SOUTH CAROLINA
ACTUAL INNOCENCE
JUSTICE CENTER

July 19, 2018

Daniel E. Shearouse, Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: James R. McClurkin v. State of South Carolina

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Habeas Corpus, two (2) copies of the Appendix, and Proof of Service in the above referenced matter.

Should you have any questions please do not hesitate to contact me or my staff

Very truly yours,

J. Kyle McClain

JKM/pkb
Enclosures

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ORIGINAL JURISDICTION

James R. McClurkin,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition for Writ of Habeas Corpus has been served upon Counsel for the Respondents by placing one (1) copy of the same in the United States Mail, first class, postage pre-paid, and addressed as follows:

Deputy Attorney General Donald Zelenka
Rembert Dennis Building, 1000 Assembly Street, Room 519,
Columbia, SC 29201

This 19th day of July, 2018, in Columbia, South Carolina.

Kyle McClain, Esq.
South Carolina Actual Innocence Justice Center

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ORIGINAL JURISDICTION

James R. McClurkin,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF JURISDICTION

Petitioner, James R. McClurkin, ("Petitioner") respectfully prays this Court grant his Petition for Writ of Habeas Corpus filed in the original jurisdiction based on actual innocence. U.S. Const. amends. V, VIII, XIV; S.C. Const. art. I, § 3, 18; Rule 245, SCACR; S.C. Code § 17-17-10.

I. The Unique and Compelling Circumstances of Petitioner's Wrongful Conviction Demand the Extraordinary Relief Afforded by Habeas Corpus because he has exhausted all other remedies and squarely falls within the class of those who have been utterly failed by our criminal justice system.

In 2016, Chester County Sheriff Alex Underwood re-opened the investigation of Claude Killian's murder. Sheriff Underwood uncovered previously unknown evidence that undermines the reliability of Petitioner's conviction and supports Petitioner's declaration of actual innocence. Based on his investigation, Sheriff Underwood publicly declared at Petitioner's parole hearing that the Petitioner is innocent of the murder conviction for which he has spent most of his life in prison (approximately 40 years of incarceration). "There is just no evidence linking McClurkin to this case." Appendix A. Fundamental fairness requires Petitioner's exoneration when the Chief Law Enforcement Officer of the County where the crime occurred publicly declares Petitioner's innocence and provides testimony that Petitioner should be released from prison on parole.

Additionally, a written statement from the admitted killer, Melvin Harris, dated in 1992, fully supports Petitioner's innocence and underscores the unreliability of the State's key witness. App. B. Melvin Harris acknowledges that he lied about Petitioner's involvement and was incentivized by law enforcement to testify falsely is shocking to any sense of justice. These are the "unique and compelling circumstances" that demands the "extraordinary relief" afforded by habeas corpus. *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). Notably,

Petitioner has exhausted all other remedies and squarely falls within the class of "those who have, for whatever reason, been utterly failed by our criminal justice system." *McWee v. State*, 357 S.C. 403, 593 S.E.2d 456 (2004) (citation omitted); *See Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998); *see also* S.C. Code §§ 17-27-20 to 160.

After decades of declaring his innocence from a prison cell, the time is now to remedy a grave constitutional error, incomprehensible deprivation of human liberty, and the tragic conviction of an innocent man. Therefore, this Petition for Writ of Habeas Corpus in this Court's original jurisdiction can provide the relief that Petitioner has sought and been denied for forty (40) years because his conviction and sentence constitute "a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice". *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (emphasis in original) (internal citation omitted).

A. Summary of Relevant Facts

After reopening the investigation of Claude Killian's murder in 2016, Sheriff Underwood assigned an officer to conduct an independent investigation. Based on his review of the investigation, Sheriff Underwood stated, "There is just no evidence linking them [Petitioner and Degraffenreid] to this case." App. A. The actual and lone killer, Melvin "Smokey" Harris, recanted his false trial testimony that imprisoned Petitioner and later confessed that he acted alone in the murder of Claude Killian. App. B.

Petitioner's conviction and sentence were built upon a foundation of sinking sand; a false and coerced confession from his co-defendant, Ray Charles Degraffenreid, and testimony from an incentivized informant and convicted felon, Melvin "Smokey" Harris, who had been arrested for the same crime. App. C.

Notably, Degraffrenreid's false confession implicating Petitioner came only after he had been held in solitary confinement without aid of counsel, medical attention, visitors, or phone calls for almost one week following his arrest. Petitioner does not get convicted without this alleged confession, as shown by the first trial that ended in a mistrial/hung jury when Degraffenreid's statement was not allowed into evidence.

Harris lied when he testified at Petitioner's trial that he had not been charged with murder of Claude Killian and that he had not been promised anything by the State for his testimony. His 1992 statement confirms that he lied, and more importantly, why he lied. He lied because he was promised lenient treatment on other criminal charges; and even was later made a trustee because he did "such a good job" in lying at the Petitioner trial. App. B. Immediately following the conclusion of Petitioner's second trial, Harris pled guilty to two unrelated robbery charges (with a knife) and received a reduced 10-year sentence for his cooperation in implicating and testifying against Petitioner and Degraffenreid.

