THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

Appellate Case No. 2016-002081

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

vs.

ARDON P. CATO, II,

APPELLANT.

RETURN TO PETITION FOR REHEARING

Respondent, by and through undersigned counsel, would respectfully show this Court: Appellant, Ardon P. Cato, II. ("Cato"), has filed a *pro se* Petition for Rehearing from this Court's Unpublished Opinion affirming the denial of his *Rule 29(b), SCRCrP,* "Motion for a New Trial based on After-discovered Evidence" by the Honorable Stephen John. State v. Ardon P. Cato II. Opinion No. 2018-UP- 383 (Ct. App. Filed October 17, 2018). Cato alleges this Court overlooked or misapprehended the law and overlooked or misapprehended certain facts in affirming Judge John's denial of his motion for a new trial. Cato is wrong. As the record and procedural history shows, this Court did not overlook or misapprehend the law or any facts.

Procedural History

On April 9, 2005, Cato shot and killed Anthony Hemingway. On the same date and at the same time, Cato shot and wounded Elisa Narruhn and Ronald Lamey. All 3 crimes occurred

at a nightclub in Horry County.[1] Cato was arrested moments after the shootings. He was indicted for murder (05-GS-26-3412), ABWIK [2 counts] (05-GS-26-3409-3410), and 2 additional counts of ABWIK. He was represented by retained counsel J.M. Long, III.

The Guilty Pleas

On July 17, 2006, the day his trial was to begin on the above charges, Cato pleaded guilty to murder and ABWIK (2 counts] [the above numbered indictments] before Judge John. The State agreed to dismiss the other 2 indictments [not numbered above] for ABWIK in exchange for the guilty pleas.[2] There was no recommendation as to sentence.[3] At the plea, Cato admitted he was guilty of Hemingway's murder and the shootings [ABWIKs] of Narruhn and Lamey. Judge John sentenced Cato to 42 years for murder and 20 years for each ABWIK concurrent. Cato did not directly appeal his convictions or sentences.

***The PCR Action* (06-CP-26-4399)**

Cato filed a PCR action on September 6, 2006. A PCR hearing was held on April 3, 2007 before Judge Paula H. Thomas. Cato alleged plea counsel: (1) gave him erroneous advice; (2) conducted an inadequate ballistics investigation and gave him erroneous advice regarding a defense related to this; (3) did not seek a plea bargain to manslaughter; and, (4) breached his duty of loyalty and had a conflict. On May 29, 2007, Judge Thomas issued an Order, filed June 4,

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1 Cato also shot and wounded 2 other victims at about the same time.

[2]One of these victims died prior to trial from injuries unrelated to this case. Another was a bouncer or security person who was apparently nicked by a bullet fired by Cato as he was fleeing from the scene. The State agreed to dismiss these 2 charges in exchange for the guilty pleas.

[3]Prior to trial, the State offered to recommend a sentence of 40 years on murder & ABWIK (2 counts). Cato declined the offer. On the morning of trial, the Solicitor and Cato's counsel met with Judge John in chambers, and he indicated if Cato pled guilty he would sentence Cato to between 40 to 45 years. After counsel advised Cato of Judge John's indication of the potential sentence range upon pleas of guilty, Cato withdrew his pleas of not guilty and entered pleas of guilty to the above charges.

2007, denying and dismissing the claims with prejudice. (Supp. R. 97-105).

The PCR Appeal

Cato appealed to the S.C. Supreme Court by way of a Johnson Petition for Writ of Certiorari (Supp. R. 106-18) raising the following issue: "Did the PCR judge err in denying relief despite trial counsel's providing ineffective assistance of counsel which affected and prejudiced the outcome for petitioner?" In the Petition, Cato argued counsel never advised him of the results of his ballistics investigation. PCR appellate counsel certified to the Court the appeal was without merit. The appeal was transferred to this Court. On May 28, 2009, this Court, after careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), denied the petition and granted appellate counsel's request to withdraw. (Supp. R. 119). The Remittitur was issued June 15, 2009. (Supp. R. 120)

The Federal Habeas Action

Cato then filed a *pro se* petition for federal habeas corpus relief on August 17, 2009. (Cato v. Padula, C/A No. 4:09-2110-CMC-TER). (Supp. R. 121-63). The State filed a Return and Motion for Summary Judgment. (Supp. R. 164-99). U.S. Magistrate Thomas E. Rogers, by Report and Recommendation ("R&R") issued July 26, 2010, recommended Respondent's motion be granted and the petition be denied and dismissed. (Supp. R. 200-13). U.S. District Judge Cameron M. Currie adopted the R&R and dismissed the action on August 12, 2010. (Supp. R. 214-16). Cato appealed and the Fourth Circuit Court of Appeals dismissed the appeal by unpublished opinion. (Supp. R. 217-19).

The Motion for a New Trial based on After-Discovered Evidence

On March 14, 2016, in Horry County, Cato, filed the *pro se* "Motion for a New Trial based on After-Discovered Evidence" that is the subject of this appeal. (R. 21-32). Cato

submitted 2 affidavits in support of the motion. The State filed a Response on April 6, 2016 asking the Motion be denied and dismissed. (R. 40-41). Judge John, the original plea/sentencing judge, denied and dismissed the Motion by written Order. (R. 3-4). On August 10, 2016, Cato filed a Motion to Alter or Amend the Order, which was denied by written Order. (R. 42-50, 5-6). This appeal followed.

Relevant Facts

On April 9, 2005, Cato was at a nightclub, "The Red Room," in Myrtle Beach. It was about 4:30 a.m., and Cato was intoxicated. He became involved in an altercation in the club with 2 men. Cato was told to leave the club by bouncers. He did and went to his car, which belonged to his girlfriend, and retrieved a pistol, also belonging to his girlfriend. Unknown to Cato, the 2 men involved in the altercation also left the club at the same time he did. (Supp. R. 1-35).

