# <u>ISSUE THREE</u>
# <u>Newly Discovered Evidence</u>

New York Criminal Procedure Law, Section 440.10, 1 (g) states:

> "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:"
>
> "New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; ..."

At Petitioner's 1997 trial, Aaran Yarborough testified that he had seen Petitioner Jonathan Parker at the intersection of Northhampton and East Parade. He further testified that he had seen Petitioner shooting Police Officer McDougald at that scene.

Aaran Yarborough now states under oath that his 1997 trial testimony was false, that he had never seen Petitioner at that intersection, and that he had never seen Petitioner interact in any shooting with Officer McDougald. He also states under oath that he had been threatened by Homicide Detective Andre Ortiz with death if he did not falsely testify to incriminate Petitioner Jonathan Parker in the shooting death of Officer McDougald. See Affidavit appended hereto as Exhibit "B".

Mr. Yarborough swears in his Affidavit that, based on his awareness of Detective Ortiz'

reputation and past behavior, he feared for his life if he did not falsely testify as instructed by Detective Ortiz. Since then Detective Ortiz has been convicted for doing something similar in a different case, and is no longer a Police Officer. Mr. Yarborough is now confident that he can now safely admit the truth.

At Petitioner's 1997 trial, another witness, Aaran Lott, also testified that he had seen the Petitioner at that intersection and that he had seen the Petitioner shooting Officer McDougald.

Aaran Lott now states under oath that his 1997 trial testimony was false. He now swears that, although he had driven past the intersection of Northhampton and East Parade, he had already driven down to the intersection of Northhampton and Fillmore before he heard shooting. He further swears that he never saw Petitioner at that time, nor did he witness the shooting of Officer McDougald. See Affidavit appended hereto as Exhibit "C".

Mr. Lott states that he had just been convicted in federal court of a drug offense, and that, in return for his falsely claiming to have seen Petitioner Jonathan Parker shooting Police Officer McDougald, that Police Officers would make sure that he would serve considerably less time in federal custody. He is now willing to tell the truth.

Both these Affidavits were not obtainable, even with the exercise of due diligence, by Petitioner Jonathan Parker, at the time of his trial. That if the jury had known the information in both these Affidavits, to wit that the Police were involved in framing an innocent man, it is unquestionable that the verdict would have been more favorable to Petitioner Jonathan Parker.

# <u>ISSUE FOUR</u>

## <u>Petitioner is Actually Innocent</u>

It is well established law that a defendant may, at any time, collaterally, or even on direct appeal, raise an assertion of **<u>Actual</u> <u>Innocence</u>** under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as under Article 1, Section 6, of the New York State Constitution. See, e.g., ***<u>People v. Burmudez</u>***, 25 Misc.2d 1226 (N.Y. Cty. 2009), ***<u>People v. Hamilton</u>***, 115 AD3d 12 (2nd Dept, 2014).

Petitioner Jonathan Parker has now made a clear and compelling showing of **<u>Actual Innocence.</u>** As noted, ***<u>ante</u>***, in Issue Three, the two eye-witnesses who had initially placed Petitioner at the scene of the crime now admit that their initial testimony was false, initiated by the police, frantic to get a conviction for the death of one of their own. The Petitioner is entitled to have that Claim heard. See, ***<u>People v. Caldvadado</u>***, 26 NY3d 1034 (2015). As stated by Justice Blackmum in ***<u>Herrara v. Collins</u>***, 506 U.S. 390, 435 (1993), to ignore a claim of **<u>Actual</u> <u>Innocence</u>** would be "fundamentally unfair" as a matter of procedural due process. Petitioner Parker respectfully submits that it would indeed be fundamentally unfair to wholly ignore his assertion of **<u>Actual</u> <u>Innocence</u>**! See, ***<u>People v. Conway</u>***, 118 AD3d 1290 (4th Dept. 2014) (a freestanding actual innocence claim may be raised). ***<u>People v. Hamilton, supra</u>***, at 21, "freestanding claims justify relief in and of itself", quoting ***<u>House v. Bell</u>***, 547 U.S. 518, 554 (2006). See, generally, ***<u>Schlup v. Delo</u>***, 513 U.S. 298 (1995).

