

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Steven. H. John, Circuit Court Judge

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SC Court of Appeals

STATE OF SOUTH CAROLINA,

Respondent

v.

ARDON P. CATO, II,

Petitioner

Appellate Case No. 2016-002081

PETITION FOR REHEARING

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Respondents

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AUTHORITIES

State v. Gagnon, 2013 Order Granting New Trial Based on After-Discovered Evidence, Case No. 06-65-26-0594

Jamison v. State, S.C. Court of Appeals,
Unpublished Opinion No. 2012-UP-437

Jamison v. State, S.C. Supreme Court, 2014
Opinion No. 27454

State v. McCoy, 401 S.C. 363, 737 S.E2d 623 (2013)

State v. Spann, 334 S.C. 618, 513 S.E2d 98 (1999)

In re Reise, 192 P.3d 949 (Wash Ct. App 2008)

State v. Miller, 379 S.C. 108, 665 S2d 596 (2008)

State v. Johnson, 376 S.C. 8, 654 S2d 835 (2007)

State v. Simmons, 279 S.C. 165, 303 S2d 857 (1983)

State v. Needs, 333 S.C. 134, 508 S2d 857 (1998)

OTHER AUTHORITIES

Rule 221, S.C.A.C.R.

Rule 240, S.C.A.C.R.

Rule 220(b)(2), S.C.A.C.R.

Rule 29(b), S.C.R. Crim. Pro.

Rule 102, S.C.R.E.

Rule 103, (a), S.C.R.E.

Rule 104(b), (e), (f), S.C.R.E.

Rule 401, S.C.R.E.

Rule 602, S.C.R.E.

QUESTION PRESENTED

- 1) WAS CIRCUIT COURT JUDGES' DECISION IN ERROR OF LAW AND DID HE ABUSE HIS DISCRETION IN DISPOSING OF ORAL ARGUMENTS AND DENYING

PETITIONERS RULE 29(b), S.C.R. CRIM. PRO. MOTION
FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE?

STATEMENT OF THE CASE

Arden P. Cato, II, was indicted at the Horry County September 2005 Grand Jury term for two counts of assault and Battery with Intent to Kill and Murder. J.M. Long, III, represented him. On July 17, 2006 Petitioner plead guilty as indicted. He was sentenced to the State Dept. of Corrections by Judge Steven H. John for a term of 4yrs for Murder and 20yrs for each ABWIK to run concurrent.

Petitioner Arden P. Cato, II, proceeded Pro Se and filed a Rule 29(b) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence, dated March 8 2016, and was clock stamped with the Horry Co. Clerk of Court on March 14, 2016.

The Circuit Court Judge Steven H. John, issued an Order Disposing of Oral Arguments and Denying Petitioners Motion for a New Trial Based on After-Discovered Evidence dated July 18, 2016, filed July 19, 2016.

Petitioner filed a motion to Alter or Amend Judgement of the Order pursuant to Rule 59(e) S.C.R. Civ. Pro. dated August 5, 2016, clock stamped with the Clerk on Aug. 10, 2016.

Circuit Court Judge issued an Order Denying Petitioners Motion to Alter or Amend Judgement dated Sept. 14, 2016, filed

on September 15, 2016.

Petitioner filed a Notice of Appeal to S.C. Court of Appeals dated Oct. 3, 2016. Oct. 17, 2018 S.C. Court of Appeals issued an Order Affirming the Circuit Court Judge decision.

This is Petitioner's Petition for Rehearing which proceeds as follows:

ARGUMENT

I.) Circuit Judges' decision was in error of law and abused his discretion in Disposing of Oral Arguments and Denying Petitioner's Rule 29(b) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

Pursuant to Rule 221(a), S.C.A.C.R. and in accordance with Rule 240, S.C.A.C.R., this Petition for Rehearing states with particularity how the Circuit Court Judges' decision was in error of multiple clearly established and defined laws, and how he abused his discretion in Disposing of Oral Arguments and Denying Petitioner's Rule 29(b) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence that was overlooked and/or misapprehended by this Court.

