STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
Steven H. John, Trial Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

ARDON P. CATO, II,

Appellant

Appellate Case No. 2016-002081

FINAL BRIEF OF APPELLANT

Ardon P. Cato, II #316535
Evans C.I. F3A-193
610 Highway 9 West
Bennettsville, S.C. 29512

Pro Se Appellant

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DID THE TRIAL JUDGE ERR IN DISPOSING OF ORAL ARGUMENTS AND DENYING APPLICANT'S MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE?

STATEMENT OF THE CASE

Ardon P. Cato, II, was indicted at the Horry County September 2005 Grand Jury term for two counts of assault and battery with intent to kill and Murder. J.M. Long, III, represented him. On July 17, 2006 Appellant plead guilty as indicted. He was sentenced to the State Dept. of Corrections by the Honorable Steven H. John for a term of 42yrs for Murder and 20yrs for an ABWIK, to run concurrent.

Appellant filed for P.C.R. on September 7, 2006. A. PCR Hearing was convened on April 3, 2007; Appellant was represented by Paul Archer. On May 29, 2007, Judge Paula H. Thomas issued an Order denying Appellants PCR. (**NOTE:** Judge Paula H. Thomas also denied Appellants Bond [redacted] at a Bond Hearing in February 2006.)

Pursuant to Rule 59(e) of the S.C.R. Civ.Pro. Appellant submitted a request to Amend the PCR judgement. The Motion 59(e) was clock stamped and recieved by the S.C. Supreme Court on June 27, 2007. (R. pg. 51-54). Appellant never recieved a reply.

On March 3 2008 Appellant filed a petition for Writ of Certiorari in the S.C. Supreme Court. The S.C. Court of Appeals issued an Order denying petition on

May 28, 2009. An explanation was not given for the denial.

Appellant filed a petition for Habeas Corpus on August 7, 2009. The U.S. District Court issued an Order denying Appellants Writ of Habeas Corpus and C.O.A. on August 17, 2010. Appellant Cato filed a 59(e) Motion for Reconsideration of the District Court ruling on August 25, 2010. The final ruling on the matter was issued on October 20, 20.

Appellant Ardon P. Cato, II, proceeded as Pro Se Applicant, filed a Motion for New Trial Based on After Discovered Evidence, pursuant to Rule 29(b) S.C.R. Crim. Pro. dated March 8, 2016, and was clocked stamped with the Horry County Clerk of Court on March 14, 2016.

The Honorable Steven H. John issued an Order Disposing of Oral Arguments and Denying Applicants Motion for New Trial Based on After Discovered Evidence dated July 18, 2016, filed July 19, 2016. Appellant recieved this Order at Lieber C.I. Mailroom on July 29, 2016.

Appellant filed a Motion to Alter or Amend judgement of the Order Disposing of Oral Arguments and Denying Applicants Motion for New Trial Based on After Discovered Evidence pursuant to Rule 59(e) of the S.C.R. Civ Pro, dated August 5, 2016, clock stamped with

the Clerk of Court on August 10, 2016.

The Honorable Steven H. John issued an Order Denying Applicants Motion to Alter or Amend judgement dated September 14, 2016, filed on September 15, 2016. Appellant recieved this Order at Evans C.I. Mailroom on September 27, 2016.

This is Appellants Final Brief which proceeds as follows:

FACTS

On April 9, 2005 at about 4:00 am Jordon P. Cato, II was at the Red Room nightclub dancing on the dance floor. Cato spotted a female he recognized sitting on a booth at the edge of the dance floor. He then walked over to have a few words with her. As Cato was beginning to converse with the female, he felt a tap on the back of his shoulder. Cato stood [redacted] and turned only to face an unidentified person who said, "she doesnit want to be bothered right now." In an attempt to avoid an altercation, Cato responded by saying, "Cool. No problem". It is probable an believed that this unidentified subject did not hear Cato, or at least misunderstood him. As Cato was leaning to tell

the female "goodbye", the unidentified subject, who now becomes an assailant, tapped Cato on the shoulder again and simultaneously, as Cato was turning around, the assailant threw a punch of which Cato dodged by leaning back. The second punch thrown by this assailant barely brushed Cato's forehead. Despite the chaos and crowd closing in on him, Cato decided to remove himself from the situation. At that time he chose to exit the club through the front entrance on his own without any help nor assistance from anyone.

