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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
- Steven H. John, Circuit Court Judge

Appellate Case No. 2016-002081

THE STATE,

Respondent,

v.

ARDON P. CATO, II,

Appellant

SUPPLEMENTAL RECORD ON APPEAL

ARDON P. CATO, II, #316535
Evans Correctional Institution
610 Highway 9 West
Bennettsville, S.C. 29512

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Paula H. Thomas, Circuit Court Judge

ARDON P. CATO, II,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
COUNTY OF HORRY) (05-GS-26-3409), (3410)
) (05-GS-26-3412)
STATE)
VERSUS) TRANSCRIPT OF RECORD
ARDON PERCIVAL CATO, II)
) JULY 17, 2006
) Conway, South Carolina

B E F O R E:
HONORABLE STEVEN H. JOHN, Judge.

A P P E A R A N C E S:
BERT VON HERRMANN, ESQ.
ASSISTANT SOLICITOR FOR HORRY COUNTY
ATTORNEY FOR STATE
J. M. LONG, III, ESQ.
ATTORNEY FOR DEFENDANT

DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT

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1 (THE FOLLOWING TAKES PLACE ON JULY 17, 2006.)

2 THE COURT: All right, sol.

3 MR. von HERRMANN: Thank you, Your Honor. May it
4 please the Court, we are here on docket number (05-GS-26-
5 3409), State versus Ardon Percival Cato, an indictment for
6 assault and battery with intent to kill. Your Honor that
7 indictment reads that Ardon Percival Cato, II, did, in Horry
8 County, on or about the 9th day of April, 2005, commit an
9 unlawful act of violent injury to the victim, Elisa Narruhn,
10 with malice, by shooting her with a gun, thus committed the
11 crime of assault and battery with intent to kill.

12 Also, Your Honor, (05-GS-26-3410), State versus Ardon
13 Percival Cato, an indictment for assault and battery with
14 intent to kill. Your Honor, that indictment reads that Ardon
15 Percival Cato, II, did, in Horry County, on or about the 9th
16 day of April, 2005, commit an unlawful act of violent injury
17 to the victim, Ronald Lamey, with malice, by shooting him with
18 a gun, thus committing the crime of assault and battery with
19 intent to kill.

20 Your Honor, also (05-GS-26-3412), the State versus Ardon
21 Percival Cato, II, an indictment for murder. That indictment,
22 Your Honor, reads that Ardon Percival Cato, II did, in Horry
23 County, on or about April 9, 2005, unlawfully kill the victim,
24 Anthony Hemingway, with malice aforethought, either express or
25 implied, by means of shooting the victim with a gun, and that

1 the victim did die as a proximate result thereof, in violation
2 of 16-3-10, South Carolina Code of Laws, 1977, as amended.

3 Your Honor, it's my understanding that he wishes to
4 tender a plea of guilty to all three of these counts, with no
5 recommendation from the State, Your Honor.

6 THE COURT: All right.

7 All right, Madame Clerk, if you would place Mr. Cato
8 under oath, please.

9 ARDON PERCIVAL CATO, II, first duly
10 sworn, testified as follows:

11 THE COURT: All right. Mr. Cato, give me your
12 attention, sir. You come before the Court pleading guilty to
13 three offenses, those being murder, assault and battery with
14 intent to kill, and another charge of assault and battery with
15 intent to kill; is that correct?

16 A. Yes sir.

17 THE COURT: All right, sir. If you can -- Mr. Long,
18 yes, slide that microphone over there a little bit closer, if
19 it's possible.

20 All right. Thank you.

21 THE COURT: All right, now, regarding these offenses,
22 you understand that the potential sentence regarding murder
23 could be anywhere from a minimum of thirty years up to life in
24 prison; you understand that?

25 A. Yes sir.

1 THE COURT: You understand assault and battery with
2 intent to kill is zero to twenty years; you understand that?

3 A. Yes sir.

4 THE COURT: You understand that all three of those
5 offenses, the two counts of assault and battery with intent to
6 kill, and the murder charge, are all classified as violent and
7 most serious by the State of South Carolina; you understand
8 that?

9 A. Yes, Your Honor.

10 THE COURT: You understand that they qualify then under
11 the State's two-strike law, that should you -- two-strike and
12 three-strike law -- that should you be convicted of any
13 further serious, or most serious offense in the State of South
14 Carolina that you would be subject to being sentenced to life
15 in prison without the possibility of parole. You understand
16 that?

17 A. I understand, Your Honor.

18 THE COURT: All right, sir. You understand that these
19 three offenses are the offenses for which you were indicted by
20 the Horry County Grand Jury; true bills were rendered on these
21 matters on September 29, 2005; you understand that?

22 A. Yes sir.

23 THE COURT: You also understand the matters come before
24 the Court without negotiations or recommendations as to the
25 sentence by the State of South Carolina; you understand that?

1 A. Yes sir.

2 THE COURT: All right, sir. Knowing all of these
3 matters, do you want to go forward with your three guilty
4 pleas?

5 A. Yes, I do, Your Honor.

6 THE COURT: Are you currently under the influence of
7 any drugs or intoxicants of any kind, or have them in your
8 system?

9 A. No sir.

10 THE COURT: Are you suffering from any kind of
11 physical, mental or emotional problem that would keep you from
12 understanding what we are doing here today?

13 A. No sir.

14 THE COURT: Now, when you plead guilty you give up
15 certain Constitutional Rights. Among those are the right to
16 remain silent. When you speak to me you give that right up;
17 you understand that?

18 A. Yes sir.

19 THE COURT: Other rights are the presumption of
20 innocence, the right against self-incrimination at a trial.
21 The State has to prove your guilt beyond a reasonable doubt.
22 When you plead guilty you give up all those rights; you
23 understand that?

24 A. Yes sir.

25 THE COURT: You are entitled to a jury trial. Twelve

1 men and women would look at the facts presented by the State
2 to see if there are, indeed, sufficient facts to prove you
3 guilty beyond a reasonable doubt, so when you plead guilty you
4 give up that right; you understand that?

5 A. Yes, Your Honor.

6 THE COURT: In that jury trial you have the right to
7 confront your accusers. With your attorney you could question
8 the witnesses, the evidence presented by the State. If you
9 wanted to you could present a defense. When you plead guilty
10 you give up all those rights; you understand that?

11 A. Yes, Your Honor.

12 THE COURT: You come before the Court and you are
13 pleading guilty to one count of murder, and two counts of
14 assault and battery with intent to kill. Are you doing so
15 freely and voluntarily?

16 A. Yes, Your Honor.

17 THE COURT: Of your own freewill and accord?

18 A. Yes sir.

19 THE COURT: Are you pleading guilty because you are
20 guilty?

21 A. Yes sir.

22 THE COURT: Anybody promise you anything, threaten you,
23 force you in any way to get you to plead guilty?

24 A. No sir.

25 THE COURT: Now, you are here with your attorney, Mr.

1 Long; is that correct?

2 A. Yes sir.

3 THE COURT: Did you tell him everything you needed to
4 tell him about this case, or these cases?

5 A. Yes, Your Honor.

6 THE COURT: Have you had enough time to talk to him?

7 A. Yes, Your Honor.

8 THE COURT: Do you need any more time to talk to him?

9 A. No, Your Honor.

10 THE COURT: Has he done everything that you expected of
11 him, that you wanted him to do to try to help you in all of
12 these cases?

13 A. Yes, he has, Your Honor.

14 THE COURT: And you are satisfied then with his help
15 and representation?

16 A. Yes, I am, Your Honor.

17 THE COURT: Any complaints about his help or
18 representation?

19 A. No sir.

20 THE COURT: Mr. Long, you represent the interests of
21 Mr. Cato in these matters?

22 MR. LONG: Yes sir, Your Honor.

23 THE COURT: He comes before the Court tendering his
24 pleas of guilty to the three offenses named. Do you concur?

25 MR. LONG: I do, Your Honor.

1 THE COURT: And do you believe he's coming before the
2 Court of his own freewill and accord?

3 MR. LONG: He has.

4 THE COURT: And have you explained to him his
5 Constitutional Rights, any defenses that he might have, as
6 well as the information, the evidence in the possession of the
7 State?

8 MR. LONG: I have, sir.

9 THE COURT: Thank you very much, sir.
10 Solicitor.

11 MR. von HERRMANN: Thank you, Your Honor.

12 May it please the Court, on April 9th, 2005, this
13 offense occurred at the Red Room. It was a bar down in Myrtle
14 Beach, Your Honor, right there at the corner of 17 and 501.

15 Your Honor, this happened about 4:30 in the morning.
16 The dance club was full. It's actually a three-partitioned
17 section club, where there's actually three different type
18 clubs going on, dancing. There's a V.I.P. room and some other
19 things.

20 Your Honor, this Defendant got into an altercation, a
21 struggle, or a brief fight with two individuals that were --
22 are not victims in this case, Your Honor. He and the other
23 individuals which he was struggling or fighting with were all
24 thrown out of the bar. It was, again, about 4:30 in the
25 morning.

1 This Defendant, Your Honor, apparently went to a car
2 owned by his girlfriend, retrieved a pistol out of the
3 vehicle, came back in and actually went -- entered the club
4 through the exit door, by one of the bouncers, and began
5 opening fire into the crowd in the -- into the club, Your
6 Honor.

7 He ended up striking one individual by the name of
8 Ronald Lamey, in the stomach. He shot an individual by the
9 name of Jamila Hytower, in the buttocks. He ended up shooting
10 Anthony Hemingway, which is the individual that has died in
11 this particular case, in the shoulder, or excuse me, the chest
12 area. It went through and struck the carotid artery, causing
13 Mr. Hemingway to ultimately bleed to death.

14 Your Honor, all of that being tragic, there is the
15 fourth victim, Elisa Narruhn, who is here today, Your Honor,
16 and she was also in the club that night, dancing, and when I
17 talked to her -- she was actually shot, Your Honor, and has
18 never felt anything. She never felt any pain from the shot,
19 and will most likely, according to medical doctors, never feel
20 anything again from the waist down. She is now currently,
21 Your Honor, and most always will be, a paraplegic. She is
22 here in the courtroom today.

23 Your Honor, at that point, once the -- we believe the
24 gun jammed. Apparently the gun was loaded with three-eighty
25 automatic rounds, as well as nine millimeter, which this gun

1 will fire, but does not fire appropriately, and will cause to
2 jam.

3 Also, Your Honor, the witnesses would -- would have
4 indicated that he was shooting what's known in law enforcement
5 terms as limp-wrist, which is something you see a lot on T.V.,
6 which is actually the gun cocked sideways instead of straight
7 up, which would have also caused the gun to jam.

8 I tell the Court that because it's our contention that
9 he was going to shoot until that gun went dry or quit
10 shooting, but for the grace of God, or some of those people
11 that attended, or were in the club -- and there were quite a
12 few people -- he would have continued shooting. The gun ended
13 up jamming, and he exited the establishment of the Red Room
14 and headed north on 17, along the walkway to where his car was
15 parked, along with another individual.

16 When he got in front of the Chinese restaurant located
17 right up north about a -- about a half block from the Red Room
18 he turned around, and a man by the name of Joseph Morison, who
19 was one of the bouncers, was courageous enough to attempt to -
20 - obviously he was attempting to stop him, but as much as
21 trying to get descriptions and vehicles, and mode of travel,
22 and things of that nature, he pursued this Defendant. This
23 Defendant turned around, and did shoot at that individual. We
24 have an allegation, or a charge of that. We have dismissed
25 that charge, as well as we have dismissed the assault and

1 battery with intent to kill against Ms. Hytower. Ms. Hytower
2 was the victim of an unfortunate incident here in Horry County
3 where she recently passed away.

4 Your Honor, there was a good description gotten of the
5 car, of the gun, and as well as the direction of travel. The
6 Red Room is about two blocks from the Myrtle Beach Police
7 Department, and Patrolman Sisk had been checking a call at the
8 California Pizza, an alarm call, and heard the radio traffic
9 between the individuals, Officer Boley and Officer Gaither,
10 Your Honor, and they had actually been riding their bikes ride
11 beside -- or right up to the Red Room, and saw the two
12 Defendants run from the club. They were able to give a
13 description out almost immediately. Officer Sisk was in
14 behind the vehicle that this individual was driving. He was
15 pulled over about -- less than a mile away from the Red Room.
16 Literally, if you would listen to -- and we would have played
17 for the jury, a copy of the radio traffic from that night,
18 literally Officer Sisk had to wait for the other two officers
19 to give out the description of these individuals before she
20 could say, I'm pulling them over right now. That's how
21 rapidly the Myrtle Beach Police Officers responded to this
22 scene.

23 They were ultimately able to do a felony car stop,
24 remove this individual, as well as a co-defendant who has got
25 current charges pending on accessory after the fact of murder,

1 Your Honor -- on a felony stop, and ultimately they found and
2 located the gun, the murder weapon, in the vehicle, and
3 ballistics tested to come back to all of the rounds shot were,
4 in fact -- came from that particular gun.

5 Your Honor, I tell the Court -- or I would like to tell
6 the Court that, first of all, obviously this is a senseless
7 tragedy. I mean, there is absolutely no sense. The
8 individuals that were fighting with this Defendant weren't
9 even present when he came back in and started shooting.
10 That's how senseless and how tragic this situation really is.

11 I also tell you, Your Honor -- and I think there are at
12 least four of the victims that want to talk to the Court, and
13 make a presentation, that this is an emotionally charged -- as
14 the Court might understand and might imagine -- it is an
15 emotionally charged -- we have the mother of Anthony
16 Hemingway, Tony Hemingway, who was deceased -- I mean, of
17 course, we have Elisa here -- who obviously want to talk to
18 the Court and explain kind of how it's affected their life.

19 But I want the Court to be aware, this is a true tragic
20 situation created by this Defendant, by every sense of the
21 word, and it was the State's intention then, when we prepared
22 this case for trial -- which we were suppose to draw a jury
23 today -- and it is the State's intention as of right now, that
24 life in prison is an appropriate sentence. And I tell the
25 Court that, not in any way to invade the Court's province, as

1 you are the sole determiner of the sentence, and the
2 appropriate sentence of this Defendant, but the -- kind of the
3 angle the State has taken about this, in particular with
4 regards to the victims in this case, and the fact that there
5 are no recommendations in this case, and the fact that I want
6 to make sure that they understand that our position has not
7 changed one little bit, understanding, Your Honor, that I have
8 explained to them that there are typically -- and most Court,
9 in my experience, and having done this, and appeared before
10 this Court for a number of years -- does give some
11 credibility, or some allowance for an individual that is
12 willing to come before the Court and tender a plea of guilty
13 in accepting the responsibility for them, and I completely
14 understand that, and to the extent that it really matters, I
15 completely concur with the Court. So I have indicated to my
16 victims that the potential sentence range is thirty to life,
17 with twenty years for each of the assault and battery with
18 intent to kill, but I want the Court to understand just how
19 emotionally charged this is.

20 I have met with the individuals for probably about the
21 last twenty minutes to a half hour to discuss this with them,
22 and let them know, and I understand that there are four, at
23 the appropriate time, that would like to address the Court.

24 THE COURT: All right, sir. Thank you.

25 All right, Mr. Cato, you heard those facts regarding the

1 particular matters before the Court, the murder and the
2 assault and battery with intent to kill, the facts that the
3 Solicitor stated regarding those cases. Further, those are
4 the facts that are set forth in the three indictments. My
5 question to you is, are those facts true and correct?

6 A. No sir, Your Honor, with two exceptions.

7 THE COURT: All right, sir, and those would be?

8 MR. LONG: If I could, Your Honor.

9 THE COURT: Yes sir.

10 MR. LONG: The two individuals, and Mr. Cato, that were
11 involved in the altercation, they were not ejected from the
12 club. They were all still in the club when Mr. Cato left the
13 club.

14 The other being, Your Honor, the statement concerning
15 the person outside who tried to come after him. Law
16 enforcement found the weapon with a cartridge jammed in the
17 weapon, and I believe that occurred during the shooting inside
18 the club. He says he did not fire at any other persons when
19 he was going to the car.

20 So those were the only two exceptions, not as relates to
21 the actual pleas -- the offenses he's pleading to here today.

22 THE COURT: All right, sir. With that, Mr. Cato, as to
23 the charges of murder, and assault and battery with intent to
24 kill, there is no question or doubt in your mind that you
25 committed those offenses; is that correct?

1 A. Yes sir.

2 THE COURT: All right, sir. So you are before the
3 Court tendering your pleas of guilty to the offense of murder,
4 and the two counts of assault and battery with intent to kill;
5 is that correct?

6 A. Yes, I am, Your Honor.

7 THE COURT: All right. Have you understood my
8 questions here today?

9 A. Yes sir.

10 THE COURT: Have all your answers been the truth?

11 A. Yes sir.

12 THE COURT: Anybody tell you how to answer my
13 questions?

14 A. No sir.

15 THE COURT: And you understand you have the right to
16 appeal your guilty pleas within ten days?

17 A. Yes sir.

18 THE COURT: I find there has been a substantial factual
19 basis for the pleas, find the Defendant's decision to plead
20 guilty has been done freely, voluntarily, knowingly and
21 intelligently made; he's had the advice of competent counsel
22 with whom he's satisfied, therefore Mr. Cato's decision to
23 plead guilty to murder, and two counts of assault and battery
24 with intent to kill, is accepted.

25 All right, Solicitor, you indicated that the

1 representatives of the victims, or other individuals wish to
2 address the Court, and I'll be glad to hear from them at this
3 point in time.

4 MR. LONG: Your Honor, may we have permission to be
5 seated?

6 THE COURT: Yes sir. While that's going on, yes sir,
7 you may do so.

8 MR. von HERRMANN: Thank you, Your Honor. First I
9 would like to introduce to the Court Elizabeth Bowens. That
10 is, Your Honor, Tony Hemingway's mother. Mr. Hemingway is the
11 one that passed away, Your Honor.

12 THE COURT: All right, sir.

13 All right, Ma'am, if you would state your name, and then
14 I'll be glad to hear from you, Ma'am.

15 MR. von HERRMANN: Your Honor, if we could we would
16 like to pass up -- the victim's mother has provided a copy of
17 two photographs.

18 THE COURT: Yes sir, certainly.

19 All right, sir. Yes Ma'am. Once again, if you would
20 just state your name, and I'll be glad to hear from you,
21 Ma'am.

22 MS. BOWENS: My name is Elizabeth H. Bowens.

23 Tony became my caretaker after I suffered a stroke.
24 After my divorce Tony was my caretaker. He would always call
25 me and ask me did I needed anything. He was always there for

1 me.

2 But the night of the shooting Tony came to the church
3 because we had choir rehearsal, and he came and told me, said,
4 Mama, I took care of that bill for you. He said, I told you
5 to stop worrying, cause you worry too much. He said, I told
6 you I'm going to take care of you.

7 It was a call that no parent want to receive about their
8 child. Tony was my oldest child, and it was six years before
9 I had my daughter. Tony was always my pride and joy. When
10 they called me that morning and told me that Tony had gotten
11 shot I immediately went to the hospital, and I wanted out
12 there and the doctor called, got me, and they called me back
13 there, and I had to identify my son.

14 It was a senseless shooting, and Cato carried out his
15 plans, because any time you take a gun with you when you leave
16 your home, and you say you are going out to have a good time,
17 and you take a gun with you, your intention is the break the -
18 - break the law, cause harm to someone. He carried out his
19 plans because he, not only killed my son, but he harmed many
20 other lives. If the gun hadn't jammed it would have killed
21 someone else, or injured them. And the gun that I was told
22 that he had, it carried a round of nine to twelve bullets, so
23 when he sprayed that club that night he carried out his
24 intentions. His intention was to kill, because if you want to
25 hurt someone you will aim to the lower part of their body, and

1 not up. As you would notice from my son, he was a tall guy.
2 Cato, he's tall. So he did carried out his mission by killing
3 my son. And it's very emotional to me, because Tony is not
4 there now.

5 He would always call me and say, Ma'am, I just called to
6 hear your voice. I cannot hear Tony's voice anymore. I don't
7 hear the phone calls calling me and saying, Ma'am, do you need
8 anything. I'm left on my own now. I'm on disability because
9 of my stroke. Tony's life was cut off short. He was thirty-
10 two years old. He had full intention, and he talked to his
11 friends and everyone that he was going to start back to
12 college in May. He was accepted into mortician school in
13 Atlanta. Tony's life got cut off in April. He wasn't able to
14 go back to college -- go to college. The plans that he had
15 intention to do, he wasn't able to fulfil his plans.

16 Every day it's hard for me. It's very hard. I want the
17 Court and the Judge to know that Tony was my friend. When I
18 would leave church, and he used to live across 501, on Sunday
19 he would always buy my dinner. I would go by there and he
20 would always buy my dinner for me. On yesterday when I left
21 church I looked across the street, across 501, and he wasn't
22 there for me. It's very hard, and there is not a day, or a
23 night that I just -- the tears are still there, and it feels
24 like there is a hole in my heart, and my heart valves are
25 leaking from the pain and hurt of missing my son. It's very

1 hard, and I would like to petition the Court to do what is
2 right, Judge, because Tony was my close friend.

3 As you notice by the picture he was a gentle giant. I
4 would always tell him he was my gentle giant. The night of
5 that night, Friday night, when he came to the church he came
6 in there laughing and smiling. Tony would always try to sit -
7 - well, he sits in my lap, and I told him, I said, Tony, you
8 already outgrow my lap. He laughed and said, Ma'am, I never
9 outgrow your lap. He was always embracing me, and hugging and
10 kissing me, and he would always say, that -- that's my Ma'am,
11 that's my mama. He was very proud of me, and I was proud of
12 him, because he accomplished a lot of things in his thirty-two
13 years of life, but Cato cut his life off, and it's painful.

14 Thank you for this time.

15 THE COURT: Thank you, Ma'am.

16 MR. von HERRMANN: Your Honor, if I could, I would like
17 to next recognize Elisa Narruhn. I have mispronounced that,
18 Your Honor. I think she will be able to pronounce it a lot
19 better than I can. I got it right the first time, but Your
20 Honor ---

21 THE COURT: Yes, Solicitor.

22 MR. von HERRMANN: Thank you.

23 THE COURT: Thank you, sir.

24 Yes Ma'am. Just state your name, and I will be glad to
25 hear from you, please.

1 A. My name is Elisa. I'm twenty-nine years old. I'm from
2 a small island called Micronesia. I left my home island to
3 come out here to make my own life, but now I'm living with my
4 brother, who is now taking care of me.

5 I did apply for Medicaid and disability. They denied
6 it, since I'm not a U.S. Citizen, so I'm not getting anything.
7 my family paid for my medical assistance, my bills, and
8 everything that I need.

9 I am paralyzed from my waist down. Doctors said that I
10 will never walk again, but I pray every day, and I do believe
11 that miracles do happen.

12 Coming out here I never knew that I would leave my home
13 island to come out here and mess up my life. Whatever
14 decisions you make, Your Honor, I would appreciate.

15 That's all I have to say. Thank you.

16 THE COURT: Thank you, Ma'am.

17 MR. von HERRMANN: Your Honor, the State would like to
18 introduce to the Court Rebecca Ramos. She was actually up
19 here visiting from Moncks Corner, South Carolina, a friend of
20 hers, and they decided they would go to the club, and I know
21 that she was in the club, and shot at as well, and attended to
22 some of the injured people, and she would like to address the
23 Court as well, Your Honor.

24 THE COURT: Yes Ma'am.

25 MS. RAMOS: Hi, Your Honor.

1 My name is Rebecca Ramos. As the Solicitor has stated,
2 I was up here on vac -- a short little mini-vacation, with my
3 best friend that lives here in Conway.

4 What was suppose to be a great night out with the
5 girlfriends that night turned into something really horrible,
6 that I have had to live with for more than -- almost a year
7 and a half. Mr. Cato committed such a heinous act that night
8 for -- and I do believe that he -- he knew what he was doing.
9 Even though he was angry and all he knew, because he did get
10 thrown out, because during the fight I got knocked down, and
11 they threw them out. They escorted separate ways. Some were
12 exited out the back door; some were exited out that front exit
13 door. Mr. Cato was out the front exit door.

14 But in his anger, that he could not let go he returned
15 to the club, came in through the exit door where they knew --
16 where he knew there was not a metal detector to detect the
17 gun, because the front entrances is where they have the
18 detector. But he entered that door and came in and started
19 shooting people.

20 I froze. I'm not used to this. I just stood there --
21 not that anybody is used to it. All I could think of was my
22 family, my children, my grandchild. And as people were
23 falling from getting shot, right in front of me, and then
24 right behind me, and then I questioned really quick, Lord, how
25 am I getting missed, but I did. Although I may not have

1 suffered a physical injury, I am not whole. I live with
2 nightmares every night. I have a fear of going places any
3 more, for fear of strangers just starting to shoot people.
4 It's not an easy thing to do, and Mr. Cato took that from me.
5 He took my security from me, as he has taken it from everybody
6 else that was there.

7 I feel that Mr. Cato, although pleading guilty -- I
8 praise him for stepping up and accepting responsibility, but
9 just by accepting responsibility does not mean that he's going
10 to change, and it is my desire, and my prayer, that he spends
11 as much time as the law will allow him to spend in jail, to
12 think about what he did, and how many lives he has affected.
13 Ms. Bowens losing her son, Elisa here being paralyzed from the
14 waist down, the other gentlemen that got shot in the abdomen,
15 the other lady who got shot in the rear, but who now is dead
16 from another incident, these are all violent things that can
17 be controlled if you just stop and think, and not take such
18 anger out, just calm down, take a moment to breathe and
19 (unintelligible whisper). Don't act it out in violence.

20 Thank you.

21 THE COURT: Thank you, Ma'am.

22 MR. von HERRMANN: Your Honor, that would conclude the
23 State's presentation of the facts, as well as the witnesses
24 and victims.

25 I would like to point out to the Court, Your Honor, that

1 Mr. Morison, the individual that was the bouncer at the club
2 that pursued him out of the door, is here, Your Honor. He has
3 indicated to me he doesn't want to address the Court.

4 Your Honor, we were prepared to go to trial. Obviously
5 the witnesses and the victims and everybody -- and their
6 families, are in the courtroom today, and have been very
7 supportive of the prosecution of this case, Your Honor, but
8 that would conclude the State's presentation.

9 THE COURT: Thank you.

10 All right, Mr. Long, be glad to hear from you, sir.

11 MR. LONG: Your Honor, the English language works
12 pretty well for people to communicate ideas and thoughts. It
13 doesn't work very well to communicate feelings, and there are
14 three words here today that are just totally inadequate to
15 even begin to explain what everyone has gone through.
16 Senseless, tragedy and sorrow. Certainly it's a senseless
17 tragedy. I can't possibly begin to explain to you what these
18 victims, and people, and witnesses went through in that club
19 that night, but I've been talking with Ardon for fifteen
20 months about this case, and I can't begin to tell you, or
21 explain to them his sorrow about it.

22 This is not a young man with a violent past. This is
23 not a young man with an extensive record. I believe he has
24 one possession with intent to distribute marijuana, that he
25 received probation for, and he went through probation with

1 clear marks, and was due to end in two months when this
2 happened.

3 He was born and raised in Conway and Georgetown, lived
4 here with family, completed his high school education, went
5 two semesters at technical college, joined the Navy, served
6 two years in the Navy, and was discharged -- received a
7 general discharge, honorable conditions. Has a girlfriend,
8 has a son, had a baby on the way, and life was simply being
9 good to him. He worked every day. He came home to his
10 family. He tried to do what was right so that he would end
11 his probation and show to society that he was an appropriate
12 candidate to be a citizen.

13 As can happen in the blink of an eye, senseless tragedy
14 can occur. He was overly concerned with me when we had our
15 discussion about the possibility of him having committed a
16 murder, when he says I never intentionally meant to harm
17 someone. And I explained to him by his actions, and what he
18 did, and what he didn't think, and how he acted rational --
19 rash, and how he was in a rage. The officers didn't interview
20 him until the next day because he was severely intoxicated
21 that night. He was out with a friend. Now he looks back at
22 that as being the turning moment of the rest of his life, that
23 he was intoxicated. He was out on the dance floor. He bumped
24 one of the other gentlemen's girl, or was dancing with one of
25 the other gentlemen's girl, and they jumped him, cold-cocked

1 him, and beat him, and at that point he says, literally, I saw
2 red.

3 The bouncers came -- the bouncers were -- to see if he
4 was okay, asked him if he needed any help. He didn't see that
5 the others were escorted out. He walked out under his own
6 power. He went straight to the glove box of his girlfriend's
7 car, where she kept the weapon, grabbed it and walked around
8 to the side, the back of the club, and he tells me -- and he
9 has been consistent in this -- that his intention was to scare
10 them badly for what he had to go through.

11 And Your Honor, there is no word in the English language
12 that can possibly say how senseless that was. I don't mean to
13 justify his actions in any way. He knows, there is no
14 justification for his actions.

