23405 STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Trial Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

ARDON P. CATO, II,

Appellant

Appellate Case No. 2016-002081

RECORD ON APPEAL

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

Pro Se Appellant

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ORDERS

STATE OF SOUTH CAROLINA COUNTY OF HORRY ARDON PERCIVAL CATO, II Applicant, VS. STATE OF SOUTH CAROLINA Respondent.	IN THE COURT OF GENERAL SESSIONS Warrant: H893922, 926, 927 Indictment: 2005GS2603409, 3410, 3412 Case: 77066-1 ORDER DISPOSING OF ORAL ARGUMENTS & DENYING APPLICANT'S MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE

Applicant Cato moved this Court for a New Trial based on after-discovered evidence pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure in a motion dated March 8, 2016 and filed March 14, 2016. This Court received Respondent's response to Applicant's motion filed with the Clerk of Court's Office on April 6, 2016. After considering the file, Applicant's motion, and the Respondent's response to the motion, this Court finds that a hearing on the motion would be neither helpful nor necessary and hereby decides the issue on the filings.

Applicant pled guilty as indicted, without recommendation or negotiation, on July 17, 2006, to one count of Murder and two counts of Assault and Battery with Intent to Kill. At his guilty plea, this Court ensured that the Defendant was aware of his rights and knowingly, freely, and voluntarily waived those rights in order to enter a guilty plea. Subsequent to the acceptance of the guilty plea and the imposition of his sentence, Applicant requested a new trial pursuant to Rule 29(b) based on after-discovered evidence. SCRCrimP. The newly-discovered evidence advanced by the Applicant is a pair of affidavits included as Exhibits A and B attached to Applicant's motion. To succeed on a Motion for New Trial based on Rule 29(b), an applicant must show, in accordance with *Spann*, that the evidence would change the result if a new trial were granted, has been discovered since the trial, could not have been discovered with due diligence before trial, is material, and is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

This Court finds that Applicant's after-discovered evidence does not meet the requirements set forth by *Spann*. Even assuming, *arguendo*, that statements of individuals who claim to have been present

at the scene of the crime could not have been discovered prior to the guilty plea, the substance of their affidavits is wholly cumulative. Moreover, at his guilty plea, Applicant admitted to murdering one victim and shooting at two others with the intent to kill them; no statement in either affidavit offered by the Applicant is so material that it could possibly change the result of Applicant's admission to the crime.

Because the affidavits offered by Applicant in support of his motion do not meet the requirements set by *Spann* to entitle him to a new trial based on after-discovered evidence as allowed by Rule 29(b) of the South Carolina Rules of Criminal Procedure,

Applicant's Motion for a New Trial is hereby **DENIED**.

AND IT IS SO ORDERED.

THE HONORABLE STEVEN H. JOHN
RESIDENT CIRCUIT COURT JUDGE
FIFTEENTH JUDICIAL CIRCUIT OF SOUTH CAROLINA

Conway, South Carolina

July 18, 2016

FILED
HORRY COUNTY
2016 JUL 19 AM 9:11
MELANIE WILKINSON
CLERK OF COURT

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	Warrant: H893922, 926, 927
COUNTY OF HORRY	)	Indictment: 2005GS2603409, 3410, 3412
	)	Case: 77066-1
ARDON PERCIVAL CATO, II	)	
	)	
Applicant,	)	**Order Denying Applicant's Motion to Alter or Amend Judgment**
VS.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	

Applicant Cato moved this Court to alter or amend judgment of the Order Disposing of Oral Arguments and Denying Applicant's Motion for a New Trial Based on After-Discovered Evidence pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. After considering the file and Applicant's motion, this Court finds that Rule 59 SCRCP has no application to the Court of General Sessions. This Court reaffirms the prior Ruling of July 18, 2016.

Applicant pled guilty as indicted, without recommendation or negotiation, on July 17, 2006, to one count of Murder and two counts of Assault and Battery with Intent to Kill. At his guilty plea, this Court ensured that the Defendant was aware of his rights and knowingly, freely, and voluntarily waived those rights in order to enter a guilty plea. Subsequent to the acceptance of the guilty plea and the imposition of his sentence, Applicant requested a new trial pursuant to Rule 29(b) based on after-discovered evidence. SCRCrimP. Applicant's motion for a new trial was denied by order of the court July 18, 2016.

Applicant moved the court to Alter or Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on August 10, 2016. This Court finds that Rule 59(e) SCRCP has no application to the Court of General Sessions. The Court reaffirms its prior ruling from July 18, 2016.

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Applicant's Motion to Alter or Amend Judgment is hereby **DENIED**.

AND IT IS SO ORDERED.

THE HONORABLE STEVEN H. JOHN
RESIDENT CIRCUIT COURT JUDGE
FIFTEENTH JUDICIAL CIRCUIT OF SOUTH CAROLINA

September 14, 2016

Conway, South Carolina

FILED
2016 SEP 15 AM 9:17
MELANIE HUGGINS-WARD
CLERK OF COURT

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Cases of Authority

DECISIONS

Matthew Jamison, Respondent,

v.

State of South Carolina, Petitioner.

Unpublished Opinion No. 2012-UP-437.

Court of Appeals of South Carolina.

Heard June 21, 2012.
Filed July 18, 2012.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney Brian T. Petrano, all of Columbia, for Petitioner.

Tricia A. Blanchette, Law Office of Tricia A. Blanchette, LLC, of Columbia, for Respondent.

Not to be Published

PER CURIAM.

The **State** appeals the grant of Matthew Jamison's second petition for post-conviction relief (PCR) arguing the petition was successive and should have been procedurally barred. The **State** further contends the PCR court erred in several respects in concluding the petition sufficiently established the existence of after-discovered evidence warranting the withdrawal of Jamison's guilty plea to involuntary manslaughter and the granting of a new trial. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: **S.C.** Code Ann. § 17-27-70(b) (2003) ("When a court is satisfied, on the basis of the application . . . that the applicant is not entitled to post-conviction relief . . . it may indicate to the parties its intention to dismiss the application and its reason for so doing."); *id.* ("Disposition on the pleadings and record is not proper if there exists a material issue of fact."); *Odom v. State*, 337 **S.C.** 256, 261, 523 S.E.2d 753, 755 (1999) ("All applicants are entitled to a *full and fair opportunity* to present claims in one PCR application.") (emphasis added); *Greene v. State*, 276 **S.C.** 213, 214, 277 S.E.2d 481, 481 (1981) ("On appeal from an order granting post-conviction relief, our review is limited to whether there is any evidence to support the trial court's findings of fact."); *State v. Irvin*, 270 **S.C.** 539, 545, 243 S.E.2d 195, 197 (1975) ("A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge."); *State v. De Angelis*, 256 **S.C.** 364, 369, 182 S.E.2d 732, 734 (1971) (stating absent error of law or abuse of discretion, this court will not disturb the trial court's judgment); *State v. Wharton*, 381 **S.C.** 209, 215, 672 S.E.2d 786, 789 (2009) ("[T]he applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina."); *De Angelis*, 256 **S.C.** at 369, 182 S.E.2d at 734 (considering whether the defendant could withdraw his guilty plea based on after-discovered evidence and stating "there are cases that motions of this character should be entertained and granted in order that wrongs done may be remedied").

AFFIRMED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

Matthew Jamison, Respondent,

v.

State of South Carolina, Petitioner.

Opinion No. 27454.

Supreme Court of South Carolina.

Heard March 5, 2014.
Filed October 22, 2014.

Assistant Attorney General Brian T. Petrano, of Columbia, for Petitioner.

Tricia A. Blanchette, of Columbia, for Respondent.

JUSTICE KITTREDGE.

This is a post-conviction relief (PCR) matter. Respondent Matthew Jamison pled guilty to voluntary manslaughter and was sentenced to twenty years in prison. No direct appeal was taken. Respondent's first application for PCR was denied. Respondent filed a second PCR application alleging newly discovered evidence. The PCR judge granted relief, and the court of appeals affirmed. *Jamison v.* ***State***, Op. No. 2012-UP-437 (**S.C.** Ct. App. filed July 18, 2012). We reverse.

I.

This case involves a shooting that occurred at a party one Saturday evening in June 2000, following a series of altercations between apparent rival drug dealers, one of whom was Respondent Matthew Jamison.[1] On the night of the shooting, Respondent encountered the rival group at a concert in Columbia, South Carolina. An eyewitness testified that the group walked past Respondent and "gave him a look like, yeah, we're going to get you tonight." After the concert, Respondent encountered the group again in a parking lot. Hundreds of people were crowded in the parking lot, and an eyewitness saw Respondent leaning against the front of a vehicle in the parking lot. According to Respondent, an individual he referred to as "Jig" pointed at him, and Jig and others with him approached Respondent as if they were going to "blitz" or jump Respondent. Respondent pulled a gun and fired shots towards the group. One of the bullets struck and killed the fifteen-year-old victim, an innocent bystander who was not involved in the ongoing dispute. By all accounts, the intended target was Jig.

Immediately following the shooting, Respondent was apprehended while attempting to flee from the scene. That night, Respondent gave a statement to police in which he admitted firing the gun into the crowd. Respondent was indicted for murder, but his attorney negotiated with the solicitor for Respondent to plead guilty to the lesser included offense of voluntary manslaughter.

Before accepting Respondent's guilty plea, the plea judge engaged in a thorough plea colloquy with Respondent, specifically including the following:

> The Court: Now, realizing, [Respondent], that when you plead guilty, you admit the truth of the allegation contained in this indictment against you. You're saying that I had a gun and I shot [the

victim] and he died. You understand that?

The Defendant: Yes, sir.

The Court: All right. I tell you that, sir, because you may have some defenses to this charge, [Respondent]. Of course, I have no way of knowing that, but you need to realize that by pleading guilty here today, you give up any defenses you might have. Do you understand that, sir?

The Defendant: Yes, sir.

. . . .

The Court: Now, [Respondent], I'll ask you, once again, did you commit this offense?

The Defendant: Yes, sir.

The Court: All right. So, [Respondent], once again, you're telling me you are pleading guilty to . . . voluntary manslaughter, because you did, in fact, . . . shoot [the victim] and as a result of your gunshot, [the victim] was killed. You shot him and he died, is that correct?

The Defendant: Yes, sir.

. . . .

The Court: Now, [Respondent] has anyone promised you anything or held out any hope of reward in order to get you to plead guilty?

The Defendant: No, sir.

The Court: Has anyone threatened you or used force to get you to plead guilty?

The Defendant: No, sir.

The Court: Has anyone used any pressure or intimidation to cause you to plead guilty?

The Defendant: No, sir.

The Court: Have you had enough time to make up your mind as to whether or not you want to plead guilty?

The Defendant: Yes, sir.

The Court: Are you pleading guilty of your own free will and accord?

The Defendant: Yes, sir.

Additionally, during the plea hearing, Respondent's counsel stated the following on behalf of Respondent:

[Respondent] had no individual animus against [the victim]. [The victim] was standing with a group of folks that had been engaged with [Respondent] some time in the past and that night as well and he fired towards that crowd because he thought that they were coming at him and he was coming at them.

> And he understands the aspect we know in the law as transferred intent. It was not a self-defense. It may have been a very imperfect self-defense. *But those are the issues that we would have brought forward.* But he had no individual animus. He had no reason. Didn't even know this boy. It was a shot at a crowd of people in a very crowded environment in which this young man was struck and killed and died as a result.

(emphasis added). The plea judge sentenced Respondent to twenty years in prison. No direct appeal was taken.

