THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2019-000042

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

vs.

ARDON P. CATO, II,

APPELLANT.

RETURN TO PETITION FOR CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Was the S.C. Court of Appeals final decision in error with regard to the novel question of law, the Spann test, State v. Spann, 334 S.C.618, 513 S.E.2d 98 (1999), upholding the consistency of rulings established by Circuit Court Judge Steven H. John in State v. Gagnon, 2013 Order Granting New Trial Based on After-Discovered Evidence. Case No. 06-GS-26-0594, and, Petitioner Cato's After-Discovered Evidence, wherein both cases the new evidence was obtained in similar fashion, relatable as to application of elements/law, and should be ruled on similarly?

II. In regard to the S.C. Supreme Court discretion or power to grant review in general, was the S.C. Court of Appeals final decision in error concerning the errors in the SLED Ballistics Report that gives preponderance to Petitioner Cato's After-Discovered Evidence, affects substantial constitutional issues directly involved, and makes his convictions null and void at best, and/or require the grant of a new trial at the very least?

III. Was the final decision of the S.C. Court of Appeals in conflict with a prior decision of the S.C. Supreme Court, in particular Jamison v. State, S.C. Court of Appeals, Unpublished Opinion No. 2012-UP-437, Jamison v. State, S.C. Supreme Court, 2014 Opinion No. 27454, and State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) concerning Rule 29(b), SCRCrP motions after guilty pleas in reference to the Petitioner's Initial Brief, Final Brief, and Petition for Rehearing in this case by way of an opinion/ruling in Petitioner Cato's favor?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Whether certiorari should be denied where Cato has failed to meet the exacting standard of after-discovered evidence, to overturn his admissions at his guilty plea that he committed the crimes, and grant him a new trial?

STATEMENT OF THE CASE

On April 9, 2005, Petitioner, Arden P. Cato ("Cato"), shot and killed Anthony Hemingway and shot and wounded Elisa Narruhn and Ronald Lamey in Horry County.[1] Cato was arrested moments after the shootings. He was indicted for murder (05-GS-26-3412), ABWIK [2 counts] (05-GS-26-3409-10), and 2 additional counts of ABWIK. He was represented by retained counsel.

On July 17, 2006, the day his trial was to begin on the above charges, Cato pled guilty to murder and ABWIK (2 counts) [the above indictments] before Judge Steven H. John. The State dismissed the other 2 indictments for ABWIK in exchange for the pleas.[2] There was no recommendation as to sentence. At the plea, Cato admitted he was guilty of Hemingway's murder and the shootings [ABWIKs] of Narruhn and Lamey. Judge John sentenced Cato to 42 years for murder and 20 years for each ABWIK concurrent. Cato did not file a direct appeal.

Cato then filed a PCR action. A PCR hearing was held before Judge Paula H. Thomas. Cato alleged among other things that plea counsel: (1) gave him erroneous advice; (2) conducted an inadequate ballistics investigation and gave him erroneous advice regarding a defense related to this; and, (3) did not seek a plea bargain to manslaughter. Judge Thomas subsequently issued an Order denying and dismissing the claims on the merits. (Supp. R. 97-105).

Cato appealed the denial of PCR by way of a Johnson[3] Petition. (Supp. R. 106-18). In the Petition, Cato argued ineffective assistance of counsel and counsel never advised him of the results of his ballistics investigation. Appellate counsel certified the appeal was without merit.

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

[2] One of these victims died prior to trial from injuries unrelated to this case. Another was a bouncer who was apparently nicked by a bullet fired by Cato as he was fleeing from the scene.

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

The appeal was transferred to the Court of Appeals. On May 28, 2009, the Court of Appeals, after careful consideration of the entire record as required by Johnson, denied certiorari, granted counsel's request to withdraw, and the Remittitur was issued. (Supp. R. 119-20).