The United States Court of Appeals for the Second Circuit has recently held, as a matter of first impression in this Circuit, that a "credible" and "compelling" showing of **Actual Innocence** warrants an equitable exception to allow an otherwise time-barred claim to be heard. ***Rivas v. Fisher***, 780 F.3d 529 (2nd Cir. 2015). Appellate Courts have likewise held that a Hearing is required on a claim of **Actual Innocence**. See, ***People v. Jones***, 115 AD3d 984 (2nd Dept. 2014). Petitioner Jonathan Parker, as he has done from the time of his arrest, again affirms that he is **Actually Innocent**, ***Murray v. Carrier***, 477 U.S. 478, 496 (1986). Therefore, inasmuch as the conviction had herein was obtained in violation of Petitioner's State Constitutional rights, as well as his rights to a fair trial and due process of law secured under the United States Constitution, he is entitled to have his assertions properly and adequately heard before a Court of Law.

As was observed some eighty-five (85) years ago in ***Berger v. United States***, 295 U.S. 78, 88 (1935), "... that a prosecutor must abstain from acting with impropriety to bring about a wrongful conviction ... is trenchant in our time ... ."

As the great Oliver Wendell Holmes wrote, over a Century ago, in ***McDonald v. Maber***, 243 U.S. 9, 91 (1917):

> "Great caution should be used not to let fiction deny the fair play
> that can be secured only by a pretty close adhesion to fact."

Petitioner Jonathan Parkers has continuously and persistently asserted **Actual Innocence**. Because of false testimony at trial, that assertion has been so far ignored. See, ***Herrare v. Collins***, 506 U.S. 390 (1993), ***People v. Calvado***, 26 NY3d 1034 (2015). But now that the malfeasance heretofore

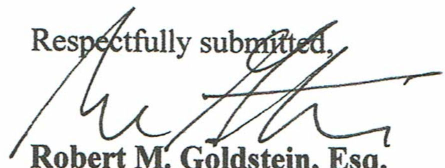
had at trial has been uncovered, the truth has finally been revealed. Jonathan Parker is truly **actually innocent!** "It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated ... for a crime which he or she did not commit.", ***People v. Tankleff***, 49 AD3d 160 (2nd Dept. 2007). This was a "miscarriage of justice" where, by the intentional use of false and misleading testimony, "constitutional errors have resulted in the incarceration of an innocence person", ***McQuiggin v. Perkins***, 569 U.S. 383 (2013), quoting ***Herrera v. Collins***, ***supra***, at 404.

## CONCLUSION

***Therefore,*** for the good cause herein and heretofore shown, Petitioner respectfully asks this Honorable Court to grant the herein Motion for relief, to vacate the herein convictions, or, in the alternative, to conduct an Evidentiary Hearing to determine why the herein convictions should be vacated, and whatsoever further and additional relief as this Court might deem just and proper.

Buffalo, New York
April 26, 2021:

Respectfully submitted,



**Robert M. Goldstein, Esq.**
Attorney for Petitioner Parker
69 Delaware Avenue, Suite 1103
Buffalo, NY 14202
Telephone: (716) 854-5333

# EXHIBIT A

State of New York : County Court
County of Erie

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People of the State of New York
*Plaintiff*

*vs*

Jonathan Parker,
*Defendant*

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AFFIDAVIT OF
JAMES P. HARRINGTON

Indictment # 97-0762

James P. Harrington, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice law in the State of New York.

2. I have been requested by Robert Goldstein, Esq., attorney for Jonathan Parker, to prepare this affidavit regarding a post-trial motion pursuant to New York State Criminal Procedure Law ("CPL") §440.10 related to his conviction under Indictment Number 97-0762 in Erie County, New York.