In his first PCR application, Respondent alleged his guilty plea was not knowingly and voluntarily entered. At the PCR hearing, plea counsel testified the theory of the defense was as follows:

> It was that "Jig" had a gun and had come at—had come at [Respondent]. It was a very imperfect self-defense because nobody else sees a gun. There was no other gun found, as I recall it. [Respondent] in his statement to the police says something about—he fails to say to the police, I saw "Jig" with a gun while he was coming at me. His words were, "they were going to blitz me." That means a whole bunch of them were going to jump him. But later he tells me that "Jig" had a gun. And we wouldn't ever verify that. I mean, I talked to lots of witnesses, went to the scene, had a private investigator. We went out several times trying to get any one person to say that "Jig" had a gun. We couldn't do that.[2]

The PCR judge denied relief. Respondent sought a writ of certiorari, and his counsel filed a *Johnson*[3] petition. Respondent filed a *pro se* petition, in which he raised, for the first time, a newly discovered evidence claim.

Specifically, Respondent claimed that, while serving his prison sentence, he met a fellow inmate who allegedly was an eyewitness to the shooting incident and was willing to provide testimony to support Respondent's self-defense claim. Attached to Respondent's *pro se* petition was an affidavit of Theotis Bellamy, in which Bellamy discussed the prior difficulties between Respondent and the group involved in the incident and stated he believed Respondent would have been further harmed "if things did not happen the way they did" on the night of the shooting. Bellamy's affidavit also stated he previously had an opportunity to give his version of what happened on the night of the shooting; however, he did not share his knowledge with defense investigators earlier because Jig had threatened his family and he was afraid. Ultimately, the court of appeals denied the petition.

While the *Johnson* petition from his first PCR application was pending before the court of appeals, Respondent filed a second PCR application alleging newly discovered evidence and attached a second affidavit by Bellamy that was essentially the same as the first.

At the second PCR hearing, Respondent admitted shooting the victim but maintained he was defending himself against the group led by Jig. Respondent claimed he was scared when the group approached him because they had previously shot at and threatened him and jumped on one of his family members. Respondent explained that his guilty plea was influenced by the fact that no witness would come forward and corroborate his contention that Jig had a weapon.[4] Respondent stated he would not have pled guilty but would have insisted on going to trial if he could have presented a stronger self-defense claim.

Bellamy testified at the PCR hearing that he knew the members of the rival group and that they carried guns. Specifically, Bellamy said he saw Jig with a gun in his pants just before the shooting occurred. Bellamy stated he saw the group approach Respondent at the after-party, gesturing "like they're fixing to pull out weapons," and

that Respondent shot at Jig before Jig could shoot Respondent. Bellamy stated he did not come forward previously because Jig threatened him and his family, but now that Jig was serving time in the federal penitentiary, he felt more comfortable testifying in court.

The PCR judge granted Respondent relief on the basis of "fundamental fairness" and ordered a new trial. The PCR judge found Respondent met his burden of proving that Bellamy's eyewitness testimony constituted newly discovered evidence and that Bellamy's testimony would likely change the result at trial. In granting relief, the PCR judge stated:

> While the record demonstrates that a claim of self-defense was known to the Applicant from the outset and that his attorney tried to get someone to back up that claim, no one would come forward. This Court is concerned about granting a new trial because a claim of self-defense can be waived. Yet, no law has been cited to the Court concerning whether the entry of a guilty plea where self-defense was specifically mentioned, constitutes a waiver of that defense and prohibits granting a new trial on [the basis of] after-discovered evidence when someone does not come forward to corroborate that claim. . . . Here, the Applicant could have gone to trial [and] told his version of the events to the jury . . . . While the Court has concerns about granting a new trial when the Applicant clearly knew he had a self-defense claim from the beginning and did not present it, the Court feels that the issue is one of fundamental fairness. . . . Plea counsel informed the court and undoubtedly advised the Applicant that the claim of self-defense could not be established. It was too risky to attempt, in the opinion of plea counsel. The only reasonable reading of this record is that the Applicant relied upon that advice to elect to accept the plea bargain.[5] . . . So, despite the fact that there is a question in the Court's mind as to whether a person who waives a known claim of self-defense can thereafter assert it when a corroborating witness comes forth with after-discovered evidence, in the absence of authority being cited by either side on this issue, this Court feels that fairness dictates a new trial.

The **State** sought a writ of certiorari, which was granted, but the court of appeals affirmed the PCR judge's order. *Jamison v.* ***State***, Op. No. 2012-UP-437 (**S.C.** Ct. App. filed July 18, 2012). This Court granted the **State's** petition for a writ of certiorari to review the court of appeals' decision.

II.

"This Court gives deference to the PCR judge's findings of fact, and 'will uphold the findings of the PCR court when there is any evidence of probative value to support them.'" *Jordan v.* ***State***, 406 **S.C.** 443, 448, 752 S.E.2d 538, 540 (2013) (quoting *Miller v.* ***State***, 379 **S.C.** 108, 115, 665 S.E.2d 596, 599 (2008)). "However, we review questions of law *de novo*, and 'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Id.* (quoting *Goins v.* ***State***, 397 **S.C.** 568, 573, 726 S.E.2d 1, 3 (2012)).

A.

The **State** contends Respondent's newly discovered evidence claim is successive and thus procedurally barred because it was previously raised to the court of appeals in Respondent's *pro se Johnson* petition in the appeal of his first PCR application. We disagree.

The South Carolina Uniform Post-Conviction Procedure Act (PCR Act) allows an applicant to file an application

for relief "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." **S.C.** Code Ann. § 17-27-45(C) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts "could have been ascertained by the exercise of reasonable diligence").

Following Respondent's first PCR hearing and the subsequent order denying relief, Respondent discovered Bellamy was willing to testify to what happened on the night of the shooting. Accordingly, Respondent attached Bellamy's first affidavit to his *pro se* petition to the court of appeals pursuant to *Johnson v. **State***. The court of appeals denied the petition, stating in its order the decision was made "[a]fter careful consideration of the entire record as required by *Johnson v. **State***."

The **State** argues the language in the court of appeals' order reflects that its review of all issues was on the merits, and thus, Respondent's second PCR application was successive because Bellamy's affidavit was previously presented to and considered by the court of appeals.

A petition filed pursuant to *Johnson v. **State*** is the post-conviction relief equivalent of a direct appeal filed pursuant to *Anders v. California*.[6] *Johnson*, 294 **S.C.** at 310, 364 S.E.2d at 201. This Court recently held that, "[u]nder the *Anders* procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit." *McHam v. **State***, 404 **S.C.** 465, 475, 746 S.E.2d 41, 46 (2013) (citations omitted). Thus, this Court concluded the merits of an unpreserved claim were not considered by the court of appeals on direct appeal pursuant to *Anders*. *Id.* at 475, 746 S.E.2d at 47 (noting issues raised on direct appeal and found to be unpreserved may be the subject of a subsequent PCR claim).

Although Bellamy's affidavit was presented to the court of appeals in Respondent's *pro se* petition, it was not properly before the court of appeals because it was not part of the lower court record. *See* Rule 243(f), SCACR (the appendix shall include only matter that was presented to the PCR court). Because the discovery of Bellamy's testimony was not properly before the court of appeals, it was not part of the *Johnson* review. *McHam*, 404 **S.C.** at 475, 746 S.E.2d at 47. Therefore we find, as a procedural matter, this issue was properly raised in Respondent's second PCR application.

B.

The **State** also argues that because Respondent pled guilty, he is therefore not entitled to PCR in the face of newly discovered evidence. Specifically, the **State** contends that by pleading guilty, Respondent waived any argument relating to potential trial evidence, including claims of newly discovered evidence. Notably, Respondent has never argued that his guilty plea was entered involuntarily or unknowingly or that he pled guilty as a result of ineffective assistance of counsel; rather, the sole basis upon which Respondent has claimed to be entitled to PCR was because of the newly discovered evidence of Bellamy's testimony. Thus, the narrow issue presented to this Court is whether and to what extent an otherwise valid guilty plea may be vacated in PCR proceedings on the basis of newly discovered evidence.

Traditionally, in South Carolina, "'[t]o obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.'" *McCoy v. **State***, 401 **S.C.** 363, 368 n.1, 737 S.E.2d 623, 625 n.1 (2013) (quoting *Clark v. **State***, 315 **S.C.** 385, 387-88, 434 S.E.2d 266, 267 (1993)).

The **State** contends the PCR judge committed an error of law in applying this traditional, five-factor newly discovered evidence test in evaluating Respondent's PCR claim. Specifically, the **State** argues this traditional five-factor test applies only where a defendant has gone to trial and was convicted—not where a defendant pled guilty. The **State** further contends that, during the plea colloquy, Respondent waived his right to have a trial and present any defenses, and therefore, Respondent may not subsequently raise a PCR claim on the basis of newly discovered evidence relating to a claim of self-defense.

"[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." ***State** v. Rice*, 401 **S.C.** 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing *Hyman v. **State***, 397 **S.C.** 35, 44, 723 S.E.2d 375, 379 (2012)). "'A guilty plea represents a break in the chain of events which has preceded it in the criminal process.'" *Id.* at 332, 737 S.E.2d at 486 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). By entering a guilty plea, "[a]n accused [] waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions." *Rivers v. Strickland*, 264 **S.C.** 121, 124, 213 S.E.2d 97, 98 (1975) (citation omitted). "A plea of guilty is an admission or a confession of guilt, and [is] as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury." ***State** v. Fuller*, 254 **S.C.** 260, 266, 174 S.E.2d 774, 777 (1970) (citations omitted); *see North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (noting guilty pleas constitute a waiver of trial and an express admission of guilt upon which a sentence may be imposed). Thus, "'[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" *Rice*, 401 **S.C.** at 332, 737 S.E.2d at 486 (quoting *Tollett*, 411 U.S. at 267).

Nevertheless, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. **S.C.** Code Ann. § 17-27-20(A)(4) (2014). Thus, by its plain language, the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence—not just individuals convicted and sentenced following trial. Accordingly, we must reject the **State's** claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases.

We nevertheless acknowledge that a valid guilty plea must be treated as final in the vast majority of cases. Indeed, "[w]hat is at stake in this phase of the case is not the integrity of the **state** convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the **State** to its proof." *McMann v. Richardson*, 397 U.S. 759, 773 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). "Furthermore, there must be some consequence attached to the decision to plead guilty." *People v. Schneider*, 25 P.3d 755, 761 (Colo. 2001) ("A defendant who voluntarily and knowingly enters a plea accepting responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea.").

Although we find that a guilty plea does not preclude post-conviction relief following a guilty plea in all circumstances, we nonetheless conclude that the traditional, five-factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea. As the Supreme Court of Colorado has noted, in the case of a guilty plea:

[I]t was not an independent trier of fact that determined the defendant's guilt based upon sworn

> trial testimony—it was the defendant who acknowledged his own guilt. Because of that simple fact, the trial court handling the postconviction proceeding is necessarily in a different position. That court does not have the full record of the prior trial, but it does have the defendant's own statements of guilt. [The traditional, five-factor newly discovered evidence test] presumes that the [PCR] judge is in a position to weigh the new testimony against that provided at the prior trial and assess whether an acquittal verdict would enter based upon new evidence. In the circumstance in which there never was a trial on the charges, the [PCR] court is hampered in that assessment.

Id. Indeed, the traditional, newly discovered evidence factors are "difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial." *In re Reise*, 192 P.3d 949, 954 (Wash. Ct. App. 2008).

Guided by the language of section 17-27-20(A)(4) of the PCR Act, we hold that, when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions. In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. *Cf. Reise*, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice). Such a determination will not be resolved in a formulaic manner, but will necessarily be context dependent.

