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S.C. SUPREME COURT

EXHIBIT 1

The Supreme Court of South Carolina

John Dewayne Garvin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-001418

ORDER

Petitioner's motion to exceed the page limit is denied. Within twenty days of this order, Petitioner shall serve and file an amended petition for a writ of certiorari that complies with the page limitations set forth in Rule 243(e)(3), SCACR.

C.J.
FOR THE COURT

Columbia, South Carolina
October 15, 2021

cc:
William Harold Ray, Esquire
Office of Appellate Defense
John D Garvin, 355509

EXHIBIT
2

The Supreme Court of South Carolina

John Dewayne Garvin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-001418

ORDER

Petitioner has failed to serve and file an amended petition for a writ of certiorari in compliance with this Court's order of October 15, 2021, and Rule 243(e)(3) of the South Carolina Appellate Court Rules (SCACR). Accordingly, Respondent's motion to dismiss this matter is granted. The remittitur will be sent as provided in Rule 221(b), SCACR.

C.J.

FOR THE COURT

Columbia, South Carolina
November 12, 2021

cc:
William Harold Ray, Esquire
Office of Appellate Defense
John D Garvin, 355509

EXHIBIT 3

The Supreme Court of South Carolina

John Dewayne Garvin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-001418

ORDER

Petitioner filed a 202-page petition for a writ of certiorari, which was dismissed for failure to comply with the page limit of Rule 243(e)(3), SCACR. He has now filed a motion for leave to file "an enlarged brief," which we construe as a motion to reinstate and a motion to exceed the page limit of Rule 243(e)(3). We grant the motion to reinstate this matter. However, Petitioner's motion to exceed page the limit is denied. Within fifteen days of this order, Petitioner shall serve and file an amended petition for a writ of certiorari that complies with the twenty-five page limit set forth in Rule 243(e)(3). Petitioner's failure to do so will result in the dismissal of this matter.

Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
December 9, 2021

cc:
William Harold Ray, Esquire
Office of Appellate Defense
John D Garvin, 355509

EXHIBIT 4

The Supreme Court of South Carolina

John Dewayne Garvin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-001418

ORDER

By order dated December 9, 2021, this Court denied Petitioner's request to exceed the page limit set forth in Rule 243(e)(3), SCACR, and instructed Petitioner to serve and file an amended petition for a writ of certiorari that complies with the twenty-five page limit set forth in Rule 243(e)(3) within fifteen days. The order provided Petitioner's failure to do so would result in the dismissal of this matter.

Petitioner has now filed a twenty-eight page amended petition for a writ of certiorari and a motion to file "an enlarged brief," which we construe as a motion to exceed the page limit of Rule 243(e)(3). The motion is denied, and this matter is dismissed for Petitioner's failure to comply with Rule 243(e)(3) and this Court's order dated December 9, 2021.

_____ C.J.
FOR THE COURT

Columbia, South Carolina
January 18, 2022

cc:
William Harold Ray, Esquire
Office of Appellate Defense
John D Garvin, 355509
Amy W. Cox

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Lower Court Case No.: 2015-CP-42-4699
Appellate Court Case No. 2020-001418

John Garvin . . . . . Petitioner-Appellant,

v.

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

AFFIDAVIT IN SUPPORT OF
MOTION FOR REINSTATEMENT OF APPEAL
AND A SUBSEQUENT APPLICATION FOR RELIEF,
PURSUANT TO RULE – 260(a) AND RULE – 266, SCACR

I, John Garvin, being first duly sworn, deposes and says:

1. I am the Petitioner in the above-entitled action, proceeding as Pro-se, makes this affidavit in support of my Motion for Reinstatement of Appeal and a Subsequent Application for Relief, pursuant to Rules – 260(a), and 266, SCACR.

2. This Court has dismissed Petitioner's Petition for Writ of Certiorari and has improvidently denied the Petitioner's third Motion to Enlarge Brief on January 18, 2022, stating that, "[t]he motion is denied, and this matter is dismissed for Petitioner's failure to comply with Rule 243(e)(3) and this Court's Order dated December 9, 2021." (see Exhibit – 4).

3. This Court's January 18, 2022, Order dismissing Petitioner's appeal and denying his third Motion to Enlarge Brief to exceed the twenty-five (25) page limit, has contravened on Petitioner's statutory right to appeal, the final judgment of the PCR Judge's Order of dismissal that was entered on July 9, 2020, under the South Carolina Uniform Post-Conviction Procedure Act section 17-27-100.

4. It also contravenes on Petitioner's right to present to this Court, that his conviction and sentence was in violation of the Constitution of the United States or the Constitution or laws of this State; or that the Court was without jurisdiction; or that there exists evidence of material facts,

not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(1)(2)(4).

5. On October 8, 2021, Petitioner presented to this Court a Motion to Enlarge Brief and six (6) novel questions warranting the grant of a Writ of Certiorari in the form of a two hundred – two (202) pages brief that was presented to this Court by challenged decision of a PCR Court's Order of dismissal that was twenty-seven (27) pages in length. On October 15, 2021, this Court denied Petitioner's first Motion to Enlarge Brief, and ordered "within twenty days of the Order, [that] Petitioner serve and file an amended Petition for Writ of Certiorari that complies with the page limitations set forth in Rule 243(e)(3), SCACR." (see Exhibit – 1).

6. On November 4, 2021, Petitioner would re-submit to this Court a second Motion to Enlarge Brief and his first Amended Petition for Writ of Certiorari that consisted of fifty-six (56) pages. On November 5, 2021, the Respondent's would file in this Court a Motion to Dismiss. On November 12, 2021, this Court issued an Order dismissing Petitioner's Petition for Writ of Certiorari and would improvidently grant the Respondent's Motion to Dismiss, stating that "Petitioner has failed to serve and file an amended Petition for Writ of Certiorari in compliance with this Court's Order of October 15, 2021, and Rule – 243(e)(3) of the South Carolina Appellate Court Rules." (see Exhibit – 2). On November 15, 2021, this Court received from Petitioner a declaration of inmate filing, a second Motion to Enlarge Brief, and his first Amended Petition for Writ of Certiorari that consisted of fifty-six (56) pages.

7. On November 24 and November 26, 2021, Petitioner submitted to this Court by via e-mail, a Motion for Reinstatement of Appeal by his brother, Bernard Garvin, that was classified as correspondences to the Court and not filed as a Motion for Reinstatement of Appeal as was presented to this Court on November 24 and November 26, 2021. On December 9, 2021, this Court would issue an Order construing Petitioner's second Motion to Enlarge Brief, as a Motion to Reinstate Appeal and as a Motion to Exceed the Page Limit of Rule – 243(e)(3). Whereas, this Court granted the Motion to Reinstate Petitioner's Appeal and denying Petitioner's Motion to Exceed the Page Limit for a second time. (See Exhibit – 3).

8. On December 23, 2021, Petitioner would submit to this Court by e-mail and certified mail return receipt requested, a third Motion to Enlarge Brief and a second Amended Petition for Writ of Certiorari that consisted of twenty-eight (28) pages. On January 18, 2022, this Court would issue an Order dismissing Petitioner's Petition for Writ of Certiorari and would also improvidently deny the Petitioner's Motion to Enlarge Brief for a third time, stating that, "[t]he Motion is denied, and this matter is dismissed for Petitioner's failure to comply with Rule 243(e)(3) and this Court's Order dated December 9, 2021." (see Exhibit – 4).

9. Petitioner states that as a Pro-se litigate with only a General Education Degree, (G.E.D.), and to have only completed the eighth (8) grade with no legal education and is just a layman of law, cannot get the two hundred-two (202) paged brief down to the twenty-five (25) page limit as Rule – 243(e)(3) requires. To do so, Petitioner would be presenting before this Court a conclusion argument of an issue that would amount to an abandonment of the issues that Petitioner is trying to present to this Court.

10. Petitioner would also state to this Court that his first Amended Petition for Writ of Certiorari was brought down to fifty-six (56) pages and his second Amended Petition for Writ of Certiorari brief was brought down to twenty-eight (28) pages and states that Rule – 243(e)(3), twenty-five (25) page standard limit is unreasonable and prejudices the Petitioner who is a Pro-se litigate with only a basic eighth (8) grade education and bares the burden of trying to present to this Court the operative facts and the controlling legal principles of the questions that are being presented in his brief for the violation of his constitutional rights during his State proceedings, cannot do it within the twenty-five (25) page standard limit.

11. The questions that are being presented in Petitioner's brief are numerous and complex, to whereas, the Petitioner needs to exceed the twenty-five (25) page limitation, due to his low level of competence, to be able to adequately address the questions that are being presented before this Court.

12. Petitioner has inadvertently failed to comply with Rule – 243(e)(3), SCACR, due to his low level of competence and limited education. In addition, his appeal should not be dismiss because of his incompetent and lack of an education to comply with Rule – 243(e)(3).

13. Petitioner has submitted to this Court, three Motions to Enlarge Brief, due to his low level of competence and his inability to bring his brief within the twenty-five (25) page limit as is required by Rule – 243(e)(3), SCACR.

14. This Court has blatantly refused to grant Petitioner permission to exceed the twenty-five (25) page limit and has subsequently denied Petitioner's Motion to Enlarge Brief to exceed the twenty-five (25) page limit on three different occasions, (see Exhibits – 1, 3, and 4), and has failed pursuant to Rule – 220(b), SCACR, to state distinctly it's findings of facts and the reasons for it's decision in denying Petitioner's Motion to Enlarge Brief, for a third time. (See Exhibit – 4).

15. This Court blatant refusal to grant Petitioner's Motion to Enlarge Brief and give permission to exceed the twenty-five (25) page limit has induced Petitioner to waive four out of the six issues that was raised in his original brief for Writ of Certiorari and any challenges to the PCR Judge's Order of dismissal that Petitioner's substantive claims for relief are barred in PCR by not challenging the claims on Certiorari.

16. This Court's failure to consider Petitioner's constitutional claims and to continue the imprisonment of one who is actually innocent, without review amounts to a gross miscarriage of justice.

17. Because there is evidence establishing beyond peradventure that the State's circumstantial case rested upon inaccurate and misleading evidence and if this evidence was presented at Petitioner's trial, it is more likely that no reasonable juror would have voted to convict in light of the new evidence.

18. The existence of evidence of material facts, not previously presented and heard, requires vacation of Petitioner's conviction, in the interest of justice, whereas, the PCR Court has failed

to rule on evidence, (see App. pp. 1097 1098),[1] that was presented before that court on July 31, 2019.

