

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry County
Court of General Sessions
Steven H. John, Circuit Court Judge

RECEIVED

JAN 14 2019

S.C. SUPREME COURT

Appellate Case # 2016-002081

State of South Carolina

Respondent,

v.

Arden P. Cato, II,

Petitioner

RECORD ON APPEAL

- 1.) Petitioners Rule 29(b), S.C.R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.
- Exhibits (A-G)
- 2.) Respondents Response to Petitioners Motion for New Trial Based on After-Discovered Evidence.
- 3.) Order Disposing of Oral Arguments and Denying Petitioners Motion for New Trial Based on After-Discovered Evidence.
- 4.) Petitioners Rule 59(e), S.C.R.C.P. Motion to Alter or Amend Judgement.

- 5.) Order Denying Petitioners Rule 59(e) S.C.R.C.P.
Motion to Alter or Amend Judgement.
- 6.) Testimony of Petitioner Ardon P. Cato, II.
- 7.) Testimony of J.M. Long, III,
Appendix pg. 76, line 12 - pg 78 line 15
- 8.) Article on J.M. Long, III
- 9.) Jamison v. State, Opinion No. 27454
(S.C. Supreme Court filed October 22, 2014)
- 10.) Jamison v. State, Appellate Case No. 2008-106026
(No 2012-UP-437, Decided July 18, 2012)

I certify that this designation contains no matter
which is irrelevant to this appeal.

11-13-18

Date

Ardon P. Cato, II

Ardon P. Cato, II #316535

Evans C.I. FSB 267

610 Highway 9 West

Bennettsville, S.C. 29512

Pro Se Petitioner

(S)

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SC Court of Appeals

Exhibit #1

Appellant's Motion for New Trial
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**

HORRY COUNTY
2015 MAR 14 PM 2:16
CLERK OF COURT

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 SCRPC, 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.

Ludheen Bryant

Notary Public for South Carolina My Commission

Expires: May 26, 2020

Exhibit A

STATE OF SOUTH CAROLINA.)
COUNTY OF HORRY.)
)

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

The State of South Carolina)
)
v.)

CASE NO: (05-GS-26-3409, 3410, 3412

Affidavit of Twila Beckman

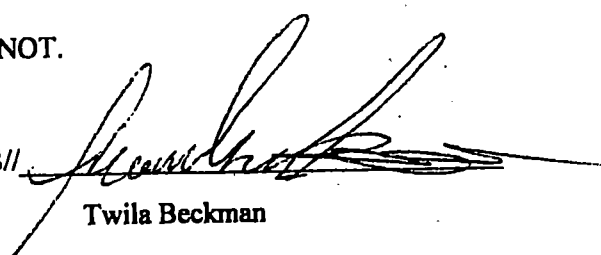
Ardon P. Cato, II.)
Defendant.)
)

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.

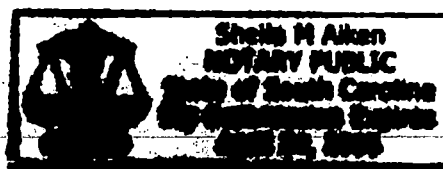
S//

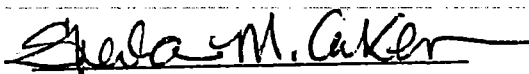

Twila Beckman

SUBSCRIBED AND SWORN TO

Before me on this ____th

Day of August 5, 2015





Notary Republic for South Carolina

My Commission Expires April 25, 2015

Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF GENERAL SESSIONS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

State of South Carolina,

)
) CASE NO: (#2005-GS-26-3409;
) 3410; and 3412)

vs.

)
) AFFIDAVIT OF WILLIE EDWARDS
)

Ardon P. Cato, II,

)
) Defendant.
)

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.

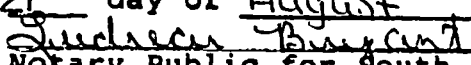
15). Wednesday, August 19, 2015, Cato asked me if I knew anything about the Red Room in Myrtle Beach, South Carolina. Cato also mentioned his reluctance to ask me because he remembered when I told him that earlier in 2015 how I was apprehended in Georgia in 2005.

FURTHER AFFIANT SAYETH NOT

August 21, 2015



Willie Edwards

Sworn and subscribed before me this
21st day of August, 2015


Notary Public for South Carolina
My commission expires: May 26, 2020

Exhibit C

RECEIVED

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-26-4309 S.C. SUPREME COURT
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,

1st Ardon P. Cato II #316535
Ardon P. Cato, II., #316535

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 25 DAY OF June, 2007

Isaac B. Bartlett
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: My Commission Expires March 2, 2008

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-26-4399

CERTIFICATE OF SERVICE

APPLICANT'S MOTION PURSUANT TO

RULE 59 (e) OF S.C.R.C.P.

FOR REQUEST TO AMEND JUDGEMENT

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

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

Exhibit D

ATTN 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, Anthony
(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.



February 06, 2006
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Page 2 of 3

RESULTS:

Item 2 was a correct magazine assembly for use in Item 1 and some other Hi-joint 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.



February 06, 2006
L0504378

Page 3 of 3

RESULTS:
Item 9 was fired by Item 1.



F. Dan DeFreese

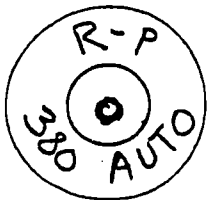
Location: SLED



AMMUNITION/CARTRIDGE WORKSHEET

LED LAB NO: L0504378 AGENCY: MYRTLE BEACH P.D.DATE COMPLETED: 2-6-06 EXAMINER: DEFREESEITEM NO: 5 - ONE FIRED CARTRIDGE CASE
SOURCE: REC'D IN BOX MARKED "ITEM #9..."HOW PACKAGED: I-5 STAPLE-CLOSED BROWN PAPER BAG EVIDENCE TAPE SEALED (ETS) 9X12"
KRAFT CLASP ENVELOPE # E234271DATE OPENED: FEB. 1, 2006 BY: FDRCALIBER: 380 AUTOBULLET WGT/TYPE: NONEUNFIRED ☐ FIRED ☒ MISFIRED ☐
CASE CONSTRUCTION: BRASS CASE, NICKEL BOXER PRIMERBRAND: REMINGTON-PETERS (U.M.C.)CASE MARKINGS: HS: "R-P 380 AUTO"FIRING PIN: Hemi EXTRACTOR ~EJECTOR: ~ BREACHFACE PARALLELCHAMBER: ~
EXAMINER'S MARKINGS/LOCATION: ENGRAVED ON EXTERIOR CASE WALL FORWARD OF EXTRACTIONGROOVE "L0504378 I-5 OR"CONDITION: VERY GOOD.