3. I was Mr. Parker's lead attorney in this capital murder case under New York Penal Law ("PL") §125.27 and CPL ("CPL") §400.27.

4. Upon information and belief, Mr. Parker's motion raises an issue based upon *McCoy v. Louisiana*, 584 U.S. ___ (2018) which is a United States Supreme Court decision related to defense counsel admitting the commission of a crime by the defendant in summation to a jury during the guilt/innocence phase of a capital trial.

5. This affidavit is my recollection of this issue in Mr. Parker's case.

**Background**

6. I was admitted to the practice of law in January, 1970. Except for the first four years of my practice, I have always practiced criminal defense law.

7. In 1995, the Governor of New York State signed a law which reinstated the death penalty in New York State for specific types of murder. Part of that law created a Capital Defender Office ("CDO") which would have regional offices in New York City, Albany, and Rochester. These offices were staffed by attorneys trained in the defense of capital cases who would be assigned to represent capital defendants charged under New York's death penalty statute. In order to assure that there were sufficient available capital defense counsel and in case there were conflict of interest cases, very experienced private criminal defense lawyers in New York, but who did not have capital defense experience, were trained to be able to defend capital defendants. In addition, the CDO attorneys were available to assist private lawyers with these cases.

8. I was selected as one of the private criminal defense attorneys in 1995 to be trained for defending these cases in the first training session. I had extensive criminal trial experience in all types of criminal cases in New York State and in Federal courts at that time.

9. The CDO capital training focused on the concept that "Death is Different" in all aspects of a death penalty case. Because of the ultimate penalty which can result, defense attorneys had to look at capital cases differently that other criminal cases, including murder. The emphasis was on saving the client's life. Every part of the case, from its inception until its end had to have that principle in mind. This applied to the legal and factual aspects of the case. It was a different way of approaching and doing a criminal defense which was the product of years of defending cases in states where the death penalty had been used, unlike New York, which had not had a death penalty statute from 1977 until 1995.

10. As a result of my criminal defense experience and the CDO training I received, I was certified by the CDO to be assigned by Supreme Court Justices and County Court Judges to represent capital defendants within New York State.

11. Although several counties in New York State had initiated capital prosecutions, Erie County had not until 1997. Erie County's first capital case was against Jonathan Parker.

12. On April 9, 1997, a Buffalo Police Department Officer, Charles McDougald, was shot and killed on a street in Buffalo, New York. His partner, Officer Michael Martinez, was also shot, but did not die. Based on the investigation of the Buffalo Police Department, they made public that Mr. Parker was the person whom they believed did the shooting and who would be charged with the killing and other crimes.

13. On April 12, 1997, Mr. Parker's attorney for unrelated cases, Paul V. Hurley, Esq., arranged for his surrender to the Buffalo Police Department.

14. I was assigned to represent Mr. Parker as his capital counsel by the Hon. John Rogowski, Erie County Court Judge, within a day of Mr. Parker's surrender and arraignment in Buffalo City Court. Judge Rogowski also appointed John Elmore, Esq. as co-counsel with me for Mr. Parker.

15. I continued to represent Mr. Parker during pretrial proceedings, pretrial preparation, his guilt-innocence trial, his sentencing trial, and in filing a notice of appeal. I did not represent him in his appeals nor have I represented him in any post conviction proceedings.

16. On the day I was assigned to represent Mr. Parker, I had a meeting alone with Frank J. Clark, III, the Erie County District Attorney, at his invitation. He told me that he asked me to meet with him as a courtesy to me so I would know where he stood on this case

immediately. (I had known Mr. Clark for many years and had tried New York State cases against him when he was an Assistant Erie County District Attorney and federal cases against him Assistant United States Attorney. We knew each other very well and had deep respect for each other.) At that time of our meeting, I had little knowledge about Mr. Parker or the circumstances of his case.