19. The newly discovered evidence, (see App. pp. 1097 – 1098), tends to show that the State's witnesses provided false testimony about the trustworthiness of an alleged confession statement, (see App. p. 1100), allegedly made by the Petitioner.

20. The newly after-discovered evidence in this case also establishes that the State has obtained a conviction by committing extrinsic fraud upon the court with the subornation of perjury and the submission of fabricated document upon the court. (See App. p. 1100).

21. The constitutional errors in Petitioner's trial has deprived the jury of critical exculpatory evidence that would have established insufficient evidence of guilt and would have also proved his innocence.

22. The Petitioner makes this Motion for Reinstatement of Appeal, pursuant to Rule – 260(a), SCACR, and a Subsequent Application for Relief of Petitioner's denied three Motion to Enlarge Brief, pursuant to Rule – 266, SCACR. Petitioner should be allowed to present his constitutional claims to this Court and this motion should be granted in the "interest of justice."

WHEREFORE, based upon the foregoing the Petitioner prays that this Court grants his Motion for Reinstatement of Appeal, pursuant to Rule – 260(a), SCACR, and the Subsequent Application for Relief, pursuant to Rule – 266, SCACR, and due administration of justice. Executed on this 27th day of January, 2022.

John Garvin, # 355509, Pro-se.
Lieber Correctional Institution
136 Wilborn Avenue
Ridgeville, S.C. 29472

AFFIDAVIT

State of South Carolina)
) s.s.:
County of Dorchester.)

I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 27th day of January, 2022.

John Garvin, # 355509, Pro-se.

[1] Please refer to Petitioner's Appendix that was filed with his original Petition for Writ of Certiorari.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Lower Court Case No.: 2015-CP-42-4699
Appellate Case No.: 2020-001418

John Garvin……. Petitioner-Appellant,

v.

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REINSTATEMENT OF APPEAL, AND SUBSEQUENT APPLICATION FOR RELIEF PURSUANT TO RULES – 260(a), AND 266, SCACR

Petitioner, John Garvin, proceeding as pro-se, makes this Memorandum of Law in Support of his Motion for Reinstatement of Appeal, pursuant to Rule – 260(a), SCACR, and a Subsequent Application for Relief, pursuant to Rule – 266, SCACR. This motion is made seeking the reinstatement of appeal, that was dismissed on January 18, 2021. (see Exhibit – 4). And a Subsequent Application for Relief of three denied Motions to Enlarge Brief to exceed the twenty-five (25) page limit, that was denied on October 15, 2021, on December 9, 2021, and on January 18, 2022. (See Exhibits – 1, 3, and 4). Whereas, Petitioner now seeks an Order granting him this Motion for Reinstatement of Appeal, pursuant to Rule – 260(a), SCACR, and a Subsequent Application for Relief, pursuant to Rule – 266, SCACR.

FACTS OF THE CASE

The following pertinent procedural and factual history is necessary to understand the issues presented within this Motion for Reinstatement of Appeal and a Subsequent Application for Relief. On October 8, 2021, Petitioner presented to this Court a Motion to Enlarge Brief and six (6) novel questions warranting the grant of a Writ of Certiorari in the form of a two hundred – two (202) pages brief that was presented to this Court by challenged decision of a PCR Court's Order of dismissal that was twenty-seven (27) pages in length. On October 15, 2021, this Court denied Petitioner's first Motion to Enlarge Brief, and ordered "within twenty days of the Order, [that] Petitioner serve and file an amended Petition for Writ of Certiorari that complies with the page limitations set forth in Rule 243(e)(3), SCACR." (see Exhibit – 1).

On November 4, 2021, Petitioner would re-submit to this Court a second Motion to Enlarge Brief and his first Amended Petition for Writ of Certiorari that consisted of fifty-six (56) pages. On November 5, 2021, the Respondent's would file in this Court a Motion to Dismiss. On November 12, 2021, this Court issued an Order dismissing Petitioner's Petition for Writ of Certiorari and would improvidently grant the Respondent's Motion to Dismiss, stating that "Petitioner has failed to serve and file an amended Petition for Writ of Certiorari in compliance with this Court's Order of October 15, 2021, and Rule – 243(e)(3) of the South Carolina Appellate Court Rules." (see Exhibit – 2). On November 15, 2021, this Court received from Petitioner a declaration of inmate filing, a second Motion to Enlarge Brief, and his first Amended Petition for Writ of Certiorari that consisted of fifty-six (56) pages.

On November 24 and November 26, 2021, Petitioner submitted to this Court by via e-mail, a Motion for Reinstatement of Appeal by his brother, Bernard Garvin, that was classified as correspondences to the Court and not filed as a Motion for Reinstatement of Appeal as was

presented to this Court on November 24 and November 26, 2021. On December 9, 2021, this Court would issue an Order construing Petitioner's second Motion to Enlarge Brief, as a Motion to Reinstate Appeal and as a Motion to Exceed the Page Limit of Rule – 243(e)(3). Whereas, this Court granted the Motion to Reinstate Petitioner's Appeal and denying Petitioner's Motion to Exceed the Page Limit for a second time. (See Exhibit – 3).

On December 23, 2021, Petitioner would submit to this Court by e-mail and certified mail return receipt requested, a third Motion to Enlarge Brief and a second Amended Petition for Writ of Certiorari that consisted of twenty-eight (28) pages. On January 18, 2022, this Court would issue an Order dismissing Petitioner's Petition for Writ of Certiorari and would also improvidently deny the Petitioner's Motion to Enlarge Brief for a third time, stating that, "[t]he Motion is denied, and this matter is dismissed for Petitioner's failure to comply with Rule 243(e)(3) and this Court's Order dated December 9, 2021." (see Exhibit – 4). Petitioner now files this Motion for Reinstatement of Appeal and a Subsequent Application for Relief, pursuant to Rules – 260(a), and 266, SCACR.

STANDARD OF REVIEW

"Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, …. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court … in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded)." See Rule – 260(a), SCACR.

"When any justice of any of the Courts of this State has declined to grant any Order or writ in any case, and thereafter an application for the same Order or writ, or an Order or writ of a similar

character, is made to an appellate court or any member thereof, it shall be incumbent upon the party, or his attorney, to show in the application the former refusal and the judge or justice who refused the same, and if the refusal has been reduced to writing, a copy of the Order shall be attached to the application." See Rule – 266, SCACR.

"As a general rule, claims that are forfeited under State law or are otherwise procedurally barred "may support [post-conviction] relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. An exception to the general rule applies, however, when a petitioner "falls within the 'narrow class of cases … implicating a fundamental miscarriage of justice.'" quoting *Larsen v. California Victim Comp. Bd*., 64 Cal. App.5th 112, 125 (2021) (citation omitted).

ARGUMENT

I.

THE APPELLANT COURT RULES ALLOWS THE PETITIONER TO EXCEED THE TWENTY-FIVE (25) PAGE LIMIT, UPON THE PRESENTATION OF A MOTION THAT'S BEFORE THE COURT REQUESTING LEAVE TO DO SO WITH GOOD CAUSE.

The South Carolina Supreme Court has jurisdiction to review final decisions under the Post-Conviction Relief Act[1] by issuance of a Writ of Certiorari. Rule – 243(a), SCACR. Such a request is by petition, but is jurisdictionally effected in accordance with the rules governing appeals under South Carolina Appellant Court Rules.

Appellate briefs are a special type of pleading governed by the South Carolina Appellate Court Rules. The Court may dismiss an appeal on account of the failure of a party to comply with the rules. See *Tinsley v. Ervin Co*., 264 S.C. 487, 494, 216 S.E.2d 170, 173 (1975)("This Court would be fully justified in dismissing the entire appeal for failure to comply with the Supreme

[1] S.C. Code Ann. §§ 17-27-10 to 17-27-120

Court Rules."). This Court has dismissed Petitioner's Petition for Writ of Certiorari and has improvidently denied the Petitioner's third Motion to Enlarge Brief on January 18, 2022, stating that, "[t]he motion is denied, and this matter is dismissed for Petitioner's failure to comply with Rule 243(e)(3) and this Court's Order dated December 9, 2021." (see Exhibit – 4). Despite the fact that Petitioner has submitted to this Court, three Motions to Enlarge Brief, requesting to exceed the twenty-five (25) page limit, due to his low level of competence and his inability to bring his brief within the twenty-five (25) page limit as is required by Rule – 243(e)(3), SCACR.

"On [a] motion, the appellate court may grant a party permission to exceed [the page] limitations." See Rule – 208(b)(5), SCACR. "The time prescribed by these rules for performing any act … may be extended or shortened by the appellate court, or by any judge or justice thereof." See Rule – 263(b), SCACR. The Appellant Court Rules allows Petitioner to exceed the twenty-five (25) page limit, upon the presentation of a Motion to Exceed the Page Limit, that's before the Court requesting leave to do so with good cause. As was the case in *Robertson v. State*, Case No.: 2012-205909. In that case the Petitioner and the Respondent filed with this Court a Motion to Exceed Page Limit of Rule – 243(e)(3), SCACR, and each had requested that their briefs would not go over forty (40) pages. Whereas, this Court granted the motions that was filed in that case for both the Petitioner and the Respondent for good cause. Here in this case, this Court has overlooked Rules – 208(b)(5) and 263(b), SCACR, and the material facts of Petitioner's three Motion to Enlarge Brief. Because Rule – 208(b)(5), SCACR, allows this Court the power to grant Petitioner permission to exceed the twenty-five (25) page limitation on a Motion to Enlarge Brief to exceed the page limit, that's presented upon this Court with good cause. While Rule – 263(b), SCACR, allows the performing of any act "may be extended … by an appellate court, or by any judge or justice thereof."

But this Court would disregard the material facts that Petitioner has stated within his second Motion to Enlarge Brief, that establishes good cause reasons as to why Petitioner has exceeded the twenty-five (25) page limit of Rule – 243(e)(3), SCACR, and has erroneously construed Petitioner's second "Motion to Enlarge Brief" as a "Motion for Reinstatement of Appeal." (see Exhibit – 3). This Court has blatantly refused to grant Petitioner permission to exceed the twenty-five (25) page limit and has subsequently denied Petitioner's Motion to Enlarge Brief to exceed the twenty-five (25) page limit on three different occasions, (see Exhibits – 1, 3, and 4), and has failed pursuant to Rule – 220(b), SCACR, to State distinctly it's findings of facts and the reasons for it's decision in denying Petitioner's Motion to Enlarge Brief, for a third time. (See Exhibit – 4). When an appellate court chooses to find facts in accordance with it's own view of the evidence, the court must state distinctly it's findings of facts and the reason for it's decision. See *Carpenter v. Burr*, 381 S.C. 494, 673 S.E.2d 818 (S.C. App. 2009) rehearing denied, certiorari dismissed as improvidently granted 394 S.C. 518, 716 S.E.2d 295.

