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S.C. SUPREME COURT

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

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

STATE OF SOUTH CAROLINA,

Respondent,

v.

JODY L. WARD,

Appellant.

Appellate Case No. 2021-000702

RETURN TO PETITION FOR WRIT OF CERTIORARI

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 Certiorari should be denied because the Court of Appeals and Judge Hyman only imposed the reasonable diligence standard of Rule 29(b) on Ward, and Ward’s allegation that Juror 19 failed to disclose she was second cousins, by marriage, to one of the State’s witnesses was reasonably discoverable within one year of trial and is further too remote and unsubstantiated to meet any 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 Juror 19 knew the witness was a relative of her husband by 6th degree of consanguinity8

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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

1. Whether the Court of Appeals and Judge Hyman erred in applying the same “reasonable diligence” standard to Petitioner Ward as is applied by our Courts to all criminal defendants who file a Rule 29(b), SCRCrimP, motion for a new trial based on after-discovered evidence?

STATEMENT OF THE CASE

Petitioner, Jody L. Ward (“Ward”), is confined in the Department of Corrections as a result of his 2 murder convictions and resulting sentences from Georgetown County in 2004. He currently seeks certiorari from the Court of Appeals affirmance of the denial of his 2nd Rule 29(b), SCRCrimP “Motion for a New Trial Based on After-discovered Evidence” by Circuit Court Judge Larry Hyman. State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021). A Petition for Rehearing was denied. This is Respondent’s Return to the Petition for Writ of Certiorari

Procedural History

On August 3, 2002, Ward killed Wilford Brown and Elton Rutledge in Georgetown County. Ward was then indicted on July 8, 2003 for 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 Judge Paula H. Thomas. On March 18, 2004, the jury found Ward guilty of both murders. Judge Thomas sentenced him to life without parole on both indictments.

The Direct Appeal

Ward 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 8 collateral actions challenging his convictions and sentences. He has filed 4 PCR actions, a state habeas action, a federal habeas action, and 2 post-trial motions for a new trial based on after discovered evidence. All 8 collateral

actions have been denied and dismissed by the lower courts and the appellate courts to which they were raised. The sole remaining appeal is this petition from the Court of Appeals' affirmance of the denial of Ward's 2nd motion for a new trial based on after discovered evidence.¹ The allegations in the other collateral actions were not the same as those asserted in the current action.

The 2nd Rule 29(b) motion before this Court / What occurred below

On September 22, 2014, Ward filed a motion to stay his appeal, of the denial of his 1st Rule 29(b) motion pending in the Court of Appeals, to file this 2nd 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 the Circuit Court could proceed with matters not affected by the pending appeal pursuant to Rule 205,

¹ Beginning in 2007, Ward filed his 1st collateral action, a PCR application. It was denied and dismissed by Judge Stephen H. John and this Court denied certiorari. Ward then filed his 2nd PCR application 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 3rd PCR application in 2010 which Judge Culbertson denied and dismissed; and, from which this Court denied certiorari. Ward filed a state petition for habeas corpus in this Court's original jurisdiction in 2011, which this Court denied based upon the failure to meet the standard for state habeas corpus relief. 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 1st 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 2nd 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 Application 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 application was dismissed by Judge William H. Seals, Jr. 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 this appeal for failing to give a sufficient Rule 243(c) explanation. The Remittitur was issued on July 15, 2019.

SCACR. On October 30, 2014, Ward filed his 2nd 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).² On November 12, 2014, the Court of Appeals affirmed the denial of the 1st Rule 29(b) motion. Judge Culbertson denied the 2nd 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 an evaluation on whether he could represent himself. On September 8, 2017, the State filed a Motion to Dismiss Ward's 2nd 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 Judge Larry B. Hyman. (R. 498-540). Mr. Shaffer represented Ward and Deputy Solicitor Scott Hixson 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,

² 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.

2021). A Petition for Rehearing was denied June 4, 2021. This petition followed.