15 We had discussed the possibility of there being other
16 shooters in the club, because it was not his weapon. He did
17 not know what it was loaded with, or how many rounds were in
18 it, but when he came back in the club he intended to shoot as
19 many rounds as the gun would shoot, in the ceiling, or
20 whatever the case may be, because he assumed those two
21 individuals were still there. He wanted to scare them. And
22 this tragedy ensued, and that's a word that cannot possibly
23 begin to describe what happened, for someone to die, for
24 someone to be here today in a wheelchair, paralyzed for the
25 rest of their life

1 Ardon and I have had discussions about these victims,
2 and he has told me, quite frankly, for whatever my life is
3 worth, whatever the rest of my life means, I would gladly give
4 it, if it were possible, to straighten her -- pick her up out
5 of a wheelchair and give her legs, or to take that man out of
6 the grave that he put there, to take the pain and hurt from
7 the other ones that were shot. He said he would gladly give
8 his life for any one of them. That doesn't begin to describe
9 what I'm telling you is his sorrow for what has happened.

10 Ardon is a soft-spoken man. He is a very polite young
11 man. I have never had a case that was so sad to both sides.
12 No question the victims, but him as well.

13 I have explained to him that his plea has the
14 possibility of putting him in prison for the rest of his
15 natural life, with one way of leaving prison, and that's in a
16 coffin, and he understands that that is a possibility, but he
17 wants Your Honor to understand he does not go a day without
18 thinking about what happened, and what he has done, and whose
19 lives he has affected.

20 He knows at some point in time -- and he hopes that Your
21 Honor will see that, but for the circumstances that happened
22 that night, and the sense violence, the senseless rage that
23 came over him that night, that is an aberration of Ardon Cato.
24 That is not the man who stands before you, soft-spoken,
25 polite, meek, full of sorrow.

1 Your Honor, there is some incentive to ask for mercy,
2 some things that I think actions speak louder than words. He
3 has been in jail fifteen months, since this incident occurred,
4 without bond, or with a bond so high that he could not
5 possibly post. He has had no write-ups, no reports, no
6 discipline problems. I don't think anybody in the jail would
7 say anything bad about Ardon Cato, and even under the dire
8 circumstances he faces, and the violent acts that he is
9 accused of having committed, and the knowledge that he could
10 very likely spend the rest of his life in prison -- I hate to
11 use the term model prisoner, but that is, in effect, what he
12 has been, and that goes to show his mild-manneredness, his
13 politeness, and his respect for others, and how in the world
14 an aberration to this extent can occur is beyond me, and it's
15 beyond him.

16 Your Honor, we ask you to consider something less than
17 life, something that -- he understands he will serve -- and
18 that's the difficult thing about this, about your job, and
19 that's why you are the Judge -- and I'm glad you are the Judge
20 and I don't have to make these decisions -- because what's
21 just and what's merciful, we feel, is a sentence fashioned by
22 you that will try to make the victims whole, will try to
23 punish Mr. Cato, and in effect, will have the most likelihood
24 of doing what is right. I feel putting him in jail for the
25 rest of his natural life does not help the victims. It does

1 not help him, not that he deserves help, but that justice
2 would require some help, to give him some kind of incentive,
3 that he can learn and do, work, teach, whatever is required of
4 him while he's in jail, that he can try to lead, by example,
5 whatever, that he has some date to look for when he can return
6 to society, and he can track down any family members he has
7 that are still alive, or his son, or his children, or his
8 grandchildren, that he has some hope, something to look
9 forward to. So I would ask Your Honor to consider something
10 less than a life sentence for him. I think his actions, in
11 spite of what has taken place, would justify him to have
12 something that gives him some hope, some -- some hope of being
13 able to try to return to society.

14 Thank you, Your Honor.

15 THE COURT: Thank you, sir.

16 MR. LONG: I think Mr. Cato would like to address the
17 Court as well.

18 THE COURT: Yes sir. Mr. Cato, I'll be glad to hear
19 from you, sir.

20 A. Your Honor, as I was driving away that night, when I
21 got on Highway 17, the first thought that came to my head was,
22 man, I hope nobody got hurt, because that was -- that was real
23 stupid; I hope nobody got hurt. That was before the blue
24 lights came.

25 And they didn't let me know what happened until the next

1 day. The detectives didn't tell me exactly what went on until
2 the next day, and when they told me I cried, and I cried, and
3 I cried, and I cried, like no, that that couldn't have
4 happened like that; it couldn't have happened like that.

5 When I was going through the door the bouncer stopped me
6 from going through the door, and I raised my hand up as high
7 as I could, over -- to shoot over everyone. My intentions
8 were to scare the guys, to kind of let them know, okay, you
9 hit the wrong person, you know. But I was intending to shoot
10 over everyone, maybe hitting a wall or the ceiling. I -- I
11 didn't believe -- I thought -- when I got arrested I thought
12 it would be just a shooting in public charge. I didn't think
13 anyone got hurt.

14 I know how it feels to lose a loved one. I watched my
15 child go through a miscarriage, and my mother -- I lost her
16 when I was seventeen, so I know exactly how it feels to lose
17 someone you love.

18 I pray -- I pray every day -- I pray every day for the
19 victims. I pray, Lord, please help them, bless them, Lord,
20 please help and bless them. I think about them all the time.
21 I think about Mr. Hemingway's family, his children. I think
22 about -- I still pray to them -- even up to now I still pray,
23 and wish the best for all of them.

24 I've got a son, he's six years old. He's not my
25 biological son. I raised him from about -- when he was about

1 ten months old up to now, and I'm the only father he knows.
2 He said -- last time he came to visit me he said, daddy, you
3 coming home soon; you coming home soon. I said, yeah,
4 Demonte, okay, all right, I hope so.

5 That's -- I heard in prison that you can't bring
6 children there unless you have a birth certificate for, you
7 know, they really being your children, so that means I won't
8 be able to see him till he gets old enough to come see me,
9 probably.

10 I'm not a bad person, Your Honor, and the Lord knows my
11 heart, the Lord knows my heart. I -- when I first got to jail
12 I beat myself up, every day. Ever since the detectives told
13 me what happened I was real heavy, and real down on myself all
14 the time. Since then, when I first got to jail, I gave my
15 life over to Jesus, and I'm living for the Lord, and I am a
16 God-fearing man, and I do believe in justice and judgment.
17 That's one of the reasons for me taking a guilty plea.

18 I wish I had a machine that would turn back time, you
19 know, that could just take all of this away, you know, wipe
20 all of this out, like it never happened. It was very stupid
21 to shoot in a club full of people. I thought for sure no one
22 got hit, because I raised my hand up as high as I could, and I
23 only shot four times. I shot four shots. I wasn't intending
24 to shoot the whole round. I shot four shots, and I turned
25 around and I walked away. I didn't run. And no one didn't

1 chase me, and I didn't fire back. There would have been a
2 shell there.

3 The reason the gun was jammed because, when I told the
4 person to put it up in the glove compartment they pulled it
5 back again. That's why it was something in there, because a
6 automatic -- it au -- it automatically -- you know, the shell
7 automatically comes up. So I wasn't intending to empty the
8 whole clip. I was just -- it was just scare shots, you know,
9 four scare shots. That's all it was.

10 Like I said, God knows my heart, and I look at Mr.
11 Hemingway like he is my brother, you know. I look at him like
12 I lost a brother, like I lost a friend, you know.

13 I want to be -- I want to be there for my son. If I can
14 just -- I probably can help him, you know, through writing
15 letters and stuff like that, but maybe if I could, you know,
16 just be there with them again to, you know, help him so he
17 don't make the mistakes I made, you know. I'm not a bad
18 person, Your Honor, I'm really not. That was just stupid. It
19 was just stupid. I should have just fought the guy.

20 Well, I wish the best for everybody. I wish the best
21 for all the victims. I'm going to continue praying for them
22 daily.

23 Thank you for the chance to explain myself, Your Honor.
24 Thank you.

25 THE COURT: Yes sir. Thank you.

1 All right. (05-GS-26-3412), State of South Carolina,
2 County of Horry, versus Ardon P. Cato, regarding the offense
3 of murder -- no sentence that this Court can impose can make
4 any sense out of this horrendous tragedy that has affected so
5 many people. The best that this Court can do is fashion a
6 sentence that does what -- as best we can, set forth justice
7 in this matter -- therefore, the Defendant is committed to the
8 State Department of Corrections for a determinat term, forty-
9 two years.

10 (05-GS-26-3409), assault and battery with intent to
11 kill, Defendant is committed to the State Department of
12 Corrections for a determinat term, twenty years, concurrent
13 with (05-3412), the murder charge.

14 (05-GS-26-3410), assault and battery with intent to
15 kill, Defendant is committed to the State Department of
16 Corrections for a determinat term, twenty years, concurrent
17 with the murder charge.

18 Thank you very much.

19 MR. von HERRMANN: Thank you, Your Honor.

20 MR. LONG: Thank you, Your Honor.

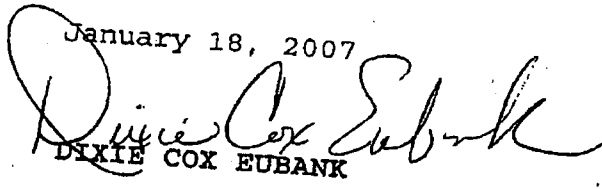
21 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
22
23
24
25

C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the GUILTY PLEA of the captioned case, relative to appeal, in the COURT OF GENERAL SESSIONS for HORRY COUNTY, SOUTH CAROLINA, on the 17th day of July, 2006.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

January 18, 2007


DIXIE COX EUBANK

CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

County of Horry

IN THE COURT OF COMMON PLEAS

Arden P. Catlett ^{SCDC#} 316535
 Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR
 POST-CONVICTION RELIEF

MELANIE HUGGINS
 CLERK OF COURT

06 SEP - 7 AM 10:28

HORRY COUNTY

2006 CP 26 4399

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institute
2. Name and location of Court which imposed sentence Horry County Court, Conway, S.C. 29526
3. Name(s) of co-defendant(s) (if any) Altona Wright
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a)

CERTIFIED A TRUE
 AND CORRECT COPY

Melanie Huggins
 HORRY COUNTY CLERK OF COURT

BY J. H. Huggins

- (c) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 7-17-06
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
no
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) Judge John stated no appeal on Guilty plea

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) N/A
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof: _____

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition: _____

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition: _____

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NA

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (b) your trial, if any? NO TRIAL
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Buddy Long - 319 Berry St.
Conway, S.C. 29526
 ii. _____
 iii. _____

(b) the proceedings at which each such attorney represented you:

i. Bond hearing
Guilty plea sentencing
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

TO BE RELEASED ON PAROLE AND/OR
MONITORING RESTRICTIONS, SO I CAN WORK AND
PROVIDE FOR FAMILY, AND TO LIVE A PRODUCTIVE LIFE

20. Are you now under sentence from any other court that you have not challenged? *(cont. other side)*

N/A

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

I, Arnon P. Catbitt *SCDC# 316535*, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Arnon P. Catbitt *SCDC# 316535*

SWORN to and subscribed before me this 1
 day of Sept, 2010.

[Signature]
 Notary Public

(L.S.)

My Commission Expires: 11-4-2015

HORRY COUNTY
 06 SEP - 7 AM 10:28
 MELANIE HUGGINS
 CLERK OF COURT

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Arden P. Cobb II ^{S.D.C.#} 316538, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Arden P. Cobb II ^{S.D.C.#} 316538
Applicant

SWORN or affirmed to and subscribed before me this
1 day of Sept, 2004.

Debra Sosa
Notary Public

My Commission Expires: 11-4-2015

HORRY COUNTY
06 SEP -7 AM 10:28
MELANIE HUGGINS
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS

2006-CP-26-4399

Ardon P. Cato II, # 316535,)
Applicant,)
v.) RETURN
State of South Carolina,)
Respondent.)

Respondent, making its Return to the application for post conviction relief (PCR) filed September 7, 2006, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the term of the September 2005 County Grand Jury for two counts of assault and battery with intent to kill (05-GS-26-3410, 05-GS-26-3409) and murder (05-GS-26-3412). J.M. Long, III, Esquire, represented him. On July 17, 2006, Applicant pled guilty as indicted. He was sentenced by the Honorable Steven H. John to confinement for forty-two (42) years for murder and twenty (20) years for each ABWIK charge, to run concurrently. Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any of the above not so attached will be forwarded upon receipt.

II.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Judge John stated no appeal on guilty plea".

III.

Respondent interprets each of Applicant's allegations to be claims that he received ineffective assistance of counsel. In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Second,

counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

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November 15, 2006.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) 06-CP-26-4339

Ardon P. Cato, II,)
))
Plaintiff,) Transcript of Record
))
versus) PCR Hearing
))
The State of South Carolina,) April 3, 2007
))
Defendant.)
_____)

B E F O R E :

Honorable Paula H. Thomas
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Paul Archer, Esquire
Attorney for Plaintiff

Sabrina C. Todd, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1	I N D E X	
2		
3	April 3, 2007	
4	Ardon Cato, III	
5	Exam by Mr. Archer.	10
6	Exam by Ms. Todd.	22
7	J.M. Long, III	
8	Exam by Ms. Todd.	29
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1 THE COURT: All right, let me just note that what I'm
2 seeing here is that the relief being sought on this
3 application is, "To be released on parole and/or monitoring
4 restrictions so I can work and provide for family." That is
5 not something that I can do. Have you explained to him that
6 that is not something that this Court can do as relief for a
7 post conviction?

8 MR. ARCHER: Yes, ma'am, I explained to him the only
9 thing you could do is vacate the sentence and he's still
10 charged with murder.

11 THE COURT: All right, okay, I just wanted to make
12 sure because as I saw your request for relief that relief is
13 not possible. This Court cannot grant that relief. You
14 understand that?

15 MR. CATO: Yes, but I sent in my amended application
16 for seeking relief to have my sentence vacated and the case
17 remanded for a new trial.

18 THE COURT: Okay, let me see if I see an amended
19 application. I don't think I've got the amended application
20 in my stack. All right, I will note for the record and I will
21 see if I can get my hands on that, this is Ardon P. Cato.
22 This is case number 2006-CP-26-4399. Mr. Cato is present here
23 represented by Mr. Archer. The State of South Carolina is
24 also present and represented by Ms. Todd. Mr. Archer, I'll
25 be glad to hear from you and I also am hoping that one of you

1 can hand me the amended.

2 MS. TODD: Your Honor, I don't have an amended
3 application.

4 THE COURT: You don't have an amended, all right.

5 MR. ARCHER: He'll withdraw that, Your Honor. I think
6 that'd be the simplest way to do it.

7 THE COURT: Well, he needs to amend his relief, but I
8 don't know if he wants to, I don't know what was in his
9 amended. So, you need to talk to him about that.

10 MR. CATO: I want to amend my claims here, Your
11 Honor. I have four claims here today that I have to be
12 amended, and like I said, for my sentence to be vacated and
13 the case remanded for a new trial.

14 MR. ARCHER: It's not a new trial. It was a guilty
15 plea. It would be a trial.

16 MR. CATO: Yeah, remanded for a trial, yes.

17 THE COURT: All right, let me hear your allegations
18 of ---

19 MR. CATO: Well, first, Your Honor, before we begin I
20 have evidence here where I been asking for my motion of
21 discovery and I filed motions to get my motion of discovery
22 and I need that to help ---

23 THE COURT: All right, talk to your attorney about
24 this. If you think you're ready to go to trial you let me
25 know. We're having a hearing today. Mr. Archer, please talk

1 to your client.

2 MR. ARCHER: Your Honor, I spoke to him already about
3 that. I told them this is a civil proceeding and that this is
4 the -- a Brady versus Maryland does not apply to a PCR and I
5 also said that there is a provision under a civil rule where
6 you can get discovery but you have to have an order from a
7 judge and then once you get the order from the judge if the
8 judge grants the order then the judge will tell you what you
9 can get and what you can't get. So, his motion for discovery
10 is not valid. I explained that to him, but what I did do is,
11 what he's asking for, I wrote a letter to Mr. Long and I told
12 him that he has the discovery. So, what he needs just bring
13 to the court and what he needs and what he wanted was a
14 ballistics report. So, I got that from Mr. Long and I gave it
15 to him and that's what he wants.

16 THE COURT: All right, okay.

17 MR. ARCHER: So, he's got what he wants.

18 THE COURT: That's what he wanted. All right.

19 MR. CATO: I requested my motion also along with the
20 ballistics report and I need my motion to help present my
21 evidence.

22 THE COURT: What motion is that?

23 MR. CATO: The motion of discovery.

24 THE COURT: I'm sorry. I'm not following you at all.

25 MR. CATO: I need my motion of discovery to help

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1 present my evidence here today, Your Honor.

2 THE COURT: Please help me understand, your discovery
3 motion was that you ---

4 MR. LONG: Brady material.

5 THE COURT: Oh, for the prior case.

6 MR. LONG: When they say motion for discovery
7 they're referring to Brady material.

8 THE COURT: Okay.

9 MR. CATO: The evidence, the evidence that the
10 Prosecution had. I need, I need that to present my evidence.

11 MR. ARCHER: I explained to him, Your Honor, there is
12 no such thing in a PCR. This is a civil proceeding. There is
13 no Brady and I don't know how many times I can tell him, but I
14 told him, and I asked him what he specifically wants and he
15 said the ballistics test and he got them. I gave it to him
16 and I got them from Mr. Long and that's -- if there's anything
17 else he needs Mr. Long would have it.

18 MR. CATO: I have, I have letters here where I've
19 requested the motion of discovery also and I need, I need ---

20 THE COURT: You want a copy of his motion where he's
21 -- his Brady motion because that's ---

22 MR. CATO: No, the evidence.

23 THE COURT: --- what it sounds like you're saying.

24 MR. CATO: The evidence that the Prosecution had.

25 THE COURT: Oh, you just want all the evidence that

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1 they had.

2 MR. CATO: The evidence that they have, yes.

3 THE COURT: All right.

4 MR. CATO: Of -- behind the allegations or the
5 charges.

6 THE COURT: So, you don't know what that is, you just
7 want to see everything there is. Is that what you're saying?
8 You don't know really what you want. You just want whatever
9 he might have gotten.

10 MR. CATO: No, I want to see the evidence that the
11 Prosecution has.

12 THE COURT: Okay, what specifically are you wanting to
13 see and maybe we can work with you on it. What do you want to
14 see?

15 MR. CATO: There's no evidence in my motion of
16 discovery that shows ---

17 THE COURT: I'm just having a real hard time
18 following you when you're talking about a motion of discovery,
19 but yeah, you're talking about in the Brady material there was
20 nothing that was provided in response to that motion?

21 MR. CATO: I'm talking about the evidence that the
22 Prosecution has against me. That's what I'm talking about.

23 THE COURT: All right, let's go forward and we'll see.
24 There will be an open file in this case, I would suppose. You
25 have any problem with that?

1 MS. TODD: No, Your Honor. Mr. Long has brought
2 exactly what was provided to him by the State and it's right
3 here.

4 THE COURT: All right.

5 MR. ARCHER: I told him in advance to bring his file.

6 THE COURT: Okay, all right.

7 MR. ARCHER: And that's what I did.

8 THE COURT: Very good, it will be open and then you
9 can respond to that; okay.

10 Anything further -- no, before he takes the stand let me
11 go through. What specifically are you -- are your allegations
12 on this petition? Since there was an amended petition that we
13 don't have before us, I want to make sure that we address all
14 of the issues that you need to have addressed, okay?

15 MR. CATO: And I will refer to the evidence that the
16 Prosecution has during my claims.

17 THE COURT: All right, now, answer my question. What
18 is in your petition, your amended petition? What specifically
19 are your allegations?

20 MR. CATO: All right, my first claim, Your Honor, is
21 that I have been deprived of effective assistance of counsel
22 due to counsel's erroneous advice rendering my plea
23 involuntary. The second claim, Your Honor, is that I have
24 been ---

25 THE COURT: Okay, so, you're basically saying it was

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1 involuntary because of bad advice.

2 MR. CATO: Yes.

3 THE COURT: Okay, all right.

4 MR. CATO: The second claim, Your Honor, is that I
5 have been deprived of effective assistance of counsel due to
6 counsel's failure to properly investigate and advise his
7 client of a constructive defense in the event of trial.

8 THE COURT: Okay, didn't investigate, all right.

9 MR. CATO: And advise his client of a constructive
10 defense in the event of trial.

11 THE COURT: And didn't, and didn't advise of defense,
12 okay. The reason I'm writing these down is I'll be listening
13 to these as you and as everyone testifies.

14 MR. CATO: Yes, and my third claim is that I have
15 been deprived of effective assistance of counsel due to
16 counsel's failure to properly negotiate a plea for the lesser
17 included offense.

18 THE COURT: Failure to negotiate, okay.

19 MR. CATO: And my fourth claim is that after -- I
20 have been deprived of effective assistance of counsel due to a
21 conflict of interest.

22 THE COURT: Okay, whose conflict, the attorney's?

23 MR. CATO: Between me and my defense attorney.

24 THE COURT: Okay, all right, if you'd come forward,
25 please. This is going to be your first witness, Mr. Archer?

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1 MR. ARCHER: Yes, ma'am.

2 THE COURT: All right, but I didn't mean to cut you
3 off. Is that it? Those, those are the four?

4 MR. CATO: Yes.

5 THE COURT: I'll be listening for, okay.

6 MR. CATO: And the relief that I'm seeking is to
7 have my sentence vacated and granted.

8 THE COURT: Yeah, that would be the only relief that
9 this Court could grant. All right, very well, if you would
10 please come forward.

11 WHEREUPON, ARDON CATO, II, WAS CALLED TO THE STAND, DULY
12 SWORN BY THE COURT AND TESTIFIED AS FOLLOWS:

13 THE COURT: All right, please have a seat. State your
14 full name for the record if you would, please.

15 MR. CATO: Ardon Perceival Cato, II.

16 THE COURT: All right, thank you. Yes, sir.

17 EXAMINATION

18 BY MR. ARCHER:

19 Q: Sir, you filed an application for post conviction
20 relief; is that correct?

21 A: Yes.

22 Q: And your attorney was J.M. Long, III?

23 A: Yes.

24 Q: Was he retained or was he appointed?

25 A: Retained.

- 1 Q: And you were indicted at the September '05 Grand Jury on
2 two counts of assault and battery with intent to kill and
3 murder; is that correct?
- 4 A: Yes.
- 5 Q: And he represented you at that time?
- 6 A: Yes.
- 7 Q: And you were sentenced by the Honorable Steven John to
8 confinement of 42 years for murder and 20 years for each
9 assault and battery with intent to kill to run concurrently;
10 is that correct?
- 11 A: Yes.
- 12 Q: And you're claiming today that Mr. Long was ineffective?
- 13 A: Right.
- 14 Q: And because of his ineffectiveness you thought that you
15 should have gone to trial; is that correct?
- 16 A: Yes, had it not been for his ineffectiveness I would
17 have proceeded to trial.
- 18 Q: You have to speak up. I don't think she can hear you.
- 19 A: Yeah.
- 20 THE COURT: I can hear him.
- 21 Q: There was some indication that you needed the ballistics
22 report?
- 23 A: Along with the Prosecution ---
- 24 Q: Discovery?
- 25 A: Yes, along with the discovery evidence that the

1 Prosecution has, yes.

2 Q: All right, and then did I give you that ballistics
3 report?

4 A: Yes, but you didn't give me the evidence that the
5 prosecution has, the discovery evidence.

6 Q: No, but I'm saying -- I'm asking you one specific
7 question. Did you get the ballistics report?

8 A: I don't know if this is the entire report but you gave
9 me, yeah, I guess you gave me something similar to that, yeah.

10 Q: All right, but you're claiming that there was a problem
11 with the shooting of the gun; is that correct?

12 A: Explain what you mean by that.

13 Q: Well, one of your arguments is that if Mr. Long did his
14 job he may have found out that you didn't shoot the gun; is
15 that correct?

16 A: I never denied shooting the gun.

17 Q: All right, so, why did you need a ballistics report?

18 A: I needed the ballistics report to find out where the 380
19 bullets came from because I told my defense attorney that the
20 gun was loaded with nine millimeter Winchester bullets, and I
21 offered to present them as evidence. So, I was questionable
22 about where the 380 bullets came from.

23 Q: All right, and how would that be helpful to you?

24 A: That would help me a lot to -- it would show me where
25 the bullets came from if they happened to come from another

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1 gun or another shooter or if they came from my gun.

2 Q: All right, so, one of your defenses would be at trial
3 that you were not the shooter?

4 A: If there was proof that the 380 bullets didn't come from
5 my gun that that would be. That's why I needed the ballistics
6 report to find that out.

7 Q: All right, and you received the ballistics report?

8 A: Yeah.

9 Q: Okay, and I can ask Mr. Long about that. Did he discuss
10 with you -- first of all, let's get the facts of the case.
11 The way I understand it you were provoked in a nightclub; is
12 that correct by another patron?

13 MS. TODD: Your Honor, I would ask that the Applicant
14 testify.

15 THE COURT: Just ask him.

16 Q: All right, just let the Judge know some of the facts of
17 the case.

18 A: Okay, what happened was I was, I was actually the victim
19 first in this incident. I was on the dance floor minding my
20 own business, and a guy came up to me and he swung twice at
21 me. He missed because I dodged, I dodged his punches, but one
22 of his hands brushed by, brushed by my head, my forehead. At
23 that time I stood back and looked at him. That's when the
24 crowd kind of closed in on me and I left the club because I --
25 being in that environment, you know, I know there's bottles

1 sitting around and once I saw the crowd closing in on me I
2 left, I left the club on my own will and once I came back to
3 the club my, my thoughts were irrational. I wasn't, I wasn't
4 thinking clearly. In my transcript page 24 lines 19 through
5 21 indicates that indeed I was severely intoxicated to the
6 extent that my thoughts were irrational. My mental and
7 physical capabilities were impaired. I just wasn't thinking
8 clearly at the time, but it's, it's, it's just inhumane to
9 want to harm anyone. So, my natural instincts, you know, not
10 to want to harm anyone when I fired the gun I raised by arm up
11 to avoid shooting anyone and I shot four shots into the club
12 not intending to directly aim at anyone or shoot anyone or
13 kill anyone, but I was trying to avoid shooting or killing
14 anyone but I did shoot four shots into the club.

15 Q: All right, let me ask you this. When you left the club
16 you were angry; is that correct?

17 A: I was more so frustrated that the guy swung at me and
18 disrupted me having a good time. I was more so frustrated,
19 you know.

20 Q: And then you left the club. How soon was it that you
21 came back to the club with the gun?

22 A: It was a matter of seconds because my car wasn't that
23 far. It was -- my car was maybe 50 feet or less away. So,
24 it was a matter of seconds. It wasn't even probably 30 to 45
25 seconds, probably wasn't a full minute.

1 Q: All right, did Mr. Long ever discuss with you the
2 elements of voluntary manslaughter which is the killing of a
3 person in the heat of passion?

4 A: When I first met my defense attorney in April 2005 he
5 heard my testimony and he did gave me his -- give me his
6 assumption of manslaughter. That's why I agreed to retain him
7 as counsel.

8 Q: All right, and then did he explain that this is
9 something where you could have gone to trial and maybe have
10 gotten a verdict of voluntary manslaughter?

11 A: No, he didn't. That's where his erroneous advice came
12 in at. In my transcript page 24 lines 14 through 17, it shows
13 that I questioned my lawyer about the plea and that I did not
14 want to plead guilty to murder. Then that's when counsel gave
15 me erroneous advice that pleading guilty to murder was in my
16 best interest because if I proceeded to trial I would be found
17 guilty of murder and sentenced to life imprisonment. He said
18 -- he told me the best thing to do was to just say yes when
19 the judge asked if I'm guilty. So, there wasn't much of an
20 option there. I felt I was pressured into the guilty plea,
21 and actually I didn't feel as though pleading guilty to murder
22 was in my best interest because I saw the evidence to warrant
23 the lesser included offense.

24 Q: And that would be voluntary manslaughter.

25 A: Manslaughter, yes.

- 1 Q: All right, how many times did you meet with Mr. Long?
- 2 A: During the 15 months I was detained about four brief
- 3 times for a total of about 20 minutes.
- 4 Q: 20 minutes altogether or 20 minutes each time?
- 5 A: Altogether.
- 6 Q: All right, and then when you pled tell us something
- 7 about that. Was that just minutes before you went into the
- 8 courtroom but just tell us -- just tell the Court what that
- 9 was about.
- 10 A: Well, when I arrived to the courtroom the decision of
- 11 whether we were going to plea or whether we were going to
- 12 trial or enter into plea negotiations was never made. So,
- 13 when I arrived at the court I didn't know what to expect.
- 14 That's when Mr. Long presented an open plea to me, and I
- 15 didn't felt, I didn't feel prepared for the guilty plea
- 16 proceedings due to there being failure of him to, failure to
- 17 of -- his failure to timely inform me of a plea offer, excuse
- 18 me.
- 19 Q: And did he tell you that there was a plea offer?
- 20 A: Actually it was an open plea. There wasn't a plea
- 21 offer.
- 22 Q: All right, at that time did you tell him that you
- 23 thought that you could not plead guilty to murder, that you
- 24 thought that in the heat of passion this was a voluntary
- 25 manslaughter?