HEADSTAMP:

1xRESULTS: MATCHING BREACHFACE 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: J. Allen 2-3-06PHOTO: ☒ YES ☐ NODATE SEALED: 2-6-06

BULLET/PROJECTILE WORKSHEET

SLED LAB NO:

L0504378

AGENCY:

MYRTLE BEACH P.D.

DATE COMPLETED:

2-6-06

EXAMINER:

DeFREese

ITEM NO:

9 - ONE FIRED BULLET

SOURCE:

REC'D IN CONTAINER MARKED "... HEMINGWAY, ANTHONY..."

HOW PACKAGED:

I-9

CLOSED SCREW TOP PLASTIC SPECIMEN
JAR WITH INTACT SEALETS 9X12" KRAFT
ENVELOPE # E 234271

DATE OPENED:

FEB. 1, 2006

BY:

TAM

CALIBER:

(38)

MCW 9mm LUGER

LANDS & GROOVES:

9

DIRECTION OF TWIST:

LEFT

LAND IMPRESSION WIDTH:

SAME AS TEST BULLETS

GROOVE IMPRESSION WIDTH:

FIRED BY ITEM 1

MAKE: CONSISTENT WITH WINCHESTER - COULD BE OTHERS.

TYPE: FIRED, COPPER-ALLOY JACKETED, FULL METAL CASE, ROUND NOSE BULLET.

LEAD CORE EXPOSED AT BULLET'S HOLLOW BASE

WEIGHT:

115.3 GRAINS

EXAMINER'S MARKINGS/LOCATION:

ENGRAVED ON OGIVE 'L0504378 I-9 RD"

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:

TAM 2-3-06

PHOTO:

☒ YES ☐ NO

GRC:

☒ YES ☐ NO

SEE PAGE

DATE SEALED:

2-6-06

See PHOTO



SLED LABORATORY EVIDENCE INVENTORY SHEET

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

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

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

ITEM #	DESCRIPTION OF EVIDENCE: I.E. SUBJECT OR VICTIM'S (EVIDENCE TO INCLUDE SPECIFIC ARTICLES AS TO COLOR, ETC., IF DRUGS THEY ARE TO BE COUNTED, ETC.)	EXAMINATIONS REQUESTED
1	Black Luger HiPoint 9MM Handgun S/N P198697	Process for Latents Extract DNA Compare w/casings & IBIS
2	Black Magazine (from 9mm Handgun)	Process for Latents Extract DNA Compare to
3	380 Caliber cartridge case (spent) R-P	Compare to weapon
4	9mm cartridge case (spent) Luger/Win	" "
5	380 Caliber cartridge case (spent) R-P	" "
6	Full metal jacket projectile	" "
7	380 Auto Bullet (Extracted from Handgun)	Compare to casings
8	9mm live cartridge (has been fumed)	Compare to weapon
9	(9mm) Full metal jacket projectile (removed from victim) #1-2 E235174 - #2-9 E234271	Compare to weapon
10	GSR Kit on Wright, Alphonso Lamont	CS 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) <i>not submitted</i>	"
	Trace Evidence Vacuum Filter (front Pass. seat Saturn) <i>not submitted</i>	"
	Trace Evidence Vacuum Filter (back seat Saturn) <i>not submitted</i>	"

#14-15 E234269 #16 E233840

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

Delivered By (Print) Patty Daniels L0504378 3 Patty Daniels 4/15/05 Date
#1-9 13-15 1 Earth 4-15-05 #16 DNA 4-15-05
Received By Earth Date 4-15-05 Item # -32-

Exhibit E

MYRTLE BEACH POLICE DEPARTMENT

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

File # 01-05-022625

Incident Report

I N C I D E N T	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			Alcohol Related : UNKNOWN		
En Route : 04/09/2005 04:47			Drug Related : UNKNOWN		
Arrived : 04/09/2005 04:55			Total Damaged Property Value : \$0.00		
Census Tract : 30D			Total Stolen Property Value : \$0.00		
Premise Type : BAR/ NIGHT CLUB			Total Recovered Property Value : \$0.00		
Patrol Area : TOWN					

P E R S O N 1	Person Type	Business/Person Name			Daytime Phone
	VICTIM	JAMILA HYTOWER			
	Evening Phone	Person Address			Census Trac
					30F
	Other Phone	Employer Address			Census Trac
	Race	Sex	SSN	DL Exp. Date	DL Number
	BLACK	Female			
	Birth Date	Birth Location			
Age : 26					Extent of Injury : MINOR
Ethnic Origin : NON-HISPANIC					Injury Type 1 : APPARENT MINOR INJURY
Min. Height : 5'06"					Medical Treatment : EMERGENCY ROOM
Min. Weight : 215 lbs					Hospital Taken To : CONWAY HOSPITAL
Adult/Juvenile : ADULT					Physician's Name : HAYES
Victim Type : INDIVIDUAL					Hair Color : BLACK
Was File Charges : UNKNOWN					Eye Color : BROWN
Can Identify Offender : YES					Residency Type : JURISDICTION
Sobriety of Victim : SOBER					

N A R R A T I V E 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 VICTIM'S 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
Min. Height : 5'09"
Min. Weight : 165 lbs
Adult/Juvenile : ADULT
Victim Type : INDIVIDUAL
Will File Charges : YES
Can Identify Offender : UNKNOWN

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

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Topic SUPPLEMENTAL

1 AT APPROXIMATELY 0500, MBPD OFFICER JOHNSON RESPONDED TO GRAND STRAND REGIONAL MEDICAL CENTER IN REFERENCE TO THE SHOOTING VICTIMS TRANSPORTED FROM THE RED ROOM. VICTIM HEMINGWAY WAS PRONOUNCED DECEASED BY ER DOCTOR SENN APPROXIMATELY 5 MINUTES AFTER ARRIVAL BY AMBULANCE. HEMINGWAY WAS TRANSPORTED FROM THE INCIDENT LOCATION BY 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