Cato can only recall chaos and the crowd closing in on the dance floor area. "If", there is any truth to the States theory, seriously questioning how they could even possess such information, as to whether "bouncers" responded to the incident, it is very unclear. What is clear is that Cato was not touched, grabbed, nor escorted as he exited the club's front entrance. This relevant fact that disproves the states theory is presented by the most credible person who could possess such information with veracity, Mr. Cato himself. Cato was not attacked, nor beaten. Myrtle Beach Police Dept. Records includes no signs of bruises on Cato; plus his clothing was clean and nearly intact. There is no substantial evidence of a bouncer or any for that matter, mentioning ejecting Cato out of the club.

Cato walked approx. 30yds to his vehicle, retrieved a gun and returned to the exit of the front of nightclub. (Please take careful consideration of this very important **NOTE**; as it will be addressed later in this Brief: The double door entrance where payment is made to enter the nightclub, and the exit door to the dancefloor, is located in the front of the nightclub. There, also in the front of the nightclub it is a sidewalk and most notably Hwy 17 Business. The back door, located in the back of the nightclub, opens to an alleyway. There, if someone exited that back door in the back of the nightclub, and take a right, it would be in the direction of 12th Ave. N.) (R. pg 83, 84). Standing just outside the exit door in the front of the nightclub, (not inside that door), Cato, who has never had any history of harming or assaulting people, raised the gun up high to avoid any actual harm of people, fired four shots into the upper wall towards the ceiling. (Respondents Record, Appendix pg. 68, line 10-17)

Appellant now pleads with this Honorable Court to not be overly swayed by the fabrications in the Respondents Statement of Facts. Respondents State a false claim of two men against Appellant on pg 4 of Respondents Initial Brief. How is this proven to be

true? Absolutely no testimony in the record verify or attest to this.

Respondents Statement of Facts and the State's theory of the case is very inconsistent. The aforementioned always argued that Appellant Cato was forcibly ejected by "bouncers" to assert malice. (Respondents Record, Appendix pg. 9, line 23-24; Appx. pg. 15, line 10-13; Appx. pg. 76, line 2-6; Appx. pg. 86, line 24 - pg. 87, line 1). Now on pg. 4 of Respondents Initial Brief, "Cato was told to leave by bouncers"?

Who is it that witnessed or can testify to the gun being "limp wrist style sideways" as Respondents unjustly fabricate on pg. 4 of their Initial Brief? It is moot to address that the Respondents and the Solicitor said the gun jammed while shots were being fired, then added on that Appellant Cato shot at a bouncer. This is not substantiated by the evidence and highlights untruths in their theory. (Respondents Initial Brief pg. 21; Respondents Record, Appendix pg. 11, line 8-24).

Appellant Cato is respectfully requesting that this Honorable Court please recognise that the only people that can be accurately consistent and accurately state what did or did not happen due to their veracity are Appellant and the Affiants who were

actually there. Also praying that Respondents fabrications be considered when ruling in the Appellants favor.

ARGUMENTS

I.) Trial Judge did err in Disposing of Oral Arguments and Denying Appellant's Motion for a New Trial Based on After Discovered Evidence, failing to properly and correctly rule on the findings of facts and conclusions of law on the issue of the guilty plea.

Rule 29(b) S.C.R. Crim. Pro. uses a five prong Spann Test in regards to Newly Discovered Evidence, stating that... (1) the newly discovered evidence is such that it would probably change the result if a new trial were granted.

The Respondent is claiming that the Newly Discovered Evidence will not change the outcome of the guilty plea, arguing that the plea itself binds the Appellant to the charges despite the new facts presented.

