called his girlfriend Denise Cox throughout the day on his cell phone telling her of what was taking place. In the first two (2) calls, Ward was happy and told Denise he was going to buy a pound of marijuana. He stated he was with Brown and he and Brown were going to meet the man with the drugs at a park to make the exchange. Later though, in the last calls that afternoon he indicated someone had ripped him off of over \$1,000, and Brown and the other guy ripped him off. Ward told Denise he was going to get the men responsible; either he would get his marijuana or he was going to kill them, including Brown. During one (1) call, Ward told Denise he was buying bullets at Walmart. She told Ward not to do anything stupid. Later in another call, Ward told her Brown was with him and he was at his [Ward's] wife's house showing Brown his bulldogs. (App. 389-422; 600-06).

Later that night, Ward called Denise asking her to pick him up at the end of the street where Ward's wife lived. Denise did so. Ward got in Denise's car and told her he and his wife argued and as a result he left. After they got to Denise's home, Ward told her he had killed both Brown and Rutledge, shooting both men at a location off a dirt road. Ward told her he shot Brown near one end of the vehicle, and Rutledge tried to get in the back of the *Sidekick* and Ward shot him.

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<sup>3</sup> Citations in the "Statement of Facts" are to the Appendix from Ward's 1<sup>st</sup> PCR appeal containing the trial transcript. Respondent asks this Court to take judicial notice of its own records. Wise v. Wise, 394 S.C. 591, 600, 716 S.E.2d 117, 122 (Ct. App. 2011).

Ward also told her he had gotten rid of the firearm, a Tech 9, he used to kill the two (2) men by throwing it in a creek and went back and got it later. He told her he dumped the vehicle in Dawhoo Lake. He told Denise if she said anything he would kill her and her children. After Ward's arrest for the crimes, Denise told police everything she knew about Ward's commission of the murders, including his possession of a Tech 9, 9mm firearm before the crimes. Another witness, Tracy Collins, also testified she had seen Ward with a 9mm with a banana clip two (2) months before the murders. (App. 389-422; 600-06).

Ward's wife, Beverly, also testified Ward borrowed her *Suzuki Sidekick* the morning of the victims' disappearance. Ward was only supposed to be gone one (1) or two (2) hours but did not return until 10:30 p.m. without her *Sidekick*. They argued and Ward left. The next day, Ward's mother drove Beverly and Ward to the Sheriff's Office where Ward informed police the two (2) victims, Brown and Rutledge, stole Beverly's *Sidekick* leaving Ward at a store. Ward filed a false police report to the same. The story was a lie because Ward had dumped the *Sidekick* in the lake because it had bullet holes and blood in it after Ward murdered the victims. At trial, Ward's wife claimed spousal privilege and refused to testify to anything Ward told her confidentially about the crimes, only what she witnessed. (App. 465-76).

*Kevin Cooper*<sup>4</sup> testified he knew both Ward and Brown. Cooper went by his mother's to eat lunch the Saturday the victims disappeared. While talking to a neighbor, Ward arrived with Brown. Ward was angry and complaining he lost money. Ward asked Cooper to buy 9mm bullets for him at Walmart. Cooper declined. Cooper overheard Ward tell the neighbor someone had

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<sup>4</sup> Cooper is the witness who is part of the subject of the Rule 29(b) motion based on after-discovered evidence that is before this Court. As will be shown, his testimony was brief and is cumulative to other witnesses. And, there was much more incriminating evidence admitted against Ward than Cooper's short testimony.

ripped him off and Ward was going to get the persons responsible. (App. 452-65).

On that same Saturday morning around 11:00 a.m., Ward showed up at Brown's mother Nadine's home to pick up Brown. She told Ward that Brown was not there but she could call him. Ward then said not to bother because Brown was on his way and he saw Brown coming down the street. Moments later Nadine looked outside and Ward's green Jeep type vehicle [*the Sidekick*] was gone. Nadine tried to reach her son that afternoon by phone with no response, which was unusual. Between 10:00 and 11:00 p.m., Ward called Nadine asking if she had seen Brown. She said no. Ward told Nadine that the victims had taken his wife's vehicle, *the Sidekick*, and left Ward at a store. Ward said his wife wanted the vehicle back and was threatening to go to the police. Nadine tried calling Brown again but there was still no response. The next morning Nadine filed a missing person's report. She never saw her son again. (App. 476-82).

Brown's wife, Indria, was sick that Saturday. About 2:00 p.m. Brown called and asked her what she wanted for lunch and stated he had gotten a ride from Ward. Brown, Ward, and Rutledge arrived about 3:10 p.m. with her food. The three (3) men were in a green *Suzuki Sidekick*. All three (3) men came inside. Ward left for about 20 minutes and returned. Then all three (3) men left in the *Sidekick* with Ward driving. Indria never saw her husband again. Later she was present when Ward told Nadine the victims had taken Ward's wife's car. He also told Indria the same story, the victims took his wife's car and left Ward stranded at a store. (App. 490-503).

Elton Rutledge, Sr., Rutledge's father, testified his son left their home on that Saturday afternoon. Rutledge told his father he was going to do something with a friend that would take about 20 minutes. Rutledge was friends with Brown. Rutledge never returned. His father never saw him alive again, but later identified shoes police recovered that his son Rutledge was wearing when he disappeared. (App. 516-28; 718-20).

On Sunday, August 4, 2002, Ward and his wife went to the police and reported the wife's *Suzuki Sidekick* stolen to Officer Danny Watson. Ward did most of the talking. Ward stated he had been with a man the previous day, Brown, when they picked up another male he only knew as "Elton" [Rutledge]. They went to a store about 4:00 p.m. Ward told the officer that while he, Ward, was in the store, Elton [Rutledge] got in the driver's seat and Brown got in the passenger seat, and those two (2) men left in the *Suzuki Sidekick* leaving Ward in the store. Ward said they never returned. Ward also told police the two (2) men had been talking about taking a trip out of town and Brown wanted to borrow the *Sidekick* or Ward to rent him a car. (App. 528-32).

Several days after the victims disappeared, Ward had his brother-in-law, Louis Bazen, drive to a location where Ward obtained a large burlap bag and then a shovel. Bazen then drove Ward to a location where Ward had buried something. Bazen testified Ward got out with the burlap bag and went into the woods with the shovel. Ward then came out of the woods dragging the burlap bag which Bazen thought contained a deer carcass. Ward put the bag in the trunk. Ward smelled awful upon reentering the car. Ward told Bazen to drive to another location off a dirt road where Ward got out, took the burlap bag out of the trunk, and drug it into the woods. Ward returned to the car, and Ward and Bazen left the area. Later, when riding by the area, Ward stated "the boys" were in that area. Bazen's conscience bothered him; he contacted police, and led police to portions of the remains of two (2) human beings and a burlap bag. There was evidence the bodies had been moved to this 2<sup>nd</sup> site from another location. Brown's badly decomposed body was identified from dental records. Family identified Rutledge's shoes that were found at the burial site. (App. 606-38; 642-64).