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

N A R R A T I V E	Topic	SUPPLEMENTAL
	1	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

Incident Report

File # 01-05-022627

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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/O OBSERVED OTHER POLICE VEHICLES AND BICYCLES 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 HAD 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 MICHAEL J MARSH (5755)	Department MYRTLE BEACH POLICE DEPT	Report Status: Approved
Officer Name		Date/Time
Approving Officer MICHAEL J MARSH (5755)	Department MYRTLE BEACH POLICE DEPT	Date / Time 04/09/2005 09:48

Exhibit F

Incident Report

File # 01-05-022625

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Topic

SUPPLEMENTAL

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

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

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

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LO504378 -39-

Exhibit G

FOI #
2007-214

Arden P. Cato II 316-435
LEE C.I. Rich/D/143
498 W. 300th Hwy
B. Shopville, S.C. 29610

March 27, 2007

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

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

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

L05-4378

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 Mazzuchio
- Donald Loney
- Pamela Hylton

LP
Trace
DNA
Furc

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.

Thank you.

Respectfully,
Arden 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



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



US POST
FIRST-CLASS
MAILED FROM SC
1 MAY 2007

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

43

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

) Indictment: 2005GS2603412

) Case: 77066-1

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RESPONDENT'S RESPONSE TO PROSE
APPLICANT'S MOTION FOR NEW TRIAL BASED ON
AFTER-DISCOVERED EVIDENCE

FILED
HORRY COUNTY
2018 APR 6 PM 4:38
CLERK OF COURT

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).

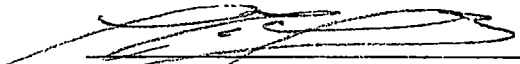
Applicant argues that two affidavits from two individuals who claim to have been at the incident location the night of the murder are after-discovered evidence that entitle him to a new trial. See Exhibit A and Exhibit B of Applicant's Motion. These affidavits, while they appear to have been discovered 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 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

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

FILED
HORRY COUNTY
2016 JUL 19 AM 9:34
CLERK OF COURT

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

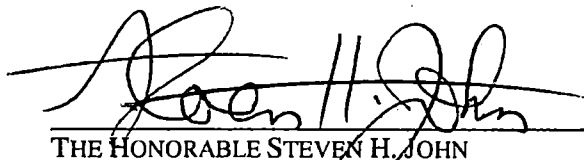
-46-
J.H.J.

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.



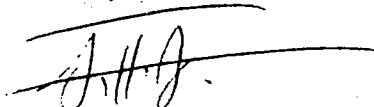
THE HONORABLE STEVEN H. JOHN
RESIDENT CIRCUIT COURT JUDGE
FIFTEENTH JUDICIAL CIRCUIT OF SOUTH CAROLINA

Conway, South Carolina

July 18, 2016

FILED
HORRY COUNTY
2016 JUL 19 AM 9:14
MELANIE HARRIS, CLERK OF COURT

-47-



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
) IN THE COURT OF GENERAL SESSIONS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

Adron P. Cato ,II,

Applicant,

)
) Warrant No.(s) #H-893922;
) 926; 927
)

) Indictment No.(s)
) #05-GS-26-3409; 3410; 3412
)

vs.

) 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
)

State of South Carolina,
Respondents.

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, SCRCP, 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 erroneously 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-Discovered 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.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
) IN THE COURT OF GENERAL SESSIONS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Adron P. Cato, II,

)
) Applicant,

Warrant No.(s) #H 893922;
926; 927

Indictment No.(s)
#05-GS-26-3409; 3410; 3412

vs.

)
) Case No. #7706-1

)
) CERTIFICATE OF SERVICE

State of South Carolina,
Respondents.)

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:

PAGE 1

HORRY COUNTY
2016 AUG 10 PM 1:00
CLERK OF COURT

August 5, 2016

Respectfully Submitted,

Adron P. Cato, II

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

N/A APCF
Sworn and subscribed before me this
____ day of _____, 2016

Notary Public for South Carolina
My commission expires: _____

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

PAGE 3

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 SCRPC 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.

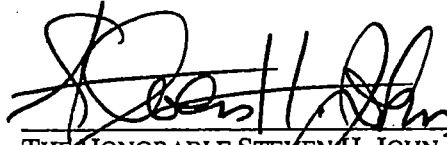
Applicant moved the court to Alter or Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on August 10, 2016. This Court finds that Rule 59(e) SCRPC has no application to the Court of General Sessions. The Court reaffirms its prior ruling from July 18, 2016.

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

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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SC Court of Appeals

Exhibit #2

Testimony of Appellant Cato

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

4

1 can hand me the amended.

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

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

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

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

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

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

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

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

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

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

1 to your client.

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

16 THE COURT: All right, okay.

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

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

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

22 THE COURT: What motion is that?

23 MR. CATO: The motion of discovery.

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

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

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

6

1 present my evidence here today, Your Honor.

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

4 MR. LONG: Brady material.

5 THE COURT: Oh, for the prior case.

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

8 THE COURT: Okay.

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

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

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

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

22 MR. CATO: No, the evidence.

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

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

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

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

7

1 they had.

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

3 THE COURT: All right.

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

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

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

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

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

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

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

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

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

8

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

4 THE COURT: All right.

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

6 THE COURT: Okay, all right.

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

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

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

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

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

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

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

1 involuntary because of bad advice.

2 MR. CATO: Yes.

3 THE COURT: Okay, all right.

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

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

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

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

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

18 THE COURT: Failure to negotiate, okay.

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

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

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

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

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SC Court of Appeals

Exhibit #3

Testimony of J.M. Long, III

1 EXAMINATION (BY MS. TODD):

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

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

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

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

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

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

25 Q: And otherwise basically what he explained here today and

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

31

1 at his guilty plea?

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

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

13 A: Yes.

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

15 A: Yes.

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

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

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

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

14 A: Correct.

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

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

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

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

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

1 three shell casings?

