

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS  
2017-CP-10-03273

**RECEIVED**

**Feb 22 2024**

Herbert Palmer, Jr. )

**S.C. SUPREME COURT**

) TRANSCRIPT OF RECORD

-vs- )

) August 24, 2023

State of South Carolina )

) Charleston, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

A P P E A R A N C E S:

Danielle Dixon, Esquire  
Attorney for the State

Brian M. Byrd, Esquire  
Attorney for the Applicant

Reported By:

Yvestre Torres, OCR  
Circuit Court Reporter for the  
Ninth Judicial Circuit

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**EXHIBITS**

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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NO EXHIBITS INTRODUCED

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WITNESS                      DIRECT                      CROSS                      REDIRECT                      RECROSS

Herbert Palmer, Jr.

Mr. Byrd                      29

Ms. Dixon                      31

Mr. Byrd                      32

1 THE COURT: Please be seated. Good morning,  
2 everybody.

3 MR. BYRD: Good morning, Your Honor.

4 MS. DIXON: Good morning.

5 THE COURT: I know this is an application  
6 for post-conviction relief. I'm going to recognize  
7 the attorney general, ask if she can put on the record  
8 the procedural history. Then I'm going to recognize  
9 Applicant's attorney, Mr. Byrd, and ask if you would  
10 set forth the grounds that you're alleging to go forward  
11 with today.

12 MS. DIXON: Oh, Your Honor, we're here  
13 on a motion to dismiss.

14 THE COURT: Oh, okay. Very good.

15 MS. DIXON: Yeah, not an evidentiary  
16 hearing.

17 THE COURT: It actually says it right  
18 on there, motion to dismiss.

19 MS. DIXON: Yeah. State has a motion  
20 to dismiss, so ---

21 THE COURT: Yes.

22 MS. DIXON: --- which I can lay out after  
23 I give the procedural history, if you don't mind.

24 THE COURT: Yes. All right. Very good.  
25 Thank you.

1 MS. DIXON: All right. May it please  
2 the Court. This is Herbert Palmer v. State, Docket  
3 No. 2017-CP-10-3273. Mr. Palmer is currently serving  
4 a life sentence. He was indicted in March of 1998  
5 by the Charleston County Grand Jury for murder, and then  
6 in August of 1999 by the Charleston County Grand Jury  
7 for pointing and presenting a firearm and possession  
8 of a firearm during a violent crime. Those are  
9 Indictment Nos. 1998-GS-10-1859, 1999-GS-10-5258,  
10 and 1999-GS-10-5259.

11 He proceeded to a jury trial before the  
12 Honorable Daniel Pieper in August of 1999. He was  
13 represented by Robert Howe, and he was convicted,  
14 as indicted, and sentenced to life for murder,  
15 and concurrent terms of three years for the pointing  
16 and presenting, and five years for the other weapon  
17 charge.

18 He filed a direct appeal, which was --  
19 he was represented by appellate defender Joseph Savitz.  
20 Mr. Savitz filed a brief, pursuant to Anders, and  
21 it was dismissed. The remittitur was sent July 9, 2002.  
22 He filed his first PCR application October 23rd, 2002;  
23 that's Docket No. 2002-CP-10-4287.

24 He made several complaints of ineffective  
25 assistance of counsel, as well as judicial misconduct,

1 structural error, and there was an evidentiary hearing  
2 on June 14th, 2004. That was before the Honorable  
3 Doyet A. Early. He proceeded only on the ineffective  
4 assistance claims and alleged that counsel failed  
5 to prep for trial and failed to explain the elements  
6 of the crime. That was dismissed by an order dated  
7 August 20th, 2004. He did appeal. The South Carolina  
8 Court of Appeals denied cert on his petition for cert,  
9 and the remittitur was sent July 6th, 2007.

10           Thereafter, he filed a federal habeas action  
11 October 1st, 2007. That was ultimately dismissed after  
12 the State moved for summary judgment; that was dismissed  
13 April 23rd, 2009. A certificate of appealability  
14 was also not issued in that case. He filed a second  
15 PCR application July 14th, 2011; that's Docket No.  
16 2011-CP-10-4986. At that time, he alleged his  
17 conviction was unconstitutional under State v. Belcher.  
18 The court issued a conditional order of dismissal June  
19 4th, 2012.

20           On June 21st, 2012, he did file objections  
21 to the conditional order of dismissal, and on June 8th,  
22 2015, the court issued a final order of dismissal.  
23 He did appeal that order. The Supreme Court dismissed  
24 it, finding he did not demonstrate an arguable basis  
25 for asserting the court's order was improper.

1 The remittitur was sent April 14th, 2015.

2 On September 3rd, 2015, he filed a motion  
3 in general sessions court based on after-discovered  
4 evidence. He asserted State's witnesses lied under oath  
5 and gave false testimony, he was denied due process,  
6 victim coercion by the prosecutor, and the prosecutor  
7 withheld discovery, and he didn't get a fair trial.