17. During this meeting, Mr. Clark advised me that the killing of a police officer was one of the murder cases eligible for a death penalty sentence that he would seek the death penalty for if he believed he had proof beyond a reasonable doubt. He had no previous experience with capital cases in his long career as a prosecutor in state and federal courts. Although he had considered authorizing the death penalty in several other murder cases in Erie County after New York's re-instituting it in 1995, Mr. Parker's case for which he intended to seek the death penalty.

18. Mr. Clark told me that while he did not oppose the death penalty, he had decided that he would use it sparingly because it was arbitrary and he lacked the resources to prevent a disruptive burden on the orderly working of his office. He also said that he would not change his mind on this issue in Mr. Parker's case unless he learned of a significant legal or factual flaw in his case.

19. I advised him that I was not in a position to discuss the case because I did not know Mr. Parker, had not investigated the case, and was in no position to discuss the merits of the case. I also told him that capital cases were treated differently in many ways including investigation, preparation, legal challenges, motions, trial strategy, and sentencing. He said he understood and expected me to do whatever I could to defend Mr. Parker. His position on seeking the death penalty never changed throughout the case.

20. Mr. Parker was indicted by a Grand Jury of Erie County, New York under

Indictment Number 97-0762. The indictment charged violations of New York State Penal Law of Murder in the First Degree, PL§125.27; Murder in the Second Degree (Intentional), PL§125.25; Murder in the Second Degree, §125.25 (Depraved); Manslaughter in the First Degree (Intentional), PL§125.20; Manslaughter in the Second Degree (Reckless), PL§125.15; Attempted murder in the First Degree, PL §125.17(110.00); Attempted Murder in the Second Degree, PL §125.25(110.00); Aggravated Assault on a Police Officer, PL§120.11; Assault in the First Degree (Intentional), PL§120.10; Assault in the Second Degree (Reckless), PL§120.05; Criminal Possession of a Weapon in the Second Degree, PL§265.03; and Criminal Possession of a Weapon in the Third Degree, PL§265.02.

21. Mr. Elmore and I worked together on all aspects of Mr. Parker's case. In addition, the resources of the New York State Capital Defender's (CDO) regional office in Rochester, New York were made available to us for whatever assistance we needed. Throughout the motion, investigation, and trial preparation work on the case, we consulted with CDO attorneys many times.

22. As Mr. Parker's trial approached in June, 1998, the CDO's attorneys and support staff provided more and more assistance. Contributors included Thomas Dunn, Esq., Office Director; William Easton, Esq., Staff Attorney; Patricia Warth, Esq., Staff Attorney; Joseph Flood; Esq., Staff Attorney; Bryant Graham, Investigator; and Joan Podkul, Mitigation Specialist.

23. Because of the complicated nature of the issues, the amount of work necessary and the expertise needed to defend in a capital case, the CDO resources were necessary and welcomed by Mr. Elmore and me. None of them, however, entered notices of appearance on Mr. Parker's behalf.

24. As Mr. Parker's trial approached and through all stages of jury selection, the

guilt/innocence phase of the trial and sentencing phase of the trial, different members of the CDO mentioned above assisted Mr. Elmore and me. Mr. Dunn was especially involved in this process. He attended the trial daily, consulted on all parts of our defense work, and made recommendations for strategic decisions. He had extensive capital trial experience in Florida and Georgia before he joined the CDO office in Rochester after the enactment of New York's capital statute.

**Issue before this Court**

25. During the guilt/innocence phase of the trial, Mr. Elmore and I defended the case contesting the evidence against Mr. Parker.

26. Near the conclusion of the trial testimony and then after proof closed, Mr. Dunn and I spent hours reviewing the evidence and testimony against Mr. Parker. He and I came to the conclusion that the case, although circumstantial, was compelling, had been proven beyond a reasonable doubt, and that Mr. Parker would be found guilty.