RESPONDENT'S STATEMENT OF FACTS

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

On Saturday morning, August 3, 2002, Ward borrowed his wife's green Suzuki Sidekick and eventually met up with the victims Wilford Brown and Elton Rutledge. Ward called his girlfriend, Denise Cox, throughout the day on his cell phone telling her of what was taking place. In the first 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 1 call, he told her he was buying bullets at Walmart. She told him not to do anything stupid. Later in 1 call, Ward told her Brown was with him and he was at his wife's house showing Brown his bulldogs. Later that night, Ward called Denise asking her to pick him up at the end of the street where he lived with his wife. She did so. Ward got in Denise's car and told her he and his wife argued and he left. After they got to Denise's home, Ward told her he had killed both Brown and Rutledge, shooting both men off a dirt road. He shot Brown near one end of the vehicle, and Rutledge tried to get in the back of the Sidekick and he shot him. He also told her he had gotten rid of the firearm, a Tech 9, he used to kill the 2 men by throwing it in a

³ Citations in the "Statement of Facts" are to the Appendix from Ward's 1st 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).

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. Tracy Collins also testified she had seen Ward with a 9mm with a banana clip 2 months before the murders. (App. 389-422; 600-06).

Ward's wife, Beverly, also testified Ward borrowed her car the morning of the victims' disappearance. Ward was only supposed to be gone 1 or 2 hours but did not return until 10:30 p.m. without her car. They argued and Ward left. The next day, Wards' mother drove Beverly and Ward to the Sheriff's Office where Ward informed police the 2 victims stole Beverly's car leaving him at a store, and Ward filed a false police report to the same. The story was a lie because Ward had dumped the car in the lake because it had bullet holes and blood in it after Ward murdered the victims. Ward's wife refused to testify to anything Ward told her. (App. 465-76).

Kevin Cooper testified he knew both Ward and Brown. Cooper went by his mother's to eat lunch that Saturday. 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 ripped him off and Ward was going to get the persons responsible. (App. 452-65).

On that Saturday morning around 11:00 a.m., Ward showed up at Wilford Brown's mother Nadine's home to pick up Wilford. She told him Wilford was not there but she could call him. Ward then said not to bother because Wilfred was on his way and he saw him. Moments later Nadine looked outside and Ward's green Jeep type vehicle was gone. She 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 her asking if she had seen Wilford. She said no. Ward stated the victims had taken

his wife's vehicle and left Ward at a store. Ward said his wife wanted it back and was threatening to go to the police. Nadine tried calling Wilford but there was still no response. The next morning she filed a missing person's report. She never saw her son again. (App. 476-82).

Wilford Brown's wife, Indria, was sick that Saturday. About 2:00 p.m. Wilford called and asked her what she wanted for lunch and stated he had gotten a ride from Ward. Wilford, Ward, and Elton Rutledge arrived about 3:10 p.m. with her food. The 3 men were in a green Suzuki Sidekick. All 3 men came inside. Ward left for about 20 minutes and returned. Then all 3 men left in the Sidekick with Ward driving. She never saw her husband again. Later she was present when Ward told Nadine the victims had taken his 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. testified his son left their home on that Saturday afternoon. Elton Rutledge Jr. told his father he was going to do something with a friend that would take about 20 minutes. Elton was friends with Wilford Brown. Elton never returned. His father never saw him alive again, but identified shoes he was wearing when he disappeared. (App. 516-28; 718-20).

On Sunday, August 4, 2002, Ward and his wife came and reported the wife's vehicle stolen to Officer Danny Watson. Ward did most of the talking. Ward stated he had been with a man the previous day, Wilford Brown, when they picked up another male he only knew as "Elton." They went to a store about 4:00 p.m. While Ward was in the store, Elton got in the driver's seat and Brown the passenger seat, and they left in the car leaving Ward in the store. They never returned. Ward also told police the 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 victim's 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. 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 2 people and a burlap bag. There was evidence the bodies had been moved to this 2nd 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 Wilford Brown wanting to purchase marijuana on August 3, 2002. The 2 men arranged to get together and they later met up with Elton Rutledge and Brian Elliott. The 4 men shared drugs together. 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 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." 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 at 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 Denise about the crimes. (App. 742-52; 555-570; 578-600).

