

LAW OFFICE OF



**TARA DAWN SHURLING, PA**

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**RECEIVED**

August 25, 2016

AUG 29 2016

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-08-1841.

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 Dennis in this matter. I was retained to represent this client in the circuit court only. They paid me a small additional fee for my agreement to respond to the Court's inquiry pursuant to Rule 267. I have not been retained to perfect an appeal should this matter be allowed to proceed. 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. The client has been provided copies of this Notice of Appeal, and a Form Affidavit of Indigency. He has been instructed 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 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



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August 25, 2016

**RECEIVED**

AUG 29 2016

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

**S.C. SUPREME COURT**

RE: Stephen J. Green, #259765 v. State of South Carolina; 2011-CP-08-1841.

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. They have paid me to respond to the Rule 267 inquiry and will make a decision about representation for the balance of the appeal if it is allowed to advance forward. If the appeal makes it past the Rule 267 stage, 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". The signature is written over the typed name and title.

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

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas  
W. Jeffery Young, Presiding Judge

2011-CP-08-1841

RECEIVED

AUG 29 2016

S.C. SUPREME COURT

STEPHEN J. GREEN, #259765

Applicant,

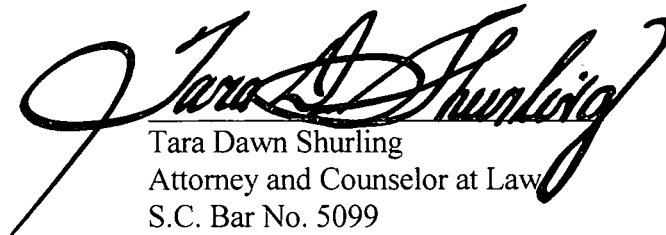
v.

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 6, 2015 and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRPC which was filed with the Berkeley County Clerk of Court on July 22, 2016 and received by undersigned counsel on July 28, 2016.

  
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 25<sup>th</sup> day of August, 2016.

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

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

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2011-CP-08-1840

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STEPHEN J. GREEN, #259765,

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

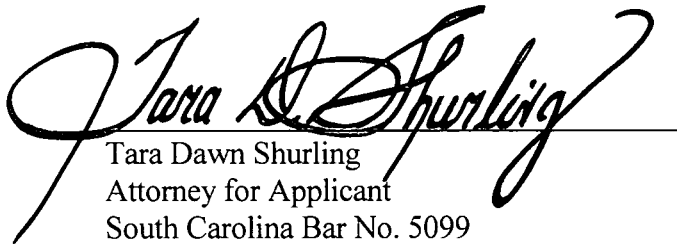
Respondent.

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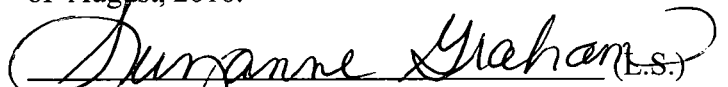
CERTIFICATE OF SERVICE

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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 25<sup>th</sup> day of August, 2016.

  
Tara Dawn Shurling  
Attorney for Applicant  
South Carolina Bar No. 5099

SWORN TO BEFORE me this 25<sup>th</sup> day  
of August, 2016.

  
Notary Public for South Carolina  
My Commission Expires: 2/28/24



pursuant to Graham v. Florida<sup>1</sup>, as Applicant was not a juvenile when he committed these crimes; and

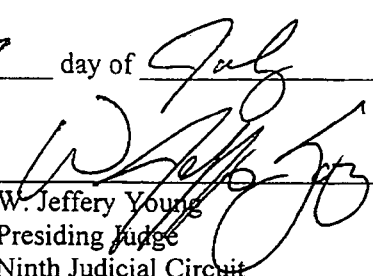
4. This Court improperly found that laches bars Applicant claims as he waited over eight years from the denial of his first PCR action to file this application.

Having carefully reviewed the entire record in this matter, this Court finds that no basis for altering or amending is prior ruling. This Court also finds the Applicant is merely asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

Therefore, this Court hereby denies the Applicant's Rule 59 Motion in its entirety, and affirms the previous Order of Dismissal.

This Court advises that if the Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Rule 59 Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND IT IS SO ORDERED this 7 day of July, 2016.

  
\_\_\_\_\_  
W. Jeffery Young  
Presiding Judge  
Ninth Judicial Circuit

Samter, South Carolina

<sup>1</sup> 560 U.S. 48 (2010)

**RECEIVED**

AUG 29 2016

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY  
IN THE COURT OF COMMON PLEAS

---

STEPHEN J. GREEN, #259765

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Order Denying Applicant's Motion to Alter of Amend** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Tara Shurling, Esquire  
3614 Landmark Drive, Suite A  
Columbia, South Carolina 29204**

This 27<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
J. RUTLEDGE JOHNSON  
Attorney for Respondent

SWORN to before me this 27<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 12/16/2024

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

2011-CP-08-1841

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

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**FINAL ORDER OF DISMISSAL**

2015 FEB -6 PM 1:33  
CLERK OF COURT  
BERKELEY COUNTY, SC  
FILED

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 6, 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.

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

*rm dg/c*

sexual conduct in the first degree (1999-GS-08-0391).<sup>1</sup> Applicant proceeded to trial, and a jury found him guilty as indicted. J. Mitchell Lanier, Esquire, represented Applicant. On July 14, 1999, the Honorable Daniel F. Pieper sentenced Applicant to life imprisonment. Applicant appealed, and following an *Anders*<sup>2</sup> brief, the South Carolina Court of Appeals dismissed his appeal. *State v. Green*, Op. No. 2000-UP-740 (S.C. Ct. App. filed Dec. 5, 2000). The remittitur was issued on February 28, 2001.

