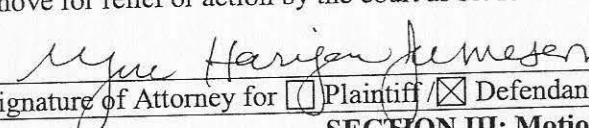


STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 HERBERT PALMER, #260691 )  
 Plaintiff, )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-10-3273

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

Plaintiff's Attorney: Brian Marshall Byrd, Esquire, Bar No. Address: The Byrd Law Firm, LLC 147 Wappoo Creek Drive, Ste. 303 Charleston, SC 29412 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Megan Harrigan Jameson, Bar No. Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between;"> <div style="text-align: center;">             Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant         </div> <div style="text-align: right;">           October 10, 2017            Date submitted         </div> </div>	
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____  Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

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AG  
AT

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
  
Herbert Palmer, Jr., #260691, )  
  
Applicant, )  
  
v. )  
  
State of South Carolina, )  
  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2017-CP-10-3273

**CONDITIONAL ORDER OF DISMISSAL**

FILED  
2017 NOV -3 PM 2:31  
JULIE MURPHY / RONALD  
CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief filed June 27, 2017. Respondent made its return and motion to dismiss the application as procedurally barred as untimely.

**I. PROCEDURAL HISTORY**

Herbert Palmer, Jr. (Applicant) is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its March 1998 term, the Charleston County Grand Jury indicted Applicant for Murder (1998-GS-10-1859). The Charleston County Grand Jury subsequently 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) during its August 1999 term. Applicant proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Daniel Pieper in August of 1999. Applicant was represented at trial by Robert G. Howe, Esquire. On August 26, 1999, the jury convicted Applicant of all charges. The trial court sentenced Applicant to life imprisonment 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.

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[Signature]

Applicant appealed his convictions and sentences and was represented by Appellate Defender Joseph L. Savitz, Esquire of the South Carolina Commission on Indigent Defense—Division of Appellate Defense on appeal. Following the submission of an Anders<sup>1</sup> brief and a *pro se* brief, the South Carolina Court of Appeals entered an order dismissing the appeal. State v. Herbert Palmer, Jr., 2002-UP-390 (filed May 30, 2002). The Remittitur was returned to the circuit court on July 9, 2002.

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

Applicant filed his first application for post-conviction relief on October 23, 2002, 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 the trial court's involvement with a State's witness at trial.

Respondent made its return on September 15, 2003. An evidentiary hearing into the application was convened in the Charleston County Court of Common Pleas on June 14 2004, before the Honorable Doyet A. Early, III. Applicant was present at the hearing and represented by Joshua Snow Kendrick, Esquire. At the evidentiary hearing, Applicant expressly abandoned his claims of judicial misconduct and structural error, electing to proceed only on the claim of ineffective assistance of counsel. As to this claim, Applicant alleged that counsel failed to reasonably prepare for his murder trial and that counsel's alleged lack of preparation led to an unfair trial. Applicant further asserted counsel failed to adequately explain the elements of the crime with which he was charged. The post-conviction relief court found these allegations to be without merit and denied the application by written order filed August 20, 2004.

<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

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Applicant appealed the denial of this post-conviction relief action. Following the submission of his Petition for a Writ of Certiorari and Respondent's Return to the Petition for a Writ of Certiorari, the case was transferred the South Carolina Court of Appeals who, in turn, denied certiorari. The Remittitur was sent on 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. Herbert Palmer, Jr. v. Robert M Stevenson, C/A No. 6:07-3140-PMD-WMC. In the petition, Applicant alleged various grounds of ineffective assistance of counsel as well as due process violations. Respondent made its Return and Memorandum of Law in Support of Motion for Summary Judgment and Motion for Summary Judgment on December 27, 2007 asking the petition be denied and dismissed. On June 18, 2008, the Magistrate Judge issued a Report and Recommendation recommending that Respondent's motion for summary judgement be granted. On September 2, 2008, District Court Judge Patrick Michael Duffy of the United States District Court for the District of South Carolina denied the petition and granted Respondent's motion for summary judgment. The Court did not issue a certificate of appealability.