State v. Needs, 333 S.C. 134, 508 S.E2d 857 (1998)
(in criminal cases, the Appellate Court sits to review error of law...). Adding that, (An abuse of discretion occurs when the conclusions of the [Circuit court] Judge lack

evidentiary support. Unlike Needs, Petitioner Cato has new outcome changing evidence that is being presented and argued. State v. Johnson, 376 S.C. 8, 654 S.E2d 835 (2007), (... when determining whether an error of law exists in a criminal case, ... it is necessary to consider the merits of the case.) State v. Simmons, 279 S.C. 165, 303 S.E2d 857, (1983), ([an] error[is] when [there's] no evidence to support decision).

It has been stated Per Curiam, in an opinion that holds no precedential value and should not be cited or relied on unless in the proceeding it is directly involved, that the Interest of Justice Test set forth in Jamison v. State, S.C. Supreme Court, 2014, Op. No. 27454, only applies in the PCR context.

In this present case Petitioner Cato presented After-Discovered Evidence after guilty plea motioned by Rule 29(b), S.C.R. Crim. Pro. Jamison presented Newly Discovered Evidence after guilty plea by PCR. Jamison presented new evidence to argue a different defense which could change the outcome. Petitioner Cato presented after-discovered evidence to claim innocence which would change the outcome. (R. pg. 15-21).

Quoting Jamison v. State, S.C. S. Ct., 2014, Op. No. 27454, (The PCR Judge granted relief on the basis of 'fundamental fairness' and ordered a new trial. The PCR Judge found Respondent met his burden proving that ... eyewitness

testimony constituted newly discovered evidence and that... testimony would likely change the result at trial.) The Court of Appeals of South Carolina affirmed in agreement of that ruling. Jamison v. State, S.C. Ct. App. Unpublished Op. No. 2012-UP-437.

In this present case Petitioner Cato is entitled to the very same "fundamental fairness". Petitioner clearly overcomes the burden Jamison could not. Cato has established on record that his plea came as a result of counsel's ineffectiveness with failure to investigate the ballistics evidence and advise his client of a constructed defense in the event of trial. (R. pg. 59-65). Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008). Petitioner Cato is being deprived of a fair and impartial proceeding by not being able to put on an affirmative defense due to his lack of access to evidence of a SLED Ballistics Report that substantiates with accuracy for his involvement during the night in question. (R. pg. 4-43) (See Petitioners Initial Brief and Final Brief on Respondents Record).

This Court will find that the Circuit Court Judges' decision is in error of Rule 103(a), S.C.R.E. (Error may not be presented upon a ruling which admits or excludes evidence unless a substantial right... is affected), and that he abused his discretion in Disposing of Oral Arguments and Denying Petitioners Rule 29(b), S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

In Jamison, the S.C. Supreme Court took away the 5 prong standard test, and instead applied the Interest of Justice standard test of newly discovered evidence after guilty pleas in a PCR context. The S.C. Supreme Court never ruled that the 5 prong standard test did not apply to after-discovered evidence after guilty pleas in a motion by Rule 29(b) S.C.R. Crim. Pro. context.

Both Jamison, rulings are applicable to this present case of Petitioner Cato because the PCR Judges ruling relied on the 5 prong criteria of State v. McCoy, 401 S.C. 363, 737 S.e2d 623 (2013) and, State v. Spann, 334 S.C. 618, 513 S.e2d 98 (1999), which is the same 5 prong criteria Cato relies on in his Rule 29(b) Motion. The S.C. Court of Appeals affirmed in agreement of that ruling.

Quoting Jamison v. State, S.C. Supreme Court, 2014, Op. No. 27454, (Accordingly, we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude . . . relief in all cases). With emphasis on "in all cases" and "in all circumstances", whether using the 5 prong Spann Criteria, or the S.C. ~~Court~~ Supreme Court Interest of Justice test, a guilty plea not precluding relief applies in a Rule 29(b) Motion for New Trial Based on After-Discovered Evidence context as well.

Rule 29(b), S.C.R. Crim. Pro., (A motion for new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the



defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence). This Court will find that the Circuit Court Judges' decision is in error of Rule 201(e), S.C.R.E. (A party is entitled upon timely request to an opportunity to be heard), Rule 201(f), S.C.R.E. (Judicial notice may be taken at any stage of the proceeding), and that he abused his discretion in Disposing of Oral Arguments and Denying Petitioners Rule 29(b) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence. (R. pg. 4-43) (See Petitioners Initial Brief and Final Brief on Respondents Record).