Cato then filed a federal habeas corpus petition arguing: (1) the PCR Court erred in denying relief on counsel's failure to investigate the ballistics, and (2) the PCR Court erred in denying relief on counsel's failure to advise Cato of a constructed defense related to the ballistics investigation (i.e. a 2nd shooter)? Respondent filed a Return and Motion for Summary Judgment. The U.S. Magistrate, by Report and Recommendation ("R&R") recommended Respondent's motion be granted. The U.S. District Judge adopted the R&R and denied and dismissed the petition. Both found Cato failed to show the PCR Court unreasonably applied U.S. Supreme Court precedent or reached an unreasonable determination of the facts on either issue above. Cato appealed and the Fourth Circuit Court of Appeals dismissed the appeal. (Supp. R. 121-219).

On March 14, 2016, in Horry County, Cato, filed a *pro se* "Motion for a New Trial based on After-Discovered Evidence" that is the subject of this appeal. (R. 21-32). He submitted 2 affidavits in support of the same. The State filed a Response asking the motion be denied. (R. 40-41). Judge John, the original plea/sentencing judge, denied and dismissed the motion by written Order. (R. 3-4). Cato filed a Motion to Alter or Amend, which was denied. (R. 42-50, 5-6).

Cato, *pro se*, appealed to the Court of Appeals. After full briefing, the Court of Appeals affirmed Judge John's denial of the motion in an Unpublished Opinion. State v. Ardon P. Cato II. Opinion No. 2018-UP- 383 (Ct. App. Filed October 17, 2018). Cato filed a Petition for Rehearing and Respondent filed a Return to the same. The Court of Appeals denied rehearing. Cato then filed this *pro se* Petition seeking certiorari. This is Respondent's Return to the same.

RESPONDENT'S STATEMENT OF FACTS

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

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

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

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

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

ARGUMENT

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

What occurred below on the present motion

Cato submitted 2 affidavits in support of his motion for a new trial based on after-discovered evidence. The affidavit of Twila Beckman stated in pertinent part:

> I have been attending the LPN class on the Georgetown Campus at Horry-Georgetown Technical College since August 2014 with Yegide Boyd. Being classmates led to an eventual friendship between Yegide and I, friendship went a duration of about six months that consist of going out to lunch, talking over the phone, and study sessions. On Monday 6/22/15 while having a study session at Yegide's residence, Yegide opened up about her friend's case, by asking me have I ever heard anyone speak about attending the Red Room around April 2005, if I ever hear anything to keep my eyes open. At that point I excited about frequenting the Red Room a lot during that time period. Yegide ask did I remember the incident in April 2005 at the Red Room. I excited that I was there that night, I was

indeed there that night, and I went on to explain to her what I remember which was: It was an all white party that night a late Friday night early Saturday morning. I was in the lounge area of the club when shots were fired. I heard shot coming from two directions, from the exit area on the front of the club, and shots from the back area of the club. A total of six or seven shots. As the shots were fired I ran to hide in the bathroom, therefore I could not see nor identify any one shooting. Also I have no knowledge of and did not see the incident that led to the shooting. As I was running to the bathroom I saw a back door open.

FURTHER AFFIANT SAYETH NOT.

[August 5, 2015] (R. 34-35).

The affidavit of Willie Edwards stated in pertinent part:

It is documented that I was apprehended in Georgia by South Carolina authorities in July 2005. In the months prior to said apprehension I periodically traveled to South Carolina. In April 2005, I was in South Carolina and was indeed at the Red Room Night Club on the early hours of April 9, 2005. I remember that it was an "all white" party, and it was late Friday night to early Saturday morning. I was thinking that I should keep my distance away from whatever was going on when I felt my pockets and realized I left my cigarettes on the pool table in the back. As I walked back towards the pool table area to retrieve my cigarettes I overheard a group of guys talking about "get 'em", or "ima get 'em", or something to that affect. Literally seconds later shots rang out. It could have been about 6-8 shots were fired. The shots were coming from what sounded like the front entrance area, and from the crowd. It was dark in the Club and I could not identify anyone. I ducked and followed the crowd rushing out the front entrance, some were rushing towards the back exit. This is what I can remember from that night. I met Ardon P. Cato, II, (Cato), in the early part of 2015 at the Lieber Correctional Institution (LCI), in the Wando Unit. (See Institutional Record for dates). Being that Cato had already went through the PCR process, our conversations revolved around me asking questions about that legal aspect. We never discussed any specifics of his case. I left the Wando Unit for some months to return to the Cooper Unit, then returned to the Wando Unit, on August 18, 2015, which was Tuesday. Wednesday, August 19, 2015, Cato asked me if I knew anything about the Red Room in Myrtle Beach, South Carolina. Cato also mentioned his reluctance to ask me because he remembered when I told him that earlier in 2015 how I was apprehended in Georgia in 2005.