Turning to the facts of this case, we find there is evidence in the record to support the PCR judge's finding that Respondent could not have discovered Bellamy's testimony prior to pleading guilty. We, however, find the interests of justice do not require that Respondent's guilty plea and sentence be vacated and conclude the PCR judge erred in granting relief. During the thorough plea colloquy, Respondent admitted having a gun and shooting the victim, specifically waived the right to present any defense, and testified that he did so freely and voluntarily. Respondent's PCR testimony reveals that his decision to plead guilty rested on several considerations: the strength of the **State's** evidence against him, the relative weakness of his self-defense claim, and his counseled determination that it was to his advantage to plead guilty to the lesser charge of manslaughter in order to avoid going to trial on the indicted offense of murder. Although Respondent might have pled differently had he known Bellamy could provide eyewitness testimony, Respondent is bound by his plea and conviction unless he can demonstrate the interest of justice requires that they be vacated. To grant relief under these circumstances would undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea.

"The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Brady v. United States*, 397 U.S. 742, 757 (1970). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the **State's** case or the likely penalties attached to alternative courses of action." *Id.* Further, the weight and quality of Bellamy's testimony as "evidence of *material* facts, not previously presented and heard" is severely undermined because it

pertains not to a theory of self-defense but to one of transferred self-defense. **S.C.** Code Ann. § 17-27-20(A)(4) (emphasis added). Specifically, Bellamy's testimony would tend to show Respondent fired shots at Jig before Jig could shoot Respondent; however, the victim who died in this case was an innocent, fifteen-year-old bystander, not Jig. The transferability of intent in a self-defense claim has not been recognized in South Carolina, and Respondent does not ask this Court to recognize it now. *See* ***State v. Porter***, 269 **S.C.** 618, 622, 239 S.E.2d 641, 643 (1977) (noting the theory of transferred self-defense has not been accepted in South Carolina); *cf* ***State v. Wharton***, 381 **S.C.** 209, 215, 672 S.E.2d 786, 789 (2009) (noting the applicability of the doctrine of transferred intent to voluntary manslaughter cases remains an unsettled question in South Carolina). Therefore, Bellamy's testimony does not constitute evidence of *material* facts within the language of section 17-27-20(A)(4), and Respondent's guilty plea made without the knowledge of Bellamy's potential testimony does not constitute an injustice that would permit Respondent to disavow his guilty plea. Rather, given the totality of the circumstances of this particular case, we find the interest of justice is best served by enforcing Respondent's validly entered guilty plea and upholding Respondent's conviction and sentence.

III.

Because Bellamy's testimony does not constitute evidence of material facts not previously presented and heard that, in the interest of justice, requires Respondent's conviction and sentence to be vacated, Respondent is not entitled to relief. In reversing the court of appeals, we reinstate Respondent's conviction and sentence pursuant to his guilty plea.

REVERSED.

TOAL, C.J. and HEARN, J., concur. PLEICONES, J., dissenting in a separate opinion in which BEATTY, J., concurs.

JUSTICE PLEICONES.

While I find great appeal in the majority's thoughtful "in the interest justice" test, I respectfully dissent as I would adhere to our traditional test to determine whether a post-conviction relief (PCR) applicant is entitled to a new trial based on after discovered evidence. Applying our traditional test, I would affirm the court of appeals as I am bound to uphold the PCR judge's order when there is evidence in the record to support the decision.

Rather than adopt a new test, I adhere to the five-part inquiry we recently affirmed to determine whether a PCR applicant is entitled to a new trial based on after discovered evidence after entering a guilty plea. *See* ***McCoy v. State***, 401 **S.C.** 363, 368, 737 S.E.2d 623, 625 n.1 (2013). In my opinion, the "interest of justice" is served best by applying the same standard to determine if a PCR applicant is entitled to a new trial, whether the applicant has pled guilty or been convicted by a jury. I fear the majority's new test may give rise to the unintended consequence of dissuading criminal defendants from entering guilty pleas, further contributing to our already crowded General Sessions dockets.

The majority implicitly acknowledges, as I believe it must, that it is adopting a new test. Under the majority's framework, the key inquiry, one which differs substantially from the standard affirmed in *McCoy,* is whether "the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea be vacated." Since this is a new rule, were we to adopt it, I would apply it prospectively. *See* ***Talley v. State***, 371 **S.C.** 535, 541, 640 S.E.2d 878, 881 (2007). Further, even were we to apply this new test to Respondent, I would find the "interest of justice" standard

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requires a factual determination and is one which should be made by the PCR judge. Therefore, I would remand to the PCR judge to determine whether Bellamy's testimony constitutes after discovered evidence under this new analytical framework.

As I would apply the standard analytical framework to determine whether the PCR judge properly found Bellamy's testimony constitutes after discovered evidence, I turn to the five factors affirmed in *McCoy*. In my view, the following evidence supports a finding that Bellamy's testimony constitutes after discovered evidence: (1) Bellamy testified that Jig had a gun, and Respondent shot Jig after Jig gestured towards Respondent in a manner that suggested Jig was going to pull out his weapon; (2) Respondent discovered Bellamy's testimony after the entry of his guilty plea; (3) Respondent could not have discovered the testimony before his plea because Jig secured Bellamy's silence by threatening Bellamy and his family; (4) Bellamy's testimony is material because it tends to prove Respondent's claim of self-defense;[7] and (5) Bellamy's testimony is not merely cumulative or impeaching because no one gave the police a statement as to what happened on the night of victim's murder. *See* McCoy, 401 **S.C.** at 368, 737 S.E.2d at 625 n.1 (outlining the five factors to determine whether a PCR applicant is entitled to a new trial on the basis of after discovered evidence). Employing our standard analysis, I find there is evidence in the record to affirm the court of appeals' decision even though the PCR judge failed to make explicit findings on the after discovered evidence issue. *See* ***Williams v. State***, 363 **S.C.** 341, 343-44, 611 S.E.2d 232, 233 (2005) (finding this Court will uphold the PCR judge's findings if there is any evidence of probative value in the record to support them); Rule 220(c), SCACR (stating this Court may affirm any ruling, order, decision, or judgment upon any ground appearing in the record).

I disagree with the majority's finding that Bellamy's testimony is not material on the basis that we have not recognized "the transferability of intent in a self-defense claim." In my opinion, if there is any such doctrine as "transferred self-defense," it has no applicability to this case.[8] Whether a defendant harms an unintended victim while acting in self-defense is irrelevant since the question is whether the defendant's **state** of mind entitled him to react as he did. *See, e.g.*, *Dickey*, 394 **S.C.** at 499, 716 S.E.2d at 101. On the other hand, transferred intent permits a jury to find a defendant criminally responsible even though the defendant did not have the "intent" to harm the victim. *See* ***State v. Fennell***, 340 **S.C.** 266, 271 — 72, 531 S.E.2d 512, 515 (2000) (explaining transferred intent as a legal fiction by which a jury may convict a defendant even though he did not act with the requisite *mens rea* towards an unintended victim). Thus, a defendant need not have a specific "intent" in order to assert a viable claim of self-defense; instead, the only question is whether Bellamy's testimony would have entitled him to a charge on self-defense. Although the answer to this question is undeniably close, and is one that underscores the important gatekeeping function of our PCR judges, I am constrained by our standard of review. *See* *Williams*, 363 **S.C.** at 343-44, 611 S.E.2d at 233.

Because I would adhere to the five factor test set forth in *McCoy*, and because I find there is probative evidence in the record to support the PCR judge's findings, I would affirm the court of appeals.

BEATTY, J., concurs.

[1] Several weeks prior to the shooting, it appears Respondent was attacked in his home by several men whose street nicknames are Jig, Little Thee, Fax, and Butter.

[2] Indeed, by all accounts, finding willing witnesses was an extremely difficult task. At the plea hearing, the solicitor's comments revealed the similar difficulty the **State** encountered in obtaining witnesses:

One of the other tragic parts of this case was that nobody even came forward. Of the hundreds of people at the party, not one was willing to give the police a statement that night as to what they saw and heard. Even when we were preparing this case . . .

out there trying to find other witnesses, these people: "Jig" and "Thee," these people that could have been witnesses—"Butter," who is a relative of the victim's, they weren't even willing to come forward and help the **State** out in this case.

[3] *Johnson v. **State***, 294 **S.C.** 310, 364 S.E.2d 201 (1988).

[4] Respondent explained that although he admitted the shooting from the outset, his counsel advised him that it would be difficult to establish a self-defense claim that would overcome the **State's** physical evidence and Respondent's statement to police on the night of the shooting, in which Respondent did not claim to be acting in self-defense or explain that he fired shots because he was scared for his life when he saw Jig with a gun.

[5] Respondent has never raised an ineffective assistance of counsel claim regarding counsel's advice to accept the plea bargain.

[6] 386 U.S. 738 (1967).

[7] *See **State** v. Dickey*, 394 **S.C.** 491, 499, 716 S.E.2d 97, 101 (2011).

[8] Below is one formulation of the doctrine:

[O]ne who kills in self-defense does so without the mens rea that otherwise would render him culpable of the homicide. . . .

However, if A had no criminal intent with respect to B, as where A is exercising a lawful right of self-defense, [no criminal intent] could exist as to C. It follows, then, that A in shooting C has not committed a criminal act, the essential [sic] of a mens rea being impossible of proof. The inquiry must be whether the killing would have been justifiable if the accused had killed the person whom he intended to kill, as the unintended act derives its character from the intended.

***State** v. Clifton*, 290 N.E.2d 921, 923 (Ohio Ct. App. 1972).

PLEADINGS

Exhibit #1

Appellant's Motion for New Trail
Based on After Discovered Evidence

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No: (05-GS-26-3409, 3410, 3412)

Ardon P. Cato, II.

Applicant,

v.

State of South Carolina,
Respondent.

RULE 29(b) Motion for New Trial
Based on After-Discovered Evidence

TO: THE HONORABLE JUDGE STEVEN H. JOHN; and
JERRY RICHARDSON, SOLICITOR OF THE FIFTEENTH JUDICIAL CIRCUIT

The APPLICANT, Ardon P. Cato II, proceeding Pro Se, hereby moves pursuant to Rule 29(b) SCRCrimPro for a new trial based on after-discovered evidence. After-Discovered evidence in this case involves new information presented by witnesses who were actually at the Red Room nightclub when the incident occurred.

Specifically, the information provided by these witnesses substantiates more than a scintilla of evidence that refutes the prosecution's theory of events, and bring clarity to the discrepancies that lead to applicant's conviction. The after-discovered evidence in this motion will show altogether the discrepancies in the ballistics report, along with the wounds-to-shots fired ratio proves that Applicant's convictions are in error and demands at least, a new trial and at most, a vacation of sentence. See

Exhibits (A) and (B); the required affidavits from (A) Twila Beckman and (B) Willie Edwards showing after-discovered evidence did not exist at the time of trial and could not have been discovered by the exercise of due diligence.

Procedural History

Ardon P. Cato II was indicted at the Horry County September 2005 term Grand Jury term for two counts of assault and battery with intent to kill and murder. J.M. Long, III represented him. On July 17, 2006 applicant plead guilty as indicted. He was sentenced to the state department of corrections by the Honorable Steven H. John for a term of 42 years for murder and 20 years for each ABWIK, respectfully, to run concurrent.

Applicant filed for PCR on September 7, 2006. A PCR hearing was convened on April 3, 2007; applicant was represented by Paul Archer. On May 29, 2007, Resident Judge Paula H. Thomas issued an order denying the Applicant's PCR. (Note: Judge Paula H. Thomas also denied Applicant's bond at a bond hearing in February 2006.)

Pursuant to Rule 59(e) of the SCRCP, applicant submitted a request to amend the PCR judgment. The Motion 59(e) was clocked stamped and received by the SC Supreme Court On June 27, 2007. See Exhibit (C). Applicant never received a reply.

On March 03, 2008 Applicant filed a petition for Writ of Certiorari in the SC Supreme Court. The S.C. Court of Appeals issued an order denying petition on May 28, 2009. An explanation was not given for the denial.