2 A: I believe three shell casings.

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

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

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

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

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SC Court of Appeals

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

FR 20, 2011

OBITUARIES

CONWAY

From Page 1C

on Nov. 19, 2009, at his law firm on Beaty Street in Conway, Nancy Live-
say, 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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SC Court of Appeals

Cases of Authority

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."); *Odum 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.

5/17/2015

Jamison v. State, SC: Court of Appeals 2012 - Google Scholar

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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. 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 ⁽²⁾ aspect we know in the law as transferred ⁽³⁾ it. 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 said 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 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 PC ~~edge~~ committed an error of law in applying ~~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

Bad Ballistics gave me interest of justice
but not ballistics as good evidence
Both ammo did not come from my gun

I admitted firing shots
but never that I shot anyone (see P.R. & Plea)
nor that I was guilty of murder

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

requires a factual determination and is one which should be made by the 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 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).

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Steven H. John. Trial Judge

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NOV 01 2016

SC Court of Appeals

Appellant Case # 2016-002081

State of South Carolina

County of Horry

Respondent

v.

Ardon P. Cato II

Appellant

INITIAL BRIEF OF APPELLANT

Ardon P. Cato II #316535

Evans C.I. Cheraw A 271

610 Highway 90 West

Bennettsville, SC 29512

Pro Se Appellant

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Jamison v. State, Opinion No. #27454
(S.C. Supreme Court Filed October 22, 2014)

OTHER AUTHORITIES

Rule 29(b)
Rule 59(e)

STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

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

Respondent filed a Response to Pro Se Applicants Motion for New Trial based on After Discovered Evidence clock stamped April 6, 2016.

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

Appellant filed a motion to Alter or Amend Judgement of the Order Disposing of Oral Arguments and Denying Applicants Motion for New Trial Based on After Discovered Evidence pursuant to Rule 59(e) of the S.C.R.C. P., dated August 5 2016, clocked stamped with the Clerk of Court on August 10, 2016.

The Honorable Steven H. John issued on Order Denying Applicants Motion to Alter or Amend Judgment Dated September 14, 2016, filed on September 15, 2016. Appellant Received this order at Evans C.I. Mailroom on September, 27 2016.

Appellant filed a Notice of Appeal to S.C. Court of Appeals dated October 3, 2016.

This is Appellant's initial Brief which proceeds as follows:

FACTS /ARGUMENTS

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

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

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

The issue of the accused presenting newly discovered evidence after the guilty plea has been addressed in the justice system of South Carolina, particularly in Jamison v. State, Op. No 27454 (S.C. Sct filed October 22, 2014). The South Carolina Supreme Court sets forth the Interest of Justice standards in *Jamison*. This Court held that when examining new evidence from guilty pleas “.....establishing that,.....The new evidence is of such weight and quality that under the facts and circumstances of the particular 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.”

Quoting *Jamison*: [...we must reject the states claim that the waiver of the trial and admission of guilt encompassed 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 a manifest justice”) 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 weight and quality that, under the facts and circumstances of that particular case, “ the Interest of Justice” requires the defendant guilty plea be vacated”) [Respondent has never argued that he pled guilty as a result of ineffective assistance of counsel”].

The present case is clear contrast from *Jamison* where Appellant clearly overcomes the burden *Jamison* could not. Appellant case separates from *Jamison* wherein Appellant indeed argued that his plea came as a result of counsel’s ineffectiveness with a failure to properly investigate the ballistics evidence and advise his client of a constructed defense in the event of trial. (See Appendix pg. 49, line 19 pg 54, line 25. Attached is the testimony of Appellant Cato Exhibit #2 of this Brief where the Appellant’s position of having no knowledge of the ballistics evidence is well documented, (Also, see Exhibit (G) of Appellant Rule 29 (b) Motion for New Trial Based on After Discovered Evidence attached as Exhibit #1 of this Brief, where Appellant

requested to SLED the Ballistics Report on March 27, 2007. SLED's office received the request on April 3, 2007. The PCR hearing was convened on April 3, 2007. At the time of the hearing Appellant was not in possession of the Ballistics Report. As a matter of fact, He was not in receipt of the report until May 3, 2007, a date well after the hearing was convened. Nevertheless, the PCR Judge left the file of the Ballistics evidence open for reference and review.)

Appellant's attorney who failed to properly investigate and advise his client of a constructed defense, was unaware of the inconsistencies and/or ineffectiveness of his performances. Ultimately in Appellant'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 Appellant was by way of ineffective assistance of counsel convicted by an invalid Ballistics Report that erroneously pairs a .380 shell casing with a .9mm bullet. A .9mm bullet cannot come from a .380 shell casing. (See Exhibit (D) of Appellant's Motion for a New Trial Due to After Discovered Evidence. Attached as Exhibit #1 of this Brief.

Presently there is more than a scintilla of evidence that, had been exposed and/ or known to the defense, it would have been used to change the outcome of the Appellant's case. The Appellant was 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 Ballistics Report that substantiates the accuracy for his role during the night in question.

As the facts and circumstances of this Appellant's particular case, the newly discovered evidence is of such weight and quality with witnesses on the scene hearing people actually plotting to do harm to someone, and then hearing shots fired from totally different directions, establishing the fact that there was someone, (who is not Appellant), on the inside of the club shooting and inflicting harm on the victims, (See Exhibits (A), (B), (D), (E) and (F) of Appellant's Motion for a New Trial based on After Discovered Evidence attached as Exhibit #1 of this Brief, wherein Appellant 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. The newly discovered evidence, is evidence of material facts that pertains to the two shooter theory defense mentioned at Appellant's PCR Hearing. (See Appendix page 76, line 12- pg. 78, line 15, attached as Testimony of J. M. Long III Exhibit #3 of this Brief.) Appellant's attorney testified to not moving forward with, nor making appellant

aware of the relevant two shooter theory based on the Ballistics Report being valid and correct. Appellant's attorney was ineffective for failing to properly investigate the Ballistics report to see the errors in it, make his client aware of the discrepancies in the report, and advising his client of a constructed defense in the event of trial by using the invalid Ballistics Report to corroborate the two shooter theory.

(Note: The attorney who represented the Appellant, a Mr. J.M. Long, III was suspended from his law practice for indecently exposing himself as reported some 20-30 times on January 01, 2006 which was during the time he represented the Appellant. Thus proving he was not at all utilizing competency which is expected of reasonableness.) (See Article on J.M. Long, III attached as Exhibit #4 of this Brief.)