FURTHER AFFIANT SAYETH NOT

[August 21, 2015.] (R. 37-39).

Cato argued in his motion before Judge John that these 2 affidavits along with an *alleged* error in the SLED Firearms Report produced shortly after the crimes shows there was a 2nd shooter at the club that night and as a result his guilty plea convictions should be vacated and he should be granted a new trial. Cato is wrong. There is no error in the SLED Firearms Report. (R. 72-77). Cato is confusing what was designated as "Item 9" by Myrtle Beach police and what was designated "SLED Item 9" by the SLED Firearms Laboratory. And, the affidavits do not change anything. The affidavits are from 2 individuals who claim to have been present inside the nightclub on the night of the shooting. One person is in prison with Cato. The other is a friend of Cato's female friend. Neither came forward with this "information" for about 10 years. Both claim to have heard gunshots fired at the time of the shootings. Both claim it sounded like gunshots were coming from both the front door of the club and the back of the club. However, neither person actually witnessed the shooting or saw who was shooting. They cannot say Cato was not the shooter. Neither could give an exact number of shots that were fired. Further, even if one believes these individuals were present that night, since they were inside the club when the shots were fired but did not see the shooting, they could have heard merely echoes of the shots fired by Cato or ricocheting bullets. A fired bullet was found near the front door. It matched Cato's gun. Additionally, Edwards' statement he heard some individuals discussing getting someone, even if true, does not prove they had anything to do with or were involved in the shootings or that he did not overhear Cato and his acquaintance talking about retaliating for the earlier altercation. After considering the affidavits submitted by Cato and arguments in his motion, Judge John, the plea/sentencing judge, denied the motion in the following written order.

The Order Denying the Motion

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

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

This Court finds that Applicant's after-discovered evidence does not meet the requirements set forth by *Spann*. Even assuming, arguendo, that statements of individuals who claim to have been present at the scene of the crime could not have been discovered prior to the guilty plea, the substance of their affidavits is wholly cumulative. Moreover, at his guilty plea, Applicant admitted to murdering one victim and shooting two others with the intent to kill them, no statement in either affidavit offered by Applicant is so material that it could possibly change the result of Applicant's admissions to the crime.

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

Applicant's Motion for a new Trial is hereby DENIED.

AND IT IS SO ORDERED.

(Order). (R. 3-4).[4]

Standard of Review

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. "The granting of a new trial because of after-discovered evidence is not favored," and this Court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). As this Court held in State v. Rhodes, 44 S.C. 325, 327, 21 S.E. 807 (1895):

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

Rhodes, 44 S.C. at 327, 21 S.E. 807. "A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." Irvin, 270 S.C. at 545, 243 S.E.2d at 197; Harris, 391 S.C. at 544, 706 S.E.2d at 529. The credibility of newly-discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641,

[4] Cato filed a Rule 59, *SCRCP*, Motion to Alter or Amend. Judge John denied the motion finding a Rule 59 Motion has no application in General Sessions and reaffirmed his prior ruling.(R. 5-6).

643 (1977); Harris, 391 S.C. at 545, 706 S.E.2d at 529. Only the trial court, and not the appellate court, has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. Id.; Harris, *supra*. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); Harris, *supra*. "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." Id.; Harris, *supra*.

Traditionally, to obtain a new trial on after discovered evidence, a defendant must show the 5 factors in State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013)(*quoting* Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993). However, this test proved unworkable where the defendant pled guilty. "Indeed, the traditional, newly discovered evidence factors are 'difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial.'" Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014),(*quoting* In re Reise, 192 P.3d 949, 954 (Wash. Ct. App. 2008). As this Court noted in Jamison, in the case of a guilty plea:

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

Id., at 469-70, 765 S.E.2d at 129-30 (*quoting* People v. Schneider, 25 P.3d 755, 761 (Colo.