Applicant filed a petition for Habeas Corpus on August 07, 2009. The U.S. District Court later issued an order denying applicant Writ of Habeas Corpus and C.O.A. on August 17, 2010. Cato filed a 59(e) Motion for Reconsideration of the District Court ruling on August 25, 2010. However, the final ruling on the matter was issued on October 20, 2010, respectfully.

State's Theory of the Case

The State's theory of the case was: 1.) Cato was "attacked" by an unidentified assailant, 2) Cato was "ejected" out of the club by a bouncer; 3.) Cato made it back "inside" the club; 4.) Cato "maliciously' intended to inflict deadly harm to five different people who were in different sections of the club; 5.) Cato fired all of the shots and inflicted wounds on all of the victims by the way of two different types of ammo from one gun.

Relevant Facts

On April 09, 2005 at about 4:00 am Ardon P. Cato II, was at the Red Room nightclub dancing on the dance floor. Cato spotted a female he recognized sitting in a booth at the edge of the dance floor. He then walked over to have a few words with her. As Cato was beginning to converse with the female, he felt a tap on the back of his shoulder. Cato stood and turned only to face an unidentified person who said, "She doesn't want to be bothered right now." In an attempt to avoid an altercation, Cato responded by saying, "Cool. No Problem." It is probable and believed this unidentified subject did not hear Cato or at least misunderstood him. As Cato was leaning to tell the female "goodbye" the unidentified subject, who now becomes an assailant, tapped Cato on the shoulder again and simultaneously, as Cato was turning around, threw a punch of which Cato dodged by leaning back. The second punch thrown by this assailant barely brushed Cato's forehead. Despite the chaos and crowd closing in on him Cato decided to remove himself from the situation. At that time he chose to exit the club through the front entrance on his own, without any help nor assistance from anyone.

Analysis

Cato can only recall chaos and the crowd closing in on the dance floor area. "If' there is any truth to the States theory as to whether "bouncers" responded to the incident, it is unclear. What is clear, is that Cato was not touched, grabbed nor escorted as he exited the club's front entrance. These relevant facts that disprove #1 and #2 of the State's theory is presented by the most credible person who could possess such information, Mr. Cato himself. Cato was not attacked, nor beaten. MBPD records includes

no signs of bruises on Cato; plus his clothing was neatly intact. To the contrary, there is no substantial evidence of a bouncer or any for that matter mentioning ejecting Cato out of the club.

Cato walked approx. 30 yards to his vehicle, retrieved a gun and returned to the exit door of the nightclub. (Note: the double door entrance where payment is made to enter and the exit door to the dance floor is positioned in the front of the club. There, it is a side walk and most notably Hwy. 17. The back door of the club opens to an alleyway. There, if someone exited the back door, and take a right, it would be the direction of 12th Ave. N.) Standing just outside the exit door in front of the night club (not inside that door), Cato raised the gun high to avoid any actual harm of people, and shot into the upper wall towards the ceiling.

Exhibit (D), Sled's Ballistic Report is evidence that corroborates Cato's refute of #3 of the State's theory that he made it back into the club. The report aligns with Cato's assertion that he was standing outside the exit door, where the shell casing were actually discovered. The after-discovered evidence implicating a shooter inside the club, validates error within this report and makes it not factual that Cato shot the victims. Additionally, the aforementioned evidence refutes #4 of the State's theory whereas Cato's testimony has always been consistent with him not intending to shoot, kill, or injure anyone. See App. pg. 30 lines 5-13; App pg. 31 lines 21-22; App. pg. 59 lines 9-14; App. pg. 64 lines 1-6; App. pg.68 lines 10-17.

Most importantly, as to #4 and #5 of the State's theory, there is obvious discrepancies in the State's position and absolutely impossible for Cato to have inflicted all of the various wounds on people who were in different sections of the club, on different body parts while having fired only four shots. According to the discovery evidence Exhibit (E), MBPD incident report, there are four victims with a total of seven (7) gunshot wounds. The exhibit further details each victim in a different area of the nightclub.

The demonstration of exhibit (D) reflects three (3) spent shell casings recovered from the crime scene. They are Items 3, 4, and 5 which were two .380 shell casings and one .9mm shell casing. It also

shows there were two fired bullets recovered from the crime scene. They are Items 6 and 9 which were one .380 bullet and a .9mm bullet.

Applicant draws attention to the fact that there were four (4) victims, three with one wound each and one with four wounds. Item 6 is a bullet that was found near a wall described as being 36ft away from the front exit door with no blood or body tissue, meaning that it did not strike any of the victims. With the position and description of Item 6 clear, still there exist four victims with seven gunshot wounds. Evidence in the present case creates a different scenario that substantiates a reasonable probability that applicant is innocent. (It is moot to address that the solicitor said the gun jammed while shots were being fired, then added on that Cato shot at a bouncer. This is not substantiated by the evidence and highlights untruths in the states theory. See App. page 11 line 8-24.)

Further examination demonstrates a botched ballistic report. As a result of analyzing Exhibit (D) Item 5, a .380 shell casing that is further marked "Item 9" which is a .9mm bullet. Item 5, a .380 shell casing that is marked as being paired to Item 9, a .9mm bullet, the only other bullet recovered from the crime scene blatantly substantiates an error that deemed the illegitimacy of the actual ballistic report and its credible basis to prove or support the Applicant's conviction. The ballistic report reflects error that cannot be considered harmless, but more-so an act of mishandling and documentation of the crime scene. Applicant's contention of the ballistics has been consistent and well documented. See App. pg. 49 line 19- page 53 line 16; also Exhibit (C).

Exhibit (F), MBPD incident report is a document provided by a Jonathan McIntyre, stating, "the shooter exited the back entrance and heading in the right towards 12th Ave N". The Applicant exited the front of the nightclub alone. The facts refute number 5 of the State's theory as well.

After-Discovered Evidence

Due to substantiated facts, Applicant never made it back into the nightclub, therefore he was not able to detail the chain of events on the inside of the Red Room nightclub. From the position of the front exit, he could only see darkness due to the lack of light on the inside.

Ms. Twila Beckman, having been present on the night of the incident, she was inside the club, gives a sworn statement in Exhibit (A) as a witness. Accordingly, from the lounge area of the nightclub, she was able to hear shots that were fired. Ms. Beckman heard shots coming from the front exit area and shots from the back area of the nightclub; approximately 6 or 7 shots. She also recalls the back door being opened. The same door that MBPD was put on notice as having been the exit for the shooter who was not the Applicant.

Also Exhibit (B), which is another sworn affidavit from a Mr. Willie Edwards who was inside the Red Room nightclub on the night of the incident as well. Mr. Edwards account substantiates having overheard some guys plotting, "to get someone," possibly the applicant or any one of the other victim's was the target. Mr. Edwards's version recalls hearing shots coming from the crowd, and from the front entrance area together approximately 6 to 8 shots. He details the club being dark on the inside with people rushing towards the back exit.

The evidence referred to herein provides clarity to the discrepancies in this case and answers to some questionable aspects. The version from these individuals explains why there are two types of ammunition unequivocally examined by SLED, who attempted to pair them in the ballistic report. The accounts of hearing multiple shots by Ms. Beckman and Mr. Edwards explains why there were seven gunshot wounds on four victims. The account of hearing shots from different directions explains why and how four victims were shot in different body parts while they were in different areas of the club. More so it gives more of an accurate account than the State's version as to how this scene played out. Most importantly, this after-discovered evidence in addition to the ill-manufactured ballistic report provides at minimum evidence that the Applicant's convictions are in error.

Argument

The issue of the accused presenting newly discovered evidence after a guilty plea has been well addressed in the justice system, particularly in Jamison v. State Op. No. 27454 filed October 22, 2014. The present case is a clear contrast from Jamison where Cato clearly overcomes the burden Jamison

could not. Quoting Jamison: ["...we must reject the states claim that the waiver of trial and admission of guilt encompassed in guilty plea necessarily preclude... relief in all cases."]... Jamison quoting Riese, 192 P. 3d at 995 ("finding defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice"). Defendant, ["is bound by his plea and conviction... unless he can demonstrate the interest of justice requires that they be vacated,"] ("the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, "the interest of justice" requires the defendant guilty plea be vacated") ["Respondent has never argued that he pled guilty as a result of ineffective assistance of counsel"]....

Applicant's case separates from Jamison, wherein Cato indeed argued that his plea came as a result of counsel's ineffectiveness with failure to properly investigate the ballistic evidence in addition to his reluctance to accept the plea for murder. Cato's position of the ballistic report is well documented. See App. pg. 49 line 19 - pg. 53 line 16. Also see Exhibit (G) where Cato requested to Sled the ballistic report on March 27, 2007. SLED's office received the request on April 2, 2007. The PCR hearing was convened on April 3, 2007. At the time of the hearing Cato was not in possession of the ballistic report. As a matter of fact, he was not in receipt of the report until May 3, 2007 a date after the hearing was convened.

(Note: the attorney who represented Cato, a Mr. J.M. Long, III, was suspended from his law practice for indecently exposing himself as reported some 20 to 30 times on Jan. 01, 2006 which was during the time he represented the Applicant. Thus proving he was not all utilizing competency which is expected of reasonableness.)

The following pages within the Appendix speaks in the affirmative that Applicant was not privy to the mistakes within the ballistic report. Applicant's attorney, due to his failure to properly investigate, was unaware of the inconsistencies and/or ineffective in his performance. See App., pg. 85 line 2- pg. 86 line 4; App., pg. 25 lines 14 -22; App., pg. 61 line 10 - pg. 64 line 1; App. pg.65 lines 2-9; App. Pg. 70 line 7 - pg. 71 line 5; App. pg. 72 lines 19-25; App. pg. 73 lines 23 -24; App. pg. 74 lines 3- 6; App. pg. 79 lines 7 -15; App. pg. 81 lines 12 - 13; App. pg. 87 lines 8- 11.

Ultimately in Applicant Cato's case there is a grave manifest injustice that needs to be corrected by the granting of a new trial in the interest of justice. The manifest injustice is that Cato was by way of ineffective assistance of counsel convicted by an invalid ballistics report that erroneously pairs a .380 shell casing with .9mm bullet. A .9mm bullet cannot come out of a .380 shell casing. This incorrect report, along with the after-discovered evidence of another shooter inside the nightclub infers evidence tampering and that both types of ammo did not come from one gun.

Presently, there is more than a scintilla of evidence that, had it been exposed and/or known to the defense, it would have been used to change the outcome of the applicant's case. The Applicant was deprived of a fair and impartial proceeding by way of not being able to put on an affirmative defense due to his lack of access to evidence of a ballistic report that substantiates the accuracy for his role during the night in question.

Pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure, "[a] motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of the actual discovery of the evidence by defendant or after the date when the evidence could have been ascertained by the exercise of due diligence [and] may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and grant leave to make motion...". Additionally, to prevail on a new trial motion, the defendant must show the after-discovered evidence: "(1) is such that it would probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." State v Spann, 334 S.C. 618, 619-620, 513 SE 2d 98, (1999) (citation omitted)

Would Probably Change the Result of Applicant's Trial

The after-discovered evidence in this case involves two witnesses who were in the nightclub on the night of the incident on April 9, 2005. Their sworn affidavits highlights the actual facts and affords more of an accurate account to how the events really unfolded. Particularly, from the outset, it magnifies how crime scene experts improperly handled this case to produce an inaccurate ballistics report that does not

have the preponderance to uphold applicant's convictions and obviously prejudiced the applicant during his proceeding.