1 A: Yes, evidence of that is in my transcript page 24, lines
2 14 through 17. I indeed expressed to my attorney that I
3 didn't feel as though I was guilty of murder. I saw the
4 evidence to warrant the lesser included offense and that is
5 proof that I wanted my attorney to negotiate a lesser included
6 offense.

7 Q: And was it -- did you express at that time that you
8 wanted a trial to Mr. Long?

9 A: At that time that's when he gave me erroneous advice
10 that it was more so like if you went to trial you're guilty of
11 murder, so you might as well plea to a murder. There wasn't
12 really an option that he gave me. His erroneous advice was to
13 plead guilty when actually the evidence warrants the lesser
14 included offense.

15 Q: All right, is there anything else that you would like to
16 tell the Court?

17 A: Yes, to conclude on my first claim of ineffective
18 assistance of counsel that counsel was ineffective due to his
19 erroneous advice rendering my plea involuntary, had he not
20 informed me that pleading guilty to murder was in my best
21 interest and to just say yes when the -- excuse me, let me say
22 that again, his erroneous advice that pleading guilty to
23 murder was in my best interest and to just say yes when the
24 judge ask if I'm guilty, that invalidated the voluntary nature
25 of the plea. So, therefore, had he not given me erroneous

1 advice I would have proceeded to trial where the lesser
2 included offense would be a probable result.

3 Q: Is there anything else?

4 A: That concludes my first claim that counsel was
5 ineffective due to his erroneous advice rendering my plea
6 involuntary.

7 Q: All right, is there any other claims you want to address
8 to the Court?

9 A: Yes, my second claim is that counsel was ineffective for
10 failure to properly negotiate and advise his client of a
11 constructive defense in the event of trial. Evidence of my
12 defense attorney's failure to properly investigate are clear
13 in my transcript where his statements contradict my testimony.
14 In page 14, line 17 of my transcript shows that my defense
15 attorney was unsure how the gun was jammed, but on page 31,
16 line three through seven my testimony is that the gun did not
17 jam during the shooting, instead it was jammed when the hammer
18 was pulled back as it was being put away. Again, in my
19 transcript page 25, line 17 my defense attorney erroneously
20 stated that I didn't know what the gun was loaded with and I
21 informed him that the gun was loaded with nine millimeter
22 Winchester bullets, and I offered to present them as evidence.
23 Page 23, lines 19 through 20, page 24 lines 14 through 17
24 shows that my defense attorney had knowledge of my testimony.
25 So, those mistakes should not have been made had he properly

1 interviewed and investigated. I could have been advised of a
2 constructive defense due to where I was standing at the exit
3 door during the shooting especially with the lights off in the
4 nightclub I couldn't see anyone. That evidence would help
5 prove that I was not intending to directly aim at or intending
6 to shoot or kill anyone. I could have been advised of a
7 constructive defense due to -- my transcript page 24, lines
8 19 through 20 which does indicate that I was severely
9 intoxicated. I indeed was severely intoxicated to the extent
10 my thoughts were irrational, my mental and physical
11 capabilities were impaired. I could have been advised of a
12 constructive defense from my transcript page 29, lines one
13 through 13 where I affirmed that I was not intending to shoot
14 anyone and it shows that I didn't even know, neither expected
15 that people were shot. A defense, I could have been advised
16 of a constructive defense due to the fact that there is no
17 evidence in my motion of discovery that shows any malice
18 aforethought toward the victims or an altercation with the
19 victims nor there's no evidence, like I said, there's no
20 evidence in my motion of discovery of an altercation with nor
21 malice toward the victims, and I could have been advised of a
22 constructive defense from my transcript page 14, lines one
23 through 21 where counsel should have challenged the
24 Solicitor's facts as it relates to actual pleas with more than
25 two exceptions, those being no evidence of malice

1 aforethought, nor there being evidence of an intent to kill
2 anyone. Due to counsel's failure to properly investigate and
3 advise me of a constructive defense I was discouraged from
4 further proceedings. Had counsel advised me -- had there --
5 had there been evidence of a thorough investigation and had
6 counsel advised me of a constructive defense rather than
7 advising me to plead guilty I would have proceeded to trial
8 where the lesser included offense of manslaughter would be a
9 probable result.

10 Q: All right, is there anything else you'd like to put in
11 the record?

12 A: Yes, my third claim is that counsel was ineffective for
13 failing to properly negotiate the lesser included offense.
14 Like I said, when I first met my defense attorney in April
15 2005 he heard my testimony and that's when he gave me his
16 manslaughter assumption. That's why I agreed to retain him.
17 That was my reason for agreeing to retain him because I
18 believed -- he told me that he could get me manslaughter or
19 instead of being charged for murder. Now, not to excuse my
20 actions during the incident, but rather to give a detailed
21 description of my state of mind, page 24, lines 19 through 21
22 indicates that I was severely intoxicated, and indeed I was to
23 the extent my thoughts were irrational. I wasn't thinking
24 clearly. My mental and physical capabilities, indeed, were
25 impaired. Like I said, from where I was standing at the exit

1 door with the lights off in the nightclub I couldn't see
2 anyone. That evidence would help prove that I was not
3 directly aiming at or intending to shoot or kill anyone and my
4 transcript page 29, lines one through 13 I do affirm that I
5 was not intending to shoot or kill anyone, and it does show
6 that I didn't even know, neither expected that people were
7 shot. Like I said, there's no evidence in my motion of
8 discovery of an altercation nor malice toward the victims.
9 Had counsel pursued the manslaughter assumption and had there
10 been proof he was intending to satisfy my expectancy of his
11 duty by properly negotiating the lesser included offense I
12 would not have pled guilty and I would have proceeded to trial
13 where the lesser included offense of manslaughter would have
14 been a probable result.

15 Q: All right, is there anything else?

16 A: Yes, my fourth claim is that counsel was ineffective due
17 to a conflict of interest. In my transcript -- excuse me, due
18 to counsel's erroneous advice in failing to properly
19 negotiated the lesser included offense, counsel operated under
20 a conflict of interest where he breached the duty of loyalty
21 to his client the most basic of his duties. In my transcript
22 page 14, line -- excuse me, page 24, lines one through 17 it
23 shows that I saw the evidence to warrant the lesser included
24 offense and that I did not want to plead guilty to murder.
25 So, by counsel advising me to plead guilty to murder and by

1 failing to properly negotiate the lesser included offense it
2 showed that he operated under a conflict of interest and that
3 his erroneous advice was accepted under duress. Had counsel
4 satisfied my expectancy of his duty and had there not been a
5 conflict of interest I would have proceeded to trial where the
6 lesser offense of manslaughter would be a probable result.

7 Q: Is there anything else you'd like to put in the record?

8 A: That'll be it.

9 Q: All right, I have no further questions, Your Honor.

10 THE COURT: Thank you, cross.

11 Q: Answer any questions the Attorney General has.

12 EXAMINATION

13 BY MS. TODD:

14 Q: Mr. Cato, you didn't have the gun when you were in the
15 nightclub to begin with; right?

16 A: Right.

17 Q: And after the man swung at you a couple of times then
18 you left, retrieved the gun; right?

19 A: Right.

20 Q: Went back, stood at the doorway and fired four shots
21 into the nightclub.

22 A: Right.

23 Q: Left with the gun.

24 A: Right.

25 Q: One of your victims was killed; correct?

1 A: Yes.

2 Q: Mr. Anthony Hemingway was killed?

3 A: Yes. I'm sorry to hear that.

4 Q: And one of your victims, Ms. Alisa Nyrum [spelled

5 phonetically] was paralyzed?

6 A: Unfortunately, yes

7 Q: And there were other people who were shot as well?

8 A: Unfortunately, yes.

9 Q: But you're not sure you shot them?

10 A: I couldn't see, I couldn't see anyone from where I was

11 standing at the exit door, you know, the lights were off in

12 the nightclub. I wasn't intending to shoot anyone. I fired

13 the shots intending to aim at the upper wall or the ceiling.

14 I didn't see anyone. The shot -- the detectives didn't,

15 didn't interview me till the next day. That's when I found

16 out that people were shot. I didn't even know or expect that

17 people were shot.

18 Q: Well, you didn't stick around to talk to the detectives;

19 right?

20 A: Stick around and talk to the detectives, what you mean?

21 Q: You didn't hang around and wait for the police to show

22 up and give them your statement, your ammunition?

23 A: The police arrested me a couple of blocks down from the

24 nightclub and when they arrested me they didn't interview me

25 right then and there. No, they interviewed me the next day.

1 Q: But you left after you shot into the nightclub.

2 A: Yes, I left.

3 Q: Now, is this a popular nightclub? Was it a popular
4 nightclub?

5 A: I have no idea whether -- how popular it is. I know
6 it's a nightclub.

7 Q: Were there a lot of people there that night?

8 A: I mean, I guess. I don't really recall if there were a
9 lot of people or not. I guess you could say there was a lot
10 of people.

11 Q: And have you brought any of this evidence that your
12 trial counsel should have found on a better investigation with
13 you?

14 A: I requested the discovery evidence that the prosecution
15 has, but I haven't received that. I've received it when I was
16 detained in J. Reuben Long but a family member has it at this
17 time. I don't have it with me today, but I do want to make
18 that a part of the record and if you properly interview, view
19 that discovery evidence that the Prosecution has you could
20 see that there's no evidence of malice aforethought nor an
21 intent to kill anyone.

22 Q: So, you've had access to this before?

23 A: Yes, that's how I know there was no evidence in there
24 that shows malice aforethought or an intent to kill anyone.

25 Q: Okay, you've done legal research while you've been in

1 prison?

2 A: A little I guess you can say.

3 Q: Now, did you receive a plea offer from the State at one

4 point?

5 A: A plea offer from the State?

6 Q: Uh-huh.

7 A: I think -- there were two Solicitors. There was one

8 Solicitor. The first time I think the first Solicitor had a

9 plea offer of 40 years for murder I think it was.

10 Q: Okay.

11 A: Yeah.

12 Q: And what happened with that?

13 A: Me and my lawyer he showed me that and he told me that,

14 "You know, don't worry about that," as if like we were going

15 to trial or something like that.

16 Q: So, you didn't make a decision on that plea offer?

17 A: There was no decision made to plea, no.

18 Q: But you didn't make a decision one way or the other

19 about that, you just let him decide for you?

20 A: There was -- I didn't want to plead guilty to murder,

21 no, that, that -- if that's what you're asking me, now, no, I

22 didn't want to plead guilty to murder.

23 Q: So, you told him, "I don't want to plead guilty to

24 murder"?

25 A: No, I don't want to plead guilty to murder.

- 1 Q: Because you were convinced that you hadn't committed
2 murder.
- 3 A: Right.
- 4 Q: Okay, and you're still convinced of that?
- 5 A: Still convinced of that.
- 6 Q: So, you were, you were set to be tried on July 17, 2006;
7 is that right?
- 8 A: Yes.
- 9 Q: And that was the day you pled guilty instead of going to
10 trial?
- 11 A: Yes.
- 12 Q: Okay, you think your attorney should have been able to
13 negotiate a voluntary manslaughter plea offer for you?
- 14 A: Manslaughter, yes, I believe the evidence warrants that
15 manslaughter can be inferred. I never denied, you know,
16 shooting anyone. It was an unfortunate incident. So, I never
17 said that, you know, I was not guilty altogether, you know,
18 but I do believe that the lesser offense of manslaughter can
19 be inferred.
- 20 Q: Which people do you think you shot?
- 21 A: I didn't, I didn't know neither expected that anyone
22 was shot. I wasn't intending to shoot anyone.
- 23 Q: I understand that, but you said you didn't deny, you've
24 never denied shooting.
- 25 A: Shooting the gun, I never denied shooting the gun.

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27

1 Q: Okay, maybe I misunderstood. I thought I just heard you
2 say you didn't deny shooting anybody?

3 A: No, I said I didn't deny shooting the gun.

4 Q: But you're not sure if you shot the victims; is that
5 what you're saying?

6 A: I didn't know neither expected that people were shot.

7 Q: Right, but right now do you think you shot those
8 victims?

9 A: I never, I never, see, I never seen anyone shot.

10 Q: Well, you don't, you don't doubt that there were people
11 shot inside that nightclub?

12 A: No, there's a, there's a, there's a probability that
13 those shots fired that hit the victims came from me, yes.

14 Q: Okay, and you told the Judge you were guilty as to your
15 plea.

16 A Say that again.

17 Q: As to your guilty plea you told the judge you were
18 guilty; right?

19 A: I accepted counsel's erroneous advice that pleading
20 guilty was in my best interest, yeah.

21 Q: And you told the judge you were guilty; right?

22 A: Yes, I said that counsel's erroneous advice that
23 pleading guilty was in my best interest, I accepted his advice
24 under duress. I felt that I was pressured into the plea and
25 due to his erroneous advice, yes, I pled guilty.

- 1 Q: After the Solicitor got through with stating the facts
2 of the case and after your attorney or after the victims got
3 to speak and your attorney spoke you actually made a statement
4 to the court saying how sorry you were?
- 5 A: Yeah, it indeed was an unfortunate incident. It's just
6 inhumane to want to harm anybody. That was never my intent to
7 want to actually harm anybody.
- 8 Q: Well, you told the court that as you were driving away
9 you were thinking to yourself that you hoped no one got hurt
10 and that you didn't mean to shoot anyone, you meant to shoot
11 over people?
- 12 A: Yes, that ---
- 13 Q: Shooting high up in the air, and you asked, you prayed,
14 you say you pray every day for the victims.
- 15 A: Still do.
- 16 Q: Is there anything more you can tell us about this
17 conflict of interest issue? You just think that your attorney
18 gave you bad advice; and therefore, was under a conflict of
19 interest?
- 20 A: Yes, because I wanted my attorney to negotiate the
21 lesser included offense or at least let's go to trial and get
22 the lesser included offense.
- 23 Q: So, you didn't want -- you didn't want to plea.
- 24 A: Guilty to murder, no.
- 25 Q: But ---

1 A: The evidence of that is in my transcript page 24, lines
2 14 through 17.

3 Q: But you did. Did he force you to plead guilty to
4 murder?

5 A: I accepted his erroneous advice under duress. I did
6 feel pressured into pleading guilty, yes.

7 Q: Okay, thank you very much. I have nothing further.

8 MR. ARCHER: I have nothing further.

9 THE COURT: All right, you may step down. Any
10 further witnesses?

11 MR. ARCHER: No, ma'am.

12 THE COURT: Yes, ma'am.

13 MS. TODD: Your Honor, the State would like to note
14 that Ms. Bowens, the mother of Anthony Hemingway the gentleman
15 who was killed during the shooting, is present in the
16 courtroom today.

17 THE COURT: All right.

18 MS. TODD: And I told her that I would make sure
19 that I noted that to the Court, and the State would call Mr.
20 Long to the stand.

21 WHEREUPON, J.M. LONG, III, WAS CALLED TO THE STAND, DULY
22 SWORN BY THE COURT AND TESTIFIED AS FOLLOWS:

23 THE COURT: Please be seated and state your name for
24 the record.

25 MR. LONG: My name is J.M. Long, III, Buddy Long.

- 1 EXAMINATION (BY MS. TODD):
- 2 Q: Mr. Long, can you tell us how you came to represent Mr.
- 3 Cato?
- 4 A: I believe it was family members or girlfriend initially
- 5 that advised me, called up and said what he was charged with,
- 6 went out to the jail, talked to him and then he or his
- 7 girlfriend or family members retained me.
- 8 Q: Could you tell the Court what Mr. Cato told you about
- 9 the incident at that time?
- 10 A: Pretty much what he explained today. I believe he said
- 11 that he was trying to make time with a girl at the nightclub
- 12 and one of two individuals, it was either one of their
- 13 girlfriends or a prospective girlfriend, and that they cold-
- 14 cocked him, that he was seated at a table with them and they
- 15 jumped, jumped him when he was at the table and basically beat
- 16 him up. My understanding was he had more injuries, he
- 17 described more entries than them simply just grazing his
- 18 forehead.
- 19 Q: Okay, well, now, just to be clear, we often use
- 20 colloquialisms. If you could, what did you mean by making
- 21 time or what did you think he meant by trying to make time
- 22 with a girl?
- 23 A: Conversations, dancing, flirting, drinking, you know,
- 24 maybe some mutual attraction, something of that nature.
- 25 Q: And otherwise basically what he explained here today and

1 at his guilty plea?

2 A: Yes, he said that after they had beat him up he pulled
3 himself off the floor, stayed there for a minute. The
4 bouncers came and ejected him or walked him to the door. He
5 was upset because he didn't think the other two were also
6 being, you know, bounced out of the club and that he went to
7 the car, got the pistol, came back around the side of the
8 club, not the entrance of the club, but this back door exit,
9 and I believe he waited until that exit was opened by somebody
10 leaving or whatever, then he came in that exit and fired at
11 least four times.

12 Q: Okay, did you do -- move for discovery in this case?

13 A: Yes.

14 Q: And did you receive discovery from the State?

15 A: Yes.

16 Q: What was your understanding as to the State's evidence
17 as to ammunition used in the -- ammunition and a firearm?

18 A: I had some problems with 380 brass and nine millimeter
19 brass being found at the nightclub. I think they found three
20 spent shell casings and the gun they recovered from Ardon was
21 a High Point nine millimeter semiautomatic pistol and I just
22 didn't see how it was possible, even though the bullet
23 diameter is the same size, the case cartridges are shorter,
24 and I didn't see how a 380 could be fired from a nine
25 millimeter pistol. The discovery material, however, showed

1 that there were 380 caliber as well as nine millimeter loaded
2 in the magazine of that nine millimeter pistol, if I'm not
3 mistaken. I did discovery investigation, as a matter of a
4 fact, talked with Mr. Tom Deeb, who is the president of High
5 Point firearms and he informed me that it's not public
6 knowledge and it's not something that they like to have, you
7 know, known, but the High Point will fire 380 and nine
8 millimeter shells. The bullets that were ultimately recovered
9 and the brass that was recovered was through ballistics shown
10 to have come from that firearm that Mr. Ardon Cato was found
11 with.

12 Q: So, and initially you had some concern as to whether
13 there might have been a second shooter?

14 A: Correct.

15 Q: And after you did some more investigation your
16 conclusion as to whether there was a second shooter was what?

17 A: Well, there still could have been a second shooter and
18 they didn't find any other shell casings in the club, and
19 that's not unusual for this type of situation, but the shell
20 casings they did find and the bullet that they recovered from
21 Mr. Hemingway's body was by ballistics tied to Mr. Cato's gun.

22 Q: Okay, was there only one bullet that you know of that
23 they tested?

24 A: That's correct, only one fired spent bullet.

25 Q: Okay, and the shell casings they had -- did you say

1 three shell casings?

2 A: I believe three shell casings.

3 Q: Okay, now, based on the information that you received
4 from the State and the information you received from Mr. Cato,
5 what did you think about the -- did you come to any conclusion
6 about the strength of the State's case?

7 A: Well, they had a pretty good case with the exception of
8 the number of wounds received by the victims versus the number
9 of shell casings that they found at the scene. There were
10 three fired shell casings. There was one, I don't remember if
11 it was a live or an empty shell casing still jammed in the
12 pistol, but there were at least four or five bullet wounds
13 received by the various his victims which gave rise to the
14 possibility of a second shooter. Other than that, that was
15 basically the only defense we had.

16 Q: Did you discuss with the Applicant the possibility of
17 trying to negotiate a voluntary manslaughter plea?

18 A: Yes, and I attempted to negotiate one with Jimmy
19 Richardson was the Assistant Solicitor at that time and I
20 explained to him, one, the differences in the calibers of the
21 shell casings that were found to the number of bullet wounds
22 received to the victims and talked to him about the
23 possibility of a voluntary manslaughter plea. He was
24 agreeable at first and said he would look into it but then he
25 basically firmed up and said, "No, the only thing we would

1 receive or would accept would be a plea to murder," which
2 Ardon wasn't willing to do, and I think the last plea offer we
3 received in the case was like he said like a 40-year plea or
4 30-year plea on murder, and that was the least the State would
5 do. They would not accept a plea on voluntary manslaughter.
6 Q: And the 40-year plea offer was rejected?
7 A: That's correct.
8 Q: Okay, and the Applicant made that decision?
9 A: Yes.
10 Q: At that time he didn't want to plea to murder?
11 A: That's correct.
12 Q: Okay, eventually he did plea to murder. Did he make that
13 decision on his own?
14 A: Yes, there was a lot going on and he was pressured and I
15 was pressured as well, but the State was intending to call the
16 case for trial. They had firmed up ballistics. They had all
17 witnesses present. They had the victims' family present.
18 They were prepared and ready to go to trial. We began to
19 discussing with Judge John and the Solicitor's Office, you
20 know, possible sentences or trying to get recommendations or
21 something of that nature. The State wouldn't recommend
22 anything but we met in chambers with Judge John who gave us a
23 range of 40 to 45 years that he would issue as a sentence on a
24 guilty plea and I passed that information to Ardon and that's
25 when he accepted responsibility and pled guilty and then

1 received a 42 year sentence.

2 Q: Okay, did you and Mr. Cato have any difficulties getting
3 along?

4 A: No, I like Ardon. He's a well-spoken, intelligent, I
5 don't want to say mild-mannered, but polite young man, and I
6 never had any discussions with him, in our conversations
7 nothing, no disagreements between us that were in any way
8 emotionally charged or personal or anything of that nature. I
9 understood his position. I thought he understood mine and
10 quite frankly I just told him at some point in time that, you
11 know, if we go to trial on this thing there is a substantial
12 probability that you would be convicted.

13 Q: Did you discuss with him the potential sentencing should
14 he be convicted following a trial?

15 A: Yes.

16 Q: And there were other charges dismissed at the time of
17 the plea; is that correct?

18 A: It seems as if there was -- well, he pled guilty to
19 murder and two counts of assault battery with intent to kill.
20 I'm trying to recall if there were one other victim. I don't
21 believe there were charges dismissed in exchange for the plea.

22 Q: Okay, I'll let the record speak for itself on that
23 particular issue. Is there anything else regarding your
24 representation of Mr. Cato in relation to the allegations that
25 have been made here today that you believe the Court needs to

1 know?

2 A: Yes, I didn't spend 20 minutes with him. Any time I
3 went out to the jail to talk to him, if we went over discovery
4 material, things of that nature, I won't say I stayed out
5 there hours with him and talked to him but I talked certainly
6 long enough for him to understand what I had come to know to
7 date since the last time we had talked and discussed how we
8 planned on approaching it, how we planned on, went with it.
9 So, no, it wasn't a question of, you know, not having the
10 opportunity to give him advice. Second is I never informed
11 him just to say yes, sir, to the judge when it came to, you
12 know, his entering a murder plea. This was something he
13 struggled over a lot, and like I said he's an intelligent
14 young man and he gave it some serious thought and
15 consideration. He understood because I understood that if we
16 went to trial he was facing a life sentence plus possibly
17 consecutive sentences for assault and battery with intent to
18 kill.

19 Q: Okay.

20 A: I -- one difficulty I had with him and again it wasn't
21 personal but he always wanted to talk about and wanted to
22 plead guilty to a manslaughter, and I explained to him that,
23 yes, if he had pulled out a gun when the fellows beat him in
24 the club and had shot them then that the possibility of a
25 manslaughter conviction or plea may be available but the fact

1 that the State knew that this happened in the club, he walked
2 out of the club, went to the car, got the weapon out of the
3 glove box, may have cocked it or loaded it or something of
4 that nature, went back around, not to the entrance of the club
5 but the exit of the club and came in the exit of the club and
6 fired doesn't give rise to much if any possibility of a
7 manslaughter charge, even though he was intoxicated, and I
8 explained to him that voluntary intoxication was no defense to
9 any specific intent crime. Also, my problems that I didn't
10 relate to him were that if he intended to fire into the
11 ceiling there's a possibility of ricochet and it could have
12 been that one or more could have been hit by bullet fragments
13 which would account for more bullet wounds than there were
14 bullet brass recovered, but the fact that Hemingway was shot
15 basically at relatively close range and shot in the chest, the
16 other girl was shot, I believe, in the lower abdomen resulting
17 in paralysis, and then one was the result -- one I had, I
18 think had a flesh wound in the thigh or a flesh wound in the
19 buttocks, I think that charge was dismissed. I think she
20 passed away from some unrelated incident and I think that
21 charge was dismissed. It was difficult for me to believe that
22 he didn't intend to shoot anybody, but I took him at his word,
23 that that's what he said that he intended simply to create a
24 distraction, make noise, scare them.

25 Q: You made mention of discovery a few moments ago. Did

1 you actually sit down and discuss the discovery materials with
2 the Applicant?

3 A: Yes, and he said I took, you know, materials out to the
4 jail and would make copies, leave copies with him so that he
5 could read, there were numerous statements as you can imagine
6 from a nightclub shooting, some of which were worthless as far
7 as evidence was concerned, some of it that was very damaging
8 as far as evidence against Ardon.

9 Q: Thank you very much, Mr. Long. Please answer any
10 questions Mr. Archer has.

11 THE COURT: Cross.

12 CROSS EXAMINATION

13 BY MR. ARCHER:

14 Q: Good morning, Mr. Long.

15 A: Good morning, Mr. Archer.

16 Q: When you first met your client in April of 2005 what was
17 his -- was his demeanor remorseful? Do you recall?

18 A: Yes, it was remorseful, and again, he did express some
19 surprise. He was surprised that people were injured, you
20 know, as badly as they were injured because his intention as
21 he explained to me was simply just to fire into the club, you
22 know, into the ceiling.

23 Q: And did he explain to you at that time what his version
24 of the ---

25 A: Yes.

- 1 Q: --- of the account was?
- 2 A: Yes.
- 3 Q: So, you were fully aware of what his version of the
4 account was; is that correct?
- 5 A: Yes, sir.
- 6 Q: And prior to you agreeing to retain him was it your
7 assumption then that he would probably be guilty of a lesser
8 offense of manslaughter? Was that ever raised?
- 9 A: I certainly wouldn't have told him, "Hire me and I will
10 get you off on manslaughter, that would be the worst that it
11 would be." I certainly never said anything like that to him.
12 I probably would have explained to him that that was a
13 possibility, you know, that we could try to attack and try to
14 use that to our benefit in plea negotiations or whatever, the
15 possibility of a manslaughter conviction or plea.
- 16 Q: In a voluntary manslaughter, heat of passion, the fact
17 that he came right back in the club, did you take that into
18 account that there was not a cooling-off period?
- 19 A: I certainly believed the State had evidence that if
20 we're talking about a jury viewing that evidence that his
21 walking out to the club and then coming back in a different
22 door of the club would be enough for the state to prove that
23 there was a cooling-off period, that it was not sudden heat of
24 passion.
- 25 Q: There was some evidence about the gun being jammed. Do

1 you recall that? Do you know what that was about?

2 A: Yes, sir, somewhat.

3 Q: Yeah, and there was a bullet lodged in the chamber, is

4 that what happened?

5 A: Correct, correct.

6 Q: And you were aware of that?

7 A: Yes, sir. Well, when they recovered the gun from Ardon

8 Cato they claimed there was one in the barrel that was not

9 extracted, that they had to remove from the barrel.

10 Q: So, in other words there was no evidence of when that

11 gun jammed or if it did jam; is that right?

12 A: That's correct.

13 Q: And that would be reflected on page 31, line three to

14 seven, and the record reflects that, indeed, that it was

15 possible the gun jammed during the shooting; is that how you

16 recall that?

17 A: Yes.

18 Q: And did he inform you that he only fired four shots

19 before leaving the premises? Was there any indication of how

20 many shots were fired?

21 A: Some witnesses described seven or eight, some witnesses

22 described two or three, the largest majority described between

23 four and five or three and five or four and six, somewhere in

24 that neighborhood. I don't recall specifically how many were

25 left in the magazine, but it -- that's -- it was a 10 shot or

1 11 shot pistol, and I think there was maybe three or four
2 unfired cartridges, not including the one in the barrel that
3 was jammed. So, he could have shot four, he could have shot
4 five

5 Q: Knowing that -- the time you spent with him, knowing his
6 character, do you believe that he would really try to harm
7 anybody?

8 A: I didn't know him that well.

9 Q: And let's talk just a little bit about this severe
10 intoxication. You knew that he was intoxicated at the time?

11 A: Yes, he told me he was.

12 Q: And did you explain to him at the time that that was a
13 defense, it was not a defense?

14 A: I told him it was not a defense to a specific intent
15 crime like murder or manslaughter, something of that nature.
16 You can't claim you were voluntarily intoxicated and therefore
17 not guilty, out of your mind or something.