The autopsy determined Brown was shot in the back of the head. A deformed bullet was found in Brown's skull. A bullet was also recovered from the submersed *Suzuki*. It was

determined the bullets were consistent with a 9mm. Rutledge's body was too decomposed to determine if he was shot, but Ward bragged to others he shot him. (App. 669-78; 685-94; 718-20).

Months after Ward was arrested, Ward initiated contact with police. In Ward's statement to police on January 8, 2003, he stated he had phoned Brown wanting to purchase marijuana on August 3, 2002. Ward and Brown arranged to get together, and they later met up with Rutledge and Brian Elliott. The four (4) men shared drugs together. Ward claimed Brown pulled out a gun and demanded the money - over \$1,000 - Ward had on him. Brown also demanded Elliott's money. According to Ward, during the struggle that followed, Elliott disarmed Brown and shot Brown and Rutledge. Ward claimed he helped drag the bodies into the woods because Elliott "was freaking out." Ward said there was blood in the backseat of the car because of the shooting. Ward said Elliott threatened if Ward called the police he would kill his family "and drink my baby's blood." According to Ward, another friend, Denise Langston told Ward the police would not believe him, and he would be arrested. Ward stated Elliott had a bad crack addiction and lost interest in what occurred. However, Ward got the assistance of Bazen in moving the bodies to another location because he was worried they would be found. (State's Ex. 41; App. 728-38).

The State introduced evidence Brian Elliott, who Ward tried to frame for the crimes in his statement, was at home on the day of the crimes. Police recovered the green *Suzuki Sidekick* from the bottom of Dawhoo Lake. It had bullet holes in it where Ward had shot the victims and blood staining in the back passenger compartment consistent with Ward's story to his girlfriend Denise about the crimes and how he, Ward, had committed them. (App. 742-52; 555-570; 578-600).

## ARGUMENT

**The Court of Appeals should be affirmed where it only imposed the reasonable diligence standard of Rule 29(b), SCRCrimP, in denying Ward's motion, and Ward's motion that Juror 19 failed to disclose an alleged relationship by marriage to a 2nd cousin of her husband through his grandfather's brother, to a minor State's witness, was reasonably discoverable within one year of trial and is further too remote and unsubstantiated to meet the standard warranting a new trial when Juror 19 otherwise answered the court during voir dire that she had read about the case in the newspaper and could be impartial; further, Ward offered no proof at the hearing on his motion that Juror 19 knew the witness was a relative of her husband by 6<sup>th</sup> degree of consanguinity, or that counsel would have struck or moved to strike the Juror had he known of this alleged tenuous relationship.**

### *What Occurred Below at Trial as to this Juror*

In 2004, during jury selection prior to Ward's trial, the trial court presented Ward's jury panel with standard questions including whether any member of the panel had any preformed opinions about the case, any outside knowledge about the case, and whether any potential juror could not be impartial due to the nature of the charges. (R. 5-19). In response to one (1) question, Juror 19 informed the court she had read about the case in the newspaper. The Juror represented she could be fair and impartial during the trial of the case. (R. 35-36). Later, the State read its list of potential witnesses which included "Officer Danny Cooper," and "Kevin Cooper." (R. 48-49). The trial court questioned: "All right, is there any member of the jury panel who is related by blood or marriage or friends or business acquaintance with any of these potential witnesses? If so, please stand." (R. 49). No potential juror responded. (R. 50). Juror 19, who has the same last name as witness Kevin Cooper, was seated on the jury. (R. 57). At no time before, during, or after the trial did Juror 19 respond to the trial court that she believed she had any type of meaningful relationship to anyone listed as a witness. Other jurors did. (R. 62-82).

Ten (10) years' post-trial, Ward alleged in his 2<sup>nd</sup> successive Rule 29(b), SCRCrimP, motion for a new trial based on after-discovered evidence, filed in 2014, that Juror 19 "was, at the time of trial, related by marriage to one of the State's witnesses, Kevin Cooper, and failed to disclose this relationship to the Court during voir dire." (R. 467).<sup>5</sup> Ward alleged Juror 19's husband's grandfather is a brother of witness Kevin Cooper's grandfather. (Supp. R. 2-4). Ward supported this contention with two (2) sworn affidavits by the same person, Nicole Ward, who has the same last name as appellant Ward. Her first (1<sup>st</sup>) affidavit alleges the Juror and the witness Kevin Cooper are 3<sup>rd</sup> cousins by marriage. Her second (2<sup>nd</sup>) affidavit provides a family tree linking the witness and the *husband* of Juror 19 as second cousins, i.e. their grand-fathers were brothers. (R. 558-60). The Affidavits do not disclose the affiant, Nicole *Ward's* own connection to Petitioner *Ward*. (R. 558-60). **The Affidavits do not state that Juror 19 knew her husband was related to State's witness Kevin Cooper through her husband's grandfather's brother.** Ward's affiant Niolce *Ward* alleges she told Ward about the relationship of the juror to the State's witness about a year before she signed her affidavit, but she does not explain why she did not tell Ward for nine (9) years about this alleged relationship or why Ward did not ever ask her about the same. **Ward, himself, did not provide a sworn affidavit setting forth when he learned of this alleged new information and why he could not have discovered it sooner.** Ward offered no evidence below that Juror 19 in fact knew witness Kevin Cooper or knew that her husband and Cooper were second cousins through their respective grand-fathers. (R. 558-60). Ward did not even call Juror 19 as a witness or offer an affidavit from her or her husband at the hearing on his motion for a new trial. He did not call the State's witness Kevin Cooper or offer an affidavit from him. He did not call his affiant Rhonda Ward. He did not offer any affidavit from trial counsel

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<sup>5</sup> Ward alleged allegations against other jurors and a grand juror but abandoned those on appeal.

that he would have struck or moved to strike the Juror if he had known the Juror's husband was related to witness Kevin Cooper through their grandfathers.

A lengthy scheduled hearing on the motion itself and Respondent's motion to dismiss was held on October 2, 2017. (R. 498-541). In a written order filed December 7<sup>th</sup>, 2017, Judge Hyman granted the State's motion to dismiss and denied Ward's Rule 29(b) motion. (R. 561-64).<sup>6</sup> Judge Hyman found the Motion was time barred under Rule 29(b), SCRCrimP, because the information about the juror could have been discovered before trial or at least within one (1) year after trial, and certainly long before 2014, and the information about the juror did not constitute "after-discovered evidence" under Rule 29(b), SCRCrimP.

*What occurred in the Court of Appeals*

Ward appealed raising the same issue to the Court of Appeals. After full briefing by the parties, the Court of Appeals affirmed in an unpublished opinion. State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021). The Court of Appeals opinion was as follows:

**PER CURIAM:** Jody Lynn Ward appeals his double homicide conviction and concurrent sentences of life imprisonment. On appeal, Ward argues the circuit court erred in denying his motion for a new trial based on after-discovered evidence. He alleges a juror intentionally withheld the fact she was the second cousin, by marriage, of a State's witness. Ultimately, Ward asserts this information constitutes after-discovered evidence because it was not discoverable at the time of trial. We find the circuit court did not abuse its discretion in denying Ward's motion for a new trial based on after-discovered evidence. The State provided Ward with a list of potential witnesses during voir dire in March 2004. At that time, the relationship between the juror and the witness could have been ascertained by the exercise of reasonable diligence. Ward did not file his motion for a new trial based on after-discovered evidence until October 30, 2014, almost a decade after Ward was on notice that the juror and the witness shared a common last name.

