

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger M. Young, Sr., Presiding Judge

JUN 22 2015

S.C. SUPREME COURT

2011-CP-08-1840

STEPHEN J. GREEN, #259765

Applicant,

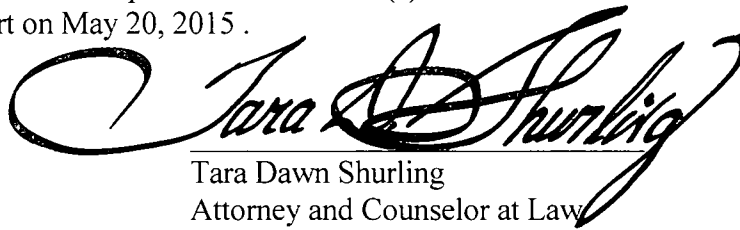
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Final Order of Dismissal denying his Post-Conviction Relief filed February 19, 2015 and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRCPC which was filed with the Berkeley County Clerk of Court on May 20, 2015.



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 17th day of June, 2015.

Other Counsel of Record:
J. Rutledge Johnson, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger M. Young, Sr., Presiding Judge

2011-CP-08-1840

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S.C. SUPREME COURT

STEPHEN J. GREEN, #259765,

v.

Applicant,

THE STATE OF SOUTH CAROLINA,

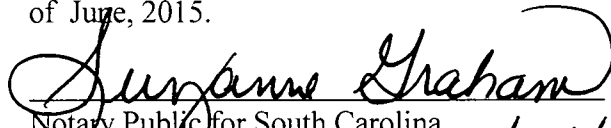
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, J. Rutledge Johnson, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 17th day of June, 2015.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE me this 17th day
of June, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 STEPHEN J. GREEN, #259765)
 Plaintiff,)
 vs.)
)
 STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2011-CP-08-1840

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC
 2015 MAY 20 PM 2:03
 FILED

Plaintiff's Attorney: Tara D. Shurling, Bar No. 5099 Address: 3614 Landmark Drive, Ste. A Columbia, SC 29204 Phone: (803) 738-8622 Fax (803) 738-1600 E-mail: tdslaw@shurlinglaw.com Other: _____	Defendant's Attorney: Elizabeth H. Neyle, Bar No. 1009 Address: PO Box 11549 Columbia, SC 29211 Phone: (803) 734-3737 Fax (803) 734-4113 E-mail: eneyle@scag.gov Other: _____
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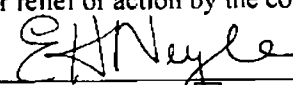
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

Date submitted: April 28, 2015

SECTION III: Motion Fee

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 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: _____
 Other: _____

JUDGE'S SECTION

<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
--	---------------------------------

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2011-CP-08-1840

Stephen J. Green, #259765,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER

2015 MAY 20 PM 2:03
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

This matter comes before this Court by way of a post-conviction relief (PCR) application filed by Stephen J. Green (Applicant) on July 1, 2011. The State (Respondent) made its return on December 18, 2014, requesting the application be summarily dismissed. After reviewing the pleadings in this matter and attached records, this Court issued a conditional order of dismissal on January 5, 2015, provisionally denying and dismissing this action, while allowing Applicant twenty days from the date of service of said order in which to show why the dismissal should not become final. Applicant responded to the conditional order of dismissal on January 26, 2015. This Court issued a final order of dismissal on February 19, 2015.

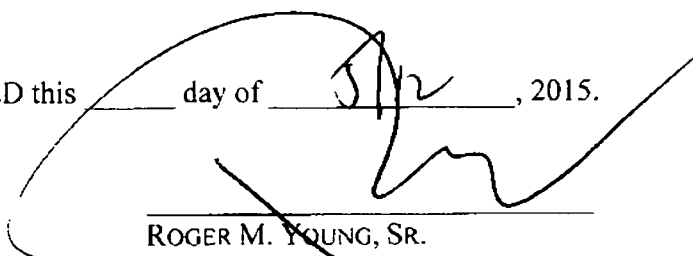
Applicant filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, in which he asks this Court to alter or amend its order dismissing his PCR application. Respondent made its return to the motion, requesting this motion be dismissed.

Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or

amend its judgment. This Court further finds oral argument would not aid in the reconsideration of the original judgment. The final order of dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014) and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this _____ day of Jan, 2015.



ROGER M. YOUNG, SR.
Circuit Court Judge
Ninth Judicial Circuit

at Chambers, South Carolina



ALAN WILSON
ATTORNEY GENERAL

May 18, 2015

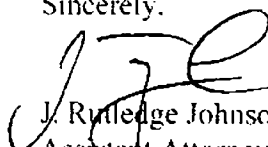
The Honorable Mary P. Brown
Clerk of Court, Berkeley County
Post Office Box 219
Moncks Corner, SC 29461

Re: Stephen J. Green #259765 v. State of South Carolina
2011-CP-08-1840

Dear Ms. Brown:

Enclosed please find the signed original **Final Order of Dismissal** in the above captioned case for filing in your office. If you have any questions or concerns, please contact me at (803) 734-3737.