8 Based on what I have, that is still pending.  
9 I have -- my notes say that it says that it was merged  
10 into the PCR. I'm not quite sure how that -- how  
11 that may have happened. June 27th, 2017, he filed  
12 the current PCR application; that's 2017-CP-10-3273,  
13 alleging after-discovered evidence, based on recanting  
14 witness affidavits from 2015.

15 The State filed a motion -- a return  
16 of a motion to dismiss, based on statute of limitations  
17 and also argued that the newly-discovered evidence  
18 did not meet the threshold of newly-discovered evidence.  
19 The court issued a conditional order of dismissal  
20 on November 3rd, 2017, basically dismissing it --  
21 conditionally dismissing it based on the statute  
22 of limitations, and he responded and requested an  
23 evidentiary hearing and asserted equitable tolling  
24 at that time.

25 On June 29th, 2022, he file another PCR

1 application; that's 2022-CP-10-2941, again alleging  
2 after-discovered evidence, this time in the form of  
3 an affidavit from a recanting witness named Tara Spann.  
4 That was dated June 13th, 2022.

5 That 2022 action was merged into the 2017  
6 case, so the 2017 case is the surviving action. And  
7 it was continued from November 22nd, 2022, and this  
8 past February, it was merged. And then just as a brief  
9 overview of our motion to dismiss, and we did file  
10 an amended return and a motion to dismiss.

11 The 2017 case is basically based on  
12 affidavits of Carl Judge, Brian Johnson and John  
13 Bradley. And just by way of background, Carl Judge  
14 did testify at his trial and did identify him as  
15 the shooter. There were about eight eyewitnesses,  
16 from my count, that identified him as the shooter.  
17 Two of them have now come forward with recanting witness  
18 statements; that would be Carl Judge, who signed  
19 his affidavit September 9th, 2014, and Tara Spann,  
20 who signed her affidavit June 13th, 2022. I will note  
21 for the record there are about six other eyewitnesses  
22 in the trial transcript that did identify him as the  
23 shooter.

24 The State would assert that a recanting  
25 witness in it of itself, you know, the courts give

1 it very little credibility, and that doesn't rise  
2 to the level of a recanting witness. But also,  
3 as to Carl Judge, that affidavit was signed September  
4 9th, 2014, and this PCR application was not filed until  
5 June of 2017, so we do assert the statute of limitations  
6 and further argue that equitable tolling should not  
7 apply here, where he did actually file a different  
8 action using that same affidavit and then just waited  
9 two years to file this PCR.

10 As to the other two affidavits, we have  
11 Brian Johnson and John Bradley. I would note for  
12 the record that those both claim to be new witnesses  
13 who were at the scene of the crime with him. And I will  
14 note that Brian Johnson did actually testify at his 2002  
15 PCR hearing. And so in light of that, he can't really  
16 be newly-discovered evidence that could survive the  
17 statute of limitations bar.

18 And then, finally, as to John Bradley --  
19 and Your Honor, these affidavits are all attached  
20 to the application themselves. But as to John Bradley,  
21 we would again assert that it doesn't meet the high  
22 threshold of newly-discovered evidence. Bradley's  
23 affidavit, if I recall, does say that he was with the  
24 Applicant. So, I think if the Applicant knew Bradley  
25 was with him, you know, in 20 -- what are we in, 2022

1 [sic.], he probably should have said something to his  
2 lawyer back in, what, 1999 when this case was tried.

3 I don't think you can wait 20 years to  
4 suddenly have a brand new witness come up and say that  
5 this is new evidence that you could not have discovered.  
6 I would also submit if you review the affidavit  
7 in it of itself, it would not be material to his guilt  
8 or innocence.

9 THE COURT: All right. Thank you very much.  
10 Yes, sir.

11 MR. BYRD: Thank you very much, Your Honor.  
12 May it please the Court. I'll try to stay as organized  
13 as I can running through my response to all these  
14 things. I also have about six years of thoughts on this  
15 matter, all trying to get a little time in the spotlight  
16 today, so I appreciate the Court's indulgence as I go  
17 through it.

18 I will, of course, start with the statute  
19 of limitations issue, and their basing the motion for  
20 a dismissal on the statute of limitations, Your Honor.  
21 Your Honor, there are a large number of cases, which  
22 I have read, I'm sure Your Honor is very familiar  
23 with, all essentially culminating in Mose. It's right  
24 on point with this issue.

25 In this particular case, Your Honor,

1 Mr. Palmer submitted his PCR application through the  
2 jail -- prison authority, who then submitted it through  
3 mail to the clerk of court here. All right. The clerk  
4 of court saw an error in the form that was submitted,  
5 sent it back by mail, okay? By the time it gets back to  
6 Mr. Palmer, and he can get it back to them, we're past  
7 the statute of limitations, okay? It is, in my mind,  
8 right in line with Mose, particularly in that ---

9 THE COURT: If ---

10 MR. BYRD: Yes, Your Honor.

11 THE COURT: If I understand you correctly,  
12 there was a prior post-conviction relief, went through  
13 to its conclusion, and it was appealed, and then  
14 a habeas corpus. What about -- what is the exception  
15 that allows you to bring another post-conviction relief  
16 action? Typically, it's just one bite at the apple.