Accordingly, we affirm pursuant to Rule 220(b) of the South Carolina Appellate Court Rules, and the following authorities: State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("The decision whether to grant a new trial rests within the sound discretion of the trial court, and [an appellate court] will not

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<sup>6</sup> In the Order, Judge Hyman also denied the claims raised against other jurors and a grand juror.

disturb the trial court's decision absent an abuse of discretion."); *id.* at 167, 672 S.E.2d at 565 ("The deferential standard of review constrains [this court] to affirm the trial court if reasonably supported by the evidence."); Rule 29(b), SCRCrimP ("A motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence.").

## **AFFIRMED<sup>1</sup>**

**LOCKEMY, C.J. and HUFF, and HEWITT, JJ., concur.**

[n. 1 We decide this case without oral argument pursuant to Rule 215, SCACR]

Ward, *supra*. (App. 49-50). Ward's petition for rehearing was also denied. (App. 54). This Court granted certiorari to review the Court of Appeals Opinion immediately above.

The Court of Appeals should be affirmed because the Court of Appeals did not err. The Rule 29 motion was untimely. Further, even if this Court were to conduct a merits determination, Ward's Rule 29 motion has no merit.

## **STANDARD OF REVIEW**

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). This deferential standard of review constrains this Court "to affirm the trial court if reasonably supported by the evidence." *Id.* at 167, 672 S.E.2d at 565; State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011).

"The granting of a new trial because of after-discovered evidence is not favored," and this Court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197-98 (1978); Harris, *supra*. As this Court held in State v. Rhodes, 44 S.C. 325, 327, 21 S.E. 807 (1895):

We, however avail ourselves of this opportunity to say that the universally recognized doctrine is that applications of this kind should be scrutinized with great

caution, in order to avoid delays, and prevent any obstructions to the administration of justice. As was said by the late Chief Justice Simpson in the case of State v. David, 14 S.C. 428, 432 (1881), “There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and as was said in the case of State v. Harding, 2 S.C.L. 267, 268 (S.C. Const. App. 1800), it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed, to allow one with his life in danger, an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice”

Rhodes, 44 S.C. at 327, 21 S.E. 807.

A motion for a new trial based on after discovered evidence of juror concealment or misconduct is also disfavored and carefully scrutinized; and, affidavits attacking the integrity of a juror should be received with caution, deliberation, and circumspection. State v. Kennedy, 177 S.C. 195, 207, 181, S.E.35, 40 (1935).

*As the Court of Appeals found, the Rule 29(b) Motion is untimely and even under a merits review by this Court under the appropriate standard there is no merit to the Rule 29(b) Motion*

Here, as Judge Hyman noted, Ward raised this claim in a Rule 29(b), SCRCrimP Motion for a New Trial based on after-discovered evidence filed in the Court of General Sessions. When a Rule 29(b), SCRCrimP motion is filed in General Sessions the timing provisions of Rule 29(b) apply. Rule 29(b), SCRCrimP. See State v. Woods, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001). Here, in the present case, the motion was clearly untimely, **a decade after trial**.

This Court should affirm the Court of Appeals because the Court of Appeals only found below that the motion was untimely under Rule 29(b), SCRCrimP, which is correct. State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021)(Unpublished). The Court of Appeals did not find or even

discuss whether the McCoy/Woods<sup>7</sup> factors or Spann/Clark<sup>8</sup> factors were applicable in this situation because it did not reach that point; it simply found the motion was untimely under Rule 29(b), SCRCrimP, given the allegations of this Motion and the affidavits submitted by Ward. Ward, supra. That determination is supported by the record.

***The Court of Appeals appropriately applied a reasonable or due diligence standard on Ward***

In his Brief, Ward first alleges Judge Hyman and the Court of Appeals imposed an improper requirement into Rule 29(b), SCRCrimP on defendants to conduct a genogram on prospective jurors. Ward is wrong. Neither the Court of Appeals nor Judge Hyman imposed such a requirement on Ward. The only requirement the Court of Appeals or Judge Hyman imposed on Ward is the same requirement that has always been present in a Rule 29(b), SCRCrimP motion for a new trial based on after-discovered evidence filed in General Sessions Court, reasonable or due diligence. Rule 29(b), SCRCrimP; **Kennedy, 177 S.C. 195, 181 S.E. 35** (motion for a new trial based upon after discovered evidence of juror concealment or misconduct was properly denied on two (2) grounds: (1) there was nothing in defendant's affidavit to show the information relied upon for a new trial, a statement of a juror pre-trial, could not have been obtained by due diligence *long before the defendant's conviction was affirmed*, or even during trial; and (2) such allegations of juror misconduct should be carefully scrutinized); **State v. Meehan, 160 S.C. 111, 158 S.E.151 (1931)**(motion for new trial based upon after discovered evidence of juror concealment or misconduct denied where there was nothing in defendant's affidavits to show the statement alleged in the affidavits made by the juror could not have been obtained with due diligence beforehand).

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<sup>7</sup> McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623 (2013); State v. Woods, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001).

<sup>8</sup> State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

Ward also alleges Judge Hyman erroneously and summarily dismissed his motion for a new trial based on after-discovered evidence because the Court did not take testimony on the issue of Juror 19's alleged familial connection to witness Kevin Cooper. Rule 29, SCRCrimP provides that a post-trial motion made in the Court of General Sessions pursuant to Rule 29, SCRCrimP, "may, in the discretion of the court, be determined on briefs filed by the parties without oral argument." Rule 29(a), SCRCrimP. However, here, **after a scheduled hearing on the motion three (3) years after the motion was filed**, and oral argument, and post-hearing briefing, Judge Hyman denied Ward's motion on the basis it was not timely made and the alleged after-discovered evidence was "not new 'evidence'":

The Court heard oral arguments and reviewed the filings including supporting documents submitted by the parties on the remaining two pending motions. Initially, the Court finds that the Defendant filed this motion in violation of the limitations contained in SCRCrimP Rule 29(b). . . .

The Court finds the information cited by the Defendant in the current motion, even if true, is not material evidence as to this Defendant's guilt or innocence and would not change the result if a new trial were granted.

The alleged new evidence cited in the Defendant's motion was known to the defendant and counsel or could have been ascertained by the exercise of reasonable diligence prior to and at the time of trial in 2004 and certainly within one year after conviction. The claims are based on common last names with extended family relatives or based on personal relationships with named individuals the Defendant or Defendant's family knew personally prior to trial. Juror background information and the State's witness list was provided to the Defense during *voir dire* which occurred prior to jury selection. That information continued to remain unchanged and available for one year after conviction and is not new "evidence" as to the defendant's guilt.

