

No. _____

In the Supreme Court of the United States

KAYLEN DEWAYNE SIMMONS,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

*On Petition for Writ of Certiorari to the Court of Appeals
for the First Supreme Judicial District of Texas*

PETITION FOR WRIT OF CERTIORARI

Joseph R. Willie, II, D.D.S., J.D.
Counsel of Record
WILLIE & ASSOCIATES, P.C.
4151 Southwest Freeway
Suite 490
Houston, Texas 77027
(713) 659-7330
attyjrwii@wisamlawyers.com

Counsel for Petitioner

QUESTIONS PRESENTED

- 1) Whether the Court of Appeals erred in affirming in part the judgments of the trial court by not performing the constitutionally mandated factual sufficiency review of the Petitioner's affirmative defenses of indigency and impossibility.
- 2) Concerning the Petitioner's affirmative defense of indigency, whether the Court of Appeals' opinion conflicts with the Court's binding precedent, the Court of Criminal Appeals of Texas' binding precedent as well as the precedent of the courts of last resort in several states.

LIST OF PARTIES

Petitioner certifies that the following is a complete list of the names of all parties.

PETITIONER:

Kaylen DeWayne Simmons

RESPONDENT:

The State of Texas

ATTORNEYS:

Joseph R. Willie, II, D.D.S., J.D
4151 Southwest Freeway, Suite 490
Houston, Texas 77027
(713) 659-7330
Kaylen DeWayne Simmons

Rebecca Klaren, Esquire
Assistant Galveston County District Attorney
600 59th Street, Suite 1001
Galveston, Texas 77551
(409) 766-2355
The State of Texas

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
PRAYER	1
OPINIONS/ORDERS	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. The Court of Appeals erred by not performing the mandated factual sufficiency review of the Petitioner's affirmative defenses in violation of U.S. CONST. amend. XIV and TEX. CONST. art. V, § 6.	3
II. Concerning indigency, the Court of Appeals' opinion conflicts with this Court's binding precedent as well as precedent of various state courts of last resort.	7
CONCLUSION	9
APPENDIX	
Appendix A Memorandum Opinion in the Court of Appeals for the First District of Texas (June 26, 2018)	App. 1

Appendix B	Order on Appellant's Motion for En Banc Reconsideration in the Court of Appeals for the First District of Texas at Houston (August 21, 2018)	App. 7
Appendix C	Judgment Adjudicating Guilt in the 212th Judicial District Court of Galveston County, Texas, Case No. 11CR3445 (July 27, 2017)	App. 9
Appendix D	Judgment Adjudicating Guilt in the 212th Judicial District Court of Galveston County, Texas, Case No. 12CR2519 (July 27, 2017)	App. 20
Appendix E	Order Denying Petition for Discretionary Review in the Court of Criminal Appeals of Texas (October 10, 2018)	App. 31
Appendix F	U.S. CONST. amend. XIV TEX. CONST. art. 1, § 3 TEX. CONST. art. 1, § 19 TEX. CONST. art. V, § 6 TEX. PEN. CODE § 2.04	App. 32 App. 32 App. 32 App. 33 App. 33

TABLE OF AUTHORITIES**CASES**

<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983)	5, 6, 8
<i>Black v. Romano</i> , 471 U.S. 606 (1985)	6, 8
<i>Commonwealth of Kentucky v. Marshall</i> , 345 S.W.3d 822 (Ky. 2011)	8
<i>Commonwealth of Massachusetts v. Henry</i> , 55 N.E. 943 (Mass. 2016)	8
<i>Debusk v. State</i> , No. 05-16-00947-CR, 2017 WL 3275904 (Tex. App.--Dallas Jul. 27, 2017, pet. ref'd)	6
<i>Drain v. State</i> , 664 S.W.2d 484 (Ark. Ct. App. 1984)	8
<i>Hill v. State</i> , 719 S.W.2d 199 (Tex. Crim. App. 1986)	6
<i>Matlock v. State</i> , 392 S.W.3d 662 (Tex. Crim. App. 2013)	6
<i>Molinas v. Comm'r of Corr.</i> , 652 A.2d 481 (Conn. 1994)	8
<i>Munguia v. State</i> , No. 11-16-00048-CR, 2018 WL 826751 (Tex. App.--Eastland Feb. 8, 2018, no pet.)	6

