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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Herbert Palmer, Jr., #260691, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2017-CP-10-3273 **ORDER OF DISMISSAL**

This matter is before the Court by way of an untimely, successive application for post-conviction relief (PCR) filed by Herbert Palmer Jr. (Applicant) on June 27, 2017, and amended on June 29, 2022.[1] Respondent filed a return and motion to dismiss, asserting this PCR application was untimely and successive, and Applicant did not make a prima facie showing of newly discovered evidence. After the Court issued a Conditional Order of Dismissal provisionally dismissing the application, Applicant filed a response asserting the statute of limitations should be equitably tolled. On August 24, 2023, a hearing convened on Respondent's motion to dismiss. Applicant was present and represented by Brian Byrd, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, Applicant testified on the limited issue of whether equitable tolling should apply. Following a thorough review of the testimony and evidence presented at the hearing, this Court finds Applicant did not meet his burden of proving newly-discovered evidence or equitable tolling. Thus, this Court grants Respondent's motion to dismiss and dismisses this application with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections serving a life

[1] Applicant filed a second PCR application on June 29, 2022 (2022-CP-10-2941). On February 27, 2023, the 2022 PCR application was merged into the 2017 application, to be treated as an amendment to the 2017 application.

sentence. In March 1998, the Charleston County Grand Jury indicted Applicant for murder (1998-GS-10-1859). In August 1999, the Charleston County Grand Jury indicted Applicant for pointing and presenting a firearm (1999-GS-10-5258) and possession of a firearm during the commission of a violent crime (1999-GS-5259).

On August 23-26, 1999, Applicant proceeded to a jury trial before the Honorable Daniel Pieper. Robert G. Howe, Esquire, represented Applicant, and Assistant Solicitor Judy Munson prosecuted the case. The jury convicted Applicant as indicted, and the trial court sentenced him to life for murder and concurrent terms of three years for pointing and presenting a firearm and five years for possession of a firearm during the commission of a violent crime.

Applicant appealed, and Appellate Defender Joseph L. Savitz represented him on appeal. Following the submission of an Anders[2] brief and a *pro se* response, the South Carolina Court of Appeals dismissed the appeal pursuant to Anders. State v. Palmer, 2002-UP-390 (filed 5/30/2002). The remittitur was sent July 9, 2002.

First Post-Conviction Relief Action (2002-CP-10-4287) and Appeal

On October 23, 2002, Applicant filed his first PCR application alleging:

1. Ineffective assistance of counsel for failure to make objections;
2. Judicial misconduct by the trial court for failing to recuse himself; and
3. Structural error based on eh trial court's involvement with a State's witness at trial

On June 14, 2004, an evidentiary hearing convened before the Honorable Doyet A. Early, III. Applicant was present and represented by Joshua Snow Kendrick, Esquire. At the hearing, Applicant abandoned his claims of judicial misconduct and structural error, electing to proceed only on ineffective assistance of counsel. Applicant alleged counsel failed to reasonably prepare

[2] Anders v. California, 386 U.S. 738 (1967).

for his murder trial and adequately explain the elements of the crime. On August 20, 2004, the PCR court issued an order denying the application. Applicant appealed, and the South Carolina Court of Appeals denied certiorari. The remittitur was sent July 6, 2007.

Federal Habeas Corpus Action (C/A No. 6:07-3140-PMD-WMC) and Appeal

On October 1, 2007, Applicant filed a federal Petition for Habeas Corpus in the United States District Court for the District of South Carolina (C/A No. 6:07-3140-PMD-WMC). In the petition, Applicant alleged various grounds of ineffective assistance of counsel and due process violations. On December 27, 2007, Respondent made its Return and Motion for Summary Judgement. On June 18, 2008, the Magistrate Judge issued a Report and Recommendation recommending Respondent's motion for summary judgement be granted. On September 2, 2008, the federal district court denied the petition and granted Respondent's motion for summary judgement. The Court did not issue a certificate of appealability.

Thereafter, On October 6, 2008, Applicant appealed the grant of summary judgement to the United States Court of Appeals for the Fourth Circuit. By per curiam opinion filed April 23, 2009, the Court dismissed the appeal. The Court denied Applicant's subsequent petition for rehearing by order dated June 8, 2009. The mandate was filed on June 16, 2009.