18 Q: Did you feel that he had any malice toward any of these
19 people which would be an element of murder?

20 A: Well, we discussed transferred intent or transferred
21 malice, also. I clearly think he had malice towards the two
22 people that beat him up, and fortunately or unfortunately for
23 them, whichever way you want to figure it, they weren't the
24 ones that were shot and injured. I think he may have had a
25 little malice toward the bodyguard, Mr. Hemingway, that took

1 him out, not bodyguard, bouncer, because I think he tried to
2 grab him or something as he was shooting or he, I think Ardon
3 told me he shot over the bouncer into the ceiling or up in the
4 ceiling of the club and I told him that, you know, just from
5 his acts alone that it's possible that a jury could infer
6 malice, just simply because of the outrageousness of his acts
7 firing into a crowded club.

8 Q: And prior to the signing of the sentence sheet do you
9 recall that he expressed his opinion that he didn't believe
10 he was guilty of murder?

11 A: Yes.

12 Q: And he signed the sheet anyway or you just told him to
13 sign the sheet? How did that come about?

14 A: He was consistent in saying he never intended to kill
15 anybody or never intended to hit anybody, and again, part of
16 my difficulty with that is that, you know, if he shot four
17 shots and he hit three or four people that's pretty bad,
18 pretty good odds as far as, you know, the fact that he was
19 aiming or was intending to do so, but he truly didn't believe,
20 and again, he was intoxicated, but he truly didn't believe
21 that he was trying to hit anybody with bullets, and I
22 explained to him, you know, transferred intent or, you know,
23 malice, you know, how that can be done by intent and he
24 understood that, yes, that the State could prove and, yes,
25 even though he didn't specifically recall intending to shoot

1 and kill somebody, his actions were sufficient that he could
2 be found guilty of murder.

3 Q: Prior to signing that sentence where he expressed that
4 he didn't believe he was guilty of murder didn't you feel at
5 that time that you had an obligation to take this case to
6 trial?

7 A: It really wasn't my choice whether to take it to trial or
8 not. I had advised him, told him what could happen at trial,
9 what most likely would have happen at trial. I also advised
10 him as far as the guilty plea that what he would be pleading
11 guilty to and he took, he made that choice and pled.

12 Q: All right, thank you, Sir.

13 MS. TODD: Nothing further.

14 THE COURT: You may step down. Any further
15 witnesses?

16 MS. TODD: No, Your Honor.

17 THE COURT: All right, I will be glad to hear
18 arguments, yes.

19 MR. ARCHER: My client expressed the wish to argue
20 closing arguments.

21 THE COURT: He's going to argue through his attorney.
22 Mr. Archer, you may speak to him, that's what you're here for.
23 Mr. Cato has had an opportunity to testify, but also, Mr.
24 Cato, you listen very carefully to Mr. Archer and if he
25 doesn't address everything in the closing that you want to

1 address I'll give you an opportunity to speak with him and he
2 can readdress the Court.

3 Yes, sir, Mr. Archer.

4 MR. ARCHER: All he's saying is that the bouncer in
5 the club was not Mr. Hemingway.

6 THE COURT: Okay, is that, is that it? Mr. Cato, is
7 there anything else that you needed to address the court
8 about?

9 MR. ARCHER: He did not have an altercation with Mr.
10 Hemingway.

11 THE COURT: Okay, and Mr. Cato, is that -- is there
12 anything else?

13 MR. CATO: I left the club of my own will, no one
14 escorted me out. I didn't have any altercation with Mr.
15 Hemingway.

16 THE COURT: Okay, all right.

17 MR. ARCHER: And as far as the closing argument, Your
18 Honor, the testimony speaks for itself.

19 THE COURT: Anything from the State?

20 MS. TODD: Your Honor, the State would submit that
21 the Applicant has failed to meet his burden on each of his
22 grounds, both as to any allegation of deficient performance by
23 counsel and any prejudice, and also, the allegation of
24 conflict of interest is absolutely without merit.

25 THE COURT: All right, and I agree. I deny the

1 Applicant. I'm going to go through each one and indicate why.
2 As to the first one, the Petitioner says that he was given bad
3 advice, that it should have been a voluntary, involuntary, it
4 should not have been murder, but it's clear based on the
5 transcript and testimony that's been presented that he knew
6 what he was pleading to and had to make then the decision of
7 whether he was going forward on murder or whether he was going
8 forward with the plea to murder with an understanding of what
9 the range would be or going forward with a trial where he
10 could receive life and he made the decision that he was going
11 to go forward with the plea understanding based on the
12 conference, the chambers conference even what the range would
13 be. There is evidence to support, there's ample evidence to
14 support the charge of murder. So, there was nothing deficit,
15 there's nothing that this attorney could do to make the State
16 plead it down to anything less than the murder that it
17 actually was and that seems to be the biggest concern, not the
18 assault and battery with intent to kill but the murders.

19 Didn't investigate, to the contrary, based on the
20 testimony that's been presented there was quite an
21 investigation, including a conversation with the ballistics
22 expert about the different types of shell casings that were
23 found and how that could be possible. So, clearly there was
24 investigation. Didn't advise of defense, the testimony
25 presented today is contrary to that assertion, and I do find

1 that, in fact, there was advice about what could and could not
2 be used, and although it is this Applicant's contention that
3 he never meant to actually hurt somebody, it's clear from the
4 evidence that he had left, gone and gotten the gun, gone back
5 into the club and shot after an altercation. The evidence is
6 sufficient to support the charge that was made.

7 Failure to negotiate, again, this attorney can't do
8 anything about what the Court is going to -- what the State is
9 going to charge other than to point out if elements are
10 missing, and of course, this attorney had explained on
11 numerous occasions to the Applicant why the elements he felt
12 were not there could be found by a jury to be there. Conflict
13 of interest, there was nothing to address any type of conflict
14 of interest on the part of the attorney in this case.

15 Have I addressed all of the issues?

16 MS. TODD: Yes, Your Honor.

17 THE COURT: All right, once again, I respectfully deny
18 the petition. Good luck to you, sir. There was some
19 evidence, I mean, he did testify that he felt pressured, but
20 as a reading of the transcript indicates there's no pressure.
21 He's had ample opportunity to speak with the Judge and was
22 asked numerous times whether or not he was satisfied with the
23 performance of his attorney and had indicated that he did.
24 His attorney indicated also on the record with no objection or
25 no outbursts from the Applicant that he was entering this

Cato v. State (4-3-07 PCR)

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1 plea of his own free will and accord. I think I have
2 addressed it all then. Okay, good luck, sir.

3 (Adjourned.)

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Cato v. State (4-3-07 PCR)

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1 plea of his own free will and accord. I think I have
2 addressed it all then. Okay, good luck, sir.

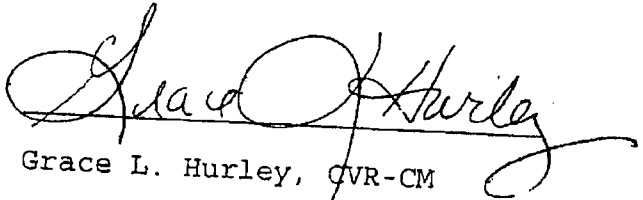
3 (Adjourned.)
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C E R T I F I C A T E

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4 I, the undersigned, Grace L. Hurley, Official Court
5 Reporter for the State of South Carolina, do hereby certify
6 that the foregoing is a true, accurate and complete
7 Transcript of Record of the PCR hearing held in the case of
8 Ardon P. Cato, II, versus the State of South Carolina, held
9 in the Court of Common Pleas for Horry County, Horry
10 County Courthouse, Conway, South Carolina, on April 3,
11 2007.

12 I do hereby certify that I am neither of kin, counsel,
13 nor interest to any party hereto.

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Grace L. Hurley, CVR-CM
Official Reporter

23 July 1, 2007.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Ardon P. Cato, II, SCDC No. 316535,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

2006-CP-26-4399

ORDER DENYING
POST-CONVICTION RELIEF

MELANIE HOGGINS
CLERK OF COURT

2007 JUN 14 PM 2:22

HORRY COUNTY

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 7, 2006. Respondent made its Return on November 15, 2006. An evidentiary hearing into the matter was convened on April 3, 2007, at the Horry County Courthouse. Applicant was present at the hearing and was represented by Paul Archer, Esquire. Respondent was represented by Sabrina C. Todd of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Testifying on behalf of Respondent was J.M. "Buddy" Long, III, Esquire. This Court also had before it a copy Applicant's guilty plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and Applicant's records from the South Carolina Department of Corrections. This Court notes Ms. Bowens, mother of murder victim Anthony Hemingway, was present during the hearing.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk

of Court. Applicant was indicted in September 2005 by the Horry County grand jury for two counts of assault and battery with intent to kill (2005-GS-26-3409 and -3410) and one count of murder (2005-GS-26-3412). He was represented by Mr. Long. On July 17, 2006, Applicant pled guilty and was indicted. In exchange for his guilty plea, the State agreed to dismiss two other charges of assault and battery with intent to kill. Applicant was sentenced by the Honorable Steven H. John to forty-two (42) years for murder and twenty (20) years for each count of assault and battery with intent to kill, with all sentences running concurrently. Applicant did not appeal his convictions or sentences.

Applicant failed to raise any allegations or grounds for relief in his initial application. During the PCR hearing, this Court required him to clearly state the grounds on which he wished to proceed and warned him all other grounds would be deemed abandoned. The Applicant announced he wished to proceed on the ineffective assistance of counsel grounds discussed below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

Findings from the Guilty Plea Transcript

Applicant's criminal convictions arise from a nightclub incident in which several people were shot, including Anthony Hemingway, who was killed, and Elisa Nahhrum, who was paralyzed. Although Applicant takes issue with some details, it is undisputed that he left the nightclub following an altercation with other individuals, retrieved a gun from a car outside, returned, opened fire into the

nightclub, and then drove away from the premises. It is also undisputed that none of the persons shot were those with which Applicant had the earlier altercation. (Plea tr. p.8, line 12 – p.12, line 4.)

During Applicant's guilty plea, the court advised Applicant of the sentencing ranges for the crimes he was pleading guilty to, explained the offenses are classified as violent and most serious, and that he was pleading without any sentencing negotiations or recommendations from the State. (Plea tr. p.3, line 11 – p.5, line 1.) Applicant told the court he wished to enter guilty pleas, that he understood what he was doing and the constitutional rights he was waiving, that he was pleading guilty voluntarily, that he was pleading guilty because he was guilty, and that he was satisfied with his attorney. (Plea tr. p.5, line 2 – p.7, line 19.)

Ineffective Assistance of Counsel Claims

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). An allegation that a counseled guilty plea was involuntary is construed by the courts as a claim of ineffective assistance of counsel. Frasier, 351 S.C. 385, 570 S.E.2d 172. Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689). With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). As discussed below, Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Erroneous Advice/Involuntary Plea

Applicant testified he hired plea counsel because counsel explained the law of voluntary manslaughter to him, but counsel gave him bad advice, rendering his guilty plea involuntary. Applicant complains plea counsel only met with him four times for a total of 20 minutes. Applicant also complains there were .380 rounds and 9 millimeter rounds fired at the nightclub and ballistics

might have shown the .380 rounds did not come from his 9 millimeter gun, demonstrating there must have been another shooter. Applicant contends he was a victim that night, explaining that one man swung at him twice. He believes the evidence showed he committed voluntary manslaughter rather than murder. He also testified he told plea counsel that when he fired shots into the club, he fired up high so as to frighten rather than hurt people. He admitted to firing four shots into the club. He asserts he was more frustrated than angry and came back to the club within 30 to 45 seconds after leaving. Counsel pressured Applicant to plead guilty even though Applicant did not think pleading guilty to murder was in his best interest. Finally Applicant alleged that when he arrived at the courthouse on the day of his plea, he had not reached a decision of whether to go to trial or attempt plea negotiations, and that he pled guilty without a plea deal.

Plea counsel testified he was retained by Applicant's family and that Applicant initially told him the altercation was caused by Applicant flirting with another man's girlfriend. Applicant said he was beat up and then the bouncers ejected him. Counsel investigated the evidence that .380 and 9 mm rounds were fired at the nightclub, hoping to find evidence that there was a second responsible shooter. In addition to the different caliber ammunition used, there was some question about how whether Applicant fired enough shots to have caused all of the wounds inflicted. However, upon investigation, the evidence did not support the two-shooter theory. Counsel talked with the president of the gun's manufacturer (Highpoint) who told him it was a little known fact that a 9mm Highpoint would fire .380 rounds. Additionally, when Applicant's gun was recovered there were both .380 and 9mm rounds in the magazine. Moreover, ballistics showed all of the brass found and well as the bullet recovered from Anthony Hemingway's body came from Applicant's gun.

Counsel testified he explained to Applicant that even if he intended to shoot at the ceiling or

over people's heads, he would still responsible for the injuries and death suffered because of the risk of ricochet. Trial counsel thought the evidence of Applicant leaving the club, retrieving a gun, and returning would be sufficient for the State to prove a cooling off period, making a voluntary manslaughter verdict unlikely. Counsel admitted both he and Applicant were under pressure at the time of Applicant's plea as the State had its ballistics evidence firmed up, would no longer recommend a sentence if Applicant pled guilty, and was ready to go trial. Concerned about the lack of a sentencing recommendation, counsel spoke with the plea judge and the prosecutor in chambers, and the plea judge stated sentence would be in the range of 40-45 years if Applicant pled guilty. After counsel advised Applicant of this, Applicant elected to plead guilty.

Applicant has failed to demonstrate that counsel gave him bad advice or that his plea was involuntary. There was ample evidence to support the plea to murder, and counsel's advice regarding Applicant's concerns and theories was sound. Applicant asserts he was pressured to plead guilty, but the transcript shows he pled guilty freely and voluntarily and that his plea was not the result of promises, threats, or force. (Plea tr. p.6, lines 12-24.) The Court finds he knew what he was pleading to and what he was doing and made the decision to plead guilty after counsel advised him of the sentencing range the plea judge said he would consider. This allegation is denied and dismissed as it is without merit.

Inadequate Investigation and Advice Regarding Defense

Applicant contends plea counsel failed to properly investigate. For example, he asserts that counsel's statements at the guilty plea and his failure to adequately correct the State, demonstrate he did not know how the gun jammed. Applicant claims counsel stated he did not know the caliber of the ammunition loaded in the gun even though Applicant said it was loaded with 9mm ammunition

and he could provide the ammunition as proof. Applicant also complains that if counsel had fully investigated, he could have shown Applicant could not see into the club because of the lighting and thus did not realize he was firing at people. Applicant also explained to counsel that he had no malice toward the people who were shot and thus counsel's advice for him to plead was faulty. Applicant further claims he was so drunk that he was not thinking clearly.

Counsel testified he explained to Applicant that voluntary intoxication was not a defense in his case. Additionally, when Applicant told counsel about his lack of ill will towards the victims, counsel advised him of the law of transferred intent.

This Court finds Applicant has failed to show counsel's investigation was inadequate or that his advice regarding potential defenses was inaccurate. Counsel did investigate this case, going so far as to speak with the president of the gun's manufacturer. Although Applicant contends he did not mean to shoot anyone and had no malice toward the victims, the evidence is he fired several shots into a crowded nightclub causing injuries and a death. Furthermore, because he fired several shots into a crowded nightclub, this Court finds evidence regarding the lighting where he fired his shots would not have been helpful to the defense. This Court finds there was ample evidence to support Applicant's guilty pleas and that counsel's performance was neither deficient nor prejudicial. Accordingly this allegation is denied and dismissed.

Voluntary Manslaughter Plea Bargain

Applicant alleges counsel was ineffective for failing to negotiate a plea to voluntary manslaughter. Trial counsel testified the State was never willing to allow the Applicant to plead guilty to less than murder and that Applicant rejected the State's forty (40)-year plea offer because at the time he still was unwilling to plead guilty to murder. Trial counsel made reasonable efforts to

secure a favorable plea offer for Applicant and had no power to compel the State to accept a voluntary manslaughter plea. Therefore, this allegation is denied and dismissed.

Conflict of Interest

Applicant contends because counsel gave him bad advice and pressured him to plead guilty against his best interest, counsel breached his loyalty to him and labored under a conflict of interest. This Court rejects Applicant's claims that counsel gave him bad advice and pressured him to plead guilty rather than go to trial. This Court also finds Applicant has presented no evidence counsel breached his loyalty to Applicant and finds the allegation contrary to the guilty plea transcript and the evidence presented at the PCR hearing. This allegation is, therefore, denied and dismissed.

Any Other Allegations

As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

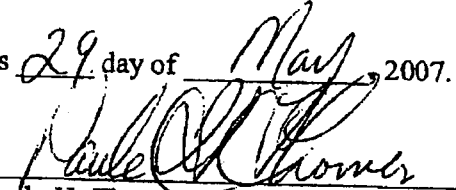
This Court advises that if Applicant wants to secure appellate review of this Order, a notice of appeal must be filed and served within thirty (30) days from the receipt of this Order. Pursuant to

Rule 71.1(g), SCRCP, PCR counsel must file a notice of appeal on Applicant's behalf if he wishes to pursue appellate review. Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the current Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 29 day of May, 2007.


Paula H. Thomas
Resident Judge
Fifteenth Judicial Circuit

Conway, South Carolina.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY

PAULA H. THOMAS, CIRCUIT COURT JUDGE

ARDON P. CATO, II,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

M. CELIA ROBINSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Did the PCR judge err in denying relief despite trial counsel's providing ineffective assistance of counsel which affected and prejudiced the outcome for petitioner?

STATEMENT OF THE CASE

Petitioner was indicted by the Horry County Grand Jury for two counts of assault and battery with intent to kill (2005-GS-26-3409 and -3410) and also for one count of murder (2005-GS-26-3412). On July 17, 2006, petitioner, represented by retained counsel, J.M. Long, III, pled guilty as charged. The Honorable Judge Steven H. John sentenced petitioner to serve forty-two (42) years in prison for murder and twenty (20) years on each count of ABIK, with all sentences to run concurrently.

Petitioner did not appeal his convictions or his sentence; however, on September 7, 2006, he filed an application for PCR. The Respondent made its Return on November 15, 2006. An evidentiary hearing was convened before the Honorable Paula H. Thomas on April 3, 2007; petitioner was represented by attorney Paul Archer. On May 29, 2007, Judge Thomas issued her Order denying relief.

ARGUMENT

Petitioner's convictions arose from an April 9, 2005, nightclub incident during which several people, including Anthony Hemingway and Eliza Nahbrum, were shot. Hemingway was killed and Nahbrum was paralyzed as a result of the shooting.

Prior to the hearing, petitioner had submitted an amendment to his application; he testified that in that amendment he requested to have his sentence vacated and his case remanded for trial. (App. p. 48, lines 15-17). However, counsel for the respondent indicated that he did not have a copy of the amendment. Whereupon, PCR counsel indicated, "We'll withdraw that, Your Honor. I think that'd be the simplest way to do it." (App. p. 49, lines 2-9). However, the PCR judge protested, "Well, he needs to amend his relief, but I don't know if he wants to, I don't know what was in his amended. So, you need to talk to him about that." (App. p. 49, lines 7-9). Petitioner indicated that he did want to amend application at the hearing. (App. p. 49, lines 10-13).

During the PCR hearing, the judge required petitioner to clearly identify the grounds on which he wished to proceed and warned him that all other grounds raised by application or otherwise would be deemed abandoned. Petitioner indicated that he would proceed on the grounds of ineffective assistance of counsel. He asserted (1) that his attorney gave him erroneous advice which rendered his guilty plea involuntary; (2) that his attorney provided ineffective assistance in that he failed to properly investigate; (3) that his attorney failed to advise him of a constructive defense in the event of trial; (4) that his attorney failed to properly negotiate a favorable plea agreement; and (5) that counsel provided ineffective assistance of counsel in proceeding despite a conflict of interest between counsel and petitioner. (App. p. 53, line 10-p. 54, line 23). The PCR

judge indicated that she was particularly listening for evidence and argument relevant to these four allegations during the PCR hearing. (App. p. 54, lines 12-13).

Petitioner testified that he hired plea counsel because counsel explained the law of voluntary manslaughter to him. However, petitioner testified that his attorney gave him bad advice so that his guilty plea was not knowing or voluntary. Petitioner testified that his plea counsel met with him only four times and that all these meetings consumed a total of twenty minutes. Petitioner testified that his attorney pressured him to plead guilty even though petitioner did not believe that pleading guilty was in his best interest. Finally, petitioner testified that if not for counsel's provision of ineffective assistance of counsel, he would not have pled guilty, but would have insisted on proceeding to trial. (App. p. 56, lines 14-17).

Petitioner indicated that he had needed the ballistics report from the State in order to establish his defense. (App. p., 56, lines 21-25). He explained that he needed the ballistics report to find out where the .380 bullets found at the scene came from because his gun was loaded with nine millimeter Winchester bullets. (App. p. 57, lines 18-22). Petitioner argued that if there was ballistic proof that the .380 bullets did not come from his gun, it would establish that he was not the responsible shooter. (App. p. 57, line 23-p. 58, line 6). Petitioner argued that he finally received a copy of the ballistic report but that his attorney did not discuss the report with him.

Petitioner further argued that he was actually a victim on the night of the shooting. Petitioner testified that one man swung at him twice during a melee on the dance floor. He testified that he dodged the punches but that a fist brushed his forehead. Petitioner testified that, at that point, "... the crowd kind of closed in on me and I left the club because I - - being in that environment, you know, I know there's bottles sitting around and once I saw the crowd closing in

on me, I left the club on my own will and once I came back to the club, my thoughts were irrational. I wasn't thinking clearly. In my transcript page 24, lines 19-21 indicates that indeed I was severely intoxicated to the extent my thoughts were irrational. My mental and physical capabilities were impaired. I just wasn't thinking clearly at the time, but it's, it's just inhumane to want to harm anyone. So, my natural instincts, you know not to want to harm anyone when I fired the gun I raised my arm up to avoid shooting anyone and I shot four shots into the club not intending to directly aim at anyone or shoot anyone or kill anyone, but I was trying to avoid shooting or killing anyone but I did shoot four shots into the club." (App. p. 58, line 23-p. 59, line 14). Petitioner testified that he was frustrated by the attack on the dance floor and that the evidence established, if anything, that his crime was voluntary manslaughter and not murder and that, therefore, his attorney provided ineffective assistance of counsel in advising him to plead guilty as charged. He testified that he decided to retain defense counsel particularly due to counsel's explanation that he believed that this was a case of manslaughter. However, petitioner argued that his attorney then failed to advise him to proceed to trial in an attempt to achieve a manslaughter conviction. (App. p. 60, lines 8-12). Petitioner testified, "... I questioned my lawyer about the plea and that I did not want to plead guilty to murder. Then that's when counsel gave me erroneous advice that pleading guilty to murder was in my best interest because if I proceeded to trial I would be found guilty of murder and sentenced to life imprisonment. He said - - he told me the best thing to do was to just say yes when the judge asked if I'm guilty. So there wasn't much of an option there. I felt I was pressured into the guilty plea and actually I didn't feel as though pleading guilty to murder was in my best interest because I saw the evidence to warrant the lesser included offense." (App. p. 60, lines 14-23).

Petitioner argued that his attorney provided ineffective assistance of counsel by advising him to plead guilty to murder in a case where a charge of manslaughter was warranted. Petitioner argued that he told his attorney that he was not guilty of murder and that he wanted him to negotiate a guilty plea to voluntary manslaughter. Petitioner testified that his attorney responded to this request by indicting that petitioner was going to be found guilty of murder so that he "might as well plead to a murder." Petitioner argued that counsel gave him erroneous advice to plead guilty to murder where the evidence warranted a lesser charge. Petitioner testified that if not for the erroneous advice of his attorney, he would have proceeded to trial after which a manslaughter verdict was a probable result. (App. p. 62, line 22-p. 63, line 2).

Petitioner further argued that his counsel was ineffective and operated in conflict to the interest of his client when he failed to negotiate an agreement whereby petitioner would be allowed to enter a plea of guilty to manslaughter. (App. p. 66, lines 16-p. 67, line 6). Petitioner testified that his attorney should have negotiated a manslaughter plea because he had never denied shooting into the club, but that he did believe that a lesser offense of manslaughter could be inferred. (App. p. 71, lines 14-19). Petitioner explained that his attorney's representation was compromised by a conflict of interest in that his attorney wanted him to plead guilty but he did not want to enter a guilty plea. Petitioner testified, "Yes, because I wanted my attorney to negotiate the lesser included offense or at least let's go to trial and get the lesser included offense. (App. p. 73, lines 16-24).

Petitioner's trial attorney, J.M. "Buddy" Long, testified that petitioner had explained to him that he was beaten up by some guys on the dance floor. Counsel recalled that petitioner told him that after he pulled himself off the color, the bouncers came and walked him out the door. Counsel recalled that petitioner said he was upset because the other men who had beaten him were not

ejected from the club. Counsel testified that petitioner told him that he got his pistol from his car, came in through the back door, and fired at least four shots into the club. (App. p. 76, lines 2-11). Counsel testified that he had moved for and received discovery from the State. He agreed that there were problems with .380 brass and nine millimeter brass also being found at the nightclub. Counsel testified that, at first, he did not see how a .380 could be fired from a nine millimeter pistol. However, counsel testified that through his investigation, he discovered that it is possible to fire .380 shells from a nine millimeter High Point semiautomatic pistol. He further testified that the magazine of the High Point pistol fired by petitioner was loaded with both .380 and nine millimeter shells and that ballistics showed that the brass recovered was fired from that weapon. (App. p. 76, line 16-p. 77, line 11).

Counsel testified that he attempted to negotiate a plea to voluntary manslaughter but that the assistant solicitor's response was that the State would only accept a plea to murder. (App. p. 78, line 16-p. 79, line 5). Counsel testified that petitioner did not want to plead guilty to murder but that the State was ready for trial and intended to call the case. Counsel indicated that the State would not make a recommendation, but that Judge John, in chambers, gave them a range of 40 to 45 years on a guilty plea and that petitioner pled guilty and he was sentenced to serve 42 years. (App. p. 79, lines 14-25).

A claim of ineffective assistance of counsel must be examined under the standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," *Id.* at 688, and that the petitioner was "prejudiced by his

attorney's substandard performance," Id. at 692; See also, Pauling v. State, 331 S.C. 606, 503 S.E.2d 468, 470 (1998).

The PCR judge found that petitioner advised the plea judge that he wished to enter guilty pleas, that he understood what he was doing and the rights he was waiving, and that he pled guilty because he was guilty. The PCR judge found from the testimony that petitioner knew what he was pleading to and that there was nothing his trial counsel could do to force the State to plead the case below murder. (App. p. 90, lines 4-16). The PCR judge found from the testimony that trial counsel did thoroughly investigate the case, including consulting with a ballistics expert. (App. p. 90, lines 19-24).

The PCR judge erred in finding that trial counsel's representation was effective on the grounds that counsel investigated the ballistics evidence. The PCR judge rightly found that counsel performed investigation into the issue of the shell casings and different caliber ammunition; however, the PCR judge did not find that trial counsel ever explained his investigation or his findings to petitioner. Trial counsel did not testify that he explained his investigation or the results of his ballistics investigation to petitioner. Further, it is clear from petitioner's testimony that his trial attorney did not explain to his understanding the ballistics evidence. Therefore, counsel provided ineffective assistance by failing to explain the ballistics results to petitioner so that petitioner could make an informed decision as to whether to plead guilty as charged. Petitioner established that he was prejudiced by counsel's ineffective representation through his testimony that, but for counsel's ineffective representation, he would have insisted on proceeding to trial.

CONCLUSION

For all the foregoing reasons and legal grounds, this Court should find that the PCR judge erred in finding that petitioner had failed to meet his burden of proof and the Court should conclude that petitioner is entitled to the reversal of his convictions and a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'M. Celia Robinson', written over a horizontal line.

M. Celia Robinson
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2008.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO Horry COUNTY
PAULA H. THOMAS, CIRCUIT COURT JUDGE

ARDON P. CATO, II,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

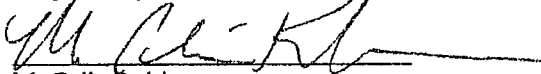
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ardon P. Cato, II states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on 4-3-07. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Ardon P. Cato, II.

Respectfully submitted,



M. Celia Robinson
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
PAULA H. THOMAS, CIRCUIT COURT JUDGE

ARDON P. CATO, II,

PETITIONER,

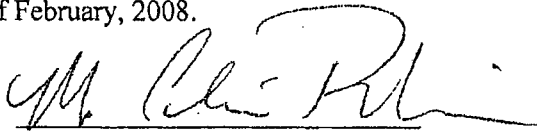
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

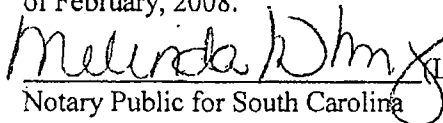
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Christina J. Catoe, Esquire, and Ardon P. Cato, II, #316535, Lee Correctional Institution, this 4th day of February, 2008.



M. Celia Robinson
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of February, 2008.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

The South Carolina Court of Appeals

Ardon P. Cato, II,

Petitioner,

v.