2001). As a result, in Jamison, this Court fashioned a more stringent and exacting standard after a guilty plea. Id. Where a criminal defendant seeks relief on the basis of after discovered evidence from a guilty plea, relief is appropriate only where the defendant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; **and** (2) the newly discovered evidence is of such a weight and quality that, under the facts of that particular case, the "interest of justice" requires the defendant's guilty plea to be vacated. Id. at 470, 765 S.E.2d at 130. "In other words, a defendant may successfully disavow his guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interest in maintaining the finality of guilty-plea convictions." Id. This Court pointed out:

> In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated....on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. *Cf.* Reise, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice).

Id., at 470, 765 S.E.2d at 130.

The reasons for this more exacting standard when a defendant seeks to overturn a guilty plea are obvious. While the fact a defendant has pled guilty is not a *per se* bar to making a motion for a new trial on after discovered evidence, *see* State v. Williams, 108 S.C. 295, 93 S.E. 1006 (1917), a guilty plea is still a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmates' right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977); Dalton v. State, 376 S.C.

130, 654 S.E.2d 870 (Ct. App. 2007). Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566, (4th Cir. 1976); Dalton v. State, 376 S.C. 130, 654 S.E.2d 870.

Cato's "[s]olemn declarations in open court carry a strong presumption of veracity." Blackledge, 431 U.S. at 74; Fields v. Attorney Gen., 956 F.2d 1290, 1299 (4th Cir. 1992)("Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy"); Beck v. Angelone, 261 F.3d 377, 395-96 (4th Cir. 2001). A guilty plea is a "'grave and solemn act,' which is 'accepted only with care and discernment.'" United States v. Hyde, 520 U.S. 670, 677 (1997); United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992)(If an appropriately conducted plea colloquy and proceeding is to serve a meaningful function, on which the criminal justice system can rely, "..it must be recognized to raise a strong presumption that the plea is final and binding."). Indeed, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784 (1979). "A plea of guilty is an admission or a confession of guilt, and as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury." Jamison, 410 S.C. at 468, 765 S.E.2d at 129; State v. Fuller, 254 S.C. 260, 174 S.E. 774 (1970)(*citations omitted). See* North Carolina v. Alford, 400 U.S. 25, (1970)(guilty pleas constitute an express admission of guilt upon which sentence may be imposed).

"The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering

into his decision." Jamison, 410 S.C. at 471, 765 S.E.2d at 130 (*quoting* Brady v. United States, 397 U.S. 742, 757 (1970). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Id. Indeed, "[w]hat is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." Jamison, 410 S.C. at 469, 765 S.E.2d at 129 (*quoting* McMann v. Richardson, 397 U.S. 759, 773 (1970)(noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). "Furthermore, there must be some consequence attached to the decision to plead guilty." Id., (*quoting* People v. Schneider, 25 P.3d at 761 ("A defendant who voluntarily and knowingly enters a plea accepting responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea."). Cato has not met this burden.

In his Petition for Rehearing before the Court of Appeals, Cato argued Jamison is not applicable when a defendant seeks to overturn a guilty plea in a Rule 29 Motion rather than a PCR action. It makes no difference here. Judge John denied Cato's motion for a new trial based on after-discovered evidence pursuant to the less stringent 5 factor Spann analysis. The Court of Appeals in its Opinion affirming Judge John also relied on Spann not Jamison. *See* State v. Ardon P. Cato II, *supra*. Cato now argues to this Court the reverse, i.e. the Court of Appeals erred in applying Spann instead of Jamison. It makes no difference. Judge John did not err as Cato cannot meet the Spann test or the more exacting standard set forth in Jamison, applicable to those who attempt to overturn their pleas of guilty.

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

Cato received a substantial benefit for himself by his plea; the State dismissed 2 ABWIK charges and Cato received less than the maximum sentence for murder, which is life without parole. Before his guilty pleas were entered, Cato was facing life without parole [for murder] plus an additional 80 years [for 4 counts of ABWIK]. Cato was charged with indiscriminately shooting into a crowded nightclub in anger and killing 1 person, paralyzing a young female, and shooting and wounding another person, wounding another female, and shooting a security guard in attempting to escape from the scene. All of the victims were innocent bystanders and had nothing to do with the original altercation Cato was involved in. *See* United States v. Marquez, 909 F.2d 738, 742 (2nd Cir. 1990)(a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison).