Second Post-Conviction Relief Action (2011-CP-10-4986) and Appeal

On July 14, 2011, Applicant filed a second PCR application alleging his conviction was unconstitutional pursuant to State v. Belcher. On May 22, 2012, Respondent filed a return and motion to dismiss, asserting the application was untimely and successive. On June 4, 2012, the Honorable Deadra L. Jefferson signed a Conditional Order of Dismissal, provisionally denying the application as untimely and successive, but allowing Applicant twenty days to present sufficient legal or factual reasons why the dismissal should not become final. On June 21, 2012,

Applicant served his objection to the conditional order of dismissal on Respondent, arguing his application should not be dismissed as successive because it is within the court's discretion to allow a successive application, and his second application raised a significant constitutional challenge. On January 8, 2015, the Honorable R. Markley Dennis signed a Final Order of Dismissal, finding Applicant failed to demonstrate why the claim in his second application could not have been raised in his initial PCR application.

Applicant filed a notice of appeal. On March 27, 2015, the South Carolina Supreme Court issued an order finding Applicant failed to show an arguable basis for asserting the lower court's order was improper. The remittitur was sent on April 14, 2015.

II. CURRENT APPLICATION

On June 27, 2017, Applicant filed his third (and current) PCR application, alleging he is being held in custody unlawfully based on newly discovered evidence. Attached to his application, Applicant affixed a General Session "Motion for a New Trial Based on After-Discovered Evidence," filed September 3, 2015,[3] in which he asserts,

> (1) Defendant will show that one of the states key witnesses not only lied under oath and gave false testimony but that the defendant was denied proper due process based on coercion by the prosecutor who instructed the state's witness to lie by making an undercover deal to dispose of pending drug charges in return for him to lie and say he witnessed the defendant shoot the victim Mario Perry;
>
> (2) Defendant will show evidence and produce two witnesses who were present at the time of the incident. These witnesses clearly state in a signed affidavit that they know that the defendant did not shoot the victim, nor did he have a weapon and did not receive a gun or any weapon from anyone else. No law enforcement has ever spoken to these witnesses about this case. And because the defendant was detained and then incarcerated he was unable to produce these witnesses during or before trial, because he did not know their government names in order to provide that information

[3] This General Sessions motion was filed with the Charleston County Clerk of Court and has not been heard.

to his attorney at the time; and

> (3) "Material Discovery Withheld, is based on the fact that the Prosecutor had a deal with Carl Judge in exchange for false testimony. The defendant had already been on the News with his picture shown, and details of the case had been covered by the newspapers, so this was public information. But this witness appeared in court after speaking to the prosecution twenty-one months after the defendant had been detained and this witness was never revealed to the defendant after Rule 5 of the S.C.R.C.P. was filed."

Applicant attached affidavits from Carl Judge (dated September 9, 2014), Brian Johnson (dated May 13, 2015), and John Bradley (dated May 5, 2015).

On November 13, 2017, Respondent filed a return and motion to dismiss. On November 3, 2017, the Court issued a Conditional Order of Dismissal provisionally dismissing the application but allowing Applicant twenty days to respond and show why the action should not be dismissed. On December 15, 2017, Applicant filed a response asserting the statute of limitations should be equitably tolled.

On June 29, 2022, Applicant filed a fourth (and current) PCR application alleging newly-discovered evidence in the form of an affidavit from Tara Spann, dated June 13, 2022. In her affidavit, Spann avers she was interviewed by PCR counsel and a private investigator on March 23, 2022. Spann also recants her trial testimony that Applicant shot the victim.

By order dated February 27, 2023, the 2022 PCR application was merged into the 2017 PCR application. Before this Court are the Charleston County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior PCR actions, the records from Applicant's prior federal habeas corpus actions, Applicant's appellate records (including the appendix from the appeal of the denial of his 2002 PCR application), and the records from this PCR action.

III. Motion to Dismiss

Respondent moved for summary dismissal on the basis Applicant's claims were barred the statute of limitations, and Applicant failed to set forth sufficient facts to support a claim of newly-discovered evidence. Respondent also asserted this application should be barred as successive. This Court finds Applicant did not establish equitable tolling should apply. This Court further finds Applicant did not set forth a valid claim of newly-discovered evidence. Thus, Respondent's motion to dismiss is granted.