The affidavit of Ms. Twila Beckman, Exhibit (A), hearing six or seven shots coming from different directions implicates someone else inside the club shooting. Accordingly, it is not possible for applicant to be in more than one place at the same time. Ms. Beckman account fits perfectly with the discovery evidence in this case. Her account of hearing six or seven shots from different directions accounts for the discovery evidence that details four victims with a total of seven wounds. The account also explains why there were two different types of bullets; and why each victim was shot in different body parts; in different areas of the club.

The affidavit of Willie Edwards provides additional clarity. Mr. Edwards recalls having overheard guys planning to maliciously harm someone; thereafter, he heard some 6-8 shots .Not only does the after-discovered evidence accounts for the shots-to-wounds ratio, it implicates another shooter and most importantly explains the inaccurate ballistics report. Beckman details the back exit being opened; and Mr. Edwards details people rushing toward that back exit. It is apparent that the shooter in this case was not apprehended for that person left out of that back exit.

To prevent the Applicant from presenting this evidence in his defense would violate his fourteenth amendment right to put on a complete defense. To deny him a new trial in the light of the after-discovered evidence would constitute a denial of fundamental fairness shocking to the universal sense of justice.

This newly discovered evidence would change the result of the trial first and foremost because it shows why the ballistics report is not valid and unable to support the convictions. It would be a manifest injustice to convict Cato when this new evidence shows that there was someone who was not Cato, that was on inside of the club shooting and inflicting harm on the victims with a deadly weapon.

Discovered Since Applicant's Trial

Cato was convicted on July 17, 2006. The evidence of Ms. Twila Beckman was discovered on June 22, 2015. The evidence of Mr. Willie Edwards was discovered on August 19 2015. This evidence has

been discovered approximately nine years after Applicant's trial and is being presented to this court within the one year time limit pursuant Rule 29(b) SCRCrimPro.

Could Not Have Been Discovered in the Exercise of Due Diligence

Due to Myrtle Beach Police Department's failure to secure the crime scene and witnesses, the after-discovered evidence referred to herein could not in the exercise of due diligence have been discovered by Applicant prior to his trial in 2006. As a result, credible witnesses were allowed to flee the crime scene without being interviewed by investigators to discover the facts. Applicant, nor his counsel had no way to identify exactly who was there on the night of the incident on April 09, 2005. Witnesses who were interviewed were unable to identify others who could have been more helpful, possibly Ms. Beckman & Mr. Edwards.

Material to Applicant's Case

A witness who establishes shots were indeed fired from the inside of the nightclub, when Cato was substantiated as being on the outside, goes to the heart of the Applicant's case. It accounts for the wound to shots ratio and further addresses a critical question to be presented to a jury... Who was it on the inside of the club that shot the victims? The evidence has value and is probative, thus effecting the conclusion and outcome of Applicants case.

Not Merely Cumulative and Impeaching Evidence

The after-discovered evidence referred to herein is not cumulative to any prior evidence offered by the State nor Applicant whereas there was no platform by way of a trial commenced for presentation. The referred to evidence has not been presented or testified to under oath due to its unavailability during the time of Applicant's conviction. Therefore this new evidence does not impeach any evidence by attacking the character, motives, integrity, or veracity of any testimony. Applicant respectfully request that this court grant this motion pursuant to Rule 29(b) SCRCrimPro.

Prayer for Relief

Wherefore, Applicant Ardon P. Cato, II respectfully request this court grant this motion for new trial based on after-discovered evidence, thereby vacating and/or reversing Cato's conviction.

Respectfully Submitted,

Ardon P. Cato II

Ardon P. Cato, II

SWORN TO AND SUBSCRIBE BEFORE ME
this 8th day of March , 2016.

Ludrean Bryant

Notary Public for South Carolina My Commission
Expires: May 26, 2020

Exhibit A

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STATE OF SOUTH CAROLINA.)	COURT OF GENERAL SESSIONS
COUNTY OF HORRY.)	FIFTEENTH JUDICIAL CIRCUIT
)	
The State of South Carolina)	
)	CASE NO: (05-GS-26-3409, 3410, 3412
v.)	
)	**Affidavit of Twila Beckman**
Ardon P. Cato, II.)	
Defendant.)	
)	

I, Twila Beckman give this statement freely and voluntarily that it is true and correct, swear and attest:

1). I have been attending the LPN class on the Georgetown Campus at Horry-Georgetown Technical College since August 2014 with Yegide Boyd.

2). Being classmates led to an eventual friendship between Yegide and I, friendship went a duration of about six months that consist of going out to lunch, talking over the phone, and study sessions.

3.) On Monday 6/22/15 while having a study session at Yegide's residence, Yegide opened up about her friend's case, by asking me have I ever heard anyone speak about attending the Red Room around April 2005, if I ever hear anything to keep my eyes open.

4.)At that point I excited about frequenting the \Red Room a lot during that time period.

5.) Yegide ask did I rermember the incident in April 2005 at the Red Room.

6.) I excited that I was there that night, I was indeed there that night, and I went on to explain to her what I remember which was:

A. It was an all white party that night a late Friday night early Saturday morning.

B. I was in the lounge area of the club when shots were fired.

C. I heard shot coming from two directions, from the exit area on the front of the club, and shots from the back area of the club. A total of six or seven shots.

D. As the shots were fired I ran to hide in the bathroom, therefore I could not see nor identify any one shooting.

E. Also I have no knowledge of and did not see the incident that led to the shooting.

F. As I was running to the bathroom I saw a back door open.

FURTHER AFFIANT SAYETH NOT.

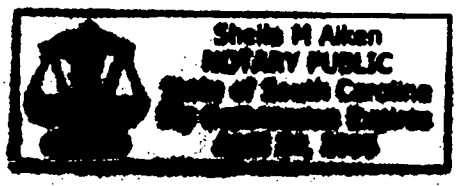
S//

Twila Beckman

SUBSCRIBED AND SWORN TO

Before me on this ____th

Day of August 5, 2015



Notary Republic for South Carolina

My Commission Expires April 25, 2025

Exhibit B

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)))	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTEENTH JUDICIAL CIRCUIT
State of South Carolina, vs. Ardon P. Cato,II, Defendant.	)))))	CASE NO: (#2005-GS-26-3409; 3410; and 3412) AFFIDAVIT OF WILLIE EDWARDS

I, Willie Edwards, hereby gives the following statement, freely and voluntarily, and that it is true and correct. I swear and attest to the following:

1). It is documented that I was apprehend in Georgia by South Carolina authorities in July 2005.

2). In the months prior to said apprehension I periodically traveled to South Carolina.

3). In April 2005, I was in South Carolina and was indeed at the Red Room Night Club on the early hours of April 9,2005.

4). I remember that it was an "all white" party, and it was late Friday night to early Saturday morning.

5). As I was preparing to leave there was some sort of commotion in the dance floor part of the Club.

6). I was thinking that I should keep my distance away from whatever was going on when I felt my pockets and realized I left my cigarettes on the pool table in the back.

7). As I walked back towards the pool table area to retrieve my cigarettes I overheard a group of guys talking about "get 'em", or "Ima get 'em", or something to that affect.

8). Literally seconds later shots rang out. It could have been about 6 - 8 shots were fired. The shots were coming from what sounded like the front entrance area, and from the crowd.

9). It was dark in the Club and I could not identify anyone.

10). I ducked and followed the crowd rushing out the front entrance, some were rushing towards the back exit.

11). This is what I can remember from that night.

12). I met Ardon P. Cato, II, (Cato), in the early part of 2015 at the Lieber Correctional Institution (LCI), in the Wando Unit. (See Institutional Record for dates).

13). Being that Cato had already went through the PCR process, our conversations revolved around me asking questions about that legal aspect. We never discussed any specifics of his case.

14). I left the Wando Unit for some months to return to the Cooper Unit, then returned to the Wando Unit, on August 18,2015, which was Tuesday.

15). Wednesday, August 19,2015, Cato asked me if I knew anything about the Red Room in Myrtle Beach, South Carolina. Cato also mentioned his reluctance to ask me because he remembered when I told him that earlier in 2015 how I was apprehended in Georgia in 2005.

FURTHER AFFIANT SAYETH NOT

August 21,2015

Willie Edwards

Willie Edwards

Sworn and subscribed before me this
21th day of August ,2015
Sudreca Bryant
Notary Public for South Carolina
My commission expires: May 26,2020

05-3416

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	Warrant: H893922
COUNTY OF HORRY	)	Indictment: 2005GS2603412
	)	Case: 77066-1
ARDON PERCIVAL CATO, II	)	
	)	
Applicant,	)	
	)	RESPONDENT'S RESPONSE TO PRO SE
VS.	)	APPLICANT'S MOTION FOR NEW TRIAL BASED ON
	)	AFTER-DISCOVERED EVIDENCE
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	

Respondent respectfully requests Applicant's Motion for a New Trial Based on After-Discovered Evidence be denied. Applicant pled guilty to indictment 2005GS2603412 for Murder and indictments 2005GS2603409 and 3410 for two separate counts of Assault and Battery with Intent to Kill. Applicant pled guilty on July 17, 2006, before the Honorable Judge Steven H. John to all three aforementioned charges. Applicant pled guilty as indicted, without recommendation or negotiation as indicated on the sentencing sheet. Applicant was represented by Counsel for his guilty plea.

Rule 29(b) of the South Carolina Rules of Criminal Procedure allows for an applicant to file a motion for a new trial based on after-discovered evidence if made within one year of the discovery of the new evidence. SCRCrimP 29(b). Furthermore, to prevail on such a motion, the applicant must show that the after-discovered evidence (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann,* 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

Applicant argues that two affidavits from two individuals who claim to have been at the incident location the night of the murder are after-discovered evidence that entitle him to a new trial. See Exhibit A and Exhibit B of Applicant's Motion. These affidavits, while they appear to have been discovered in the last year, do not warrant a new trial. First, they would not change the outcome of his guilty plea. During his guilty plea before the Honorable Judge Steven H. John, Applicant waived, *inter alia*, his right to remain silent, his right to a trial by jury, his right to challenge the State's evidence, and his right to question and cross-examine the State's witnesses.

Applicant then admitted to murdering one victim and shooting two others with the intent to kill them. Additionally, there is nothing in either of the new affidavits that would differ in any material respect from any other witness statements that were taken from the scene that night, the very definition of cumulative. Neither affiant can identify the shooter nor assert that Cato was not the shooter. For the aforementioned reasons, the affidavits on which Applicant relies do not satisfy the requirements of *Spann*.

The other arguments and exhibits advanced by Applicant are not properly before the court. Applicant raises ineffective assistance of counsel arguments. Applicant's PCR has already been heard and denied. He challenges the findings of the SLED ballistics report which he had access to at the time of his guilty plea. Applicant, contrary to his assertion, was not "convicted by an invalid ballistics report," but by his own admission made in court freely, voluntarily, knowingly, and intelligently after the advice of competent counsel. Exhibits C-G and the arguments they are used to advance, for the foregoing reasons, are not relevant to the issue at hand of newly discovered evidence.

Because Applicant's two new affidavits and his additional ancillary arguments do not meet the requirements of Rule 29 of the South Carolina Rules of Criminal Procedure and *Spann* to warrant a new trial based on after-discovered evidence, the Respondent respectfully requests that Applicant's Motion for a New Trial be denied.

Respectfully Submitted,

Thomas Groom Terrell, III
Assistant Solicitor
Fifteenth Judicial Circuit of South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)))	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Adron P. Cato ,II, Applicant, vs. State of South Carolina, Respondents.	)))))))	Warrant No.(s) #H-893922; 926; 927 Indictment No.(s) #05-GS-26-3409; 3410; 3412 Case No. #7706-1 NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, SCRCP

TO: The Honorable Steven H. John, Circuit Court Judge for the Fifteenth Judicial Circuit; and Jerry Richardson, Solicitor for the Fifteenth Judicial Circuit

The Applicant, Adron P. Cato,II, proceeding pro se, hereby moves pursuant to Rule 59(e), of the South Carolina Rules of Civil Procedure, SCRCP, to alter or amend judgment of the Order Disposing Of Oral Arguments And Denying Applicant's Motion For A New Trial Based On After-Discovered Evidence.