ARGUMENT

Certiorari should be denied because the Court of Appeals and Judge Hyman only imposed the reasonable diligence standard of Rule 29(b) on Ward, and Ward's allegation that Juror 19 failed to disclose she was second cousins, by marriage, to one of the State's witnesses was reasonably discoverable within one year of trial and is further too remote and unsubstantiated to meet any 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 Juror 19 knew the witness was a relative of her husband by 6th degree of consanguinity.

What Occurred Below

In 2004, 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 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 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 anybody listed as a witness. Other jurors did. (R. 62-82).

Ten (10) years’ post-trial, Ward alleged in a 2nd 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).⁴ 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 2 sworn affidavits by the same person, Nicole Ward. Her 1st affidavit alleges the Juror and the witness are 3rd cousins by marriage. Her 2nd 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). 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 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 witness Steve Cooper or offer an affidavit from him. 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 7th, 2017, Judge Hyman granted the State’s motion to dismiss and denied Ward’s Rule 29(b) motion. (R. 561-64).⁵ Judge Hyman found the Motion was time barred under Rule

⁴ Ward alleged allegations against other jurors and a grand juror but abandoned those on appeal.
⁵ In the Order, Judge Hyman also denied the claims raised against other jurors and a grand juror.

29(b), SCRCrimP, because the information about the juror could have been discovered before trial or at least within 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.

Ward appealed raising the same issue to the Court of Appeals. After full briefing by the parties, the Court of Appeals affirmed Judge Hyman 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 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.”).

AFFIRMED¹

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. Ward’s petition for rehearing was also denied.

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. at page 432, “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 Bay, 268, 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).

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 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. 363, 371, 737 S.E.2d 623 (2013) (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). However, 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).

McCoy 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 5 factor Spann analysis but the 2 factor analysis of juror misconduct. McCoy, 401 S.C. at 370-71, 737 S.E.2d at 627. 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 2 factor analysis of juror misconduct. 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.⁶

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. Here, the motion was clearly untimely, a decade after trial. Certiorari should be denied.

The Lack of Merit of Ward's Motion for a New Trial

In his Petition for Writ of Certiorari, 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 incorrect. 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, 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 grounds: (1) there was nothing in defendant's affidavit to show the information relied upon for a new trial, a statement of 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

⁶ Ward cites 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); State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004).

in the affidavits made by the juror could not have been obtained with due diligence beforehand).

Ward also alleges the Circuit Court erroneously and summarily dismissed his motion for a new trial based on after-discovered evidence because the court did not apply the standard for allegations of juror misconduct from McCoy, 401 S.C. at 371, 737 S.E.2d at 627⁷ and did not take testimony on the issue of Juror 19's alleged familial connection to witness Kevin Cooper. 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** 3 years after it was filed and oral argument, 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.

⁷"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).

(R. 561-64).⁸ The Court of Appeals appropriately affirmed based on the untimeliness of the motion under Rule 29(b), SCRCrimP. State v. Ward, 2021-UP-184 (Ct. App. May 19, 2021).

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 extended family member of 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.

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).⁹ 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 2 submitted by Nicole Ward, even though it had been 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 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

⁸ Judge Hyman also ruled the motion was improperly filed during the pendency of the appeal from his initial [1st] 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*, 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").

⁹ 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).

satisfies due process); Remmer v. United States, 347 U.S. 227 (1954); State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003). As a result, there is no merit to this argument and the petition for certiorari should be denied. State v. Rowell, Howard Advance Sheets, Op. No. 5832 (Ct. App. August 25, 2021)(“Rowell failed to provide a sufficient record to support reversal because he failed to subpoena Juror 164 for the post-trial hearing at which the trial court addressed the juror concealment issue.”) citing 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.”). In Rowell, *supra*, the Court found Rowell was afforded the opportunity for a hearing when the trial court heard his post-trial motion for a new trial “...yet he failed to subpoena Juror 164 to attend. Without Juror 164’s testimony, or some other supporting evidence, the record is insufficient to overturn the trial court’s order denying Rowell’s motion for a new trial.” Id.

- A. Juror 19’s alleged relation to one of the State’s witnesses (second cousins through marriage) could have been discovered within one 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 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 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.