Cato came back into the club, not through the front door where there was a metal detector, but through another exit, and fired several shots into a crowd of people in the club. When Cato re-entered the club, he was near or behind a bouncer or security person positioned near the exit door, and Cato raised the gun into the air and fired into the crowd holding the gun "limp wrist" style [the gun was cocked sideways]. Several patrons of the club were struck by bullets Cato fired. Anthony Hemingway, a club bouncer or security person, was struck in the chest, the bullet striking the carotid artery, and he died from loss of blood. Elisa Narruhn was struck in the back and paralyzed from the waist down. Ronald Lamey was struck in the stomach. Jamila Hytower was struck in the buttocks and leg. None of these victims were involved in the earlier altercation with Cato. After firing the shots, Cato fled the nightclub with the gun. An acquaintance or accomplice of Cato fled the club with Cato. (Supp. R. 1-35).

Another security guard or bouncer followed Cato and got a description and tag number of

the car Cato and his acquaintance got into, parked at a restaurant near the club. Cato was driving the car. Two (2) police officers on bicycles patrolling nearby also spotted Cato fleeing the club and radioed for assistance. Another officer, who was nearby in a police car, responded and conducted a felony car stop of the car Cato was operating. As a result, Cato was apprehended just moments after the crimes, and the murder weapon was recovered from the glovebox of the car Cato was in. (Supp. R. 1-35).

Ballistics matched the fired bullet removed from Hemingway's body at autopsy, a fired bullet from the inside of the club near the front door, and all of the fired shell casings found at the scene, to the gun Cato used to commit the crimes. Ballistics revealed the gun had fired both .380 caliber and 9mm ammo during the shooting, and a live .380 round was still jammed in the gun, a 9mm pistol, when recovered by police in Cato's car. (Supp. R. 1-35). An unfired 9mm bullet was also found in the parking lot where Cato's car had been previously parked.

At his guilty plea, Cato admitted he was guilty of Hemingway's murder and the ABWIKs of Lamey and Narruhn. Cato apologized to the victims for his actions and stated he could not believe he committed such a senseless crime. He admitted he was angry or aggravated at the 2 men he was involved in the earlier altercation with. Cato admitted he was intoxicated at the time of the crimes and stated he just wanted to show the men who he was involved in the earlier altercation with that he [Cato] was not someone to mess with. Cato was on probation at the time of these offenses for PWID marijuana. (Supp. R. 1-35).

As previously stated, Judge Thomas ("the PCR Court"), denied and dismissed Cato's PCR Application. In its Order, the PCR Court noted at the PCR hearing Cato testified on his own behalf and his plea counsel testified for the State. The Court had before it the plea transcript,

the Clerk of Court's records regarding the convictions, and Cato's prison records. After reciting the procedural history of the case, the Court noted, at the PCR hearing Cato announced he wished to proceed on the ineffective assistance of counsel ("IAC) grounds below. The Court noted it had the opportunity to review the record in its entirety, heard the testimony at the PCR hearing, and observed the witnesses at the hearing, closely passed upon their credibility and weighed their testimony. And, set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Court found Cato's convictions arose from a nightclub incident in which several people were shot, including Hemingway, who was killed, and Nahhrum, who was paralyzed. Although Cato took issue with some details, it was undisputed he left the club following an altercation with others, retrieved a gun from a car, returned, opened fire into the club, and then drove away. It was undisputed none of the persons shot were those whom Cato had the earlier altercation. (Referencing Plea Tr., Supp. R. 11, l. 12 -15, l. 4).

The Court also found that during his guilty plea, the plea court advised Cato of the sentencing ranges for the crimes he was pleading to, explained the offenses are violent and most serious, and he was pleading without any sentencing negotiations or recommendations by the State. (Ref. Plea Tr., Supp. R. 6, l. 11 - 8, l. 1). And, Cato told the plea court he wished to enter guilty pleas, understood what he was doing and the constitutional rights he was waiving, was pleading guilty voluntarily, was pleading guilty because he was guilty, and was satisfied with his attorney. (Ref. Plea Tr., Supp. R. 8, l. 2 – 10, l. 19.)

After the PCR Court correctly discussed the law applicable to IAC claims, it found and concluded, as discussed below, Cato had failed to carry his burden of proof. Therefore, the

application had to be denied and dismissed. The Court then discussed each of the claims raised at the hearing and its findings of fact and conclusions of law regarding them.

The Court summarized Cato's testimony as follows: He hired plea counsel because counsel explained the law of voluntary manslaughter to him, but counsel gave him bad advice, rendering his guilty plea involuntary. Plea counsel only met with him 4 times for a total of 20 minutes. There were .380 rounds and 9 mm rounds fired at the nightclub and ballistics might have shown the .380 rounds did not come from his 9 mm gun, demonstrating there must have been another shooter. He was a victim that night, explaining that 1 man swung at him twice. He believed the evidence showed he committed voluntary manslaughter rather than murder. He told plea counsel that when he fired shots into the club, he fired up high so as to frighten rather than hurt people. He admitted to firing 4 shots into the club. He was more frustrated than angry and came back to the club within 30 to 45 seconds after leaving. He asserted counsel pressured him to plead guilty even though Cato did not think pleading guilty to murder was in his best interest. Finally when he arrived at the courthouse the day of his plea, he had not reached a decision whether to go to trial or attempt plea negotiations, and he pled guilty without a plea deal.

The PCR Court summarized plea counsel's testimony as follows: Counsel was retained by Cato's family, and Cato initially told him the altercation was caused by Cato flirting with another man's girlfriend. Cato said he was beat up and then the bouncers ejected him. Counsel investigated the evidence that .380 and 9 mm rounds were fired at the club, hoping to find evidence there was a 2nd responsible shooter. In addition to the different caliber ammo used, there was some question about how and whether Cato fired enough shots to have caused all the wounds inflicted. However, upon investigation, the evidence did not support the 2-shooter

theory. Counsel talked with the president of the gun's manufacturer who told him it was a little known fact that a 9mm Highpoint would fire .380 rounds. Also, when Cato's gun was recovered there were both .380 and 9mm rounds in the gun. Moreover, ballistics showed all of the brass found as well as the bullet recovered from Hemingway's body came from Cato's gun.

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

The PCR Court found and concluded Cato had failed to demonstrate counsel gave him bad advice or his plea was involuntary. The Court found there was ample evidence to support the plea to murder, and counsel's advice regarding Cato's concerns and theories was sound. The Court noted Cato asserted he was pressured to plead guilty, but the Court found and concluded the transcript showed he pled guilty freely and voluntarily and his plea was not the result of promises, threats, or force. (Ref. Plea Tr., Supp. R. 9, ll. 12-24.) The Court found Cato knew what he was pleading to and what he was doing and made the decision to plead guilty after counsel advised him of the sentencing range the judge said he would consider. Therefore, this allegation was denied and dismissed since it was without merit. Cato did not file a Rule 59,

SCRCP Motion to Alter or Amend the PCR Court's Order of Dismissal.