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

As our justice system uses the lens of fundamental fairness, Appellants new evidence clearly meets the Interest of Justice standard in regards to the plea and a new trial with witnesses who were on the scene of incident hearing someone plotting to do harm to people, also hearing shots fired from totally different directions, establishing that there was someone, (who is not Appellant), on the inside of the club shooting and inflicting harm on the victims. (See Exhibits (A), (B), (D), (E), and (F); Analysis pg. 3-6, of the Appellants Motion for New Trial Based on After Discovered Evidence attached as Exhibit #1 of this Brief) This new evidence raises 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) gunshots wounds?... with another fired bullet that (only) hit an upper wall, with no blood or body tissue? ... Why was each victim shot in different body parts while being situated in different areas of the nightclub?... Why were there two different types of ammunition erroneously paired on the Ballistics report?.... With the new evidence presented, the Interest of Justice requires these question be answers in a new trial.

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

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 Appellant was standing on the outside of the exit door in the front of the nightclub,....(See Analysis pg. 3-6 of Appellants Motion for a New Trial Based on After Discovered Evidence; Also see Exhibits (A), (B), (D), (E), and (F) of Appellant's Motion for a New Trial attached as Exhibit # 1 of this Brief.) witnesses on the scene of the incident hearing someone plotting to do harm, and then hearing of shots fired from totally different directions establishes that someone was on the inside of the club shooting and inflicting harm on the victims with a deadly weapon.

The newly discovered evidence of hearing someone plotting to do harm, and the hearing of shots fired from totally different directions brings clarity to why the victims were shot in different body parts while being situated in different areas of the night club.

This newly discovered evidence answers the question, why are there two different types of ammunition erroneously paired in the Ballistics Report.

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

2) Have been discovered since Appellants trial. Appellant was convicted on July 17, 2006. The evidence of Ms. Twila Beckman was discovered on June 22, 2015. The evidence of Mr. Willie Edwards was discovered on August 19, 2015. This evidence has been discovered approximately (9) years after Appellant's trial and was presented to the lower Court within the one year time limit, pursuant to Rule 29(b), S.C.R. Crim. Pro. (See Exhibits (A) and (B) of Appellant's Motion for a New Trial Based on After Discovered evidence attached as Exhibits #1 of this Brief.)

3) Could not in the exercise of due diligence have been discovered prior to trial... it was a chaotic environment, and credible witnesses were able to leave the scene of incident 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 evidence could have been discovered prior to trial. This can only come by way of newly discovered evidence.

4) This new evidence is evidence of material facts with witnesses on the scene of the incident hearing someone plotting to do harm to people, and hearing shots fired from totally different direction, which establishes that someone, (who is not the Appellant), was on the inside of the club shooting and inflicting harm on the victims. (See Analysis pg. 3-6; Exhibits (A), (B), (D), (E), and (F) of Appellant's Motion for New Trial Based on After Discovered evidence attached as Exhibit #1 of this Brief).

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

The newly discovered evidence is evidence of material facts that pertains to the two shooter theory defense mentioned at Appellant's PCR Hearing. (See Appendix pg. 76, line 12- pg. 78, line 15 attached as Testimony of J.M. Long, III Exhibit #3 of this Brief) Appellant's attorney testified to not moving forward with, nor making Appellant aware of the relevant two shooter theory based on the Ballistics Report being valid and correct. Appellants attorney was ineffective for failing to properly investigate the Ballistics Report to see the errors in it, make his client aware of the discrepancies in the Report, and advising his client of a constructed defense in the event of trial by using the invalid Ballistics Report to corroborate the two shooter theory.

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 hearing shots fired from totally different directions. There were no sworn statements of such given under oath to accumulate or impeach.

CONCLUSION

After careful review of this Initial Brief, this court should find that the Trial Judge did err in disposing of oral arguments and denying Appellant's Motion for New Trial Based on After Discovered Evidence. Appellant respectfully request that this Court reverse the lower Courts decision and grant an Order for New Trial.

10/31/16

Date

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Evans C.I.

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Bennettsville, SC 29512

Pro Se Appellant

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Steven H. John. Trial Judge

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SC Court of Appeals

Appellant Case # 2016-002081

State of South Carolina

County of Horry

Respondent

v.

Ardon P. Cato II

Appellant

CERTIFICATION OF SERVICE

The undersigned certified that this Initial Brief complies with rule 208 S.C.A.C.P.

10/31/16

Date

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Steven H. John. Trial Judge

Appellant Case # 2016-002081

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SC Court of Appeals

State of South Carolina

County of Horry

Respondent

v.

Ardon P. Cato II

Appellant

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD OF APPEAL

Appellant proposes the following be included in the Record on Appeal:

- 1) Appellants Motion for New Trial Based on After Discovered Evidence
 - Exhibit (A)
 - Exhibit (B)
 - Exhibit (C)
 - Exhibit (D)
 - Exhibit (E)
 - Exhibit (F)
 - Exhibit (G)
- 2) Respondents response to Appellants Motion for New Trial Based on After Discovered Evidence
- 3) Order Disposing of Oral Arguments and Denying Appellants Motion for new Trial Based on After Discovered Evidence
- 4) Appellant Rule 59(e) S.C.R.C.P. Motion to Alter or Amend Judgement
- 5) Order Denying Appellants Rule 59 (e) S.C.R.C.P. Motion to alter or Amend Judgement
- 6) Testimony of Appellant Ardon P. Cato. II
- 7) Testimony of J.M. Long, III
Appendix pg. 76, Line 12 – 78, line 15

- 8) Article on J.M. Long, III
- 9) Jamison v. State Opinion No. 27454
(SC Supreme Court Filed October 22, 2014)
- 10) Jamison v. State Appellate Case No. 2008- 106026
(No. 2012 -UP- 437, Decided July 18 2012)

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SC Court of Appeals

I certify that this designation contains no matter which is irrelevant to this appeal.

10/31/14

Date

Ardon P. Cato II #316535

Ardon P. Cato II #316535

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Pro Se Appellant

Frankie Jernigan
STATE OF SOUTH CAROLINA
COUNTY OF HORRY

06-594
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HORRY COUNTY
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IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

State of South Carolina,

Respondent,

Richard Gagnon,

Appellant.