(R. 561-64).<sup>9</sup> The Court of Appeals appropriately affirmed *based on the untimeliness of the*

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<sup>9</sup> Judge Hyman also ruled the motion was improperly filed during the pendency of the appeal from his initial [1<sup>st</sup>] Rule 29(b), SCRCrimP motion because the Court of Appeals denied the motion to stay that appeal. (R. 562). See Rule 224, SCACR; State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Petitioner does not mention this ruling by Judge Hyman or other contemporaneous rulings in the instant action and that conclusion is not before this Court for review. See State v. Lindsey,

*motion* under Rule 29(b), SCRCrimP. State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021)(Unpublished). Therefore, this Court should affirm the Court of Appeals. Id.

While the underlying claim can be classified as one of juror misconduct due to Juror 19's *alleged* concealment of a relationship through marriage to an alleged extended family member of her husband, witness Kevin Cooper, the allegation found its way before the court pursuant to a Rule 29(b), SCRCrimP motion for new trial based on after-discovered evidence and was appropriately dismissed based upon procedural constraints appearing within and arising out of Rule 29(b), SCRCrimP. This Court will not ignore the timeliness rule of Rule 29(b), SCRCrimP simply because the alleged newly discovered evidence is one of juror misconduct or concealment. Rule 29(b), SCRCrimP; Kennedy, 177 S.C. 195, 181 S.E. 35.

Further, the record shows the hearing before Judge Hyman was on **Ward's Motion for a New Trial based on after-discovered evidence and on the State's Motion to Dismiss.** (R. 498-541).<sup>10</sup> Ward was aware the hearing was going to take place, and he did not subpoena or call any witness at the hearing, nor did he introduce any other affidavits than the two (2) submitted by Nicole *Ward*, **even though it had been approximately three (3) years since the Rule 29(b) motion was filed.** See Smith v. Phillips, 455 U.S. 209 (1982)(in cases where juror impartiality is

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394 S.C. 354, 714 S.E.2d 554 (Ct. App. 2011) (argument abandoned on appeal if not briefed); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (defendant's statement he had no objection to entry of evidentiary item "amounted to a waiver of any issue"). Instead, Ward argues his 2<sup>nd</sup> Rule 29 motion was timely because the Court of Appeals in its Order denying the Stay request permitted the circuit court to consider any other motion not related to the appeal. (See BOA).

<sup>10</sup> At the hearing, the State argued both the merits of Ward's Rule 29(b) Motion and its' Motion to Dismiss the Rule 29(b) Motion. Ward's counsel argued he was at the hearing to address several things including a request for, and to flesh out how and when, an evidentiary hearing would be held. He also argued against the Motion to Dismiss. Judge Hyman eventually stated on the record, after much argument, he considered both the Rule 29(b) Motion and the Motion to Dismiss part of a hearing on the merits. He asked both parties to brief the issue of whether the Rule 29(b) Motion should be dismissed, and then he would schedule another hearing if necessary. (R. 498-541).

questioned after trial, it is appropriate to conduct a hearing in which the defendant *has the opportunity* to prove actual juror bias; such a hearing satisfies due process); *see Remmer v. United States*, 347 U.S. 227 (1954);<sup>11</sup> *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003); *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013)(“Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing.”). Appellant Ward had a hearing on his motion, he simply failed to meet his burden of proof to show juror misconduct at that hearing. *McCoy, supra; Woods, supra.*

As a result, there is no merit to this argument. While “[n]othing required the trial court or a party to hail a juror into court to testify on the issue of juror misconduct *under the circumstances presented here* [.],” *State v. Rowell*, \_\_\_ S.C. \_\_\_, 870 S.E.2d 175 (Ct. App. 2022)(emphasis added), Ward was aware of the hearing and could have subpoenaed or called the juror, her husband, the State’s witness Kevin Cooper, his affiant Nicole Ward, or any other witness, or obtained an affidavit from them on this issue to prove juror misconduct, i.e. intentional concealment of an alleged marital relation by the 6<sup>th</sup> degree of consanguinity, and he failed to do so. *See S.C. Code Ann.* Section 19-7-60 (providing criminal defendants have compulsory process for obtaining witnesses to testify in their favor); *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008)(providing Section 19-7-60 “allow[s] criminal defendants to compel witnesses to appear in their favor and to produce witnesses and evidence at trial.”); *State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999)(“An appellant has a duty to provide this [c]ourt with a record sufficient for review of the issues on appeal.”); *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999)(holding the trial court may, in its discretion, consider juror affidavits on

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<sup>11</sup> *Remmer* found a presumption of prejudice when a juror was contacted in an attempt to bribe the juror. This Court found in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020) there was no presumption of prejudice simply because a juror has contact with court personnel such as a bailiff.

the issue of premature jury deliberations and if the trial court finds the affidavits credible and indicative of misconduct it should hold an evidentiary hearing to assess whether such deliberations occurred); Lynch v. Carolina Self Storage Ctrs. Inc., 409 S.C. 146, 159 n. 2, 760 S.E.2d 111m 119 n. 2 (Ct. App. 2014)(noting “ a trial court is not obligated to take juror testimony when the court determines it can rule” on the misconduct issue without it); Id. at 155, 760 S.E.2d at 116 (stating “[i]f the court finds no intentional concealment occurred the inquiry ends there”). Instead, Ward relied only on the two (2) affidavits of Nicole Ward that did not prove intentional concealment at all. Nicole Ward did not even state her relation to Appellant Ward or why Appellant Ward did not learn this information from her sooner. Even if Judge Hyman accepted the affidavits of Nichole Ward as true, that does not mean the Juror knew the witness at issue, Kevin Cooper, or that the Juror knew that her husband was related to the witness through her husband’s grandfather’s brother’s descendant.

- A. Juror 19’s alleged relation to one of the State’s witnesses (second cousins through marriage) could have been discovered within one (1) year of trial with exercise of reasonable diligence because any potential relation was provided to the defense prior to jury selection and was likewise available to Ward within one (1) year of trial.

Foremost to the consideration of a Rule 29(b), SCRCrimP motion is its timing. “A motion for a new trial based on after-discovered evidence must be made within one [1] year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence.” Rule 29(b), SCRCrimP. This is true regardless of whether the claim raised is one of juror misconduct or some other issue. Id.