The issue of the accused presenting Newly Discovered Evidence after the guilty plea has been addressed in the justice system of South Carolina,

particularly in Jamison v. State, Op. No. 2012-UP-437 (S.C. Court of Appeals filed July 18, 2012) (R. pg 8, 9), Jamison v. State, OP. No. 27454 (S.C. Supreme Court filed October 22, 2014) (R. pg. 10-19). The South Carolina Supreme Court sets forth the Interest of Justice standard in Jamison. This Court held that when examining new evidence from guilty pleas "..... establishing that ... the new evidence is of such weight and quality that under the facts and circumstances of the particular, the interest of justice requires Appellants guilty plea to be vacated." Adding that "... the guilty plea may be withdrawn when necessary to correct a manifest injustice."

Quoting Jamison: ["... we must reject the States claim that the waiver of the trial and admission of guilt encompassed in the guilty plea necessarily preclude ... relief in all cases."]

... Jamison quoting Riese, 192 P.3d at 995 ("finding [redacted] defendant may withdraw his plea on the basis of newly discovered evidence only when necessary to correct a manifest injustice."). Defendant, ["is bound by his plea and conviction ... unless he can demostrate the interest of justice requires they be vacated."] ("the newly discovered evidence is of such weight and quality that under the facts and

circumstances of that particular case, "the interest of justice" requires the defendant guilty plea be vacated.") [Respondent has never argued that he pled guilty as a result of ineffective assistance of counsel."]

The present case is a clear contrast from Jamison, where Appellant clearly overcomes the burden Jamison could not. Appellants case seperates from Jamison wherein Appellant indeed "argued" that his plea came as a result of counsel's ineffectiveness with a failure to properly investigate the SLED Ballistics evidence and advise his client of a constructed defense in the event of trial. (R. pg. 56-62).

It will please this Honorable Court that Appellant "confusing", "Item 9 M.B.P.D." and "Item 9 SLED", [redacted] is very much to the contrary. Appellant has never litigated anything about Item 9 M.B.P.D. and Item 9 SLED. The SLED Ballistics Report is one report. The heading on this report clearly shows that all of the ballistics evidence was compiled by one Agency, South Carolina Law Enforcement Division, Forensic Services Laboratory Report. All the ballistics evidence in this one report, including the worksheets are signed as correct by one SLED Examiner, Mr. Dan Defreese. (R. pg. 71-77).

M.B.P.D. incident reports actually have Myrtle Beach Police Department Incident Report as the heading. (R. pg. 78-84). There is no confusion. The fact is that Item 5, a .380 shell casing is marked to be paired to Item 9, a .9mm bullet. This is an obvious error in the SLED Ballistics Report. Appellant is in all sincerity, asking this Honorable Court to take necessary consideration of Respondents litigation to confuse this matter as relief is considered in his favor. For this is a matter that will have to be solved under oath in the grant of a new trial. Litigation alone will not suffice.

The demonstration of the SLED Ballistics Report, (R. pg. 71-77), reflects three spent shell casings recovered from the scene. They are Items 3, 4, and 5, which were two .380 shell casings, and one .9mm shell casing. It also shows there were two fired bullets recovered from the scene. They are Item 6 and 9, which were one .380 bullet and a .9mm bullet.

Appellant draws attention to the fact that there were four victims, three with one wound each, and one with four wounds. (R. pg 78-82). Also Item 6 is a bullet that was found near a far wall described as being 36ft away from the front exit door with no blood or body tissue, meaning that it did not

strike any of the victims. With the position of Item 6 and its description clear, still there exists four victims with 7 gunshot wounds. The Newly Discovered Evidence in this present case creates a scenerio that substantiates a reasonable probability that Appellant is innocent.