Cato argues the 2 affidavits he submitted from a fellow prison inmate and a friend of a female friend, 10 years after his admissions of guilt, coupled with an alleged discrepancy in the SLED Firearms Worksheets and Report proves there was another shooter involved in his crimes; therefore, he is entitled to a new trial. However, Cato has not shown anything that would overcome the "strong-presumption of veracity" carried by his statements at the guilty plea and sentencing hearing of a voluntary decision to plead guilty and that he was in fact guilty of

murder and ABWIK (2 counts). *See* United States v. Morrow, 914 F.2d 608 (4th Cir. 1990).

The PCR Court already addressed Cato's claim his counsel did not investigate the ballistics in this case and the possibility of a 2nd shooter and advise him regarding possible defenses. (See Supp. R. 100-03).[5] It found counsel did properly investigate the ballistics, to the point of contacting the president of the company who manufactured the weapon used by Cato in the murder and ABWIKs and cited counsel's testimony that he investigated the evidence .380 and 9mm rounds were fired at the nightclub hoping to find evidence there was a 2nd responsible shooter. The Court noted in addition to the different caliber ammunition used, there was some question about how and whether Cato fired enough shots to have caused all of the wounds inflicted. However, upon investigation by counsel, the evidence did not support the 2nd shooter theory. The Court also noted the gun's manufacturer had told counsel a 9mm Highpoint would fire .380 rounds, when Cato's gun was recovered there were both .380 and 9mm rounds in the gun, and ballistics testing showed the fired shell casings found as well as the bullets recovered including from the deceased victim came from Cato's gun. (Supp. R. 100-01). The Court correctly found Cato failed to prove deficient performance or prejudice with regard to these allegations.[6]

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

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

Counsel testified each time he met with Cato he informed him of what he had discovered since the last time they talked. It is clear, counsel did advise Cato regarding the ballistics investigation and its results.[7] Counsel also denied Cato's claim at PCR he only met with Cato a total of 20 minutes during his representation of him. Counsel testified, while he would not say he spent hours with Cato each time talking to him, he talked long enough with Cato for him to understand what counsel had uncovered since the last time they spoke. (Supp. R. 83).

The PCR Court found and concluded Cato had failed to show counsel's investigation was inadequate or his advice regarding potential defenses was inaccurate. (See Supp. R. 103). Although Cato contended he did not mean to shoot anyone and had no malice toward the victims, the evidence was he fired several shots into a crowded nightclub causing injuries and a death. Further, because he fired several shots into a crowded nightclub, evidence regarding the lighting where he fired his shots would not have been helpful to the defense. And, there was ample evidence to support Cato's guilty pleas and counsel's performance was neither deficient nor prejudicial. The PCR Court's decision on this issue is fully supported by the record. [8]

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

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

Counsel credibly testified at the PCR hearing that: Cato admitted to him that after the initial altercation in the nightclub, he went outside and retrieved a weapon, re-entered the bar through a different door, and fired several shots into the crowded nightclub. Because of the different caliber of fired shell casings found, the testimony of witnesses that varied regarding the number of shots they heard, and the number of wounds the victims received, counsel investigated the ballistics in this case and did so because of the possibility of another shooter, but that investigation did not pan out. He interviewed the president of High Point Firearms, who informed him Cato's gun could fire .380 and .9mm ammo, the type of bullets and shell casings found. The discovery material showed there were .380 as well as 9mm ammo loaded in the magazine of Cato's pistol.[9] The bullet from the victim Hemingway's body and the fired casings found were forensically matched to Cato's gun.[10] By the time the case was being called for trial, the State had firmed up the ballistics.[11] While there was still *a possibility* of another shooter because of the number of gunshots witnesses heard and the number of wounds to the victims, all of the ballistic evidence found at the scene came back to Cato's gun. (Supp. R. 77-90).[12]

Further, counsel testified he kept Cato apprised of his investigation when he visited him prior to trial. (Supp. R. 83). The record of the guilty plea also shows counsel advised Cato

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[9] The 9mm contained an unfired .380 round jammed in the firing chamber. An unfired 9mm round was found near where Cato parked his car.