Sincerely,


J. Rutledge Johnson
Assistant Attorney General

JRJ/cm

cc: Tara D. Shurling, Esq.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS)
NINTH JUDICIAL CIRCUIT)

Stephen J. Green,)
S.C.D.C. No. 259765,)

2011-CP-08-1840

CLERK OF COURT
BERKELEY COUNTY, SC

2015 FEB 19 AM 10:33

LEED

Applicant,)

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Stephen J. Green (Applicant) on July 1, 2011. The State (Respondent) made its return on December 18, 2014, requesting the application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and attached records, this Court issued a conditional order of dismissal filed January 5, 2015, provisionally denying and dismissing this action, while allowing Applicant twenty days from the date of service of said order in which to show the dismissal should not become final. Applicant responded to the conditional order of dismissal on January 26, 2015.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted during the December 1998 term of the Berkeley County Grand Jury for burglary in the first degree (1998-GS-08-1859) and assault and battery with intent to kill (1998-GS-08-1860). Applicant proceeded to trial, and a jury found him guilty of burglary in the first degree and the lesser-

included offense of assault and battery of a high and aggravated nature. J. Mitchell Lanier, Esquire, represented Applicant. On November 16, 1999, the Honorable R. Markley Dennis, Jr. sentenced Applicant to life imprisonment.¹ Applicant did not immediately appeal his conviction or sentence.

Applicant filed his first PCR application (2000-CP-08-2302) on November 14, 2000, solely challenging his burglary conviction. Applicant alleged the following grounds for relief:

1. Denial of statutory/due process right to direct appeal.
2. Ineffective assistance of counsel.

Respondent filed its return on April 13, 2001. An evidentiary hearing was held on August 16, 2002. Edward Brown, Esquire, represented Applicant. On October 10, 2002, the Honorable Daniel F. Pieper denied and dismissed the application, but granted Applicant a direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Applicant appealed in accordance with *White*, and the South Carolina Supreme Court dismissed the appeal. *Green v. State*, Op. No. 2003-MO-063 (S.C. S. Ct. filed Nov. 10, 2003). The remittitur was issued on November 16, 2003.

Applicant filed his second PCR application (2004-CP-08-2262) on October 20, 2004, challenging all of his convictions. *See also* Footnote 1. Applicant alleged the following grounds for relief:

1. Lack of subject-matter jurisdiction.

Respondent filed its return on February 18, 2005, and supplemental return on October 3, 2005. An evidentiary hearing was held on October 25, 2005. Andrew S. Halio, Esquire,

¹ Applicant was also indicted in the December 1998 and March 1999 terms of the Berkeley County Grand Jury for armed robbery (1998-GS-08-1855), assault and battery of a high and aggravated nature (1998-GS-08-1854), burglary in the first degree (1998-GS-08-1861), kidnapping (1998-GS-08-1857), and criminal sexual conduct in the first degree (1999-GS-08-0391). A jury found Applicant guilty as indicted and the Honorable Daniel F. Pieper sentenced him to life imprisonment on July 14, 1999.

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represented Applicant. On November 29, 2005, the Honorable Deadra L. Jefferson denied and dismissed the application.

Applicant appealed, and the South Carolina Court of Appeals denied the petition for a writ of certiorari on August 3, 2007. The remittitur was issued on August 21, 2007.

Applicant filed a pro se federal petition for a writ of habeas corpus (95-cv-1666) on July 28, 2008, challenging the dismissal of his 2004 PCR application and alleging:

1. The post-conviction relief court erred by relying on S.C. Code § 17-25-45 in dismissing his application with regard to the October 1999 convictions.
2. The October 2004 application was not successive to the 2001 PCR challenging the July 1999 convictions. All issues raised are subject matter jurisdiction issues and can be raised at any time.
3. The post-conviction relief court erred by ruling Applicant's Rule 3 challenge was barred by *res judicata*.

Respondent filed its return and motion for summary judgment on December 5, 2008. The Honorable Paige J. Gossett, United States Magistrate Judge, issued a report on August 5, 2009 recommending Respondent's motion for summary judgment be granted. The Honorable Henry F. Floyd, United States District Judge, granted Respondent's motion for summary judgment and dismissed the petition with prejudice on August 25, 2009.

Applicant filed his current application on July 1, 2011, and amended application on November 7, 2012, alleging the following grounds for relief verbatim:

1. On his First Degree Burglary judgment for which sentence was imposed November 16, 1999, the Applicant seeks a new sentencing proceeding on the grounds that his trial attorney failed to challenge his sentence to Life Without Parole where the predicate offenses occurred within 24 hours of the current offenses and therefore should not have been counted as a previous strike pursuant to § 17-25-45 and § 17-25-50.
2. The Applicant should be re-sentenced on both judgments and sentences entered on November 16, 1999 where a recent decision by the United States Supreme Court found it

unconstitutional to sentence a minor to life without the possibility of parole.