Ward stood trial in March 2004. (R. 2). As represented by the State during the motion hearing, Ward was provided the State’s witness list and background information on the potential jurors during voir dire. (R. 520). Ward does not contest the availability of that information, only the reasonableness of its discovery. (R. 528). However, as pointed out by Judge Hyman, Juror 19

and the State's witness, Kevin Cooper, share a last name and hail from Georgetown County. (R. 3, 83-84, 529). Ward and his affiant Nicole Ward share the same last name.<sup>12</sup>

Thus, to the extent the Circuit Court distinguished McCoy, a PCR action, from Ward's case it is irrelevant because the Rule 29 motion was **untimely**. (R. 562-63). As the Court of Appeals correctly found, Judge Hyman appropriately denied the Rule 29(b) motion, ten (10) years later, and granted the motion to dismiss because the information forming the basis for the allegation in the Rule 29(b) motion was previously available to Ward and could have been discovered and raised within the time limit delineated within Rule 29(b) SCRCrimP. See State v. Allen, 276 S.C. 412, 414, 279 S.E.2d 365, 366-67 (1981) ("Here, Ballard's federal conviction was a matter of public record. It was available to the respondent and his counsel through due diligence and did not constitute after-discovered evidence."); see Hassell v. City of Columbia, 430 S.C. 620, 629, 846 S.E.2d 373, 378 (Ct. App. 2020)("The City did not provide any affidavits or other evidence to show it did not or could not have known of the information prior to the verdict or within the time frame for post-trial motions"). The Court of Appeals appropriately affirmed the dismissal of this Rule 29(b), SCRCrimP motion because it was untimely under Rule 29(b). Ward, *supra* (Unpublished). This Court should affirm the Court of Appeals because it did not err.

Also, here the affidavit(s) on which *Ward* relies are from Nicole *Ward*, who has the same last name as Appellant, and who admits she is related to the State's witness and Juror 19 by marriage. And, Appellant Ward *knew* the State's witness Kevin Cooper as well, as testified to at trial by the State's witness Kevin Cooper. (App. 452-65). So, Ward could have discovered any

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<sup>12</sup> It is important to note here that Ward's affiant Nicole Ward *does not disclose* what if any relation she has to Appellant Ward in either her first or second affidavit. Respondent submits Ward could have talked to his affiant Nicole Ward prior to trial or at any time prior to the signing of her first affidavit some nine (9) years after his trial.

relation between Juror 19 and the State's witness, if any, prior to jury selection or **at least within one (1) year after his conviction and long before 2014, a decade after trial.** Kennedy, supra.

For the same reason, it was unnecessary to apply the substantive legal standard pertaining to claims of juror misconduct. Because "juror misconduct is a separate basis for a new trial, it is governed by a separate standard." McCoy, 401 S.C. at 371, 737 S.E.2d at 627. "**Provided a claim is timely raised,**" a defendant may garner a new trial "on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Id. (emphasos added) (citing State v. Woods, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001)). As discussed, Ward's claim was untimely pursuant to Rule 29(b), SCRCrimP. It was then unnecessary for the Circuit Court to proceed to the merits of the motion as it pertained to Juror's 19's *alleged* concealment. It was unnecessary for the Court of Appeals to reach the merits of the motion. This Court should affirm the denial of Ward's 29(b) motion by the Court of Appeals, because, the Rule 29(b) Motion was untimely. Ward, supra; Rule 220(c), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (on appeal, a respondent may raise on appeal any additional reason the appellate court should affirm, regardless of whether the lower court ruled upon that reason).

B. Juror 19's alleged sixth-degree relation by marriage to one of the State's witnesses was not evidence of juror misconduct or concealment under the McCoy/Woods standard to a Rule 29(b), SCRCrimP motion because the alleged relation was dubiously presented, no intentional concealment was proven, and the relation too remote to be found to materially affect the outcome of the trial or jury selection.

In South Carolina, traditionally, to obtain a new trial pursuant to Rule 29(b), SCRCrimP, based on after discovered evidence, a defendant must show the five (5) factors set forth in State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999); Clark v. State, 315 S.C. 385, 387-88, 434

S.E.2d 266, 267 (1993). See State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993). According to that standard, a defendant seeking a Rule 29(b) motion for a new trial based on after-discovered evidence must show the evidence "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching". Spann, 334 S.C. at 619-20, 513 S.E.2d at 99; Clark v. State, 315 S.C. at 387-88, 434 S.E.2d at 267 (citing Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983)). "Material" means when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence. McCoy v. State, 401 S.C. at 371, 737 S.E.2d 623 (citing as e.g. State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993))(noting that to obtain a new trial based on newly discovered evidence, the evidence must be material to the issue of guilt or innocence).

In addition to finding the Rule 29(b) motion untimely, Judge Hyman also found the information pertaining to Juror 19 "is not new 'evidence' as to the defendant's guilt." (R. 563). As cited by the circuit court, traditionally, under Rule 29(b) "to obtain leave to seek a new trial based upon after-discovered evidence, an appellant must make a *prima facie* showing before this Court of the five (5) elements of Spann. State v. Prince, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993); Spann; see also Mercer, 381 S.C. at 166, 672 S.E.2d at 565; State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998). What Ward offers, by his own admission, is not material evidence of guilt. However, this is not the correct standard. See McCoy; Woods.

Juror misconduct discovered post-trial is not properly considered "newly discovered evidence." McCoy, 401 S.C. at 371, 737 S.E.2d at 627, (Referencing as e.g. State v. Sheppard, 155 Vt. 73, 582 A.2d 116, 118 (1990))(evidence of juror misconduct is not properly considered newly discovered evidence because it has no bearing on the issue of innocence or guilt and does not

concern the substance of the State's case or an accused's defense). In McCoy, this Court recognized a defendant raising a claim of after-discovered evidence based on juror misconduct in post-conviction relief (PCR) would not be governed by the five (5) factor Spann or Clark analysis but the two (2) factor analysis of juror misconduct. McCoy, 401 S.C. at 370-71, 737 S.E.2d at 627.<sup>13</sup> In State v. Woods, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001), this Court recognized that a *timely* Rule 29(b) motion for a new trial based on after-discovered evidence based on juror concealment was governed by the two (2) factor analysis of juror misconduct as well. The defendant must show: (1) intentional concealment, and (2) the concealed information would have led to a strike for cause or influenced the intelligent exercise of a peremptory challenge. Woods, *supra*.<sup>14</sup>

While the circuit court erroneously applied the alternate standard of Spann/Clark to the alleged juror concealment claim, **the Court of Appeals did not.** Ward, *supra*. The Court of Appeals merely found the claim of alleged juror concealment was untimely under Rule 29, SCRCrimP, as Judge Hyman correctly found below. The Court of Appeals should be affirmed.

***There is no merit to the Rule 29 Motion under the appropriate standard***

However, even if this Court applies the appropriate standard of claims of juror concealment enunciated in McCoy, *supra*, and arising from Woods, *supra*, there is no merit to this Rule 29(b) motion. In Woods, this Court granted a new trial where the defendant established, pursuant to a

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<sup>13</sup>“For the benefit of the bench and bar,” McCoy addressed “the frequent but erroneous application of the standard newly discovered evidence framework in summarily dismissing *PCR claims* involving juror misconduct. . . .” McCoy, 401 S.C. at 370-71, 737 S.E.2d at 627 (emphasis added).

<sup>14</sup> Ward cites two (2) cases for the proposition that there are other cases where this issue was raised in a motion for new trial; however, that is actually incorrect. In those 2 cases, the issue was raised in a *motion for a mistrial* not a Rule 29(b) motion for a new trial. See State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (1991), *called into question on other grounds by* Green v. State, 338 S.C. 428, n.4, 527 S.E.2d 98 (2000); State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004).

timely Rule 29(b), motion for a new trial based on after-discovered evidence, made before sentencing, that a seated juror failed to disclose prior work as a volunteer victims' advocate in the same prosecuting office. The Court found: (1) the juror intentionally concealed the information and (2) had counsel been informed of the juror's prior volunteerism, the information would have materially affected counsel's intelligent use of peremptory challenges. 345 S.C. at 590-91, 550 S.E.2d at 285-86.