Applicant filed his first PCR application (2001-CP-08-2537) on December 3, 2001, alleging the following grounds for relief:

1. Ineffective assistance of counsel for counsel's failure to argue mercy.
2. Lack of subject matter jurisdiction.

Respondent filed its return on May 8, 2002. Edward Brown, Esquire, represented Applicant. An evidentiary hearing was held on June 3, 2002, where Applicant amended his application to include the following ground for relief:

1. Ineffective assistance of counsel for counsel's failure to call or contact certain alibi witnesses.

By order filed July 10, 2002, the Honorable R. Markley Dennis, Jr. denied and dismissed the application.

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

1. Lack of subject-matter jurisdiction.

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<sup>1</sup> Applicant was also 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. On November 16, 1999, the Honorable R. Markley Dennis, Jr. sentenced him to life imprisonment.

<sup>2</sup> *Anders v. California*, 386 U.S. 738 (1967).

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.

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:

1. The Applicant seeks resentencing on all counts on the ground that the sentences he received on these judgments may have been influenced by the fact that the Applicant had additional most serious charges pending for trial on which it was widely accepted at the time he would face a mandatory life sentence and further, that the sentencing judge may not have given the

Applicant the sentences he imposed had they not been run concurrent with a life sentence.

2. The Applicant should be re-sentenced on his judgments and sentences entered on July 14, 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.
3. The Applicant filed a Post-Conviction Relief on the judgments addressed herein for which sentence was imposed on July 14, 1999. That application was denied by Order dated July 10, 2002, however the Applicant's right to appeal from said order was not preserved by his PCR counsel.

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 that the "sentencing judge in his first trial may have been influenced to impose a life sentence for first degree burglary by the fact that the Applicant was likely to receive a life sentence on his other pending most serious charges." Applicant's assertion is misguided and meritless.

Further, this claim is successive and could have been raised in his prior applications. *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.* Applicant bears the burden of showing that he could not have previously raised the allegation. *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 this ground for relief in a previous application.

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 nine years** after the statutory filing period expired. *See Peloquin 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.

Finally, Applicant is not entitled to an *Austin v. State* appeal and this claim is successive and barred by the doctrine of laches.

The South Carolina Supreme Court has held that an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Applicant failed to allege any facts showing that he requested and was denied the opportunity to seek appellate review. Applicant merely states that his right to appellate review was not preserved by his PCR counsel. Applicant's *Austin* claim lacks merit and warrants dismissal.

Applicant's third and current application is successive. Although Applicant did not raise this *Austin* claim in his second PCR action, he *could have* raised this claim in his second action. *See Bray v. State*, 366 S.C. 137, 141, 620 S.E.2d 743, 745 (2005) (stating that "although petitioner did not raise an allegation that he was denied the right to review his first PCR application in his second PCR action, he could have raised this allegation"). A defendant has the

procedural right to one fair bite at the apple, a right that includes the right to file a direct appeal and one PCR application. *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 583 (2002). Because Applicant was granted the right to file a direct appeal and two PCR applications, including an appeal of his 2004 PCR application, this Court finds Applicant has received a full bite at the apple. Thus, Applicant's *Austin* claim is impermissibly successive.

Further, this Court finds Applicant's *Austin* claim is barred by the doctrine of laches. Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002) (quoting *Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988)).

Applicant filed this application **more than eight years** after the denial of his first PCR application. Applicant offered no explanation for the delay in asserting his *Austin* claim. To ensure finality of litigation, our courts require reasonable diligence in pursuing relief. *Bray*, 366 S.C. at 139, 620 S.E.2d at 745 (finding that even though the PCR court found petitioner did not knowingly and intelligently waive his right to appellate review of the denial of his first PCR application, laches barred his subsequent action, filed seven years after the denial of his first PCR application). This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." *McElrath v. State*, 276 S.C. 282, 283, 277 S.E.2d 890, 890-91 (1981). Applicant's delay greatly prejudices Respondent. Due to Applicant's neglect in filing his *Austin* claim more than eight years after the order of dismissal

from his first application, a full transcript of Applicant's first post-conviction hearing may no longer be available.<sup>3</sup> This Court dismisses Applicant's *Austin* claim as successive and barred by the doctrine of laches.

IV.


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.

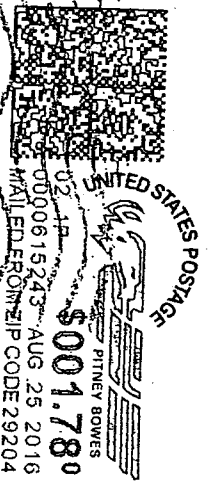
This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty days of the service of this order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 227, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 6<sup>th</sup> day of February, 2015.

  
R. MARKLEY DENNIS, JR.  
Chief Judge for Administrative Purposes  
Ninth Judicial Circuit

Marko Carter, South Carolina

<sup>3</sup> Rule 607 of the South Carolina Appellate Court Rules states that transcripts must be retained for a period of five years. If a transcript is not ordered within the five-year period, the records are destroyed.



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COLUMBIA SC 292

SAT 27 AUG 2016 AM



Law Office of

**TARA DAWN SHURLING, PA**

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COLUMBIA, SOUTH CAROLINA 29204



The Honorable Daniel E. Shearouse  
South Carolina Supreme Court Clerk  
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