Respondent filed a return and motion to dismiss on December 18, 2014. This Court issued a conditional order of dismissal on January 6, 2015. Applicant filed a response to the conditional order of dismissal on January 26, 2015, requesting an evidentiary hearing on his claims.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RESPONSE TO
APPLICANT'S OBJECTIONS**

This Court reviewed Applicant's response raising objections to the conditional order of dismissal and makes the following findings of fact and conclusions of law:

I.

Applicant is not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel for trial counsel's alleged failure to challenge his life imprisonment without parole (LWOP) sentence when the "predicate offenses occurred within 24 hours of the current offenses and therefore should not have been counted as a previous strike pursuant to § 17-25-45 and § 17-25-50." This Court must dismiss Applicant's claim because it is successive and untimely.

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). *See also* S.C. Code Ann. § 17-27-90 (2014). Successive post-conviction relief applications are prohibited unless an applicant can present a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been



raised . . . in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If Applicant could have raised this allegation in a previous application, then he may not raise it in successive applications. *Id.* This Court finds Applicant failed to establish any sufficient reason why he did not raise this ground for relief in his two previous applications.

In addition to this claim being successive, this Court also finds this claim is untimely and fails to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014). Applicant filed this application on July 1, 2011, **more than ten years** after the statutory filing period expired. *See Pelouquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). Therefore, this Court finds this application must be dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

II.

This Court also finds Applicant’s claim he is entitled to re-sentencing due to the recent United States Supreme Court opinion, *Graham v. Florida*, 560 U.S. 48 (2010), which forbids the imposition of a life imprisonment without the possibility of parole (LWOP) sentence for a non-homicide crime committed by a juvenile, is meritless and must be dismissed. Applicant fails to state a valid claim for relief under *Graham* as he was not a juvenile when he committed the underlying offense. Accordingly, this Court finds this claim must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. *See Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (stating that when deciding a motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief).

Graham does not apply to Applicant. Applicant states in his application that on the date of the underlying offense, March 9, 1998, he was eighteen years, four months, and ten days old.



PCR App. p. 3. Applicant further states, "While the Applicant was over 18 years of age at the time of his crimes, he was *barely so*." *Id.* at 4. According to his SCDC records and sentencing sheets, Applicant's birthday is November 19, 1979. Applicant was eighteen years old and not a juvenile when he committed the offenses for which he is now serving life imprisonment. *Graham* is inapplicable to Applicant.

III.

After reviewing the original pleadings, records, and Applicant's response to the conditional order of dismissal, this Court finds that a sufficient reason has not been shown why the conditional order should not become final. Applicant failed to show a reason for this Court to entertain the claims raised in his successive and untimely PCR application. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

CONCLUSION

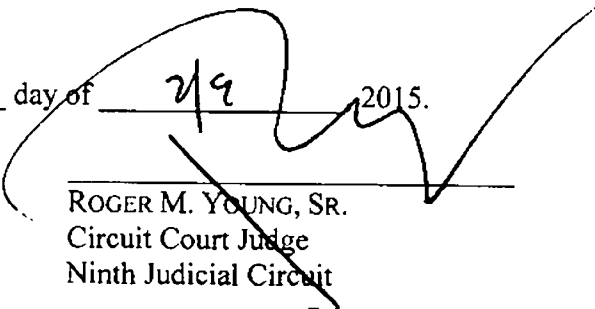
IT IS THEREFORE ORDERED that, for reasons set forth in this Court's conditional order of dismissal and this final order of dismissal, this PCR application is hereby denied and dismissed with prejudice.

This Court hereby advises 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. Applicant's attention is directed to Rule 227, SCACR, for the procedures following the filing and service of the notice of appeal.

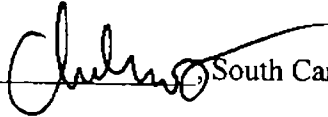
(Signature on the following page)

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AND IT IS SO ORDERED this _____ day of 2/9 2015.



ROGER M. YOUNG, SR.
Circuit Court Judge
Ninth Judicial Circuit



South Carolina

AW

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Stephen J. Green,
S.C.D.C. No. 259765,

2011-CP-08-1840

CLERK OF COURT
BERKELEY COUNTY, SC

2015 JAN -5 PM 2:03

FILED
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Applicant,

v.

**CONDITIONAL ORDER OF
DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Stephen J. Green (Applicant) on July 1, 2011. The State (Respondent) made its return, requesting the application be summarily dismissed.

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted during the December 1998 term of the Berkeley County Grand Jury for burglary in the first degree (1998-GS-08-1859) and assault and battery with intent to kill (1998-GS-08-1860). Applicant proceeded to trial, and a jury found him guilty of burglary in the first degree and the lesser-included offense of assault and battery of a high and aggravated nature. J. Mitchell Lanier, Esquire, represented Applicant. On November 16, 1999, the Honorable R. Markley Dennis, Jr. sentenced Applicant to life imprisonment.¹ Applicant did not immediately appeal his conviction

¹ Applicant was also indicted in the December 1998 and March 1999 terms of the Berkeley County Grand Jury for armed robbery (1998-GS-08-1855), assault and battery of a high and aggravated nature (1998-GS-08-1854), burglary in the first degree (1998-GS-08-1861), kidnapping (1998-GS-08-1857), and criminal sexual conduct in the

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or sentence.