This Court's blatant refusal to grant Petitioner's Motion to Enlarge Brief and give permission to exceed the twenty-five (25) page limit has induced Petitioner to waive four (4) out of the six (6) issues that was raised in his original brief for Writ of Certiorari and any challenge to the PCR Judge's Order of dismissal that Petitioner's substantive claims for relief are barred in PCR by not challenging the claims on Certiorari. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (Respondent may abandon an additional sustaining ground by failing to raise it in the appellate brief.).

This Court has dismissed Petitioner's Petition for Writ of Certiorari and has improvidently denied the Petitioner's third Motion to Enlarge Brief on January 18, 2022, stating that, "[t]he motion is denied, and this matter is dismissed for Petitioner's failure to comply with Rule –

243(e)(3) and this Court's Order dated December 9, 2021." (see Exhibit – 4). The Court's January 18, 2022, Order dismissing Petitioner's appeal and denying his third Motion to Enlarge Brief to exceed the twenty-five (25) page limit, has contravened on Petitioner's statutory right to appeal, the final judgment of the PCR Judge's Order of dismissal that was entered on July 9, 2020, under the South Carolina Uniform Post-Conviction Procedure Act section 17-27-100.

It also contravenes on Petitioner's right to present to this Court, that his conviction and sentence was in violation of the Constitution of the United States or the Constitution or laws of this State; or that the Court was without jurisdiction; or that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(1)(2)(4).

Here in this case, this Court's January 18, 2022, Order has overlooked Rule – 208(b)(5) and Rule – 263(b), SCACR, and the material facts of Petitioner's three Motions to Enlarge Brief and requires a different decision form the one that was rendered by this Court. A subsequent application for relief should be granted for Petitioner's denied three Motions to Enlarge Brief to exceed the twenty-five (25) page limit pursuant to Rule 266, SCACR, and Petitioner's appeal should be reinstated pursuant to Rule – 260(a), SCACR.

II.
MURRAY V. CARRIER, SUPRA., SHOULD BE APPLIED TO RELIEVE A PETITIONER OF A PROCEDURAL DEFAULT RESULTING FROM HIS INCOMPETENCE AND HIS INABILITY TO COMPLY WITH THE TWENTY-FIVE (25) PAGE LIMIT AS IS REQUIRED PURSUANT TO RULE – 243(e)(3), SCACR, CONSTITUTES CAUSE TO EXCUSE THE PROCEDURAL DEFAULT.

This Court has dismissed Petitioner's appeal on an independent State ground, it should reinstate Petitioner's appeal for review of his constitutional claims pursuant to *Murray v. Carrier*, 477 U.S. 478 (1986). This Court should recognize *Murray v. Carrier, Supra.*, to review Petitioner's Constitutional claims, regardless of a procedural default, review is necessary to assure fundamental

fairness. The doctrine guiding this Court's discretion is embodied in the "cause and prejudice" standards. "Cause and prejudice" exists for Petitioner's default. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] effort to comply with the State's procedural rule." 477 U.S. at 488.

In this case, Petitioner's failure to comply with the twenty-five (25) page limit can be imputed to Petitioner and characterized as him being incompetent of State procedures, due to his lack of an education to do so. Because Petitioner's original Petition for Writ of Certiorari was two hundred-two (202) pages and was in response to the PCR Court's order of dismissal that was twenty-seven (27) pages in length. (See App. pp. 859 – 886).[2] Petitioner did file with this Court a motion to enlarge his brief, to whereas, this Court denied that motion on October 15, 2021, and ordered Petitioner to bring his brief to twenty-five (25) pages, pursuant to Rule – 243(e)(3), SCACR.

Petitioner would also like to point out that he has brought his brief down to fifty-six (56) pages in his first Amended Petition for Writ of Certiorari and in his second Amended Petition for Writ of Certiorari brief that was brought down to twenty-eight (28) pages and states that Rule – 243(e)(3), twenty-five (25) page standard limit is unreasonable and prejudices the Petitioner who is a Pro-se litigate with only a basic eighth (8) grade education and bares the burden of trying to present to this Court the operative facts and the controlling legal principles of the questions that are being presented in his brief for the violation of his constitutional rights during his State proceedings, cannot do it within the twenty-five (25) page standard limit. To do so, Petitioner would be presenting before this Court a conclusory argument of an issue that would amount to an

[2] Please refer to Petitioner's Appendix that was filed in this case.

abandonment of the issues that Petitioner is trying to present to this Court. See *State v. Black*, 319 S.C. 515, 462 S.E.2d 311 (S.C. App. 1995); also see *Sullivan Co., Inc. v. New Swirl, Inc*., 313 S.C. 34, 437 S.E.2d 30 (S.C. 1993) (A broad general statement of issues made by an appellant may be disregarded by the appellate court, pursuant to Rule – 207(b)(1)(B), SCACR.).

Not to mention the fact that this Court's denial of his request to Appoint a Guardian Ad Litem to protect his rights and to assist him with his brief because of Petitioner's low level of competence as a pro-se litigate is itself an "objective factor external to the defense," that has impeded his effort to comply with the states procedural rule. While the page limitation has led Petitioner to make certain strategic choices as to which arguments to include and which to omit in his amended petition, the page limitation is unreasonable.[3] It would be nonsensical to hold that the twenty-five (25) page limit, which is itself a reasonable and consistently applied state procedural rule for lawyers with law degrees who practice law in this State. But to hold a pro-se litigant that has only completed the eighth (8) grade and with only a General Education Degree (G.E.D.), to that same level of competence is unpractical for a pro-se litigant with a basic education to accomplish. Petitioner's poor syntax and sentence construction and his unfamiliarity with pleading requirements are the reasons why Petitioner's Petition for Writ of Certiorari exceeds the twenty-five (25) page limit. Petitioner's level of competence is not on the same level as lawyers with college degrees that practice law as a career in this State.

Petitioner's low level of competence constitute as "cause" for his failure to adhere to a State procedural rule that deems issues not briefed on appeal to be waived. It makes it difficult for him to comply with the twenty-five (25) page limit, due to a basic education, does therefore constitute cause for his failure to comply with the State procedural rule requiring litigants to brief

[3] The United States Supreme Court limits opening briefs to fifty (50) pages. See U.S. S.Ct. R. 33.1(g).

issues on appeal in order to preserve them and exhaust all constitutional claims. The twenty-five (25) page limit prejudices a pro-se litigant with a low level of competence by depriving him of presenting his constitutional claims to this court.

Petitioner's post-conviction relief application presents substantial constitutional claims concerning his actual innocence, police and prosecutorial misconduct by the State, an erroneous jury charge, and attorney ineffectiveness at trial. These claims, which go to the heart of the truth-finding process, undermine confidence in the integrity of the verdict and sentence pursuant to which Petitioner is to serve a twenty-five (25) year sentence. If the State's default is allowed to stand, Petitioner, John Garvin will be precluded from demonstrating that the verdict and sentence of twenty-five (25) years that was imposed on him is unreliable.

II.
THE STANDARD OF *SCHLUP v. DELO, SUPRA.*, DEFINES THE KIND OF MISCARRIAGE OF JUSTICE WHICH PERMITS THE CONSIDERATION OF AN OTHERWISE – BARRED CONSTITUTIONAL CLAIM REGARDING THE DETERMINATION OF GUILT OR INNOCENCE IN A NON-CAPITAL CASE.

Petitioner, John Garvin, has presented to this Court in his original Petition for Writ of Certiorari and in his Amended Petition for Writ of Certiorari, a compelling case of actual innocence which warrants relief under settled law. Petitioner produced objective after-discovered evidence disproving an incriminating piece of the State's evidence that the prosecution had argued at trial served to link him to the crime. Given the entirely circumstantial case that was presented against him and the paucity of credible evidence that remains Petitioner Garvin has surely met and exceeded the requirements of *Schlup*.[4]

A. *Schlup* Established A Standard For Gateway Claims Of Actual Innocence Which Affords Petitioner's Presenting Persuasive Claims A Meaningful Avenue For Review Of Constitutional Violations That Contributed To A Wrongful Conviction.

[4] *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995)

Schlup v. Delo, 513 U.S. at 298, confirmed that a court may reach the merits of a petitioner's otherwise defaulted constitutional claims – that it may allow the petitioner to pass through the procedural "gateway" to the underlying claims – if the petitioner presents new, reliable evidence which undermines confidence in the trial verdict to such an extent that the court finds it more likely than not that no reasonable juror would have voted to convict in light of the new evidence. See *Schlup*, 513 U.S. at 327, 329. The *Schlup* court embraced the standard set forth in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), and *Kuhlmann v. Wilson*, 477 U.S. 436 (1996), for evaluating gateway innocence claims: that the constitutional error complained of "probably" resulted in the conviction of one who is actually innocent. See *Schlup*, 513 U.S. at 322. In explaining it's adoption of the *Carrier* standard for gateway claims of actual innocence, the court emphasized the "equitable nature of habeas corpus," U.S. at 319, and concluded that it was critically important to maintain a standard for evaluating gateway innocence claims which affords a petitioner in the "extraordinary" case presenting persuasive evidence of mistaken identity a "meaningful avenue by which to avoid a manifest injustice." *Id*. at 327.[5]

After announcing that the *Carrier* standard applies to gateway innocence claims, the court provided lower courts with several guiding principles for evaluating such claims. First, the petitioner should succeed under *Schlup* only if he persuades the court that "in light of the new evidence, no juror acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. Second, the petitioner must present reliable evidence, such as credible eyewitness accounts, exculpatory scientific evidence, or other critical physical evidence.

[5] In adopting the *Carrier* standard, the Court by no means ignored the impact of gateway claims of innocence on the systemic interest in "finality, comity, and conservation of judicial resources." *Schlup*, 513 U.S. at 322. The court painstakingly considered these interests and at the same time recognized that "[c]laims of actual innocence pose less threat to scarce judicial resources and to principles of finality and comity" than do other sorts of claims and that "a substantial claim that constitutional error has caused the conviction of an innocent person are extremely rare." *Id*. at 324.

Id. at 324. Third, the court must make it's gateway determination in light of all the evidence – both that adduced at trial and that newly presented – and must determine whether sufficient evidence of guilt remains unaffected by the new evidence so that a reasonable juror would still find the petitioner guilty beyond a reasonable doubt. *Id*. at 327 – 328, 331 – 332. Fourth, the court was explicit that a court must not substitute it's own judgement for a jury's but must consider the evidence of innocence from the perspective of a "reasonable, properly instructed juror" conscientiously following instructions to consider all the evidence fairly and to hold the State to it's burden of proving guilt beyond a reasonable doubt. *Id*. at 329, 331.