Case No. 06-GS-26-0594

**ORDER GRANTING
NEW TRIAL BASED ON
AFTER-DISCOVERED EVIDENCE**

I268780

This matter comes before me by way of a motion for a new trial based on after-discovered evidence. On May 25, 2012, the South Carolina Court of Appeals issued an order granting Richard Gagnon's (hereinafter "Appellant Gagnon" or "Appellant") motion to hold his appeal in abeyance and to remand for a hearing before this Court on his motion for a new trial based on after-discovered evidence.

Procedural history

On January 26, 2006, Appellant Gagnon was indicted by the Horry County Grand Jury for two counts of murder and one count of burglary in the first degree. He proceeded to trial before this Court and a jury on March 10, 2008. Appellant was represented at trial by Barbara Pratt, Esq. and William Grammer, Esq., and the State was represented by Solicitor Gregory Hembree and Deputy Solicitor Fran Humphries. The jury found Appellant guilty as charged, and this Court sentenced Appellant to two terms of life imprisonment for the murder convictions and to thirty years' imprisonment for the burglary in the first degree conviction, running concurrently with the two life sentences.

A timely notice of appeal was subsequently filed on Appellant Gagnon's behalf, and the Final Brief of Appellant was filed with the Court of Appeals on March 31, 2011. On May 30, 2012, the South Carolina Court of Appeals issued an order granting Gagnon's motion to hold his

appeal in abeyance and to remand for a hearing before this Court on his motion for a new trial based on after-discovered evidence. Pursuant to the ruling of the Court of Appeals, on June 22, 2012, Appellant filed his motion for a new trial based on after-discovered evidence before this Court.

Subsequently, evidentiary hearings were held before this Court on September 4, 2012 and October 29, 2012. Chief Appellate Defender Robert Dudek and Appellate Defender Dayne Phillips represented Appellant Gagnon. The State was represented by Solicitor J. Gregory Hembree and Deputy Solicitor Jimmy Richardson, II.

Legal standard

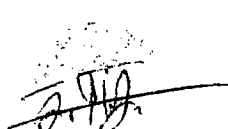
Pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure, "[a] motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence . . . [and] may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. . . ."

Additionally, to prevail on a new trial motion, Appellant Gagnon must show after-discovered evidence meets the following criteria: it "(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); *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009).

Summary of the evidence and legal application

At the September 4, 2012 hearing before this Court, the defense presented the testimony of Appellant Richard Gagnon that he was not involved in the murder of Mr. and Mrs. Parker, and

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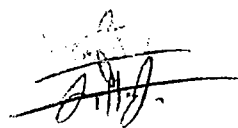
that he did not know Bruce Hill who had subsequently been convicted and sentenced to two terms of life imprisonment for the same murders as Gagnon.

During Appellant Gagnon's trial, held before this Court, there was evidence presented that blood at the crime scene did not match Gagnon or the victims. After Appellant Gagnon had been convicted of these two murders, this blood was found to be a "perfect match" to the DNA of Bruce Hill as a result of Hill's subsequent arrest in the state of Tennessee. Gagnon testified before this Court on remand that absolutely no connection between Hill and himself existed.

Regarding the DNA match of Defendant Bruce Hill's blood at the crime scene, at trial, the defense for Appellant Gagnon used the then-unknown blood found in the Parker's house to raise the issue of reasonable doubt for the Appellant Gagnon. Therefore, the Court finds that the Bruce Hill blood DNA match evidence at the crime scene does not qualify as after-discovered evidence. *See id.*

Bambi Bennett testified for the defense at the September 4, 2012 remand hearing. Ms. Bennett was Appellant Gagnon's girlfriend at the time her mother and stepfather were murdered. Ms. Bennett, who did not testify at the Gagnon trial, testified during the remand hearing that she remembered Appellant Gagnon telling her he had stepped in blood when he went back to the abandoned crime scene after the police left. She remembered requesting that Appellant Gagnon wash the blood off of his shoes before he got into her mother's automobile. Ms. Bennett also testified that the screen door in the house she shared with Appellant Gagnon made a loud noise when it opened, and she did not remember or think Appellant Gagnon could have left the house on the night her parents were murdered without her noticing. Ms. Bennett further testified that she did not know Defendant Bruce Hill, and that she had never met him in the presence of Appellant Gagnon.

As to Ms. Bambi Bennett, this Court finds that her testimony during the remand hearing is not newly-discovered evidence. Ms. Bennett's statements to the authorities were available and



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HOBBS COUNTY

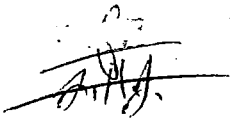
in the possession of Appellant Gagnon at the time of his trial. The defense did not call Ms. Bennett as a witness at trial. Consequently, Appellant Gagnon has failed to meet at least the third prong of the test for after-discovered evidence because Ms. Bennett's testimony could have been discovered with due diligence.

Further, as to Ms. Bennett's credibility and believability, this Court notes that she had a romantic relationship with Appellant Gagnon to the extent that she moved out of her mother and stepfather's house to live in the woods with the Defendant when the Parkers forced him to leave their home. From the Court's observation of Ms. Bennett during the remand hearing, and the tenor of her testimony, the Court gives no credence to her testimony and deems it not believable.

At the September 4, 2012 hearing, this Court accepted an affidavit from Defendant Bruce Hill, who was incarcerated in Tennessee on another conviction, only for the motion to make him appear and for no other purpose. This Court then requested that both the State and the Appellant assist in making the interstate arrangements for Defendant Hill to be transported to Horry County to testify live, and be cross-examined at the second remand hearing.

Defendant Bruce Hill appeared at the October 29, 2012 remand hearing. Hill's lawyer, Jonathan Hiller, informed the Court that Hill wished to invoke his Fifth Amendment right against self-incrimination and would refuse to testify. This Court questioned Hill at length about whether he wished to testify or invoke his rights under the Fifth Amendment. Once it was apparent to the Court that Hill's decision to invoke his Fifth Amendment right against self-incrimination was intelligently and voluntarily made, the Court excused Hill as a witness over Appellant Gagnon's objection.