17 MR. BYRD: Absolutely, Your Honor. While  
18 we understand the concerns about successive PCR  
19 applications and motions, what I would say in response  
20 in this particular case, given that it's  
21 after-discovered evidence, newly-discovered evidence,  
22 it was, frankly, not available at the time of his  
23 initial PCR.

24 THE COURT: She maintains that it was  
25 available because they were together.

1           MR. BYRD: My understanding, she maintains  
2 it was available as to, particularly, John Bradley,  
3 all right. And if you would like, just to focus on just  
4 that one individual for just for a moment. This was to  
5 give Your Honor some idea of the situation, one of those  
6 large chaotic events where there are a ton of people  
7 in the area. I don't know exact numbers, dozens, okay?

8           So you had, at the time, a group of  
9 individuals who were with Mr. Palmer. But when I say  
10 a group of individuals, I don't mean two or three  
11 buddies, something like that. I mean, there are dozens  
12 of individuals with him, dozens of individuals in the  
13 other sort of fashion that were there at the time with  
14 Marlo Perry, okay? So it is extraordinarily possible.

15           And in this case also, the factual  
16 situation, that he didn't know everybody that was right  
17 there with him, even if they are friends. He could  
18 have had people -- there were people in the back  
19 of the crowd, in the front of the crowd. It was kind  
20 of a chaotic situation, Your Honor. Now, Mr. Bradley  
21 came forward later to clarify, yes, I was there,  
22 and this is what I saw, okay? And that's just with  
23 Mr. Bradley.

24           With Keith Johnson, Keith Johnson,  
25 of course, came later. No knowledge of Keith Johnson.

1 Carl Judge, of course, we knew about Carl Judge because  
2 he testified at trial, okay? Now in terms of the  
3 successive, or the concern about a successive PCR,  
4 again even if we want to argue John Bradley, that's  
5 fine. The rest of them, we do not know, and certainly  
6 Herbert had no idea that Carl Judge was going to recant  
7 his statement and come forward later, much, much later,  
8 after his PCR -- initial PCR to say I lied. I lied  
9 on the stand; I lied under oath. He had no knowledge  
10 of that, no way of knowing that.

11 Essentially, the exact same scenario  
12 with Tara Spann, who came forward on her own, just  
13 like Carl Judge, to say -- with Tara Spann, I've spoken  
14 to her myself, my conscience is weighing on me, I felt  
15 horrible about what I did, I've reached out to his  
16 family. She was not -- that information was certainly  
17 not available to Mr. Palmer at the filing of his initial  
18 PCR, Your Honor. And did Your Honor have any followup  
19 questions about ---

20 THE COURT: You can proceed.

21 MR. BYRD: Thank you, Your Honor.

22 As I've stated, he submitted the form, the PCR  
23 application, returned as filed improperly, submitted  
24 it again, it was too late. That's exactly what's  
25 contemplated in Mose. He did not have the same

1 availability -- excuse me, availability to the resources  
2 of the clerk's office than, say, I would have.

3           Right now, if I -- when I leave here,  
4 I should have a motion to file with the clerk of court  
5 downstairs. I will file it with them. If I file  
6 it incorrectly, they will tell me. I can take it back  
7 to my office and bring it right back here. I'll be back  
8 in an hour, okay? He does not have that opportunity  
9 as an incarcerated individual, and that's exactly what  
10 we're trying to protect, Your Honor.

11           Now in -- Your Honor, there are other --  
12 another issue I would like to bring up, which  
13 I presented in my response initially, is that  
14 he was pro se at the time. The courts have determined,  
15 as Your Honor is aware, to give a good deal  
16 of difference to individuals, like Mr. Palmer,  
17 who are trying to make it through these matters,  
18 trying to navigate these waters, without the advice  
19 and assistance of learned counsel.

20           I can tell you I've dealt with Herbert  
21 here for six years. We've talked about this case  
22 more times than I can count, and he's been helpful.  
23 But we also have a scenario where he will present  
24 suggestions to me, present a case law to me, and I would  
25 say, I'm sorry, Herbert, that's not good law anymore,

1 or that procedure will not work. Why is that?  
2 Because he's not experienced in these matters.  
3 He's not an attorney; he's not learned counsel.  
4 Courts have considered that, Federal Rule of Civil  
5 Procedure has considered that. We give difference  
6 to individuals when they do not have the same abilities  
7 that people represented by learned counsel have.

8 And again, Your Honor, there are a number  
9 of cases that I could cite, Odom v. State -- summary  
10 judgment when -- in that type of scenario where  
11 Defendant, or in this particular case, where Petitioner  
12 did not have the benefit of advice of counsel.

13 I would also point out, Your Honor,  
14 Leamans v. State, which actually brings me to the next,  
15 would actually be the more recent response filed by the  
16 State that a PCR cannot be summarily dismissed if there  
17 are issues of fact to be developed in an evidentiary  
18 hearing. There's certainly issues of fact here,  
19 Your Honor. We're talking about ---

20 THE COURT: Attorney General, you know,  
21 a lot of people think that the statute of limitations  
22 is a question of law. But the statute of limitations  
23 is the question of fact, isn't it?