State of South Carolina,

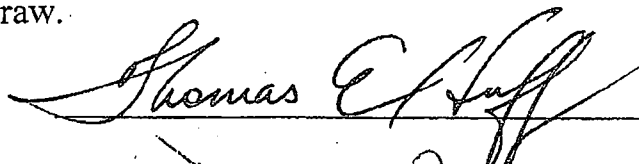
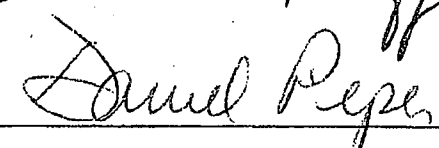
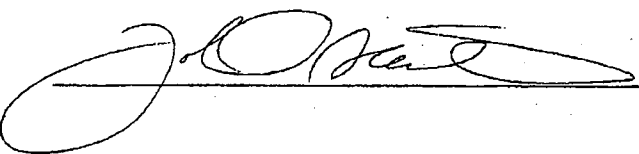
Respondent.

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief.

Petitioner's counsel asserts the petition is without merit and requests permission to withdraw from further representation.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.

Columbia, South Carolina

May 28, 2009

FILED

May 28, 2009



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMYER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 15, 2009

REMITTITUR

The Honorable Melanie Huggins
Government & Justice Center
PO Box 677
Conway, SC 29528-0677

Re: Cato, Ardon P. II v. The State
2006-CP-26-04399

Dear Ms. Huggins:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in dark ink, appearing to read "J F Barber", is written over the typed name.

Jeanette F. Barber
Clerk of Court

JFB/lf

cc: Appellate Defender M. Celia Robinson
Ardon P. Cato II, #316535
Assistant Attorney General Christina J. Catoe

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Ardon P. Cato, II, #316535

Petitioner,

vs.

Anthony J. Padula, Warden,

Respondent.

) C/A No. 4:09-2110-CMC-TER

)

) ATTORNEY GENERAL'S OFFICE 1

) RECEIVED 8-17-09

) ADMINISTRATIVE INSTRUCTIONS

) FILE OPEN END

) HAVE COPIES MADE

) ROUTE TO Anthony

) TRANSCRIPT

) CLERK RECORDS

This is an action seeking habeas corpus relief under 28 U.S.C. § 2254. The petitioner is a prisoner. Therefore, in the event that a limitations issue arises, the petitioner shall have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court). Under Local Rule 73.02(B)(2), pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge. Due 10-9-09

The petitioner has requested to proceed without prepaying the filing fee by filing an Application to Proceed without Prepayment of Fees and Affidavit (Form AO-240) which is construed as a motion to proceed *in forma pauperis*. Based on a review of the motion, the petitioner's request to proceed *in forma pauperis* is granted.

TO THE CLERK OF COURT:

The Clerk of Court shall serve the 28 U.S.C. § 2254 petition and this Order upon the respondent. Rule 4 of the Rules Governing Section 2254 Cases also requires service on "the attorney general or other appropriate officer of the state." The Attorney General of the State of South Carolina and the General Counsel of the South Carolina Department of Corrections shall each receive a copy of this Order and a copy of the 28 U.S.C. § 2254 petition through the Electronic Case Filing System.

TO THE RESPONDENT:

The respondent shall file an answer or other response to the petition as soon as reasonably possible but no later than fifty (50) days from the date of service. *See, e.g., Kramer v. Jenkins*, 108 F.R.D. 429, 430-33 (N.D. Ill. 1985) (court has discretionary authority to fix time for response to habeas corpus).

TO THE PETITIONER:

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, any documents filed subsequent to the initial pleading must be served on parties. Unless otherwise ordered, service of subsequently

filed documents on a respondent represented by an attorney is made on the attorney. Service on attorneys who have made an appearance in this Court is effected by the Court's Electronic Case Filing system through a computer generated notice of electronic filing. However, prior to the respondent's attorney making an appearance in this Court, the petitioner must serve the respondent with any documents the petitioner files subsequent to the initial pleading and file a certificate of service that states who was served, what document was served, and how the document was served.

The petitioner must place the Civil Action Number (C/A No.) listed above on any document filed in this case. **Any future filings in this case must be sent to the address below.** All documents requiring the petitioner's signature shall be signed with the petitioner's full legal name written in the petitioner's own handwriting. *Pro se* litigants shall *not* use the "s/typed name" format used in the Electronic Case Filing System. In all future filings with this Court, the petitioner is directed to use letter-sized (8½ inches x 11 inches) paper only, to write or type text on one side of a sheet of paper only and not to write or type on both sides of any sheet of paper. The petitioner is further instructed not to write to the edge of the paper, but to maintain one inch margins on the top, bottom and sides of each paper submitted.

The petitioner is a *pro se* litigant. The petitioner's attention is directed to the following important notice:

You are ordered to always keep the Clerk of Court advised **in writing** (P.O. Box 2317, Florence, SC 29503) if your address changes for any reason, so as to assure that orders or other matters that specify deadlines for you to meet will be received by you. If as a result of your failure to comply with this Order, you fail to meet a deadline set by this Court, **your case may be dismissed for violating this Order.** Therefore, if you have a change of address before this case is ended, you must comply with this Order by immediately advising the Clerk of Court in writing of such change of address and providing the Court with the docket number of all pending cases you have filed with this Court. Your failure to do so will not be excused by the Court.

Put this Order with your own record of this case so that you will not overlook your duty.

IT IS SO ORDERED.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

August 17, 2009
Florence, South Carolina

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

RECEIVED
USDC CLERK, GREENVILLE, SC
AUG 10 4 25

United States District Court		District	South Carolina
Name (under which you were convicted): Ardon P. Cato, II		Docket or Case No.: 06-CP-4399	
Place of Confinement: Lee C.I. 990 Wisacky Hwy Bishopville, SC		Prisoner No.: 316535	
Petitioner (Include the name under which you were convicted) Ardon P. Cato, II		Respondent (authorized person having custody of petitioner) v. Anthony J. Padula, Warden	
The Attorney General of the State of South Carolina, Henry McMaster			

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: _____
Horry County General Sessions
P.O. Box 677 Conway, South Carolina 29528
 (b) Criminal docket or case number (if you know): (05-GS-26-3409), (3410), (05-GS-26-3412)
- (a) Date of the judgment of conviction (if you know): July 17, 2006
 (b) Date of sentencing: Same
- Length of sentence: 42 years
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case: _____
2 Counts of Assault and Battery With Intent to Kill, and
Murder
- (a) What was your plea? (Check one)
 (1) Not guilty ☐ (3) Nolo contendere (no contest) ☐
 (2) Guilty ☒ (4) Insanity plea ☐
 (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you seek further review by a higher state court? Yes ☐ No ☐

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If yes, answer the following:

(1) Docket or case number (if you know): _____

Page 4

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Horry County Court of Common Pleas(2) Docket or case number (if you know): 06-CP-26-4339(3) Date of filing (if you know): September 1, 2006(4) Nature of the proceeding: Post Conviction Relief(5) Grounds raised: Ineffective Assistance due to Counsel's erroneous advice rendering plea involuntary. Failure to investigate and advise defense. Failure to negotiate plea to lesser offense. Conflict of interest.(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☒ No ☐(7) Result: Denied(8) Date of result (if you know): May 29, 2007

- (b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: South Carolina Supreme Court(2) Docket or case number (if you know): 06-CP-26-4339(3) Date of filing (if you know): March 3, 2008(4) Nature of the proceeding: Writ of Certiorari(5) Grounds raised: PCR Court erred in deny relief on: Trial counsel's failure to investigate, and Failure to advise client of defense.

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: Denied

(8) Date of result (if you know): May 28, 2009

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☒ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

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12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Did the PCR Court err in denying relief on trial counsel's failure to investigate?

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Ground One with Exhibits A - D (Memorandum Attached)

- (b) If you did not exhaust your state remedies on Ground One, explain why: _____

(c) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR

Name and location of the court where the motion or petition was filed: Horry County Court of Common Pleas, P.O. Box 677 Conway, South Carolina

29528

Page 7

Docket or case number (if you know): 06-CP-26-4339Date of the court's decision: May 29, 2007Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

South Carolina Supreme CourtDocket or case number (if you know): 06-CP-26-4339Date of the court's decision: May 28, 2009Result (attach a copy of the court's opinion or order, if available): Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO: Did the PCR Court err in denying relief on trial counsel's failure to advise client of defense? _____(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Ground Two with Exhibits A- D (Memorandum Attached)

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR

Name and location of the court where the motion or petition was filed: Horry County Court of Common Pleas, P.O. Box 677 Conway, South Carolina 29528

Docket or case number (if you know): 06-CP-26-4339

Date of the court's decision: May 29, 2007

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Horry County Court of Common Pleas, P.O. Box 677 Conway, South Carolina 29528

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Docket or case number (if you know): 06-CP-26-4339Date of the court's decision: May 29, 2007Result (attach a copy of the court's opinion or order, if available): Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: J. M. Long, III Esquire
Conway, South Carolina

(c) At trial: _____

(d) At sentencing: Same as Plea

(e) On appeal: _____

(f) In any post-conviction proceeding: Paul Archer, Esquire
Pawleys Island, South Carolina

(g) On appeal from any ruling against you in a post-conviction proceeding: _____
M. Celia Robinson, Division of Appellate Defense
P.O. Box 11589 Columbia, South Carolina 29211

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

Page 15

Therefore, petitioner asks that the Court grant the following relief: Sentence vacated,
Convictions reversed, Case remanded for a new trial.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on
8/7/09 (month, date, year).

Executed (signed) on 8/7/09 (date).

Arden P. Cato, II #316535
Signature of Petitioner

* (...continued)

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

IN FORMA PAUPERIS DECLARATION

U.S. District Court District South Carolina

[Insert appropriate court]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

RECEIVED
USDC CLERK, GREENVILLE, SC

100 AUG 10 A 9 26

ARDON P. CATO, II, #316535

Petitioner,

V.

ANTHONY J. PADULA, Warden of
Lee Correctional Institution

Respondent

Case No. 06-CP-26-4339

MEMORANDUM IN SUPPORT

OF

HABEAS CORPUS PETITION

Petitioner Ardon P. Cato, II #316535 hereby incorporates this memorandum in support of his 28 U.S.C. Section 2254 Habeas Corpus Petition.

This memorandum in support of petitioner's previous grounds in all state proceedings now follows.

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Exhibits A-D	
Certificate of Service	

ISSUES PRESENTED

1.) Did the PCR Court err in denying relief on the issue of trial counsel's failure to properly investigate, which affected and prejudiced the outcome for petitioner?

2.) Did the PCR Court err in denying relief on the issue of trial counsel's failure to advise his client of a constructed defense in the event of trial, which affected and prejudiced the outcome for petitioner?

STATEMENT OF THE CASE

Petitioner was indicted by the Horry County Grand Jury for two counts of assault and battery with intent to kill (2005-GS-26-3409 and -3410) and also for one count of murder (2005-GS-26-3412). On July 17, 2006, petitioner, represented by retained counsel, J. M. Long, III, pled guilty as charged. The Honorable Judge Steven H. John sentenced petitioner to serve forty-two (42) years in prison for murder and twenty (20) years on each count of assault and battery with intent to kill, with all sentences to run concurrently.

petitioner did not appeal his convictions or his sentence; however, on September 7, 2006, he filled an application for PCR. The Respondent made its Return on November 15, 2006. An evidentiary hearing was convened before the Honorable Paula Thomas on April 3, 2007; petitioner was represented by attorney Paul Archer. On May 29, 2007, Judge Thomas issued her Order denying relief. On March 3, 2008, petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The South Carolina Court of Appeals issued order denying Petition for Writ of Certiorari on May 28, 2009.

STATEMENT OF THE FACTS

Appellate Defender M. Celia Robinson, attorney for petitioner has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988), briefed the arguable legal issue which arose during the post-conviction relief process, which proceeds as follows:

The PCR judge erred in finding that the trial counsel's representation was effective on the grounds that counsel investigated the ballistics evidence. The PCR judge rightly found that counsel performed investigation into the issue of the shell casings and different caliber ammunition; however, the PCR judge did not find that trial counsel ever explained his investigation or the results of his ballistic investigation to petitioner. Further, it is clear from petitioners testimony that his trial attorney did not explain to his understanding the ballistics evidence. Therefore, counsel provided ineffective assistance by failing to explain the ballistics results to petitioner so that petitioner could make an informed decision as to whether to plead guilty as charged. Petitioner established that he was prejudiced by counsel's ineffective representation, through his testimony that, but for counsel's ineffective representation, he would have insisted on proceeding to trial.

GROUND #1

At the PCR hearing petitioner raised concerns about information contained in the Brady material, specifically the ballistics report. (App. pg. 50, line 19-pg. 51, line 8 and App. pg. 56, line 21-pg. 57, line 9). In reference to the Brady material in this case the PCR judge ordered for his file to be open. (App. pg. 52, line 17-pg. 53, line 9). Attached for reference and examination are Exhibits: (A) a copy of SLED Ballistics Report, (B) a copy of SLED Examiner Dan Defreese's Documentation of Conversations Related To This Case, (C) a copy of Officer Johnson's Statements in Myrtle Beach Police Department's Incident Report, (D) a copy of a witness statement in Myrtle Beach Police Department's Incident Report, and a copy of Officer Gaithers's statements in same Incident Report.

Exhibit (A) shows that there were three spent shell casings, (Items 3,4,5, which were two .380 shell casings, and one 9mm shell casing), and two fired bullets, (items 6, and 9, which were one .380 and a 9mm bullet), recovered from the crime scene. IF they had been paired correctly, that would have left one spent .380 shell casing without a fired bullet that was recovered making it impossible to prove that it struck any of the victims. Petitioner's convictions therefore became questionable.

Item 6 was found near a wall 36ft. away from the front door with no blood or body tissue, meaning it didn't strike any

of the victims. Item 9 was recovered from one of the victims.

Exhibit (A) shows a discrepancy where item 5, and a .380 shell casing, is marked "Item 9". "Item 9" is a 9mm bullet. This connection is not a positive match. Exhibit (B) reveals that trial counsel never contacted, nor discussed the ballistics report with the examiner. The American Bar Association Guidelines directs the following: "with the assistance of appropriate experts, defense counsel should aggressively re-examine all of the governments forensic evidence". According to petitioner's testimony at the PCR hearing, he didn't have any knowledge of what was contained in the ballistic report. (App. pg. 56, line 21-pg. 57, line 9). (See dates on the cover sheet to SLED's Ballistics Report in Exhibit (A) where petitioner had to request the entire ballistics report on March 27, 2007, about 6 days before the April 3, 2007 PCR hearing, but didn't receive the entire report until about a month later on April 26, 2007 after the hearing). In addition, trial counsel did not testify that he discussed the ballistics report with petitioner. Petitioner was insistent that trial counsel failed to properly investigate and relay this information to him. Exhibit (B) shows that trial counsel clearly failed to properly investigate. Petitioner maintains that because trial counsel failed to investigate and discuss with him the discrepancies shown in Exhibit (A), he was not able to make an informed decision and was

prejudiced from trial proceedings where a reasonable challenge to his questionable convictions should have been presented with the outcome clearly to be in his favor.

GROUND #2

At the PCR hearing petitioner raised concerns about information continued in the Brady material. (App. pg. 50, line 19-pg. 51, line 8). In reference to the Brady material in this case the PCR judge ordered for this file to be open. (App. pg. 52, line 17-pg. 53, line 9). Attached for reference and examination are Exhibits: (A) a copy of SLED Ballistics Report, (B) a copy of SLED Examiner Dan Defreese's Documentation of Conversations Related To This Case, (C) a copy of Officer Johnson's Statements in Myrtle Beach Police Department's Incident Report, (D) a copy of a witness statement in Myrtle Beach Police Department's Incident Report, and a copy of Officer Gaithers's statements in same Incident Report.

Trial counsel admitted at the PCR hearing that the number of wounds received by the victim's versus the number of shell casings found, inferring the possibility of another shooter, was a defense.)App. pg. 77, lines 12-17, and App. pg. 78, lines 3-15).

Exhibit (A) shows that there were three spent shell

casings, (Items 3,4, and 5, which were two .380 shell casings and one 9mm shell casing), and two fired bullets, (Items 6, and 9, which were one .380 and a 9mm bullet), recovered from the crime scene. If they had been paired correctly that would have left one spent .380 shell casing without a fired bullet that was recovered making it impossible to prove that it struck any of the victims. Petitioners convictions therefore become questionable.

Item 6 was found near a wall 36ft. away from the front door with no blood or body tissue, meaning it didn't strike any of the victims. Item 9 was recovered from one of the victims.

In the event of trial, petitioner's convictions could have been subjected to a reasonable challenge in favor of the defense due to there being no physical evidence, (i.e. fired cartridge cases, and fired bullets(, to prove exactly where each wound on each victim came from. (Compare Items 3,4,5,6, and 9 in Exhibit (A) to wounds in Exhibit [C]). Although trial counsel admitted that he was aware of this dilemma he did not testify that he discussed this with petitioner in the form of a constructed defense. Thus, petitioners constitutional right to effective assistance of counsel has been violated by a disregard of the indispensable element of the effective performance of trial counsel's responsibilities, which is to act independently of the prosecution and oppose it in adversary litigation. Petitioner established that he was prejudiced by counsel's

ineffective representation through his testimony that, but for counsel's failure to advise him of a constructed defense, he would have insisted on proceeding to trial to challenge his questionable convictions, with the outcome clearly to be in his favor.

Moreover Exhibit (D) details that a witness gave police the description of another shooter who does not resemble petitioner, and who left the club from a different exit (described as being at the back of the business), than where petitioner was alleged to have been. (Officer Gaither viewed a possible suspect being on Kings Highway, which is at the front of the business).

Who was the other shooter that made it out of the back exit? Why wasn't petitioner made aware of this witness? Why wasn't this witness prepared to testify for the defense in the event of trial? Counsel entirely failed to subject the prosecutions case to a meaningful adversarial challenge, which is a denial of petitioner's sixth amendment rights. Petitioner maintains that had trial counsel advised him of these defenses, he would have insisted on proceeding to trial, but for counsel's ineffectiveness, he was discouraged and prejudiced from trial proceedings where his questionable convictions should have been challenged with the outcome to clearly be in his favor.

CONCLUSION

For all the foregoing reasons and legal grounds, this Court should find that petitioner met his burden of proof and the Court should conclude that petitioner's sentence is to be vacated, his convictions reversed, and the case remanded for trial.

Respectfully Submitted,

Ardon P. Cato, II #316535
Ardon P. Cato, II #316535
Petitioner

EXHIBIT (A)

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

April 26, 2007

Mr. Ardon P. Cato, II, #316535
Lee C. I. / Rich-D-143
990 Wsacky Highway
Bishopville, SC 29020

RE: SLED Lab No.: L05-4378

Dear Mr. Cato:

Please find enclosed the information provided to me by our Firearms Department concerning your request dated March 27, 2007.

Sincerely,

Mary C. Perry
FOIA/Subpoena Compliance Coordinator

MCP/FOI#2007-214



An Accredited Law Enforcement Agency
P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7041



SLED LABORATORY EVIDENCE INVENTORY SHEET

(Use ballpoint pen and press firmly. Print all
information except where signature is required.)

FORM: LAB-004
NOVEMBER 1993
Previous Editions
May Be Used

Lab Number L 05-4378 Sheet Number 2 of 2
(Use more than one sheet if necessary.)

ITEM #	DESCRIPTION OF EVIDENCE: I.E. SUBJECT OR VICTIM'S (EVIDENCE TO INCLUDE SPECIFIC ARTICLES AS TO COLOR, ETC., IF DRUGS THEY ARE TO BE COUNTED, ETC.)	EXAMINATIONS REQUESTED
1	Black Luger HiPoint 9MM Handgun S/N P198697	Process for Latents Extract DNA Compare w/casings & IBIS
2	Black Magazine (from 9mm Handgun)	Process for Latents Extract DNA Compare to
3	380 Caliber cartridge case (spent) R-P	Compare to weapon
4	9mm cartridge case (spent) Luger/Win	" "
5	380 Caliber cartridge case (spent) R-P	" "
6	Full metal jacket projectile	" "
7	380 Auto Bullet (Extracted from Handgun)	Compare to casings
8	9mm live cartridge (has been fumed)	Compare to weapon
9	(9mm) Full metal jacket projectile (removed from victim) #1-2 E235174 - #2-9 E234271	Compare to weapon
10	GSR Kit on Wright, Alphonso Lamont	GS Residue
11	GSR Kit on Catoe, Ardon Pervial II	" "
12	GSR Kit on Hemingway, Anthony Leon	" "
13	Black nylon holster w/spare magazine	" "
14	Pair of Blue Jeans from Catoe, Ardon P.	" "
15	Red T-Shirt from Catoe, Ardon P.	" "
	#10-12 E233931 #13 E234270	
16	Evidence Box w/Hair Fibers (Extracted from holster)	Extract DNA
	Trace Evidence Vacuum Filter (driver's seat Saturn) not submitted	"
	Trace Evidence Vacuum Filter (front Pass. seat Saturn) not submitted	"
	Trace Evidence Vacuum Filter (back seat Saturn) not submitted	"

#14-15 E234269 #16 E233840

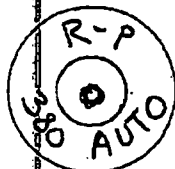
EVIDENCE SUBMITTED IN SEALED CONTAINER IS PROVISIONALLY ACCEPTED AS BEING CORRECTLY DESCRIBED
AS LISTED ABOVE. CONTRIBUTORS AGREE THAT THE ACTUAL INVENTORY OF EVIDENCE CONDUCTED BY THE
SLED EXAMINER WILL BE THE CORRECT INVENTORY

Delivered By (Print) Patty Daniels L0504378 3 Patty Daniels 4/15/05 Date
Delivered By (Sign) [Signature]
Item # #1-9 13-15 1 2004 4-15-05 #16 DNA-Rep 4-15-05 Date
Received By [Signature] Date 4-15-05

AMMUNITION/CARTRIDGE WORKSHEET

SLED LAB NO: L0504378 AGENCY: MYRTLE BEACH P.D.
DATE COMPLETED: 2-6-06 EXAMINER: DE FREESE
ITEM NO: 5 - ONE FIRED CARTRIDGE CASE
SOURCE: REC'D IN BOX MARKED "ITEM #9..."
HOW PACKAGED: I-5 STAPLE-CLOSED BROWN PAPER BAG EVIDENCE TAPE SEALED (GTS) 3x12"
KRAFT CLASP ENVELOPE # E234271
DATE OPENED: FEB. 1, 2006 BY: FDA
CALIBER: 380 AUTO
BULLET WGT/TYPE: NONE
UNFIRED ☒ FIRED ☐ MISFIRED ☐
CASE CONSTRUCTION: BRASS CASE, NICKELED BOXER PRIMER
BRAND: REMINGTON-PETERS (U.M.C.)
CASE MARKINGS: HS: "R-P 380 AUTO"
FIRING PIN: Hemi EXTRACTOR: ~
EJECTOR: ~ BREECHFACE: PARALLEL
CHAMBER: ~
EXAMINER'S MARKINGS/LOCATION: ENGRAVED ON EXTERIOR CASE WALL FORWARD OF EXTRACTION
GROOVE "L0504378 I-5 ON"
CONDITION: VERY GOOD.

HEADSTAMP:



RESULTS: MATCHING BREECHFACE IMPRESSIONS
WERE FOUND ON ITEM 5 AND ON TEST
CTG. CASES FIRED BY ITEM 1.
ITEM 5 WAS FIRED BY ITEM 1.

"MICRO" VERIFIED: ☒ YES ☐ NO BY: JAN 2-3-06
PHOTO: ☒ YES ☐ NO
DATE SEALED: 2-6-06

BULLET/PROJECTILE WORKSHEET

SLED LAB NO: L0504378 AGENCY: MYRTLE BEACH P.D.
DATE COMPLETED: 2-6-06 EXAMINER: DEFREESE
ITEM NO: 9 - ONE FIRED BULLET
SOURCE: RECD IN CONTAINER MARKED "... HEMINGWAY, ANTHONY..."
HOW PACKAGED: I-9 CLOSED SCREWTOP PLASTIC SPECIMEN ETS 9X12" KRAFT
JAR WITH INTACT SEAL ENVELOPE # E 234271
DATE OPENED: FEB. 1, 2006 BY: YRM
CALIBER: (38) MCW 9mm LUGER (TOO DISTORTED TO MEASURE DIAMETER)
LANDS & GROOVES: 9
DIRECTION OF TWIST: LEFT
LAND IMPRESSION WIDTH: < SAME AS TEST BULLETS >
GROOVE IMPRESSION WIDTH: FIRED BY ITEM 1
MAKE: CONSISTENT WITH WINCHESTER - COULD BE OTHERS.
TYPE: FIRED, COPPER-ALLOY JACKETED, FULL METAL CASE, ROUND NOSE BULLET.
LEAD CORE EXPOSED AT BULLET'S HOLLOW BASE
WEIGHT: 115.3 GRAINS
EXAMINER'S MARKINGS/LOCATION: ENGRAVED ON OGIVE "L0504378 I-9 020"
DAMAGE/TRACE: DISTORTED BUT INTACT. OBVIOUS BLOOD / BODY TISSUE NOTED.
BUT NOT REMOVED FOR PRESERVATION OR ANALYSIS. SANITIZED WITH
BLEACH SOLUTION.
SKETCH:

RESULTS: MATCHING INDIVIDUAL STRIATED
MARKS WERE FOUND ON ITEM 9 AND
ON TEST BULLETS FIRED BY ITEM 1.
ITEM 9 WAS FIRED BY ITEM 1.

"MICRO" VERIFIED: ☒ YES ☐ NO BY: YRM 2-3-06
PHOTO: ☒ YES ☐ NO
GRC: ☒ YES ☐ NO SEE PAGE 2-6-06
DATE SEALED: 2-6-06

See PHOTO

BULLET/PROJECTILE WORKSHEET

SLED LAB NO: L0504378 AGENCY: MYRTLE BEACH P.D.
DATE COMPLETED: 2-6-06 EXAMINER: DE FREESE
ITEM NO: 6 - ONE FIRED BULLET
SOURCE: REC'D IN BAG MARKED "... 36' 1" from front door and 6' 2" north of center wall at 90° ..."
HOW PACKAGED: I-6 STAPLE CLOSED BROWN PAPER BAG ETS 9X12" KRAFT ENVELOPE #E 234271
DATE OPENED: FEB. 1, 2006 BY: FA92
CALIBER: (38) MCW 380 AUTO DIA. $\approx$.355"
LANDS & GROOVES: 9
DIRECTION OF TWIST: LEFT
LAND IMPRESSION WIDTH: < SAME AS TEST BULLETS >
GROOVE IMPRESSION WIDTH: < FIRED BY ITEM 1 >
MAKE: CONSISTENT WITH REMINGTON - COULD BE OTHERS
TYPE: FIRED, COPPER-ALLOY JACKETED, FULL METAL CASE, ROUND NOSED BULLET. CORE EXPOSED AT BULLETS FLAT BASE
WEIGHT: 95.7 GRAINS
EXAMINER'S MARKINGS/LOCATION: ENGRAVED ON OGIVE "L0504378 I-6 100"
DAMAGE/TRACE: VERY GOOD. NO OBVIOUS BLOOD/BODY TISSUE NOTED

SKETCH:

RESULTS: MATCHING INDIVIDUAL STRIATED MARKS WERE FOUND ON ITEM 6 AND ON TEST BULLETS FIRED BY ITEM 1
ITEM 6 WAS FIRED BY ITEM 1.

"MICRO" VERIFIED: ☒ YES ☐ NO BY: FA92 2-3-06

PHOTO: ☒ YES ☐ NO

GRC: ☒ YES ☐ NO SEE PAGE

DATE SEALED: 2-6-06

See PHOTOS

Lab Form 036
March 1994

PAGE 21 1072

EXHIBIT (B)

SLED LABORATORY **Case Note Cover Sheet**

(Entry not always required in shaded areas)

Lab Number: L 0504378

Examiner DeFreese

Original Submission

Page 1 of 43 Total Pages of Notes

Satisfactory Peer/Technical

Review Completed On: _____ By _____
 Date Initials

Analysis Started On: _____

Analysis Completed On: _____

Satisfactory Administrative Review

Completed On: _____ By _____
 Date Initials

Additional Submission

Page 1 of _____ Total Pages of Notes

Satisfactory Peer/Technical

Review Completed On: _____ By _____
 Date Initials

Analysis Started On: _____

Analysis Completed On: _____

Satisfactory Administrative Review

Completed On: _____ By _____
 Date Initials

Additional Submission

Page 1 of _____ Total Pages of Notes

Satisfactory Peer/Technical

Review Completed On: _____ By _____
 Date Initials

Analysis Started On: _____

Analysis Completed On: _____

Satisfactory Administrative Review

Completed On: _____ By _____
 Date Initials

USE ADDITIONAL COVER SHEET(S) IF MORE SUBMISSIONS ARE RECEIVED

DOCUMENTATION OF CONVERSATIONS RELATED TO THIS CASE

Date/Time	Person's Name Agency, Call Back No.	Summation of Conversation	Initials
1-31-06	Investigator Mark Jackson w/ Myrtle Beach P.D.	Called (843-918-1909 call back #). He inquired about case status. I told him it had not yet been examined but that I'd do so soon. Court expected in the Summer.	
2-6-06	Called Mark Jackson and told him results of exam.		
6-14-06	SUZANN w/ Horry Co. Sol. Off (843-915-8633)	called to set up a pre-trial conference with Bert Von Hermann. (FDD was in Court)	
6-15-06	Called Suzann back and set up meeting on 6-22-06 @ 10:00 AM.		
6-22-06	Had pre-trial meeting w/ Bert Von Hermann @ SLED HOURS.		