B. Statement of Interest

The South Carolina Actual Innocence Justice Center ("SC Justice Center") is a non-profit organization dedicated to providing pro bono legal services for persons whose actual innocence may be proved through post-conviction evidence. The primary mission of the SC Justice Center is to exonerate the innocent and enhance the fundamental fairness of the criminal justice system.

Attorney Dayne Phillips of Price Benowitz LLP supports the SC Justice Center's mission and Petitioner's unwavering determination to prove his innocence.

PROCEDURAL HISTORY

On August 5, 1973, Claude Killian was tragically murdered by Melvin Harris at a laundromat he owned in Chester County. A pistol and knife were found at the crime scene and there was evidence that money had been stolen. An eye-witnesses saw *one person* running away from the crime scene. It appears that the police detained an unknown person who was in the proximity of the crime scene that night, but quickly released this person based on insufficient evidence.

Melvin "Smokey" Harris (Recanted Trial Testimony and Confessed to the Murder)

In 1977, ***four (4) years after the murder,*** the police arrested Melvin "Smokey" Harris for the murder of Claude Killian after interviewing numerous witnesses. Harris initially denied knowing anything about the crime, or having any involvement in the crime, but later implicated Petitioner and Degraffenreid as the murderers. Harris said that Petitioner and Degraffenreid *drove away in a car*, while other witnesses put Harris at the scene, on foot.

Harris' charge for this murder was ultimately dismissed due to his willingness to point the finger of blame at Petitioner and Mr. Degraffenreid in exchange for a lighter sentence on other felony charges. Specifically, immediately after Petitioner's second trial concluded, Harris pled guilty to two unrelated robbery charges and received a reduced ten (10) year sentence for his cooperation in testifying against Petitioner and Degraffenreid. App. B. Based on the trial transcript, it also appears that Petitioner's lawyer did not have proof or specific knowledge of Harris' initial arrest for the murder of Claude Killian.

Notably, Harris *was allowed in the interrogation room* during the questioning of Degraffenreid, resulting in a false and coerced confession. This outrageous breach of standard procedure is wholly improper and egregious conduct considering Harris himself

was a suspect.

Petitioner Arrested Four Years After the Crime

In 1973, after being questioned by police, Petitioner was released from police custody because he took and *passed a lie detector test.* Almost four (4) years later in 1977, Melvin "Smokey" Harris accused Petitioner and Degraffenreid of killing Claude Killian after he was initially arrested for the murder. Petitioner and Degraffenreid were arrested based on Harris' statements to police four (4) years after the murder.

Ray Charles Degraffenreid (Co-Defendant) False Confession

After spending nearly a week in solitary confinement without visitors, access to a lawyer, proper clothing, or medical care, Degraffenreid falsely confessed to the murder of Claude Killian. His confession mirrored the fabricated story Harris told the police. Notably, Degraffenreid's version of events were later discredited by the facts (and Harris subsequent recantation and confession).

Several days later, Degraffenreid told a SLED agent that he was not involved in the murder and had been in another town with his girlfriend. A witness saw Degraffenreid miles away from the crime scene. Most of the other witnesses did not remember the details of what happened on the night of the murder, and it appears that these interviews took place several years after the murder in 1977.

It appears that Degraffenreid's lawyer was uninterested in defending him because his lawyer delayed seeing Degraffenreid for several days, despite being speaking with law enforcement in the Sheriff's Office about the case. It also appears that Degraffenreid's lawyer called him a liar and refused to believe his alibi.

First Joint Trial

On May 12, 1977, Petitioner proceeded to a joint trial with Degraffenreid before the Honorable Julius H. Baggett and a jury (1977-GS-12-0118). Arthur Lee Gaston represented Petitioner. The Trial Court suppressed Degraffenreid's coerced, involuntary statement. After a mere five hours of deliberation, the Trial Court declared a mistrial because the jury was unable to reach a unanimous verdict. It is believed that the jury was 11-to-1 for an acquittal.

Second Joint Trial

A few months later, Petitioner and Degraffenreid proceeded again to a joint trial before the Honorable Joseph Moss (Former Chief Justice of this Court) and a jury. Former Chief Justice Moss, was unconcerned with the circumstances of Degraffenreid's coerced confession and allowed it into evidence during the second trial. Based almost solely upon the coerced confession and Smokey Harris' incentivized, inconsistent and almost incomprehensible testimony, Petitioner and Mr. Degraffenreid were both convicted and sentenced to life imprisonment.

Direct Appeal Denied in 1979

Despite Petitioner's timely *pro se* request for a direct appeal, it appears that the merits of this appeal were never addressed by the Court. Specifically, it appears that Petitioner's direct appeal was dismissed on procedural grounds for allegedly missing a filing deadline. The Honorable George F. Coleman filed an Order, dismissing Petitioner's direct appeal on January 24, 1979.

First PCR Action - 1980-CP-12-0053

Petitioner filed an initial PCR application on March 18, 1980 (1980-CP-12-0053). An evidentiary hearing was held on February 9, 1981. Petitioner was present and represented by

Tyree D. Lee. William K. Moore of the Attorney General's office represented the State. The Honorable Donald A. Fanning denied and dismissed the application on March 18, 1981.