24 MS. DIXON: Your Honor, I would assert  
25 that the statute of limitations is a legal matter

1 based on the timing of the filing and everything,  
2 the development of equitable tolling as a basis  
3 to set aside would be a question of fact for the judge.  
4 But I do believe that, you know, it's a defense that's  
5 available at the time it shows it's available.

6 And I will just note for the record  
7 that in 2017, when he filed this PCR, I mean, even  
8 if you go back to when he got these affidavits in 2015,  
9 we're already 15 years past trial. I mean, the statute  
10 of limitations, we've already had a PCR hearing at that  
11 point in 2002, you know. It's just -- to me, it strains  
12 credibility to think you can come back 15 ---

13 THE COURT: What is law -- and you know  
14 better than the anyone. What is the law with regard  
15 to after-discovered evidence and the conclusion of that?

16 MS. DIXON: Yes, Your Honor. So for  
17 after-discovered evidence, and we typically look to  
18 Hayden, *Hayden v. State* for that, which is 278 S.C. 610;  
19 that's a 1983 case. "A party requesting a new trial  
20 based on after-discovered evidence must show that the  
21 evidence, number one, is such as would probably change  
22 the result if a new trial was had," number two, "Has  
23 been discovered since the trial," number 3, "Could not  
24 by the exercise of due diligence have been discovered  
25 before the trial," number four, "Is material to the

1 issue of guilt or innocence," and number five, "Is not  
2 merely cumulating or impeaching."

3           So as to those factors, we would -- I would  
4 contend, Your Honor, first of all, all of these witness  
5 affidavits could have been discovered by the experience  
6 of due diligence at the time of trial. It's incredulous  
7 to me to think that you couldn't discover them in 2002,  
8 but you can suddenly discover them in 2022.

9           I mean, obviously, the longer people sit,  
10 the less they remember. So it doesn't make sense  
11 to me that you would have a better memory 20 years  
12 later, if you might have been there than you did back  
13 in 2002, or even actually, I think the trial was in 1999  
14 -- sorry, Your Honor. Yep, 1999. So, I mean, this  
15 is how old this case is.

16           THE COURT: But the law is generally against  
17 the Applicant when it comes to recanted testimony.

18           MS. DIXON: Absolutely. And, Your Honor,  
19 I do have a cite for that, if you would give me just  
20 one moment. That would be State v. Harris, 391 S.C.  
21 539, "Recantation of testimony ordinarily is unreliable  
22 and should be subjected to the closest scrutiny when  
23 offered as a ground for a new trial." And then also  
24 State v. Caskey, 273 S.C. 325, "Finding after-discovered  
25 evidence of conversation between the solicitor and

1 a witness, where the witness was promised immunity  
2 or leniency, was at most merely impeaching and not  
3 material to guilt or innocence."

4 And I would just note that one of the Hayden  
5 factors does provide that the evidence cannot be merely  
6 cumulative or impeaching. And so recantation  
7 of testimony is always just merely impeaching.

8 THE COURT: Anything further?

9 MS. DIXON: I do, Your Honor. Let me see  
10 my notes. I do want to note for the record, because  
11 I made this kind of brief argument as to why I didn't  
12 think the affidavit of John Bradley was material,  
13 and I want to read it into the record. "I'm a resident  
14 of North Charleston, South Carolina. I was present  
15 at the scene when Marlo Perry was shot. I was there  
16 with Herbert Palmer, Marcus Palmer, and an individual  
17 named Nate. I was 16 years old. Prior to the shooting,  
18 we were approached by a group of approximately nine  
19 to ten people that included Marlo and his brother Twan  
20 [ph.]. An argument ensued. Herbert stood in front  
21 of me facing Marlo. When the shots were fired, Herbert  
22 and I ran in the same direction, away from the scene.  
23 We then separated from there. I know Herbert did not  
24 shoot Marlo, because Herbert was standing in front  
25 of me when I heard the shots, and I did not see Herbert

1 with a firearm. I had not spoken to police about  
2 the shooting and was never approached by a police  
3 officer to give an interview."

4 And, Your Honor, I would -- I mean, this  
5 person says "when the shots were fired." He's saying  
6 that he ran away from the scene. He never indicates  
7 that he saw who fired the shot. I'm not sure how that  
8 could be material to guilt or innocence when there were  
9 -- you know, not counting the two recanting witnesses,  
10 six other witnesses have identified Mr. Palmer as the  
11 shooter at his trial. So, I would just submit that this  
12 not material to guilt or innocence.

13 THE COURT: Anything further?

14 MS. DIXON: Oh, as to the argument -- there  
15 was an argument that he made about pro se individuals  
16 getting leniency. I would just note for the record  
17 he cited to federal cases. Our state courts do not give  
18 that same leniency to pro se people. There are state  
19 court cases, and I don't have a cite off the top  
20 of my head, but they basically hold pro se litigants  
21 to the same standards as they would a lawyer.