SLED Gunshot Residue (GSR) Expert Jeffrey Hollifield testified at the October 29, 2012 remand hearing and was qualified as a GSR expert without objection. During his testimony, and upon the State's cross-examination, Mr. Hollifield asserted his expert opinion that the GSR evidence was exculpatory of Appellant Gagnon, and potentially inculpatory of Charlie Parker, Jr.



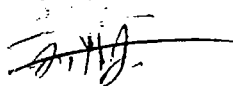
The Court finds that any expert GSR testimony could have been brought forth at trial by the Defense and is based on evidence that was available at the time of Appellant Gagnon's trial. It therefore does not qualify as after-discovered evidence. *See id.*

During Appellant Gagnon's trial, the State presented the testimony of Robert Mullins. Mullins testified that while he was incarcerated with Appellant Gagnon at the Horry County Detention Center, Appellant Gagnon talked to him about his murder charges involving Mr. and Mrs. Parker. Mullins testified that he initially thought Appellant Gagnon was innocent but changed his mind the more he talked to Appellant. Mullins believed Gagnon was guilty because of things Appellant said to him about the murders. At trial, Mullins fought any attempt by the defense to label him just another "jailhouse snitch" seeking favor with the State during Appellant Gagnon's trial. At the remand hearing, Appellant's private investigator, Bill Beam, testified that he had located the apartment Mullins was apparently renting in Horry County, but that Mullins was avoiding the service of a subpoena to testify at that hearing.

During the September 4, 2012 remand hearing, the defense presented the testimony of Nico Toscani. The essence of Toscani's testimony was that he was incarcerated with Robert Mullins, and that Mullins told Toscani that he did not feel bad about lying during Appellant Gagnon's trial.

The Court finds the testimony of Mr. Toscani to be confusing and contradictory. He specifically stated that he did not know the pieces about which Mr. Mullins had lied, and that he just knew that Mullins lied and that was enough for him.

At the October 29, 2012 remand hearing, the defense presented the testimony of Robert Troy Taylor. Taylor testified that he was previously incarcerated at Evans Correctional Institution where he met Robert Mullins. Taylor played the piano in the chapel that Mullins frequented. Taylor noted that Mullins began to confide in him. Taylor stated that Mullins repeatedly told him that he had lied at Appellant Gagnon's trial when he testified that Gagnon



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had indicated his involvement in the Parker murders.

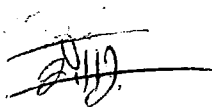
This Court was able to observe closely the demeanor of Robert Troy Taylor during his testimony at the remand hearing. The Court notes that Taylor was convicted on April 20, 2006, in Georgetown County, of two counts of Committing Lewd Act Upon Child Under Sixteen and one count of Criminal Sexual Conduct with a Minor Second Degree. The South Carolina Supreme Court has subsequently granted certiorari in the PCR appeal in that case. Taylor, on July 10, 2007, in Williamsburg County, was convicted of Kidnapping and Criminal Sexual Conduct with a Minor. That conviction is pending on appeal.

The Court takes note of Mr. Taylor's former occupation as a preacher at a fairly large church in the Grand Strand area. The Court observes that Mr. Taylor is skilled at traits normally associated with successful preachers, that is, being a persuasive public speaker and a good actor. These traits notwithstanding, in his testimony he was adamant that Robert Mullins "confessed" to him that he lied on the witness stand in Mr. Gagnon's trial. Further, Mr. Taylor's statements were subject to rigorous cross-examination and he did not waiver in his statements.

As the trial judge who presided over the initial trial of Richard Gagnon, I find that the testimony of Robert Mullins was an important part of the State's case. Therefore, the credibility and believability of Robert Mullins is and was an important issue in the prosecution of Mr. Gagnon. See *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977).

The parties are in agreement on the five prongs of the standard for prevailing on a new trial motion premised upon after-discovered evidence as found in *Mercer*, 381 S.C. at 166, 672 S.E.2d at 565, and *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99. Regarding these five elements, the testimony of Robert Troy Taylor is the only testimony that the Court finds to satisfy all five elements of the standard. Taylor did not waiver under rigorous cross-examination at the remand hearing, and if his testimony is believed by a jury, it would cast significant doubt on the reliability and believability of Robert Mullins and therefore on a significant part of the State's

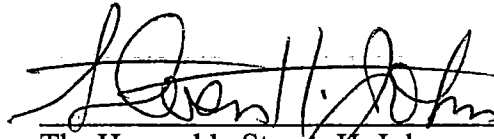
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evidence against Gagnon. Mr. Taylor's testimony was discovered after trial and could not have been discovered before trial in the exercise of due diligence because of the dates that Taylor was imprisoned with Mullins and Gagnon. The Court finds the testimony to be material because it squarely attacks the credibility of a major piece of evidence the State used in its case against Richard Gagnon, and because it is the only testimony of this type existing, it is not merely cumulative and impeaching.

Therefore, the motion for a new trial is granted.

AND IT IS SO ORDERED.

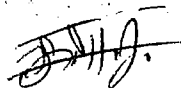


The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

January 7, 2013
Conway, South Carolina

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Ardon Percival Cato, II, Appellant.

Appellate Case No. 2016-002081

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

Unpublished Opinion No. 2018-UP-383
Submitted September 1, 2018 – Filed October 17, 2018

AFFIRMED

Ardon Percival Cato, II, pro se.

Attorney General Alan McCrory Wilson and Senior
Assistant Attorney General Anthony Mabry, both of
Columbia; and Solicitor Jimmy A. Richardson, II, of
Conway, all for Respondent.

PER CURIAM: Ardon Percival Cato, II, appeals the circuit court's denial of his
motion for a new trial based on after-discovered evidence pursuant to Rule 29(b) of

the South Carolina Rules of Criminal Procedure. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (providing that an appellant seeking a new trial based on after-discovered evidence must show the 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. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) ("A [circuit court] has the discretion to grant or deny a motion for a new trial, and [its] decision will not be reversed absent a clear abuse of discretion."); *State v. Needs*, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) ("The granting of such a motion is not favored and, absent error of law or abuse of discretion, an appellate court will not disturb the [circuit court's] denial of the motion."); *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the [circuit] court if reasonably supported by the evidence." (quoting *State v. Mercer*, 381 S.C. 149, 167, 672 S.E.2d 556, 565 (2009))); *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[S]tatements 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.").