Further examination demonstrates the botched SLED Ballistics Report. As a result of analyzing SLED's Ballistics Report (R. pg. 71-77), Item 5, a .380 shell casing that is further marked "Item 9", which is a .9mm bullet. A .9mm bullet cannot come out of a .380 shell casing, so, this .380 shell casing being paired to a .9mm bullet, the only other bullet recovered from the scene blatantly substantiates an error that deem the illegitimacy of the actual SLED Ballistics Report and its credible basis to prove or support the Appellants convictions. The SLED Ballistics Report reflects error that cannot be considered harmless, but more so an act of mishandling and documentation of the crime scene. Appellants contention of the SLED Ballistics Report has been consistent and well documented. (R. pg. 56-62) (R. pg. 51-54).

The issue with this current case is that Appellant Coto's Defense Attorney J. M. Long, III, at the

time of this case, in all actuality during the compiling of SLED's Ballistics Report by SLED Examiner Dan Defreese, was engaging in criminal sadistic acts. (See dates on SLED Ballistics Report, Febuary 2006, R. pg. 71-77; dates of unprofessional criminal acts by Defense Attorney J. M. Long, III, 20 to 30 times exposing himself to women and children January 1, 2006 through 1st quarter months of 2006 in Article on J. M. Long, III, R. pg. 68, 69). Appellant is praying that this Honorable Court not take the unprofessional representation of J. M. Long, III, lightly as relief is considered in Appellants favor. During this time J. M. Long, III, did not speak to the SLED Examiner Dan Defreese to investigate why the errors in SLED's Ballistics were made. Appellant made every attempt to the best his Pro Se abilities would allow, to bring Mr. Long, III's ineffectiveness for failing to properly investigate the SLED's Ballistics evidence to be acknowledged during the PCR proceedings. (R. pg. 56-62) (R. pg. 51-54). Appellant Cato addressed this issue to the extent that PCR Judge Paula H. Thomas said the SLED's Ballistics evidence would be an open file for review in this case. (R. pg. 60 line 23 - pg. 61, line 16.) (R. pg. 51-54).

At this point in this brief Appellant will have

to address note 6 on pg. 22 of Respondents Initial Brief. Appellant Cato never said that he had recieved SLED's Ballistics Report from J. M. Long, III. Appellant Cato was discussing the lack of malice aforethought shown, and the lack of an intent to kill shown in some paperwork detailing the charges he was facing. Never was there a SLED's Ballistics Report given to Appellant by J. M. Long, III. (Respondents Record, Appendix pg. 69, line 14-24).

Counsel J. M. Long, III, was suppose to investigate why the SLED's Ballistics Report and evidence was forcefully and erroneously doctored to attempt to show the following: That two different types of ammunition came from one gun; that four victims with a total of 7 gunshot wounds, shot in different body parts, while being situated in different areas of the nightclub was all done by this one Appellant? As this Final Brief will show, the Newly Discovered Evidence in this case will expose all of this as being wrong.

This Honorable Court will have to agree that merely contacting a gun manufacturer does not at all conclude nor qualify for a total, proper, complete investigation. Critical to this matter, the Jonathan T. McIntyre statement in the Myrtle Beach Police Dept.

Incident Report, (R. pg. 83, 84), of seeing another shooter who was not Appellant, shoot and inflict harm on the victims, and then leave out of that back exit at the back of the nightclub aforementioned in the note in the Facts section of this Final Brief on pg. 7. (R. pg. 83, 84), wherein Appellant Cato was in the front outside of the nightclub, was not abandoned in the Lower Court as Respondent claims. Appellant Cato never knew about the Jonathan T. McIntyre statement until after the PCR Hearing because the McIntyre statement in M.B.P.D. Incident Report, along with the other M.B.P.D. Incident Reports, was attached to the SLED Ballistics Report when SLED sent the Ballistics Report and the other evidence to Appellant Cato, received on May 3, 2007, after the April 3, 2007 P.C.R. Hearing convened. (R. pg. 85-88). So as this Honorable Court can calculate, J. M. Long, III, never knew or never revealed to Appellant the McIntyre Statement, nor the errors in the SLED Ballistics Report because Mr. Long, III, never conducted a complete, adequate investigation of all the necessary SLED's Ballistics Evidence.