The Federal Habeas Determination

The federal habeas court addressed these issues as well. In his federal habeas petition, Cato raised the following claims: (1) Did the PCR Court err in denying relief on counsel's failure to investigate the ballistics? (2) Did the PCR Court err in denying relief on counsel's failure to advise the client of a constructed defense [related to the ballistics investigation]? The Magistrate and District Judge found Cato failed to show the PCR Court unreasonably applied U.S. Supreme Court precedent or reached an unreasonable determination of the facts on either of these issues given the evidence before the PCR Court. As a result, the federal habeas petition was denied and dismissed with prejudice. The appeal from this ruling was also denied and dismissed.

What occurred below on the present motion

Cato submitted 2 affidavits below in support of his motion for a new trial based on after-discovered evidence.

The affidavits offered below

Twila Beckman

The affidavit of Twila Beckman states in pertinent part:

> I have been attending the LPN class on the Georgetown Campus at Horry-Georgetown Technical College since August 2014 with Yegide Boyd. 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. 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. At that point I excited about frequenting the Red Room a lot during that time period. Yegide ask did I remember the incident in April 2005 at the Red Room. 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: It was an all white party that night a late Friday night early Saturday morning. I was in the lounge area of the club when shots were fired. 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. As the shots were fired I ran to hide in the bathroom, therefore I could not see nor identify any one shooting. Also I have no knowledge of and did not see the incident that led to the shooting. As I was running to the bathroom I saw a back door open.

FURTHER AFFIANT SAYETH NOT.

[August 5, 2015]

(R. 34-35).

The affidavit of Willie Edwards

The affidavit of Willie Edwards states in pertinent part:

It is documented that I was apprehended in Georgia by South Carolina authorities in July 2005. In the months prior to said apprehension I periodically traveled to South Carolina. 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. I remember that it was an "all white" party, and it was late Friday night to early Saturday morning. 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. 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. 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. It was dark in the Club and I could not identify anyone. I ducked and followed the crowd rushing out the front entrance, some were rushing towards the back exit. This is what I can remember from that night. 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). 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. 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. 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.]

(R. 37-39).

Cato argued in his motion before Judge John that these 2 affidavits along with an *alleged* error in the SLED Firearms Report produced shortly after the crimes shows there was a 2nd shooter at the club that night and as a result his guilty plea convictions should be vacated and he should be granted a new trial. Cato is wrong.

As shown in Respondent's brief, there is no error in the SLED Firearms Report. (R. 72-77). Cato is confusing what was designated as "Item 9" by Myrtle Beach police and what was designated "SLED Item 9" by the SLED Firearms Laboratory.

And, the affidavits do not change anything. The affidavits are from 2 individuals who claim to have been present inside the nightclub on the night of the shooting. One (1) person is in prison with Cato. The other is a friend of Cato's female friend. Neither came forward with this "information" for about 10 years. Both claim to have heard gunshots fired at the time of the shootings. Both claim it sounded like gunshots were coming from both the front door of the club and the back of the club. However, neither actually witnessed the shooting or saw who was shooting. They cannot say Cato was not the shooter. Neither could give an exact number of shots that were fired. Further, even if one believes these individuals were present that night, since they were inside the club when the shots were fired but did not see the shooting, they could have heard merely echoes of the shots fired by Cato or ricocheting bullets. A fired bullet was found near the front door. It matched Cato's gun. Additionally, Edwards' statement he heard

some individuals discussing getting someone, even if true, does not prove these individuals had anything to do with or were involved in the shootings or that he did not overhear Cato and his acquaintance talking about retaliating for the earlier altercation.

After considering the affidavits submitted by Cato, and Cato's arguments in his motion, Judge John, the original plea/sentencing judge, appropriately denied the motion in the following written order.

The Order Denying the Motion

> 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 negotiations, 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 Exhibit A and B attached to the Applicant's motion. To succeed on a Motion for a 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, 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 two others with the intent to kill them, no statement in

either affidavit offered by Applicant is so material that it could possibly change the result of Applicant's admissions 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.

(Order). (R. 3-4.) Cato filed a Rule 59, *SCRCP*, Motion to Alter or Amend. Judge John denied the motion finding a *SCRCP* Rule 59 Motion has no application to the Court of General Sessions. The Court reaffirmed its prior ruling. (R. 5-6).

THE PETITION FOR REHEARING MUST BE DENIED

Cato has failed to meet the exacting standard of after-discovered evidence, to overturn his admissions at his guilty plea that he committed the crimes, and grant him a new trial.

As this Court is well aware, in criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005).

(Motion for a New Trial based on after discovered evidence)

"The granting of a new trial because of after-discovered evidence is not favored," and this Court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). As the South Carolina Supreme Court held in State v. Rhodes, 44 S.C. 325, 327, 21 S.E. 807 (1895):

> We, however avail ourselves of this opportunity to say that the universally recognized doctrine is that applications of this kind should be scrutinized with great caution, in order to avoid delays, and prevent any obstructions to the administration of justice. As was said by the late Chief Justice Simpson in the case of State v. David, 14 S.C. at page 432, "There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and as was said in the case of State v. Harding, 2 Bay, 268, it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed, to allow one with his life in danger, an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice"

Rhodes, 44 S.C. at 327, 21 S.E. 807.

"A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." Irvin, 270 S.C. at 545, 243 S.E.2d at 197; Harris, 391 S.C. at 544, 706 S.E.2d at 529. The credibility of newly-discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977); Harris, 391 S.C. at 545, 706 S.E.2d at 529. Only the trial court, and not the appellate court, has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. Id.; Harris, *supra*. "In this post-trial setting, our jurisprudence recognizes the

gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); Harris, *supra*. "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." Id.; Harris, *supra*.