In Petitioner Garvin's case, these principles have been completely disregarded by the PCR court, as a matter of fact the PCR Court's order of dismissal does not even address or rule on the Petitioner's after-discovered evidence that he has presented to the PCR court. Under *Schlup*, Petitioner Garvin's presentation of two Report of Interviews, (See App. pp. 1097 – 1098), conducted by SLED Agent, Ashley Asbill, shows that extrinsic fraud was committed upon the Court, thus, discrediting the State's most incriminating documented evidence against him, an alleged inculpatory confession statement, (see App. p. 110), in an entirely circumstantial case, plus the record shows that, Asst. Solicitor, James E. Hunter and Petitioner's trial attorney, Scott D. Robinson, Esquire, did conspire to convict Petitioner, should have led the PCR Court to find that such a showing undermines the confidence in the outcome of his trial sufficiently so that no reasonable juror knowing all of this evidence existed would persist in believing Petitioner Garvin is guilty beyond a reasonable doubt.

1. **The Existence Of Evidence Of Material Facts, Not Previously Presented And Heard, Requires Vacation Of Petitioner's Conviction, In The Interest Of Justice, Whereas, The PCR Court Failed To Rule On The Evidence That Was Presented Before The Court, Pursuant To S.C. Code Ann. §§ 17-27-20(A)(4) and 17-27-45(C).**

The South Carolina Uniform Post-Conviction Procedure Act (PCR Act) allows an applicant to file an application for relief "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." See S.C. Code Ann. §17-27-20(A)(4) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts "could have been ascertained by the exercise of reasonable diligence"). See also S.C. Code Ann. § 17-27-45(C).

So therefore, guided by the language of sections 17-27-20(A)(4) and 17-27-45(C) of the PCR Act, when a PCR applicant seeks relief on the basis of newly discovered evidence following a [trial], relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after [trial] and, in the exercise of reasonable diligence, could not have been discovered prior to the [conviction at trial]; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's [conviction] to be vacated. *Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014).

Turning to the facts of this case, the newly discovered evidence, (see App. pp. 1097 – 1098), namely evidence that corroborates and relates to Petitioner's testimony and his defense theory of being tricked/mentally coerced into signing a blank statement that was later filled in by SLED Agent, Ashley Asbill, (see App. pp. 295 – 300, Ln. 14 – 2); (also see App. pp. 214, 220, Ln. 8 – 15, 2 – 11), which Petitioner discovered after being convicted at trial for drug trafficking in heroin, on June 15, 2015, and on July 16, 2019, does constitute as evidence of material facts not previously presented and heard that, in the interest of justice, requires Petitioner's conviction to be vacated on a petition for post-conviction relief (PCR).

Furthermore, the weight and quality of Petitioner's newly discovered evidence as "evidence of material facts, not previously presented and heard" severely corroborates Petitioner's theory of being tricked/mentally coerced into signing a blank statement that was later filled in by SLED Agent, Asbill. See S.C. Code Ann. § 17-27-20(A)(4) (emphasis added). Specifically, the newly discovered evidence, (see App. pp. 1097 – 1098), tends to show that the States Witnesses provided false testimony about the trustworthiness of an alleged confession statement, (see App. p. 1100), allegedly made by the Petitioner. The newly discovered evidence also impeaches and contradicts the States Witnesses testimony about not coercing Petitioner into making a statement. Therefore, the newly discovered evidence does constitute evidence of material facts within the language of section 17-27-20(A)(4), and that Petitioner's conviction was based without the knowledge of the potentially newly discovered evidence does constitute an injustice that would change the result of a new trial if had.

2. The Constitutional Errors in Petitioner's Trial Has Deprived the Jury of Critical Exculpatory Evidence That Would Have Established Insufficient Evidence of Guilt and Would Have Also Proved His Innocence.

A trial error, which is an "error which occurred during the presentation of the case to the jury," may "be quantitatively assessed in the context of other evidence presented in order to determine whether it's admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 308 – 309, 111 S.Ct. 1246 (1991). Some constitutional trial errors "which in the setting of a particular case are so unimportant and insignificant that they maybe, consistent with the Federal constitution be deemed harmless … [and do not require an] automatic reversal of the conviction." *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824 (1967). "Indeed, "the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes

public respect for the criminal process by focusing on the underlying fairness of the trial rather than the virtually inevitable presence of immaterial error.'" quoting *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013)(citation omitted).

In sum, the right of an accused to effective assistance of counsel in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to relieve counsel "is either respected or denied; it's deprivation cannot be harmless." *Mckaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944 (1984). As such, the error is structural in that it is " 'so basic to a fair trial that [its] infraction can never be treated as harmless error.' " *Fulminante*, 499 U.S. at 289, 111 S.Ct. 1246 (quoting *Chapman*, 386 U.S. at 23, 87 S.Ct. 824).

In this case, the trial court denied Petitioner's Motion to Relieve Counsel, thus, depriving Petitioner of his right to relieve Scott D. Robinson, Esquire, as his attorney, who would constructively deny him effective assistance of counsel at his trial. The deprivation of Petitioner's sixth amendment constitutional right to effective assistance of counsel in his defense and his Fourteenth Amendment right to due process, due to the prosecutorial misconduct at his trial cannot be harmless and, as such, are constitutional errors that have occurred during Petitioner's trial in violation of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *United States v. Cronic*, 466 U.S. 648 (1984), *Napue v. Illinois*, 360 U.S. 264 (1959), *Giglio v. United States*, 405 U.S. 150 (1972) and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

a. Newly Discovered Evidence

"The PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims … that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. S.C. Code Ann. § 17-27-20(A)(4) (2014). Thus, by its plan language,

the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence." quoting *Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014). Pursuant to South Carolina Code sections 17-27-20(A)(4) and 17-27-45(C), a person who has been convicted of certain crimes, like drug trafficking, may petition for post-conviction relief to present newly discovered evidence and have a hearing on that evidence that was not presented at trial. To obtain an order granting relief, the Petitioner must present prima facie proof that, among other things, the evidence is material to exonerating the Petitioner as the perpetrator of the charged offense and that a reasonable probability exists that the Petitioner would not have been convicted of the charged offense if the exculpatory evidences had been presented at trial. See *Edmond v. State*, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2002) ("The burden is on the applicant in a PCR proceeding to prove the allegations in his application."). If the newly discovered evidence is favorable to the Petitioner, then the court must order appropriate relief, which may include a new trial. See S.C. Code Ann. § 17-27-80. A petition filed pursuant to this statutory authority is considered a petition for post-conviction relief. See S.C. Code Ann. §§ 17-27-20(A)(4) and 17-27-45(C).

A Petitioner claiming that he is entitled to relief on the basis of newly discovered evidence must establish the following:

> (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (citing *McCoy v. State*, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n.1 (2013) (quoting *Clark v. State*, 315 S.C. 385, 387 – 88, 434 S.E.2d 266, 267 (1993)). Regarding the first factor that is most critical, the defendant must raise a strong presumption that the result at any subsequent trial in all probability would be different. See

Clark, 315 S.C. at 388. In determining whether the newly discovered evidence will probably produce a different result, the post-conviction court, should have consider the "weight and quality" of Petitioner's newly discovered evidence, which a reasonable trier of fact would give the proffered evidence and the probable impact of it in light of all the facts and circumstances shown at the original trial of the case. *Id*. at 388.

In this case, since the completion of Petitioner's trial and the entry of judgment on May 23, 2013, and the appellate courts affirming of Petitioner's conviction on November 26 2014. There exists evidence of material facts, not previously presented and heard, (see App. pp. 1097 – 1098), that requires vacation of the conviction or sentence in the interest of justice, pursuant to S.C. Code Ann. §§ 17-27-20(A)(4) or 17-27-45(C), evidence that Petitioner inadvertently discovered that actually relates to his case was discovered on June 15, 2015. (See App. p. 981). Then again on July 16, 2019, Petitioner discovered additional evidence that can also prove his innocence and prove that fraud was committed upon the Court to prevent Petitioner from fully exhibiting and trying his case. (See App. p. 982 – 983).

The after-discovered evidence refers to evidence of facts existing at the time of trial of which Petitioner was excusable ignorant to, because of being forced to rely on insidious counsel. Who would deliberately fail to present this exculpatory evidence to the court and would pursue an unreasonable trial strategy that would fail to subject the State's case to adversarial testing at the expense of a different viable trial strategy. (See App. p. 485).

During Petitioner's state proceedings, his trial counsel, Scott D. Robinson, received from Asst. Solicitor, James E. Hunter, discovery evidence on November 8, 2012, and on December 10, 2012, (see App. pp. 978 – 979), after filing a Motion for Discovery Evidence on or about October 19, 2012. When Counsel Robinson, was given the discovery evidence while the case was pending

in the Spartanburg County Court of General Sessions, it included information that was not utilized by Counsel Robinson at Petitioner's trial, namely two Report of Interview by SLED Agent, Ashley Asbill, (1) stating that he "conducted an interview with subject Jonathan Perez at the Spartanburg County Sheriff's Office following his arrest." (see App. p. 1097). And (2) stating that he "conducted an interview with subject Jonathan Garvin at the Spartanburg County Sheriff's Office following his arrest." (see App. p. 1098).

The evidence, is two Report of Interviews by SLED Agent Asbill, shows that extrinsic fraud upon the Court was committed by the State and SLED Agent Asbill, who fabricated those two documents, in all actuality three fabricated documents, to the State that was in Petitioner's December 10, 2012, discovery evidence, (see App. p. 979), by claiming to have conducted an interview with Jonathan Perez at the Spartanburg County Sheriff's office following Perez's arrest. (See App. p. 1097). The second, one is a statement claiming that Petitioner made a signed confession to him that he wrote and claims that Petitioner was to nervous to write himself. (See App. p. 1100). The third, one claims to have conducted an interview with Jonathan Garvin at the Spartanburg County Sheriff's office following Jonathan Garvin's arrest. (See App. p. 1098). Agent Asbill stated in those two Report of Interviews that, after Jonathan Perez and Jonathan Garvin was read Miranda warnings, Perez/Garvin stated that each one wanted to cooperate with Agent Asbill, but stated they both would refuse to provide a written statement. (See App. pp. 1097 – 1098). ATF Special Agent, David Pait, would also make the same assertion in his July 17, 2012, Report of Investigation. (See App. pp. 1070 – 1071).