I. Pursuant to the mandates of Rule 59(e), SCRCP, the Applicant requests that the judgment be altered or amended upon review of:

(A). Findings of facts and conclusions of law on issue of guilty plea:

Rule 29(b), of the South Carolina Rules of Criminal Procedure, SCRCrimP, uses a five-prong Spann Test in regards to newly discovered evidence, stating that ... (1) the newly discovered evidence is such that it would probably change the result if a new trial were granted.

The Respondents are claiming that the newly discovered evidence will not change the outcome of the guilty plea, arguing that the plea itself binds the Applicant to the charges. despite the new facts presented.

The South Carolina Supreme Court sets forth the Interest of Justice standard in Jamison v. State, Opinion No. #27454 (S.C.Sup. Ct. filed October 22,2014). This Court held that when examining new evidence from guilty pleas, establishing that ... the new evidence is of such weight and quality that under the facts and circumstances of the particular case, the Interest Of Justice requires Applicant's guilty plea to be vacated. Adding that ... the guilty plea may be withdrawn when necessary to correct a manifest injustice.

As the facts and circumstances of this Applicant's particular case, the newly discovered evidence is of such weight and quality with hearing people actually plotting to do harm to someone, and then hearing shots come from totally different directions, establishing the fact that there was someone, (who is not Applicant), on the inside of the club

shooting and inflicting harm on the Victims. (See Exhibit(s) A & B, in Motion attached, wherein Applicant is positioned on the outside of the exit door in the front of the nightclub).

This newly discovered evidence is material and necessary in the determination of correcting a manifest injustice. That manifest injustice would be to have Applicant remain convicted of the charges when new evidence is presented that someone, (who is not Applicant), was inside the club shooting and inflicting harm on the Victims.

In addition, the ballistics report cannot be used to unequivocally prove Applicant guilty of these charges. The ballistics report erroneously pairs a 9mm bullet coming from a .380 shell casing. It is a manifest injustice to use the ballistics report as a part of the record to unequivocally convict applicant of the charges. (See Exhibit D, in Motion attached).

As our justice system uses the lens of fundamental fairness, applicants new evidence clearly meets the Interest Of Justice standard in regards to the plea and a new trial, with hearing someone plotting to do harm to people, also hearing shots coming from different directions, establishing that there was someone, (who is not Applicant), on the inside of the club shooting and inflicting harm on the Victims, raising pertinent questions to be answered in a new trial. Those questions are: Who was on the inside of the club shooting and inflicting harm on the Victims? ... Where did that person go? ... Why were there originally four Victims with a total of [7] gunshot wounds? ... With another fired bullet that only hit an upper wall, with no blood or body tissue? ... Why was each Victim shot in different body parts, while being situated in different

areas of the nightclub? ... Why were there two types of ammunition erroneously paired in the ballistics report? ... The Interest Of Justice requires these questions to be answered in a new trial.

(B). Finding of facts and conclusions of law on issue of Applicant satisfying the five-prong criteria of the Spann Test pursuant to Rule 29(b), SCRCrimP:

The newly discovered evidence clearly satisfies the five-prong criteria of the Spann Test ... (1) the newly discovered evidence not only warrants a new trial, it would change the result if a new trial were granted because it implicates the fact that while Applicant was standing outside the exit door in the front of the nightclub, (see Motion attached, including Exhibit(s) A & B), the hearing of someone plotting to do harm, the hearing of shots from different directions, establishes that someone on the inside of the club was shooting and inflicting harm on the Victims with a deadly weapon.

The newly discovered evidence of hearing someone plotting to do harm, the hearing of shots from different directions brings clarity to why the Victims were shot in different body parts while being situated in different areas of the nightclub.

This newly discovered evidence answers the question, why there are two types of ammunition erroneoulsy paired in the ballistics report.

Together, for the foregoing reasons, the new evidence of hearing someone plot to do harm, then hearing shots from different directions, would change the result of a new trial, because now, there is more than a reasonable doubt, which can lead to Applicant being not guilty of these convictions.

(2). Have been discovered since Applicants trial ... Applicant was convicted on July 17,2006. The evidence of Ms. Twila Beckman, was discovered on June 22,2015. The evidence of Mr. Willie Edwards, was discovered on August 19,2015. This evidence has been discovered approximately nine-years after Applicants trial and is being presented to this Court within the one-year time limit, pursuant to Rule 29(b), SCRCrimP.

(3). Could not in the exercise of due diligence been discovered prior to trial ... it was a chaotic environment, credible witnesses were able to leave the crime scene, without being interviewed. The witnesses who were interviewed were unable to identify others who were there. There is no amount of due diligence that this could have been discovered prior to trial. This can only come about by way of newly discovered evidence.

(4). This new evidence is material with the hearing of someone plotting to do harm to people and hearing shots come from totally different directions which establishes that there was someone, (who is not Applicant), on the inside of the club shooting and inflicting harm on the Victims. (See Motion attached and Exhibit(s) A & B).

The new evidence is material because it raises questions to be answered in a new trial ... Who was it on the inside of the club shboting and inflicting harm on the Victims with a deadly weapon? ... Where did that person go? ... Why were there originally four Victims with a total of [7] gunshot wounds? ... Also, another bullet fired only hit an upper wall with no blood or body tissue? ... Why was each Victim shot in different body parts while being situated in different areas of the nightclub? ... Why were there two types of ammunition

paired in the ballistic reports?

(5). The newly discovered evidence is not cumulative nor impeaching because no one has ever given testimony of hearing someone plotting to do harm, nor of hearing shots come from different directions. There were no such sworn statements of such given under oath to impeach.

II. The Applicant respectfully submits this Motion in a timely manner upon receipt of the Order Disposing Of Oral Arguments And Denying Applicants Motion For A New Trial Based On After-Disovered Evidence, on July 29,2016, from the Horry County Solicitors Office.

After you have reviewed this Motion to your satisfaction, Applicant respectfully requests that you make a ruling in his favor, altering or amending the judgment addressing the findings of facts and conclusions of law on Sections (A) and (B) of this Motion.

August 5, 2016

Respectfully Submitted,

Adron P. Cato, II
Wando-B-244 #316535
Leiber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

N/A APCA

Sworn and subscribed before me this
____ day of _____, 2016

_____
Notary Public for South Carolina
My commission expires: _____

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)))	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Adron P. Cato, II, Applicant, vs. State of South Carolina, Respondents.	)))))))	Warrant No.(s) #H 893922; 926; 927 Indictment No.(s) #05-GS-26-3409; 3410; 3412 Case No. #7706-1 CERTIFICATE OF SERVICE

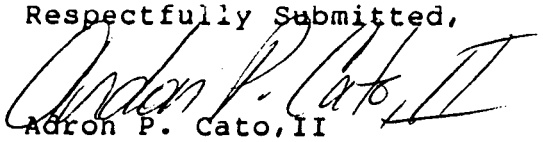
I hereby certify that I have served the: (1) Notice Of Motion And Motion To Alter Or Amend Judgment; (2) Exhibit(s) A, B, & D; and (3) Certificate Of Service upon counsel of record for Respondents by depositing a copy of the same in the United States Mail, First Class postage affixed thereon, and addressed as follows:

SOLICITORS OFFICE FOR HORRY COUNTY
FOR THE FIFTEENTH JUDICIAL CIRCUIT
Jerry Richardson, Solicitor
Post Office Box 1276
Conway, South Carolina
29526-1276; and

CLERK OF COURTS OFFICE, HORRY COUNTY
FOR THE FIFTEENTH JUDICIAL CIRCUIT
Melanie Huggins-Ward, Clerk
Post Office Box 677
Conway, South Carolina
29528-0677.

August 5, 2016

Respectfully Submitted,



Adron P. Cato, II
Wando-B-244 #316535
Leiber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

PRO SE APPLICANT

Exhibit C

51

STATE OF SOUTH CAROLINA COUNTY OF HORRY ARDON P. CATO, II.,316535 APPLICANT, Vs. STATE OF SOUTH CAROLINA RESPONDENT.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO. 2006-CP-26-4369 APPLICANT'S MOTION PURSUANT TO RULE 59 (e) OF S.C.R.C.P. FOR REQUEST TO AMEND JUDGEMENT

TO THE SOUTH CAROLINA SUPREME COURT

NOW COMES THE APPLICANT ARDON P. CATO, II with a request to Amend Judgement pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure, amended effective May 1986; August 30, 1998.

I. Pursuant to the mandate of Rule 59 (e) of the South Carolina Rules of Civil Procedure, the Applicant request the judgement be amended upon review of:

A) Exhibit (a) SLED's Ballistic Report (attached); whiche indicates that item 5 is a 380 cartridge that is marked "item 9". "Item 9" is a 9mm bullet that was taken from Mr. Hemingway's (victim) body. The obvious mistake is that the 380 cartridge, and the 9mm bullet together are not a positive match. This evidence makes the applicant's conviction questionable and supports the applicant's claims that his former defense attorney, J.M. Long, III, Esq., was ineffective for failing to properly investigate and advise his client of a constructive defense in the event of

trial, and also for erroneously advising his client to plead guilty.

II. The Applicant respectfully submits this request in a timely manner upon receipt of order denying Post-Conviction Relief on June 18, 2007 from the Horry County Clerk of Court.

After you have reviewed this evidence to your satisfaction, the Applicant request that you reverse the P.C.R. court decision, and remand this case for a new trial.

Motion submitted by Applicant,

/s/ Ardon P. Cato II #316535
Ardon P. Cato, II., #316535

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 25 **DAY OF** June **,2007**

Isaac B. Battle
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: My Commission Expires March 2, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
ARDON P. CATO, II.,316535 APPLICANT,	)	CASE NO. 2006-CP-26-4399
	)	CERTIFICATE OF SERVICE
	)	APPLICANT'S MOTION PURSUANT TO
Vs.	)	RULE 59 (e) OF S.C.R.C.P.
	)	FOR REQUEST TO AMEND JUDGEMENT
STATE OF SOUTH CAROLINA RESPONDENT.	)	

The undersigned hereby certifies that the foregoing pleading was this day served upon the below named counsel and parties by mail, postage prepaid, a copy of each such instrument to such counsel at the address shown below:

Honorable, Daniel E. Shearouse
Clerk of Court
S C Supreme Court
P.O. Box 11330
Columbia, S C 29211

MAILED
06/26/2007

/s/ Ardon P. Cato II #316535
Ardon P. Cato, II., #316535

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TRANSCRIPTS

Exhibit #2

Testimony of Appellant Cato

can hand me the amended.

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

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

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

THE COURT: 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.

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

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

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

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

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

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

to your client.

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

THE COURT: All right, okay.

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

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

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

THE COURT: What motion is that?

MR. CATO: The motion of discovery.

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

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

present my evidence here today, Your Honor.

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

MR. LONG: Brady material.

THE COURT: Oh, for the prior case.

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

THE COURT: Okay.

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

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

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

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

MR. CATO: No, the evidence.

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

MR. CATO: The evidence that the Prosecution had.

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

they had.

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

THE COURT: All right.

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

THE COURT: Okay, all right.

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

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

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

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

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

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

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

involuntary because of bad advice.

MR. CATO: Yes.

THE COURT: Okay, all right.

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

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

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

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

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

THE COURT: Failure to negotiate, okay.

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

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

MR. CATO: Between me and my defense attorney.

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

Exhibit #3

Testimony of J.M. Long, III

EXAMINATION (BY MS. TODD):

Q: Mr. Long, can you tell us how you came to represent Mr. Cato?