Jamison, S.C. Supreme Court ruling, (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). Adding that, (In other words a PCR applicant may successfully disavow his or her guilty plea only where the interest 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). Further holding, (In so holding, we caution that it will be the rare case indeed where the interest of justice will require that a knowing and voluntary guilty plea be vacated... on the basis of newly discovered

evidence, for an unconditional guilty plea involving an admission of guilt and ~~an~~ waiver of trial and all defenses will ... preclude any subsequent challenge to factual guilt.)

In re Reize. 192 P3d 949, at 955, (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice). Unlike Reize, Petitioner Cato has shown that a grave manifest injustice exist, and that it is very necessary in the Interest of Justice that it be corrected. The S.C. Supreme Court holds in Jamison that, (such a determination will not be resolved in a formulaic manner, but will necessarily be context dependent). The manifest injustice would be to have Petitioner Cato remain convicted of the charges when new evidence is presented that someone, who is not Petitioner, was inside the nightclub shooting and inflicting harm on the victims. It is a manifest injustice to use the SLED Ballistic Report that erroneously pairs a .380 shell casing and a .9mm bullet as a part of the record to unequivocally convict the Petitioner of the charges. (R. pg. 15-21) (R. pg. 26-32).

As the S.C. judicial system uses the lens of fundamental fairness, Petitioner's after-discovered evidence clearly meets the Interest of Justice Standard in regards to the guilty plea and a new trial with witnesses who were on the scene of incident, hearing someone plotting to do harm to people, and hearing shots being fired from totally different

directions, which establishes that someone, who is not Petitioner, was on the inside of the club shooting and inflicting harm the victims. (R. pg. 15-21) Rule 201(b), S.C.R.E. (A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to ~~success~~ sources whose accuracy cannot reasonably be questioned).

This after-discovered evidence raises pertinent questions to be answered in a new trial. Those questions are: who was on the inside of the nightclub shooting and inflicting harm on the victims? . . . Where did that person go? . . . Why were there originally (4) 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 each being situated in different parts of the nightclub? . . . Why were there two different types of ammunition erroneously paired in the SLED Ballistics Report? With the after-discovered evidence presented, the Interest of Justice require these questions be answered in a new trial.

Rule 401, S.C.R.E. (Relevant Evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

This Court will find that the Circuit Court Judges' decision is in error of Rule 104(b), S.C.R.E. (When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it . . . [when the]

evidence [is] sufficient to support a finding of the fulfillment of the condition), and Rule 104(e), S.C.R.E. (This rule does not limit the right . . . to introduce before [a] jury evidence relevant to weight or credibility), and that he abused his discretion in Disposing of Oral Arguments and Denying Petitioners Rule 29(b), S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

Here Petitioner may indeed disavow his guilty plea. Clearly, the Interest of Justice with after-discovered evidence presented, outweighs his waiver and solemn admission of guilt encompassed in his plea of guilty and the compelling interests of the Circuit Court Judge to maintain the finality of his guilty plea convictions. Petitioner Cato's case is the 'rare case' where the Interest of Justice require that his plea be vacated. This Court will find that the Circuit Court Judges' decision is in error of Rule 102, S.C.R.E. (These rules shall be construed to secure fairness . . . that the truth may be ascertained and proceedings justly determined), and in error of the 'Fundamental Fairness' Standard affirmed by the S.C. Court of Appeals in Jamison v State Unpublished Op. No. 2012-UP-437. Due to these errors this Court will find that the Circuit Court Judge abused his discretion by wrongfully Disposing of Oral Arguments and Denying Petitioners Rule 29(b) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

With regard to the Interest of Justice Test set

This Court will find that the Circuit Court Judges' ruling of Petitioner (a) is After-Discovered Evidence being "wholly cumulative" is in error of the fifth (5th) prong of the Spann test. This After-Discovered Evidence is not cumulative because no one has ever said, stated, nor testified under oath that they heard shots being fired from totally different directions. This after-discovered evidence is not

Per Curiam, the S.C. Court of Appeals overlooked, and/or misapprehended the Circuit Court Judge error of law and abuse of discretion in applying the Spann test set forth in State v. Spann, 334 S.C. 618, 513 S.E2d 98 (1999), (... evidence tending to exonerate defendant could not reasonably have been discovered through exercise of due diligence at time of his trial, thus entitling defendant to new trial). (reversal on this ground, need not address remaining issues). (new evidence), raise reasonable inference as to [Petitioners] innocence), (error of law under the unusual facts of this case).