Traditionally, in South Carolina, to obtain a new trial on after discovered evidence, a defendant must show the 5 factors set forth in State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). 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).[4]

However, this test proved unworkable where the defendant pled guilty. "Indeed, the traditional, newly discovered evidence factors are 'difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial.'" Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014),(*quoting* In re Reise, 192 P.3d 949, 954 (Wash. Ct. App. 2008). As the Court noted in Jamison, in the case of a guilty plea:

> [I]t was not an independent trial 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 post-conviction 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.

Jamison, 410 S.C. at 469-70, 765 S.E.2d at 129-30 (*quoting* People v. Schneider, 25 P.3d 755,

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4 *See* State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993). *See also* Mercer, 381 S.C. at 166, 672 S.E.2d at 565; State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998); Johnson v. Catoe, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

761 (Colo. 2001). As a result, in Jamison, our Supreme Court fashioned a more stringent and exacting standard after a guilty plea. Id. Where a criminal defendant seeks relief on the basis of after discovered evidence from a guilty plea, relief is appropriate only where the defendant 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 of that particular case, the "interest of justice" requires the defendant's guilty plea to be vacated. Id. at 470, 765 S.E.2d at 130. "In other words, a defendant may successfully disavow his 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 interest in maintaining the finality of guilty-plea convictions." Id. The Court pointed out:

> 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....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).

Jamison, 410 S.C. at 470, 765 S.E.2d at 130.

The reasons for this more exacting standard when a defendant seeks to overturn a guilty plea are obvious. While the fact that a defendant has pled guilty is not a *per se* bar to making a motion for a new trial on after discovered evidence, *see* State v. Williams, 108 S.C. 295, 93 S.E. 1006 (1917), a guilty plea is still a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmates' right to contest the validity of such a plea is usually, but

not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977); Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566, (4th Cir. 1976); Dalton v. State, 376 S.C. 130, 654 S.E.2d 870.

Cato's "[s]olemn declarations in open court carry a strong presumption of veracity." Blackledge, 431 U.S. at 74; United States v. Eades, 583 Fed. Appx. 257, 2014 W.L. 4792062 (4th Cir. 2014)(*not reported in federal reporter*); Fields v. Attorney Gen., 956 F.2d 1290, 1299 (4th Cir. 1992)("Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy"); Beck v. Angelone, 261 F.3d 377, 395-96 (4th Cir. 2001)(similar). A guilty plea is a "'grave and solemn act,' which is 'accepted only with care and discernment.'" United States v. Hyde, 520 U.S. 670, 677 (1997); United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992)(If an appropriately conducted plea colloquy and proceeding is to serve a meaningful function, on which the criminal justice system can rely, "..it must be recognized to raise a strong presumption that the plea is final and binding."). Indeed, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784 (1979).

"A plea of guilty is an admission or a confession of guilt, and 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." Jamison, 410 S.C. at 468, 765 S.E.2d at 129; State v. Fuller, 254 S.C. 260, 174 S.E. 774 (1970)(*citing* 21 Am Jur. (2d) Criminal Law, section 495; 22 C.J.S. Criminal Law s 424(1); State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967) [*and the cases cited therein*]), *reversed on other grounds* Furman v. Georgia, 408 U.S. 238 (1972). *See also* North Carolina v. Alford, 400 U.S. 25, 37 (1970)(guilty pleas constitute an express admission of guilt upon which a sentence may be imposed).

"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." Jamison, 410 S.C. at 471, 765 S.E.2d at 130 (*quoting* 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. 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." Jamison, 410 S.C. at 469, 765 S.E.2d at 129 (*quoting* 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." Id., (*quoting* 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."). Cato has not met this

burden.

In his Petition for Rehearing, Cato argues Jamison is not applicable when a defendant seeks to overturn a guilty plea in a Rule 29 Motion. It makes no difference. Judge John denied Cato's motion for a new trial based on after-discovered evidence pursuant to the less stringent 5 factor Spann analysis. This Court in its Opinion affirming Judge John also relied on Spann not Jamison. *See* State v. Ardon P. Cato II. Opinion No. 2018-UP- 383 (Ct. App. Filed October 17, 2018). Judge John did not err as Cato cannot meet the Spann test or the more exacting standard set forth in Jamison, *supra,* applicable to those who attempt to overturn their pleas of guilty.

At his pleas, Cato was informed that by pleading guilty he would waive and give up his right to a jury trial, to remain silent, to make the State prove him guilty, to confront witnesses, and to put up his own defense. Cato understood all the plea judge told him and asked him during the plea and waived each of his constitutional rights. Cato admitted his plea was his own decision, and he made it of his own free will. He also stated he was satisfied with his attorney's representation. Finally, Cato admitted he was guilty of murdering Hemingway and the ABWIKs of Narruhn, and Lamey.

Cato received a substantial benefit for himself by his plea; the State dismissed 2 ABWIK charges and Cato received less than the maximum sentence for murder, which is life without parole. Before his guilty pleas were entered, Cato was facing life without parole [for murder] plus an additional 80 years [for 4 counts of ABWIK]. Cato was charged with indiscriminately shooting into a crowded nightclub in anger and killing 1 person, paralyzing a young female, and shooting and wounding another person, wounding another female, and shooting a security guard in attempting to escape from the scene. All of the victims were innocent bystanders and had

nothing to do with the original altercation Cato was involved in. *See* United States v. Marquez, 909 F.2d 738, 742 (2nd Cir. 1990)(a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison).

Cato argues the 2 affidavits he submitted from a fellow prison inmate and a friend of a female friend, 10 years after his admissions of guilt, coupled with an alleged discrepancy in the SLED Firearms Worksheets and Report proves there was another shooter involved in his crimes; therefore, he is entitled to a new trial. However, Cato has not shown anything that would overcome the "strong-presumption of veracity" carried by his statements at the guilty plea and sentencing hearing of a voluntary decision to plead guilty and that he was in fact guilty of murder and ABWIK (2 counts). *See* United States v. Morrow, 914 F.2d 608 (4th Cir. 1990).

