THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No: 2016-CP-23-4114

Mark Martucci, # 00314148.....Appellant,

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Mark Martucci appeals the order of the Honorable Brooks P. Goldsmith, dismissing his application for post-conviction relief, dated March 26, 2017. Appellant received written notice of entry of this order on April 12, 2017.

Pursuant to Rule 243(c), SCACR, Appellant hereby submits that summary dismissal of his application for post-conviction relief (PCR) was inappropriate. *See McCoy v. State*, 401 S.C. 363, 369-70, 737 S.E.2d 623, 626-27 (2013) ("Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits, the PCR judge erred in granting the State's motion for summary dismissal because genuine issues of material fact exist as to whether Petitioner's PCR claim is successive or untimely."). The present application is not untimely because it was filed within one year from the discovery of an exculpatory interview of the State's

key trial witness. *See* S.C. Code Ann. § 17-27-45(C). The discovery of the interview requires vacation of his conviction for homicide by child abuse in the interest of justice and the grounds raised in the present application have not been previously presented nor heard. *See* S.C. Code Ann. § 17-27-20(A)(4).

The present application has made a prima facie showing that Appellant is entitled to relief because the new evidence: "(1) would probably change the result if a new trial is 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." *State v. Prince*, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993) (citing *State v. Ford*, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990)).

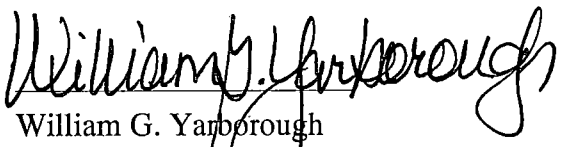
The newly discovered evidence would probably change the result of a new trial because the interview directly refutes the testimony of the only witness at trial who had allegedly seen Appellant abuse the victim. Due the State's lack of direct or forensic evidence at trial, in which the identity of the victim's abuser was the pivotal issue, the interview is material and exculpatory. Further, the interview is not merely impeaching because it would support a third-party guilt defense at a new trial, could be admitted as substantive evidence at a new trial, *see State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434, (S.C. 2009), and because of its significant exculpatory value in light of the State's evidence against Appellant. *See e.g.*, *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999); *City of Columbia v. Assa'ad-Faltas*, No. 2007-UP-193, 2007 WL 8327496, at *1 (Ct. App. Apr. 26, 2007); *State v. Gagnon*, No. 06-GS-26-0594, 2013 WL 637730 (S.C. Gen. Sess. Jan. 7, 2013). Further, neither the interview itself nor testimony regarding its exonerative contents were introduced into evidence at trial. The contents of the interview

were unknown to Appellant and subsequent counsel for years until its discovery in July 2015, due to the concealment by trial counsel.

Trial counsel's concealment of the interview, and Appellant's resulting lack of knowledge of the interview's contents and exculpatory value constitute a sufficient reason for not previously raising the grounds asserted in his current application. *See Tilley v. State*, 334 S.C. 24, 28, 511 S.E.2d 689, 691 (1999) (holding that the applicant's fourth PCR application, which challenged the validity of his guilty plea, was not successive because he did not know of the claim until he received a letter from the parole board stating that he was ineligible for parole, and thus he could not have raised it in a previous application); *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016) (holding that petitioner's lack of knowledge that his previous PCR counsel was not qualified for capital defense was a sufficient reason for not raising the ground in his initial PCR application).

April 20, 2017

Respectfully submitted,



William G. Yarborough
Attorney for Applicant
522 North Church Street
Greenville, SC 29601
(864) 331-1612
SC Bar No.: 10271

Other Counsel of Record:
The Honorable Alan Wilson
P.O. Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Thirteenth Circuit Court Judge

Case No.: 2016-CP-23-04114

The State, Respondent

v.

Mark Anthony Martucci, Appellant

AFFIDAVIT OF SERVICE

I, Traci Trouton-Burr, certify on this date, April 12, 2017 I served a Supplemental Notice of Appeal (including Rule SCACR 243 (c) in this action, dated April 20, 2017 on the Honorable Alan Wilson, Benjamin Aplin, and Assistant Attorney General Julie A. Coleman by mailing it to him/her at his/her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Honorable Alan Wilson
Benjamin Aplin
Julie A. Coleman
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

Respectfully submitted,

Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 20
Day of April, 2017

Notary Public for South Carolina
My Commission expires: 10/9/23