22 THE COURT: Anything further from the State?

23 MS. DIXON: Nothing further, Your Honor.

24 THE COURT: If nothing further, I'll give  
25 the defense the last word on behalf of the Applicant.

1 MR. BYRD: Thank you very much, Your Honor.  
2 Based on everything that Ms. Dixon just stated, I might  
3 have some concerns if John Bradley was our only witness  
4 in this case. We, again, have three others. Tara  
5 Spann, I might add, Your Honor, particularly given the  
6 issue of statute of limitations, when she came forward,  
7 as you heard, this is another PCR application that,  
8 unfortunately, Mr. Palmer was forced to file because  
9 she came later, and that was filed in a timely fashion.  
10 There's been no argument against that, Your Honor.

11 So even if Your Honor were incline to grant  
12 the State's motion based on the statute of limitations  
13 issue regarding the original three witnesses, Ms. Spann  
14 is not an issue. She was filed in a timely fashion.  
15 Her -- the PCR based on her recanted statements were  
16 filed in a timely fashion, Your Honor. Regarding  
17 the ---

18 THE COURT: That's not what's before me here  
19 today, is it?

20 MR. BYRD: It is.

21 MS. DIXON: Yes, Your Honor. And just  
22 to note for the record, that argument is in our amended  
23 return. We move to dismiss hers based on the statute  
24 of limitations as well and argue that it is not --  
25 does not meet the threshold of after-discovered evidence

1 that could circumvent the statute.

2 MR. BYRD: But again, I may not completely  
3 understand the argument, Your Honor. But Ms. Spann,  
4 that PCR was filed within a year of learning  
5 of her new testimony, Your Honor. That's the point  
6 that I'm making.

7 Regarding Mr. Judge, and quite frankly,  
8 the arguments made by the State, we do not contend  
9 that these are merely -- that the testimony provided  
10 would be impeaching, Your Honor. These are individuals  
11 who have come forward and stated that they lied under  
12 oath.

13 Mr. Palmer, as Your Honor is aware,  
14 has a right given to him by the Sixth Amendment  
15 of the Constitution to confront the witnesses against  
16 him at trial. He has to be able to do that on level  
17 plane, Judge. He cannot do that if, as stated by Carl  
18 Judge, there is a backroom deal about which the jury  
19 is not aware, okay -- is not aware of. Your Honor,  
20 that's contemplated in State v. Dean.

21 THE COURT: What was the deal?

22 MR. BYRD: I'm sorry?

23 THE COURT: What was the deal?

24 MR. BYRD: The deal itself, the details of  
25 it, Your Honor, were he got -- Your Honor, I apologize.

1 He got a reduced sentence on other charges that he  
2 was facing at that time. It was made -- it was stated  
3 during trial that he did not have a deal in place.  
4 He states that he was, in fact, in communication with  
5 the prosecutor, with the solicitor's office, who had  
6 told him there would be a deal in place if he testified  
7 against Mr. Palmer.

8 With regard to Ms. Spann, it's a very  
9 similar situation. Ms. Spann had stated that she felt  
10 direct pressure from law enforcement to testify the way  
11 that she testified. And again, he cannot be able  
12 to exercise his rights under the Sixth Amendment  
13 Constitution to confront these witnesses if he does  
14 not know about these deals, these pressures, all these  
15 things that these witnesses would allege.

16 We're not talking, Your Honor, about after  
17 newly-discovered evidence of one of these witnesses  
18 having conviction of a crime of moral turpitude that  
19 would impeach them. We're talking about the fact that  
20 they came forward, and said that they lied under oath.  
21 And as a result, this man was convicted of murder.

22 We talked about there being six other  
23 witnesses. There are six other witnesses, but we're not  
24 talking about people who said I saw a gun in his hand,  
25 and I saw him shoot. That is not what we're talking

1 about. There are other witnesses that, if I recall  
2 correctly, stated to the effect, we believe it was him.  
3 That's it, because they -- those were their impressions  
4 at the time. Ms. Spann and Mr. Judge were key witnesses  
5 for the State in that trial, Your Honor. Their  
6 recantation is of paramount importance.

7           Your Honor, I have distinguished attorneys,  
8 most of my colleagues in the area, who specialize  
9 in post-conviction relief actions. I've had a handful  
10 of them over the years. I've learned a lot about  
11 them over the years. One thing that has struck  
12 me over and over as I read them, as I read the case law,  
13 as I learned about them, I see one word over and over,  
14 and it's equity, equitable. I see that constantly.  
15 I think about that a lot, particularly in Herbert's  
16 situation.

17           When someone, like Herbert, is in trial,  
18 and two witnesses testify against him, lie under oath,  
19 he is denied his rights under the Constitution to  
20 confront those witnesses. But what refuge does he have  
21 at that point? They have lied; they have moved on with  
22 their lives. He has gone to prison, the trial is over.  
23 This is his refuge, Your Honor.