[10] One of the records Cato previously attached in federal habeas corpus, from the Myrtle Beach Police Department, also shows some of the victims, at least 2, had through and through gunshot wounds, providing a plausible explanation for the number of wounds vis a vis the number of shots Cato claimed he fired.

[11] Two of the SLED documents Cato attached to this appeal show the bullet that came from the deceased victim, Hemingway, and a bullet taken from near the front door of the club were fired by Cato's gun. (See R. 78-82).

[12] This is borne out by the SLED records and the official SLED ballistics Report, (See R. 72-82), which shows all the fired shell casings recovered [both 9mm and .380] and the 2 fired bullets recovered, 1 from near the front door and 1 from the deceased, came from Cato's gun. The forensic evidence tied Cato directly to the crime scene, the murder, and the ABWIKs.

regarding any potential defenses and the evidence of the State. (Supp. R. 11). Cato told the plea court he was satisfied with his attorney, and his attorney had done everything he wanted him to do to try to assist with his charges. (Supp. R. 10). When counsel informed the court he had explained Cato's defenses to him as well as the evidence in possession of the State, Cato did not disagree or challenge the statement but said nothing at all. (Supp. R. 11). With only 2 exceptions, Cato did not contest the facts as set forth by the Solicitor. (See Supp. R. 11-18).[13] Cato admitted he committed the crimes. (See Supp. R. 17-18). Counsel had also discussed with Cato the possibility there were other shooters. (Supp. R. 28, ll. 15-16). Cato chose to plead guilty anyway. (Supp. R. 1-35). Cato admitted he fired 4 times into the crowd in the club. (Supp. R. 33). He stated the reason the gun jammed was because his accomplice reloaded the gun when he got in the car. (Supp. R. 34). Cato stated 1 reason he was pleading guilty was because he had given his life to the Lord, was a God-fearing man, and believed in justice and judgment. (Supp. R. 33). Cato did not claim there was another shooter. Therefore, the credible evidence is Cato knew of the incriminating nature of the ballistics investigation.[14] Cato failed to establish deficient performance or prejudice at PCR on this issue. Strickland; Hill.[15] Given the

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[13]The 2 exceptions were: (1) the 2 men who initially assaulted Cato were not ejected from the nightclub, and (2) Cato denied shooting at a bouncer in the parking lot. As further justification for this 2nd exception, counsel stated the gun jammed in the nightclub because .380 rounds were being used in a 9mm gun. (See Supp. R. 11-18). Cato did not dispute he actually re-entered the nightclub through a different door, where there was no metal detector, and raised his gun over a security guard's head and holding the gun sideways fired multiple shots into the crowd.

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

[15]Further, even assuming counsel did not inform him *of the results of the ballistics investigation*, Cato cannot show if counsel had informed him of the results of the same he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 574 U.S. 52 (1985). In addition

overwhelming evidence Cato was guilty of murder and ABWIK, the potential sentences he was facing if convicted by the jury, and the procedural posture of the case at the time of his plea, Cato has not met the exacting standard of Jamison to set aside his admissions of guilt.[16]

Cato's contention the SLED Firearms Report is defective or in error is without merit. Cato **is confusing** what was marked "Item 9" by Myrtle Beach police and what was designated by the SLED firearms lab as "SLED Item 9." The SLED firearms lab worksheets [submitted by Cato] show SLED Item 5 was **received in a Box marked "ITEM #9" [by Myrtle Beach police].** However, SLED designated or identified this fired .380 shell casing as "*SLED Item 5.*" (See Worksheet-R. 75). "SLED Item 5" was also contained in "a staple closed brown bag" and was evidence tape sealed. (See Worksheet-R. 75). The worksheet also shows this fired shell

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the ballistics which pointed to Cato as the only shooter, Cato was arrested a few blocks away minutes after the crimes fleeing the scene in possession of **the murder weapon**. Cato was charged with murder and 4 counts of ABWIK and was facing life in prison plus 80 years if convicted at trial. Given the facts, 1 victim killed, another paralyzed for life, and another seriously wounded, in all likelihood Cato would have been sentenced to life and consecutive sentences if he proceeded to trial. The State was prepared to try the case that day. Cato's contention the crime should be voluntary manslaughter, or he did not intend to wound or kill the victims, is not borne out by the facts or the physical evidence. The trial judge had assured plea counsel and the prosecutor *in camera* prior to trial that if Cato pled guilty, his sentence would not be a life sentence but between 40 and 45 years. After being informed of these discussions, Cato decided he did not want to go to trial and risk a life sentence on the murder charge and consecutive sentences on the ABWIK charges, but instead wanted to plead guilty.