Appellant's Defense Attorney J. M. Long, III, who failed to properly investigate and advise his client of

a constructed defense, due to his unprofessional criminal acts during this time, was unaware of the inconsistencies and/or ineffective in his performance. Ultimately in Appellants case there is a grave manifest injustice that needs to be corrected by the granting of a new trial in the interest of justice. The manifest injustice is that Appellant was by way of ineffective assistance of counsel, convicted by an invalid SLED Ballistics Report that erroneously pairs a .380 shell casing with a .9mm bullet. A .9mm bullet cannot come out of a .380 shell casing. Presently there is more than a scintilla of evidence that, had it been exposed and/or known to the defense, it would have been used to change the outcome of the Appellants case. The Appellant is being deprived of a fair and impartial proceeding by not being able to put on an affirmative defense due to his lack of access to evidence of a SLED Ballistics Report that substantiates the accuracy for his role during the night in question.

As the facts and circumstances of this Appellants particular case, the Newly Discovered Evidence is of such weight and quality, with witnesses on the scene hearing people actually plotting to do harm

to someone, and then hearing shots fired from totally different directions, establishing the fact that there was someone, (who is not Appellant), on the inside of the club shooting and inflicting harm on the victims. (R. pg. 33-39).

The Affidavits are sworn to notarized documents that are factual and true. For Respondents to try to illegitimize the Affidavits in litigation only will not suffice. The matter being addressed in Appellants Motions and Briefs is that, since there was no trial for all the pertinent facts and appropriate evidence to be acknowledged, it would definitely suit the interest of justice that a new trial be conducted to properly examine the weight of the newly discovered evidence. As it stands, the preponderance of the Newly Discovered Evidence is in favor of the Appellant, especially being that the Appellant, and the Affiants were actually at the Red Room nightclub. Credibility weighs more with the veracity of these witnesses and Appellant who were actually there.

Realistically, Newly Discovered Evidence does not discriminate in how it presents itself. In this case, due to Appellant's Cato's incarceration and not having any legal representation, the Newly Discovered

Evidence can only come forth by way of being connected to, or in the vicinity of Appellant Cato, by one form or another. The fact of this matter is that, the Newly Discovered Evidence is truthful, factual, and it exposes the obvious discrepancies and errors in this case, which make Appellant Cato's convictions null and void at best, or decided for examination by a neutrial at the very least.

Appellant would like to bring to the attention of this Honorable Court that the Respondents are raising too many theories and speculations as to what could have or could not have happened on the night of incident. (Respondents Initial Brief pgs. 12, 13, and pg. 26) (Respondents Record, Appendix pg. 11, lines 8-24). Respondents are fictitiously reaching and grabbing at straws that are simply not there. For example, how can Affiant Edwards hear Appellant Cato discuss anything when its pretty clear that Appellant Cato was on the outside of the nightclub, and Mr. Edwards was on the inside of the nightclub?

Appellant Cato presents Newly Discovered Evidence that highlights why an actual eyewitness, Jonathan T. McIntyre (R. pg. 83, 84), informed M.B.P.D. that he saw another shooter, (not Appellant Cato by description), run towards that back exit in the

back of the nightclub, and ran to the right towards 12th Ave N. Appellant Cato was outside in the front of the nightclub where the dancefloor exit is positioned facing Hwy 17 Business. The Newly Discovered Evidence being presented is not cumulative at all. The Newly Discovered Evidence is not speculation, but sworn to facts of Ms. Beckman and Mr. Edwards hearing shots fired from totally different directions. (R. pg. 33-39). Not speculation, but sworn to facts that Ms. Beckman is an eyewitness that saw that back exit door open, and that Mr. Edwards is an eyewitness that saw people rush towards that back exit, the very same back exit that the Myrtle Beach Police Dept. documented in their Incident Report that they were notified that the shooter in this case, who is not Appellant Cato, ran out of. This Newly Discovered Evidence is not cumulative because no one has ever said, stated, nor testified under oath that they heard shots fired from totally different directions. This Newly Discovered Evidence is not cumulative because no one has ever said, stated, nor testified under oath that they heard people plotting to do harm before shots were fired. This Newly Discovered Evidence is not cumulative, but it is an affirmation

of the fact that someone other than Appellant Cato was on the inside of the Club Shooting and harming the victims.