But Ward's case is distinguishable from Woods for several reasons, each of which demands affirmance, none of which were specifically cited by the Circuit Court. Ex parte Morris, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (Although family court erred in rejecting request for an evidentiary hearing, "...we affirm the result in this case."); Columbia Architectural Grp., Inc. v. Barker, 274 S.C. 639, 642, 266 S.E.2d 428, 429 (1980) (this Court may affirm when satisfied the circuit court reached the correct result); Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("In this state it has long been recognized that a right decision based upon a wrong ground will be affirmed.").

Within the *affidavits* of Nicole Ward affixed to the motion, Juror 19 is described variously as 3rd cousins and then 2nd cousins by marriage to witness Kevin Cooper. (**R. 558-60; Supp. R. 18-20**). Given the source of the information and its inconsistent claims, the claim is dubious at best. However, even *assuming* the latest affidavit is true: "Technically speaking, a second cousin is one who is descended from a common great-grandfather and bears the relationship in the sixth degree" of consanguinity. S.C. Nat. Bank of Columbia v. Bates, 175 S.C. 168, 178 S.E. 611, 613 (1935). Thus, a second cousin can be described as the grandchild of a grandparent's sibling, or as a child of a parent's first cousin. It is a relationship of collateral, rather than vertical, consanguinity

because it terms a relationship “between persons who have the same ancestor but do not descend or ascend from one another.” CONSANGUINITY, *Black’s Law Dictionary* (11th ed. 2019).

There is no question Juror 19 is **not** related by blood to the State’s witness Kevin Cooper. Respondent would note it is questionable under South Carolina case law whether she would even be considered *related by marriage* to the sixth degree of consanguinity to witness Kevin Cooper. See State v. Logue, 204 S.C. 171, 28 S.E.2d 788 (1944), discussing State v. Howell, 167 S.C. 380, 166 S.E. 409 (1932) and Gant et. al v. Belk Simpson Co., 171 S.C. 43, 174 S.E. 1 (1934) In Howell, the first cousin of the wife of the juror had married the defendant. This Court upheld the trial court’s denial of the motion for a new trial based on after discovered evidence where the trial court found the juror was *not related by blood or marriage* to the defendant. In Gant et. al, the plaintiff was the sister of the wife of the brother of the challenged juror. The trial judge held the juror was *not related by blood or marriage* to the plaintiff. On appeal, this Court affirmed. Id. Then in Logue, *supra*, the Court found that where the juror stated that the victim’s sister had married the juror’s first cousin, and that the sheriff’s sister had married the juror’s uncle, the juror was not related within the sixth degree, *either by blood or marriage* to any of the parties; although the juror had these family connections, such connections were not of the family relationship which would place them within the prohibition of the rule of relations within the sixth degree.<sup>15</sup> The above cited cases seem to imply *relation by marriage* to a witness is not simply a matter of a

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<sup>15</sup> Despite Logue’s implying there was a 6<sup>th</sup> degree of consanguinity rule, this Court later held in Smith v. Quattlebaum, 223 S.C. 384, 388, 76 S.E.2d 154, 156 (1953) and State v. Wells, 249 S.C. 249, 260, 153 S.E.2d 904, 910 (1967)(quoting State v. Hilton, 87 S.C. 434, 69 S.E. 1077 (1911)) that there is no common law rule or statute which automatically disqualifies a juror from jury service on account of his family relationship to a witness, whether by affinity or consanguinity, **within any degree**. See also Savage, 305 S.C. 5, 409 S.E.2d at 810, quoting Smith v. Quattlebaum (recognizing the same principle). In Hilton, 87 S.C. 434, 69 S.E.1077, this Court held a juror who is related *by blood* within the sixth degree to the State’s prosecuting witnesses **was not a disqualified juror**.

witness being a relative of your spouse, such as a cousin. See Logue; Howell; Gant et. al. Again it is even questionable Juror 19 is what our law defines as “related by marriage” to witness Kevin Cooper. Id.

This *alleged* relationship of the Juror to the State’s witness, whatever it is, and however this Court characterizes it, is quite different from that requiring a new trial in Woods because it bears no straightforward relation to either party to the trial *or* to the State’s witness like Woods’ juror, who volunteered as a victims’ advocate in the prosecuting office. Here, Ward has offered no evidence, much less any credible evidence the Juror’s husband knew Steve Cooper was his 3<sup>rd</sup> or 2<sup>nd</sup> cousin, much less any evidence *Juror 19 knew the witness was her husband’s relation by the 6<sup>th</sup> degree of consanguinity.* McCoy, supra; Woods, supra. “The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.” State v. Kelly, 331 S.C. 132, 147, 502 S.E.2d 99, 106 (1998)(quoting Thompson v. O’Rourke, 288 S.C. 13, 15, 339 S.E.2d 505 506 (1986).

Respondent would additionally note *the allegation* Juror 19 concealed this information is of dubious credibility, since Ward would have the Court believe that Juror 19 violated instructions of the trial judge during voir dire and the affiant does not aver the juror actually knew her husband was related to the witness through his grandfather’s brother. See Green, supra (declining to adopt a presumption of prejudice in that case). Contrary to Ward’s unsubstantiated allegations, jurors are presumed to follow jury instructions. *E.g.*, State v. Young, 420 S.C. 608, 623, 803 S.E.2d 888, 896 (Ct. App. 2017). In fact, Juror 19 reacted to the court’s instructions and questions during voir dire when she disclosed she had read about the case in the newspaper, thus indicating she was capable of and interested in following the Court’s instructions. (R. 35-36). She did not hide that she had read about the case.

Worse, Ward failed to lay a record as to when or how he supposedly discovered the information that gave rise to these allegations by him. In other words, he has made no demonstration he could not have raised these assertions at some earlier point in the ten (10) years he had been litigating his convictions and sentence. He likewise does not indicate why he believes Juror 19 deliberately failed to reveal a relationship of her husband to the sixth (6<sup>th</sup>) degree of consanguinity. Even if the last affidavit is true, there simply is no evidence Juror 19 knew the witness was her husband's 3<sup>rd</sup> cousin or 2<sup>nd</sup> cousin *and* intentionally concealed the relationship. Woods, supra. See also McCoy. Ward had three almost (3) years from the filing of his Rule 29(b) motion for a new trial to obtain evidence on this issue and he presented none but the two (2) affidavits filed with his motion from a woman with the same last name as Appellant Ward.