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. (Petition; R. 528). However, as pointed out by Judge Hyman, Juror 19 and the State's witness share a last name and hail from Georgetown County. (R. 3, 83-84, 529). Judge Hyman therefore appropriately denied the Rule 29(b) motion and granted the motion to dismiss because the information forming the basis for the allegation was previously available to Ward and could have been 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."). The Court of Appeals appropriately agreed. Ward, *supra*. Also, here the affidavit(s) on which Ward relies are from Nicole Ward, who has the same last name as Petitioner, and who admits she is related to the witness and Juror 19 by marriage. And, Petitioner knew the witness as well, as testified to at trial. Ward could have discovered any relation between Juror 19 and the witness prior to jury selection or at least within 1 year after his conviction and long before 2014, a decade after trial. Kennedy, *supra*.

For the same reason, Judge Hyman also correctly declined 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. (emph. 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 whether it was pursuant to Spann or McCoy. Thus, to the extent the Circuit Court distinguished McCoy, a PCR action, from Ward's case and found Ward not entitled to another hearing on the matter, the Circuit Court correctly concluded that "the analysis set forth in State v. Woods," *supra*, "is of no import in the present matter." (R. 562-63). Respondent requests this Court to affirm the denial of Ward's 29(b) motion. 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 to one of the State's witnesses was "not new 'evidence' as to the defendant's guilt" because the alleged relation was dubiously presented and too remote to be found to materially affect the outcome of the trial under any standard applicable to Rule 29(b), SCRCrimP.

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 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 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). This is not material evidence of guilt.

Ward alleges the court erroneously denied application of the alternate standard applicable to claims of juror misconduct enunciated in McCoy, *supra*, and arising from Woods, *supra*. In Woods, this Court granted a new trial where the defendant established, pursuant to a 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 of the Circuit Court's conclusion, 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 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). This *alleged* relationship 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 3rd or 2nd cousin,

much less any evidence *Juror 19 knew the witness was her husband's relation by the 6th degree of consanguinity*. Rowell, (finding where defendant did not subpoena Juror to hearing on argument on his motion for a new trial based on juror concealment, defendant failed to meet his burden of proof to show intentional concealment to overturn court's denial of motion for a new trial).

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. 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 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). 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 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 to the sixth degree of consanguinity. Even if true, there simply is no evidence Juror 19 knew the witness was her husband's 3rd cousin or 2nd cousin and intentionally concealed the relationship. Woods, *supra*.

Indeed, in addition to the motion's untimeliness, Ward's motion was properly denied because he did not submit an affidavit, *by him*, 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 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).

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. “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 3rd or 2nd cousin

named Steve Cooper and did not recognize the witness as any relation to her by marriage.¹⁰

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 3rd 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 actually known and 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 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

¹⁰ 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. Ward has not offered any proof that Juror 19 knew Steve Cooper was a relative to her husband through her husband’s grand-father’s brother.

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 3rd cousin to a state's witness).

The record in Ward's case lends itself to the decision reached by this Court 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. This 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, this 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 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 as found by Judge Hyman. See also Wilson v. Childs, 315 S.C. 431, 437-38, 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). It 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*.

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 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). This Court should affirm the result reached by the Circuit Court and Court of Appeals. *See Mercer*, 381 S.C. 149, 672 S.E.2d 556 (finding trial court's determination was reasonably supported by the evidence and therefore the motion for a new trial was properly denied).

- 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 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 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 deny certiorari.

Respectfully submitted,

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August 25, 2021

STATE OF SOUTH CAROLINA
In the Supreme Court

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

STATE OF SOUTH CAROLINA,

Respondent,

v.

JODY L. WARD,

Appellant.

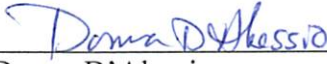
Appellate Case No. 2021-000702

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Writ of Certiorari, and Proof of Service has been forwarded to Appellant's counsel, Tristan M. Shaffer, Esq. via email today, August 25, 2021 to tristan@shafferlawsc.com.

I further certify that all parties required by Rule to be served have been served.

This 25th day of August, 2021.



Donna D'Alessio,
Legal Assistant to J. Anthony Mabry,
Senior Assistant Attorney General