The PCR Court already addressed Cato's claim his counsel did not investigate the ballistics in this case and the possibility of a 2nd shooter and advise him regarding possible defenses. (See Supp. R. 101, ll. 16-17). This included the investigation into the ballistics which necessarily involved trying to construct a defense of a 2nd shooter. (See Supp. R. 100-03). The PCR Court found counsel did properly investigate the ballistics, to the point of contacting the president of the company who manufactured the weapon used by Cato in the murder and ABWIKs. The Court recounted in an earlier portion of the Order summarizing counsel's testimony that counsel investigated the evidence that .380 and 9mm rounds were fired at the nightclub hoping to find evidence there was a 2nd responsible shooter. (See Supp. R. 101). The Court also noted in addition to the different caliber ammunition used, there was some question about how and whether Cato fired enough shots to have caused all of the wounds inflicted. (See Supp. R 100-01). The Court noted however that upon investigation by counsel, the evidence did

not support the 2nd shooter theory. (See Supp. R. 101). The Court also noted earlier the gun's manufacturer had told counsel that a 9mm Highpoint would fire .380 rounds. (See Supp. R. 101). The Court noted additionally, that when Cato's gun was recovered there were both .380 and 9mm rounds in the gun. (Supp. R. 101). The Court also noted ballistics testing showed the fired shell casings found as well as the bullets recovered including from the deceased victim came from Cato's gun. (Supp. R. 101). The PCR Court reasonably and correctly found Cato failed to prove deficient performance or prejudice with regard to this allegation.[5]

Contrary to Cato's claim at PCR, counsel testified each time he met with Cato he informed him of what he had discovered since the last time they talked. (Supp. R. 83, ll. 2-10). So, it is clear from the record, counsel did advise Cato regarding the ballistics investigation and its results.[6] Counsel also denied Cato's claim at PCR he only met with Cato a total of 20 minutes during his representation of him. (Supp. R. 83). Counsel testified, while he would not say he spent hours with Cato each time at the jail talking to him, he talked long enough with Cato for Cato to understand what counsel had uncovered since the last time that they talked. (Supp R. 83).

The PCR Court found and concluded Cato had failed to show counsel's investigation was inadequate or that his advice regarding potential defenses was inaccurate. (See Supp R. 103). The Court found counsel did investigate this case, going so far as to speak with the president of

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[5]The PCR Court implicitly found counsel's testimony was credible and Cato's was not. (See Order, Supp. R. 98, 101). That determination is fully supported by the record.

[6]It also appears from the record, Cato received a copy of the discovery evidence the prosecution had prior to his guilty plea. (See Supp. R. 71, ll. 11-24). Cato stated in this portion of the PCR hearing he received the State's evidence "when he was detained *at J. Rueben Long* but a family member has it at this time." (emph. added). Given his answer and the words he used here, he had a copy of the discovery from the State prior to his plea. (See Supp. R. 71, ll. 14-17). (See also Supp. R. 85).

the gun's manufacturer. (See Supp. R. 103). The Court found that although Cato contended he did not mean to shoot anyone and had no malice toward the victims, the evidence was he fired several shots into a crowded nightclub causing injuries and a death. Further, because he fired several shots into a crowded nightclub, the Court found evidence regarding the lighting where he fired his shots would not have been helpful to the defense. The Court found and concluded there was ample evidence to support Cato's guilty pleas and counsel's performance was neither deficient nor prejudicial. The PCR Court's decision on this issue is fully supported by the record.

The record shows counsel did investigate the ballistics in this case. Counsel testified Cato admitted to him that after the initial altercation in the nightclub, he went outside and retrieved a weapon, re-entered the bar through a different door, and fired several shots into the crowded nightclub. (Supp. R. 78). Because of the different caliber of fired shell casings found, the testimony of witnesses that varied regarding the number of shots they heard, and the number of wounds the victims received, counsel testified he investigated the ballistics in this case. (Supp. R. 77-90). Counsel testified he interviewed Tom Deeb, president of High Point Firearms, who informed him that Cato's gun could fire .380 and .9mm ammo, the type of bullets and shell casings found. (Supp. R. 79). Counsel also testified, that if he was not mistaken, the discovery material showed that there were .380 as well as 9mm ammo loaded in the magazine of Cato's pistol. (Supp. R. 79). Counsel also credibly testified the bullet from the victim Hemingway's body and the fired casings found were forensically matched to Cato's gun. (Supp. R. 79). One (1) of the records Cato previously attached in federal habeas corpus review, from the Myrtle Beach Police Department, also shows some of the victims, at least 2, had through and through gunshot wounds, providing a plausible explanation for the number of wounds vis a vis the

number of shots Cato claimed he fired. Two (2) of the SLED documents Cato attached to his brief to this Court show the bullet that came from the deceased victim, Hemingway, and a bullet taken from near the front door of the club were fired by Cato's gun. (See SLED Documents-R. 78-82). Counsel credibly testified at PCR that by the time the case was being called for trial, the State had firmed up the ballistics. (Supp. R. 81). The SLED Report shows all the fired shell casings recovered [both 9mm and .380] and the 2 fired bullets recovered, 1 from near the front door and 1 from the deceased, came from Cato's gun. (See SLED Firearms Report – R. 78-82).[7]

Cato's contention the SLED Firearms Report is defective or in error is without merit. Cato is confusing what was marked "Item 9" by Myrtle Beach police and what was designated by the SLED firearms lab as "SLED Item 9."

The SLED firearms lab worksheets [submitted by Cato] show SLED Item 5 was **received in a Box marked "ITEM #9" [by Myrtle Beach police].** However, SLED designated or identified this fired .380 shell casing as "*SLED Item 5*." (See Worksheet-R. 75). "SLED Item 5" was also contained in "a staple closed brown bag" and was evidence tape sealed. (See Worksheet-R. 75). The worksheet also shows this fired shell casing was forensically matched to the gun Cato used in the shooting. (See Worksheet-R. 75). This corresponds to the findings on the SLED Firearms Report [submitted by Cato] that *SLED Item 5* was fired by SLED Item 1, the

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[7]Respondent would also point out Cato made several factual assertions in federal habeas which are either, not significant, relevant, or correct. Cato claimed the fact that the fired bullet found on the floor did not contain blood or tissue means it didn't strike any victim. Respondent would submit a bullet could pass through a human body without retaining any blood or tissue on it, especially if it struck an object after passing through the body. Cato also claimed because 1 bullet was never located this made it impossible to prove it struck any of the victims. While the bullet was never located, it does not mean the bullet did not strike any victims and pass through them. Further, this is really irrelevant to the issue of Cato's guilt. The State did not have to prove which bullet hit which victim. And, the bullet from the deceased victim matched Cato's gun.

gun used by Cato in the shootings, which belonged to Cato's girlfriend. (See SLED Firearms Report-R. 72-82).