But at Petitioner's trial, Jonathan Perez testified that he didn't give a statement at all to police. (See App. pp. 239 – 240, Ln. 21 – 25, 1 – 8). Whereas, Petitioner testified that the statement he gave related to events that transpired in Pennsylvania and New Jersey. (See App. pp. 203 &

213, Ln. 18 – 19 & 15 – 23). Not to mention, the fact that Petitioner testified that he was tricked/coerced into signing a blank statement by Agent Asbill that was later filled in by Agent Asbill. (See App. pp. 203, 206, 207, 213, Ln. 18 – 23, 20, 2 – 7, 15 – 23, 2 -15). The question is why would Petitioner sign an inculpatory statement, but would refuse to sign a statement that talks about drugs being distributed in New Jersey and Pennsylvania. Had Counsel Robinson utilized this evidence at Petitioner's trial, he would have cross-examined, Agent Asbill and ATF Special Agent Pait, regarding how those statements came to be during their interview of Petitioner and the truthfulness and voluntariness of the alleged confession statement that was written by Agent Asbill, as the newly discovered evidence is exculpatory. It was Counsel Robinson's deliberate strategy to omit this information on cross-examination. Rather, Counsel Robinson would cross-examine SLED Agent Asbill and ATF Special Agent Pait on how they conducted their interview of Petitioner with no evidence to support their testimony, but each other's own testimony. (See App. pp. 173 – 174; 183 – 184, Ln. 13 – 19; 6 – 16).

Counsel Robinson's sole defense at trial was one of mere presence. (See App. p. 729, Ln. 2 – 17). A defense that he himself did not believe. (See App. p. 1099). In all retrospect and viewing Petitioner's Motions and attachments, (see App. pp. 480 – 488, 489 – 511, 523 – 552, and 919 – 921), Petitioner believes that Counsel Robinson's failure to utilize the discovery material, his lack of preparation, omissions at trial, both singly and considered together, constitutes ineffective assistance of counsel.

b. Involuntarily Confession: Police Misconduct

1. SLED Agent, Ashley Asbill Has Falsified An Inculpatory Statement That The Petitioner Did Not Make or Even Write and Was Tricked/Mentally Coerced Into Signing.

The manufacturing of evidence by SLED Agent, Ashley Asbill and ATF Special Agent, David Pait, is deplorable police conduct. There are circumstances and factual evidence in this case that was not presented and heard during Petitioner's trial that will reveal that Petitioner Garvin's will was overborne by SLED Agent, Ashley Asbill and ATF Special Agent, David Pait deplorable police conduct, so as to render the alleged confession statement, (see App. p. 1100), that the officers said Petitioner gave, to be involuntary. The officers did trick or coerce Petitioner Garvin into signing a blank statement that SLED Agent Asbill filled in later in his own words. (See App. pp. 295 – 309, Ln. 14 – 2); (also see App. pp. 214, 220, Ln. 8 – 15, 2 – 11). Petitioner contends that the alleged confession statement should have been suppressed, because ATF Special Agent Pait and SLED Agent Asbill did engaged in a "question-first" manipulation of Miranda forbidden by *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010).

"A statement may be held involuntary if … obtained by the exertion of improper influence." quoting *State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996). Any statements that are produced as a result of a *Miranda* violation must be suppressed. See *Miranda v. Arizona*, 384 U.S. 436, 458, 86 S.Ct. 1602, 1619 (1966)(Police interrogation is inherently coercive, and unless adequate protective devices are employed, no statement can truly be voluntarily given); *Id*. at 479, 86 S.Ct. 1602 ("[u]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."). The manufacturing of false documents by police officials offends the traditional notions of due process of law under both the Federal and State Constitutions. See U.S. Const. Amends. V, XIV; S.C. Const. Art. I, § 3, 12.

Petitioner states that his *Miranda* rights were violated and that this Court must suppress the alleged confession statement, because Petitioner did not give a knowingly and intelligently subsequent valid waiver that was voluntary. It was determined, after Petitioner's *Jackson-Denno* hearing, that the inculpatory confession statement was voluntary, that the Petitioner was advised of his right under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), despite the fact that he did not sign a form waiving those rights or was ever question during his trial about being *Mirandized*.

Petitioner, to the contrary, argues that even when a defendant has waived his Miranda rights, a subsequent incriminating statement may not be admissible at trial if the statement and the waiver were obtained as a result of improper police coercion. citing *State v. Reed*, 133 N.J. 237, 627 A.2d 630 (1993).

Here in this case, a manufactured document was admitted as substantive evidence against Petitioner. The fabricated document should have been suppressed because it was the product of police trickery and coercion during a police interview. On May 21, 2013, a *Jackson-Denno* hearing was conducted to determine whether Petitioner did make an alleged inculpatory confession statement knowingly and voluntarily concerning a drug trafficking crime that would be admissible at trial on the second indictment. (See App. pp. 1043 – 1044). ATF Special Agent, David Pait and SLED Agent Ashley Asbill testified on behalf of the State and describe their roles in the taking of Petitioner's allege confession statement. Petitioner's attorney would advise him to not testify at his *Jackson-Denno* hearing. Insomuch as, Petitioner's trial attorney would stipulate that Petitioner Garvin was read his Miranda rights, (see App. p. 56, Ln. 1 – 4), despite the fact that the Petitioner did not sign a form waving those rights and was not questioned during his *Jackson–Denno* hearing or at his trial about receiving his *Miranda* warning. The trial court did not conduct a lengthy

colloquy to determine the voluntariness of Petitioner's allege confession statement. The record will show that Petitioner never stipulated on record that he was properly *Mirandized*.

"Failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warning and getting a waiver generally produces a virtual ticket of admissibility, with most litigation over voluntariness ending with waiver finding." quoting *Missouri v. Seibert*, 542 U.S. 600, 601, 124 S.Ct. 2601, 2603 (2004).

Asst. Solicitor, James E. Hunter, did submit to the courts a fabricated document (see App. p. 1100)[6] and the perjured testimony of SLED Agent, Ashley Asbill and ATF Special Agent, David Pait, in the trial against Petitioner, testifying with the sole intent to prevail upon the courts for the appearance of presenting and establishing the trustworthiness of an alleged confession statement that was allegedly made by the Petitioner to be within the legal standard of *Jackson v. Denno*, Supra., and *Miranda v. Arizona, Supra*., then it was placed into evidence after being redacted, with no objection from Petitioner's Court-Appointed Attorney, Scott D. Robinson. (See App. p. 72, Ln. 7 – 20).

When in truth and in fact, as Asst. Solicitor, James E. Hunter, very well knew, the alleged confession was the fruit of an arrest that was unsupported by probable cause and evidence of an opportunity to commit the crime charged was insufficient in order to establish the *corpus delicti* for drug trafficking. Asst. Solicitor, James E. Hunter, did not provide any facts that corroborate facts contained in the confession; any facts that establish the crime which corroborate facts contained in the confession; or facts under which the confession was made that show that the confession is trustworthy or reliable, taken together with the statement, that allow a reasonable

[6] During Petitioner's PCR hearing he would present to the court material exculpatory evidence, (see App. pp. 1097 – 1098), that his Court-Appointed Attorney, Scott D. Robinson, would fail to present to the courts to prove his innocence.

inference that the crime of drug trafficking in heroin was committed. The details of Petitioner's alleged confession was not corroborated by SLED Agent, Ashley Asbill and ATF Special Agent, David Pait's testimony during Petitioner's *Jackson-Denno* hearing and trial.

The testimony of SLED Agent, Asbill and ATF Special Agent, Pait does not state or corroborate that Petitioner Garvin knew of or was even involved with the drug transaction. Asst. Solicitor, James E. Hunter, did not prove or corroborated that Petitioner actively participated in the underlying drug trafficking crime with advanced knowledge to provide sufficient independent evidence to support the trustworthiness of Petitioner's alleged confession to SLED Agent, Asbill and ATF Special Agent, Pait. The lack of independent evidence, taken together with the unincorporated alleged confession, does not present a reasonable inference that the crime of drug trafficking was committed by Petitioner Garvin.

The Petitioner argues that the admission of the incriminating statement as evidence violated his Fifth Amendment Constitutional right against self-incrimination. The method used to elicit the alleged confession statement in this case deserves close scrutiny. Because ATF Special Agent, David Pait and SLED Agent, Ashley Asbill, devised a ruse to trick Petitioner into signing a blank statement that was later filled in by SLED Agent, Asbill with an incriminating inculpatory statement in SLED Agent, Asbill's own words. (See App. pp. 295 – 300, Ln. 14 – 2).

Where there is conflicting evidence about a confession, the court must first make a finding as to the validity of the statement. *State v. Atchison*, 268 S.C. 588, 235 S.E.2d 294 (1977), cert. denied, 434 U.S. 894, 98 S.Ct. 273 (1977).

Here, the purpose of questioning Petitioner was to obtain information about drug crimes in North Jersey and Pennsylvania that Petitioner had witnessed, not to elicit a confession or

incriminating information about an alleged involvement in the crime of drug trafficking in heroin in South Carolina.

2. The Trial Judge Erred In Admitting An Involuntary Confession That Was Redacted To Hide The Fact About Police Misconduct.

The trial judge erred in denying Petitioner's pre-trial *Jackson-Denno* hearing motion to exclude the evidence of an alleged confession. Petitioner argues that the State did not present sufficient evidence to satisfy the *corpus delicti* rule as express by the United States Supreme Court in *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158 (1954) and expressed by the South Carolina Supreme Court in *State v. Osborne*, 335 S.C. 172, 179 – 80, 516 S.E.2d 201, 204 – 05 (1999). In particular, Petitioner asserts that the alleged confession was the fruit of an arrest that was unsupported by probable cause and evidence of opportunity to commit the crime charge was insufficient in order to establish the *corpus delicti*.

This court should apply an abuse of discretion standard in reviewing the trial court's decision to deny Petitioner's *Jackson-Denno* motion to suppress. A Judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (S.C. App. 2013). Moreover, Petitioner states that his *Jackson-Denno* hearing was totally lacking a reliable evidentiary base that demonstrates the proper judicial review of the procedural safeguards that's effective to secure the privilege against self-incrimination. *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013) (citing *Miranda*, 384 U.S. at 144); also see S.C. Const. Art. I, § 22.

Here in this case, the details of Petitioner's alleged confession was not corroborated by Officer Asbill and Officer Pait's testimony during Petitioner's *Jackson-Denno* hearing and trial. There is testimony evidence in the record, that Petitioner made a claim that his confession was

false and that he was coerced into signing it. (See App. pp. 203, 206, 207, 213, Ln. 18 – 19, 20, 2 – 7, 15 – 21); (also see App. pp. 295 – 300, Ln. 14 – 2).

The evidence presented at Petitioner's *Jackson-Denno* hearing and trial did not prove or corroborate that Petitioner Garvin was knowingly involved in the commission of a criminal act, or that there had been some planning an agreement between him and his co-defendant, Jonathan Perez pertaining to the act. The State did not prove or corroborated that Petitioner actively participated in the underlying drug trafficking crime with advanced knowledge to provide sufficient independent evidence to support the trustworthiness of Petitioner's alleged confession to SLED Agent, Asbill and ATF Special Agent, Pait. Furthermore, the lack of independent evidence, taken together with the unincorporated alleged confession, does not present a reasonable inference that the crime of drug trafficking was committed by Petitioner Garvin.

c. Conspiracy:

1. Asst. Solicitor, James E. Hunter, Has Conspired With Petitioner's Appointed Counsel, Scott D. Robinson, to Deprive Him of His Rights And Privileges Guaranteed By the Federal and State Constitution

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence." *McMillan v. Oconee* Mem'l. *Hosp., Inc*., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (citation omitted). The elements a plaintiff must demonstrate in order to prove a civil conspiracy are (1) the combination of two or more people; (2) for the purpose of injuring the plaintiff; and (3) which cause special damages. *Pye v. Estate of Fox,* 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "[I]n civil [conspiracy] actions, the gravamen of the tort is the damage resulting to [the] plaintiff

from an overt act done pursuant to a common design." *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989).

Here in this case, the Petitioner will show by the record. That on or about April 5, 2013, Petitioner had told Counsel Robinson to relieve himself as counsel on his case during an attorney/client visit at Spartanburg County Detention Center. Then on April 10, 2013, Counsel Robinson would file his Motion to Relieve Counsel as requested with the Spartanburg County Clerk's Office and the Spartanburg County Solicitor's Office. (See App. p. 1036, Counsel Robinson's filed Motion to Relieve Counsel). Whereas, a motion hearing date was scheduled for that motion to be heard on April 12, 2013. "But that motion never made it before the court. It was just discussed in chambers," with Asst. Solicitor, James E. Hunter, Counsel Robinson and Circuit Judge, R. Lawton McIntosh. (See App. pp. 11 – 12, Ln. 25 – 4).

The record would respectfully show this court that on or about April 12, 2013, Petitioner's Court-Appointed Pro-bono Attorney, Scott D. Robinson, Esq., withdraw his Motion to Relieve himself as Counsel then would combine forces with Asst. Solicitor, James E. Hunter and entered into an extra-judicial conspiracy, that was discussed off the record in Judge McIntosh's chambers, to injure Petitioner Garvin by having him convicted of drug trafficking on May 23, 2013, then causing Petitioner to receive a sentence of 25 years with a $250,000.00 fine in the following manner.

It can be determined from the record that on April 12, 2013, Asst. Solicitor, James E. Hunter and Petitioner's court-appointed pro-bono attorney, Scott D. Robinson, Esq., did conspire to convict Petitioner, as it was discussed in Circuit Judge, R. Lawton McIntosh's chambers. (See App. pp. 11 – 12, Ln. 25 – 4).

d. Fraud:

1. The Assistant Solicitor and Petitioner's Trial Counsel Deliberately Conspired to Scheme to Defraud the Courts, Knowingly and Intentionally.

A judgment may be set aside on the ground of fraud only if the fraud is "extrinsic" and not "intrinsic." Extrinsic fraud is collateral or external to the trial of the matter. See *Hagy v. Pruitt,* 339 S.C. 425, 431, 529 S.E.2d 714 (2000). "Extrinsic fraud is fraud that induces a person not to present a case or deprived a person of the opportunity to be heard. Relief is granted for Extrinsic fraud on the theory that the fraud prevented a party from fully exhibiting and trying his case." quoting *Chewning v. Ford Motor Co*., 354 S.C. 72, 81, 579 S.E.2d 605 (2003).

The subornation of perjury and the submission of a fabricated document unto the courts by Asst. Solicitor, James E. Hunter, are actions which constitute extrinsic fraud. "[W]here an attorney – an officer of the court – suborns perjury or intentionally [submitted a fabricated] document[], he … effectively precludes the opposing party from having his day in court.[7] These actions by an attorney constitute extrinsic fraud." quoting *Chewning*, 354 S.C. at 82. Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of South Carolina's system of justice. Where[as,] an attorney [that] embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs. *Id*.[8]

Asst. Solicitor, James E. Hunter and Scott D. Robinson, Esquire, had a mutual understanding to commit extrinsic fraud upon the court, to convict Petitioner, John Garvin of drug trafficking in heroin, their conduct and the circumstances that are within the record that creates

[7] See *Chewing*, 354 S.C. 72, n. 5, 579 S.E.2d 605 (2003) (internal citation omitted)(attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony).

[8] "[B]ecause fraud upon the court is an affront to the administration of justice, a litigant who has been defrauded need not established prejudice. [T]he perpetrator of the fraud upon the court should not be allowed to dispute the effectiveness of the fraud after the fact." *Id*. at n7.

circumstantial evidence that's susceptible to a reasonable inference that they did in fact conspire to commit those acts for collateral purposes on April 12, 2013. See *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006)("In order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. [The] [c]onspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances.").

Here, the "factual" basis for the fraud-based issue that's before this court and that form Petitioner's "collateral attack" on his underlying conviction consists of the alleged acts by Asst. Solicitor, James E. Hunter; SLED Agent, Ashley Asbill; ATF Special Agent, David Pait and Petitioner's trial attorney, Scott D. Robinson in furtherance of their shared scheme to commit a fraud upon the court by utilizing the suborn testimony of SLED Agent, Ashley Asbill and ATF Special Agent, David Pait to prevail onto the courts for the appearance of presenting and establishing the trustworthiness of an alleged confession statement that was allegedly made by the Petitioner. Whereas, Petitioner's trial attorney, Scott D. Robinson would deliberately fail to advise the Court's of an existing conflict of interest and to inform Petitioner of and to utilize exculpatory evidence (see App. pp. 1097 – 1098), to impeach SLED Agent, Asbill and ATF Special Agent, Pait. All these acts, individually and collectively, constitute "extrinsic" fraud. As such, they are grounds for setting aside Petitioner's conviction.

e. **Prosecutorial Misconduct**:

1. Asst. Solicitor, James E. Hunter Has Abused the Judicial Process of the Petitioner With His Official Lawlessness in the Enforcement of South Carolina Statute § 44-53-370(e), Whereas, He has Shown Bad Faith, Has Prosecuted the Petitioner's Case Maliciously and Sadistically to Cause Harm to Him With the Use of False Evidence

Petitioner states that Asst. Solicitor, James E. Hunter, "knowingly used false testimony" and a fabricated document as evidence to obtain Petitioner Garvin's conviction in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972), and his trial counsel, Scott D. Robinson, was ineffective for failing to object. Petitioner will show that the solicitor's misconduct "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974).

"A convicted defendant is entitled to a new trial if he can establish that the Government intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key Government witness at the trial." quoting *United States v. Harris*, 498 F.2d 1164,1168 (3rd Cir. 1974). "The fact that a defendant knows that the [S]tate is attempting to secure his conviction on the basis of false evidence does not necessarily discharge the prosecutor from his duty to correct the false testimony [and evidence] or immunize the state from a claim that the defendant's right to due process was violated." quoting *Gomez v. Commissioner of Correction*, 336 Conn. 168, 243 A.3d 1163 (2020).

However, the grant of a new trial based upon a *Napue*/*Giglio* violation is proper only if: (1) the statements at issue are shown to be actually false; (2) the prosecution knew they were false; and (3) the statements were material. *United States v. O'keefe*, 128 F.3d 885, 893 (5th Cir. 1997). Indeed, the PCR court does have a duty to correct because *Napue* and *Giglio* does apply to merely "misleading" testimony in the first instance. Rather, those two cases require the prosecutor to correct only testimony that is substantially misleading or false.

Under the present facts, the State allowed to go uncorrected false testimony about the trustworthiness of a fabricated document in relation with two of its witnesses. Although the State

had within it's possession exculpatory evidence, (see App. pp. 1097 – 1098), that would contradict it's witnesses, the State, in it's opening argument, knowingly told the jury that Petitioner "confessed to it," "[h]e confessed to buying four grams of heroin in North Carolina." … "[L]ook at the evidence, both the evidence that we present through exhibits and the evidence that you hear from the officer's testimony, from Mr. Jerman's testimony." (see App. pp. 86 – 87, Ln. 15 – 17, 25 – 2). Furthermore, there was testimony provided by the Petitioner that he was coerced into signing a blank statement (see App. pp. 203, 213, Ln. 18 – 19, 15 – 21), (also see App. P. 207, Ln. 2 – 7), and the testimony provided by his co-defendant, Jonathan Perez, that he didn't make a statement to the police. (See App. pp. 239 – 240, Ln. 21 – 25, 1-8). In addition, to the fact, that "[Petitioner] didn't have any involvement, (see App. p. 231, Ln. 11 – 13), and that "[Petitioner] did not know of [his] intentions of whatever [he was] gonna do at all." (see App. p. 231, Ln. 23 – 24), (see App. p. 234, Ln. 1 – 8). The PCR court's findings are not supported by competent evidence of probative value in the record to support its findings.

A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. The failure to correct false evidence is as reprehensible as it's presentation." quoting *Riddle v. Ozmint*, 369 S.C. 39, 47 – 48, 631 S.E.2d 70 (2006) (citing *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (quoting *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763 (1972))).

2. Asst. Solicitor, James E. Hunter, Has Vouched For the Credibility of the State's Witnesses, that Have Committed Perjury During Petitioner's Trial

The Due Process Clauses in both the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty "without due process of law." U.S. CONST. AMEND. V; Id. XIV, § 1. To find whether the Assistant Solicitor, James E. Hunter's comments in closing argument violated the Petitioner's due process rights. This court must determine whether the comments were

improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. See *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " (quoting *Donnelly v. Dechristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974))); United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990) (Stating "the test for reversible prosecutorial misconduct" in a prosecutor's closing argument is "the prosecutor's remarks or conduct must in fact have been improper, and … such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprived the defendant of a fair trial" (citation omitted)).

Petitioner did not receive a fair trial due to, Asst. Solicitor, James E. Hunter, vouching for the creditability of the State's witnesses within his closing argument. (See App. pp. 254 – 259, Ln. 10 – 13). This, Solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. *Id*. (citing *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (stating that a solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicting that information not presented to the jury supports the testimony"). This, solicitor[ ] must confine [his] closing remarks to the record and the reasonable inferences that may be drawn therefrom. *Id*.

Here, Petitioner's trial counsel's closing argument did not invite the solicitor to repeatedly assert that the State's witnesses were truthful in their testimony and had no motive to lie. Rather, trial counsel's presentation merely pointed out that the confidential informant, Fredrick Jerman's motive for testifying, (see App. pp. 245 – 254, Ln. 21 – 5), which could do no more than invite the solicitor to point out the defendant's witnesses motive to testify.

"The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." "[A] prosecutor cannot vouch for a witness' credibility. A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." quoting *Vaughn v. State,* 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citation omitted). "[A] solicitor's comments "so infect[s] [a] trial with unfairness as to make the resulting conviction a denial of due process."" *Id*. at 170, 607 S.E.2d at 75. (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868 (1974).

Accordingly, there is evidence in the record to support the Petitioner's claim of prosecutorial misconduct for Asst. Solicitor, James E. Hunter's repeated vouching for the State's witnesses credibility. Petitioner's trial counsel was deficient for failing to object to the Solicitor's vouching for it's witnesses. The prejudicial impact of Counsel Robinson's failure to object is evident from the record, prejudice has clearly flowed from counsel's error.

f. Due Process Violation

Next, Petitioner states that his conviction was obtained in violation of the due process clause of the Federal and State constitutions. Petitioner's argument is based on his court appointed counsel constructively denying him effective assistant of counsel and the State's presentation of false testimony and a fabricated document as evidence to obtain Petitioner's conviction in violation of *United States v. Cronic*, 466 U.S. 648 (1984), *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio v. United States*, 405 U.S. 150 (1972). Whereas, Asst. Solicitor, James E. Hunter, vouched for the credibility of the States Witnesses testimony in his closing rebuttal argument. (See App. pp. 254 – 259, Ln. 10 – 13). The solicitor's misconduct "so infected[ed] [the Petitioner's] trial with

unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974).

The Petitioner further states, that his *Napue*/*Giglio* claim is cognizable because there is evidence that indicate that the State has committed extrinsic fraud upon the court. (See App. p. 110); (see App. pp. 1097 – 1098). The Petitioner also asserts that under the present facts, the PCR court chose to ignore this fact by stating in it's order of dismissal, that "there has been presented no evidence tending to establish that the State's witnesses provided perjured or false testimony, fabricated evidence used against the applicant in his trial, or that the prosecutor fraudulently or improperly relied upon that testimony in the prosecution of the applicant's case." "Applicant's claim of prosecutorial misconduct have no merit and relief on those grounds are there denied." (see App. p. 876). The PCR court has allowed to go uncorrected false information and evidence about its relationship with two of the state witnesses that was presented at the Petitioner's trial. The Indiana Supreme Court has stated, "[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002).

The Petitioner would also point out that, Asst. Solicitor, James E. Hunter, knew or should have known it's evidence and the testimony that was provided by the State's Witnesses was false and misleading, if he would have properly investigated the discovery evidence he received from the Spartanburg County Sheriff Officers. That is, the falsity of the evidence was uniquely within the knowledge of the prosecution. Because the "false" nature of the evidence arises from it's supposed relevance in light of a police interview conducted by SLED Agent, Ashley Asbill, and ATF Special Agent, David Pait, after Petitioner was arrested on July 17, 2012. The newly

discovered evidence, (see App. p. 1097), existed and was deliberately not presented at Petitioner's trial by his appointed counsel. In short, this is new evidence about this particular claim of actual innocence.

The PCR court's order of dismissal determined that "[Petitioner] has presented no additional evidence relevant to the issue and has failed to provide credible evidence proving that the "involuntary confession" was "involuntary" and is in fact false. [Petitioner's] claim has no merit and relief on that ground is therefore denied." (see App. p. 880). "[Petitioner] has further failed to establish any other ground permitted under S.C. Code Ann. § 17-27-20 entitling the [Petitioner] to relief from his conviction or sentence and therefore, the application requesting post-conviction relief should be and is therefore denied and the application **DISMISSED** with **PREJUDICE**." (See App. p. 886).

Clearly, the PCR court has overlooked the evidence that the Petitioner has presented before the PCR court. Specifically, Petitioner's exhibits – 1 and 2, (see App. pp. 1097 – 1098), establishes that he was prejudice by Counsel Robinson's deficient performance to present exculpatory evidence that would have proved Petitioner's innocence.

g. Petitioner's Motions and Supporting Documentation

The question in this case is whether Petitioner has set forth a colorable claim of actual innocence. Accordingly, this court should consider Petitioner's issue of actual innocence as claimed within his PCR application, along with his Motion for Relief of Judgement — Based on Extrinsic Fraud, Misrepresentation, and other Misconduct of Asst. Solicitor, James E. Hunter and Scott D. Robinson, Esq., with supporting Affidavit. (See App. pp. 480 – 488). His Motion for Relief from Judgement — Based on After-Discovered Evidence with supporting Affidavit. (See

App. pp. 489 – 511). His Motion to Show Cause for Contempt for Perjury by State's Witnesses with supporting Affidavit. (See App. pp. 523 – 552). In addition, to Petitioner's Rule – 59(e), Motion for Reconsideration to Alter/Amend Judgment with supporting affidavit, (see App. pp. 919 – 921), to ascertain whether he has raised the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

This Court should consider and address the affidavits of Petitioner's above-mentioned Motions, which was presented to the PCR court. Petitioner's affidavits of those Motions as a whole averred that, "he is the victim of an extra-judicial conspiracy that consisted of "extrinsic fraud and misrepresentation" that was orchestrated by Asst. Solicitor, James E. Hunter and Scott D. Robinson, Esquire, on April 12, 2013," [in Circuit Judge, R. Lawton McIntosh's chambers] to keep exonerating evidence from the decision-makers." (See App. p. 485), (also see App. pp. 8, 12, Ln. 20 – 23, 4). "Scott D. Robinson, Esquire, who has conspired with the Asst. Solicitor, James E. Hunter, in committing extrinsic fraud upon the court, with his intentional perversion of the truth and misrepresentation to Petitioner that testifying at his Jackson-Denno hearing would give away his defense strategy, was done for the purpose of inducing the Petitioner to not testify and to surrender his legal right to challenge the alleged confession statement pursuant to Jackson v. Denno, Supra., 378 U.S. 368, 84 S.Ct. 1774 (1964)." (See App. p. 486).

Petitioner further averred that, "ATF Confidential Reliable Informant (CRI) No. 380, "Fredrick Jerman; SLED Agent, Ashley Asbill, and ATF Special Agent, David Pait, did perjure themselves as witnesses for the State of South Carolina during the trial of John Garvin, in State v. John Garvin, 2012-GS-42-05979, on May 22, 2013." (See App. p. 525).

"Fredrick Jerman testified under oath during the trial of Petitioner, John Garvin, that he knows him as Garvin but personally knows him as "Big Unc," on three occasion during his

testimony as the State's Witness. (See App. pp. 108, 112, 118, Ln. 19 – 21, 5 – 6, 14 – 15). Such testimony was false and Fredrick Jerman knew it to be false, because Fredrick Jerman stated to Deputy Officer, Matt Hutchins, of the Spartanburg County Sheriff's Office that, he "did not know the driver other than he was a relative of Brill's." (See App. p. 525); (also see App. p. 1103). During Petitioner's July 31, 2019, PCR hearing officer, Hutchins, would testify that, "the CRI in that case stated to him that he knew one of the occupants as Brills and did not know the other ." (See App. pp. 778 – 779, Ln. 24 – 25, 1). "I can't say when he knew you. I - - I'm relaying to you what was relayed to me. He knew one occupant as Brills and did not [know][9] the other occupant's name." (See App. p. 779, Ln. 13 – 15). "I can tell you he relayed to me he knew one occupant as Brills, and the other occupant he did not know." (See App. p. 779, Ln. 22 – 23).

SLED Agent, Ashley Asbill, "testified under oath during Petitioner's *Jackson-Denno* hearing and at his trial, that Petitioner was not under duress and that he did not mentally coerce him into making a statement and that his statement was in response to the deal in which he was arrested for on July 17, 2012." (See App. p. 525); (See App. p. 58, Ln. 4 -5); (See App. pp. 178 – 179, Ln. 25, 1 – 5); (See App. p. 179, Ln. 22 – 25) and (See App. p. 181, Ln. 11 – 19). Such testimony was false and SLED Agent, Ashley Asbill knew it to be false, because on July 17, 2012, SLED Agent, Asbill claimed to have conducted an interview with Jonathan Perez at the Spartanburg County Sheriff's Office following his arrest. Agent Asbill stated in his Report of Interview that, after Perez was read his Miranda warning, Perez stated that he wanted to cooperate with Agent Asbill, but stated he would refuse to provide a written statement. (See App. p. 1097). But during Petitioner's trial, Jonathan Perez testified that he didn't give a statement at all to police. (See App. pp. 239 – 240, Ln. 21 – 25, 1 – 8). Whereas, [Petitioner] testified that the statement [he]

[9] Petitioner has filed a complaint pursuant to the South Carolina Court Reporters Manual § XIII(B)(C), due to the court reporter's transcript errors within the PCR transcript.

gave related to events that transpired in Pennsylvania and New Jersey." (See App. pp. 203, 243, Ln. 18 – 19, 15 – 21); (also see App. p. 494, 526). At Petitioner's PCR hearing Agent Asbill would continue to claim that Jonathan Perez made a statement to him, when asked, so Jonathan Perez gave that statement to you?, (See App. p. 792, Ln. 24 – 25). "I made notes off what [Perez] told me." (See App. p. 793, Ln. 3). But when confronted with both Exhibits 1 and 2, (See App. pp. 1097 – 1098). Agent Asbill would claim that he made a Scrivener's error, but still stated that he interviewed Perez and that he inadvertently put Petitioner's name on the - - on the first one. (See App. pp. 799, 800, Ln. 3, 1 – 2).

ATF Special Agent, "David Pait, testified under oath during Petitioner's Jackson-Denno hearing and at his trial that Petitioner was not under duress and that he did not mentally coerce him into making a statement. (See App. pp. 172 – 173, Ln. 25, 1 – 5). And that Petitioner's statement was in response to questions made by himself and SLED Agent Asbill. (See App. p. 52, Ln. 18 – 22). Such testimony was false and ATF Special Agent, David Pait, knew it to be false, because Agent Pait also made the same assertion that SLED Agent, Ashley Asbill, made in his July 17, 2012, Report of Investigation." (See App. pp. 318 – 321, 526).

On May 23, 2013, Judgment was rendered and entered by the Spartanburg County General Sessions Court in a criminal matter then and there, that was pending, in which Petitioner, John Garvin was a Defendant and the State of South Carolina was the Plaintiff in that case, by which it was adjudged that [Petitioner], John Garvin was guilty of drug trafficking. (See App. p. 485). The testimony at Petitioner's "trial was material and prejudicial to Petitioner, and as a result of the testimony provided by Fredrick Jerman; SLED Agent, Ashley Asbill, and ATF Special Agent, David Pait, a guilty verdict was returned in the criminal trial." (see App. p. 526). The "testimony was perjury and was given for the purpose of persuading the jury to decide the criminal matter

erroneously in favor of the State of South Carolina. As a result, such perjured testimony obstructed the proceedings and hindered the proper administration of justice in the action and constitute as a contempt of court." (See App. pp. 526).

In addition, Petitioner's affidavits of those above-mentioned Motions also averred that, "that judgment was obtained by extrinsic fraud, misrepresentation, and other misconduct practiced by Asst. Solicitor, James E. Hunter, and Scott D. Robinson, Esquire, in obtaining the judgment. The extrinsic fraud, misrepresentation, and other misconduct consisted in the following: Scott D. Robinson, Esquire, as the representative of the Petitioner, was obtuse for the sake of deliberately failing to subject the prosecution's case to meaningful adversarial testing. Counsel Robinson deliberately pursued an unreasonable trial strategy at the expense of a different viable trial strategy, while conspiring with Asst. Solicitor, James E. Hunter, in committing extrinsic fraud upon the court by getting an alleged inculpatory statement, (See App. p. 1100), that was written by SLED Agent, Ashley Asbill, claiming that Petitioner, John Garvin, made said statement, which was then admitted into evidence. Once the alleged inculpatory statement, (See App. p. 1100), was admitted into evidence, it was then redacted with no objections from Petitioner's trial attorney, Scott D. Robinson. This statement was then presented to the jury as State's Exhibit No. 1 to secure a conviction for drug trafficking." (See App. p. 485).

According to Petitioner's affidavits, "since the completion of the trial and the entry of judgment on May 23, 2013, and the Appellate Court's affirming of the conviction on November 26, 2014. There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4). The Petitioner inadvertently discovered evidence that actually relates to his case on June 15, 2015. (See App. p. 981). The After-Discovered evidence refers to evidence of facts

existing at the time of which Petitioner was excusably ignorant to, because of being forced to rely on insidious counsel. Who would deliberately fail to present this exculpatory evidence to the Court and would pursue an unreasonable trial strategy that would fail to subject the State's case to adversarial testing at the expense of a different viable trial strategy." (See App. pp. 919 – 920); (also see App. p. 146, Ln. 11 – 19). "Then on [or about] July 16, 2019, Petitioner discovered additional evidence that can also prove his innocence and prove that fraud was committed upon the court to prevent Petitioner from fully exhibiting and trying his case. (See Exhibit – F)." (See App. pp. 982 – 983).

Petitioner's affidavits also explained that "the after-discovered evidence corroborates Petitioner's testimony that was presented at his trial and contradicts testimony given at trial by the State's witnesses, SLED Agent, Asbill and ATF Special Agent Pait." (See App. p. 494). 'The after-discovered evidence in this case also establishes that the State has obtained a conviction by committing extrinsic fraud upon the court with the subornation of perjury and the submission of a fabricated document upon the courts." (See App. p. 920). "[That] Asst. Solicitor, James E. Hunter, has engaged in a deliberately planned and carefully executed scheme to defraud by submitting to the Court a fabricated document and the suborn testimony of SLED Agent, Ashley Asbill and ATF Special Agent, David Pait, who's testimony was perjury, that was utilized to obstruct Petitioner's adversarial trial with the sole intent to prevail upon the Courts for the appearance of presenting and establishing the trustworthiness [and truthfulness] of an alleged confession statement that was allegedly made by the Petitioner to be within the legal standards of *Jackson v. Denno, Supra*., and *Miranda v. Arizona, Supra*., and was placed into evidence at his criminal trial to secure a conviction for drug trafficking in heroin." (See App. p. 920).

"The evidence has been discovered since the trial on June 15, 2015, (See App. p. 1080), and on July 16, 2019." (See App. p. 1098). "The evidence could not have been discovered before the trial by the exercise of due diligence. The evidence is material to the issue. The evidence is not merely cumulative or impeaching. The evidence is such as will probably change the result if a new trial is granted. Perez's falsified statement, SLED Agent Asbill and ATF Special Agent Pait's Report of Investigation constitutes after-discovered evidence for a new trial, pursuant to S.C. Code Ann. § 17-27-20(A)(4) (2014)." (See App. p. 921).

Lastly, Petitioner states that his trial attorney, Scott D. Robinson, was privy to this information, (see App. pp. 978 – 983), and the majority of the details herein was actually within his knowledge and he purposely did not present it to the Courts. Thus, he would deliberately fail to present the evidence that he had within his possession to prove his clients innocence. Petitioner also asserts that the issue regarding police misconduct that's within his PCR application is and should be consider new evidence that shows a practice of police coercion of Petitioner by the interviewing officers, SLED Agent, Ashley Asbill, and ATF Special Agent, David Pait, in this case. Accordingly, the after-discovered evidence, (see App. pp. 1097 – 1098), corroborates the testimony that Petitioner provided at trial, and during his PCR hearing in this case that he was subject to police coercion by showing that the interviewing officer, SLED Agent Asbill was acting in conformity with his past practice. That he has openly admitted to during Petitioner's trial. (See App. p. 179, Ln. 14 – 17), (also see App. p. 185, Ln. 18 – 25). Petitioner maintains this evidence, (See App. pp. 1097 – 1098), calls into question the propriety of allowing the alleged confession statement, (See App. p. 1100), of the Petitioner that was introduced at trial.

As set forth above, evidence is newly discovered where it was discovered after trial and where the Petitioner could not have discovered it earlier through the exercise of due diligence. See

State v. Spann, 334 S.C. 618, 619 – 620, 513 S.E.2d 98, 99 (1999). By its own terms, Petitioner's affidavits demonstrates that extrinsic fraud was committed upon the Courts and that the information contained therein was not known to him before his trial, due to his trial counsels misrepresentation of the value of the exculpatory evidence, (see App. p. 1097), as not being useful to Petitioner's case. Also to the extent that the affidavits includes information that can be construed as exculpatory evidence of extrinsic fraud, Petitioner obviously was not aware of that information prior to trial, and there is no indication that Petitioner's attorney attempted to properly challenge the inculpatory statement, (see App. p. 1100), at trial, nor is there any explanation of why he didn't properly challenge the inculpatory confession statement during Petitioner's *Jackson-Denno* hearing. (See App. pp. 148 – 149, Ln. 1 – 25, 1 – 12).

In addition, effective assistant of counsel was abandoned and did so inhibit Petitioner's ability to present the exculpatory evidence, (See App. pp. 1097), at Petitioner's trial. Moreover Petitioner's averment that he was coerced into signing a blank statement that was later filled in by SLED Agent Asbill, (See App. Pp. 295 – 300, Ln. 14 – 2); (also see App. pp. 214, 220, Ln. 8 – 15, 2 – 11), explain that Petitioner was tricked to incriminate himself in order to take responsibility for the crime of drug trafficking. For all of the above reasons, the content of Petitioner's affidavits is newly discovered and should be considered in support of his claim of actual innocence.

With regards to the affidavits that was presented to the PCR courts, the PCR court would state that no evidence was presented before that court, (See App. pp. 859 – 886), and would fail to make a ruling on the newly discovered evidence or Petitioner's issue of police misconduct and the materiality elements of the evidence for an actual innocence claim, pursuant to State v. Spann, Supra. Accordingly, this court should review only the determination of whether the evidence set forth in the affidavits of those four Motions, (See App. pp. 480 – 488, 489 – 511, 523 – 552, and

887 – 1095), and Exhibits 1 and 2, (See App. pp. 1097 – 1098), was of such a conclusive character as would probably change the outcome on retrial.

Here, no direct evidence linked Petitioner to the crime of drug trafficking in heroin, and no eyewitness identified him as being involved at the time of the relevant event. The only trial evidence directly linking Petitioner to the crime was his own alleged inculpatory confession statement and the perjured testimony of ATF Confidential Reliable Informant No. 380, Fredrick Jerman, SLED Agent Asbill and ATF Special Agent Pait, the State witnesses to whom Petitioner allegedly confessed.

Although the state witnesses testimony and Petitioner's alleged one page statement provided circumstantial evidence of Petitioner's guilt, that trial evidence is directly contradicted by the affidavits of Petitioner's four Motions, that extrinsic fraud was committed by the State upon the Court. Taking as true the allegations in the supporting affidavits, as this court must at the pleading stage, it should conclude that a fact finder could determine that the new evidence exculpates Petitioner from any involvement in the crime and refutes the State's evidence at trial. Accordingly, this court should find that Petitioner's Motions and supporting documentation contain evidence of such a conclusive character that, when considered along with the trial evidence, would probably lead to a different result. See *Spann*, 334 S.C. at 619 – 620, 513 S.E.2d at 99.

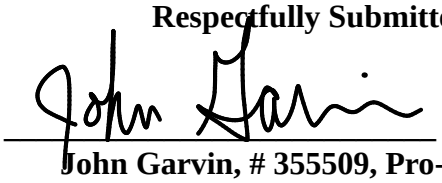
Petitioner would also like to point out to this court that, on October 10, 2013, in Spartanburg County Court of General Sessions, State v. John Garvin, Case No.: 2012-GS-42-5978, Asst. Solicitor, James E. Hunter, dismissed Indictment No.: 2012-GS-42-5978. (See App. pp. 1040 – 1041). After Petitioner made a Pro-se Motion for a Speedy Trial that was filed on May 31, 2013, to bring that case to trial, but it was dismissed due to video evidence that proved Petitioner's

innocence of the alleged crime and the fact that Officer, Ken Hancock falsified the arrest warrant and fabricated the weight of evidence within the arrest warrant. (See App. p. 1125).

CONCLUSION

For the reasons set out above, Petitioner respectfully request that this Honorable Court to grants this Motion for Reinstatement of Appeal, pursuant to Rule – 260(a), SCACR, and a Subsequent Application for Relief for the denied three Motions to Enlarge Brief, pursuant to Rule – 266, SCACR.

Respectfully Submitted,



DATED: January 27, 2022
Ridgeville, South Carolina

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