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

The State, Respondent,

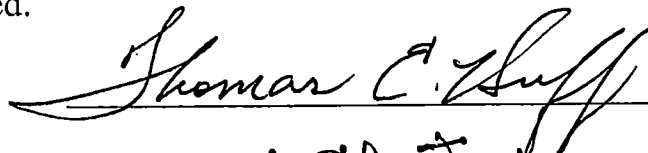
v.

Ardon Percival Cato, II, Appellant.

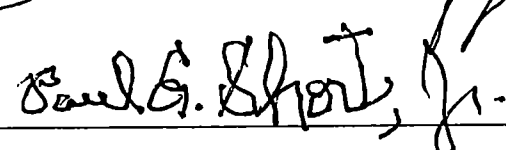
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ORDER

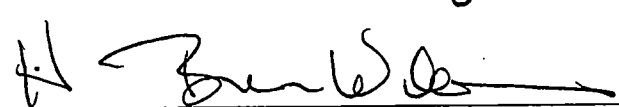
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Ardon Percival Cato, II, 00316535
Jimmy A. Richardson, II, Esquire
Alan McCrory Wilson, Esquire
J. Anthony Mabry, Esquire

FILED

December 13, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

State of South Carolina

Respondent,

v.

Ardon P. Cato, II

Petitioner

Appellate Case No. 2016-002081

PETITION FOR REHEARING

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Pro Se Petitioner

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Conway, S.C. 29526

Respondents

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AUTHORITIES (cases)

State v. Cagnon, 2013 Order Granting New Trial Based on After-Discovered Evidence, Case No. 06-GS-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.2d 623 (2013)

State v. Spann, 334 S.C. 618, 513 S.2d 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. Weeds, 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) S.C.R.E.

Rule 201(b)(e)(f) S.C.R.E.

Rule 401, S.C.R.E.

Rule 602, S.C.R.E.

Question Presented

I) Was Circuit Court Judge decision in error of law and did he abuse his discretion in Disposing of Oral Arguments and Denying Petitioner's Rule 29(b)

S.C.R. Crim. Pro. Motion for a New Trial Based on After-Discovered Evidence?

STATEMENT OF THE CASE

Ardon P. Cato, II, was indicted at the Horry County September 2005 Grand Jury term for two counts of assault and Battery with Intent to Kill and Murder. Sam. 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 42yrs for Murder and 20yrs for each ABWIK to run concurrent.

Petitioner Ardon 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 clocked stamped with the Horry County Clerk of Court on March 14, 2016.

The Circuit Court Judge Steven H. John issued an Order Disposing of Oral Arguments and Denying Petitioner's 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 of Court on August 10, 2016.

Circuit Court Judge issued an Order Denying Petitioner's Motion to Alter or Amend Judgement dated September 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 Petitioners Petition for Rehearing which proceeds as follows:

Argument

I.) Circuit Court Judges decision was in error of law and abused 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.

- 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 Petitioners Rule 29(b) S.C.R.Crim.Pro. Motion for a 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.e.2d 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.2d 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.2d 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, Opinion 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 of 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 counsels 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 affirmation 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. (Errors 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 S2d 623 (2013) and, State v. Spann, 334 S.C. 618, 513 S2d 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.

Supreme Court Interest of Justice test, a guilty plea not precluding relief in a Rule 29(b) Motion for New Trial Based on After-Discovered Evidence, applies in this context as well.

Rule 29(b), S.C.R. Crim. Pro. (A motion for a 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 a waiver of trial and all defenses will... preclude any subsequent challenge to factual guilt).

In re Reese. 192 P.3d 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 Reese, 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 Ballistics 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. (Rpg. 15-21) (Rpg. 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 on the victims. (Rpg. 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 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 requires 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 Judge's 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(c), 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 the 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 Judge's 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 Jamson 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 Petitioner's 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 forth by the S.C. Supreme Court in Jamson v. State, 2014 Op. No. 27454, (Such a determination will not

be resolved in a formulaic manner, but will necessarily be context dependent). This Court will find that the Circuit Court Judge is in error of that law and abused his discretion by wrongfully 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.

Per Curiam, the S.C. Court of Appeals overlooked, and/or misapprehended the Circuit Court Judge error of law and abuse of discretion in apply 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 [Petitioner's] innocence), (error of law under the unusual facts of this case).

This Court will find that the Circuit Court Judges' ruling of Petitioner Cato's 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 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 Judge's ruling was/is in error of this clearly defined and established 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.

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.E.2d 835 (2007), Petitioner Cato'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, 513 S.E.2d 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 that law and abused his discretion by Disposing of Oral Arguments and Denying Petitioners Rule 29(b)

S. C. R. Crim. Pro. Motion for New Trial Based on
After-Discovered Evidence.

Petitioner Cato 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 Cato's case in the aspects of how the after-discovered evidence that was ruled 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 Cato attacks the credibility of the errors in the SLED's Ballistic Report, The Shots fired vs wounds inflicted/ 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 the witnesses inference and identification of someone who is not Petitioner Cato that was on the inside of the night club shooting and inflicting harm on the victims. (R. pg. 4-43) (See Petitioners 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. Cannon, 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 Petitioners Rule 29(b) S.C. R. Crim. Pro. Motion for New Trial Based on After-Discovered Evidence.

(CONCLUSION)

Pursuant to Rule 220(6), (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 Petitioners 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 Petitioners favor, the reason for the Courts decision.

11-13-18

Date

Respectfully Submitted

Ardon P. Cato, II

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Pro Se Petitioner

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry County
Court of General Sessions

RECEIVED

JAN 14 2019

S.C. SUPREME COURT

Steven H. John, Circuit Court Judge

Case No. 2016-002081

State of South Carolina

Respondent

v.

Ardon P. Cato, II

Petitioner

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing, Record on Appeal, and all necessary documents on Atty. Gen. A. McCrory Wilson P.O. Box 11549, S.C. Atty Gen. Office, Columbia, S.C. 29211, and Jimmy A. Richardson, Solicitor P.O. Box 1276 Conway, S.C. 29526 by depositing a copy of it in US mail, postage prepaid on Nov. 13 2018

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