27. I had, however, already outlined a summation to the jury arguing that the prosecution had not established proof beyond a reasonable doubt against Mr. Parker.

28. During the evening hours of the day before summations, Mr. Dunn and I discussed how my arguments in the case regarding the guilt/innocence verdict would affect the penalty or sentencing trial which would follow with the same jury assuming there was a conviction. Because in capital litigation the overriding mission is to save the client's life, Mr. Dunn and I discussed my credibility with the jury. The question was would I lose it for arguments against the death penalty if I argued against the compelling guilt evidence.

29. Based on my conversations with Mr. Dunn and other experienced capital lawyers and my own research, I knew that it was accepted within the death penalty defense

community that it was an acceptable strategic decision to concede guilt of a client if it was necessary for credibility with the jury in sentencing arguments. This strategy was not uncommon at that time.

30. This strategy, however, lead to the decision by the United States Supreme Court *in McCoy v. Louisiana*, supra, holding that such a strategic decision was improper if done without the client's consent.

31. Mr. Dunn and I came to the same conclusion that this approach was the right one in Mr. Parker's case. While I valued Mr. Dunn's extensive experience and assistance defending Mr. Parker, the final decision was mine. When we parted very late that evening, we left it that I would defer my final decision until the morning. Conceding a client's guilt for a crime in a summation was something I had never done in my career as a criminal defense trial lawyer. (Mr. Elmore was not with us when this decision was made and did not play a part in this decision.)

32. I agonized over this decision from the time I left Mr. Dunn until I arrived at my office in the morning before going to court for summations. Mr. Dunn had not changed his recommendation. I made the final decision as I walked to the courthouse with Mr. Dunn as we continued to discuss it.

33. When we arrived in the courtroom, Erie County Court Judge Michael D'Amico, who had presided over this case from indictment through trial, wanted to start summations promptly at 9:30 AM. Unfortunately, when Mr. Parker was brought into the courtroom, Judge D'Amico took the bench immediately. I did not have a chance to discuss my decision with him before my summation.

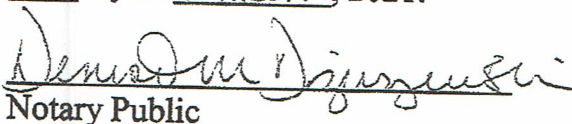
34. After my summation, Mr. Parker was extremely upset with me for what I had done. He had never admitted guilt to Mr. Elmore or me.

35. Also, as I had not advised him of what I was going to do, he did not consent to my decision, nor authorize me to do what I had done.

36. I make this affidavit knowing that a Court and the parties will rely on it in Mr. Parker's post conviction motion.

James P. Harrington

Sworn to before me on this
1st day of March, 2021.



Notary Public

DENISE M DZIERZEWSKI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Aug. 17, 2022

# EXHIBIT B

# AFFIDAVIT

**State of New York]**
**County of Erie ]ss:**
**City of Buffalo ]**

**Aaron Yarborough**, being duly sworn, deposes and says:

1. That in 1996 I testified against Jonathan Parker at his murder trial for the shooting of a Buffalo Police Officer.

2. That the testimony that I then offered was false and totally untrue. I was told what to say that I had seen.

3. That I did not see Jonathan Parker at or even near the scene of the murder.

4. That I definitely did NOT see Jonathan Parker shoot a Buffalo Police Officer.

5. That I had been in a corner store a block away from the shooting. When I heard the noise I looked out to see what was happening. I saw many Police cars going by so I quickly left the area.

6. That later that evening, Homicide Detective Andre Ortiz, and a bunch of other cops, captured me while I was visiting on Sweet Street.

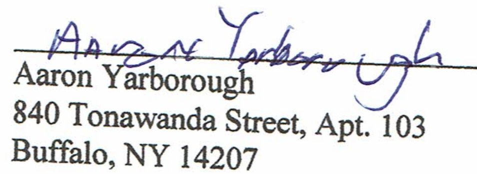
7. That Detective Andre Ortiz told me that if I did not say what they told me to say at Jonathan Parker's murder trial that he would take me out in the corn fields and kill me.