A: I believe it was family members or girlfriend initially that advised me, called up and said what he was charged with, went out to the jail, talked to him and then he or his girlfriend or family members retained me.

Q: Could you tell the Court what Mr. Cato told you about the incident at that time?

A: Pretty much what he explained today. I believe he said that he was trying to make time with a girl at the nightclub and one of two individuals, it was either one of their girlfriends or a prospective girlfriend, and that they cold-cocked him, that he was seated at a table with them and they jumped, jumped him when he was at the table and basically beat him up. My understanding was he had more injuries, he described more entries than them simply just grazing his forehead.

Q: Okay, well, now, just to be clear, we often use colloquialisms. If you could, what did you mean by making time or what did you think he meant by trying to make time with a girl?

A: Conversations, dancing, flirting, drinking, you know, maybe some mutual attraction, something of that nature.

Q: And otherwise basically what he explained here today and

at his guilty plea?
A: Yes, he said that after they had beat him up he pulled himself off the floor, stayed there for a minute. The bouncers came and ejected him or walked him to the door. He was upset because he didn't think the other two were also being, you know, bounced out of the club and that he went to the car, got the pistol, came back around the side of the club, not the entrance of the club, but this back door exit, and I believe he waited until that exit was opened by somebody leaving or whatever, then he came in that exit and fired at least four times.
Q: Okay, did you do -- move for discovery in this case?
A: Yes.
Q: And did you receive discovery from the State?
A: Yes.
Q: What was your understanding as to the State's evidence as to ammunition used in the -- ammunition and a firearm?
A: I had some problems with 380 brass and nine millimeter brass being found at the nightclub. I think they found three spent shell casings and the gun they recovered from Ardon was a High Point nine millimeter semiautomatic pistol and I just didn't see how it was possible, even though the bullet diameter is the same size, the case cartridges are shorter, and I didn't see how a 380 could be fired from a nine millimeter pistol. The discovery material, however, showed

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

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

A: Correct.

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

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

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

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

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

three shell casings?
A: I believe three shell casings.
Q: Okay, now, based on the information that you received from the State and the information you received from Mr. Cato, what did you think about the -- did you come to any conclusion about the strength of the State's case?
A: Well, they had a pretty good case with the exception of the number of wounds received by the victims versus the number of shell casings that they found at the scene. There were three fired shell casings. There was one, I don't remember if it was a live or an empty shell casing still jammed in the pistol, but there were at least four or five bullet wounds received by the various his victims which gave rise to the possibility of a second shooter. Other than that, that was basically the only defense we had.
Q: Did you discuss with the Applicant the possibility of trying to negotiate a voluntary manslaughter plea?
A: Yes, and I attempted to negotiate one with Jimmy Richardson was the Assistant Solicitor at that time and I explained to him, one, the differences in the calibers of the shell casings that were found to the number of bullet wounds received to the victims and talked to him about the possibility of a voluntary manslaughter plea. He was agreeable at first and said he would look into it but then he basically firmed up and said, ``No, the only thing we would

EXHIBITS

Exhibit #4

Article of J. M. Long, III

Conway attorney seeks reinstatement

By Tonya Root
troot@thesunnews.com

A Conway attorney, who was suspended from practice after he entered an Alford plea earlier this year to two indecent exposure charges, has petitioned to be reinstated to practice law, according to a notice released Monday from the S.C. Supreme Court.

Jefferson Marion "Buddy" Long of Myrtle Beach was suspended for nine months after he entered an Alford plea on Jan. 6 to two counts of exposure of private parts in a lewd manner as part of a plea arrangement in which four other counts were dismissed.

In an Alford plea, the defendant does not admit guilt, but acknowledges a jury would likely convict based on the evidence.

In the notice filed Sept. 12 with the state Supreme Court, a hearing has been scheduled for Oct. 14 by the Committee on Character and Fitness to review Long's petition for reinstatement.

At the time of his January plea, the judge ordered Long to pay a $300 fine or spend 30 days in jail for each charge, and the sentences would run concurrently. He had faced up to six months in jail or a $500 fine on each count.

"I wish it would've never happened and we would have never gone through this," Long said during the Jan. 6 hearing.

Long, who had been an attorney in Horry County for 25 years, was charged with exposing himself on Jan. 1, 2006, at his Myrtle Beach home and

See CONWAY | Page 7C

CONWAY

From Page 1C

on Nov. 19, 2009, at his law firm on Beaty Street in Conway, Nancy Livesay, assistant solicitor, said during the hearing.

In March 2010, the S.C. Bar Association placed Long on interim suspension pending the outcome of the criminal charges against him.

Long was arrested on Jan. 27, 2009, and Nov. 24, 2009, after two women reported on separate occasions that a man had exposed himself while standing in front of the clear glass storm door at Long's law office in Conway.

According to an Horry County police report about the 2006 incidents, a woman and her sister said Long exposed himself by standing naked behind the glass storm door to his house on Six Lakes Road.

They told police it happened between 20 and 30 times while they were in their front yard and that Long would stand at the door facing

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Exhibit D

Atten Jackson.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

FIREARMS DEPARTMENT

CSO David B. Bailey
Myrtle Beach Police Department
1101 Oak Street
Myrtle Beach, S. C. 29577

February 06, 2006

SLED No: L0504378
Your Case No:
Incident Date: 04/09/200
(V) Hemingway, Anthon
(S) Cato, Ardon P.
(S) Wright, Alphonso

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item: 1 One Hi-Point Model C9, 9mm Luger caliber pistol, serial number P198697, without magazine.

RESULTS:
Item 1 was examined, test fired using Item 2, and found to be in working order. Item 1 fired 9mm Luger and 380 Auto caliber test cartridges interchangeably.

Test bullets and cartridge cases fired by Item 1 were submitted for entry into the Integrated Ballistics Identification System (IBIS). Should any "hits" be developed against these entries, you will be notified. Please retain Item 1 for a minimum of two years in order to maintain its availability for any future comparisons related to IBIS activity.

Item: 2 One Hi-point, 10 round (maximum capacity), competition pistol magazine.

P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

RESULTS:
Item 2 was a correct magazine assembly for use in Item 1 and some other Hi-point pistols.

Item: 3 One fired 380 Auto caliber cartridge case, headstamped "R-P 380 AUTO", received in container marked "...1 foot 9 inches south of center of door..."

RESULTS:
Item 3 was fired by Item 1.

Item: 4 One fired 9mm Luger caliber cartridge case, headstamped "WIN 9mm LUGER", received in container marked "...1' 8"...North of center of front door..."

RESULTS:
Item 4 was fired by Item 1.

Item: 5 One fired 380 Auto caliber cartridge case, headstamped "R-P 380 AUTO", received in container marked "ITEM #9..."

RESULTS:
Item 5 was fired by Item 1.

Item: 6 One fired bullet received in container marked "...36' 1" from front door..."

RESULTS:
Item 6 was fired by Item 1.

Item: 7 One unfired 380 Auto caliber cartridge, headstamped "R-P 380 AUTO", removed from Item 1.

RESULTS:
Item 7 was not the correct caliber for use in Item 1 but can be fired in Item 1.

Item: 8 One unfired 9mm Luger caliber cartridge, headstamped "WIN 9mm LUGER" received in container marked "...in front of BEILing China Buffet..."

RESULTS:
Item 8 was the correct caliber for use in Item 1 or in other 9mm Luger caliber firearms.

Item: 9 One fired bullet removed from the body of Anthony Hemingway.

RESULTS:
Item 9 was fired by Item 1.

F. Dan DeFreese
Location: SLED

AMMUNITION/CARTRIDGE WORKSHEET

LED LAB NO: L0504378 AGENCY: MYRTLE BEACH P.D.

ATE COMPLETED: 2-6-06 EXAMINER: DEFREESE

TEM NO: 5 - ONE FIRED CARTRIDGE CASE

OURCE: REC'D IN BOX MARKED "ITEM #9..."

OW PACKAGED: I-5 <STAPLE-CLOSED BROWN PAPER BAG <EVIDENCE TAPE SEALED (ETS) 9X12" KRAFT CLASP ENVELOPE # E234271

ATE OPENED: FEB. 1, 2006 BY: FDR

ALIBER: 380 AUTO

ULLET WGT/TYPE: NONE

~~UNFIRED~~ FIRED ~~MISFIRED~~

ASE CONSTRUCTION: BRASS CASE, NICKELED BOXER PRIMER

RAND: REMINGTON - PETERS (U.M.C.)

ASE MARKINGS: HS: "R-P 380 AUTO"

IRING PIN: Hemi EXTRACTOR ~

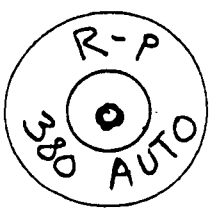
JECTOR: ~ BREECHFACE PARALLEL

HAMBER: ~

XAMINER'S MARKINGS/LOCATION: ENGRAVED ON EXTERIOR CASE WALL FORWARD OF EXTRACTION GROOVE "L0504378 I-5 DD"

ONDITION: VERY GOOD.

EADSTAMP:



1X

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: TMW 2-3-06

PHOTO: YES ~~NO~~

DATE SEALED: 2-6-06

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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: Rec'd in container marked "... Hemingway, Anthony..."

HOW PACKAGED: I-9 < closed screwtop plastic specimen jar with intact seal < ETS 9x12" kraft envelope # E 234271

DATE OPENED: Feb. 1, 2006 BY: TAW

CALIBER: (38) MCW 9mm Luger (too distorted to measure diameter)

LANDS & GROOVES: 9

DIRECTION OF TWIST: LEFT

LAND IMPRESSION WIDTH: < Same as test bullets fired by Item 1 >

GROOVE IMPRESSION WIDTH:

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 DD"

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: TAW 2-3-06

PHOTO: [YES] ~~NO~~

GRC: ~~YES~~ [NO] SEE PAGE ~

DATE SEALED: 2-6-06

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See Photo

Lab Form: 036

PAGE 24 One

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	Full metal jacket (9mm) projectile (removed from victim)	Compare to weapon
	#1-2 E235174 - #2-9 E234271	
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	" " per Lt. Turner
	~~Trace Evidence Vacuum Filter (front Pass. seat Saturn)~~ not Submitted	" "
	~~Trace Evidence Vacuum Filter (back seat Saturn)~~ not Submitted	" "
	#14-15 E234269 #16 E233840	

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

P 3 DNA

L0504378

Patty Daniels — Delivered By (Print)

Patty Daniels — Delivered By (Sign) — 4/15/05 Date

#1-9 13-15 — Received By — 4-15-05 Date

#16 DNA — Received By — 4-15-05 Date

Item # 1 15 17 — Received By — Date

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Exhibit E

178

MYRTLE BEACH POLICE DEPARTMENT

Report Date/Time 04/09/2005 08:28

File # 01-05-022625

Incident Report

INCIDENT

File #	Report Date/Time	Occurred From	Occurred To	Report Type
01-05-022625	04/09/2005 08:28	04/09/2005 04:30	04/09/2005 04:45	Supplemental
Incident Type		**Case Status**	**Case Status Date**	**Cleared**
ASSAULT: WITH INTENT TO KILL		OPEN/ACTIVE	04/09/2005	04/09/2005 07:57

Incident Location Information
RED ROOM - 1121 N KINGS HWY MYRTLE BEACH, SC 29577 (HAMPTON County)

Dispatched : 04/09/2005 04:47
En Route : 04/09/2005 04:47
Arrived : 04/09/2005 04:55
Census Tract : 30D
Premise Type : BAR/ NIGHT CLUB
Patrol Area : TOWN

Alcohol Related : UNKNOWN
Drug Related : UNKNOWN
Total Damaged Property Value : $0.00
Total Stolen Property Value : $0.00
Total Recovered Property Value : $0.00