Statute of Limitations

This Court finds this application is untimely and barred by the statute of limitations. A person may institute a PCR action if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice". S.C. Code Ann. § 17-27-20(A)(4). A PCR application asserting newly-discovered evidence must be filed within one year after the date of the Applicant's actual discovery of the facts or after the date when the facts could have been discovered by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(C). Otherwise, a PCR must be filed within one year of sentencing or, if a direct appeal is filed, within one year of the remittitur. § 17-27-45(A).

Here, Applicant was sentenced in August 1999, and the remittitur from his direct appeal was sent on July 9, 2002. Applicant's 2017 and 2022 PCR applications fall well outside the timeframe set by the statute. Thus, unless Applicant can set forth a prima facie showing of newly-discovered evidence, these actions are barred by the statue of limitations. As set forth below, Applicant has failed to set forth a cognizable claim of newly-discovered evidence. Further, Applicant's claims from the 2017 PCR application were not timely filed from the discovery of the alleged "new" evidence, and Applicant did not prove equitable tolling should

apply. This Court thus finds this action should be barred by the statue of limitations.

Equitable Tolling

In his response to the Conditional Order of Dismissal, Applicant alleged equitable tolling should apply to the claims from his 2017 application, which relate to affidavit of Carl Judge (dated September 9, 2014), Brian Johnson (dated May 13, 2015), and John Bradley (dated May 5, 2015).[4] This Court finds Applicant did not establish that equitable tolling should apply to the 2017 PCR application.

"[M]ailing does not constitute filing of a PCR application for statute of limitations purposes." Mose v. State, 420 S.C. 500, 507, 803 S.E.2d 718, 721 (2017). "Rather, the application is deemed "filed" when it is delivered to and received by the Clerk of Court." Id.

Equitable tolling may be applied to toll the statute of limitations. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Id. "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Id. at 117, 687 S.E.2d at 33.

> [T]he unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant. Our decision in no way eliminates the rule created in Gary or absolves inmates from complying with the one-year statute of limitations. In fact, we expressly decline to adopt a rule that automatically deems a PCR application "filed" on the date an applicant claims it was delivered to prison authorities. Instead, if a PCR applicant relies on the defense of equitable tolling in response to a motion to dismiss, the applicant must substantiate that the correct and complete application was delivered to prison authorities prior to the expiration of the statute of limitations and that any delay in the Clerk of Court's receipt of the application was due to processing. If the PCR judge determines that the applicant has presented a valid defense, then the statute of limitations shall be tolled until the application is delivered to and received by the

[4] The affidavit from Spann was not signed until June 13, 2022, and

Clerk of Court.

Mose, 420 S.C. at 510, 803 S.E.2d at 722-23. However, "tolling the statute of limitations in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to no fault of his own "does not create an exception by which incarcerated litigants may avoid time restrictions." Mose v. State, 420 S.C. 500, 510, 803 S.E.2d 718, 723 (2017).

In Applicant's response to the Conditional Order of Dismissal, Applicant averred he made a good-faith attempt to file this PCR application on September 3, 2015, after obtaining affidavits from witnesses on September 14, 2014 (Judge), May 5, 2015 (Bradley), and May 13, 2015 (Johnson). At the hearing on Respondent's motion to dismiss, Applicant testified he did not recall the exact date he filed his 2017 PCR application. He stated he left the application in the mail room at Lieber Correctional Institution, but it was returned to him three months later. Applicant stated the returned application indicated it had been sent to the wrong address. He clarified the application was returned three months after he sent it.