In contrast, "*SLED Item 9,*" the fired bullet from the autopsy of the deceased victim, was received in a closed intact specimen jar with intact seal marked "Anthony Hemingway." (See Worksheet SLED Item 9 [Attached by Cato]-R. 76). The Worksheet for "SLED Item 9" shows this fired bullet was forensically matched to the gun Cato used in the shootings. (See Worksheet SLED Item 9-R. 76). This corresponds to the SLED Firearms Report which shows the evidence designated or identified by SLED as "*SLED Item 9,*" the fired bullet from the autopsy of the deceased, was forensically matched to SLED Item 1, the gun Cato used in the shootings. (SLED Firearms Report-R. 72-82). Cato is simply wrong. The SLED Firearms Report is not in error.

The Affidavits offered in support of the Rule 29(b) Motion for a New Trial do not change anything. The affidavits are from 2 individuals who claim to have been present inside the nightclub on the night of the shooting. One (1) individual is in prison with Cato. The other is a friend of Cato's female friend. Their credibility is dubious at best. Neither witness came forward with this "information" for about 10 years. Both witnesses claim to have heard gunshots fired at the time of the crimes. Both claim it sounded like gunshots were coming from both the front door of the club and the back of the club. However, neither witness actually witnessed the shooting or saw who was shooting. They cannot and do not assert Cato was not the shooter. Neither could give an exact number of shots that were fired. Further, even if one believes these individuals were present that night, since they were inside the club when the shots were fired but did not see the shooting, they could have heard merely echoes of the shots fired by Cato in a crowded enclosed nightclub or ricocheting bullets, or some other noise caused by the fleeing

crowd. A fired .380 bullet was found near the front door of the club after the shooting. This bullet was forensically matched to Cato's gun.

Additionally, the claim in Willie Edwards' affidavit that he heard a group of men, at least 2 men, discussing "get em" or lets get em" even if considered credible, proves nothing. Edwards admits as soon as he heard this exchange shots rang out. Even if true, this does not prove these individuals did anything or had anything to do with the shootings. Further, what Edwards could have heard was Cato and his accomplice discussing getting the men who assaulted Cato earlier. Cato and his accomplice fled immediately after the shootings.

Finally, this does not change anything as Cato has admitted under oath he fired the 9mm pistol into a crowded night club in anger or frustration and **the bullet taken from the murder victim's body came from Cato's gun**. Cato has never claimed he was acting in self-defense. Cato claimed he was shooting to scare people or to show people he was not someone to be trifled with because of the earlier altercation. All of the fired bullets and casings recovered inside the club were forensically matched to Cato's gun. Cato's sentences for ABWIK were for 20 years **concurrent with the murder sentence of 42 years.** As Judge John correctly found, Cato is not entitled to a new trial based on after-discovered evidence. Jamison; Spann.[8]

The record of the guilty plea proceedings also shows counsel advised Cato regarding any potential defenses and the evidence in possession of the State. (Supp. R. 11). Cato told the plea court he was satisfied with his attorney, did not need any more time to talk with him, and his attorney had done everything he wanted him to do to try to help him with his charges. (Supp. R. 10). When counsel informed the plea court he had explained Cato's defenses to him as well as

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8 Rule 29 (a), SCRCrP allows the trial judge, in his discretion, to rule on post-trial motions based on the briefs filed by the parties without oral argument. *Rule 29(a), SCRCr.P*

the evidence in possession of the State, Cato did not disagree or challenge counsel's statement. (Supp. R. 11). In fact, Cato said nothing at all. (Supp. R. 11). After the Solicitor recited the facts, with only 2 exceptions, Cato did not contest the facts as set forth on the record by the Solicitor. (See Supp. R. 11-18).[9] Cato admitted he committed the crimes. (See Supp. R. 17-18).

The plea transcript also shows counsel had discussed with Cato the possibility that there were other shooters. (Supp. R. 28, ll. 15-16). The record shows Cato chose to plead guilty anyway. (Supp. R. 1-35). Cato admitted to the plea court he fired 4 times into the crowd in the night club. (Supp. R. 33). Cato informed the court the reason the gun jammed was because his accomplice reloaded the gun when he got in the getaway vehicle. (Supp. R. 34). Cato informed the court that 1 of the reasons he was pleading guilty was because he had given his life to the Lord, was a God-fearing man, and believed in justice and judgment. (Supp. R. 33). Cato did not claim there was another shooter.

Cato was charged with murder and 4 counts of ABWIK. Cato was facing life in prison without parole for murder, and 20 years each on each ABWIK. Cato was facing a potential sentence of life in prison plus 80 years. Given the facts of this case, in all likelihood, had Cato proceeded to trial, he would have been sentenced to life without parole and consecutive sentences. One (1) victim was killed, another paralyzed from the waist down for life, and another seriously wounded

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[9]Cato stated he had 2 exceptions to the facts as set forth by the Solicitor. His counsel explained to the Court the 2 exceptions: First the 2 men that initially assaulted Cato were not ejected from the nightclub, and second Cato denied shooting at a bouncer in the parking lot after the initial shooting. As further justification for this second exception, counsel stated to the plea court that the gun jammed inside the nightclub because .380 rounds were being used in a 9mm pistol. (See Supp. R. 11-18). Cato did not dispute the fact that he actually re-entered the nightclub through a different door, where there was no metal detector, and raised his gun over a security guard's head and holding the gun sideways fired multiple shots into the crowded nightclub.