8. That knowing the reputation of Detective Ortiz, I was afraid for my life, so agreed to say whatever they told me to say at Jonathan Parker's murder trial.

9. That now that Detective Ortiz is no longer a Buffalo Police Detective, and therefore can no longer kill me for telling the truth, I am now willing to tell the absolute truth.

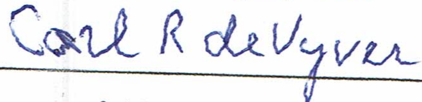
10. That the truth is I never saw Jonathan Parker, or any one else, with any gun, or do any shooting of any Buffalo Police Officer. All my trial testimony was false. I just repeated what I had been told I had to say.

11. That I will so testify under oath if called to do so.



Aaron Yarborough
840 Tonawanda Street, Apt. 103
Buffalo, NY 14207

Sworn and subscribed to before me
this 30th day of August, 2020:



Carl R. deVyver
COMMISSIONER OF DEEDS
In and for Buffalo, Erie County, NY
Commission Expires December 31, 2020

# EXHIBIT C

# AFFIDAVIT

**State of New York]**
**County of Erie ]ss:**
**City of Buffalo ]**

**Aaron Lot**, being duly sworn, deposes and says:

1. That in 1996 I testified against Jonathan Parker at his murder trial for the shooting of a Buffalo Police Officer.

2. That the testimony that I then offered was false and mainly untrue.

3. That I lied about what I had done and what I had seen because a Buffalo Police Officer, whose name I do not recall, had promised me that if I did lie and say I saw Jonathan Parker at the scene of the Police Officer being shot, that he would guarantee that I would do much less time for the federal drug charges for which I had been convicted.

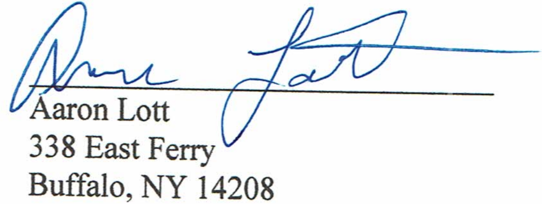
4. That I did lie at Jonathan Parker's murder trial because I was trying to save myself from doing more time for my conviction. My wife Cassandra lied for the same reason.

5. That the truth is that I was in a car driving down Northhampton Street, towards Fillmore. I saw a police car turn off East Parade on to Northhampton. We drove past the police car and stopped at the East Parade stop sign. We continued down to Fillmore. It was while we were stopped at the light at Fillmore that I heard the gun shots.

6. That at the trial I testified that as we were driving down Northhampton, we saw Jonathan Parker crossing the street in front of the police car. In reality I did not see Jonathan Parker at all. We did see the police car. We drove slowly past the police car, stopped at the stop sign, and continued to Fillmore Avenue. Then we heard the gun shots.

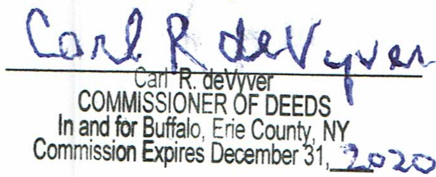
7. That the truth is that I did not see Jonathan Parker on Northhampton Street that night. I was not even at the scene of the shooting, so I did not see Jonathan Parker, or anyone with a gun, nor did I see the police, or Jonathan Parker, or anyone else, do any shooting.

8. That I will so testify under oath if called to do so.



Aaron Lott
338 East Ferry
Buffalo, NY 14208

Sworn to and subscribed before me
this 4th day of September, 2020:



Carl R. deVyver
COMMISSIONER OF DEEDS
In and for Buffalo, Erie County, NY
Commission Expires December 31, 2020