No appeal was filed.

Petition for Writ of Habeas Corpus / Post-Conviction Relief Application in 1987

On March 23, 1987, Petitioner filed a *pro se* petition for writ of habeas corpus. The Honorable Walter J. Bristow, Jr., signed an Order on April 27, 1987, instructing that the state habeas petition be construed as an Application for Post-Conviction Relief. Judge Bristow ultimately signed a Final Order of Dismissal on February 18, 1988, denying the converted PCR application and request for relief with prejudice. Notably, Petitioner was not represented by counsel during this action.

Appeal Denied in 1988

Petitioner timely filed a Notice of Appeal, and the Court denied certiorari in an unpublished opinion on October 19, 1988.

Second PCR Action - 1988-CP-12-0048

Petitioner filed a second PCR application on March 4, 1988 (1988-CP-12-0048). The Honorable John Hamilton Smith signed a Conditional Order of Dismissal dated October 25, 1988, finding the application successive and barred by the one-year statute of limitations. The Honorable Don S. Rushing subsequently signed a Final Order of Dismissal with prejudice on March 24, 1989.

Harris' Recantation in 1992 and Striking Similar Crime

On October 11, 1992, Melvin "Smokey" Harris recanted his testimony concerning Petitioner's and Degraffenreid's involvement in the murder.

In 1992, Harris was charged with an unrelated murder and armed robbery. This crime,

however, had striking similarities to the Claude Killian murder. Facing the death penalty, Harris accepted a deal with the State and later admitted that he lied under oath when he testified against Petitioner at both trials.

Motion for New Trial in 1993

On March 16, 1993, Petitioner filed a motion for a new trial based on Harris' recantation. Harris testified under oath regarding his recantation on November 22, 1993. The Honorable Don Rushing presided over the hearing and found that Harris' recantation lacked credibility. Petitioner and Degraffenreid were present at the hearing and were represented by retained counsel Dennis Bolt.

Harris testified concerning his recantation of his earlier trial testimony and the statements he gave in the interim on October 11, 1992 and May 28, 1993. Judge Rushing eventually denied the motion for a new trial on January 7, 1994.

Pro Se Request for Belated Appeal Denied in 1994

Petitioner's attorney failed to timely file a Notice of Appeal, so Petitioner filed a *pro se* Notice of Appeal on February 4, 1994. Petitioner then filed a Motion to File a Belated Appeal before this Court on March 9, 1994. This Court denied Petitioner's motion to file a belated direct appeal on May 6, 1994.

Federal Habeas Corpus Action in 2001 - (2:01-cv-00836-DCN)

Petitioner subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina (2:01-cv-00836-DCN). Respondent filed its Return and Motion for Summary Judgment on May 9, 2001. On June 28, 2001, the Honorable Robert S. Carr, United States Magistrate Judge, entered his Report and Recommendation. The Honorable David C. Norton, United States District Judge, adopted the Magistrate's Report and

Recommendation and dismissed Applicant's petition for being untimely by Order filed July 13, 2001.

Petition for Writ of Habeas Corpus in the U.S. Court of Appeals for the Fourth Circuit

An appeal to the Fourth Circuit Court of Appeals was dismissed on October 30, 2001. *McClurkin v. Condon*, No. 01-7454 (4th Cir. Oct. 30, 2001) (unpublished). Petitioner filed a *pro se* request for a certificate of appealability in the United States Court of Appeals for the Fourth Circuit. The Court denied Petitioner's request for a certificate of appealability and dismissed the appeal on February 4, 2002.

Petition for Writ of Habeas Corpus / Application for Post-Conviction Relief in 2003

Petitioner filed a *pro se* Petition for Writ of Habeas Corpus on June 18, 2003. At a hearing on February 23, 2004, Petitioner asked the reviewing court to construe his filing as a PCR action and took issue with prior attorneys' failing to file appeals in his criminal case and prior PCR cases. The Petitioner was represented by Joan Winters. The Respondent was represented by Assistant Attorney General Douglas Leadbitter. The Honorable Kenneth G. Goode found that Petitioner failed to show that he was entitled habeas corpus relief, and if the filing were treated as a PCR application, it was successive and time-barred. Judge Goode denied the petition on February 24, 2004.

Appeal Denied in 2005

Petitioner timely filed a *pro se* Notice of Appeal. Joseph Savitz of the Office of Appellate Defense filed a Petition for Writ of Certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Petitioner filed a *pro se* Petition. This Court construed the Petition as an application for post-conviction relief and denied the appeal on December 14, 2005. The remittitur was sent on December 30, 2005.

Third PCR Action – (2013-CP-12-0112)

Petitioner made another application for post-conviction relief filed on March 4, 2013, alleging that he was being held in custody unlawfully for the following reasons: Ineffective assistance of PCR counsel in failing to file an appeal from the denial of my 1980 PCR. The Respondent made its Return and Motion to Dismiss on or about December 11, 2013, requesting that the PCR Application be summarily dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached, the Honorable J. Ernest Kinard, Jr., issued a Conditional Order of Dismissal filed on December 27, 2013, provisionally denying and dismissing this action, while giving Petitioner twenty (20) days from the date of service to show why the dismissal should not become final. In response, Petitioner submitted "Applicant['s] Opposition to State's Conditional Order of Dismissal" dated March 31, 2014. Petitioner argued that the Application is not successive or barred by the statute of limitations because it raises and Austin claim.