Cato admits he was at the night club before the shootings and was involved in an altercation with 2 individuals. As a result of this altercation, Cato was asked to leave the club. Cato left but went to his car and retrieved a 9mm handgun. Cato walked back to the club, did not enter the front door, where there was a metal detector, but re-entered the club at another exit and fired into the crowded nightclub. At his plea, Cato did not contend he saw someone else with a gun or that he fired in self-defense. Cato struck the murder victim in the chest, a female victim who was paralyzed in the back, and another victim in the abdomen. Cato attempted to flee but was pursued by a bouncer or security person who Cato shot at and may have wounded slightly. Cato then fled the scene in a car. Cato was stopped by police just a few blocks from the crime scene shortly after the murder and other shootings in possession of the murder weapon. The weapon contained 9mm and .380 caliber ammo. The bullet from Hemingway's body matched Cato's weapon. Another bullet and all casings from the crime scene matched Cato's gun. Because Cato was intoxicated, Cato was not questioned by police that night.[10]

In his Petition for Rehearing, Cato repeatedly argues in determining whether Judge John abused his discretion in ruling on his motion for a new trial, the Court must look at the strength of the entire case. However, the evidence of Cato's guilt of murder and ABWIK (2 counts) was overwhelming. Under South Carolina law, a specific intent to kill is not required to prove murder. Malice aforethought is all that is required. *See* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996, *citing* State v. Johnson, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987 State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); *and* State v. Alexander, 30 S.C. 74, 8

10 Intoxication is not a defense to the crime of murder. State v. Crocker, 272 S.C. 344, 251 S.E.2d 764 (1979); State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977). It is not a defense to the crime of murder that one was so intoxicated that he could not form malice. State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983).

S.E. 440 (1889). Malice can be inferred from the circumstances of the crime including the intent to do serious bodily harm, or conduct of such gross recklessness as to indicate a depraved or wicked heart. Mouzon, 231 S.C. at 662-63, 99 S.E.2d at 675-76, *quoting* State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 699, 671 (1941); State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991). Those circumstances are present in this case. State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). *See also* State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991)(*citing* State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946)(malice is "the doing of a wrongful act intentionally and without just cause or excuse"); State v. Hammond, 36 S.C.L. (5 Strob.) 91, 1850 WL 2840 (S.C. App. 1850)(Malice "may be proved by previous threats, former grudges, hatred and ill-will, or it may be inferred from facts attending the homicide, showing a cruel and vindictive temper, a wantonness in the destruction of human life, and a heart regardless of social duty and fatally bent on mischief.").[11]

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11 Further, transferred intent in an alleged voluntary manslaughter situation where a 3rd party is killed was an unsettled question in S.C. at this time. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)(expressly refusing to decide issue); State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007)(plurality of the Court held transferred intent was not applicable to voluntary manslaughter cases because the overt act that produces the sudden heat of passion must come from the victim, while the dissent held when the defendant kills an unintended victim upon sufficient legal provocation committed by a third party, the doctrine of transferred intent applies, entitling the defendant to voluntary manslaughter charge). Further, the facts of the case show there was a sufficient cooling off period such that the jury would have found murder. Cato left the club after the altercation, crossed the parking lot to another parking lot near a restaurant, and retrieved a loaded 9mm pistol. Cato then returned to the night club in the same fashion, and did not enter from the front door but another exit, and only then began shooting into the crowd indiscriminately. *See* State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)(defendant had a sufficient time period to cool where fight occurred between victim and the defendant in the appellant's home and the defendant's actions in going next door to get a gun and returning to fatally shoot the victim from appellant's yard indicated "cool reflection"); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(as a matter of law defendant's actions in obtaining a gun, going to his room and loading it, waiting, and then going to his grandfather's room and shooting his grandfather and grandmother showed he did not act in heat of passion entitling him to a

Cato admitted that he was not necessarily firing at the people who assaulted him earlier, but was shooting over the head of the occupants of the nightclub to scare them because he was frustrated. (Supp. R. 60-61, 67-68). The State's evidence showed Cato fired into the crowded nightclub because he was angry at the 2 persons who assaulted him earlier or at the bouncers who asked him to leave. The doctrine of transferred intent would apply in this situation to the victims who were hit making the crimes murder and ABWIK.

Finally, Cato's claim that he was just shooting over the head of the victims to scare them is not credible. Hemingway was hit in the chest. Another victim was paralyzed from the waist down, and another victim was hit in the stomach. Another victim was hit in the buttocks. The physical evidence of the victims' injuries shows Cato, who was intoxicated and angry, was shooting to wound or kill, not over the victim's heads.

ABWIK requires the same elements as murder, only that the victim survived the assault. State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000); State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Malice was clearly shown in Cato's actions in firing a loaded firearm into a crowded nightclub. And, there is no question, the victims were wounded, constituting an assault and battery. Had the surviving victims died, there deaths would have been murder as well. Id.

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voluntary manslaughter charge), *referencing* State v. Walker, 324 S.C. 257, 261, 478 S.E.2d 280, 281-82 (1996)(the defendant demonstrated cool reflection by his actions between the alleged provocation and the killing), *and* State v. Byrd, 323 S.C. 319, 322-23, 474 S.E.2d 430, 432 (1996)(the defendant's actions between the alleged provocation and killing did not support a finding of sudden heat of passion) *other citation omitted.* (See Supp. R. 81-82, 84, ll.19-24). *But see* Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990); *see also* State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001), *citing* Carter, *wherein the dissent distinguished* Carter, *Burnett, J. dissenting along with Toal, C.J.* Carter v. State is also distinguishable from this case because in Carter the victim was the person who had slapped the defendant. *See also* State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009), *distinguishing* Carter v. State.

Given the evidence in this case and the criminal law of South Carolina, Cato was guilty of each crime he pled guilty to. Further, the results of counsel's ballistics investigation were that Cato's gun fired the fatal shot that killed Hemingway and the bullets and casings that were analyzed came from Cato's gun. Even if Cato's allegation were true, that counsel did not advise him of the results of the ballistics test, the results of the ballistics investigation would only have helped to confirm Cato's decision to plead guilty.

Cato also asserts counsel did not advise him of a constructed defense regarding a possible 2nd shooter arising from counsel's investigation of the ballistics.[12] The PCR Court ruled on this issue and denied Cato's claim. It found Cato had not shown deficient performance or prejudice. The Court's determination of this issue is supported by the record.