[16]Cato also asserted ineffective assistance for failing to interview SLED's ballistics expert. This issue was not raised to the PCR Court, and was therefore waived and abandoned. Counsel did not need to interview the SLED expert given the facts of this case. Cato admitted firing 4 shots into the club. Cato was arrested in possession of a 9mm pistol. According to counsel's testimony, the pistol magazine contained both 9mm and 380 ammo. A .380 round was found jammed in the gun. A 9mm bullet was found in the parking lot of the restaurant where Cato stated his accomplice racked the gun after Cato handed him the gun after the shooting. SLED's expert's report clearly shows all recovered fired bullets and shell casings forensically matched Cato's gun. Counsel spoke with the president of the gun's manufacturer who informed him the gun could fire .380 and 9mm ammo. Further, Cato has not shown how he was prejudiced by a failure to interview SLED's expert as the Firearms Report is not in error as shown above.

casing was forensically matched to the gun Cato used in the shooting. (See Worksheet-R. 75). This corresponds to the findings on the SLED Firearms Report [submitted by Cato] that *SLED Item 5* was fired by SLED Item 1, the gun used by Cato in the shootings. (See Firearms Report-R. 72-82). In contrast, "*SLED Item 9,*" **the fired bullet from the autopsy** of the deceased victim, was received in a closed intact specimen jar with intact seal marked "Anthony Hemingway." (See Worksheet SLED Item 9 [Attached by Cato]-R. 76). The Worksheet for "SLED Item 9" shows this fired bullet was forensically matched to the gun Cato used in the shootings. (See Worksheet SLED Item 9-R. 76). This corresponds to the SLED Firearms Report which shows the evidence designated or identified by SLED as "*SLED Item 9,*" the fired bullet from the autopsy, was forensically matched to SLED Item 1, the gun Cato used in the shootings. (Firearms Report-R. 72-82). Cato is wrong. The Firearms Report **is not** in error.

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

near the front door of the club after the shooting. It was forensically matched to Cato's gun.

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

Finally, this does not change anything as Cato has admitted under oath he fired the 9mm pistol into a crowded night club in anger or frustration and **the bullet taken from the murder victim's body came from Cato's gun.**[17] Cato has never claimed he was acting in self-defense. Cato claimed he was shooting to scare people or to show people he was not someone to be trifled with because of the earlier altercation. All of the fired bullets and casings recovered inside the club were forensically matched to Cato's gun. Cato's sentences for ABWIK were for 20 years **concurrent with the murder sentence of 42 years.** As Judge John correctly found, Cato is not entitled to a new trial based on after-discovered evidence. Jamison; Spann.[18]

Cato repeatedly argues in determining whether Judge John abused his discretion in ruling on his motion for a new trial, the Court must look at the strength of the entire case. But, the evidence of Cato's guilt of murder and ABWIK (2 counts) was overwhelming.[19] A specific

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[17] Cato also argues the Court of Appeals inconsistently affirmed an order granting a new trial in another case, Richard Gagnon. This is incorrect. The State did not appeal the order granting a new trial in Gagnon. The Court of Appeals did not affirm that order. Second, Gagnon was a trial. Cato pled guilty. Finally, the facts of the Gagnon case are completely different from Cato's case. What Judge John held in another completely different case is irrelevant to this appeal.