EXHIBIT (C)

Incident Report

File # 01-05-022625

Ethnic Origin : UNKNOWN
Min. Height : 5'09"
Min. Weight : 165 lbs
Adult/Juvenile : ADULT
Victim Type : INDIVIDUAL
Will File Charges : YES
Can Identify Offender : UNKNOWN

Seriousness of Victim : HAD BEEN DRINKING
Extent of Injury : SERIOUS
Injury Type 1 : OTHER MAJOR INJURY
Medical Treatment : EMERGENCY ROOM
Hospital Taken To : GRAND STRAND REGIONAL MED CENTER
Physician's Name : SENN
Residency Type : UNKNOWN

Topic SUPPLEMENTAL

1 AT APPROXIMATELY 0500, MBPD OFFICER JOHNSON RESPONDED TO GRAND STRAND REGIONAL MEDICAL CENTER IN REFERENCE TO THE SHOOTING VICTIMS TRANSPORTED FROM THE RED ROOM. VICTIM HEMINGWAY WAS PRONOUNCED DECEASED BY ER DOCTOR SENN APPROXIMATELY 5 MINUTES AFTER ARRIVAL BY AMBULANCE. HEMINGWAY WAS TRANSPORTED FROM THE INCIDENT LOCATION BY HCFR MEDIC 30 AND STAFFED BY DENISE WARD AND JOEY SUMMERS OF Horry County Fire/Rescue and MIKE RAPP AND BRIAN UHL OF MYRTLE BEACH FIRE DEPARTMENT. WARD REPORTED HEMINGWAY HAD A SINGLE GUNSHOT WOUND TO UPPER RIGHT CHEST IN THE AREA OF HIS CLAVICLE (COLLAR BONE).

ELISA NARRUHN WAS ALSO TRANSPORTED BY AMBULANCE TO GRAND STRAND REGIONAL MEDICAL CENTER. NARRUHN SUFFERED 1 GUNSHOT WOUND TO THE UPPER BACK WHICH APPARENTLY EXITED IN THE AREA OF THE SHOULDER JOINT ON THE OPPOSITE SIDE OF HER BODY. ER STAFF REPORTED NARRUHN'S INJURIES TO BE NON-LIFETHREATENING AT THE TIME OF REPORT.

RONALD LAMY WAS ALSO TRANSPORTED TO GRAND STRAND REGIONAL MEDICAL CENTER WITH A GUNSHOT WOUND TO THE SIDE OF THE ABDOMEN WITH APPARENT EXIT WOUND ON THE OPPOSITE SIDE. LAMY HAD NO IDENTIFICATION ON HIM AND WAS UNABLE TO SPEAK TO OFFICERS. LAMY WAS IN SURGERY AT TIME OF REPORT BUT HOSPITAL STAFF REPORTED HIS INJURIES AS NON-LIFETHREATENING.

JOHNSON COLLECTED CLOTHING FROM THREE ABOVE VICTIMS AND TURNED ALL PROPERTY OVER TO CRIME SCENE OFFICER C. ALLEN.

CPL. GARRETT, CPL. BENDER, INV. T. ALLEN, AND INV. DILORENZO RESPONDED TO THE HOSPITAL.

Reporting Officer KANDI MICHELL JOHNSON (8783)	Department MYRTLE BEACH POLICE DEPT	Report Status: Approved
Officer Name		Date/Time
Approving Officer CPL JAMES L GARRETT (9018)	Department MYRTLE BEACH POLICE DEPT	Date / Time 04/09/2005 09:31

EXHIBIT (D)

Incident Report

File # 01-05-022625

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Topic SUPPLEMENTAL

ON 04/09/2005 AT APPROXIMATELY 07:30 HOURS, I, INV. A PROCK MET WITH THE WITNESS, JONATHAN TRAVIS MCINTYRE, IN THE COURT ROOM OF THE CITY OF MYRTLE BEACH. UPON SPEAKING WITH MCINTYRE HE ADVISED THAT HE HAD BEEN IN THE CLUB FOR SINCE APPROXIMATELY 01:00 ON 4/9/05. HE STATED THAT PRIOR TO THIS INCIDENT OCCURRING HE HAD PURCHASED A BEER AND WAS STANDING AMONGST A CROWD OF PEOPLE IN THE MAIN ROOM OF THE CLUB TOWARDS THE RIGHT SIDE, WHEN HE HEARD WHAT HE BELIEVED TO BE FOUR SHOTS FROM THE EXIT DOOR AREA. HE TURNED TO THE AREA FROM WHICH HE HEARD THE SHOTS AT WHICH TIME HE OBSERVED A HISPANIC MALE (WEARING DARK JEANS AND A DARK SHIRT) FALL TO THE GROUND ON THIS BACK. MCINTYRE STATED THAT THE HISPANIC MALE FELL INTO HIM BEFORE FALLING TO THE GROUND. UPON SEEING THIS OCCUR, HE THE OBSERVED A BLACK MALE SUBJECT, WHO HE BELIEVED WAS THE SHOOTER IN THE INCIDENT RUN TOWARDS THE EXIT DOOR. MCINTYRE DESCRIBED THE BLACK MALE SUBJECT AS BEING APPROXIMATELY 5'10, 180 POUNDS, WITH SHORT BLACK HAIR, IN HIS EARLY TO MID TWENTIES WEARING DARK CLOTHING. MCINTYRE STATED ONCE HE OBSERVED THE BLACK MALE, HE FOLLOWED HIM OUT THE EXIT DOOR (WHICH HE DESCRIBED AS BEING AT THE BACK OF THE BUSINESS) AND OBSERVED HIM RUNNING TOWARDS THE RIGHT IN THE DIRECTION OF 12TH AVENUE NORTH. MCINTYRE FURTHER STATED THAT HE ALSO OBSERVED A WHITE MALE SUBJECT WITH THE BLACK MALE SUBJECT. MCINTYRE DESCRIBED THE WHITE MALE AS BEING IN HIS MID TWENTIES, WITH BROWNISH TO BLONDE HAIR, 5'8, 180 POUNDS LOOKING UNKEPT (HAIR IN DISARRAY, CLOTHING OLD/DIRTY). MCINTYRE STATED THAT HE OBSERVED THE WHITE MALE RUN FROM THE SAME AREA OF THE CLUB THE BLACK MALE SUBJECT DID AND CONTINUE BEHIND THE BLACK MALE SUBJECT IN THE SAME DIRECTION OUT THE EXIT DOORS. MCINTYRE STATED HE THEN WENT BACK INTO THE CLUB WHERE HE TRIED TO ASSIST THE HISPANIC MALE. HE OBSERVED THE HISPANIC MALE TO HAVE TWO WOUNDS TO HIS ABDOMEN AREA (RIGHT AND LEFT SIDE). MCINTYRE FURTHER STATED THAT HE HAD SEEN BOTH THE WHITE MALE AND THE BLACK MALE SUBJECTS IN THE CLUB PRIOR TO THE INCIDENT OCCURRING.

MCINTYRE HAD A SPOT OF BLOOD (DRIED) ON THE LEFT SIDE OF HIS BLUE IN COLOR BUTTON UP SHIRT. THE SHIRT WAS SEIZED AS EVIDENCE, INVENTORIED AND PLACED IN PROPERTY AND EVIDENCE LOCK BOX.

Reporting Officer AMY B STANLEY (6044)	Department MYRTLE BEACH POLICE DEPT	Report Status: Approved
Officer Name		Date/Time
Approving Officer AMY B STANLEY (6044)	Department MYRTLE BEACH POLICE DEPT	Date / Time 04/09/2005 10:31

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00

10504378

2 of 2

01-05-022625

MYRTLE BEACH POLICE DEPARTMENT

Report Date/Time 04/09/2005 08:24

Incident Report

File # 01-05-022825

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Topic

ORIGINAL

1

R/O WAS LEAVING THE POLICE DEPARTMENT HEADED EAST BOUND ON 12TH NORTH. PFC. BOLEY AND MYSELF WERE APPROACHING LEGION STREET WHEN I HEARD WHAT APPEARED TO BE TWO GUN SHOTS AHEAD OF US NEAR KINGS HWY. I OBSERVED A DARK CLOTHED SUBJECT RUNNING NORTH BOUND ON KINGS HWY. I WAS TOO FAR AWAY TO HAVE A BETTER DESCRIPTION. I THEN OBSERVED OTHER SUBJECTS STARTING TO RUN OUT OF THE RED ROOM SCREAMING SOMEONE WAS IN SIDE SHOOTING. BOLEY HEADED TOWARD THE FRONT AND I HEADED TOWARD THE REAR OF THE CLUB. BOLEY WAS ABLE TO GIVE OUT THE VEHICLE DESCRIPTION OF THE VEHICLE WITH THE POSSIBLE SUSPECTS. THE VEHICLE WAS DESCRIBED AS A BURGUNDY VEHICLE OCCUPIED BY TWO BLACK MALES HEADED NORTHBOUND ON KINGS HWY. ONE SUSPECT WAS WEARING A RED SHIRT AND DARK PANTS AND THE OTHER WAS WEARING A LIGHT COLORED SHIRT. AS I ENTERED THE REAR DOOR SEVERAL SUBJECTS WERE FIGHTING AND APPEARED TO BE COVERED IN BLOOD. AFTER A BRIEF STRUGGLE WITH SEVERAL SUBJECTS I WAS ABLE TO MAKE TO ONE OF THE VICTIMS. HE WAS IDENTIFIED TO ME AS "TONY". I OBSERVED HE HAD SOME TYPE OF INJURY TO HIS THROAT AREA AND WAS RECEIVING ASSISTANCE FROM A FEMALE WHO STATED SHE WAS A NURSE. I IMMEDIATELY NOTIFIED STATION TO SEND EMS AND ADDITIONAL UNITS. OTHER OFFICERS ARRIVED ON SCENE TO HELP SECURE THE SCENE AND BREAK UP THE CROWD WHICH WAS BECOMING UNRULY. SGT. COOKE AND CPL. MARSH ARRIVED ON SCENE AND OFFICERS STARTED CLEARING THE BUILDING AND ESTABLISHING A CRIME SCENE LOG. EMS TRANSPORTED THE THREE VICTIMS OF THE INCIDENT. BECAUSE OF THE ENVIRONMENT AT THE TIME R/O WAS UNABLE TO GET ALL THE VICTIMS INFORMATION. OFFICERS WERE SENT TO THE HOSPITAL WITH THE VICTIMS AND WILL BE COMPLETING SUPPLEMENTAL REPORTS. PFC. DAILEY WAS NOTIFIED BY CPL. MARSH AND SGT. COOKE CONTACTED DETECTIVE GRAHAM. ALL WITNESSES WERE ASKED TO FOLLOW OFFICERS TO THE MBPD COURT ROOM TO GET ALL THEIR STATEMENTS. PFC. SISK AND OTHER OFFICERS WERE ABLE TO STOP THE SUSPECT VEHICLE AND PLACE TWO BLACK MALE SUBJECTS INTO CUSTODY. ALL FURTHER INFORMATION WILL BE COVERED IN SUPPLEMENTAL REPORTS.

Reporting Officer DAVID GAITHER (6767)	Department MYRTLE BEACH POLICE DEPT	Report Status: Approved
Officer Name		Date/Time
Approving Officer SGT DAVIS A COOKE (1780)	Department MYRTLE BEACH POLICE DEPT	Date / Time 04/09/2005 07:19

Arden P. Cate, II #316535

Lee C. I. Ric C-219

990 W. Sucky Hwy

Bishopville, SC 29010



UNITED STATES POSTAL SERVICE
\$ 05.04
10/02/02 10/07/02
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RMC 4-10-02

Larry W. Proppes, Clerk

United States District Court

P.O. Box 10768

Greenville, SC 29603

SV-02110 CMC-TER

Date Filed 08/07/2009

Entry Number 62

Page 410

RECEIVED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

QUALITY
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Ardon P. Cato, II, #316535,	)	C/A No. 4:09-2110-CMC-TER
	)	
Petitioner,	)	
	)	
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
Anthony J. Padula, Warden,	)	
	)	
Respondent.	)	
_____	)	

The Respondents, above-named, by and through the undersigned attorneys, would respectfully move this Court, pursuant to Rule 56(b) F.R.C.P., for judgment on the pleadings, or in the alternative, for summary judgment based on the pleadings.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General
ID No. 2091



By: s/ J. Anthony Mabry
ATTORNEYS FOR RESPONDENTS

December 9, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Ardon P. Cato, II, #316535,	)	C/A No. 4:09-2110-CMC-TER
	)	
Petitioner,	)	
	)	
v.	)	RETURN AND MEMORANDUM OF
	)	LAW IN SUPPORT OF MOTION FOR
Anthony J. Padula, Warden,	)	SUMMARY JUDGMENT
	)	
Respondent.	)	
	)	

Respondent, by and through the Attorney General of South Carolina, hereby makes a Return to the Rule to Show Cause filed by the Honorable Thomas E. Rogers, III, United States Magistrate Judge, to the *pro se* petition for habeas corpus filed by Petitioner on August 7, 2009. Respondent would show the Court there is no genuine issue of material fact, and Respondent is entitled to summary judgment as a matter of law pursuant to Rule 56 F.R.C.P. In support of its Motion, Respondent would show the Court as follows:

PROCEDURAL HISTORY

The records before the Court indicate that Petitioner is currently incarcerated at the Lee Correctional Facility of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Horry County, S.C. Petitioner was indicted by the Horry County Grand Jury for numerous charges including murder (05-GS-26-3412), assault and battery with intent to kill (05-GS-26-3409), and assault and battery with intent to kill (ABWIK)(05-GS-26-3410). Petitioner was represented by retained counsel J.M. "Buddy" Long, III. On July 17, 1996, the date of Petitioner's trial on the above charges, Petitioner pled guilty to murder, ABWIK, and ABWIK. (The above indictments). Petitioner pled guilty before the Honorable Stephen H. John, Circuit Court Judge. The State agreed to dismiss two other indictments for ABWIK in exchange for

the plea.¹ There was no recommendation by the State as to sentence.² Judge John sentenced Petitioner to forty-two (42) years on the murder charge and twenty (20) years each on the ABWIK charges to run concurrent with the murder charge. Petitioner did appeal his convictions or sentences.

The Facts

On April 9, 2005, Petitioner was at a nightclub in Horry County. He became involved in an altercation inside the nightclub. Petitioner was told to leave the club by bouncers. Petitioner left the nightclub and went to his girlfriend's car and retrieved a pistol. He came back into the nightclub, not through the front door, but through a rear exit, and fired several shots into a crowd of people in the nightclub. Several patrons of the club were struck by bullets that Petitioner fired. Anthony Hemingway was struck in the chest and died from loss of blood. Ronald Lamey was struck in the stomach. Elisa Narruhn was struck and paralyzed from the waist down. None of these victims were involved in the earlier altercation with Petitioner. After firing the shots, Petitioner fled the nightclub. Petitioner was apprehended by Myrtle Beach police just a few minutes later with the murder weapon. Ballistics matched a bullet from Anthony Hemmingway's body, a bullet from the nightclub's front door, and shell casings found at the scene to Petitioner's girlfriend's pistol, the pistol Petitioner used to commit the crimes.

¹One victim died prior to trial from injuries unrelated to the shooting. Another victim was a bouncer or security person who was apparently nicked by a bullet fired from Petitioner as he was fleeing from the nightclub. The State agreed to dismiss these two charges in exchange for the guilty pleas to the other charges.

²Prior to the date of the trial, the State had offered to recommend a sentence of 40 years on murder, ABWIK, and ABWIK. Petitioner declined to accept this plea offer. On the date of the trial, counsel for the State and Petitioner's trial counsel met with Judge John prior to the beginning of the trial, and Judge John indicated if Petitioner pled guilty he would sentence Petitioner between 40 to 45 years. After consulting with counsel, Petitioner withdrew his plea of not guilty and entered pleas of guilty to the above charges.

The PCR Action

Petitioner filed a PCR application on September 6, 2006. (2006-CP-26-4399). In his original application Petitioner stated no grounds. Respondent filed its Return on November 15, 2006. At his PCR hearing, Petitioner was represented by Paul Archer, Esq. An evidentiary hearing into the matter was convened on April 3, 2007 at the Horry County Courthouse before the Honorable Paula H. Thomas, Circuit Court Judge ("the PCR Court"). Petitioner moved to amend his PCR application at the PCR evidentiary hearing. At the evidentiary hearing, Petitioner asserted claims of ineffective assistance of counsel. Petitioner claimed counsel gave him erroneous advice, counsel conducted an inadequate investigation and gave him erroneous advice regarding a defense, counsel did not seek a plea bargain to voluntary manslaughter, and counsel breached his duty of loyalty and labored under a conflict of interest. On May 29, 2007, Judge Thomas issued a written Order of Dismissal dismissing all of Petitioner's claims of ineffective assistance of counsel with prejudice. (See Order of Dismissal App. pp. 95-103). The Order of Dismissal was filed June 4, 2007.

The Order of Dismissal

In its Order of Dismissal, the PCR Court noted that at the hearing, Petitioner testified on his own behalf. The Court also noted that testifying on behalf of Respondent was J.M. "Buddy" Long, III, Esquire, Petitioner's plea counsel. The Court noted that it also had before it a copy Petitioner's guilty plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and Petitioner's records from the South Carolina Department of Corrections. The Court also noted Ms. Bowens, mother of murder victim Anthony Hemingway, was present during the hearing.

After reciting the procedural history of the case, the PCR Court also noted that during the

PCR hearing, the Court required Petitioner to clearly state the grounds on which he wished to proceed and warned him all other grounds would be deemed abandoned. The Court noted Petitioner announced he wished to proceed on the ineffective assistance of counsel grounds discussed below.

Findings of Fact and Conclusions of Law

In its Order of Dismissal, the PCR Court also noted it had the opportunity to review the record in its entirety and had heard the testimony at the post-conviction relief hearing. The Court also noted it had further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

Findings from the Guilty Plea Transcript

The Court found Petitioner's criminal convictions arose from a nightclub incident in which several people were shot, including Anthony Hemingway, who was killed, and Elisa Nahhrum, who was paralyzed. Although Petitioner took issue with some details, it was undisputed that he left the nightclub following an altercation with other individuals, retrieved a gun from a car outside, returned, opened fire into the nightclub, and then drove away from the premises. The Court also found it was undisputed that none of the persons shot were those with which Petitioner had the earlier altercation. (Plea tr. p.8, line 12 – p.12, line 4.)

The PCR Court also found that during Petitioner's guilty plea, the plea court advised Petitioner of the sentencing ranges for the crimes he was pleading guilty to, explained the offenses are classified as violent and most serious, and that he was pleading without any sentencing negotiations or recommendations from the State. (Referencing Plea tr. p.3, line 11 – p.5, line 1.)

The PCR Court also found that Petitioner told the plea court he wished to enter guilty pleas, that he understood what he was doing and the constitutional rights he was waiving, that he was pleading guilty voluntarily, that he was pleading guilty because he was guilty, and that he was satisfied with his attorney. (Referencing Plea tr. p.5, line 2 – p.7, line 19.)

Ineffective Assistance of Counsel Claims

The PCR Court then discussed the law applicable to ineffective assistance of counsel claims. The PCR Court pointed out that in a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Quoting Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). The Court also noted that an allegation that a counseled guilty plea was involuntary is construed by the courts as a claim of ineffective assistance of counsel. *Citing Frasier*, 351 S.C. 385, 570 S.E.2d 172. The PCR Court also pointed out that where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Quoting Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The PCR Court pointed out the proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The PCR Court noted courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Referencing Strickland*, 466 U.S. at 690. The PCR Court pointed out that an applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR Court also noted that a reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Quoting Cherry*, at 117, 386 S.E.2d at 625 (*quoting Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Again quoting Cherry*, at 117-18, 386 S.E.2d at 625 (*quoting Strickland*, 466 U.S. at 689). The PCR Court also pointed out that with respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. *Citing Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The PCR Court noted a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Citing Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). The PCR Court found and concluded that as discussed below, Petitioner had failed to carry his burden in this action. Therefore, the PCR Court found that the application had to be denied and dismissed. The PCR Court then discussed each of the claims raised by Petitioner at the hearing and its findings of fact and conclusions of law regarding each claim asserted.

Erroneous Advice/Involuntary Plea

In its Order of Dismissal, the PCR Court summarized Petitioner's testimony as follows: Petitioner testified he hired plea counsel because counsel explained the law of voluntary manslaughter to him, but counsel gave him bad advice, rendering his guilty plea involuntary. Petitioner complained plea counsel only met with him four (4) times for a total of twenty (20)

minutes. Petitioner also complains there were .380 rounds and 9 millimeter rounds fired at the nightclub and ballistics might have shown the .380 rounds did not come from his 9 millimeter gun, demonstrating there must have been another shooter. Petitioner contended he was a victim that night, explaining that one man swung at him twice. He believed the evidence showed he committed voluntary manslaughter rather than murder. He also testified he told plea counsel that when he fired shots into the club, he fired up high so as to frighten rather than hurt people. He admitted to firing four shots into the club. He asserted he was more frustrated than angry and came back to the club within 30 to 45 seconds after leaving. The Court noted that Petitioner asserted counsel pressured Petitioner to plead guilty even though Petitioner did not think pleading guilty to murder was in his best interest. Finally Petitioner alleged that when he arrived at the courthouse on the day of his plea, he had not reached a decision of whether to go to trial or attempt plea negotiations, and that he pled guilty without a plea deal.

In its Order of Dismissal, the PCR Court summarized plea counsel's testimony as follows: Plea counsel testified he was retained by Petitioner's family and that Petitioner initially told him the altercation was caused by Petitioner flirting with another man's girlfriend. Petitioner said he was beat up and then the bouncers ejected him. Counsel investigated the evidence that .380 and 9 mm rounds were fired at the nightclub, hoping to find evidence that there was a second responsible shooter. In addition to the different caliber ammunition used, there was some question about how and whether Petitioner fired enough shots to have caused all of the wounds inflicted. However, upon investigation, the evidence did not support the two-shooter theory. Counsel talked with the president of the gun's manufacturer (Highpoint) who told him it was a little known fact that a 9mm Highpoint would fire .380 rounds. Additionally, when Petitioner's gun was recovered there were both .380 and

9mm rounds in the magazine. Moreover, ballistics showed all of the brass found as well as the bullet recovered from Anthony Hemingway's body came from Petitioner's gun.

Counsel testified he explained to Petitioner that even if he intended to shoot at the ceiling or over people's heads, he would still be responsible for the injuries and death suffered because of the risk of ricochet. Trial counsel thought the evidence of Petitioner leaving the club, retrieving a gun, and returning would be sufficient for the State to prove a cooling off period, making a voluntary manslaughter verdict unlikely. Counsel admitted both he and Petitioner were under pressure at the time of Petitioner's plea as the State had its ballistics evidence firmed up, would no longer recommend a sentence if Petitioner pled guilty, and was ready to go trial. Concerned about the lack of a sentencing recommendation, counsel spoke with the plea judge and the prosecutor in chambers, and the plea judge stated sentence would be in the range of 40-45 years if Petitioner pled guilty. After counsel advised Petitioner of this, Petitioner elected to plead guilty.

The PCR Court found and concluded Petitioner had failed to demonstrate that counsel gave him bad advice or that his plea was involuntary. The Court found there was ample evidence to support the plea to murder, and counsel's advice regarding Petitioner's concerns and theories was sound. The Court noted Petitioner asserted he was pressured to plead guilty, but the PCR Court found and concluded the transcript showed he pled guilty freely and voluntarily and that his plea was not the result of promises, threats, or force. (Referencing Plea tr. p.6, lines 12-24.) The Court found Petitioner knew what he was pleading to and what he was doing and made the decision to plead guilty after counsel advised him of the sentencing range the plea judge said he would consider. Therefore, this allegation was denied and dismissed since it was without merit.

Inadequate Investigation and Advice Regarding Defense

The Court noted Petitioner also contended plea counsel failed to properly investigate. The Court noted that, for example, he asserted that counsel's statements at the guilty plea and his failure to adequately correct the State, demonstrate he did not know how the gun jammed. The Court noted Petitioner claimed counsel stated he did not know the caliber of the ammunition loaded in the gun even though Petitioner said it was loaded with 9mm ammunition and he could provide the ammunition as proof. The Court noted Petitioner also complained that if counsel had fully investigated, he could have shown that Petitioner could not see into the club because of the lighting and thus did not realize he was firing at people. The Court noted Petitioner also explained to counsel that he had no malice toward the people who were shot and thus counsel's advice for him to plead was faulty. The PCR Court also noted Petitioner further claimed he was so drunk that he was not thinking clearly.

The PCR Court pointed out that counsel testified he explained to Petitioner that voluntary intoxication was not a defense in his case. Additionally, the Court noted that when Petitioner told counsel about his lack of ill will towards the victims, counsel advised him of the law of transferred intent.

The PCR Court found and concluded Petitioner had failed to show counsel's investigation was inadequate or that his advice regarding potential defenses was inaccurate. The PCR Court found counsel did investigate this case, going so far as to speak with the president of the gun's manufacturer. The Court found that although Petitioner contended he did not mean to shoot anyone and had no malice toward the victims, the evidence was he fired several shots into a crowded nightclub causing injuries and a death. Furthermore, because he fired several shots into a crowded

nightclub, the Court found evidence regarding the lighting where he fired his shots would not have been helpful to the defense. The Court found and concluded there was ample evidence to support Petitioner's guilty pleas and that counsel's performance was neither deficient nor prejudicial. Accordingly, this allegation was denied and dismissed.

Voluntary Manslaughter Plea Bargain

The PCR Court also noted Petitioner alleged counsel was ineffective for failing to negotiate a plea to voluntary manslaughter. The Court pointed out that trial counsel testified the State was never willing to allow Petitioner to plead guilty to less than murder and that Petitioner rejected the State's forty (40)-year plea offer because at the time he still was unwilling to plead guilty to murder. The PCR Court found and concluded that trial counsel made reasonable efforts to secure a favorable plea offer for Petitioner and had no power to compel the State to accept a voluntary manslaughter plea. Therefore, this allegation was denied and dismissed.

Conflict of Interest

The PCR Court also noted Petitioner contended that because counsel gave him bad advice and pressured him to plead guilty against his best interest, counsel breached his loyalty to him and labored under a conflict of interest. The PCR Court rejected Petitioner's claims that counsel gave him bad advice and pressured him to plead guilty rather than go to trial. The Court also found Petitioner had presented no evidence counsel breached his loyalty to Petitioner and found this allegation contrary to the guilty plea transcript and the evidence presented at the PCR hearing. This allegation was, therefore, denied and dismissed.

Any Other Allegations

As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, the Court found Petitioner failed to present any probative evidence regarding such allegations. Accordingly, the Court found that Petitioner waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they were dismissed with prejudice.

Conclusion to the Order of Dismissal

Based on all the foregoing, the PCR Court found and concluded Petitioner had not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. The Court found counsel was not deficient in any manner, nor was Petitioner prejudiced by counsel's representation. Therefore, the application for PCR had to be denied and dismissed with prejudice.

The Court advised that if Petitioner wanted to secure appellate review of this Order, a notice of appeal must be filed and served within thirty (30) days from the receipt of the Order. The Court also pointed out that pursuant to Rule 71.1(g), SCRCP, PCR counsel had to file a notice of appeal on Petitioner's behalf if he wished to pursue appellate review. Petitioner and counsel were directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal had been timely filed. It was therefore ordered: that the application for post-conviction relief was denied and dismissed with prejudice, and Petitioner was remanded to the custody of Respondent for completion of his sentence.

Petitioner's collateral counsel did not file a Rule 59 Motion to have the PCR Court address any issues not specifically addressed in the Order of Dismissal.

The Appeal from the Order of Dismissal

Petitioner appealed the denial of his application for post-conviction relief to the South Carolina Supreme Court by way of a Johnson Petition for Writ of Certiorari. Petitioner was represented in the appeal by M. Celia Robinson, Appellate Defender, of the S.C. Commission on Indigent Defense/Division of Appellate Defense. In the Johnson Petition, Petitioner raised the following issue: "Did the PCR judge err in denying relief despite trial counsel's providing ineffective assistance of counsel which affected and prejudiced the outcome for petitioner?" In the Johnson Petition, Petitioner argued counsel never advised him of the results of his ballistics investigation. Ms. Robinson, Petitioner's collateral appellate counsel certified the appeal was without merit. The case was transferred to the South Carolina Court of Appeals by Order of the South Carolina Supreme Court. On May 28, 2009, the South Carolina Court of Appeals, after careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), denied the petition for certiorari and granted appellate counsel's request to withdraw. The Remittitur was issued on June 15, 2009. This habeas petition followed.