Counsel testified he investigated the ballistics in this case because of the possibility of another shooter. Counsel testified that investigation did not pan out. While counsel testified there was still *a possibility* of another shooter because of the number of gunshots witnesses heard and the number of wounds to the victims, all of the ballistic evidence found at the scene came back to Cato's gun. This is borne out by the SLED records and the official SLED ballistics Report. (See SLED Firearms Report – R. 72-77). Importantly, the only shell casings found at the crime-scene, and a bullet from near the front door of the nightclub, forensically matched Cato's gun. Critically, the bullet taken from the murder victim's body was determined to have come

[12]Cato also alleged on federal habeas review, he was never advised of a witness statement regarding an alleged 2nd shooter. This issue was not raised or argued at the PCR hearing. Therefore, it was waived and abandoned in state court. However, this allegation on federal habeas review shows Judge John was correct in finding the new affidavits are merely cumulative pursuant to Spann. Further, the record shows counsel testified he sat down and actually discussed the discovery materials with Cato. (Supp. R. 84, l. 25 – 85, l. 8). He also kept Cato advised of the results of his investigation and talked with him long enough for Cato to understand what counsel had come to know since their last meeting. (Supp. R. 83).

from Cato's gun. And, according to counsel's testimony, Cato's gun was found to contain unfired 9mm and .380 ammo, just like the fired shell casings found at the scene. The 9mm contained an unfired .380 round jammed in the firing chamber. An unfired 9mm round was found near where Cato parked his car. The forensic evidence tied Cato directly to the crime scene, the murder, and the ABWIKs at the nightclub.[13]

Furthermore, counsel testified he kept Cato apprised of his investigation of the case when he visited him at the jail prior to trial. (Supp. R. 83). Counsel also informed the plea court at the guilty plea he had informed Cato of the evidence the State had against him. (Supp. R. 11). Therefore, the credible evidence is Cato knew of the incriminating nature of this evidence.[14] Cato failed to establish deficient performance at PCR on this issue. Strickland; Hill.

Further, even assuming Cato's contention that counsel did not inform him *of the results of the ballistics investigation as a constructed defense*, which is not borne out by the credible evidence, Cato cannot show that if counsel had informed him of the results of this investigation

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[13]Cato also asserted IAC for failing to interview the SLED ballistics expert. This issue was not raised to the PCR Court, and was therefore waived and abandoned. Counsel did not need to interview the SLED expert given the facts of this case. Cato admitted firing 4 shots into the club. Cato was arrested in possession of a 9mm pistol. According to counsel's testimony, the pistol magazine contained both 9mm and 380 ammo. A .380 round was found jammed in the gun. A 9mm bullet was found in the parking lot of the restaurant where Cato stated his accomplice racked the gun after Cato handed him the gun after the shooting. The SLED expert's report clearly shows all recovered fired bullets and shell casings forensically matched Cato's gun. Counsel spoke with the president of the company that manufactured the gun who informed counsel the gun could fire both .380 and 9mm ammo. There is no merit to this allegation. Further, Cato has not shown how he was prejudiced by counsel's failure to interview the SLED expert as the Firearms Report is not in error as shown above. To the extent this Court considers this issue, it must be denied.

[14]As stated, the PCR Court implicitly found counsel's testimony credible and Cato's was not. The Court's credibility determination is entitled to deference by this Court. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 513 (1993). However, even under *de novo* review, there is no merit to this issue.

as a constructed defense he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 574 U.S. 52 52 (1985); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). The results of the ballistics investigation showed all physical evidence at the scene and autopsy pointed to Cato as the only shooter. Cato was arrested a few blocks from the crime scene just minutes after the murder and ABWIKs fleeing the area and fleeing away from the crime-scene. Cato was in possession of **the murder weapon** upon his arrest. As previously stated, Cato was facing life without parole plus 80 years if convicted at trial. The State was prepared to proceed with Cato's trial the morning of his guilty plea. Cato's contention the crime should be voluntary manslaughter, or that he did not intend to wound or kill the victims, is not borne out by the facts of how the incident happened or by the physical evidence. The trial judge had assured plea counsel and the prosecutor *in camera* prior to the trial that if Cato pled guilty, his sentence would not be a life sentence but between 40 and 45 years. After being informed of these *in camera* discussions, Cato decided that he did not want to go to trial and risk a life sentence on the murder charge and consecutive sentences on the ABWIK charges, but instead wanted to plead guilty. Given the overwhelming evidence Cato was guilty of murder and ABWIK, the potential sentences he was facing if convicted by the jury, and the procedural posture of the case at the time of his plea, Cato has not met the exacting standard of Jamison to set aside his admissions of guilt.

There simply is no merit to this claim, and Cato is not entitled to any relief. Id.; *See* State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(trial court's determination was reasonably supported by the evidence and therefore the motion for a new trial was properly denied). The decision of Judge John is reasonably supported by the evidence and must be affirmed. Id. Cato

has not shown anything which would overcome the "strong presumption of veracity" carried by his statements at the guilty plea and sentencing hearing. *See* Morrow, 914 F.2d 608. Cato has failed to show that this is the rare case where "the interests of justice" will require that a knowing and voluntary guilty plea and admission of guilt be vacated. Jamison. There is no merit to this appellate issue.

CONCLUSION

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge, 431 U.S. 63. Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents reasons why he should be allowed to depart from the truth of his statements. Crawford, 519 F.2d 347; Edmonds, 546 F.2d 566. Cato has not done so. The plea transcript is clear and so are Cato's statements therein. Cato received a benefit for himself by pleading guilty, avoiding a possible life sentence and consecutive sentences, and he has not shown anything which would overcome the "strong presumption of veracity" carried by his statements at the guilty plea hearing of a voluntary decision to plead and that he was guilty of each of the crimes. *See* Morrow, 914 F.2d 608.

This Court did not overlook or misapprehend the law or overlook or misapprehend the facts and appropriately found this appeal has no merit. The evidence Cato offered below does not meet the test set forth in Spann or the more exacting test for setting aside guilty pleas set forth in Jamison. For all of these reasons, the petition for rehearing must be denied and dismissed.

Respectfully submitted,

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Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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November 29, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2016-002081

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

vs.

ARDON P. CATO, II,

APPELLANT.

CERTIFICATE OF SERVICE

I, Anthony Mabry, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Ardon P. Cato, II, #316535
Evans Correctional Institution
610 Highway 9 West
Bennettsville, SC 29512

I further certify that all parties required by Rule to be served have been served.

This 29th day of November, 2018.

ANTHONY MABRY
Senior Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

November 29, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. Ardon P. Cato, II
Appellate Case No: 2016-002081

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Return to Petition for Rehearing along with proof of service in the above-referenced case.

Sincerely,

J. Anthony Mabry
Senior Assistant Attorney General
S.C. Bar No: 11973

JAM/ab
Enclosures

cc: Ardo Cato, II, #316535
Victim Advocacy Division