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**May 25 2021**

**S.C. SUPREME COURT**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

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**APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
J. Derham Cole, Circuit Court Judge**

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**Case No. 2020-001418**

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John Garvin..... Petitioner-Appellant,

v.

The State of South Carolina..... Respondent-Appellee.

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO SUPPLEMENT THE RECORD,  
PURSUANT TO RULE – 212(b), SCACR**

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Petitioner, John Garvin, proceeding as pro-se, makes this Memorandum of Law in Support of his Motion to Supplement the Record, pursuant to Rule – 212(b), SCACR. The motion is made seeking Petitioner’s desire to supplement the record with exhibits or other material in the above-entitled cause for setting forth the principal matter contained in his Petition for Writ of Certiorari and Appendix for the reviewing court to which this appeal is being taken, to be part of the record on appeal.

**FACTS OF THE CASE**

Petitioner is a state prisoner incarcerated at Lieber Correctional Institution in Ridgeville, South Carolina. That is presently serving a twenty-five (25) year sentence for drug trafficking, imposed on May 23, 2013, by the Spartanburg County Court of General Sessions following his trial. A direct appeal was taken and the South Carolina Court of Appeals affirmed the conviction

and sentence on November 26, 2014. See *State v. Garvin*, No. 2014-UP-414, 2014 WL 6721427 (Ct. App. S.C. Nov. 26, 2014). Petitioner's initial application for post-conviction relief was dated October 28, 2015 and was filed on November 18, 2015. To challenge the constitutionality of the erroneous conviction and to vindicate Petitioner's rights that have actually been denied at trial.

On the 19<sup>th</sup> and the 31<sup>st</sup> of July, 2019, a motion and evidentiary hearing was held at the Spartanburg County Courthouse to address some outstanding motions and issues within Petitioner's PCR application that was filed in this matter. At that hearing Circuit Court Judge, J. Derham Cole, heard and ruled on Petitioner's pro-se motions and issues within his PCR application. Petitioner filed a Notice of Appeal on October 22, 2020.

#### **STANDARD OF REVIEW**

With the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences. Without such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. In response to that motion, the other party(s) shall designate any supplemental materials which that party desires to add if the Court grants the motion. Supplemental materials filed under Rule 212(b) shall be included in an Appendix to the Record on Appeal. Unless otherwise agreed by the parties or ordered by the Court, the Appendix shall be compiled, served and filed by the party initially proposing it. See Rule – 212(b)(c), SCACR.

#### **ARGUMENT**

##### **I.**

**THIS COURT SHOULD GRANT PETITIONER'S MOTION TO SUPPLEMENT THE RECORD, TO ALLOW PETITIONER TO SET FORTH THE PRINCIPLE MATTER CONTAINED IN HIS PETITION FOR WRIT OF CERTIORARI AND APPENDIX, PURSUANT TO RULE – 212(b), SCACR,**

The Record on Appeal is the appellate court's source of information as to what occurred in the [lower court]. It's purpose is to inform the court authoritatively of the legal questions contested

below and of the facts pertaining to those questions. See 15 S.C. Jur. Appeal and Error § 59 (citation omitted). The Record on Appeal should contain only the information needed to permit the court to decide the issues on appeal; it should contain no irrelevant material. *Id.*

The Record on Appeal should bring clearly and succinctly to the court's attention all necessary elements of the questions on appeal. *Id.* The appellate has the burden of showing that the lower court erred in some respect; to do this, the appellate court must place in the record on appeal evidence sufficient to support his argument. *Id.* The appellate court cannot consider questions relating to points based on facts not in the Record on Appeal. *Id.*

However, when appellate motions are filed before the record on a case is filed, facts relied on and support of the motions maybe set forth in affidavits or other documents filed with the clerk of the Supreme court. *Id.* (citing Rule – 224(c)(3)).

The Appellate Court will not consider any fact not appearing in the record on a appeal, Rule – 210(h), SCACR, unless it appears in a supplement to the record on appeal, Rule – 210(h) and 211, or relate to an undisputed portion of the case history set forth in the parties' statement of the case, Rule – 210(h), and Rule – 207(b)(1)(c) and (2), SCACR. The record on appeal cannot contain any matter not presented to the lower court or tribunal, Rule – 210(c), SCACR; the same is true for supplements to the record on appeal. See Rule – 211(a), SCACR, (appellate Court may supplement record on its own motion by requiring copies of all or any part of the transcript of proceedings or "other matter which was before the trial court"); see also *Norris v. Ferre*, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (denying party's motion to supplement record with matters not presented to the trial judge). Accordingly, reversal is not available for an argument based on facts not appearing in the record, *Ravan v. Greenville Cnty.*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993), or matter not presented to the lower court. See *Henning v. Kaye*, 307 S.C. 436, 415

S.E.2d 794 (1992) (ordering a pellet to serve and file amended brief and designation of matter to be included in the record that comply with the Appellate Court rule and reminding appellate that the record on appeal shall not contain matters not presented to the trial court). The Appellate has burden of presenting the Supreme Court with an adequate record. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 533 S.E.2d 886 (2000), cert. denied, 721 S.Ct. 880 (2001).

Rule – 212(b) allows a party to supplement the record “with the written consent of all parties of record, a party may supplement the Record on Appeal at any time before argument commences. Without such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. In response to that motion, the other party(s) shall designate any supplemental materials which that party desires to add if the Court grants the motion. Supplemental materials filed under Rule 212(b) shall be included in an Appendix to the Record on Appeal. Unless otherwise agreed by the parties or ordered by the Court, the Appendix shall be compiled, served and filed by the party initially proposing it. See Rule – 212(b)(c), SCACR.

Here in this case Petitioner desires to supplement the record with exhibits or other material in the above-entitled cause for setting forth the principal matter contained in his petition for writ of certiorari and appendix for his issue of ineffective assistance of counsel and the denial of his motion for recusal of judge that are attached to this motion and is to be transmitted to this reviewing court to which this appeal is being taken, as part of the record on appeal, whereas, leave to supplement the record will not prejudice the Respondent.

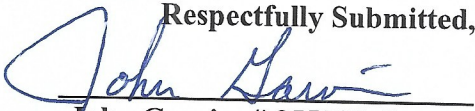
Supplementation of the record is necessary to allow the Petitioner a fair appeal of his denied Post-Conviction Relief (PCR) application. Supplementation is also necessary because the transcribed portions of the PCR hearing, by Court Reporter Linda D. Moffitt, are distorted and

omits certain key testimony of the witnesses that testified at the PCR hearing, were substantial and significant alterations and omissions to the testimony given by the witnesses at the PCR hearing.

### CONCLUSION

For the reasons set out above, Petitioner respectfully request that this Honorable Court grants this Motion to Supplement the Record, pursuant to Rule – 212(b)(c), SCACR.

DATED: May 25, 2021  
Ridgeville, South Carolina

Respectfully Submitted,  
  
John Garvin, # 355509, Pro-se.  
Lieber Correctional Institution  
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