This Newly Discovered Evidence is material and necessary in the determination of correcting a manifest injustice. The Newly Discovered Evidence, is evidence of material facts that pertains to the two shooter theory defense admittedly abandoned by J. M. Long, III, at Appellants PCR Hearing. (R. pg. 63-67). Appellants Defense Attorney testified to not moving forward with, nor making Appellant aware of the relevant two shooter defense based solely on the SLED Ballistics Report being valid and correct. Appellants Defense Attorney was ineffective for failing to properly investigate the SLED Ballistics Report to see the errors in it, make his client aware of the discrepancies in the Report, and advising his client of a constructed defense in the event of trial by using the invalid SLED Ballistics Report to corroborate the two shooter defense. Merely contacting a gun manufacturer does not hold the standard for a professional, effective, investigation. Attorney J. M. Long, III, did not contact SLED Examiner Dan Defreese to

discuss the errors in the SLED Ballistics Report. During the time of the preparation of the ill-manufactured Report in February 2006, (R. pg. 71-77), J. M. Long, III, the Attorney who represented Appellant Cato, was suspended from his law practice for indecently exposing himself as reported some 20-30 times January 2006 through the first quarter months of 2006. Thus proving he was not at all utilizing competency which is expected of reasonableness. (R. pg. 68, 69).

The manifest injustice would be to have Appellant Cato remain convicted of the charges when new evidence is presented that someone, (who is not Appellant), was inside the club shooting and inflicting harm on the victims. In addition, the SLED Ballistics Report cannot be used to unequivocally prove Appellant guilty of the charges. It is a manifest injustice to use the SLED Ballistics Report that erroneously pairs a .380 shell casing and a .9mm bullet as a part of the record to unequivocally convict Appellant of the charges.

As our justice system uses the lens of fundamental fairness, Appellants new evidence clearly meets the interest of justice standard in regards

to the plea and a new trial with witnesses who were on the scene of incident hearing someone plotting to do harm to people, also hearing shots fired from totally different directions, establishing that there was someone (who is not Appellant), on the inside of the nightclub shooting and harming the victims. (R. pg 33-39) (R. pg. 83,84) (R. pg. 24-26) (R. pg. 71-82). This new evidence raises pertinent questions to be answered in a new trial. Those questions are: Who was on the inside of the nightclub shooting and inflicting harm on the victims? ... Where did that person go? ... Why were there originally four victims with a total of 7 gunshot wounds? ... with another fired bullet that (only) hit an upper wall, with no blood or body tissue? ... Why was each victim shot in different body parts while being situated in different areas of the nightclub? ... Why were there two different types of ammunition erroneously paired in the SLED Ballistics Report? ... With the new evidence presented, the interest of justice requires these questions be answered in a new trial.

Here Appellant indeed may disavow his

guilty plea because the interest of justice of the Newly Discovered Evidence of witnesses hearing someone plotting to do harm to people, and hearing shots fired from totally different directions, the error in the SCED Ballistics Report of pairing a .380 shell casing and a .9mm bullet, the identification to the M.B.P.D. of a shooter, who was not the Appellant, shoot the victims and run out of that back exit and towards 12th Ave N., outweighs his waiver and solemn admission of guilt encompassed in his plea of guilty, and the now compelling interests of Respondents of overlooking the SCED Ballistics errors, the reasonable doubt raised by,... (to address note 7 on pg. 24 of Respondents Initial Brief, this is an issue that cannot be accurately figured out by speculation in litigation only. For proper justice for all the victims involved, a new trial will need to commence wherein professional forensic experts can determine exactly what happened with the projections of the wounds to shots fired ratio. As it stands, preponderance of this aspect of this case is overwhelmingly in Appellant Cato's favor.), ... the fact that the 7 gunshot wounds on the four victims who were shot in different body parts, while being situated in different areas of the nightclub does

not add up with the Ballistics evidence, the now compelling interest of Respondents overlooking the reasonable doubt raised by the Newly Discovered Evidence witnesses affirming the actual identification of another Shooter that was on the scene, who is not Appellant, to maintain the finality of his guilty plea convictions. This is the rare case where the interest of justice require that a knowing and voluntary plea be vacated.