Indeed, in addition to the motion's untimeliness, Ward's motion was properly denied because he did not submit an affidavit, *by himself*, averring the after-discovered evidence and the facts to which the witnesses will testify, as well as the fact he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. Rule 220(c), SCACR; I'On, L.L.C., supra. Nearly fifty (50) years ago, this Court found that such an affidavit is necessary when a criminal defendant seeks a new trial based upon after-discovered evidence

As is heretofore stated, the appellant did not file his own affidavit setting forth the after-discovered evidence and the facts to which the witnesses will testify. It is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused himself. Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. An affidavit of the appellant's counsel showing these matters is not sufficient. 24 C.J.S. *Criminal Law* s 1484c, page 286. Chilton v. Commonwealth, 170 Ky. 491, 186 S.W. 191. Nothaf v. State, 91 Tex.Cr.R. 378, 239 S.W. 215, 23 A.L.R. 1374.

Viewing the record in this case in the light of the affidavit made in support of the motion and in the light of the foregoing principles of law, we find no abuse of discretion, amounting to an error of law, on the part of the trial judge in refusing the motion of the appellant for a new trial based on after-discovered evidence.

State v. DeAngelis, 256 S.C. 364, 371-72, 182 S.E.2d 732, 735 (1971). Rhonda Ward's affidavits are insufficient.

Further, if a juror fails to disclose a relationship during *voir dire*, that juror may only be inferred to have been impartial only if there is no justification for the failure to disclose—but “where the failure to disclose is innocent, no such inference may be drawn.” Woods, 345 S.C. at 587-88, 550 S.E.2d at 284. There is a demonstrable difference between intentional and unintentional concealment which precludes Ward from meeting any standard demanding the relief requested including McCoy. “Although it may be inferred that a juror is not impartial if she fails to disclose a relationship without justification, such an inference may not be drawn where there is information to the contrary or the failure to disclose is innocent.” State v. Guillebeaux, 362 S.C. 270, 275, 607 S.E.2d 99, 102 (Ct. App. 2004) (citing State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002) (juror's failure to disclose acquaintance with witness was innocent and too “scant” to materially affect the fitness or any challenge for cause)). Here there is a reasonable explanation that Ward has not disproved: Juror 19 simply did not know her husband had a 3<sup>rd</sup> or 2<sup>nd</sup> cousin named Kevin Cooper and did not recognize the witness as any relation to her husband.<sup>16</sup>

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<sup>16</sup> Many individuals do not know the names or even existence of grand-children of their grand-parents' siblings. Much less **do their spouses know** the names or even existence of the grand-children of *their spouse's* grand-parents' siblings. That is what we are talking about here. Ward has not offered any proof that Juror 19 knew Kevin Cooper was a relative to her husband through her husband's grand-father's brother. As a result, Ward has not proven jury concealment. Woods; McCoy.

Intentional concealment occurs when a reasonably comprehensible question is presented to the juror “and the subject of the inquiry is of such significance that the juror’s failure to respond is unreasonable.” Id. at 588, 550 S.E.2d at 284. Even then, “relief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party’s peremptory challenges.” Thompson v. O’Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). This final inquiry requires focus on the character of the information alleged to have been concealed. Id.; See Savage, 306 S.C. at 7-8; 409 S.E.2d 810 (no evidence Savage or his attorney would have exercised a peremptory strike if they had known juror and witness were 3<sup>rd</sup> cousins).

“Unintentional concealment, on the other hand, occurs . . . where the subject of the inquiry is insignificant or so far removed in time that the juror’s failure to respond is reasonable under the circumstances.” Woods, 345 S.C. at 588, 550 S.E.2d at 284. It is not unreasonable to fail to disclose a relationship by marriage to the sixth degree of consanguinity, even assuming the relation was in existence at the time of Ward’s trial in March 2004. State v. Galbreath, 359 S.C. 398, 403-04, 597 S.E.2d 845, 847-48 (Ct. App. 2004) (no intentional concealment where the juror accurately answered the specific question posed and the alleged relationships did not amount to close personal friends or business associates).

Ward’s submission of two (2) affidavits by Nicole Ward fails to establish the Juror at issue had any intent to conceal information from the court in a manner warranting an inference of bias, and Ward himself failed to file his own affidavit setting forth any belief in support of Juror 19’s intentional concealment of that information. On the record, Juror 19 responded she could be fair and impartial towards each side in this case. **(R. 36)**. Any non-disclosure was justifiably innocent based upon the existing record and no inference of impartiality should be drawn. Guillebeaux,

*supra*; See Savage, 306 S.C. 5, 409 S.E.2d 809 (juror did not intentionally conceal he was 3<sup>rd</sup> cousin to a State’s witness); Cf. Smith v. Quattlebaum, 223 S.C. 384, 76 S.E.2d 154 (1953) (holding that the trial judge did not abuse his discretion in refusing to grant a mistrial after it was discovered that, through inadvertence, a juror had not disclosed his relationship to a party).

The record in Ward’s case lends itself to the decision reached in Guillebeaux rather than that reached in Woods, *supra*. Guillebeaux moved for a new trial, alleging a juror failed to disclose a social relationship with the State’s chief witness even though the juror only recognized that witness from the community and had never conversed with the witness “beyond saying ‘hi’ in passing on the street.” 362 S.C. at 273, 607 S.E.2d at 101. The Court affirmed the resolution by the trial court, finding no intentional concealment, finding that it was “a reasonable response” to fail to reveal her limited knowledge of the witness, and finding the rare exchange of greetings did not constitute a “social relationship,” which was the degree of relationship the jurors were asked to disclose during voir dire. Id. at 275-76, 607 S.E.2d at 102. “Further, [the] Juror indicated during voir dire that she knew of no reason she could not be impartial to both the defense and the State and there [was] no evidence to the contrary.” Id. Finding no intentional concealment, the Court declined to further address “whether the information would have been a material factor in the exercise of Guillebeaux’s peremptory strikes.” Id. Juror 19’s relation, if established, is similar in nature. Like Guillebeaux’s juror, Juror 19 otherwise indicated during voir dire that she could be fair and impartial. (R. 35-36). Given the record in Ward’s case, the alleged marital, sixth-degree connection cited within the affidavit at issue fails to demonstrate a significant connection to the jury’s determination of Ward’s guilt or innocence.<sup>17</sup> See also Wilson v. Childs, 315 S.C. 431, 437-

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<sup>17</sup> The witness, Kevin Cooper, testified briefly he overheard Ward complaining about someone ripping him off in front of Brown, and Ward wanted the witness to buy him bullets, which the witness refused to do. Other witnesses testified to Ward complaining it was Brown who ripped

38, 434 S.E.2d 286, 290 (Ct. App. 1993) (trial court's refusal to exclude jurors for cause justified where appellant identified no circumstances suggesting any juror dishonestly declared his or her impartiality and jurors otherwise state their ability to be impartial). See State v. Hilton, 87 S.C. 434, 69 S.E.1077 (1911)(a juror who is related by blood within the sixth degree to the State's prosecuting witnesses was not a disqualified juror)(quoted in State v. Wells, 249 S.C. 249, 260, 153 S.E.2d 904, 910 (1967). The affidavit fails to establish the Juror even knew or was acquainted with a witness who was allegedly related to her husband by sixth-degree connection. See Savage, *supra*.