Initially, Applicant did not enter into evidence the initial application that was allegedly returned, and he did not recall when he attempted to file the first application. Although Applicant alleged in his Response to the Conditional Order of Dismissal that he first attempted to file this application on September 3, 2015, he did not produce any credible evidence at the PCR hearing to support that claim. In the absence of evidence about when he filed this alleged first application, any inquiry into the timeliness of it is speculation. Applicant failed to "substantiate that the correct and complete application was delivered to prison authorities prior to the expiration of the statute of limitations and that any delay in the Clerk of Court's receipt of the application was due to processing." Mose, 420 S.C. at 510, 803 S.E.2d at 723 ("[I]f a PCR applicant relies on the defense of equitable tolling in response to a motion to dismiss, the

applicant must substantiate that the correct and complete application was delivered to prison authorities prior to the expiration of the statute of limitations and that any delay in the Clerk of Court's receipt of the application was due to processing."). Applicant did not produce any credible evidence that he initially attempted to file a complete application on September 3, 2015. In the absence of credible evidence, Applicant did not meet his burden of proving equitable tolling should apply. Hooper, 386 S.C. at 115, 687 S.E.2d at 32 ("The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.").

Assuming *arguendo* Applicant did in fact file his initial PCR application on September 3, 2015—which this Court finds he did not prove—based on Applicant's testimony, Applicant did not show the statute of limitations should be equitably tolled. To the extent these affidavits set forth a prima facie showing of newly-discovered evidence,[5] this PCR action would have been timely filed on September 3, 2015. Applicant testified he received the initial filings about three months later, which would have been sometime around December 2015. Applicant then waited until June 27, 2017—almost eighteen months—to file the 2017 application. This is different than the situation in Mose, where the inmate mailed his application seventeen days before the filing deadline, and it was filed only three days after the statue of limitations expired. The current application was verified on June 27, 2017—well after the filing deadline, and well after Applicant testified he learned the initial application had been returned. Thus, this Court finds Applicant did not establish that equitable tolling should apply to the 2017 application.

Newly-Discovered Evidence

This Court finds Applicant did not allege sufficient facts of newly-discovered evidence to

[5] As set forth below, this Court finds the affidavits do not set forth a prima facie showing of newly-discovered evidence.

warrant an evidentiary hearing.

In his application, Applicant's newly discovered evidence consists of affidavits signed by Carl Judge, Brian Johnson, John Bradley, and Tara Spann. However, these affidavits do not meet the high threshold for after-discovered evidence.

> A party requesting a new trial based on after-discovered evidence must show that the evidence:
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> (1) Is such as would probably change the result if a new trial was had;
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> (2) Has been discovered since the trial;
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> (3) Could not by the exercise of due diligence have been discovered before the trial;
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> (4) Is material to the issue of guilt or innocence; and,
>
> (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983)

Initially—and critically—the information in all these affidavits could have been discovered with due diligence prior to trial. Notably, Johnson and Bradley both averred they were at the scene with Applicant; Applicant thus would have known they were there and could have identified them as potential witnesses for counsel to speak to prior to trial. It strains credibility to suggest Applicant can withhold information from his attorney about who was at the scene of the crime with him for more than fifteen years and then obtain a new trial based on "newly-discovered evidence." See State v. Jones, 89 S.C. 41, 71 S.E. 291, 294 (1911) ("To permit one on trial to hold back evidence which he may have in his possession, or which he failed to use due diligence to obtain, and then use it as the grounds of a motion for a new trial in the event of an adverse verdict, would be destructive of the efficient administration of justice, and subversive of the rule that it is to the interest of society to have an end to litigation.").

Because the information in these affidavits could have been discovered with due diligence, Applicant has failed to make the high showing required for newly-discovered evidence. See Hayden, 278 S.C. at 611, 299 S.E.2d at 855 (providing a party requesting a trial based on after-discovered evidence must show the evidence has been discovered since trial and "[c]ould not by the exercise of due diligence have been discovered before the trial"); Jones, 89 S.C. at 41, 71 S.E. at 294 ("It should also be borne in mind that this evidence, if the witnesses had been interrogated, would have become known to the counsel for the defendant . . . .").

Likewise, Judge and Spann were witnesses at Applicant's trial, and the information in their affidavits could have been discovered with due diligence prior to trial or through cross-examination. Further, Johnson testified at Applicant's 2004 PCR hearing; thus, the information in his 2015 affidavit could have been discovered with due diligence.[6] (App. 811-14). Because the information in these affidavits could have been discovered with due diligence, Applicant has failed to make the high showing required for newly-discovered evidence. See id.