Appellant Cato is now prayerfully pleading with this Honorable Court respectfully and in all sincerity to not allow these aspects of this case to go overlooked as relief is considered in his favor. Because of this Newly Discovered Evidence, a new trial needs to convene so that real professional, effective legal representations and investigations can be conducted to exact justice for everyone involved, and prevent a manifest injustice of Appellant Cato being wrongly convicted.

II.) Trial Judge did err in Disposing of Oral Arguments and Denying Appellants Motion for New Trial Based on After Discovered Evidence, failing to properly and correctly rule on the findings of facts and conclusions of law on the issue of Appellant satisfying the five prong criteria for the Spann Test pursuant to Rule 29(b) S.C.R. Crim. Pro.

The Trial Court decision is not supported by the evidence. The Newly Discovered Evidence clearly satisfies the five prong criteria of the Spann Test...

1) The Newly Discovered Evidence not only warrants a new trial, it would change the result when a new trial is granted because it implicates the fact that while Appellant was standing on the outside of exit door in the front of the nightclub, witnesses on the scene of the incident hearing someone plotting to do harm, and then hearing shots fired from totally different directions, establishes that someone, (who is not Appellant), was on the inside of the club shooting and inflicting harm on the victims with a deadly weapon. (R. pg 24-26), (R. pg. 33-39), (R. pg. 83, 84).

The Newly Discovered Evidence of hearing someone, (who is not Appellant), plotting to do harm,

and then hearing shots fired from totally different directions brings clarity to why the victims were shot in different body parts while being situated in different areas of the nightclub (R. pg. 78-82)

This Newly Discovered Evidence answers the question, why are there two types of ammunition erroneously paired in the SLED Ballistics Report. (R. pg. 71-77).

Together for the foregoing reasons, the Newly Discovered Evidence of witnesses, who were on the scene of incident having heard someone, (who is not Appellant), on the inside of the nightclub plot to do harm, and then heard shots fired from totally different directions, would change the result when a new trial is granted, because now there is more than a reasonable doubt, which can lead to Appellant being not guilty of the convictions.

2) This Newly Discovered Evidence have been discovered since Appellants trial. Appellant was convicted on July 17, 2006. The evidence of Ms. Twila Beckman was discovered on June 22, 2015. The evidence of Mr. Willie Edwards was discovered on August 19, 2015. This evidence has been discovered approximately 9yrs after Appellants trial and was presented to the

Lower Court within the one year time limit pursuant to Rule 29(6) S. C. R. Crim. Pro. (R pg 33-39).

Truthfully, Newly Discovered Evidence does not discriminate in how it presents itself. In this case, due to Appellant Cato's incarceration and not having legal representation, the Newly Discovered Evidence can only come forth by way of being connected to, or in the vicinity of Appellant Cato, by one form or another. In our society and institutions people tend to meet, interact, and relate to one another. This is very common and it is not at all far fetched, even in this present case.

The fact of the matter is that this Newly Discovered Evidence is truthful, factual, and it exposes the obvious discrepancies and errors in this case, which makes Appellant Cato's convictions null and void at best, or decided for examination by a new trial at the very least.

3) This Newly Discovered Evidence could not in the exercise of due diligence have been discovered prior to trial. It was a chaotic environment, and credible witnesses such as Ms. Beckman and Mr. Edwards were able to leave the scene of incident without being interviewed. The witnesses who were interviewed

where unable to identify others who were there. There is no amount of due diligence that this evidence could have been discovered prior to trial. This can only come by way of Newly Discovered Evidence.