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

[19] Cato admits he was at the night club before the shootings and was involved in an altercation

intent to kill is not required to prove murder. Malice aforethought is all that is required. *See* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957).[20] Those circumstances are present in this case. State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). [21]

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with 2 men resulting in him being asked to leave. Cato left but went to his car and retrieved a 9mm pistol, walked back to the club, did not enter the front door where there was a metal detector, but re-entered the club at another exit and fired into the crowded nightclub. At his plea, Cato did not contend he saw someone else with a gun or fired in self-defense. Cato shot the murder victim in the chest, a victim in the back, and another in the abdomen. He attempted to flee but was pursued by a bouncer who Cato shot at and may have wounded slightly. Cato fled the scene in a car and was stopped by police a few blocks away in possession of the murder weapon matching the bullet from Hemingway's body, another bullet, and all casings from the crime scene. Because Cato was intoxicated, he was not questioned by police that night. However, intoxication is not a defense to murder. State v. Crocker, 272 S.C. 344, 251 S.E.2d 764 (1979); State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977). Nor is it a defense that one was so intoxicated he could not form malice. State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983).

[20]Malice can be inferred from the circumstances of the crime including the intent to do serious bodily harm, or conduct of such gross recklessness as to indicate a depraved or wicked heart. Mouzon, 231 S.C. at 662-63, 99 S.E.2d at 675-76; *See also* State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991)(malice is "the doing of a wrongful act intentionally and without just cause or excuse"); State v. Hammond, 36 S.C.L. (5 Strob.) 91 (S.C. App. 1850)(Malice "may be proved by previous threats, former grudges, hatred and ill-will, or it may be inferred from facts attending the homicide, showing a cruel and vindictive temper, a wantonness in the destruction of human life, and a heart regardless of social duty and fatally bent on mischief.").

[21] Further, transferred intent in an alleged voluntary manslaughter situation where a 3rd party is killed was an unsettled question at this time. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009); State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007). And, the facts show there was a sufficient cooling off period such that the crime was murder. Cato left the club after the altercation, crossed the parking lot to another parking lot near a restaurant, and retrieved a loaded 9mm pistol. He then returned to the night club in the same fashion, and did not enter from the front door but another exit, and only then began shooting into the crowd indiscriminately. *See* State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)(defendant had sufficient time period to cool where fight occurred between victim and defendant in appellant's home and defendant's actions in going next door to get a gun and returning to fatally shoot the victim from appellant's yard indicated "cool reflection"); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(defendant's actions in obtaining a gun, going to his room and loading it, waiting, and then going to his grandfather's room and shooting his grandfather and grandmother showed he did not act in heat of passion entitling him to a voluntary manslaughter charge); State v. Walker, 324 S.C. 257, 261, 478 S.E.2d 280, 281-82 (1996)(defendant demonstrated cool reflection by his actions between

Cato admitted that he was not necessarily firing at the people who assaulted him earlier, but was shooting over the head of the occupants of the nightclub to scare them because he was frustrated. (Supp. R. 60-61, 67-68). The State's evidence showed Cato fired into the crowded nightclub because he was angry at the 2 persons who assaulted him earlier or at the bouncers who asked him to leave. The doctrine of transferred intent would apply in this situation to the victims who were hit making the crimes murder and ABWIK. Finally, Cato's claim he was just shooting over the head of the victims to scare them is not credible. Hemingway was hit in the chest, nother victim in the back, another was hit in the stomach, and another in the buttocks. The victims' injuries show Cato, who was intoxicated and angry, was shooting to wound or kill.

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

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

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alleged provocation and killing); State v. Byrd, 323 S.C. 319, 322-23, 474 S.E.2d 430, 432 (1996)(defendant's actions between alleged provocation and killing did not support a finding of sudden heat of passion). (See Supp. R. 81-82, 84, ll.19-24).

knowing and voluntary guilty plea and admission of guilt be vacated. Jamison.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 29, 2019.

RECEIVED
APR 29 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2019-000042

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

vs.

ARDON P. CATO, II,

APPELLANT.

CERTIFICATE OF SERVICE

I, J. Anthony Mabry, counsel for the Respondent, certify that I have served the within Return to Petition for Certiorari on the Petitioner by depositing one (1) copy of the same in the United States mail, postage prepaid, addressed to:

Ardon P. Cato, II, #316535
Evans Correctional Institution
P.O. Box 2951202
Bennettsville, South Carolina 29512

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

This 29th day of April, 2019.

J. ANTHONY MABRY
Senior Assistant Attorney General