In addition to this being information that could have been discovered with due diligence, the information in Johnson's affidavit is not material and would not likely change the outcome of trial. See Hayden, 278 S.C. at 611, 299 S.E.2d at 855 (providing an applicant seeking a new trial based on after-discovered evidence must show the evidence would probably change the result if a new trial was granted and is material to the issue of guilt or innocence). Johnson's affidavit

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[6] At the 2004 PCR hearing, Johnson testified to the following events from the day of the shooting:

> Well, a couple of fellows came down to where we was at, some fellows from another group, and Mr. Palmer was telling them to just leave; don't cause any commotion; just get off the trailer park, and there was a dude's brother—he was in the background, acting all crazy, and I saw something in his waist line. I don't think he saw that , but he was just telling them to get out the yard, and they all got upset, and the next think I know the dude came and they got in a scrap or something, and that's the way it started out.

(App. 812-13).

actually placed Applicant at the scene; although Johnson averred Applicant did not have a firearm and refused a firearm from Archie Wright, Johnson also averred he "turned around and walked away" after seeing the second gun. Johnson further alleged he heard six to seven shots fired and ran; however, Johnson did not allege he saw who did the shooting—making it feasible that Applicant could have been a shooter even if Johnson's affidavit is believed in its entirety. Thus, it is not material and would not likely change the outcome.

Finally, Judge and Spann's affidavits are both recanting witness affidavits that are merely impeaching. See id. (providing an applicant seeking a new trial based on after-discovered evidence must show the evidence "is not merely cumulative or impeaching"); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial."); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979) (finding "after-discovered evidence" of a conversation between the solicitor and a witness wherein the witness was promised immunity or lenience in exchange for his testimony "was at most merely impeaching of [the witness's] credibility and not material to appellant's guilt or innocence").

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a *prima facie* showing of newly-discovered evidence. Because his claims do not meet the high threshold of newly-discovered evidence, they are barred by the one-year statute of limitations set forth in section 17-27-45(A). Thus, Applicant is not entitled to an evidentiary hearing on his claims of newly-discovered evidence, and this matter shall be dismissed.

Successive

This action should be dismissed as successive to Applicant's 2002 PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Section 17-27-90 is clear—successive PCR applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications or actions challenging these convictions. See Aice, 305 S.C. at 452, 409 S.E.2d at 395 ("[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules."). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

As discussed, Applicant's allegations of newly-discovered evidence do not reach the high threshold of newly-discovered evidence because they contain information that could have been

discovered prior to trial. Additionally, Judge and Spann's affidavits are merely impeaching, and Johnson's affidavit is not material and is unlikely to change the outcome of trial. Further, Johnson actually testified at Applicant's 2004 PCR hearing, and his testimony was largely similar to his 2015 affidavit. To the extent these claims could be framed as allegations of ineffective assistance of counsel, claims related to failure to investigate and/or cross-examine witnesses could have been raised in Applicant's 2002 PCR application. See Jones, 89 S.C. 41, 71 S.E. 291, 294 ("It should also be borne in mind that this evidence, if the witnesses had been interrogated, would have become known to the counsel for the defendant . . . ."). Applicant had a full opportunity to litigate these claims in his previous PCR action and has failed to show a successive application is appropriate or why he could not have raised these claims in his prior collateral actions; thus, these allegations are successive and barred under section 17-27-90. See Aice, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were" (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). Applicant has not made *a prima facie* showing he is entitled to a successive PCR application and thus is not entitled to an evidentiary hearing.

[Conclusion and signature page follows]

IV. Conclusion

Based on the foregoing, this Court finds this Application is untimely and successive, and Applicant has not established equitable tolling or a prima facie claim of newly-discovered evidence. Thus, this Court grants Respondent's motion to dismiss

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. An applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 2 day of Nov, 2023.

Michael G. Nettles
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina

ALAN WILSON
ATTORNEY GENERAL

November 15, 2023

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: **Herbert Palmer, Jr., #260691 v. State of South Carolina**
Case No.: 2017-CP-10-3273

Dear Ms. Armstrong:

Enclosed please find the original Order of Dismissal signed by the Honorable Michael G. Nettles in the above-captioned case, for filing in your office. Please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh

cc: Brian M. Byrd, Esquire