24           This moment, where we are asking the Court  
25 simply to give us an evidentiary hearing on this matter,

1 to give him the opportunity to call those witnesses,  
2 to have them sit on the stand and explain themselves.  
3 And the State can certainly cross-examine them all day  
4 long, that's fine. But their testimony is absolutely  
5 material. It's not impeaching; it's paramount to an  
6 equitable resolution in this case.

7           Regarding -- bear one moment, Your Honor.  
8 Court's indulgence. As far as -- and I just touched on  
9 this lightly, Judge. The idea that Mr. Palmer did not  
10 exercise due diligence in tracking down these witnesses  
11 initially. He had, at that time, the assistance  
12 of counsel. There were, as I stated, a large number  
13 of people on that scene. I don't believe that due  
14 diligence requires his counsel to somehow discover  
15 each and every name of each and every person there.

16           Not only would that be difficult in normal  
17 circumstances. Quite a few of these people don't go  
18 by names that everyone regularly recognizes. It's not  
19 John Smith over there; it's a guy named "T" or whatever.  
20 And that's all anybody knows him as. But now he's  
21 disappeared, and now he's hard to find.

22           I am concerned they're requiring  
23 for a fishing expedition by a defense attorney,  
24 it's tantamount, in my opinion, Your Honor, to shifting  
25 the burden of proof. He is to address the charges

1 brought to him by the State, address the issue --  
2 the evidence submitted by the State, respond to that.  
3 He did so. Unfortunately, the evidence was, frankly,  
4 tainted by backroom deals and by pressure from law  
5 enforcement. That's, unfortunately, where he's at.

6 Beg the Court's indulgence one moment,  
7 please, Your Honor. Your Honor, again, I would just  
8 reemphasize the two cases, South Carolina Supreme  
9 Court cases, that I believe are so emphatically  
10 in Mr. Palmer's favor today, Mose, as I've said quite  
11 a few times, and State v. Dean.

12 State v. Dean contemplates the exact  
13 scenario in which a deal was made by a State's witness,  
14 and the Defendant at that time, Petitioner now, did not  
15 have knowledge of that, the jury did not have knowledge  
16 of that. There would be no way to determinate that  
17 until after the fact, which is why we have the avenue  
18 available to us of newly-discovered evidence,  
19 after-discovered evidence, in a post-conviction relief  
20 action.

21 This, as I mentioned, Your Honor,  
22 is Mr. Palmer's last refuge. We are simply asking  
23 for a hearing, just a hearing, an evidentiary hearing  
24 to bring these witnesses forward and have them present  
25 their testimony to the Court. Thank you, Judge.

1 THE COURT: Yes, ma'am.

2 MS. DIXON: Yes, Your Honor. I would  
3 just note at this point there hasn't been any evidence  
4 put up about him -- I know Mr. Byrd made an argument,  
5 but attorney argument is not evidence. There's been  
6 no evidence submitted that I've seen that he actually  
7 tried to file this application, and the clerk returned  
8 it.

9 THE COURT: Well, therein lies the problem  
10 about whether or not we have a hearing about this issue.

11 MS. DIXON: He can testify, and Your Honor  
12 can make a credibility finding. But as of now, there's  
13 not been any kind of evidence as to him actually  
14 filing that -- trying to file that application in 2015  
15 to assert equitable tolling. But even so, I mean,  
16 we're still 15 years past the deadline or, you know,  
17 at least ten years past the deadline.

18 But I do want to note for the record  
19 the eight eyewitnesses that I told you, that there  
20 were at least eight eyewitness who identified him  
21 as the shooter, did all identify him as the shooter,  
22 and I would be happy to give you -- you have the  
23 appendix which has the trial transcript.

24 I will say that, unfortunately, a lot  
25 of -- I think I gave you a redacted transcript,

1 but I'll be happy to send you the witness names.  
2 But there's a witness starting on Page 84 of the trial  
3 transcript named Jasper who identified the Defendant  
4 as the shooter. Carl Judge begins on Page 151 of the  
5 transcript. He identified the Defendant as the shooter.  
6 Tara Spann begins on Page 50 -- well, there's multiple  
7 transcripts in the appendix, so she begins on Page 51  
8 of the second day, identifies him as the shooter.

9           There's someone who calls herself the  
10 victim's girlfriend that identifies him as the shooter.  
11 There's the victim's brother, Antoine [ph.], identifies  
12 him as the shooter. There's another female on Page 192  
13 that identifies him as the shooter. Another victim's  
14 brother on Page 245 identifies him as the shooter, and  
15 then there's another girl who has a child by the victim  
16 on Page 4 of the third transcript who identifies him  
17 as the shooter. So, I don't think it's accurate to say  
18 that Spann and Judge's testimonies were so critical  
19 when you had six other people also there who identified  
20 him as the shooter.

21           But all of this goes back to the statute  
22 of limitations and how old this is. And, you know,  
23 these are things that could have been discovered back  
24 in 1999 when this trial took place. And I believe  
25 if we allow it today, 20 years later, I don't know

1 where there's ever any end to this.

2 THE COURT: Yes, sir.

3 MR. BYRD: Very briefly, Your Honor.

4 I encourage everything that the State just suggested.  
5 I would -- we have no problem if Your Honor would like  
6 to question Mr. Palmer to determine credibility.

7 THE COURT: It's your case. If you would  
8 like to call him to the stand, you could.

9 MR. BYRD: All right. Thank you, Judge.  
10 And regarding the transcript, we certainly encourage  
11 reading the witnesses's statements, and I think it will  
12 be very enlightening, Your Honor.

13 THE COURT: All right. You may call your  
14 witness, if you choose to do so.

15 MR. BYRD: I'm happy to do so. I don't know  
16 if it's more appropriate for me to call him or for her.  
17 I'm happy to do whichever Your Honor feels is more  
18 appropriate.

19 THE COURT: Just call him to the stand,  
20 and I want you to ask him questions.

21 MR. BYRD: Thank you, Your Honor. At this  
22 time, we call Herbert Palmer to the stand.

23 THE COURT: Mr. Palmer, if you could,  
24 please come forward, place your left hand on the Bible,  
25 and raise your right hand as the clerk administers

1 the oath.

2 MR. HERBERT PALMER was called as a witness,  
3 being duly sworn, was examined and testified as follows:

4 THE CLERK: Please be seated. Please state  
5 your full name, spelling your last name for the record.

6 THE WITNESS: Just spell it?

7 THE CLERK: Yeah.

8 THE WITNESS: Herbert Palmer, Jr.,  
9 H-E-R-B-E-R-T, P-A-L-M-E-R.

10 MR. BYRD: Thank you very much, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. BYRD:

13 Q. Herbert, you filed a post-conviction relief  
14 application with the clerk of this court; is that  
15 correct?

16 A. Yes, sir.

17 Q. And do you remember when you filed the  
18 application that was based on the testimony -- excuse  
19 me, on the affidavits of Carl Judge, Brian Johnson,  
20 and John Bradley?

21 A. I don't remember the exact date, but it's post  
22 stamped on the paperwork from when I turned it into  
23 the mailroom. They stamped it when you turn it in,  
24 the date that you give it to them.

25 Q. Do you remember filing it?

1 A. Yes, I do.

2 Q. Do you remember -- and if you need a copy  
3 of it, I'll give it to you to refresh your recollection,  
4 but do you feel comfortable moving forward without it?

5 A. I feel comfortable.

6 Q. Okay. When you initially filed that, how did  
7 you do it?

8 A. Myself.

9 Q. I understand. Did you hand it in to the clerk  
10 yourself?

11 A. Nah, I gave it to the mailroom.

12 Q. To the mailroom where?

13 A. At the prison, Lieber.

14 Q. Okay. Which prison?

15 A. Lieber.

16 Q. Okay. And then what happened with it, do you  
17 know?

18 A. Months later, it came back to me in a different  
19 envelope from the envelope that I mailed it out in.  
20 And it had a letter in there saying that it went to  
21 the wrong address.

22 Q. You said months later; is that right?

23 A. Yeah, it was months later, like, maybe three  
24 months later. So when I got it, I was confused because  
25 it's in a different envelope, and they're saying

1 it was the wrong address. So, I got another envelope,  
2 sent it back out again, gave it back to the mailroom,  
3 and this time it went through. And then I got a letter  
4 back saying that I didn't submit it in a timely fashion,  
5 because time had passed. The time I gave it to them,  
6 it was in a timely fashion, but the three months that  
7 it took to get back to me and the time to send it back  
8 out, it passed the time.

9 Q. So the statute -- are you saying the statute  
10 of limitations had run by the time you were able to send  
11 it back?

12 A. Resend it, yes.

13 Q. Okay. Thank you.

14 MR. BYRD: No further questions.

15 THE COURT: Yes, ma'am.

16 CROSS-EXAMINATION

17 BY MS. DIXON:

18 Q. All right, I just want to make sure I'm  
19 understanding your testimony. So your testimony today  
20 is that you delivered an application for post-conviction  
21 relief to the mailroom at Lieber, correct?

22 A. Yes, ma'am.

23 Q. And you sent it off, this application for PCR,  
24 you sent it to the mailroom, and three months later,  
25 you got an envelope saying you had sent it to the wrong

1 address?

2 A. Well, it said went to the wrong address.

3 Q. Went to the wrong address. Okay.

4 MS. DIXON: May I approach?

5 THE COURT: Yes.

6 BY MS. DIXON:

7 Q. All right. I am handing you a document,  
8 and I want you to tell me if it looks familiar.  
9 And, Your Honor, for the record, this is the 2017  
10 PCR application.

11 A. You said if it looks familiar?

12 Q. Um-hum. Does that look like a document you've  
13 seen before? All right, let me do this. Turning to --  
14 do you recognize this?

15 A. I recognize the paper.

16 Q. Okay, okay. All right.

17 MS. DIXON: Your Honor, I want to note  
18 for the record that he didn't sign this, his attorney  
19 did, but it was verified June 27, 2017, so two years  
20 after the 2015 affidavit. This is when the PCR  
21 application was verified.

22 THE COURT: Okay. Any redirect?

23 MR. BYRD: Please, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. BYRD:

1 Q. Addressing that specific point of the time delay,  
2 if I understand the points being made, you had two  
3 affidavits from witnesses in -- excuse me, one in 2014,  
4 correct, Carl Judge; is that correct?

5 A. Yes.

6 Q. And then 2015, the other two, correct?

7 A. Correct.

8 Q. All right. And you realized -- tell me  
9 if I'm wrong here. Did you, at that time, realize when  
10 you got the response from the court that the statute  
11 of limitations had passed, and that you had filed  
12 incorrectly; is that true?

13 A. No, the statute of limitations hadn't passed  
14 yet when I got the mail back. It passed -- by the time  
15 all that took place, that's when it passed. When  
16 I initially gave them my paperwork, the time -- the  
17 statute of limitations had not gone by yet.

18 Q. And once you realized that the statute of  
19 limitations had run, what did you decide to do at that  
20 time?

21 A. Well, I didn't realize the statute of limitations  
22 had passed until they sent me a letter back telling  
23 me that. At that time, I got an attorney. I was able  
24 to get an attorney at that time and turn everything over  
25 to my attorney, which my attorney, I think, went back

1 and amended my application, and then we moved forward.

2 Q. Why did you get an attorney?

3 A. I needed one. I needed one because I didn't  
4 go to law school. I was just trying to do the best  
5 I could on my own. In prison, they have a law library.  
6 We pretty much have to do everything on our own.

7 Q. One last question for you, Herbert. When  
8 you submit mail to the prison mailroom, at that point,  
9 are you in control of where it goes?

10 A. No, we just give it to the -- give it to the mail  
11 lady.

12 Q. Are you in control of how it gets where it's  
13 going?

14 A. No, sir.

15 Q. Are you in control of when it gets where it's  
16 going?

17 A. No, sir.

18 Q. Thank you.

19 MR. BYRD: Nothing further, Your Honor.

20 THE COURT: All right. You may step down.  
21 I'm going to ask -- anything further from anybody?

22 MS. DIXON: Your Honor, I don't think this  
23 fits the facts of Mose. I mean, Mose is a situation  
24 where they attempt to mail it, and it does get sent  
25 back. But, I mean, in those cases where I've had it,

1 you know, you could look at the verification date,  
2 and it's typically within the statute of limitations'  
3 timeframe. This one just is not.

4 THE COURT: All right. I'm going to ask  
5 both of y'all to prepare a detailed proposed order.  
6 I want to review all the affidavits, the transcript,  
7 and I look forward to receiving those. How long do  
8 you anticipate it will take y'all to get those together?

9 MR. BYRD: And I assume these are in the  
10 nature of duelling orders, Your Honor?

11 THE COURT: Yes.

12 MR. BYRD: Yes. I would -- I would guess  
13 I could probably have that to you, probably not by  
14 tomorrow, Judge, I would think, but probably ---

15 THE COURT: Certainly not.

16 MR. BYRD: Yeah. Next week, I believe,  
17 would be ---

18 THE COURT: Fourteen days. This emergency  
19 has brewing, for what, 20 years?

20 MR. BYRD: We've been -- I think we've  
21 waited five to get a hearing, yes, sir.

22 THE COURT: All right. So, I don't think  
23 two weeks is unreasonable, and I want you to spend some  
24 time on it.

25 MS. DIXON: May I have -- I have a term

1 of court starting the week after next.

2 THE COURT: Certainly. How much time do  
3 you need?

4 MS. DIXON: Let me go get my calendar.  
5 The week of the 11th, I think I could get it by that  
6 Friday. I may be able to get it done tomorrow. But if  
7 I don't, next week is going to be probably preoccupied  
8 preparing for my term.

9 THE COURT: So how many weeks do you need?

10 MS. DIXON: I guess that would be three.  
11 Let me look at the calendar.

12 THE COURT: I'll say within the next 30  
13 days. Let's get it done within the next 30 days.

14 MS. DIXON: I'll try to knock it out  
15 tomorrow. If I don't, I'll have to shift gears.

16 THE COURT: I think it's more important for  
17 -- you give it some thought, a very thorough proposed  
18 order would be better. Very good. And we will stand  
19 at ease with regard to that, Madam Attorney General.

20 (End of Transcript of Record.)

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CERTIFICATE OF REPORTER

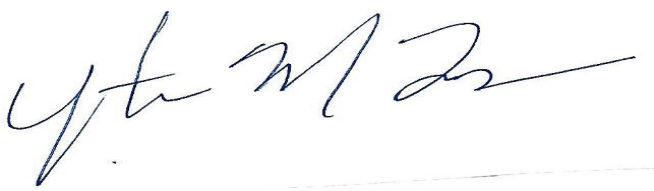
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I, the undersigned, Yvestre Torres, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 24th of August, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 26, 2023



Yvestre Torres  
Circuit Court Reporter