First PCR Application: 2000-CP-08-2302

Applicant filed his first PCR application on November 14, 2000, solely challenging his burglary conviction. Applicant alleged the following grounds for relief:

1. Denial of statutory/due process right to direct appeal.
2. Ineffective assistance of counsel.

Respondent filed its return on April 13, 2001. An evidentiary hearing was held on August 16, 2002. Edward Brown, Esquire, represented Applicant. On October 10, 2001, the Honorable Daniel F. Pieper denied and dismissed the application, but granted Applicant a direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Applicant appealed in accordance with *White*, and the South Carolina Supreme Court dismissed the appeal. *Green v. State*, Op. No. 2003-MO-063 (S.C. S. Ct. filed Nov. 10, 2003). The remittitur was issued on November 16, 2003.

Second PCR Application: 2004-CP-08-2262

Applicant filed his second PCR application on October 20, 2004, challenging all of his convictions. *See also* Footnote 1. Applicant alleged the following grounds for relief:

1. Lack of subject-matter jurisdiction.

Respondent filed its return on February 18, 2005, and supplemental return on October 3, 2005. An evidentiary hearing was held on October 25, 2005. Andrew S. Halio, Esquire, represented Applicant. On November 29, 2005, the Honorable Deadra L. Jefferson denied and dismissed the application.

Applicant appealed, and the South Carolina Court of Appeals denied the petition for a writ of certiorari on August 3, 2007. The remittitur was issued on August 21, 2007.

first degree (1999-GS-08-0391). A jury found Applicant guilty as indicted and the Honorable Daniel F. Pieper sentenced him to life imprisonment on July 14, 1999.



First Federal Habeas Corpus: 95-cv-1666

Applicant filed a pro se federal petition for a writ of habeas corpus on July 28, 2008, challenging the dismissal of his 2004 PCR application and alleging:

1. The post-conviction relief court erred by relying on S.C. Code § 17-25-45 in dismissing his application with regard to the October 1999 convictions.
2. The October 2004 application was not successive to the 2001 PCR challenging the July 1999 convictions. All issues raised are subject matter jurisdiction issues and can be raised at any time.
3. The post-conviction relief court erred by ruling Applicant's Rule 3 challenge was barred by *res judicata*.

Respondent filed its return and motion for summary judgment on December 5, 2008. The Honorable Paige J. Gossett, United States Magistrate Judge, issued a report on August 5, 2009 recommending Respondent's motion for summary judgment be granted. The Honorable Henry F. Floyd, United States District Judge, granted Respondent's motion for summary judgment and dismissed the petition with prejudice on August 25, 2009.

II.

Applicant filed his current application on July 1, 2011, and amended application on November 7, 2012, alleging the following grounds for relief verbatim:

1. On his First Degree Burglary judgment for which sentence was imposed November 16, 1999, the Applicant seeks a new sentencing proceeding on the grounds that his trial attorney failed to challenge his sentence to Life Without Parole where the predicate offenses occurred within 24 hours of the current offenses and therefore should not have been counted as a previous strike pursuant to § 17-25-45 and § 17-25-50.
2. The Applicant should be re-sentenced on both judgments and sentences entered on November 16, 1999 where a recent decision by the United States Supreme Court found it

unconstitutional to sentence a minor to life without the possibility of parole.

Before this Court are the Berkeley County Clerk of Court's records regarding the subject convictions, South Carolina Department of Corrections records, appellate records, and Applicant's previous and current PCR records.

III.

This Court finds this current PCR application must be summarily dismissed because it is successive to his previous applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code (2014) states:

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

Under this statute, successive post-conviction relief applications are prohibited unless an applicant can present a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise

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those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

This Court finds Applicant failed to establish any sufficient reason why he did not raise his current grounds for relief in a previous application. This Court must summarily dismiss Applicant's current application because it is successive to his previous applications.

IV.

This Court also finds this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014). Section 17-27-45(a) states:

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 held the one-year 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). Applicant was convicted of the offenses he challenges on November 16, 1999. Therefore, Applicant was required to file his PCR application on or before November 16, 2000. Applicant filed this application on July 1, 2011, more than ten years after the statutory filing period expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2003). Section 17-27-70(c) authorizes this 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." Therefore, this Court finds this application must be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

Applicant claims he is entitled to re-sentencing due to the recent United States Supreme Court opinion, *Graham v. Florida*, 560 U.S. 48 (2010), which forbids the imposition of a LWOP sentence for a non-homicide crime committed by a juvenile. This Court finds Applicant's claim lacks any merit because Applicant was not a juvenile when he committed the underlying offense. This Court finds this claim must be summarily dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. See *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (stating that when deciding a motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief).

Graham does not apply to Applicant. Applicant states in his application that on the date of the underlying offense, March 9, 1998, he was eighteen years, four months, and ten days old. PCR App. p. 3. Applicant further states, "While the Applicant was over 18 years of age at the time of his crimes, he was *barely so*." *Id.* at 4. According to his SCDC records and sentencing sheets, Applicant's birthday is November 19, 1979. Applicant was eighteen years old and not a juvenile when he committed the offenses for which he is now serving life imprisonment. *Graham* is inapplicable to Applicant and this Court must summarily dismiss this claim.

VI.

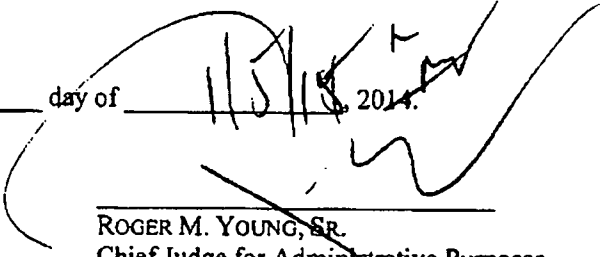
Pursuant to section 17-27-70(b) of the South Carolina Code, this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why

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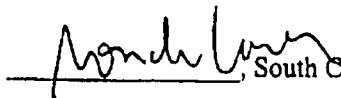
the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Elizabeth H. Neyle, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this _____ day of 11/5/14, 2014.



ROGER M. YOUNG, SR.
Chief Judge for Administrative Purposes
Ninth Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Stephen J. Green, # 259765

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

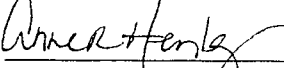
2011-CP-08-1840

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Conditional Order of Dismissal of the Respondent in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
 3614 Landmark Drive, Suite A
 Columbia, SC 29204

DATED this 8th day of January 2015



 Anne R. Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

STEPHEN J. GREEN, 259765,)
) Applicant,)
)
) v.)
)
)
)
THE STATE OF SOUTH CAROLINA,)
) Respondent.)
_____)

2011-CP-08-1840

REPLY TO CONDITIONAL
ORDER OF DISMISSAL

MARY P. DROWN
CLERK OF COURT
BERKELEY COUNTY, SC

15 JAN 30 AM 11:52

This matter comes before this Court by way of an Application for Post-Conviction Relief (PCR) filed by Stephen J. Green (Applicant) on July 1, 2011, and an Amended Application for Post-Conviction Relief filed on November 13, 2012. The State (Respondent) did not file its Return and Motion to Dismiss in this matter December 18, 2014. A Conditional Order of Dismissal was subsequently filed on this application on January 5, 2015. In Response to that Conditional Order, the Applicant would show this Court the following:

While the Conditional Order of Dismissal entered in this case, sets forth the allegations found in the Application for Post-Conviction Relief filed on July 1, 2011 and the subsequent Amended Application filed on November 13, 2012, at Question 10(a) and (b), it contains no analysis or discussion concerning the facts in support of these allegations as set forth in the Application at Question 11 (a) and (b). The Conditional Order of Dismissal therefore concludes, without adequate finds of fact and rulings of law, that this Application should be summarily dismissed as both untimely and successive without addressing the factual and legal arguments put forth by Applicant in support of his position that he should be granted hearing on these issues pursuant to S.C. Code Ann. Section 17-27-45(B).

In his applications, Applicant notes the following in support of his allegations;

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) On *July 14, 1999* the Applicant was sentenced following trial by jury on the following indictments:

1998-GS-08-1854- Assault and Battery of a High and Aggravated Nature
1998-GS-08-1855- Armed Robbery
1998-GS-08-1857- Kidnapping
1998-GS-08-1861- Burglary First Degree
1999-GS-08-391 - Criminal Sexual Conduct, First Degree

The Applicant received a life sentence for the First Degree Burglary count and an aggregate sentence of thirty (30) years concurrent for the remaining offenses which were each for crimes committed on *March 9, 1998*.

The First Degree Burglary count addressed *in this application* for which the Applicant was subsequently sentenced to life pursuant to S.C. Code Ann § 17-25-45 (F) 1995 was also committed on *March 9, 1998*.

In *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (April 2003) our Supreme Court initially ruled that S.C. Code Ann. § 17-25-50 did not apply to the calculation of strikes for sentencing under the authority of § 17-25-45. That ruling was overturned shortly thereafter in *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105 (November 2003), wherein our high court concluded that § 17-25-45 and § 17-25-50 “ must be construed together.” Id at 588 S.E. 2d 109. More recently in *Bryant v. State*, 384 S.C. 525, 683 S.E. 2d 280 (2009) the court adhered to the position taken in *Gordon, supra*, that sections 17-25-45 (F) and 17-25-50 must be construed together toward a determination concerning whether the circumstances of a particular case preclude the imposition of a life without parole case.

The Applicant's initial Application for Post-Conviction Relief on these judgments and sentences was filed on November 14, 2000 and was decided by Order filed October 15, 2002. The sole issue addressed in that action was whether the Applicant was entitled to a belated direct appeal pursuant to *White v. State*, 263 S.C. 100, 208 S.E. 2d 35 (1974). After his judgments and sentences were affirmed on his belated direct appeal, the Applicant filed a second Post-Conviction Relief Application (2004-CP-08-2262) which was dismissed as successive and barred as untimely by § 17-27-45 (A). Thus, the Applicant was denied the opportunity to go forward on an application in which he clearly could have asserted that his second PCR action was proper pursuant to § 17-27-45 (B) inasmuch as it raised this new legal standard. Although the Applicant did not raise this precise issue in his 2004 application, the issue clearly would have been supported by the record. The Applicant did have an appeal perfected on his behalf from this dismissal. He was represented in that PCR appeal by Robert M. Pachak of the Appellate Division of the South Carolina Commission on Indigent

Defense. Assistant Appellate Defender Pachak filed a *Johnson* Petition¹ on behalf of the Applicant. That petition dated April 11, 2006 raised the question of “*Whether there was any evidence to support the Post-Conviction Relief judge’s findings that Petitioner’s current application was successive and that it was barred by the statute of limitations?*” Therefore, similar to the procedure followed by the reviewing appellate court when a brief is filed on direct appeal pursuant to *Anders v. California*² the burden shifted to the Supreme Court of South Carolina to review the entire record below to determine whether they concurred with Attorney Pachak’s position that this Post-Conviction Relief appeal was meritless. Once again, Attorney Pachak, like the Post-Conviction Relief lawyer in the circuit court, did not raise the question of whether the Applicant should be allowed to go forward under § 17-27-45(B) which addresses filing a Post-Conviction Relief action following the pronouncement of a new standard of law. As previously noted, *Gordon, supra*, was not decided until November, 2003. The Applicant’s 2004 Post-Conviction Relief Application was filed on October 20, 2004. Thus, he filed his application docketed at 2004-CP-08-2262 within one year of the new standard of law announced in *Gordon* as is required by S.C. Code Ann. § 17-27-45(B). The Appendix submitted along with the *Johnson* Petition filed by Attorney Pachak did include the indictments for the offenses used as predicate convictions for purposes of sentencing the Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45. These indictments reflect that each of these offenses occurred *on or about March 9, 1998*. See, Indictments No. 98-GS-08-1855, 98-GS-08-1861, 98-GS-08-1857. Although the Order of Dismissal on 2004-CP-08-2262 indicates that the Records of the Clerk of Court were before the Court, the arrest warrants for these crimes *were not* included in the Appendix submitted with the *Johnson* Petition filed following that Order of Dismissal dated November 25, 2005 and filed November 29, 2005. While the indictments for the predicate offenses, which were included in the Appendix at pages 101-102, 105-106, and 109-110, each reference crimes committed *on or about March 9, 1998, the arrest warrants* for each of these offenses clearly establish that the underlying acts each occurred on *March 9, 1998*. See, Attachments obtained from the Berkeley County Clerk of Court’s records. As such, these offenses clearly occurred on the same date as the crime for which the Applicant received life without parole pursuant to § 17-25-45. The trial record from the Applicant’s November 15-16, 1999 trial for the crimes of First Degree Burglary and Assault and Battery with Intent to Kill clearly establishes that the life without parole sentence for First Degree Burglary was predicated upon his conviction earlier the previous summer for armed robbery, first degree burglary and kidnapping. See, Trial Transcript dated November 15-16, 1999, pages 191-193. Testimony from this trial clearly establishes that the first degree burglary for which the Applicant received a sentence of life without parole in fact occurred on *March 9, 1998*.

In light of all the above, the Applicant asserts that the Supreme Court of South Carolina in conducting its review of that case pursuant to *Johnson* would have

¹ 294 S. C. 310, 364 S.E.2d 201 (1998).

² 386 U. S. 738, 87 S. Ct. 1396 (1967).

been able to determine that the Applicant was entitled to a second Post-Conviction Relief action pursuant to § 17-27-45(B) had the arrest warrants from the Clerk of Court's records been included in the Appendix submitted with the *Johnson* Petition. Accordingly, he now seeks a *de novo* Post-Conviction Relief action on the question of whether § 17-25-50 should have been applied to all his crimes making him ineligible for receipt of a life without parole sentence pursuant to § 17-25-45. The Applicant in *Bryant*, supra, had in fact had a previous Post-Conviction Relief and was allowed to go forward with a second collateral action in 2004 after the favorable change in the law concerning the proper application of § 17-25-50 to 17-25-45. *Bryant* was granted relief in the circuit court, however that ruling was reversed by the Supreme Court on appeal. The ruling of the Post-Conviction Relief judge was reversed, however based on a finding that Bryant's three armed robberies which took place *over the course of three days* did not qualify for application of § 17-27-50 for purposed of counting strikes. In the Applicant's case the crimes that were used as his first strike occurred *on the same date* as the crime for which he was sentenced to life without the possibility of parole pursuant to § 17-27-45. The Applicant's trial lawyer was ineffective in that he did nothing to challenge the use of these prior convictions for enhancement purposes, and in fact, virtually conceded the point during sentencing. See, Trial Transcript p. 192 ll. 18-24.

(b) The Applicant was 18 years, 4 months and 10 days old on March 9, 1998. In *Graham v. Florida*, 130 S.Ct. 2011 (July 16, 2010) the United States Supreme Court found that the sentencing of an individual *under the age of 18 years old* to life without the possibility of parole, for a crime other than murder, violated the Eighth Amendment prohibition against cruel and unusual punishment. On July 14, 1999 the Applicant received a life sentence for Burglary First Degree on Indictment No. 98-GS-08-1861. On November 16, 1999 he received a second life sentence for Burglary First Degree on Indictment No. 1998-GS-08-1859. In the second case, addressed in this application, he was sentenced to life without parole for First Degree Burglary pursuant to § 17-25-45. At the time of his sentencing all parties, sadly even his own defense attorney, seem to accept without question that the harsh penalty imposed *was mandatory* based on his July, 1999 judgments. The Applicant is mindful that First Degree Burglary carries a penalty of thirty (30) years to life even without application of § 17-25-45. There is no indication that the second life sentence was imposed in the exercise of discretion by the sentencing judge. To the contrary, that sentence appears clearly to have been imposed based upon the Applicant's prior record. Assuming that the life given in this case could have been imposed under the judge's sentencing authority pursuant to S. C. Code Ann. § 16-11-31 (1976 as Amended), which provides for a sentence of up to life for First Degree Burglary, the Applicant would argue that the sentences imposed in this case should be revisited in light of *Graham, supra*. While the Applicant was over 18 years of age at the time of his crimes, *he was barely so*. It is logical to infer that a sentencing authority would be far less likely to impose a discretionary sentence of life without parole on a young offender who was four months and ten days past his eighteenth birthday in the face of authority that dictated that he *could not* have given the offender a life without parole

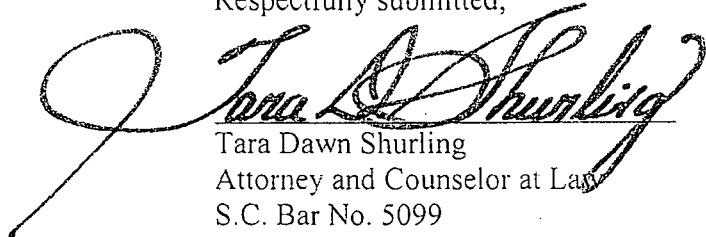
sentence had he been a mere fourth months and eleven days younger. Furthermore, it is impossible to know what impact the mandatory life sentence may have had on the decision of the trial judge to sentence the Applicant to a consecutive ten (10) year term for Assault and Battery of a High and Aggravated Nature. Certainly, once a life sentence was in play, the term imposed on the remaining count became virtually inconsequential. For this reason the Applicant asserts that the grant of new sentencing hearings is necessary and appropriate on all counts. The Applicant asserts that this application is timely filed pursuant to S.C. Code Ann. § 17-27-45(B) inasmuch as it is filed within one year of the announcement of the new legal standard announced in *Graham*.

Applicant submits that the facts and arguments set forth in his Application for Relief, and his Amended Application, clearly support his position that he is entitled to a review of this Application on its merits. While the procedural history in this case is somewhat long and confusing, one clear fact emerges, Applicant received a life without parole sentence based upon §17-25-45 where the settled law now holds that a conviction for a predicate offense, or offenses, committed within the same twenty-four hour time period as the later offense, *may not* used to enhance the penalty in the latter offense(s). Although the offense of First Degree Burglary carried a possible maximum sentence of life, the record below makes plain the fact that the sentencing judge viewed the imposition of a life sentence on this burglary charge to be mandatory pursuant to §17-25-45 and that he was not sentencing Applicant to life in exercise of his sentencing discretion for that crime. Applicant believes the record on this point is abundantly clear however, if there were any inclination of the Court to find that the sentence may have been handed down as a discretionary life sentence for First degree Burglary, Applicant further submits that the sentence should be revisited in light of the *Graham* decision. It is Applicant's position that the sentencing court would have been far less likely to impose a discretionary life sentence on a defendant a mere fourth months and eleven days past his eighteenth birthday in the wake of the *Graham* decision wherein the United States Supreme Court held that such a penalty may not be imposed on a minor.

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Applicant respectfully prays that the Conditional Order of Dismissal filed in this matter not be made final. He asks that an evidentiary hearing be scheduled on the merits of the allegations raised in his current PCR Application, and his Amended PCR Application. In the event this Court is disinclined to grant Applicant's request for a hearing, he would ask that any Final Order of Dismissal entered on this Application for Post-Conviction Relief make specific findings of fact and rulings of law on the matters addressed herein so as to preserve these important issues for appellate review. If this Court grants an evidentiary hearing on the merits of this application, Applicant respectfully asks that the hearing in this case be scheduled for the same date as a hearing in the companion case docketed at **2011-CP-08-1841** inasmuch as the procedural histories in these two cases are so intertwined, and the issues addressed in the two applications are so related, that it would be difficult to fairly hear either of these matters independently of the other. *See, Application and Amended Application in 2011-CP-08-1841 attached.*

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 26th day of January, 2015.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

STEPHEN J. GREEN, 259765,) 2011-CP-08-1840
Applicant,)
)
v.) CERTIFICATE OF SERVICE
)
)
)
THE STATE OF SOUTH CAROLINA,)
Respondent.)
_____)

15 JAN 30 AM 11:55
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

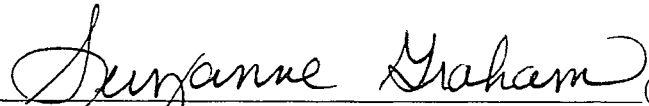
The undersigned hereby certifies that a true copy of the Reply to Conditional Order of Dismissal in the above matter has been served on the Honorable Roger M. Young, this the 26th day of January, 2015, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable Roger M. Young
Chief Judge for Administrative Purposes
Ninth Judicial Circuit
100 Broad Street, Ste. 368
Charleston, S.C. 29401

The original having been sent to the Berkeley County Clerk of Court for filing.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE ME this 26th day of
January, 2015.


Suzanne Graham (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

STEPHEN J. GREEN, 259765,) 2011-CP-08-1840
Applicant,)

v.) CERTIFICATE OF SERVICE
)
)
)

THE STATE OF SOUTH CAROLINA,)
Respondent.)
_____)

15 JAN 30 AM 11:52
MARY P. BOGGS
CLERK OF COURT
BERKELEY COUNTY

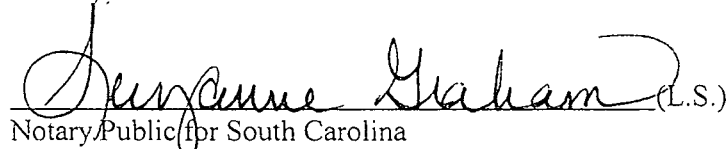
The undersigned hereby certifies that a true copy of the Reply to Conditional Order of Dismissal in the above matter has been served on opposing counsel, Elizabeth H. Neyle, Assistant Attorney General, this the 26th day of January, 2015, by mailing one (1) copy in a stamped envelope properly addressed to:

Elizabeth H. Neyle
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Berkeley County Clerk of Court for filing.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE ME this 26th day of
January, 2015.


Notary Public for South Carolina (L.S.)

My Commission Expires: 2/28/24

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

E-Mail: tdslaw@shurlinglaw.com

(803) 738-8622

RECEIVED
FAX (803) 738-1600

June 17, 2015

JUN 22 2015

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

S.C. SUPREME COURT

Re: Stephen J. Green, #259765 v. State of South Carolina; 2011-CP-08-1840.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal in the above captioned Post-Conviction Relief matter along with proof of service on opposing counsel. This Notice addresses the client's intent to appeal the Order of Dismissal issued by Judge Young in this matter. I was retained to represent this client in the circuit court only. The family has not yet advised me whether they intend to hire me to handle this appeal. I am asking that they make this decision immediately. I am providing the client copies of this Notice of Appeal, and a Form Affidavit of Indigency. I am instructing him to fill it out and return it to me immediately for submission to Appellate Division of the South Carolina Commission on Indigent Defense, *if he wishes to seek representation by them*. I am sending the affidavit for him to execute and return to me so I will be prepared to act quickly if he decides to seek representation by SCCID. I will make certain he is aware that time is of the essence, and that he must return his affidavit to me immediately. For now, I would appreciate having the two additional copies of this notice enclosed with this correspondence clocked and returned to me in the self-addressed, stamped envelope provided. With my thanks for your kind assistance always, I am,

Sincerely yours,

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: J. Rutledge Johnson, Assistant Attorney General
Lorienne French, Legal Service Coordinate, Appellate Defense
Stephen J. Green, #259765
Ms. Clareon S. McNeill

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

June 17, 2015

J. Rutledge Johnson, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: Stephen J. Green, #259765 v. State of South Carolina; 2011-CP-08-1840.

Dear Mr. Johnson:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. The family has not decided yet if they will be able to hire me to handle this appeal. I will let you know if they decide to hire someone else or let the Appellate Division of the South Carolina Commission on Indigent Defense handle this appeal. I am copying you on this correspondence since Elizabeth Neyle is no longer with your office, and I understand you are now handling this circuit. I remain,

Sincerely yours,

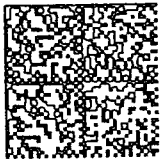
A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina ✓
Stephen J. Green, #259765
Clareon S. McNeill



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MAILED FROM ZIP CODE 29204

Law Office of

TARA DAWN SHURLING, PA

3614 LANDMARK DRIVE, SUITE A
COLUMBIA, SOUTH CAROLINA 29204



The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330