In fact, by only requesting a remand for another hearing where he can attempt to establish juror concealment (See BOA, p. 13), Ward as impliedly conceded he has not established or proven juror concealment in this case. As a result, the Court of Appeals should be affirmed.

As to impartiality in a broader sense, Ward's presentation continues to fall short of the standard demanding relief. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Phillips, 455 U.S. at 217. A criminal defendant is guaranteed "a fair trial by a panel of impartial and indifferent jurors." State v. Bryant, 352 S.C. 390, 581 S.E.2d 157 (2003). Yet "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." Phillips, *supra*. "The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might

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him off and Ward was going to Walmart or was at Walmart purchasing bullets. Others also testified Brown was last seen alive with Ward later after the witness. Ward admitted to police he was present when the victims were murdered. Ward's own brother-in-law was with Ward when he retrieved the victims' decomposing bodies from the woods and moved them to another location.

theoretically affect their vote.” Id. Ward’s affidavits fail to make a *prima facie* showing that Juror 19 intentionally failed to disclose a known material relationship and, as such, the allegation, even if true, was not laden with potential to change the result of the trial. *See, e.g., Hayden*, 278 S.C. at 612, 299 S.E.2d at 856 (holding after-discovered evidence of an alleged setup could have been discovered before trial by the exercise of due diligence and would not change the outcome in a new trial due to it being hearsay made by an unimportant and impeachable witness).

Witness Kevin Cooper’s testimony was brief and was cumulative and not as strong as other evidence Ward was angry with someone for ripping him off, including the victim Brown, and went to Walmart and bought bullets. (See testimony of Ward’s girlfriend who testified to her phone conversations with Ward throughout the day of the murder (App. 465-76)). Ward told his girlfriend someone had “ripped him off” and he was going to get his money back or the persons responsible including Brown. He later told his girlfriend that he was at Walmart buying bullets. She told him not to do anything stupid. (App. 465-76). And, Brown’s own mother testified Ward came to her house looking for Brown later that afternoon, after State’s witness Kevin Cooper saw Ward and Brown together, and Ward told Brown’s mother while standing on the front porch that he [Ward] saw Brown coming down the road toward Brown’s mother’s home (App. 476-82); Brown’s own sister, Indria, was the last to see Brown and Rutledge alive, and they left her home with Ward in *the Sidekick* and this was much later in the day than when witness Cooper saw Ward and Brown (App. 490-503); Ward reported the next day to police he was the last person with both victims when they stole *the Sidekick* and left him at a store (App. 465-76; 528-32); Ward’s own brother-in-law was with Ward when Ward moved the victims’ decomposing bodies (App. 606-38; 642-64); at least two (2) witnesses testified to Ward’s access to a 9mm pistol (App. 389-422; 600-06); The bullet recovered was consistent with a 9mm; Ward admitted to police on tape he was

with the victims when they were murdered over drug money, the victims did not steal *the Sidekick* as he had previously represented to police, and it was he, Ward, who dumped *the Sidekick* in the lake because it contained evidence of the crimes and he [Ward] also moved the victims' bodies (State's Ex. 41; App. 728-38); and finally, Ward admitted to his girlfriend he killed the two (2) victims by shooting them, one (1) at the back of *the Sidekick* and one (1) as he entered *the Sidekick*. (App. 389-422).

Simply put, given this record, there is no credible evidence trial counsel would have struck this juror, even if the allegation is true, that she was related *by marriage* to the *sixth (6<sup>th</sup>) degree of consanguinity* to witness Kevin Cooper. See Savage, 306 S.C. at 7-8; 409 S.E.2d 810 (no evidence Savage or his attorney would have exercised a peremptory strike if they had known juror and witness were 3<sup>rd</sup> cousins). Petitioner did not offer an affidavit from himself or trial counsel that they would have moved to strike the juror for cause *or* would have used 1 of his peremptory challenges to strike this juror. (See ROA Vol. I. & II. & Suppl. App.). Woods, *supra*; McCoy, *supra*. Ward has not established the 2<sup>nd</sup> required element of the McCoy/Woods juror concealment test, prejudice. Id.<sup>18</sup> This Court should affirm. See Mercer, 381 S.C. 149, 672 S.E.2d 556 (finding

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18 As previously discussed, there is no common law rule or statute which automatically disqualifies a juror from jury service on account of his family relationship to a witness, whether by affinity or consanguinity, within any degree. Wells, 249 S.C. 249, 260, 153 S.E.2d 904, 910 (1967)(quoting Hilton, 87 S.C. 434, 69 S.E. 1077). Prior opinions have not been uniform on what degree of consanguinity disqualifies a juror. Hilton, 87 S.C. 434, 69 S.E.1077 (a juror who is related by blood within the sixth degree to the State's prosecuting witnesses was not a disqualified juror); Logue, 204 S.C. 171, 28 S.E.2d 788 (where juror stated the victim's sister had married the juror's first cousin, and that sheriff's sister had married juror's uncle, juror was not related within the sixth degree, either by blood or by marriage, to any of these parties, although the jury had these family connections, such connections were not of the family relationship which would place them within the prohibition of the rule of relations within the sixth degree); See generally State v. Henderson, 73 S.C. 201, 53 S.E.170 (1906)trial judge erred in quashing array of petit jurors on the ground that the county auditor, as one of the commissioners, was related by consanguinity within the fifth degree to the deceased victim).

court's determination was reasonably supported by the evidence and therefore the motion for a new trial was properly denied); Columbia Architectural Grp., Inc. v. Barker (this Court may affirm when satisfied the circuit court reached the correct result); Rule 220 (b) & (c), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (on appeal, a respondent may raise on appeal any additional reason the appellate court should affirm, regardless of whether the lower court ruled upon that reason).

C. Res judicata precludes an alternative outcome on appeal because Ward had a full and fair opportunity to litigate this claim during his other numerous pursuits of collateral relief.

As an additional sustaining ground, Respondent submits that *res judicata* bars the relief Ward requests. Rule 220(c), SCACR. *Res judicata* can act to bar collateral allegations brought after a defendant has elsewhere pursued collateral relief. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (PCR action); *see* S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (a litigant is barred from raising any issues which could have been raised, or which were raised, in a prior suit). Ward bears “the burden of showing that a new ground for relief could not have been raised in a previous application.” Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987). As delineated in Respondent’s Statement of the Case, Ward has filed no less than eight (8) collateral actions attempting to obtain relief from his convictions and sentences. Thus, not only was the instant claim regarding Juror 19 discoverable within one (1) year, but Ward had the opportunity to fully and fairly litigate the instant claim in any of those actions and failed to do so. Accordingly, *res judicata* bars relief on the present issue.

### CONCLUSION

For all of the foregoing reasons, this Court should affirm the Court of Appeals denial and dismissal of this appeal because the underlying motion for a new trial was untimely under Rule

29(b), SCRCrimP, which is all the Court of Appeals found. Even if this Court applies the juror concealment factors set forth in McCoy and Woods, Appellant has not shown juror concealment or prejudice. As a result, this Court should affirm the result.

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