PERSON 1

Person Type	Business/Person Name			Daytime Phone
VICTIM	JAMILA HYTOWER			[redacted]
Evening Phone	Person Address			Census Trac
	[redacted]			30F
Other Phone	Employer Address			Census Trac
[redacted]				
Race	Sex	SSN	DL Expiration	DL Number
BLACK	Female			
Birth Date	Birth Location			
[redacted]				

Age : [redacted]
Ethnic Origin : NON-HISPANIC
Min. Height : 5'06"
Min. Weight : 215 lbs
Adult/Juvenile : ADULT
Victim Type : INDIVIDUAL
Will File Charges : UNKNOWN
Can Identify Offender : YES
Sobriety of Victim : SOBER

Extent of Injury : MINOR
Injury Type 1 : APPARENT MINOR INJURY
Medical Treatment : EMERGENCY ROOM
Hospital Taken To : CONWAY HOSPITAL
Physician's Name : HAYES
Hair Color : BLACK
Eye Color : BROWN
Residency Type : JURISDICTION

NARRATIVE 1

Topic SUPPLEMENTAL

ON ABOVE DATE AT APPROXIMATELY 05:30, R/O WAS DISPATCHED TO CONWAY MEDICAL CENTER TO STAND-BY WITH THE VICTIM IN REFERENCE TO THE SHOOTING AT THE RED ROOM. R/O SPOKE WITH THE VICTIM AND SHE STATED THAT THE INCIDENT STARTED ON THE DANCE FLOOR AND SECURITY EJECTED TWO SUBJECTS WHILE ONE SUBJECT LEFT QUICKLY THROUGH THE FRONT DOOR. THE VICTIM DESCRIBED THE SUBJECT THAT LEFT THROUGH THE FRONT DOOR AS A BLACK MALE, 6'00" TO 6'04", ABOUT 150 TO 160 LBS., LOW CUT HAIR, RED SHIRT WITH A DESIGN ON THE FRONT, BLUE JEANS, BLACK AIR FORCE ONE SHOE WITH A RED CHECK AND RED ON THE BOTTOM OF THE SOLES. AFTER ABOUT TWO TO THREE MINUTES THE SUBJECT IN THE RED SHIRT CAME BACK IN THROUGH A SIDE DOOR, AND STOOD BEHIND A SECURITY GUARD/ BOUNCER, AND BEGAN SHOOTING. VICTIM STATES THAT SHE COULD POSITIVELY IDENTIFY THE SHOOTER THROUGH EITHER A LINE-UP OR A PHOTO LINE-UP. THE VICTIMS WOUNDS WERE NOT SERIOUS, AND THE DOCTOR SAID SHE MAY BE RELEASED TODAY. THE VICTIM WAS SHOT TWICE IN THE RIGHT CALF, AND TWICE IN THE LEFT BUTTOCK.

Reporting Officer	Department	Report Status:
PTL BRIAN K WELCH (5561)	MYRTLE BEACH POLICE DEPT	Signed
Officer Name		Date/Time
Approving Officer	Department	Date / Time

Incident Report

Ethnic Origin : UNKNOWN	Sobriety of Victim : HAD BEEN DRINKING
Min. Height : 5'09"	Extent of Injury : SERIOUS
Min. Weight : 165 lbs	Injury Type 1 : OTHER MAJOR INJURY
Adult/Juvenile : ADULT	Medical Treatment : EMERGENCY ROOM
Victim Type : INDIVIDUAL	Hospital Taken To : GRAND STRAND REGIONAL MED CENTER
Will File Charges : YES	Physician's Name : SENN
Can Identify Offender : UNKNOWN	Residency Type : UNKNOWN

NARRATIVE 1

Topic SUPPLEMENTAL

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 HCR 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 (6783)	**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

MYRTLE BEACH POLICE DEPARTMENT

Report Date/Time 04/09/2005 07:10

Incident Report

File # 01-05-022625

INCIDENT					
File # 01-05-022625	Report Date/Time 04/09/2005 07:10	Occurred From 04/09/2005 04:47	Occurred To 04/09/2005 07:09	Report Type Supplemental	
Incident Type ASSAULT: WITH INTENT TO KILL		Case Status OPEN/ACTIVE	Case Status Date 04/09/2005	Cleared 04/09/2005 07:09	
Incident Location Information 1121 N KINGS HWY MYRTLE BEACH, SC 29577 (HORRY County)					
Dispatched : 04/09/2005 04:47 En Route : 04/09/2005 04:47 Arrived : 04/09/2005 04:47 Census Tract : 30D Premise Type : BAR/ NIGHT CLUB Patrol Area : TOWN			Alcohol Related : UNKNOWN Drug Related : UNKNOWN Total Damaged Property Value : $0.00 Total Stolen Property Value : $0.00 Total Recovered Property Value : $0.00		

NARRATIVE 1

Topic SUPPLEMENTAL

ON THE ABOVE DATE AND TIME, I RESPONDED TO THE RED ROOM IN REFERENCE TO A SHOOTING INCIDENT THAT OCCURRED. WHEN I ARRIVED I ASSISTED IN KEEPING THE PATRONS OF THE CLUB CALM AND ORDERLY. I ASSISTED IN THE RETRIEVING OF WITNESS STATEMENT FORMS FROM ALL THAT WERE IN THE CLUB DURING THE INCIDENT. I DID NOT OBSERVE OR HEAR ANY GUN FIRE FROM THE AREA OF THE CLUB. I RESPONDED DUE TO THE INITIAL OFFICERS CALLING FOR ADDITIONAL UNITS TO ASSIST AT THE RED ROOM CRIME SCENE. I DID OBSERVE THE WOUNDED SUBJECTS IN THE CLUB. A MALE LAYING ON HIS BACK AT THE INSIDE ENTRANCE AREA OF THE CLUB ON THE NORTH EAST CORNER OF THE CLUB, WITH NUMEROUS PERSON ASSISTING HIM. A FEMALE IN THE SMALL HALLWAY IN THE NORTH WEST PART OF THE CLUB, WAS LAYING ON HER BACK WITH NUMEROUS PERSONS ASSISTING HER. A BLACK FEMALE SITTING ON THE COUCH IN THE CENTER PORTION OF THE CLUB AT THE SOUTH EAST WALL, SHE HAD SEVERAL PERSONS ASSISTING HER. I ONLY NOTICED THE BLACK MALE IN THE SOUTHERN MOST PART OF THE CLUB WHEN EMS ARRIVED AND WAS DOING CPR ON THE SUBJECT. I OBSERVED A TOTAL OF 4 PERSONS THAT WERE INJURED FROM THE INCIDENT.

Reporting Officer	Department	Report Status:
PTL LARRY A WILLIAMS (7118)	MYRTLE BEACH POLICE DEPT	Signed
Officer Name		Date/Time
Approving Officer	Department	Date / Time

NARRATIVE 1

Topic SUPPLEMENTAL

AT APPROX. 0448 HOURS 04/09/05 I/O HEARD VIA RADIO THAT PFC GAITHER NEEDED ASSISTANCE IN REFERENCE TO A SHOOTING CALL AT THE 'RED ROOM' WHICH IS LOCATED AT 1121 N. KINGS HWY, MYRTLE BEACH SC. UPON MY ARRIVAL AT THE CLUB I/ OBSERVED OTHER POLICE VEHICLES AND BICYLES AT THE SCENE AND OBSERVED A GREAT DEAL OF ACTIVITY NEAR THE ENTRANCE AT THE CORNER OF 12TH AVE N. AND KINGS HWY. AS I/O ENTERED THE BUILDING I/O NOTED THAT OFFICERS GAITHER,BOLEY,GIBSON AND DAVIS WERE STRUGGLING WITH A MALE WHO WAS TRYING TO GO THO THE REAR OF THE CLUB AND REFUSING THEIR COMMANDS TO STOP. ALSO NOTED WAS THAT THERE WAS A GROUP OF ABOUT FOUR PERSONS, BOTH MALE AND FEMALE TO THE LEFT OF THIS ENTRY WAY ATTENDING TO A MALE WEARING BLACK PANTS LAYING ON HIS SIDE. I/O THEN APPROACHED TO HELP THE OTHER OFFICERS RESTRAIN THE SUBJECT THEY HAD WITH HIM BECOMING MORE AGITATED AND LOWERING HIS HEAD TOWARDS ME. AT THIS TIME PFC GIBSON WHO WAS ADVISING THE SUBJECT TO CEASE RESISTANCE STRUCK THE SUBJECT LATER IDENTIFIED AS NGIRACHREANCHE IN THE LEG WITH HIS ASP BATON. SUBJECT WAS THEN HANDCUFFED AND REMOVED. FOLLOWING THIS OFFICER GAITHER ADVISED ME THAT THERE WAS A PERSON NEAR THE KITCHEN WHO ALSO BEEN SHOT AND ANOTHER IN A SEPARATE ROOM WHO HAD BEEN SHOT AS WELL. I/O AND OTHER OFFICERS BEGAN TO SECURE THE EXTERIOR OF THE BUILDING AND SURROUNDING AREA FOR EVIDENCE RETENTION AND THE IDENTIFICATION AND RETENTION OF WITNESSES. WITNESSES AND PATRONS WERE REMOVED FROM THE INTERIOR OF THE CLUB AFTER IT WAS DETERMINED THAT THE EXTERIOR WAS SECURE AND SAFE THESE PEOPLE WERE RETAINED FOR DETECTIVE INTERVIEW. I/O REMAINED AT THE SCENE AND ASSISTED RESPONDING OFFICERS WITH CONTROL AND CONTAINMENT UNTIL CRIME SCENE SPECIALIST BAILEY ACCEPTED RESPONSIBILITY FOR THE CRIME SCENE.

Reporting Officer	Department	Report Status:
MICHAEL J MARSH (5755)	MYRTLE BEACH POLICE DEPT	Approved
Officer Name		**Date/Time**
Approving Officer	**Department**	**Date / Time**
MICHAEL J MARSH (5755)	MYRTLE BEACH POLICE DEPT	04/09/2005 09:48

Exhibit F

NARRATIVE 1

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

P 9 DR L0504378 84

01-05-022625

Exhibit G

85

Ardeni P. Cato II 316533
LEE C.I. Bach/D/143
990 Wisacky Hwy
Bishopville, S.C. 29010

FOI # 2007-214

March 27, 2007

Rec'd 3/30/07
Due 4/19/07

SLED
P.O. Box 21398
Columbia, S.C. 29221-1398

Re: Freedom of Information Act Request
Ardeni Cato II
FOI #2007-214

L05-4378

LP
Trace
DNA
Fire

To whom it may concern,

Date of offense: April 9, 2005
Date of Arrest: April 9, 2005
County of Arrest: Horry County
Name of Victims:
- Anthony Hemingway
- Elisa Narrehn
- Ronald Comey
- Jamilia Hykenere

Please forward the ballistic report for Case #'s 05-65-26-3409, 05-65-26-3410, and 05-65-26-3412, as soon as you can. Thankyou.

Respectfully
Ardeni P. Cato II

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

April 2, 2007

Ardon P. Cato II #316535
Lee CI / Rich/D/143
990 Wisacky Hwy
Bishopville, SC 29010

RE: Ardon Cato

Dear Mr. Cato:

We are in receipt of the additional information that you have provided and are processing your request at this time. We will be in touch with you soon regarding this matter.

Sincerely,

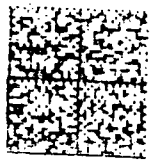
M. C. Perry

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

State Law Enforcement Division
Public Information Department
P. O. Box 21398
Columbia, SC 29221-1398



RECEIVED
MAY 3 2007
LEECI MAIL ROOM

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