ATTACHMENTS

Appendix, the Honorable Paula H. Thomas

Johnson Petition

Order Transferring Case to the South Carolina Court of Appeals

Order of the South Carolina Court of Appeals dismissing Johnson Petition

Remittitur

SLED Ballistics Report

Two (2) Witness' Statements

FEDERAL HABEAS GROUNDS

GROUND ONE: Did the PCR Court err in denying relief on trial counsel's failure to investigate?

- a. At the PCR hearing petitioner raised concerns about information contained in the Brady material, specifically the ballistics report.... In addition, trial counsel did not testify that he discussed the ballistics report with petitioner. Petitioner was insistent that trial counsel failed to properly investigate and relay this information to him. Exhibit B shows that trial counsel clearly failed to properly investigate. Petitioner maintains that because trial counsel failed to investigate and discuss with him the discrepancies shown in Exhibit A, he was not able to make an informed decision and was prejudiced from trial proceedings where a reasonable challenge to his questionable convictions should have been presented with the outcome clearly to be in his favor.

GROUND TWO: Did the PCR Court err in denying relief on trial counsel's failure to advise client of defense?

- a. ... Petitioner's convictions could have been subjected to a reasonable challenge in favor of the defense due to there being no physical evidence.... Although trial counsel admitted that he was aware of this dilemma he did not testify that he discussed this with petitioner in the form of a constructed defense. Thus, petitioner's constitutional right to effective assistance of counsel has been violated by a disregard of the indispensable element of the effective performance of trial counsel's responsibilities....

APPLICABILITY OF THE AEDPA

The present habeas petition was filed on August 7, 2009. Accordingly, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of 'clearly established federal law as decided by the United States Supreme Court, or the decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" 28 U.S.C. Section 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. Section 2254(e)(1).

STATUTE OF LIMITATIONS

Petitioner is not in violation of the AEDPA statute of limitations. Petitioner pled guilty on July 17, 2006. Petitioner's conviction was final ten (10) days later, July 27, 2006. Petitioner filed his PCR action on September 7, 2006. That action remained pending until the Remittitur was issued on June 15, 2009. Petitioner then filed this action August 7, 2009. Petitioner is not in violation of the AEDPA statute of limitations. However, this petition has no merit.

PROCEDURAL BAR AND DEFAULT

Petitioner contends that a portion of Ground One of his federal habeas petition was not ruled on by the PCR Court. (See Attachment to Habeas Petition, Ground #1). In his attachment, Petitioner claims the PCR Court correctly ruled counsel performed an investigation into the issue of the shell casings and different caliber of ammunition; however, Petitioner states the PCR Court did not find trial counsel ever explained his investigation or the results of his ballistics investigation to Petitioner.

(See Attachment to federal habeas petition page 4).³ If Petitioner's contention be true, that the PCR Court did not address this issue, this portion of Ground One of Petitioner's federal habeas petition would be procedurally barred because it was procedurally defaulted in state court.

Petitioner did not file a Rule 59 Motion to have the PCR Court address this issue. Therefore, if this issue was not addressed in the PCR Court's Order as Petitioner contends, this issue was procedurally defaulted in state court and could not be reviewed by the South Carolina Court of Appeals even though this issue was argued in the Johnson Petition. See Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)(failure to file a Rule 59 Motion to Alter or Amend to have the PCR Court address an issue not addressed in the Court's Order of Dismissal, results in waiver of the issue on appeal). If Petitioner's assertion is true, this issue would therefore be procedurally barred on habeas review. Wainwright v. Sykes, 433 U.S. 72, 87 (1977)(failure to preserve issue under state law results in procedural bar on habeas review); Coleman v. Thompson, 501 U.S. 722 (1991)(failure to properly appeal issue to state appellate court results in procedural bar on habeas review); Mathews v. Evatt, 105 F.3d 907 (4th Cir. 1997)(issue procedurally defaulted in state court is procedurally barred on habeas review).⁴

³Respondent does not agree with Petitioner's contention and believes the PCR did address the issues raised in Ground One and Two of this Petition. However, to the extent this Court finds Petitioner is correct, Petitioner's Grounds would be procedurally barred as explained above.

⁴Petitioner's PCR application contained no grounds for relief. At PCR, he was allowed to testify verbally to what his grounds were. His first claim was his plea was involuntary because counsel gave him bad advice. (See App. pp. 53-54). His second ground, which is relevant here, is that his attorney failed to properly investigate and advise him of a constructive defense in the event of trial. (See App. p. 54). However, when Petitioner explained this ground in detail, he did not mention a failure of counsel to advise of the results of his ballistics investigation, but the failure to advise of a constructive defense, i.e. no malice due to his alleged failure to intend to hit or kill anyone, the darkness of the club when he shot, and his intoxicated state. (See App. pp. 63, ll. 9- 65, ll. 9). In this discussion, Petitioner does discuss counsel's failure to investigate how the

Likewise, Petitioner's Ground Two would also be procedurally barred because Ground Two is merely an extension or restatement of Ground One. In Ground Two, Petitioner alleges counsel did not advise him of the results of the ballistics investigation as a constructed defense. As stated above, if the PCR Court did not address this issue, it was procedurally defaulted by Petitioner when he failed to file a Rule 59 Motion to have this issue addressed. Marlar. It could not be addressed by the South Carolina Court of Appeals even though argued in the Johnson Petition. The issue would be procedurally barred on habeas review. Wainwright; Coleman.

Cause and Prejudice

To the extent Petitioner is correct in his assertion as set forth above, Petitioner's grounds are procedurally barred absent a showing of cause and actual prejudice, or actual innocence. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Mathews v. Evatt, 105 F.3d 907 (4th Cir. 1997). The existence of cause must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel's or his efforts to comply with the State's procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). If Petitioner procedurally defaulted on his grounds, Petitioner expresses no particular cause for doing so. *Failure of his PCR counsel to preserve grounds for appeal cannot constitute cause.* Ellis v. Armenakis, 222 F.3d 627, 633 (9th Cir. 2000); Sidebottom

gun jammed, in light of his statement at the plea, and what type ammunition was in the gun, in light of his statements to counsel, but there is no discussion of a failure to advise of the results of his ballistics investigation. (See App. p. 63-64). There is an earlier discussion during his PCR testimony between collateral counsel and Petitioner regarding why he wanted the ballistics report. (See App. pp. 56-58). Petitioner said he needed to know the information contained therein to know if the .380 bullets came from a gun other than his. (See App. pp. 56-58). However, Respondent would submit this testimony could be considered in light of the earlier discussion with the PCR Court regarding discovery Petitioner requested and needed for the hearing. (See App. pp. 48-58). Regardless, Respondent would submit that based on the entirety of the testimony at the hearing, and the findings of the PCR Court's Order, the Court did address the issues Petitioner raises in the two grounds of his federal habeas petition.

v. Delo, 46 F.3d 744, 751 (8th Cir. 1995); Lowe-Bey v. Goose, 28 F.3d 816, 820 (8th Cir. 1994); Caswell v. Ryan, 953 F.2d 853, 862 (3rd Cir. 1992) *emphasis added*. Petitioner had a PCR hearing, and an appeal from the PCR in which to raise the issues he raises, and if he is correct in his attachment he failed to preserve the issues he now raises for habeas review by filing a Rule 59 Motion. As noted above, if Petitioner is correct as asserted in his attachment, Petitioner cannot establish cause and prejudice, because he abandoned opportunity to preserve these specific issues by failing to file a Rule 59 Motion.

In the alternative Petitioner must show a miscarriage of justice. In order to demonstrate a miscarriage of justice Petitioner must show he is actually innocent. Actual innocence is defined as factual innocence not legal innocence. Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604 (1998).

Petitioner cannot establish that the constitutional error he complains of probably resulted in the conviction of an innocent person. Schlup v. Delo, 513 U.S. 298, 327 (1995). In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." Id. A defendant convicted by a jury comes before the federal court with a "strong-and in the vast majority of cases conclusive- - presumption of guilt." Id. at 326 n.42. How much more so a defendant who pled guilty and admitted his guilt of the crimes charged. The record would make an assertion of actual innocence, not credible.

Petitioner admits he was involved in altercation inside the nightclub. Petitioner admits he went to his automobile and retrieved a 9mm pistol. Petitioner returned to the nightclub and re-entered the nightclub through a different doorway. Petitioner admitted he fired four shots into the crowded nightclub. The victims who were struck in the nightclub were shot in the middle-portion

of their bodies. Petitioner fled from the crime scene with the pistol he fired. Petitioner fled from the crime scene in his automobile. Petitioner was stopped shortly thereafter by the police. Police recovered the murder weapon from his vehicle. Ballistics tests confirmed the bullet from the deceased victim, and the bullet from the nightclub door were fired by Petitioner's gun. Ballistics also matched the shell casings found at the scene to Petitioner's gun. Petitioner admitted at his guilty plea that he committed the crimes to which he pled guilty. Petitioner cannot show actual innocence.

If Petitioner procedurally defaulted on these issues in state court, the procedural bar should be applied without exception. Murray, supra. Furthermore, actual innocence is not a claim but merely lifts the procedural bar, if established, and allows consideration of the habeas petition on the merits. Bousley v. United States, supra. Petitioner cannot establish actual innocence. The procedural bar should not be lifted if it is applicable.⁵

⁵Respondent would also note for the Court that while Petitioner raised a failure to investigate the ballistics and advise him of defenses claim at PCR, in his attachment to this habeas petition Petitioner raises new factual issues to support his grounds which were not raised or argued to the PCR Court. For example, under Ground Two, Petitioner argues a *witness statement* establishes that there was another shooter and this was not discussed with him. In Ground One and Two, Petitioner argues a bullet did not have blood or body tissue on it so it could not have struck a victim. Under Ground One, Petitioner also argues counsel never contacted the SLED Ballistics expert and talked to him. Under both grounds, Petitioner argues there were three fired shell casings and only two fired bullets making it impossible to prove that the missing bullet hit any victim. Petitioner also claims in Ground Two that there is no way to prove where each wound each victim received came from due to the ballistics in this case. In Ground One, Petitioner also argues or alleges some discrepancy in the marking of item 5 a .380 caliber shell casing as Item 9, the same as a 9mm bullet. While this Court may determine these factual issues are not procedurally barred pursuant to Kasi v. Angelone, 300 F.3d 487 (4th Cir. 2002)(variation in federal issue in federal litigation is not procedurally barred), Respondent would submit these specific issues are procedurally barred because they were not specifically raised to the PCR Court below.

THE MERITS

Standard of Review

The standard of review to be applied in habeas is "quite deferential to the rulings of state courts." Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001). Petitioner cannot prevail before this Court on the merits of this claim.

To prevail on an ineffective assistance of counsel claim, Petitioner must show (1) that his trial counsel's performance fell below an objective standard or reasonableness, and (2) that a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1985). Petitioner bears the burden of proving an error and prejudice in his ineffective assistance of counsel claim. Id. In the guilty plea setting, Petitioner must show his counsel's performance was deficient and that but for his counsel's alleged deficient performance, there is a reasonable likelihood that he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart. Petitioner cannot meet this burden under the record in this case.

He also bears the burden of showing he is entitled to habeas corpus relief. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975). To obtain habeas relief, Petitioner must show the relevant state court unreasonably applied federal law, as determined by the United States Supreme Court, or show by clear and convincing evidence that the relevant state court made "an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. Section 2254(d); Carey v. Musladin, 127 S.Ct. 649, 653-54 (2007). Here, Petitioner has shown neither. The PCR judge did not unreasonably apply clearly established federal law, as decided by the United States Supreme Court, nor has Petitioner shown by clear and convincing

evidence that its factual determinations were unreasonable in light of the facts or record before it.

To establish an unreasonable application of federal law, Petitioner must show more than "...an incorrect or erroneous application of federal law." Williams v. Taylor, 529 U.S. 362, 413 (2000). Thus, "a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be 'unreasonable' for habeas relief to be granted. This is a substantially higher threshold." Id. at 410. Petitioner has failed to overcome this substantially higher threshold.

The Lack of Merit of Each Ground

GROUND ONE: Did the PCR Court err in denying relief on trial counsel's failure to investigate?

- a. At the PCR hearing petitioner raised concerns about information contained in the Brady material, specifically the ballistics report.... In addition, trial counsel did not testify that he discussed the ballistics report with petitioner. Petitioner was insistent that trial counsel failed to properly investigate and relay this information to him. Exhibit B shows that trial counsel clearly failed to properly investigate. Petitioner maintains that because trial counsel failed to investigate and discuss with him the discrepancies shown in Exhibit A, he was not able to make an informed decision and was prejudiced from trial proceedings where a reasonable challenge to his questionable convictions should have been presented with the outcome clearly to be in his favor.

There is no merit to this ground. The PCR addressed Petitioner's claim that his trial counsel did not investigate the ballistics in this case and the possibility of a second shooter and advise him regarding possible defenses. (See App. p. 101, ll. 16-17). This included the investigation into the ballistics which necessarily involved trying to construct a defense of a 2nd shooter. (See App. pp. 98, 99, & 101). The PCR Court found trial counsel did properly investigate the ballistics in this case,

to the point of contacting the president of the company who manufactured the weapon used by Petitioner in the murder and ABWIKs. The Court had already recounted in an earlier portion of the Order summarizing counsel's testimony that counsel investigated the evidence that .380 and 9mm rounds were fired at the nightclub hoping to find evidence that there was a second responsible shooter. (See App. p. 99). In that portion of the Order, the Court had also noted that in addition to the different caliber ammunition used, there was some question about how and whether Petitioner fired enough shots to have caused all of the wounds inflicted. (See App. p. 99). The Court noted however that upon investigation by counsel, the evidence did not support the two shooter theory. (See App. p. 99). The Court had also noted earlier the gun's manufacturer had told counsel that a 9mm Highpoint would fire .380 rounds. (See App. p. 99). The Court noted additionally, that when Petitioner's gun was recovered there were both .380 and 9mm rounds in the magazine. (App. p. 99). The Court had also noted earlier that testified ballistics testing showed the brass found as well as the bullets recovered from the deceased victim came from Petitioner's gun. (App. p. 99).

When the PCR Court referred to the investigation counsel conducted in the later portion of the Order dealing with this particular ground, Respondent submits it was clearly referring back to its summary of the testimony in the record by trial counsel regarding the detail of his investigation. The PCR Court found Petitioner failed to prove deficient performance or prejudice with regard to this allegation.

The PCR Court's decision is entitled to deference under the AEDPA. Wilson v. Ozmint, 352 F.3d 847, 858-859 (4th Cir. 2003); Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001). Under 2254 (d) "...state court decisions are to be given the benefit of the doubt." Williams v. Ozmint, No. 3:05-1648-CMC, 2006 WL 1577265 (D.S.C. May 31, 2006) *reversed on other grounds* No. 06-16, 06-17

(4th Cir. July 2007)(quoting Woodford v. Viscotti, 537 U.S. 19, 24 (2002). Even if a state court fails to provide any rationale for its decision, the reviewing federal court must still apply the deferential standard of review mandated by Congress. Id. at *4 (quoting Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002). Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)).⁶

The PCR Court provided its rationale and it was reasonable and correct. Petitioner has failed to show the PCR Court unreasonably applied United States Supreme Court precedent in deciding this issue. Petitioner has also failed to show by clear and convincing evidence the PCR Court reached an unreasonable factual determination given the evidence and record before the PCR Court.

The record shows plea counsel did investigate the ballistics in this case. Counsel testified Petitioner admitted to him that after the initial altercation in the bar, he went outside retrieved a weapon, re-entered the bar through a different door, and fired several shots into the crowded nightclub. (App. p. 77). Because of the different caliber of brass that was found, the testimony of witnesses that varied regarding the number of shots they heard, and the number of wounds the victims received, counsel testified he investigated the ballistics in this case. (App. p. 75-88). Counsel testified he interviewed Tom Deeb, president of High Point Firearms, who informed him that Petitioner's gun could fire .380 and .9mm ammunition, the type of brass that was found. (App. p. 77). Counsel also testified, that if he was not mistaken, the discovery material showed that there were .380 as well as 9mm ammunition loaded in the magazine to Petitioner's pistol. (App. p. 77).

⁶In its Order of Dismissal, the PCR Court also stated that it had viewed the witnesses and judged their credibility accordingly. Respondent would submit based on the findings of the PCR Court, it implicitly found plea counsel's testimony was credible and Petitioner's was not. (See Order of Dismissal, App. pp. 96, 99). If so, this determination would be entitled to deference as well. Wilson v. Ozmint, 352 F.3d 847, 858-859(4th Cir. 2003); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). That decision is supported by the record.

Counsel also testified that the bullet from the victim Anthony Hemmingway's body and the fired brass that was found was forensically matched to Petitioner's gun. (App. p. 77). One of the records Petitioner has attached from the Myrtle Beach Police Department also shows some of the victims, at least two, had through and through gunshot wounds, providing a plausible explanation for the number of wounds vis a vis the number of shots fired by Petitioner. Two of the SLED documents Petitioner has attached to his petition show that the bullet that came from the deceased victim, Anthony Hemmingway, and a bullet taken from the front door of the nightclub were fired by Petitioner's gun. (See attached SLED Documents to Petitioner's habeas petition). Counsel testified that by the time the case was being called for trial, the State had firmed up the ballistics. (App. p. 79). The SLED Ballistics report attached by Respondent shows the fired shell casings and the two fired bullets came from Petitioner's gun. (See attached SLED Ballistics Report).⁷

Contrary to Petitioner's claim in this ground, counsel testified that each time he met with Petitioner he informed him of what he had discovered since the last time they talked. (App. p. 81, ll. 2-10). So it is clear from the record, counsel did advise Petitioner regarding the ballistics investigation and its results.⁸ Counsel also denied Petitioner's claim at PCR that he only met with

⁷Respondent would also point out to this Court that Petitioner makes several factual assertions in his attachment which are either not significant, relevant, or correct. Petitioner claims the fact that the fired bullet found on the floor did not contain blood or tissue means that it didn't strike any victim. Respondent would submit a bullet could pass through a human body without retaining any blood or tissue on it, especially if it struck an object after passing through the body. Petitioner also claims that because one bullet was never located this makes it impossible to prove it struck any of the victims. While this is true, it does not mean the bullet did not strike any of victims and pass through them. Furthermore, this is really irrelevant to the issue of Petitioner's guilt. The State did not have to prove which bullet hit which victim. And, the bullet from the deceased victim did match Petitioner's gun.

⁸It also appears from the record, Petitioner received a copy of the discovery evidence the prosecution had prior to his guilty plea. (See App. p. 69, ll. 11-24). Petitioner states in this

Petitioner for a total of twenty (20) minutes during his representation of Petitioner. (App. p. 81). Counsel testified, while he would not say he spent hours with Petitioner each time out at the jail talking to him, he talked long enough with Petitioner for Petitioner to understand what counsel had uncovered since the last time that they talked. (App. p. 81).

The PCR Court found and concluded Petitioner had failed to show counsel's investigation was inadequate or that his advice regarding potential defenses was inaccurate. (See App. p. 101). The PCR Court found counsel did investigate this case, going so far as to speak with the president of the gun's manufacturer. (See App. p. 101). The Court found that although Petitioner contended he did not mean to shoot anyone and had no malice toward the victims, the evidence was he fired several shots into a crowded nightclub causing injuries and a death. Furthermore, because he fired several shots into a crowded nightclub, the Court found evidence regarding the lighting where he fired his shots would not have been helpful to the defense. The Court found and concluded there was ample evidence to support Petitioner's guilty pleas and that counsel's performance was neither deficient nor prejudicial. The PCR Court's decision on this issue is fully supported by the record.

The record of the guilty plea proceedings also shows that counsel advised Petitioner regarding any potential defenses and the evidence in possession of the State. (App. p. 9). Petitioner informed the Court he was satisfied with his attorney, did not need any more time to talk with him, and his attorney had done everything that he wanted him to do to try to help him with his charges. (App. p. 8). When counsel informed the plea court that he had explained Petitioner's defenses to

portion of the PCR hearing that he received the State's evidence "when he was detained *at J. Rueben Long* but a family member has it at this time." (emphasis added). There is at least an inference from the record, given his answer and the words he used here, that he had a copy of the discovery from the State prior to his plea. (See App. p. 69, ll. 14-17). (See also App. p. 83).

him as well as the evidence in possession of the State, Petitioner did not disagree or challenge counsel's statement to the Court. (App. p. 9). In fact, Petitioner said nothing at all. (App. p. 9). After the Solicitor recited the facts, with only two exceptions, Petitioner did not contest the facts as set forth on the record by the Solicitor. (See App. pp. 9-16).⁹ Petitioner admitted he committed the crimes. (See App. pp. 15-16).

The plea transcript also shows that counsel had discussed with Petitioner the possibility that there were other shooters. (App. p. 26, ll. 15-16). The record shows Petitioner chose to plead guilty anyway. (App. pp. 1-33). Petitioner admitted to the plea court that he fired four times into the night club. (App. p. 31). Petitioner informed the court the reason the gun jammed was because his co-defendant reloaded the gun when he got in the getaway vehicle. (App. p. 32). Petitioner informed the trial court that one of the reasons he was pleading guilty was because he had given his life to the Lord, was a God-fearing man, and believed in justice and judgment. (App. p. 31).

Even under de novo review Petitioner cannot show deficient performance. Nor can Petitioner demonstrate prejudice under Hill v. Lockhart. Petitioner cannot show there is a reasonable probability that but for counsel's *alleged* deficient performance, there is a reasonable probability he would not have pled guilty and would have proceeded to trial. Hill v. Lockhart.

Petitioner was charged with murder and four counts of ABWIK. Petitioner was facing life in prison without parole on the charge of murder, and twenty (20) years each on each count of ABWIK. Petitioner was facing a potential sentence of life without parole plus eighty (80) years.

⁹Petitioner stated he had two exceptions to the facts as set forth by the Solicitor. His counsel explained to the Court the two exceptions. One was that the two men that initially assaulted Petitioner were not ejected from the club and the second was that Petitioner denied shooting at a bouncer after the initial shooting. As further justification for this second exception, counsel stated the gun jammed inside the club. (See App. pp. 9-16).

Given the facts of this case, in all likelihood, had Petitioner proceeded to trial, he would have been sentenced to life without the possibility of parole and consecutive sentences.

Petitioner admits he was at the night club before the shootings and was involved in an altercation with two individuals. As a result of this altercation, Petitioner was escorted from the club. Petitioner did not leave the club premises but went to his car and retrieved a 9mm handgun. Petitioner walked back to the club, did not enter the front door but re-entered the club at a back exit and fired into the crowded nightclub. Petitioner struck the murder victim Anthony Hemmingway, a female victim who was paralyzed, and another victim. Petitioner attempted to flee but was pursued by a bouncer or club security person who Petitioner shot at and wounded slightly. Petitioner then fled the scene in a motor vehicle. Petitioner was stopped by police just a few blocks from the crime scene. Petitioner was arrested shortly after the murder and other shootings in possession of the murder weapon. The weapon contained 9mm and 380 caliber ammunition. The bullet from Mr. Hemmingway's body forensically matched Petitioner's weapon. Another bullet and casings from the crimes scene, forensically matched Petitioner's gun. Because Petitioner was intoxicated, Petitioner was not questioned by police that night.

The evidence of Petitioner's guilt of murder and ABWIK was overwhelming. Under South Carolina law, a specific intent to kill is not required to prove murder. Malice aforethought is all that is required. *See State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996)(a specific intent is not required to commit murder), *citing State v. Johnson*, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987)(Supreme Court has upheld numerous murder convictions without a specific intent to murder, wrongful intent to injure another may give rise to finding of malice); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957)(malice signifies a general malignant recklessness of the lives and safety of others);

and State v. Alexander, 30 S.C. 74, 8 S.E. 440 (1889)(murder properly submitted to jury where defendant intended to assault victim which resulted in victim's death). Malice can be inferred from the circumstances of the crime including the intent to do serious bodily harm, or conduct of such gross recklessness as to indicate a depraved or wicked heart. State v. Mouzon, 231 S.C. at 675-76, 99 S.E.2d at , *quoting* State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 699, 671 (1941); State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991). Those circumstances are present in this case. State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). *See also* State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991), *cert denied* 502 U.S. 1038 (1992), (*citing* State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946)(malice is "the doing of a wrongful act intentionally and without just cause or excuse"). Malice "may be proved by previous threats, former grudges, hatred and ill-will, or it may be inferred from facts attending the homicide, showing a cruel and vindictive temper, a wantonness in the destruction of human life, and a heart regardless of social duty and fatally bent on mischief." State v. Hammond, 36 S.C.L. (5 Strob.) 91, 1850 WL 2840 (S.C. App. 1850).

Additionally, intoxication is not a defense to the crime of murder. State v. Crocker, 272 S.C. 344, 251 S.E.2d 764 (1979); State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977). It is not a defense to the crime of murder that one was so intoxicated that he could not form malice. State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983).

Furthermore, transferred intent in an alleged voluntary manslaughter situation where a third party is killed is an unsettled question in South Carolina at this time. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)(expressly refusing to decide issue); State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007)(plurality of the Court held transferred intent was not applicable to voluntary manslaughter cases because the overt act that produces the sudden heat of passion must come from

the victim, while the dissent held when the defendant kills an unintended victim upon sufficient legal provocation committed by a third party, the doctrine of transferred intent applies, entitling the defendant to voluntary manslaughter charge). Furthermore, Petitioner admitted that he was not necessarily firing at the people who assaulted him earlier, but was shooting over the head of the occupants of the nightclub to scare them because he was frustrated. (App. p. 58-59, 65-66).

The State's evidence showed Petitioner fired into the crowded nightclub because he was angry at the two individuals who assaulted him earlier or at the bouncers who ejected him. The doctrine of transferred intent would apply in this situation to the victim's who were hit. Furthermore, the facts of the case show there was a sufficient cooling off period such that the jury could and probably would have found murder. See State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)(finding defendant had a sufficient time period to cool where fight occurred between victim and the defendant in the appellant's home and the defendant's actions in going next door to get a gun and returning to fatally shoot the victim from appellant's yard indicated "cool reflection"); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(finding as a matter of law defendant's actions in obtaining a gun, going to his room and loading it, waiting, and then going to his grandfather's room and shooting his grandfather and grandmother showed he did not act in heat of passion entitling him to a voluntary manslaughter charge), referencing State v. Walker, 324 S.C. 257, 261, 478 S.E.2d 280, 281-82 (1996)(finding the defendant demonstrated cool reflection through his actions between the alleged provocation and the killing), and State v. Byrd, 323 S.C. 319, 322-23, 474 S.E.2d 430, 432 (1996)(holding that the defendant's actions between the alleged provocation and killing did not

support a finding of sudden heat of passion) *other citation omitted*.¹⁰ (See also attached witness' statements). (See also App. pp. 81-82, 84, 119-24).

Finally, Petitioner's claim that he was just shooting over the head of the victims to scare them is not credible. Anthony Hemingway was hit in the chest. Another victim was paralyzed from the waist down, and another victim was hit in the stomach. Another victim was apparently hit in the buttocks. The physical evidence regarding the victim's injuries shows Petitioner was shooting to wound or kill, not over their heads.

ABWIK requires the same elements as murder, only that the victim survived the assault. State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000); State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Malice was clearly shown in Petitioner's actions in firing a loaded firearm into a crowded nightclub. And, there is no question, the victims were wounded, constituting an assault and battery. Had the surviving victims died, there deaths would have been murder as well. Id.

Given the evidence in this case and the criminal law of South Carolina, Petitioner has failed to show there is a reasonable probability that but for his counsel's alleged deficient performance, he would not have pled guilty and would have proceeded to trial. Hill v. Lockhart. Furthermore, the results of counsel's ballistics investigation were that Petitioner's gun fired the fatal shot that killed Anthony Hemmingway and the bullets and casings that were analyzed came from Petitioner's gun. Petitioner cannot show prejudice under this record. Hill v. Lockhart. Even if Petitioner's allegation were true, that counsel did not advise him of the results of the ballistics test, the results of the

¹⁰ But see Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990); see also State v. Knoten, *supra*, citing Carter, wherein the dissent distinguished Carter, Burnett, J. dissenting along with Toal, C.J. Carter v. State is also distinguishable from this case because in Carter the victim was the person who had slapped the defendant. See also State v. Holland, *supra*, distinguishing Carter v. State.

ballistics investigation would only have helped to confirm Petitioner's decision to plead guilty. This ground must be dismissed with prejudice.

GROUND TWO: Did the PCR Court err in denying relief on trial counsel's failure to advise client of defense?

- a. ... Petitioner's convictions could have been subjected to a reasonable challenge in favor of the defense due to there being no physical evidence.... Although trial counsel admitted that he was aware of this dilemma he did not testify that he discussed this with petitioner in the form of a constructed defense. Thus, petitioner's constitutional right to effective assistance of counsel has been violated by a disregard of the indispensable element of the effective performance of trial counsel's responsibilities....