4.) This Newly Discovered Evidence is evidence of material facts with witnesses on the scene of incident hearing someone plotting to do harm, and then hearing no less than 6-8 shots fired from totally different directions, which establishes that someone, (R. pg. 83, 84), who is not the Appellant, was on the inside of the nightclub shooting and inflicting harm on the victims. (R. pg. 24-26) (R. pg. 33-39).

The Newly Discovered Evidence is evidence of material facts because it raises critical questions that can't be answered in speculations, but to be answered in a new trial... Who was it on the inside of the nightclub shooting and inflicting harm on the victims with a deadly weapon? ... Where did that person go? ... Why were there originally four victims with a total of 7 gunshot wounds? (R. pg. 78-82) ... also another fired bullet that (only) hit an upper wall with no blood or body tissue. (Respondents Record, Appendix pg. 68, line 10-17). .. Why was each victim shot in different body parts while being situated in different

areas of the nightclub? (R. pg. 78-82) ... Why were there two [redacted] different types of ammunition erroneously paired in the SLED Ballistics Report?

The Newly Discovered Evidence is evidence of material facts that pertains to the two Shooter defense J. M. Long, III, mentioned at Appellants PCR Hearing. (R. pg. 63-67). Appellants Attorney testified to not moving forward with, nor making Appellant aware of the two Shooter defense based solely on the SLED Ballistics Report being valid and correct. As we can see (R. pg. 71-77), the SLED Ballistics Report that erroneously pairs Item 5, a .380 shell casing to Item 9, a .9mm bullet, is not valid and correct. Due to Appellants Attorney, J. M. Long, III, 's inappropriate criminal acts, (R. pg. 68, 69), during the time SLED's Ballistics Report was being prepared in February 2006, he was ineffective for failing to properly investigate SLED's Ballistics Report by doing more than just merely talking to a gun manufacturer. J. M. Long, III, failed to actually interview the SLED Examiner Dan Defreese, to see the errors in the SLED Report, [redacted] failed to make his client aware of the discrepancies in the SLED Ballistics Report, and advise his client of a constructed defense in the event of trial, by using the invalid SLED Ballistics

Report to corroborate the two Shooter defense.

This present case is a clear contrast from Jamison where Appellant Coto clearly overcomes the burden Jamison could not. Appellant Coto's case seperates from Jamison wherein the Newly Discovered Evidence constitutes evidence of material facts not previously presented and heard, that in the interest of justice does require Appellant Coto's conviction and sentence to be vacated. Appellant is entitled to relief.

5.) This Newly Discovered Evidence is not cumulative because no one has ever said, stated, nor testified under oath that they heard shots fired from totally different directions. This Newly Discovered Evidence is not cumulative because no one has ever said, stated, nor testified under oath that they heard people plotting to do harm before shots were fired. This Newly Discovered Evidence is not cumulative, but is an affirmation of the fact that someone other than Appellant Coto was on the inside of the nightclub shooting and harming the victims. There were no sworn statements of such given under oath to accumulate or impeach. This

Newly Discovered Evidence does not impeach any evidence by attacking the character, motives, integrity, or veracity of any testimony.

It will please this Honorable Court that there is an error of law regarding the five prong criteria of the Spann test. Trial Courts decision is not supported by the evidence in this case, as the Newly Discovered Evidence Appellant has presented clearly satisfies the five prong criteria of the Spann Test.

CONCLUSION

After careful review of this Final Brief, Argument I.) and Argument II.), this Honorable Court will find that the Trial Judge did err in Disposing of Oral Arguments and Denying Appellant's Motion New Trial Based on After Discovered Evidence. Appellant prayerfully, and respectfully request that this Honorable Court reverse the Lower Court decision, with a ruling granting an Order for New Trial.

May 15, 2017

Ardon P. Cato, II

Ardon P. Cato, II, #316535
Evans C.I. F3A-193
610 Highway 9. West
Bennettsville, S.C. 29512

Pro Se Appellant