In a document captioned "Motion to Have all Pre-Trial Motions Rule On Based on Rule 16)(A)(7) of Rules of Civil Procedure" filed on November 6, 2014, Petitioner requested that the Circuit Court rule on the following motions filed by him: Motion for Summary Judgment, filed June 24, 2013; Motion for Appointment of Counsel, filed October 10, 2013; Motion for "Inlargement" of Time, filed on January, 23, 2014.

In an Order filed on January 30, 2015, the Honorable Brian Gibbons, acting as the Sixth Circuit Chief Administrative Judge for General Sessions, held as follows:

> This Court has reviewed Applicant's motions and finds Applicant is neither entitled to summary judgment, nor is he entitled to appointment of counsel. This Court finds the Motion for "Inlargement" of Time is moot, given Respondent consented to a sixty (60) day extension of time for Applicant to respond to the Conditional Order of Dismissal. Accordingly, the motions are

> denied. Furthermore, this Court has reviewed Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court finds Applicant has failed to provide a sufficient reason for his failure to comply with the statute of limitations in this matter. The Court also finds the Applicant has had a full opportunity to litigate the claims he raises in this matter in his previous post-conviction relief matters. Applicant could have raised the current Austin claims in his previous PCR applications. By failing to brim them up in his prior Applications, Applicant has waived any Austin claims. Accordingly, this Court finds this Application is denied and dismissed with prejudice.

McClurkin v. State, 2013-CP-12-0112, Final Order of Dismissal, dated January 12, 2015, filed on January 30, 2015.

Maxton Order

On January 14, 2015, the State, through Assistant Attorney General J. Croom Hunter made a motion to restrict future filings, alleging repetitive and frivolous nature of the prior filings Petitioner made a response to the request On January 27, 2015, and Judge Gibbons entered an "Order Restricting Future Filings" on January 30, 2015.

On February 12, 2015, Petitioner mailed a *pro se* pleading titled, "Intent to Appeal Restriction Order."

Petition for Writ of Mandamus in 2015

On July 30, 2015, Petitioner filed a *pro se* Petition for Writ of Mandamus. Judge Gibbons construed the Petition as a "state habeas case" in the Order of Appointment.

Order of Appointment in 2016

On June 14, 2016, the Honorable Brian Gibbons signed an Order "as Chief Administrative Judge for the Appointment of Counsel in a state habeas case." Judge Gibbons appointed attorney Jeffrey Bloom to represent Petitioner and attorney Joshua Kendrick to

represent his co-defendant, Ray Charles Degraffenreid. Due to a conflict of interest with Mr. Bloom, attorney Brian Jeffries began representing Petitioner.

Released on Parole in 2016

On October 11, 2016, Petitioner was granted parole based on Sheriff Underwood testimony at the parole hearing. Despite this victory, Petitioner is on supervised release and remains a legally convicted murderer who is unable to find gainful employment and is struggling to put a life torn to pieces by a wrongful conviction back together again.

Consent Order for Substitution of Counsel in 2017

On February 11, 2017, the Honorable Brian Gibbons signed a Consent Order for Substitution of Counsel, allowing that Dayne C. Phillips and Michael R. Jeffcoat be substituted as counsel for Petitioner and that Mr. Brian Jeffries be relieved as counsel.

Petition for Writ of Habeas Corpus in 2017 – (2017-CP-12-0278)

On May 31, 2017, attorneys Phillips and Jeffcoat submitted a Petition for Writ of Habeas Corpus in the Court of Common Pleas of the Sixth Judicial Circuit. The following day, counsel submitted an Amended Petition for Writ of Habeas Corpus dated June 1, 2017.

On October 13, 2017, an evidentiary hearing was held before the Honorable Brian Gibbons. Petitioner was represented by Dayne Phillips and Kyle McClain of the Texas Bar (court granted Mr. McClain's petition to appear *pro hac vice*). Co-Defendant Degraffenried was represented by Joshua S. Kendrick and Christopher S. Leonard. The State was represented by Deputy Attorney General Donald Zelenka and Sixth Circuit Solicitor Randy Newman.

Judge Gibbons ultimately denied the Petition for Writ of Certiorari and "dismissed without prejudice to the filing of an action in the original jurisdiction of the South Carolina Supreme Court." The Court held, "[i]t is for that Court, not the Circuit Court, to determine

whether the Petitioner has made or ultimately proven "there has been a violation which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice."

Pro Se Filings

Petitioner has filed numerous *pro se* motions, applications for post-conviction relief, petitions for writ of habeas corpus, and various other motions and writs that are not encompassed in this procedural history. Petitioner ultimately received a filing restriction based on his relentless pursuit to prove his innocence. It appears that all of Petitioner's *pro se* filings and appeals were denied, primarily on procedural grounds.

The arguments in support of the Petition for Writ of Habeas Corpus are as follows.

ARGUMENT FOR HABEAS RELIEF

I. Petitioner's Conviction and Sentence Constitute a Denial of Fundamental Fairness Shocking to the Universal Sense of Justice.

This Court has held that "[h]abeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights." *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008). "[H]abeas corpus continues to be available as a constitutional remedy provided a petitioner qualifies for this extraordinary relief and clears the procedural hurdles." *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998). Notably, "[a] defendant who seeks a writ of habeas corpus based on an error recognized as a constitutional violation after his conviction must show that, in the setting, the violation denied him fundamental fairness." *Williams*, 380 S.C. 473, 478, 671 S.E.2d 600, 602 (citing *Butler v. State*, 302 S.C. at 468, 397 S.E.2d at 88).

A petition for writ of habeas corpus must make a prima facie case for relief consisting of three main elements: (1) Sufficient factual allegations in support of the petition; (2) Exhaustion of all prior remedies; and (3) A constitutional claim which, based on the unique and compelling circumstances, constitutes a denial of fundamental fairness shocking to the universal sense of justice. *See Gibson,* 329 S.C. at 40, 495 S.E.2d at 427. "If the petition, on its face, meets these requirements, petitioner is entitled to a hearing." *Id* at 40, 495 S.E.2d at 428.

In this case, all the required elements are satisfied and a hearing on the merits should be held before the Court to determine whether Petitioner's conviction and sentence are "shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (citing *State v. Miller*, 16 N.J. Super. 251, 84 A.2d 459 (1951)). The actual murderer of Claude Killian has confessed and recanted his testimony against Petitioner. Without Degraffenreid's coerced confession, the jury hung 11-to-1 in favor of acquittal.

Furthermore, Sheriff Underwood's re-opened investigation has revealed additional facts

consistent with Harris' confession and recantation, rather than Petitioner's guilt. Specifically, Sheriff Underwood found an arrest warrant for Harris that was subsequently dismissed. In addition to an eye-witnesses seeing ***one person*** running away from the crime scene, he noticed that there was physical evidence from the crime scene found in the woods behind the laundromat, showing the murderer fled on foot. Harris' story that Petitioner and Degraffenreid left in a car is not supported by the evidence.

Harris' false testimony and Degraffenreid's coerced confession were the only substantial evidence against Petitioner. Harris has recanted his testimony and confessed to the being the sole murderer of Claude Killian. Harris also provided a written statement stating that he was promised leniency in sentencing in exchange for testimony against Petitioner and that Petitioner had nothing to do with the murder of Killian. App. C.

The facts Harris presented in his final explanation of the murder is consistent with both the physical evidence at the crime scene and witnesses statements provided to police. Sheriff Underwood has publicly stated that based on his investigation of this murder, he believes Petitioner is innocent. Without doubt, these are unique and compelling circumstances that require hearing on Petitioner's request for habeas corpus relief.

Petitioner declares his actual innocence in this petition, seeking the relief he desperately deserves—the exoneration of a murder he did not commit. There are sufficient factual allegations for this Court to conduct a hearing to evaluate the evidence of Sheriff Underwood's recent investigation into the murder of Claude Killian, the Harris 1992 statement and recantation, and Degraffenreid's false confession.

Four decades in prison for a crime Petitioner did not commit "constitutes a denial of fundamental fairness shocking to the universal sense of justice" in any setting and is

incomprehensible to someone who has not experienced the physical, emotional, and mental torture of a wrongful conviction and forty (40) years of incarceration.

A. Conviction and Sentence of an Innocent Person violates Due Process and amounts to Cruel and Unusual Punishment.

The conviction and incarceration of an innocent person violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 3, 12, and 14 of the South Carolina Constitution (due process and cruel and unusual punishment). Petitioner has also been deprived of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 14 of the South Carolina Constitution.

The Eighth Amendment protects against "cruel and unusual punishment" and certainly the wrongful conviction and incarceration of an innocent person is cruel and unusual. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Similarly, the Fourteenth Amendment protects citizens from unconscionable state action, such as the continued incarceration of an individual who has shown his actual innocence. *See United States v. Salerno*, 481 U.S. 739, 746 (1987).

B. Habeas Relief is Necessary When there is Evidence in Support of Actual Innocence.

The Supreme Court of the United States has not specifically decided whether there is a freestanding constitutional claim based on actual innocence. *Cf. Osborne v. Dist. Attorney's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1130-31 (9th Cir. 2008), *rev'd on other grounds*, 129 S. Ct. 2308 (2009); *Majoy v. Roe*, 296 F.3d 770, 776-77 (9th Cir. 2002).[1]

[1] Other Circuits are in *accord*: *Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997); *O'Dell v. Netherland*, 95 F.3d 1214, 1246-47 (4th Cir. 1996); *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994); *Whitfield v. Bowersox*, 324

However, the existence of a freestanding claim of actual innocence can be inferred based on the Court's opinion in *In re Davis*, 130 S. Ct. 1 (2009). *Davis* presented no other constitutional violations, but the Court still remanded for a determination of whether newly discovered evidence would establish the person's actual innocence. *Id.* at 1. If a constitutional actual innocence claim were not independently cognizable, the remand would have been pointless and not appropriate under the law.

Procedurally barring a claim of actual innocence severely impairs the already limited scope of habeas review below the minimum protections of the federal and state constitutions and should not be allowed in any court. *Cf. Alexander v. Keane*, 991 F. Supp. 329, 338 (1998) (noting "[i]f there is any core function of habeas corpus—and constitutionally required minimum below which the scope of federal habeas corpus may not be reduced—it would be to free the innocent person unconstitutionally incarcerated.").

C. Incentivized Testimony and a False Confession Results in the Deprivation of Due Process and Fundamental Fairness.

The Due Process Clause of the United States Constitution bars the admission of fundamentally unreliable evidence in criminal proceedings. In this case, the State of South Carolina convicted the Petitioner primarily based on wholly unreliable testimony from an incentivized informant (who was the initial suspect and was arrested for the murder of Claude Killian) and a coerced confession from a co-defendant (presumptively unreliable evidence).

A cursory reading of Melvin Harris' trial testimony demonstrates the bewildering array of inconsistencies, flat-out lies, and lack of specific recall of the key events. His

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F.3d 1009, 1020 (8th Cir.), *vacated in part on other grounds*, 343 F.3d 950 (8th Cir. 2003) (en banc); *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999).

testimony was at best confusing and at worst, plain wrong, as he himself later admitted. *See, e.g.*, App. D. pp. 104-125.

The idea that a criminal defendant could be convicted solely based on such patently unreliable evidence is entirely at odds with the protections guaranteed by the Due Process Clause. Petitioner urges this Court to grant the writ considering the importance of the questions presented to the proper functioning of our constitutional protections..

When initially questioned by police, in both 1973 and 1977, Harris denied having any knowledge about Mr. Killian's murder. App. D. 104 -106. However, after learning that he was a suspect, and was facing two charges for armed robbery with a knife, Harris's story changed. In Harris's revised account made years after the murder, Harris alleged that Petitioner and Degraffenreid had committed the murder. Harris ultimately changed his story after he was promised lenient treatment for the other unrelated robbery charges he admitted too committing.

1. Reliability is the Linchpin of Due Process

The Due Process Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides that "[n]o person shall ... be deprived of life, liberty, or property, without due pro-cess of law...." U.S. Const., amend. V. For at least the last forty years, this Supreme Court of the United States Due Process jurisprudence has "made it clear that the Due Process Clause bars admission of fundamentally unreliable evidence." (citing, *e.g., California v. Green,* 399 U.S. 149, 164 n.15 (1970) ("'considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking.'"); *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977) (stressing that reliability is the "linchpin" of due-process analysis)).

The requirement that courts ensure the reliability of evidence has "ancient roots." *Greene v. McElroy,* 360 U.S. 474, 496 (1959) (citing 5 Wigmore on Evidence § 1364 (3d ed. 1940), *see* John Lord O'Brian, *National Security and Individual Freedom* 62 (1955). Indeed, as the Court noted in *Greene,* "[c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Id.*

While the Due Process Clause has always served as a back-stop in protecting against the admission of patently unreliable evidence, this Court's decision in *Ohio v. Roberts,* 448 U.S. 56 (1980), directed courts to consider the reliability of hearsay evidence through the lens of the Sixth Amendment's right of confrontation so that hearsay from a non-testifying declarant could be admitted only if the declarant was unavailable and the statement bore "adequate indicia of reliability." *Id.* at 66 (internal quotation marks omitted). Thus, under *Roberts,* the Due Process reliability analysis was subsumed by the "adequate indicia of reliability" analysis.

The Due Process protection against unreliable evidence is such a fundamental part of our legal system that this Court has not limited its application to criminal proceedings, but rather applied it any time that government action is implicated (though the protections are at their greatest in the criminal context). In fact, the Due Process right to bar unreliable

hearsay evidence is particularly well illustrated by the juris- prudence that has developed following the Court's decision in *Morrissey v. Brewer,* 408 U.S. 471 (1972). *Morrissey* involved a parole revocation proceeding, which, as the Court noted, "is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply," *id.* At 480.

Following *Morrissey,* courts have consistently held that Due Process precludes the admission of unreliable hearsay evidence, even in non-criminal proceedings. *See, e.g., United States v. Kelley,* 446 F.3d 688, 692 (7th Cir. 2006) (reading *Morrissey* and *Gagnon v. Scarpelli,*411 U.S. 778 (1973) as permitting the admission of reliable hearsay at revocation hearings so long as hearsay bears substantial indicia of reliability or court makes a good cause finding); *United States v. Johnson,* 710 F.3d 784, 789 (8th Cir. 2013) (concluding trial court must consider reliability of hearsay evidence); *United States v. Rondeau,* 430 F.3d 44, 47-48 (1st Cir. 2005) (finding hearsay admissible at revocation heating only because court determined it was reliable and government had a good reason not to produce declarants); *Singletary v. Reilly,* 452 F.3d 868, 872 (D.C. Cir. 2006) ("'the use of unsubstantiated or unreliable hear- say would certainly eviscerate the safeguards guaranteed by *Morrissey* and *Gagnon."')* (quoting *Crawford v. Jackson,* 323 F.3d 123, 128 (D.C. Cir.2003)).

2. Statements by Incentivized Informants Are Inherently Unreliable because there is No Greater Motivation to lie than that of a Reduced Sentence.

It is impossible to assess the reliability of Harris's testimony without first acknowledging Harris for what he was - an incentivized informant. As one federal agent cynically observed, "'[i]n the 25 years I have been in this business, I have worked with

hundreds of informants. I believe that exactly one of them was completely truthful, and there is no way to be 100% sure about him.'" Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 69 (2009) (quoting John Madinger, senior special IRS agent and former narcotics agent).

Courts have consistently noted the problems associated with relying on incentivized testimony. *See, e.g., Banks v. Dretke,* 540 U.S. 668, 701 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose.") (citation omitted); *On Lee v. United States,* 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility"); *United States v. Cervantes-Pacheco,* 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence .. ."); *United States v. Bernal-Obeso,* 989 F.2d 331, 333 (9th Cir. 1993) ("The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril.").

It should come as no surprise then that testimony from incentivized witnesses has been found to be the leading cause of wrongful convictions in capital cases. *See* Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidle and Other Inno- cent Americans to Death Row* 3 (Winter 2004-05) (the "Snitch System") (noting that in 45.9% of death row exonerations since 1970, the original conviction was based in whole or part on the testimony of witnesses with incentives to lie).

A study by University of Michigan law school professor Samuel Gross reached a similar conclusion, finding that nearly 50% of wrongful murder convictions involved perjury by someone such as a "jailhouse snitch or another witness who stood to gain from

the false testimony." Samuel R. Gross, et al, Exonerations in the United States 1989 Through 2003, 95 Crim. L. & Criminology 523, 543-44 (2005).

The case of Perry Cobb provides an unfortunate parallel to this case. *See The Snitch System* at 7. Perry Cobb and Darby Tillis were convicted and sentenced to death for murder and armed robbery. Their convictions were based on the testimony of Phyllis Santini, who portrayed herself as an unwitting accomplice in the crime. Evidence later uncovered strongly suggested that Santini and her boyfriend were the actual perpetrators of the crimes. Nevertheless, based on Santini's self-serving testimony, Cobb and Tillis were convicted and sentenced to death. Four years later, the Illinois Supreme Court reversed the convictions based on judicial error, and Cobb and Tillis were exonerated in 1987 and received gubernatorial pardons in 2001. Just like Harris in this case, the prosecution's star witness in this case had an incredibly powerful incentive to provide misleading testimony implicating someone else - the knowledge that he was himself a suspect and that leniency was achievable through lying.

Anthony Graves presents a similar case. Graves spent 18 years on death row in Texas before being exonerated in 2010. *See* Pamela Colloff, *Innocence Lost,* Texas Monthly (Oct. 1, 2010) Graves was convicted in 1992 of murdering six members of a family in Texas. *Id.* The state's case against Graves was based primarily on the trial testimony of Robert Carter, another suspect in the case, who ultimately confessed to the murders and negotiated a plea arrangement in exchange for his testimony. *See Graves v. Dretke,* 442 F.3d 334, 337-38, 340 (5th Cir. 2006).

As in this case, there was no physical evidence connecting Petitioner to the crime, and Petitioner's conviction rested almost entirely on the Harris unreliable, incentivized

testimony, and Degraffenreid's false confession. *See Id.* at 344-45 ("Graves' conviction rests almost entirely on Carter's testimony and there is no direct evidence linking him with Carter or with the murder scene other than Carter's testimony.").

Years later Carter was found to have lied at trial, and it was revealed that the prosecutor had suppressed additional exculpatory evidence. Like Petitioner, Graves spent decades protesting his innocence and appealing his conviction. The Fifth Circuit Court of Appeals granted Graves's request for a writ of habeas corpus in 2006, *see id.* at 345, and in 2010, following a five-month investigation, the district attorney's office finally agreed to drop all charges against him. *See* Brian Rogers, *Texas Sets Man Free from Death Row,* Houston Chronicle (Oct. 27, 2010).

Here, Harris faced the most basic of all incentives - self-preservation. Just as with the cases of Cobb and Graves, Petitioner's conviction was based on the testimony of a witness who knew that suspicion would fall on him unless he could provide an alternative suspect. Harris's initial statements to police about Claude Killian's murder were devoid of any mention of involvement by Petitioner or Degraffreid.

It was only after being informed that he himself was a suspect in her murder and facing sentencing for two armed robberies he admittedly committed, that Harris came up with the allegations that would eventually result in Petitioner's conviction. Incentivized witness testimony provided by an active suspect to a crime is facially unreliable, and for this reason alone, the admission of Harris's testimony violated Petitioner's Due Process right to a fair trial.

3. Confessions of Co-Defendants Are Presumptively Unreliable

Degraffenreid's statement is the second fundamental reliability problem in this case.

His confession was not only coerced, but it was also the confession of a co-defendant, used in a joint trial against Petitioner. Confessions of co-defendant's, especially in a joint trial are tainted, often unreliable and unduly prejudicial. Because the confession came from the mouth of a co-defendant, Justice Stewart referred to it as an especially dangerous brand of hearsay: "[A]t once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves ...." *Bruton v. United States,* 391 U.S. 123, 138 (1968).