There is no merit to this ground. Petitioner's second allegation centers around the same investigation and defense as just discussed in Ground One above. Petitioner asserts counsel did not advise him of a constructive defense regarding a possible second shooter arising from counsel's investigation of the ballistics.¹¹ The PCR Court ruled on this issue and denied Petitioner's claim. The PCR Court found Petitioner had not shown deficient performance or prejudice. The PCR Court's determination on this issue is entitled to deference. Wilson; Burch. The PCR Court's determination of this issue is supported by the record.

Counsel testified he investigated the ballistics in this case because of the possibility of another shooter. Counsel testified that investigation did not pan out. While counsel testified there was still *a possibility* of another shooter because of the number of gunshots witnesses heard, and the

¹¹Petitioner also alleges in his attachment to this petitioner, that he was never advised of a witness statement regarding an alleged 2nd shooter. As previously stated, this issue was not raised or argued at the PCR hearing. Therefore, it was waived and abandoned in state court. Furthermore, the record shows trial counsel testified he sat down and actually discussed the discovery materials with Petitioner. (App. pp. 82, ln. 25 - 83, ln. 8). He also kept Petitioner advised of the results of his investigation and talked with him long enough for Petitioner to understand what counsel had come to know since their last meeting. (App. p. 81).

number of wounds to the victims, all of the ballistic evidence found at the scene came back to Petitioner's gun. This is borne out by the SLED records Petitioner has attached and the official SLED Ballistics Report attached by Respondent. (See attached SLED Ballistics Report). Importantly, the only shell casings found at the scene, and a bullet from the front door of the nightclub forensically matched Petitioner's gun. Critically, the bullet taken from the murder victim's body was forensically determined to have come from Petitioner's gun. And, according to counsel's testimony, Petitioner's gun was found to contain unfired 9mm and 380 ammunition just like the fired shell casings found at the scene. There was forensic evidence tying Petitioner to the crime scene and murder. (See attached SLED Ballistics Report). The forensic evidence tied Petitioner directly to the crime scene, the murder, and the ABWIKs at the nightclub.¹²

Furthermore, counsel testified that he kept Petitioner apprised of his investigation of the case when he visited him at the jail prior to trial. (App. p. 81). Counsel also informed the plea court at the guilty plea, that he had informed Petitioner of the evidence the State had against him. (App. p. 9). Therefore, the credible evidence is that Petitioner knew of incriminating nature of this

¹²Petitioner also asserts in his attachment that counsel was ineffective for failing to interview the SLED Ballistics expert. While this issue was not raised to the PCR Court, and was therefore waived and abandoned below, counsel did not need to interview the SLED expert given the facts of this case. Petitioner admitted firing four shots into the club. Petitioner was arrested in possession of a 9mm pistol. According to counsel's testimony, the pistol magazine contained both 9mm and 380 ammunition. The SLED expert's report clearly shows all recovered fired bullets and shell casings forensically matched Petitioner's gun. Counsel spoke with the president of the company that manufactured the gun who informed counsel the gun could fire both .380 and 9mm ammunition. There is no merit to this allegation. Furthermore, Petitioner has not shown how he was prejudiced by counsel's failure to interview the SLED expert. To the extent this Court considers this issue, it must be dismissed with prejudice.

evidence.¹³ Petitioner has failed to establish deficient performance. Strickland; Hill.

Furthermore, Petitioner cannot show prejudice in this regard. Hill v. Lockhart. Even assuming Petitioner's contention that counsel did not inform Petitioner of the results of the ballistics investigation as a constructed defense, which is not borne out by the credible evidence, Petitioner cannot show that if counsel had informed him of the results of this investigation as a constructed defense he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart.

The results of the ballistics investigation showed that all physical evidence at the scene pointed to Petitioner as the only shooter. Petitioner was arrested a few blocks from the crime scene just minutes after the murder and ABWIKs. Petitioner was in possession of the murder weapon upon his arrest.

As previously stated, Petitioner was facing life without parole plus eighty (80) years on the charges if convicted at trial. The State was prepared to proceed with Petitioner's trial the morning of his guilty plea. Petitioner's contention that the crime should be voluntary manslaughter, or that he did not intend to wound or kill the victims, is not borne out by the facts of how the incident happened or by the physical evidence.

The trial judge had assured plea counsel and the prosecutor *in camera* prior to the trial that if Petitioner pled guilty, his sentence would not be a life sentence but between forty (40) and forty (45) years. After being informed of these *in camera* discussions, Petitioner decided that he did not

¹³As stated under Ground One, given the allegations Petitioner made at the PCR hearing, trial counsel's testimony, and the Court's findings in the Order, Respondent submits the PCR Court implicitly found trial counsel's testimony credible and Petitioner's was not. If so, the Court's credibility determination is also entitled to deference by this Court. Wilson v. Ozmint; Drayton v. Evatt. However, even under *de novo* review, there is no merit to this ground given this record.

want to go to trial and risk a life sentence on the murder charge and consecutive sentences on the ABWIK charges, but instead wanted to plead guilty. Given the overwhelming evidence Petitioner was guilty of murder and ABWIK, the potential sentences he was facing if convicted by the jury, and the procedural posture of the case at the time of his plea, Petitioner cannot show that but for counsel's alleged deficient performance, he would not have pled guilty and would have proceeded on going to trial. Hill. This ground must be dismissed with prejudice.

CONCLUSION

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). Petitioner has not done so. The plea transcript is clear and so are Petitioner's statements therein. Petitioner received a benefit for himself by pleading guilty, avoiding a possible life sentence and consecutive sentences, and he has not shown anything which would overcome the "strong presumption of veracity" carried by his statements at the guilty plea hearing of a voluntary decision to plead. *See* United States v. Morrow, 914 F.2d 608 (4th Cir. 1990). This petition should be dismissed with prejudice.

Respectfully Submitted,

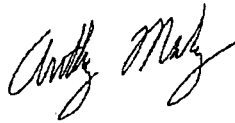
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By: s/ Anthony Mabry
ATTORNEYS FOR RESPONDENTS

December 9, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

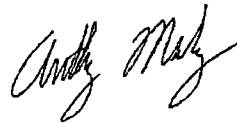
Ardon P. Cato, II, #316535,	)	C/A No. 4:09-2110-CMC-TER
	)	
Petitioner,	)	
	)	
v.	)	
	)	
Anthony J. Padula, Warden,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, Anthony Mabry, do hereby certify that I have this date served the Respondent's
Return and Memorandum of Law in Support of Motion for Summary Judgment in the foregoing
action on the Petitioner by depositing one copy of the same in the United States mail, and
addressed as follows:

Ardon P. Cato, II, #316535
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

This 9th day of December, 2009.



s/Anthony Mabry

09-3926

4:09-cv-02110-CMC

Date Filed 07/26/10

Entry Number 27

ATTORNEY GENERAL'S OFFICE
RECEIVED Page 1 of 14 7-26-10

ADMINISTRATIVE INSTRUCTIONS

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PEN RECORDS _____ CLERK RECORDS

OTHER: _____

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Ardon P. Cato, II, #316535,

Petitioner,

v.

Anthony J. Padula, Warden,

Respondent.

C/A No. 4:09-2110-CMC-TER

REPORT AND RECOMMENDATION

Petitioner, Ardon P. Cato ("Petitioner/Cato"), is an inmate in the custody of the South Carolina Department of Corrections (SCDC). Petitioner, appearing *pro se*, filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254¹ on August 13, 2009. Respondent filed a motion for summary judgment on December 9, 2009, along with supporting memorandum. The undersigned issued an order filed December 15, 2009, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. Petitioner filed a response.

I. PROCEDURAL HISTORY

There has been no significant opposition filed as to the procedural history as set out by the Respondent. Therefore, the undisputed procedural history as set out in Respondent's memorandum will be discussed below.

¹ This habeas corpus case was automatically referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02, DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the court.

Petitioner is currently incarcerated at the Lee Correctional Institution pursuant to orders of commitment of the Clerk of Court for Horry County, S.C. Petitioner was indicted by the Horry County Grand Jury for numerous charges including murder (05-GS-26-3412), assault and battery with intent to kill (05-GS-26-3409), and assault and battery with intent to kill (ABWIK)(05-GS-26-3410). Petitioner was represented by retained counsel J.M. "Buddy" Long, III. On July 17, 2006, the date of Petitioner's trial on the above charges, Petitioner pleaded guilty to murder, ABWIK, and ABWIK. (The above indictments). Petitioner pleaded guilty before the Honorable Stephen H. John, Circuit Court Judge. The State agreed to dismiss two other indictments for ABWIK in exchange for the plea. There was no recommendation by the State as to a sentence. Judge John sentenced Petitioner to forty-two (42) years on the murder charge and twenty (20) years each on the ABWIK charges to run concurrent with the murder charge. Petitioner did not appeal his convictions or sentences.

Petitioner filed a PCR application on September 6, 2006. (2006-CP-26-4399). In his original application, Petitioner stated no grounds. Respondent filed its Return on November 15, 2006. At his PCR hearing, Petitioner was represented by Paul Archer, Esq. An evidentiary hearing into the matter was convened on April 3, 2007, at the Horry County Courthouse before the Honorable Paula H. Thomas, Circuit Court Judge ("the PCR Court"). Petitioner moved to amend his PCR application at the PCR evidentiary hearing. At the evidentiary hearing, Petitioner asserted claims of ineffective assistance of counsel. Petitioner claimed counsel gave him erroneous advice, counsel conducted an inadequate investigation and gave him erroneous advice regarding a defense, counsel did not seek a plea bargain to voluntary manslaughter, and counsel breached his duty of loyalty and labored under a conflict of interest. On May 29, 2007, Judge Thomas issued a written Order of Dismissal

dismissing all of Petitioner's claims of ineffective assistance of counsel with prejudice. (See Order of Dismissal App. pp. 95-103). The Order of Dismissal was filed June 4, 2007.

Petitioner appealed the denial of his application for post-conviction relief to the South Carolina Supreme Court by way of a Johnson Petition for Writ of Certiorari. Petitioner was represented in the appeal by M. Celia Robinson, Appellate Defender, of the S.C. Commission on Indigent Defense/Division of Appellate Defense. In the Johnson Petition, Petitioner raised the following issue:

Did the PCR judge err in denying relief despite trial counsel's providing ineffective assistance of counsel which affected and prejudiced the outcome for petitioner?

In the Johnson Petition, Petitioner argued counsel never advised him of the results of his ballistics investigation. Ms. Robinson, Petitioner's collateral appellate counsel, certified the appeal was without merit. The case was transferred to the South Carolina Court of Appeals by Order of the South Carolina Supreme Court. On May 28, 2009, the South Carolina Court of Appeals denied the petition for certiorari and granted appellate counsel's request to withdraw. The Remittitur was issued on June 15, 2009. Petitioner filed his habeas petition on August 13, 2009.

II. FEDERAL HABEAS GROUNDS

GROUND ONE: Did the PCR Court err in denying relief on trial counsel's failure to investigate?

- a. At the PCR hearing petitioner raised concerns about information contained in the Brady material, specifically the ballistics report . . . [T]rial counsel did not testify that he discussed the ballistics report with petitioner. Petitioner was insistent that trial counsel failed to properly investigate and relay this information to him. Exhibit (B) shows that trial counsel clearly failed to properly investigate. Petitioner maintains that because trial counsel failed to investigate and discuss with him the discrepancies shown in Exhibit (A), he

was not able to make an informed decision and was prejudiced from trial proceedings where a reasonable challenge to his questionable convictions should have been presented with the outcome clearly to be in his favor.

GROUND TWO: Did the PCR Court err in denying relief on trial counsel's failure to advise client of defense?

- a. At the PCR hearing, petitioner raised concerns about information contained in the Brady material . . . Trial counsel admitted at the PCR hearing that the number of wounds received by the victim[s] versus the number of shell casings found, inferring the possibility of another shooter, was a defense. . . . If they had been paired correctly that would have left one spent .380 shell casing without a fired bullet that was recovered making it impossible to prove that it struck any of the victims. Petitioner's convictions therefore become questionable . . . Although trial counsel admitted that he was aware of this dilemma he did not testify that he discussed this with petitioner in the form of a constructed defense. Thus, petitioner's constitutional right to effective assistance of counsel has been violated by a disregard of the indispensable element of the effective performance of trial counsel's responsibilities, which is to act independently of the prosecution and oppose it in adversary litigation. Petitioner established that he was prejudiced by counsel's ineffective representation through his testimony that, but for counsel's failure to advise him of a constructed defense, he would have insisted on proceeding to trial to challenge his questionable convictions, with the outcome clearly to be in his favor. Moreover Exhibit (D) details that a witness gave police the description of another shooter who does not resemble petitioner, and who left the club from a different exit (described as being at the back of the business), than where petitioner was alleged to have been . . . Counsel entirely failed to subject the prosecutions case to a meaningful adversarial challenge, which is a denial of petitioner's [S]ixth [A]mendment rights. . . .

(Petition).

III. SUMMARY JUDGMENT

On December 9, 2009, the Respondent filed a return and memorandum of law in support of their motion for summary judgment. Petitioner filed responses to the motion.

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972),

and Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Department of Social Services, 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists. If none can be shown, the motion should be granted. Fed. R. Civ. P. 56(c).

The movant has the burden of proving that a judgment on the pleadings is appropriate. Once the moving party makes this showing, however, the opposing party must respond to the motion with "specific facts showing that there is a genuine issue for trial." The opposing party may not rest on the mere assertions contained in the pleadings. Fed. R. Civ. P. 56(e) and Celotex v. Catrett, 477 U.S. 317 (1986).

The Federal Rules of Civil Procedure encourage the entry of summary judgment where both parties have had ample opportunity to explore the merits of their cases and examination of the case makes it clear that one party has failed to establish the existence of an essential element in the case, on which that party will bear the burden of proof at trial. See Fed. R. Civ. P. 56(c). Where the movant can show a complete failure of proof concerning an essential element of the non-moving party's case, all other facts become immaterial because there can be "no genuine issue of material fact." In the Celotex case, the defendants are "entitled to judgment as a matter of law" under Rule 56(c) because the Petitioner has failed to make a sufficient showing on essential elements of his case with respect to which he has the burden of proof. Celotex, 477 U.S. at 322-323.

IV. STANDARD OF REVIEW

Since Catoe filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. Lindh v. Murphy, 117 S. Ct. 2059 (1997); Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998). That statute now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

To a large extent, the amendment of § 2254 shifts the focus of habeas review to the state court application of Supreme Court law. See O'Brien v. DuBois, 145 F.3d 16 (1st Cir. 1998) ("the AEDPA amendments to section 2254 exalt the role that a state court's decision plays in a habeas proceeding by specifically directing the habeas court to make the state court decision the cynosure of federal review."). Further, the facts determined by the state court to which this standard is applied are presumed to be correct unless rebutted by the Petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The United States Supreme Court has addressed procedure under § 2254(d). See Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000). In considering a state court's interpretation of federal law, this court must separately analyze the "contrary to" and "unreasonable application" phrases of § 2254(d)(1).

A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts

the governing law set forth in [Supreme Court] cases . . . A state- court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Court's] precedent.

[A] state-court decision involves an unreasonable application of [the Supreme] Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of [the] Court's precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 1519-20. Ultimately, a federal habeas court must determine whether "the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521.

The AEDPA became effective on April 24, 1996. The AEDPA substantially modified procedures for consideration of habeas corpus petitions of state inmates in the federal courts. One of those changes was the amendment of 28 U.S.C. § 2244 to establish a one-year statute of limitations for filing habeas petitions.

Respondent asserts that Petitioner is not in violation of the AEDPA statute of limitations.

V. MERITS

GROUND ONE and GROUND TWO

As Grounds One and Two both pertain to the same investigation and defense, they will be addressed together. As set out above, in Ground One, Petitioner asserts as follows:

Did the PCR Court err in denying relief on trial counsel's failure to investigate?²

² Respondent argues that even though Petitioner contends that a portion of Ground One of his federal habeas petition was not ruled on by the PCR court, Respondent does not agree and

In Ground Two, Petitioner raises the following issue:

Did the PCR Court err in denying relief on trial counsel's failure to advise client of defense?

Respondent argues there is no merit to this ground because the PCR addressed the claim and found that trial counsel did investigate the ballistics in this case and the possibility of a second shooter and advised Petitioner regarding these possible defenses. Petitioner has failed to show the PCR Court reached an unreasonable determination given the evidence and record before the PCR Court.

When presented with an application for habeas relief, the first inquiry by the court is to determine whether the claim raised in the petition was "adjudicated on the merits" by the state court. 28 U.S.C.A. §2254(d). If the claim was properly presented to the state court and the state court adjudicated it, the deferential standard of review set forth in §2254(d) applies and federal habeas corpus relief may not be granted unless the relevant state-court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Id.* § 2254(d)(1),(2); see Williams v. Taylor, 529 U.S. at 398.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to

believes the PCR did address the issues raised in Ground One and Two of the Petition. Further, if that portion of Ground One-whether trial counsel ever explained his investigation or the results of this ballistics investigation to Petitioner-was not ruled upon at PCR it would be procedurally barred. The undersigned finds that the PCR did rule on the issues raised in Ground One and will be addressed on the merits below.

effective assistance of counsel in a criminal prosecution. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). In the case of Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth two factors that must be considered in evaluating claims for ineffective assistance of counsel. A Petitioner must first show that his counsel committed error. If an error can be shown, the court must consider whether the commission of an error resulted in prejudice to the defendant.

To meet the first requirement, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." Strickland, at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985) (quoting Strickland, reversed on other grounds, 476 U.S. 28 (1986)). In meeting the second prong of the inquiry, a complaining defendant must show that he was prejudiced before being entitled to reversal. Strickland requires that:

[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, at 694.

The court further held at page 695 that:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. (Emphasis added.)

In Lockhart v. Fretwell, 506 U.S. 364 (1993), the Supreme Court clarified its definition of prejudice quoted above, stating that "an analysis focusing solely on mere outcome determination .

... is defective.” Instead, an appropriate analysis of prejudice should consider “whether the result of the proceeding was fundamentally unfair or unreliable.” Therefore, a court analyzing the prejudice prong should not “set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error.” See Williams v. Taylor, Nos. 98-14, 98-16, 1998 WL 883336 (4th Cir. Va. Dec. 18, 1998) (quoting Lockhart, at 369-70).

A review of the PCR court’s order of dismissal reveals the PCR Judge found as follows:

Applicant failed to raise any allegations or grounds for relief in his initial application. During the PCR hearing, this Court required him to clearly state the grounds on which he wished to proceed and warned him all other grounds would be deemed abandoned. The Applicant announced he wished to proceed on the ineffective assistance of counsel grounds discussed below.

...

Applicant’s criminal convictions arise from a nightclub incident in which several people were shot, including Anthony Hemingway, who was killed, and Elisa Nahhrum, who was paralyzed. Although Applicant takes issue with some details, it is undisputed that he left the nightclub following an altercation with other individuals, retrieved a gun from a car outside, returned, opened fire into the nightclub, and then drove away from the premises. It is also undisputed that none of the persons shot were those with which Applicant had the earlier altercation. (Plea Tr. P. 8, line 12–p. 12, line 4).

During Applicant’s guilty plea, the court advised Applicant of the sentencing ranges for the crimes he was pleading guilty to, explained the offenses are classified as violent and most serious, and that he was pleading without any sentencing negotiations or recommendations from the State. (Plea tr. P. 3, line 11–p. 5, line 1). Applicant told the court he wished to enter guilty pleas, that he understood what he was doing and the constitutional rights he was waiving, that he was pleading guilty voluntarily, that he was pleading guilty because he was guilty, and that he was satisfied with his attorney. (Plea tr. P. 5, line 2–p. 7, line 19).

...

Applicant testified he hired plea counsel because counsel explained the law of voluntary manslaughter to him, but counsel gave him bad advice, rendering his guilty plea involuntary. Applicant complains plea counsel only met with him four times for a total of 20 minutes. Applicant also complains there were .380 rounds and 9

millimeter rounds fired at the nightclub and ballistics might have shown the .380 rounds did not come from his 9 millimeter gun, demonstrating there must have been another shooter. Applicant contends he was a victim that night, explaining that one man swung at him twice. He believes the evidence showed he committed voluntary manslaughter rather than murder. He also testified he told plea counsel that when he fired shots into the club, he fired up high so as to frighten rather than hurt people. He admitted to firing four shots into the club. He asserts he was more frustrated than angry and came back to the club within 30 to 45 seconds after leaving. Counsel pressured Applicant to plead guilty even though applicant did not think pleading guilty to murder was in his best interest. Finally Applicant alleged that when he arrived at the courthouse on the day of his plea, he had not reached a decision of whether to go to trial or attempt plea negotiations, and that he pled guilty without a plea deal.

(Tr. 96-99).

Further, the PCR court found that counsel testified that he investigated the evidence that .380 and 9 mm rounds were fired at the nightclub hoping to find evidence that there was a second responsible shooter. (Order of Dismissal, tr. 99). Counsel testified that in addition to the different caliber ammunition used, there was some question about whether Applicant fired enough shots to have caused all of the wounds inflicted. (Id.). However, upon investigation, Counsel testified that the evidence did not support the two-shooter theory. (Id.). Counsel talked with the president of the gun's manufacturer (Highpoint) who told him it was a little known fact that a 9 mm Highpoint would fire .380 rounds. (Id.). Counsel also testified that when Applicant's gun was recovered there were both .380 and 9mm rounds in the magazine. (Id.). Moreover, ballistics showed all of the brass found as well as the bullet recovered from Anthony Hemingway's body came from Applicant's gun. (Id.).

The PCR Court further found the following:

Counsel testified he explained to Applicant that even if he intended to shoot at the ceiling or over people's heads, he would still [be] responsible for the injuries and death suffered because of the risk of ricochet. Trial counsel thought the evidence of Applicant leaving the club, retrieving a gun, and returning would be sufficient for the

State to prove a cooling off period, making voluntary manslaughter verdict unlikely. Counsel admitted both he and Applicant were under pressure at the time of Applicants pleas as the State had its ballistics evidence firmed up, would no longer recommend a sentence if Applicant pled guilty, and was ready to go to trial. Concerned about the lack of a sentencing recommendation, counsel spoke with the plea judge and the prosecutor in chambers, and the plea judge stated sentence would be in the range of 40-45 years if Applicant plead guilty. After counsel advised Applicant of this, Applicant elected to plead guilty.

Applicant has failed to demonstrate that counsel gave him bad advice or that his plea was involuntary. There was ample evidence to support the plea to murder, and counsel's advice regarding Applicant's concerns and theories was sound. Applicant asserts he was pressured to plead guilty, but the transcript shows he pleaded guilty freely and voluntarily and that his plea was not the result of promises, threats, or force. (Plea tr. P. 6, lines 12-24). The Court finds he knew what he was pleading to and what he was doing and made the decision to plead guilty after counsel advised him of the sentencing range the plea judge said he would consider. This allegation is denied and dismissed as it is without merit.

(Tr. 99-100).

As to Petitioner's claim regarding inadequate investigation and advice, the PCR court found the following:

This Court finds Applicant has failed to show counsel's investigation was inadequate or that his advice regarding potential defenses was inaccurate. Counsel did investigate this case, going so far as to speak with the president of the gun's manufacturer. Although Applicant contends he did not mean to shoot anyone and had no malice toward the victims, the evidence is he fired several shots into a crowded nightclub causing injuries and a death. Furthermore, because he fired several shots into a crowded nightclub, this Court finds evidence regarding the lighting where he fired his shots would not have been helpful to the defense. This court finds there was ample evidence to support Applicant's guilty pleas and that counsel's performance was neither deficient nor prejudicial. Accordingly[,] this allegation is denied and dismissed.

Applicant alleges counsel was ineffective for failing to negotiate a plea to voluntary manslaughter. Trial counsel testified the State was never willing to allow the Applicant to plead guilty to less than murder and that Applicant rejected the State's forty (40)-year plea offer because at the time he still was unwilling to plead guilty to murder. Trial counsel made reasonable efforts to secure a favorable plea offer for Applicant and had no power to compel the State to accept voluntary manslaughter plea. Therefore, this allegation is denied and dismissed.

(Tr. 101).

The undersigned has reviewed the record and concludes that Respondent's motion for summary judgment should be granted on this issue. The record supports the PCR judge's finding that the Petitioner has not demonstrated that his attorney's performance was deficient by showing that his representation fell below an objective standard of reasonableness and, further, he has not shown that the attorney's performance actually prejudiced him.³ As the PCR court's rejection of the ineffective assistance of counsel ground for relief did not result in an unreasonable application of Hill and Strickland and was not based upon an unreasonable determination of facts in light of the state court record, this ground is without merit. The state court decisions did not involve a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2); Williams, supra. Thus, the undersigned recommends that the Respondents' motion for summary judgment be granted on this issue.⁴

³ During the plea, Petitioner stated to the court that "[w]hen I was going through the door [of the nightclub] the bouncer stopped me from going through the door, and I raised my hand up as high as I could, over-to shoot over everyone. My intentions were to scare the guys, to kind of let them know, okay, you hit the wrong person, you know. But I was intending to shoot over everyone, maybe hitting a wall or the ceiling. . ." (Plea tr. 30). Petitioner further testified during the plea that "[i]t was very stupid to shoot in a club full of people. I thought for sure no one got hit, because I raised my hand up as high as I could, and I only shot four times. I shot four shots. I wasn't intending to shoot the whole round." (Tr. 31).

⁴ Even assuming, *arguendo*, that Petitioner's counsel was found to be ineffective with respect to these issues, Petitioner has not shown prejudice. Petitioner failed to show that he would not have pleaded guilty and would have insisted on going to trial. Petitioner entered into a plea agreement whereby the state agreed to dismiss two other indictments for ABWIK in exchange for the plea. Thus, Petitioner entered a plea and received 42 years on the murder

As the PCR court's rejection of the ineffective assistance of counsel ground for relief did not result in an unreasonable application of Hill and Strickland and was not based upon an unreasonable determination of facts in light of the state court record, this ground is without merit. The state court decisions did not involve a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2); Williams, supra. Thus, the undersigned recommends that the Respondent's motion for summary judgment be granted on this issue.

VI. CONCLUSION

Based on the foregoing, it is recommended that Respondent's motion for summary judgment (document #17) be GRANTED and Petitioner's petition for Writ of Habeas Corpus be denied, and this Petition dismissed.

Respectfully submitted,

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

July 26, 2010
Florence, South Carolina

The parties' attention is directed to the important notice on the next page.

charge and twenty (20) years on the ABWIK charges to run concurrent with the murder charge. The court questioned the Petitioner if he understood that the potential sentence regarding murder could be anywhere from a "minimum of thirty years up to life in prison" and the potential sentence for ABWIK "is zero to twenty years." (Tr. 4-5). Petitioner stated that he understood. Therefore, Petitioner was facing life in prison plus eighty years on all the charges if convicted at trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Ardon P. Cato, II, #316535,	)	C/A NO. 4:09-2110-CMC-TER
	)	
Petitioner,	)	
	)	OPINION and ORDER
v.	)	
	)	
Anthony J. Padula, Warden,	)	
	)	
Respondent.	)	

This matter is before the court on Petitioner's *pro se* application for writ of habeas corpus, filed in this court pursuant to 28 U.S.C. § 2254.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(c), DSC, this matter was referred to United States Magistrate Judge Thomas E. Rogers, III, for pre-trial proceedings and a Report and Recommendation ("Report"). On July 26, 2010, the Magistrate Judge issued a Report recommending that Respondent's motion for summary judgment be granted and this matter dismissed with prejudice. The Magistrate Judge advised Petitioner of the procedures and requirements for filing objections to the Report and the serious consequences if he failed to do so. Petitioner filed objections to the Report on August 10, 2010.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28

U.S.C. § 636(b).

After reviewing the record of this matter, the applicable law, the Report and Recommendation of the Magistrate Judge, and Petitioner's objections, the court agrees with the conclusions of the Magistrate Judge. Accordingly, the court adopts and incorporates the Report and Recommendation by reference in this Order.

Petitioner's objections are repetitive of his opposition to Respondent's summary judgment motion, and are, therefore, rejected. Petitioner fails to show how the state court decision

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). *See also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (plurality opinion) (discussing § 2254(d)).

Respondent's motion for summary judgment is **granted** and this petition is dismissed with prejudice.

CERTIFICATE OF APPEALABILITY

The governing law provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any

dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is **denied**.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
August 12, 2010

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-7139

ARDON P. CATO, II,

Petitioner - Appellant,

v.

ANTHONY J. PADULA, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. Cameron McGowan Currie, District Judge. (4:09-cv-02110-CMC)

Submitted: January 31, 2011

Decided: February 14, 2011

Before GREGORY and AGEE, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Ardon P. Cato, II, Appellant Pro Se. Donald John Zelenka, Deputy Assistant Attorney General, James Anthony Mabry, Assistant Attorney General, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ardon P. Cato, II, seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2006) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85. We have independently reviewed the record and conclude that Cato has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We furthermore deny as moot Cato's motion to hold this case in abeyance pending the district court's consideration of his motion to amend the district court's judgment, as the

district court has denied that motion. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED