MALCOLM L. GREEN-241530
LEE. C.F. SMU-NORTH-97
990 WISACKY HWY.
BISHOPVILLE, S.C. 29010

DECEMBER 17, 2013

THE HONORABLE DANIEL E. SPEARMOUSE
CLERK, SUPREME COURT OF SOUTH CAROLINA
POST OFFICE BOX 11330
COLUMBIA, S.C. 29211

RECEIVED
DEC 23 2013
S.C. Supreme Court

RE: My Notice of Appeal

DEAR MR. SPEARMOUSE, SIR, I AM CONFINED AT LEE C.F. SMU WHERE IT IS VIRTUALLY IMPOSSIBLE TO GET COPIES OF ANY MOTIONS BACK IN A TIMELY FASHION SO I KINDLY ASK THAT YOU PLEASE FORWARD A COPY OF THE RULE 243 EXPLANATION TO OPPOSING COUNSEL AND A CLOCKED-STAMPED COPY BACK TO ME.

ALL THE DOCUMENTS ARE ORIGINAL AND ONLY COPIES I HAVE SO I ASK THAT YOU FILE THEM THEN FORWARD COPIES BACK TO ME. I'VE ALSO INCLUDED WHAT I FILED WITH THE BANNERG COUNTY CLERK SO THAT THIS

Court can be fully abreast of the type of difficulties we are having here at Lee.C.F. regarding access to legal-materials & law-computer.

I suffer from ADHD & Dysthymia so I ask that this Honorable Court take that into consideration regarding any mistakes I've made with this filing. I look forward to hearing from "U" soon. Thanks!

Sincerely,

Malcolm Green

The State of South Carolina
In The Supreme Court

Appeal from Bamberg County
Court of Common Pleas

Doyet A. Early, III, 2nd Circuit Chief Administrative Judge

CASE No. 2013-CP-05-0034

Malcolm L. Green #241530 Appellant

v.

State of South Carolina Respondent

Proof of Service

I certify that I have served a Notice of Appeal Daniel Gourley-AAG by depositing a copy of it in the United States Mail, postage prepaid, on December 17, 2013, Addressed to the Attorney General's Office PCR division; P.O. Box 11549, Columbia S.C. 29211, Attn: Daniel Gourley.

December 17, 2013

s/ Malcolm Green - #241530
Lee. C. I. Sign-North-97
990 Wisacky Hwy.
Bishopville, S.C. 29010

DECEMBER 17, 2013

THE HONORABLE DANIEL E. SHEARHOUSE
CLERK, SUPREME COURT SOUTH CAROLINA
POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

RE: STATE of SOUTH CAROLINA, RESPONDENT. V.
MALCOLM L. GREEN, PETITIONER/APPELLANT,
CASE NO. 2013-CP-05-0034

DEAR MR. SHEARHOUSE,

ENCLOSED for filing is NOTICE of APPEAL in ABOVE CASE
ALSO ARE the following
(1) PETITIONER'S EXPLANATION in ACCORDANCE with RULE
243 SCACR
(2) CIRCUIT COURT EVALUATION ORDER.
(3) A LETTER from APPELLATE COUNSEL.
(4) A LETTER from PCR COUNSEL.
(5) A COPY of FINAL ORDER.

SINCERELY,
MALCOLM GREEN
LEE C.I. SAND-NORTH-97
990 WISACKY HWY.
BISHOPVILLE, S.C. 29010

The State of South Carolina
In The Supreme Court

Malcolm L. Green #241530,
Petitioner,

v.

State of South Carolina,
Respondent.

Case No. 2013-CP-05-0034

Complying with Rule 243 SCACR
Petitioner's Required Explanation

This motion comes before this Honorable Court in accordance with Rule 243 of the SCACR to show sufficient reason's why lower court's determination in Final Order was improper.

Petitioner's Explanation

The lower court's determination in Final Order was improper because it failed to make appropriate and specific findings regarding Petitioner's competency issue and contains erroneous findings of fact and conclusions of law that do not comport with precedent cases established by this South Carolina Supreme Court.

The Petitioner was initially ordered by Circuit Court prior to trial to be evaluated for Criminal Responsibility & Competency to Stand Trial. For some unexplained reason the State never executed the judge's order and found me competent to stand trial at Blair hearing. No witnesses testified at Blair hearing and trial court relied on old juvenile evaluation reports that weren't consistent with the type of order was issued by the Circuit Court. "State Court competency evaluation/determinations are entitled to a presumption of correctness." Brewer v. Lewis, 989 F.2d 1071, 1074.

As a result of this clear constitutional 6th & 14th Amendment violation I was deprived of the process due and never had my competency properly determined. Petitioner has consistently maintained that his competency is in question and can only be determined contemporaneously by the Court through a Ferguson hearing. This Honorable Court has held in Ferguson v. State, 387 S.C. 615, 677 S.E.2d 608 "Case law warrants a holding that, in circumstances in which an Applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled."

Petitioner's direct Appeal Attorney ill-advised me in a letter explaining that I could file a PCR or Federal Habeas Corpus within one year, but failed to explain

which one to file first. Petitioner being a layman to the law as well as a mental health patient timely filed a Federal Habeas Corpus in February of 2000. It was dismissed in July of 2000 without prejudice instructing me to first exaust my State remedies. In November of 2000 I filed my initial Post Conviction Relief Application on the issues of ineffective assistance of counsel & involuntary plea. PCR court then appointed counsel who raised no additional issues and did not provide effective assistance. Counsel visited Petitioner at the Gillian Psychiatric Hospital and knew that I suffered from mental illness and still failed to raise the issue at Show Cause hearing.

Counsel's ineffectiveness at Show Cause hearing severly prejudiced Petitioner and being that there is no judicial estopple at such hearing's Petitioner was unable to assist counsel on his ineffective assistance of trial counsel claim due to his incompetency. Post Conviction Relief Petitioner cannot delay his collateral review of his trial proceedings due to his incompetency; however, if at a future date, the Petitioner regains his competency and discovers that at his original post conviction relief hearing, his incompetence prevented his ability to assist his counsel on a fact based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding." Council v. Cator (cite omitted).

The very same conclusion was reached again by this Honorable Court in Ferguson, supra, in holding that "if Ferguson was prevented from filing for PCR by reason of his mental incompetency, then he has not, and will not, receive his one full bite at the apple. Accordingly, we find the proper remedy is to remand to PCR court for a hearing as to whether Ferguson's mental incapacity prevented such an application in the one year following his 1996 guilty plea" (emphasis added).

In Petitioner's case it was both the incompetency and the ineffectiveness of trial/plea, direct appeal, & PCR counsel's that deprived Petitioner of having his competency determined at a evidentiary hearing. Petitioner has an extensive mental health history that has been documented by many Psychologist, Psychiatrist, & mental health experts independent of the State of South Carolina. None of these expert's were allowed to testify to their findings at the Blair hearing which violated the confrontation clause. It was just as if no Blair hearing took place at all and the standard for determining competency are the same for both trial and plea. (See: Peten v. State, 417 S.E.2d 594, 308, S.C. 230).

The trial court was in error for not making the State act on circuit court judge's standing order for a competency evaluation which would have been current

enabling witnesses to testify as to my mental status at the time of the crime and also at trial.[1] A violation of the trial court's obligation to hold a competency hearing under Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 can only be cured by a post conviction hearing in which the state bears the burden of proving the defendant was competent to stand trial.[2]

The lower court determination was improper because Applicant's hands were essentially tied being the PCR court appointed counsel to represent me. (See: Foster v. State, 379 S.E.2d 907). It is the lower court's position that the issue of my competency should have been raised then in 2000 when it was first filed, but the rationale is flawed for two reasons. The first is the fact that had I been competent and filed any motions with the Court it would not be accepted. The second is that Ferguson, supra, wasn't decided until 2009 and set a precedent as being a type of hearing the mentally incompetent can request through the uniform Post Conviction Procedure Act. Then question becomes how does Petitioner's ineffective court-appointed attorney deprive him of a Ferguson hearing that he is clearly entitled to as a matter of right.

It is crystal-clear why the state does not want me to receive such a hearing regarding my incompetency and that is because the circuit court judge

who signed the court ordered evaluation is none other than Supreme Court Justice Pleicones. "Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: If the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to immediate release." Fay v. Noia, 372 U.S., at 401-402, 83 S. Ct., at 829." The traditional scope of collateral relief requires, again, that prisoners be afforded the broadest possible opportunity to present claims that their detention is the result of an unconstitutional procedure." Davis v. U.S., 93 S. Ct 1577.

"When the State court fails in its duty to conduct a contemporaneous hearing, it often may be impossible to repair the damage retrospectively" Evans v. Raines, 800 F.2d 884, 888. "Due process prohibits conviction of person who is mentally incompetent; that right cannot be waived by guilty-plea." Teter, supra. Petitioner's right to a fair trial & plea were violated and all other Appeals were prejudiced by the plain-error of the initial violation.

Petitioner respectfully request that he be granted a Writ of Certiorari for the above stated reasons.

Sincerely, Malcolm Green

THE STATE OF SOUTH CAROLINA)		
	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF BAMBERG.	)	
THE STATE OF SOUTH CAROLINA)		ORDER FOR COMPETENCY
	)	AND PSYCHOLOGICAL
	)	EVALUATION (AND
VS.	)	CRIMINAL
	)	RESPONSIBILITY)
	)	
MALCOLM L. GREENE,	)	WARRANT NUMBER:
DEFENDANT.	)	96-JU-05-135 & 136

1997 JAN 31 AM 9:27

BAMBERG COUNTY CLERK OF COURT

This matter comes before me on Motion of Joshua Koger, Jr., Public Defender, for an Order requiring the defendant, Malcolm L. Greene, charged with Murder and Giving False Information to Police to submit to competency, M'Naghten, and psychological examination.

I have considered the showing made in respect to the motion for such and Order and am of the opinion that the defendant should be so examined pursuant to the statutory provisions of the State.

THEREFORE, IT IS SO ORDERED that the defendant shall be:

(a) Examined and observed at the appropriate facility of the South Carolina Department of Mental Health for a period not to exceed fifteen (15) days relative his mental capacity to stand trial. (section 44-23-410(1) or section 44-23-410(2), Code of Laws of South Carolina, 1976)

(b) Examined as aforesaid to determine whether or not the above-named defendant is criminally responsible pursuant to the M'Naghten test for his actions on or about June 14, 1996

AND SHALL BE:

(c) If found pursuant to the M'Naghten test, examined as aforesaid to determine whether or not, because of mental disease or defect, the defendant lacks sufficient capacity to conform his conduct to the requirements of the law. (section 17-24-20 (a), Code of Laws of South Carolina, 1976).

AND SHALL BE:

(d) Automatically referred for evaluation to the State Department of Mental Retardation if there is any evidence of retardation.

The order examination shall be requested by the Solicitor and scheduled by the facility as soon as possible. The defendant is to be transported by the Barnwell County Sheriff's Department to arrive at the examining facility at the time established by confirm appointment with the staff of the examining facility.

A TRUE COPY

Attest J. B. Kline

Clerk of Court

#1 of 3

The defendant continues under the jurisdiction of this court. If the defendant is currently free on bond or personal recognizance, such bail is hereby revoked to the extent necessary to carry out provisions of this Order.

If the examination and observation of a patient committed to the custody of the Department of Mental Health have not concluded at the end of fifteen (15) days, the defendant may be kept in the custody of the said Department of Mental Health for an additional period not to exceed fifteen (15) days, provided the Superintendent of the facility so requests in writing the additional period for observation and examination.

Within five (5) days of the examination or at the conclusion of the observation period, a written report shall be made to the court pursuant to Section 44-23-420, Code of Laws of South Carolina, 1976 as amended.

If the judgment of the designated examiner or the Superintendent of the Department of Mental Health facility, the defendant is presently mentally ill and in need of hospitalization, then the said defendant shall be retained in the custody of the Department of Mental Health until such time as a hearing, required and provided by Section 44-23-430, Code of Laws of South Carolina, 1976, as amended, may be conducted by this court.

IT IS FURTHER ORDERED that any and all oral or written statements made by the defendant concerning the above charge(s) and communicated to any physician, hospital personnel in conjunction with this psychiatric examination shall not be admissible in evidence against the defendant in any criminal trial concerning these charges. That is to say any and all communication by the defendant to hospital personnel are protected by the Attorney/Client privilege and that the State shall be prohibited from calling any physician or hospital personnel for the purpose of testifying in court as to any statements made to them by the defendant concerning these charges. The privileged nature of a defendant's statement to a psychiatrist has been recognized by the South Carolina Supreme Court in State vs. Hitopoulus, 309 SE2d 747, 1983. The court further notes that the Solicitor's office has agreed that no effort will be to use any statements of the defendant communicated to physicians or hospital personnel in any subsequent criminal trial of the defendant

AND IT IS SO ORDERED.

Circuit Court Judge
Second Judicial Circuit

1/27, 1997

2 of 3

I SO MOVE:

Joshua Koger, Jr.
Public Defender
Attorney for the Defendant

I CONSENT:

De Grant Gibbons
Assistant Solicitor

#393

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

1122 Lady Street, Suite 940
Columbia, S.C. 29201-3243

Telephone: (803) 734-1330
(888) 204-0345
Fax: (803) 734-1397

Robert M Pachak
Robert M. Dudek
M. Anne Pearce
Melissa J. Kimbrough
Tara S. Taggart
Melody J. Brown
Aileen P. Clare
Assistant Appellate Defenders

March 11, 1999

Mr. Malcolm Lonnie Green #241530
Department of Youth Services
3200 Broad River Road
Columbia, South Carolina 29210

Re: Your direct appeal

Dear Mr. Green:

I am sorry to report bad news. Enclosed is a copy of the Court of Appeals' decision affirming your conviction and sentence. I have searched the opinion for an aspect of our argument not addressed or any other basis for further challenge; however, I cannot find one. Therefore, I will not be filing a petition for rehearing or a petition for writ of certiorari seeking review by the Supreme Court of South Carolina.

If you wish to challenge your conviction, you may file an application for post-conviction relief in Bamberg County. An application form is enclosed. If you believe you had ineffective assistance of counsel or that other constitutional rights were violated, state such grounds in answer to Questions 9 and 10. If you decide to file the application, another lawyer will be appointed to represent you at an evidentiary hearing. The application can be amended at any time before the end of the evidentiary hearing.

Please note that if you intend to seek post-conviction relief, you must file the application <u>within one year</u> of the date of the Court's opinion. However, the application should be filed as soon as possible, even if you are not satisfied that it is

complete, because federal habeas corpus review may also be limited to applications filed within one year of the end of the direct appeal, excluding any time that an application for post-conviction relief is pending.

Please feel free to contact me if you have any questions.

Sincerely,

M. Anne Pearce
Assistant Appellate Defender

MAP/srw

Enclosure

2

EARLY & NESS
ATTORNEYS AT LAW
209 NORTH MAIN STREET
BAMBERG, SOUTH CAROLINA 29003

D.A. EARLY, III
RICHARD B. NESS
NORMA A.T. JETT
—
MICHAEL C. TANNER
WILLIAM P. EARLY
DANIEL W. LUGINBILL

P.O. BOX 909
803/245-5178
FAX 803/245-5384
—
JULIUS B. NESS
1916-1991

March 9, 2001

The Honorable Rodney A. Peeples
P.O. Box 426
Barnwell, SC 29812

RE: Malcolm Lonnie Green -vs- State of South Carolina
Case No.: 00-CP-05-213

Dear Judge Peeples:

Enclosed, please find a proposed Motion to Enlarge Time to Reply to Order and Rule to Show Cause for the above-referenced matter. I would appreciate your attention to this motion based on my client's current medical condition. I thank you for your time and attention to this matter.

Yours truly,

Michael C. Tanner

MCT/jfd

Enclosure

cc: B. Allen Bullard, Jr., Esq.
Malcolm Lonnie Green

Prince George's County
DEPARTMENT OF SOCIAL SERVICES
Henry L. Gunn, III
Director

Tel: (301) 422-5000
Hearing Impaired: (301) 779-2179

805 Brightseat Road, Landover, Maryland 20785-4723

Psychosocial History

March 19, 1996

Name: Malcolm Green
Date of Birth: 2-1-81
Age: 15
Sex: male
Name of Parent/Guardian: Mother, Carolyn Green
County of residence: Prince George's
Name of respondents/historians: Malcolm Green, Noelle Nicharot, Carolyn Green, discharge records from Mountain Manor, Mellwood Treatment Center, RICA Southern Maryland, Gundry Glass Hospital

Presenting Problem:

Malcolm is referred for residential treatment due to a history of physical aggression, truancy, school suspensions for fighting, verbal disrespect, substance abuse, and uncooperativeness with recommended treatment plan. He is currently on run away most recently from Guide Shelter after being AWOL from Mellwood Treatment Center for substance abuse treatment. Malcolm was admitted to Mellwood after being discharged from Mountain Manor for assaulting a female peer, physically threatening and verbally assaulting female staff. Malcolm was hospitalized at Gundry Glass for observation, and put back on medication (tegretol) before entering treatment at Mellwood.

Malcolm has been returned home several times unsuccessfully. Ms. Green has been unable to manage Malcolm's behavior. Due to Malcolms run away status his school placement, RICA Southern Maryland, has discharged him from treatment and is consulting the Board of Education to discharge him from the school entirely as an interim placement after approximately 3-4 months of non-attendance.

Growth and Development History and Medical History

Ms. Green reports that Malcolm was a planned baby weighing 10lbs 10oz. at birth. He was carried to term and delivered vaginally. She denies any drug or alcohol use during an uneventful pregnancy. The mother reports she was home with Malcolm until he was 5 and went to kindergarten. She breastfed unit 6 months when his teeth erupted and stated he

walked early at 7 months. She recalls him as an easy happy baby. She agreed that 2 traumas occurred: electrocution at 12 months after biting an electrical cord which resulted in a lengthy hospitalization and a fall from a 3 story window at 18 months resulting in an overnight hospital stay. There were no other health problems reported.

School History

Student was first identified as seriously emotionally disturbed in third grade (Carrollton Elementary School). He was enrolled in the Wing Program (N. Forestville E.I. Wing) spring of 1990 (3rd grade). Fourth grade academic performance was one to two grades below level and he displayed attentional impairment and temper dyscontrol. He remained at N. Forestville until his admission to residential treatment, December 1991 (5th grade). He completed 5th grade and began 6th grade at Villa Maria. He attended Frost Center 11/92 to 1/93. Records document at least 3 suspensions for oppositionality and possessing a knife on the school bus. Noted also was minimal parental participation in multi-family group. Student was next referred to Phoenix school where he was suspended for fighting with a peer. Malcolm entered residential treatment a RICA Southern Maryland 7/93. Malcolm left residential 11/94 but remained at RICA as a Level V day student while living with his mother. Malcolm re-entered Foster Care 1-23-95 by both his and his mother's request, things were not working at home. Malcolm had shown improvement in school performance(3.83 GDA) before returning home, a significant drop while living at home (1.67+1.33 GPA) and an improvement following return to Foster Care (3.00 GPA). Teacher progress reports of 10/95 all state when Malcolm attends class he can show above average academic performance.

Legal History

Malcolm had charges pressed for assault of female staff member while at group home, charges were dropped.

Psychiatric Treatment History

Psychiatric Hospitalizations:

University of Maryland Medical System 7/31/91 to 8/21/91. Discharge diagnosis: Dsythymia (300.4), Conduct Disorder-Solitary, Aggressive type (312.00). Neurologic work up, including MRI and EEG reported within normal limits.

Prince George's Hospital

1/27/93 to 2/12/93. No report available.

Psychiatric Institute of Montgomery Co.

2/12/93 to 4/7/93. Dr. Lustberg treated with Ritalin 50 gd., Thorazine 20 gd, Tegretol 400gd.

Gundry Glass Hospital/Harbour Hospital

10/18/95 to 10/26/95. Dr. McCann treated with Tegretol 200mg b.i.d. Discharge diagnosis: Intermittent Explosive disorder(312.34), AD/HD (314.01), Conduct disorder (312/18), Alcohol abuse (305.00), Cannabis Abuse (305.20).

Residential Treatment

Villa Maria 12/29/91 to 11/12/92. Discharge diagnosis: Dysthymia (300.4), Conduct disorder, Solitary-Aggressive type (312.00), Developmental Reading Disorder (315.00). Treated with Aventyl 100mg. gd. After care services provided by The Frost Center.

Malcolm had been in out-patient treatment at Suitland Mental Health Clinic in 1988, Fairmount Heights Mental Health Center in 1989, and saw Ms. Beging (Credentials unknown) in 1990. Outpatient treatment was unable to contain the family dysfunction and Malcolm was in and out of foster placement due to reports of physical abuse by the parent and Malcolm's extreme oppositionality.

RICA Southern Maryland 7/7/93 to 11/94. However Malcolm remained in RICA's school day program and therapeutic treatment program. Initial therapist was John D. Clark, LCSW-C when Malcolm entered the high school program this school year a new therapist, Mr. Barry Rosenbery, LCSW-C, was assigned. Malcolm's psychiatrist at RICA has been K. Holly Sikoryak, M.D. Most recent psychiatric at RICA 9/12/95: Conduct disorder, Solitary Aggressive, Dysthymia, Intermittent Explosive disorder R/O Personality disorder NOS. with recommendations of Level VI placement.

Most recent treatment summary from therapist 12/11/95 diagnosis: Cannabis Abuse (305.20) Conduct disorder, Solitary Aggressive (312.00), Dysthymia (300.4), intermittent Explosive disorder (312.34), AD/HD (R/O 314.9), Reading disorder (R/O 315.00), Personality disorder, NOS (R/O).

Psychopharmacology

Mellari 75 mg. Started 10/91 and discontinued by Villa Maria in 4/92.

Disipramine 125mg. gd. Initiated by Villa Maria 4/92 to 11/92. Adherence following discharge unknown.

Nortriptyline Initiated by the Frost Center, Dr. Frank Board 1/93. Unknown dosage.

Ritalin 50mg. gd., Tegretol 400mg. gd., Thorazine 20mg. gd. Initiated by Dr. Lustberg at Psychiatric Institute of Montgomery County 2/93,

Tegretol 200mg. b.i.d. Ritalin 10mg. gd, Thorazine 10mg. gd. Initiated/continued at RICA Southern Maryland. All but Tegretol were eliminated at some point. Malcolm has been on Tegretol 200mg. b.i.d. through RICA. However, intermittently he has occasionally refused his medications. Malcolm was taken off Tegretol by psychiatrist at Mountain Manor.

Tegretol 200 mg. b.i.d., Oral Loxifane and LM. Inapsine was made available in PRN dosages, PRN Benadryl was made available in the event of insomnia. Initiated by Merle C. McCann, M.D. at Dundry Glass Hospital 10/18/95 to 10/26/95.

Tegretol 100mg. in A.M., 300mg. in P.M. Initiated/continued by Mellwood Treatment Center. Adherence following AWOL discharge unknown.

Family History

Ms. Green reports separating from Mr. Green in 1988 due to his drug addiction and has had no contact with him since 1990. She is currently engaged and living with her fiance. They have a single family home in Suitland, Maryland. Ms. Green was laid off from her job as a nursing assistant at Greater Southeast Hospital in Washington, D.C. She has a High School diploma and 30 college credits in data entry. Her oldest son Derrick is employed and currently living with her. Vondell, her second child is currently in a DJJ placement in Frederick, Maryland. She reports all three children have behavioral problems, but Malcolm is the worst. She also reported Malcolm's behavior problems began in 1988 when Mr. Green left the home. She stated that what she considered discipline, others felt to be abuse and that she did spank Malcolm with a belt in the past but never used "the buckle part". She reported Malcolm has exaggerated the abuse to social workers to get back at her. Ms. Green had denied handcuffing Malcolm to stairs railing in the past but recently admitted that she had but because she did not know what else to do. She stated the schools and police would not help her control her sons and that neighbors had begun to petition their leaving the neighborhood because while she would be at work Malcolm and Vondell would run wild in the neighborhood. She also stated that when she had done this Derrick was home so if in fact their was an emergency he could uncuff them.

Psychaeducational Testing (see attached).

Current Mental Status

Malcolm presents as a well-groomed well-dressed 15 year old who appears older and more physically developed than his stated age. Last contact with Malcolm was a phone call he made to worker on 2/7/96. Malcolm sounded very depressed. Even after explaining on several prior contacts and again over the phone the need of placement in residential and making recounts of prior events and behavior, Malcolm proceeded to ask me to register him in a mainstream public school and refused to understand why this was not possible at this time.

Malcolm also did not deny allegations of his participation in car theft, both using and selling drugs, and carrying a hand gun. When worker confronted him with this information he laughed. When worker stated she had a writ of attachment for him to be picked up and brought to court he stated that the worker knew that they could not hold him. This child's behavior is out of control and he could potentially be a danger to himself or others.

Presentation of Family Members

Ms. Green has been in most recent months actively participating in both school, therapy, and DSS plans for placement. The parent realistically believes that Malcolm is currently out of control and is in need of a very structured setting. She hopes Malcolm will eventually be able to live with her.

Summary and Recommendations

This 15 year old is clearly in need of a tightly structured living arrangement that provides external controls for his aggressive impulses as well as a strong substance abuse component. He has demonstrated that he is unable to function in any setting less restrictive than residential. If the family's hope of reunification is to be realized, he and the parent need intensive family therapy and interim arrangement, such as therapeutic foster care, to bridge transition from residential care to home.

Suggested Diagnosis

Axis I: Cannabis Abuse, Conduct Disorder, Solitary Aggressive, Dysthymia, Intermittent Explosive Disorder R/O, AD/HD, R/O Reading Disorder

Axis II R/O Personality Disorder, NOS.
Axis III History of Fall (18 months) and electrocution (12 months).
Axis IV severe: Multiple placement (failed) and criminal behavior.

Veronica Greene, LCSW-C
Foster Care Reunification Supervisor

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Malcolm Lonnie Green, #241530,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2013-CP-05-0034

FINAL ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief filed March 1, 2013. The Respondent made its Return and Motion to Dismiss on June 27, 2013, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated July 2, 2013, and filed July 10, 2013 provisionally denying and dismissing this action, while giving the Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein is an Affidavit of Service dated August 16, 2013, serving the aforementioned Conditional Order of Dismissal on the Applicant.

Applicant filed a "Motion To Clarify and Appointment of Counsel for Hearing" on July 25, 2013 alleging that he was mentally incompetent at the time of "trial and subsequent plea, direct appeal, initial PCR and all other proceedings." Applicant alleges that he is entitled to a post-conviction relief pursuant to Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009). Applicant contends that the "question of Applicant's competence or incompetence can only be resolved in court with a hearing." Applicant further argues that he "could not have in any way raised the issue of his own incompetency during the time of the initial PCR action and that his

hands were bound being that he had an attorney on record."

Additionally, Applicant asserts that his first post-conviction relief application was untimely filed due to his mental state, and therefore, he is entitled to equitable tolling of the statute of limitations and an evidentiary hearing to afford him his "one bite at the apple." Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). Applicant cites to Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) to support his argument that he is entitled to equitable tolling and a hearing on the merits of his second application for post-conviction relief. This Court is not persuaded by Applicant's argument, as Applicant could have raised this challenge to the statute of limitations in his prior post-conviction relief application or an appeal of the dismissal of his first post-conviction relief action.

This Court finds that Applicant's allegations regarding his mental incapacity must have been presented in his initial post-conviction relief application. The South Carolina Supreme Court has consistently ruled that successive post-conviction relief applications are permitted in only the rarest of procedural circumstances. Odom, 337 S.C. at 261, 523 S.E.2d at 756 (citing See, e.g., Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982) (allowing a successive post-conviction relief application where the applicant's first post-conviction relief application was dismissed without the assistance of legal counsel or a hearing); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987) (permitting a successive application where the applicant did not have post-conviction relief counsel that differed from his trial counsel). The present case is not a "rare procedural circumstance," as Applicant could have raised the argument of his mental incapacity in his initial post-conviction relief application.

Additionally, this Court finds that Applicant's argument that the statute of limitations should have been tolled due to his mental incompetence must have been made in his first

DIEFF2

application or on his appeal from his first application. This Court finds Applicant's reliance on Ferguson to be unpersuasive. In Ferguson, the petitioner appealed the summary dismissal of his *initial* post-conviction relief application as barred by the one-year statute of limitations. In the present case, Applicant has filed a subsequent application, successive to his first, and raised the issue of tolling due to mental incompetence for the first time. Applicant, either during his initial lower court proceeding or an appeal of that proceeding must have raised the issue of tolling of the statute of limitations due to mental incompetence as set forth in Ferguson. Failure to raise a claim in an initial action bars Applicant from attempting to do so in a successive application. See Graham, 378 S.C. 1, 661 S.E.2d 337.

As Applicant could have raised his claim that the statute of limitations should be tolled based on his alleged incompetency in his first application and Applicant has presented no reason why he did not do so, this Court finds that this application must be summarily dismissed as successive.

Applicant submitted an Objection and reply to Conditional Order of Dismissal on August 23, 2013 alleging that he is entitled to a new PCR hearing under the recently decided United States Supreme Court case Martinez v. Ryan, 132 S.Ct. 1309 (2012). This Court finds this contention to be without merit as the ruling in Martinez has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the

PAGE 3

claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision, finding that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal habeas corpus proceeding. See Martinez, *supra* at 6 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental "cause and prejudice" standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining "[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter." Id. Therefore, Applicant's contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous.

Additionally, Martinez's interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina's interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to –160. Therefore, the South Carolina Supreme Court's opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("The contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under 17-27-90."). Aice

pg 4

went on to note that such a holding was in accord with the United State's Supreme Court's opinion in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987) (there is no constitutional right to counsel for collateral review of a conviction). Accordingly, this Court finds Applicant's claim regarding the application of Martinez to be without merit.

Finally, because Applicant has failed to set forth any reason he could not have raised the current allegations in his previous application other than to allege PCR counsel was ineffective in failing to raise them, the current application is in fact successive in nature. Accordingly, this application must be summarily dismissed for a failure to state a claim entitling Applicant to relief, for being successive in nature and for failing to file the action within the statute of limitation as set forth in S.C. Code Ann. § 17-27-45(a).

The Applicant has also shown no reason why these issues were not raised in his three prior post-conviction relief applications or within the statute of limitations for filing a post-conviction relief application pursuant to S.C. Code. § 17-27-45(a). S.C. Code Ann. §17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant went pled guilty on March 20, 1997. Therefore, Applicant was required to file for post-conviction relief March 21, 1998. This Application was filed on March 1, 2013 which is approximately sixteen years after the statutory filing period had expired. Additionally, the Applicant has already three post-conviction relief actions for the subject conviction.

DTCTS

Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 17 day of October, 2013.

DOYET A. EARLY, III
Chief Judge for Administrative Purposes
Second Judicial Circuit

Bamberg, South Carolina

DAE #6

Mr. Malcolm L. Green #241530
Lee C.I. SMU-NBMH-97
990 Wisacky Hwy.
Bishopville, S.C. 29010

November 15, 2013

James B. Hiers, Clerk of Court
Bamberg County Courthouse
P.O. Box 150
Bamberg, S.C. 29003

Re: Notice of Intent To Appeal

Dear Mr. Hiers,

Sir, As you know I am imprisoned at Lee C.I. on SMU where I don't have adequate access to the Law Computer in order to research the cases cited in Judge Boyet A. Early's Final Order. The law-library workers only bring 3 cases a week and they may or may not include the recent cases requested which creates a real problem for prisoner's collaterally attacking our convictions.

I received my Proposed Final Order on October 17, 2013 and put in a request to use the law-computer in advance (See Request/Clock-stamp/Copy and returned) and still haven't been allowed access to date. I received my signed

Final Order on October 29, 2013 and was prevented from complying with Rule 59(e) SCRCP and filing Motions within ten(10) days, due to having inadequate access to legal-materials. Since receiving Proposed Final Order on October 17, 2013 the law-clerks have only come to SMU once and have not since returned. Through the law-clerks we receive copies of our legal-briefs and due to reasons beyond my control they have not returned with my legal-copies or law-materials.

For the above stated reasons I am requesting a (10) ten day extention to file my Rule 59(e) Motion to Alter and Amend Judgment. I also have enclosed my Notice of Appeal and asked the Court Clerk to clock-stamp/copy and return everything received in this letter back to me at the above address. Thank You, Sir!

Sincerely,

Malcolm L. Green

FILED
BAMBERG COUNTY
2013 NOV 20 AM 10:37
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

The State of South Carolina
In The Court of Common Pleas

Appeal From Bamberg County
Court of Common Pleas

FILED
BAMBERG COUNTY
2013 NOV 20 AM 10: 37
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

Honorable Doyet A. Early, III, 2nd Circuit Administrative Judge

Case No. 2013-CP-05-0034

Malcolm Lonnie Green #241530 — Appellant

v.

State of South Carolina — Respondent

Notice of Appeal

Malcolm Lonnie Green #241530, Appeals the Final Order of the Honorable Doyet A. Early, III Administrative Judge for the Second Judicial Circuit, dated October 17, 2013, denying his Post Conviction Relief Application. Appellant received written Notice of Final Order on October 29, 2013.

November 15, 2013

Pro-Se Appellant

Respectfully Submitted
Malcolm Lonnie Green
Malcolm Lonnie Green #241530
Smu-North-97
Lee C.I., 990 Wisacky Hwy
Bishopville, South Carolina

"Emergency Request"

FILED
BAMBERG COUNTY
2013 NOV 20 AM 8:37
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

Ms. A. Smith / SMU-Secretary
Mr. Malcolm L. Green - #241530

October 19, 2013
SMU-North-97

I would like to be placed on the computer list and I have attached positional-proof, because once judge signs final order there won't be time for research.

I am also respectfully requesting that you allow D/W Davis to review my request, because there is a long-history between us and certain things have already been discussed that you have no way of knowing. My point being you are ill-suited to address a request that you fail to let him review first because its your words and not his. Thank You. MA'AM / O

your disrespect is noted + D/W Davis sees each request and answers in his words, my handwriting. If you knew what you were talking about it would be a different story, but thank you anyway.

Mrs. A Smith
10/22/13

Mr. Malcolm L. Green #241530
Lee. C. F. SMU-North-97
990 Wisacky Hwy.
Bishopville, S. C. 29010

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211