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

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[Signature]

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

Applicant filed a second application for post-conviction relief on July 14, 2011, alleging that his conviction was unconstitutional under State v. Belcher because the trial judge charged the jury with respect to matters of fact. Respondent made its return on May 22, 2012 asking the Court to dismiss the application successive and untimely. The Honorable Deadra L. Jefferson, acting in her capacity as Chief Administrative Judge for the Ninth Judicial Circuit, signed a Conditional Order of Dismissal on June 4 2012 provisionally denying the application as untimely and successive, but allowing Applicant twenty days from the date of service 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 that his application should not be dismissed as successive because it is within the court's discretion to allow a successive application and that because his second application raises a significant constitutional challenge he should be allowed to proceed forward. On January 8, 2015, the Honorable R. Markley Dennis, acting in his capacity as Chief Administrative Judge for the Ninth Judicial Circuit, signed a Final Order of Dismissal finding that Applicant had failed to demonstrate why the claim in his second action could not have been timely raised in his initial post-conviction relief action.

Applicant filed a notice of appeal challenging the dismissal of his second application. On March 27, 2015, the South Carolina Supreme Court issued an order finding that Applicant failed to demonstrate an arguable basis for asserting that the lower court's order was improper. The Remittitur was sent on April 14, 2015.

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## II. CURRENT APPLICATION

Applicant filed his current application for post-conviction relief in the Circuit Court of Charleston County on June 27, 2017. In his current application, Applicant "requests the vacation of the prior conviction based upon evidence of material facts not previously presented or hearing, or in the alternative, a new trial based upon the discovery of new material evidence which could serve as a collateral attack on the prior conviction." Applicant has affixed a General Session "Motion for a New Trial Based on After-Discovered Evidence," filed September 3, 2015 to his PCR application.<sup>2</sup> In his motion for a new trial, Applicant asserts that he "will show that one of the states key witnesses not only lied under oath and gave false testimony but that the [applicant] was denied proper due process based on coercion by the prosecutor who instructed the state's witness to lie by making a 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." Applicant further asserts that he will present "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 [applicant] 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 [applicant] 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 to his attorney at the time." Applicant further asserts that his Motion concerning the withholding of material discovery is based on the fact that the prosecutor at his trial struck a deal with Carl Judge in exchange for false testimony. Applicant also maintains that he did not receive

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<sup>2</sup> This General Sessions motion was filed with the Charleston County Clerk of Court and is currently pending in General Sessions court.

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AKC

a fair trial because details of the case were covered by newspaper. His picture was also presented to the media. Applicant also attached affidavits from Carl Judge, Brian Johnson, and John Bradley.

Before this Court are the records of the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior post-conviction relief actions, the records from Applicant's prior federal habeas corpus actions, Applicant's appellate records, and the records from this post-conviction relief action, and Respondent's Return and Motion to Dismiss.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law.

This Court finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 ("the Act"). Pursuant to the Uniform Post-Conviction Procedure Act, "If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C).

In the present case, the affidavits submitted by Applicant in support of his Motion for a New Trial and thus presented as "new evidence" are from September 9, 2014 (Carl Judge), May 13, 2015 (Brian Johnson), and May 5, 2015 (John Bradley). Moreover, Applicant filed his Motion

for a New Trial in General Sessions court in September 3, 2015, nearly two years before he filed his current post-conviction relief action in Common Pleas court asserting identical claims.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” This Court finds that Applicant failed to comply with the filing procedures set forth in the Act. Therefore, this application for post-conviction relief is summarily dismissed with prejudice.

### CONCLUSION

S.C. Code Ann. § 17-27-70(b) states in pertinent part:

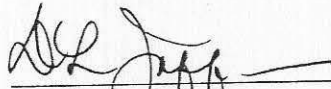
When a court is satisfied, on the basis of the application, the answer or motion, and on the record, that the Applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and give reason for so doing. Applicant shall be given an opportunity to reply to the proposed dismissal.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

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[Signature]

Office of the Attorney General  
Attn: Megan Harrigan Jameson, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 3<sup>rd</sup> day of Oct., 2017.



Deadra L. Jefferson  
Chief Administrative Judge for Common Pleas  
Ninth Judicial Circuit

Char., South Carolina

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Sols  
MCH



ALAN WILSON  
ATTORNEY GENERAL

October 10, 2017

The Honorable Deadra L. Jefferson  
Charleston County Judicial Center  
100 Broad St., Suite 336  
Charleston, SC 29401-2236

**Re: Herbert Palmer v. State of South Carolina**  
**2017-CP-10-3273**

Dear Judge Jefferson:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. If this Order meets your approval, please sign and return to me in the enclosed envelope, and I will forward to the Charleston County Clerk of Court to be filed and served.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General

MHJ/jaj  
Enclosure(s)

cc: Brian M. Byrd, Esquire