Discussed Evidence.
 Disposing of Oral Arguments and Denying Petitioner's Rule error of what law and abused his discretion by wrongfully this Court will find that the Circuit Court Judge is in a formulaic manner, but will necessarily be context dependent), Op. No. 27454, (such a determination will not be resolved forth by the S.C. Supreme Court in Jamison v. State, 2014,

cumulative because no one has ever said, stated, nor testified under oath that they heard people plotting to do harm before shots were fired. This after-discovered evidence is not cumulative, but is a solidification of the fact that someone other than Petitioner Cato, was on the inside of the nightclub shooting and harming the victims. There were/are no sworn statements of such given under oath to accumulate or impeach. This after-discovered evidence does not impeach any evidence by attacking the character, motives, integrity, or veracity of any testimony. (R. pg. 15-24).

This Court will find that the Circuit Court Judges' ruling was/is in error of this clearly defined and established law and abused his discretion in Disposing of Oral Arguments and Denying Petitioners Rule 29(b) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

The S.C. Court of Appeals affirmed the Judges' grant of a new trial based on newly discovered evidence being in accordance with the Spann criteria in Jamison v. State, Unpublished Op. No. 2012-UP-437. Spann specifically deals with prong(3), (could not in the exercise of due diligence have been discovered prior to trial.) In this present case of Petitioner Cato, the after-discovered evidence could not in the exercise of due diligence have been discovered prior to trial. It was a chaotic environment and credible witnesses such as Ms. Beckman and Mr. Edwards were able to leave the scene of incident without being interviewed. The witnesses who were interviewed were unable to identify others who were there. Rule 602,

S.C.R.E., (A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter) Unlike State v. Johnson, 376 S.C. 8, 654 S.E2d 835 (2007), Petitioner (a's case consist of witness testimony that is very credible because they were there, which is crucial to the outcome of this case. (R. pg. 15-24). There is no amount of due diligence that this evidence could have been discovered prior to trial. This can only come by way of after-discovered evidence.

With regard to State v. Spann, 334 S.C. 618, 573 S.E2d 98 (1999), the (5) five prong Spann Test Criteria, and the (3rd) third reasonable due diligence aspect in particular, this court will find that the Circuit Court Judge was/is in error of what law and abused his discretion by disposing of oral Arguments and Denying Petitioner's Rule 29(a) S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

Petitioner (a) prayerfully ask this Honorable Court to take Special consideration of similar established law by the same Circuit Court Judge in this case. State v. Gagnon, 2013 Order Granting New Trial Based on After-Discovered Evidence. This case mirrors Petitioner (a's case in the aspects of how the after-discovered evidence that was relied on to grant the new trial was obtained, and how the new evidence of witness testimony "attacks the credibility of a major piece of the evidence the State used". The after-discovered evidence in the case of

Pursuant to Rule 200(b)(2), S.C.A.C.R. and State v. Johnson, 376 S.C. 8, 654 S.E2d 835 (2007), (When determining whether an error of law exist in a criminal case... it is necessary to consider the merits of the case). Petitioner (Cato) is respectfully requesting that the points distinctly stated in Petitioner's final Brief, and clarified in Petition for Rehearing, that are necessary to the decision, that fairly arose upon the record of this Court, be addressed in detail for a just decision in Petitioner's

CONCLUSION

Cato attacks the credibility of the errors in the SC90s Ballistic Report, the shots fired vs. wounds inflicted and bullets to shell casings found ratios. The after-discovered evidence in Cato's case will change the outcome in the event of a new trial with witness inference and identification of someone who is not Petitioner (Cato) that was on the inside of the nightclub shooting and inflicting harm on the victims. (R. pg. 4-43) (See Petitioner's Initial Brief and Final Brief on Respondents Record).

Petitioner (Cato) is entitled to the very same 'fundamental fairness' and correct application of law that this same Circuit Court Judge gave Gagnon. This Court will find in regards to State v. Gagnon, 2013, Order Granting New Trial Based on After-Discovered Evidence, the Circuit Court Judge is in error of established law and abused his discretion in disposing of oral arguments and denying Petitioner's Rule 29(b) S.C.R. Crim. Pr. Motion for New Trial Based on After-Discovered Evidence.

favor, the reason for the Courts decision.

11-13-18

Date

Respectfully Submitted,
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