In a dissent in the same case, Justice White expounded on the reliability concerns, which were, in his view, quite independent of any Sixth Amendment Confrontation Clause issues. As he put it, a co-defendant: is no more than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.

Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable. *Id.* at 141-42 (internal citations omitted). Because a codefendant's admissions are intrinsically "unreliable," Justice White observed that such admissions "cannot enter into the determination of the defendant's guilt or innocence because they are unreliable." *Id.* at 142. The Court's holding in *Lee v. Illinois,* 476 U.S. 530 (1986) almost two decades after *Bruton,* voiced the same reliability concerns. "A codefendant's confession is presumptively unreliable as to the passages detailing the

defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.*

D. Denial of Direct Appellate Review Constitutes Denial of Due Process.

In *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002), this Court held that "[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal." In *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002), this Court further held that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal. Therefore, this Court has reaffirmed the principle that a criminal defense attorney must make certain that his client is fully aware of his right to appeal and in the absence of an intelligent waiver by the client, must either pursue an appeal or file a brief under *Anders v. California*, 386 U.S. 738 (1967). *See White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

This Court in *In Re Anonymous Member of the Bar*, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991), held that an attorney who is retained solely for the trial of a non-indigent criminal defendant must serve and file a timely Notice of Appeal as required by Rule 203, SCACR. The attorney must continue to represent the client until relieved by Court because that attorney is required to take all necessary steps as may be reasonably practicable to protect the client's interests under Rule 1.16 of the Rules of Professional Conduct. *Id.*; *Cf.* Rule 602(e)(4), SCACR (provides that "retained counsel shall assist in representing the accused in any manner necessary to properly establish the indigency of the accused and properly perfect the appeal," and "if the Office of Appellate Defense determines that the accused is not indigent, retained counsel shall continue representation of the accused during the appeal, unless granted leave to withdraw under Rule 264,

SCACR.").

In this case, Petitioner's conviction and sentence occurred prior to the interpretation of the above procedural safeguards. Petitioner's trial counsel failed to file a timely notice of appeal and the Court prevented Petitioner from perfecting the appeal *pro se*. Therefore, it is fundamentally unfair that Petitioner was denied his one fair bite at the apple to have direct appellate review of his conviction and sentence. *See Wilson*, 348 S.C. at 218, 559 S.E.2d at 582; *see also Legge*, 349 S.C. 222, 562 S.E.2d 618.

E. Habeas Relief is an Integral Part of Our Common-Law Heritage, and the existence of an Actual "Gateway".

The use of habeas corpus to secure relief from wrongful confinement was "an integral part of our common-law heritage" by the time the Colonies achieved independence. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). The United States Constitution itself recognizes and protects the Great Writ in the Suspension Clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., art. 1, § 9, cl. 2.

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Supreme Court of the United Stated held that "the individual interest in avoiding injustice is most compelling in the context of actual innocence. . . . *[It is a] fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.*" *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) (emphasis added) (internal quotations omitted).

The *Schlup* Court held that a showing of actual innocence may excuse procedural errors where equity so demands, describing an actual innocence showing as "'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional

claim considered on the merits.'" Id. at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). The Court opined that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 324-25. Notably, the actual innocence gateway ensures that a miscarriage of justice does not occur in the "extremely rare" but critical cases in which a prisoner demonstrates actual innocence. *Id.*

The United States Supreme Court has continued to recognize this actual innocence "gateway" in cases since AEDPA, concluding that a petitioner who "satisfy[ies] the gateway standard set forth in *Schlup*" has the right to proceed "with procedurally defaulted constitutional claims." *House v. Bell*, 547 U.S. 518, 555 (2006). The *House* Court recognized "the miscarriage-of-justice exception" and noted that "in appropriate cases . . . the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." *House*, 547 U.S. at 536 (citations and quotations omitted).

In this case, Petitioner argues this Court should recognize that evidence of actual innocence can serve as a "gateway" to reaching constitutional claims under state law. That is, a claim for relief from a conviction in state court that is procedural barred can be heard when a petitioner presents evidence of actual innocence. *See McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) ("We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations.").

The United States Supreme Court has noted that "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent

persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (citation omitted). In *Murray v. Carrier*, the Court held, to avoid a "miscarriage of justice," "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [state law] procedural default." 477 U.S. 478, 495-96 (1986).

Similarly, in *McCleskey v. Zant*, the Court provided an innocence safety valve for the cause-and-prejudice standard, explaining: "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty . . . ." 499 U.S. 467, 495 (1991) (citation omitted). Therefore, this Court should recognize that evidence of actual innocence can serve as a "gateway" to reaching constitutional claims under state law.

[Conclusion and Signature Page to Follow]

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully prays this Court review and remedy this miscarriage of justice by granting the writ for habeas relief and vacating his conviction. *See* U.S. Const. amends. V, VIII, XIV; S.C. Const. art. I, § 3, 18; Rule 245, SCACR; S.C. Code § 17-17-10.

IT IS SO PETITIONED.

Respectfully Submitted,

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