<i>Ortega v. State</i> , Nos. 07-99-0228-CR & 07-99-0233-CR, 2001 WL 667887 (Tex. App.--Amarillo Jun. 14, 2001, pet. ref'd)	7, 8
<i>Smith v. Whatcom Cnty. Dist. Court</i> , 52 P.3d 485 (Wash. 2002)	8
<i>Standfield v. State</i> , 718 S.W.2d 734 (Tex. Crim. App. 1986)	7
<i>State v. Fowlie</i> , 636 A.2d 1037 (N.H. 1994)	8
<i>State v. Jimenez</i> , 810 P.2d 801 (N.M. 1991)	8
<i>State ex el. Fleming v. Missouri Bd. of Prob. and Parole</i> , 515 S.W.3d 224 (Mo. 2017)	8
<i>Washington v. State</i> , 731 S.W.2d 648 (Tex. App.--Houston [1st Dist.] 1987, no pet.)	7
CONSTITUTIONS	
U.S. CONST. amend. XIV	1, 3, 6
TEX. CONST. art. I, § 3	1, 6
TEX. CONST. art. I, § 19	1, 6
TEX. CONST. art. V, § 6	1, 3, 6
STATUTES	
28 U.S.C. § 1257(a)	1
TEX. PEN. CODE § 2.04	1, 5

OTHER

BARRON'S LAW DICTIONARY 122 (2d ed. 1984)	5
BLACK'S LAW DICTIONARY 60 (6th ed. 1990)	5

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

Petitioner herein prays that a Writ of Certiorari issue to the Court of Appeals for the First Supreme Judicial District of Texas to review that court's June 26, 2018 Opinion and Judgment.

OPINIONS/ORDERS BELOW

The Opinion and Judgment of the Court of Appeals for the First Supreme Judicial District of Texas entered on June 26, 2018, and from which review is sought, is unreported but can be found at 2018 WL 3117876, is attached as Appendix A.

JURISDICTION

The Order of the Court of Criminal Appeals of Texas denying the Petition for Discretionary Review was entered on October 10, 2018. The Petition for Writ of Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

This case arises under U.S. CONST. amend. XIV, TEX. CONST. art. I, § 3, TEX. CONST. art. I, § 19, TEX. CONST. art. V, § 6 and TEX. PEN. CODE § 2.04. The constitutional provisions and statute are reprinted in the Appendix as Appendix F.

STATEMENT OF THE CASE

On September 9, 2016, the State of Texas filed Motions to Adjudicate Guilt on Cause Nos. 11-CR-3445 and 12-CR-2517. The allegations in both motions were virtually identical. (1C.R.32-34; 2C.R. 42-44.) On July 27, 2017, the trial court held a consolidated hearing on both motions. (C.R.R. 1-62.) At the conclusion of the hearing, the trial court revoked the Petitioner's community supervision and imposed a sentence of four years' incarceration in the Texas Department of Criminal Justice-Institutional Division in both cases. The sentences are to be served concurrently. (1C.R. 64-68; 2C.R. 67-71.) (Appendices C and D.)

On July 27, 2017, the Petitioner timely filed his Notice of Appeal in both cases and perfected his appeal to the Court of Appeals for the First Supreme Judicial District of Texas. On June 26, 2018, the Court of Appeals issued its opinion affirming in part and modifying in part the order of the trial court. (Appendix A.) On July 2, 2018, the Petitioner filed his Motion for Rehearing *En Banc*. On August 21, 2018, the Court of Appeals denied the Motion for Rehearing *En Banc*. (Appendix B.)

On August 29, 2018, the Petitioner filed his Petition for Discretionary Review with the Court of Criminal Appeals of Texas. On October 10, 2018, the Court of Criminal Appeals of Texas refused the Petition for Discretionary Review. (Appendix E.) This present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred by not performing the mandated factual sufficiency review of the Petitioner's affirmative defenses in violation of U.S. CONST. amend. XIV and TEX. CONST. art. V, § 6.

The Court of Appeals did not perform the required factual sufficiency review of the affirmative defenses that were proffered by the Petitioner in the trial court below.

TEX. CONST. art. V, § 6 states in pertinent part:

Provided, that the decision of said [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.

(Emphasis added.)

On September 13, 2017, the 212th Judicial District Court of Galveston County, Texas issued a writ of habeas corpus for the arrest of the Petitioner concerning alleged violations of the terms of community supervision in Cause Nos. 11-CR-3445 and 12-CR-2517. (1C.R. 36; 2 C.R. 45.) The Petitioner was being held in the Brazoria County Jail for 3 1/2 months before he was extradited to the Galveston County Jail on October 21, 2017. (1C.R. 39-40; 2C.R. 48-49; C.R.R. 20-21, 28-29, 47-48.)

Ms. Griffin testified that the Galveston County Probation Department never performed a financial study of the Petitioner. (C.R.R. 23.) Ms. Griffin testified that no costs or fees were assessed against the Petitioner in Cause No. 12-CR-2519. (C.R.R. 22.) She

also testified that she knew that the Petitioner was not employed. (C.R.R.23.) Ms. Griffin testified that she was not aware that the Petitioner was incarcerated at the Brazoria County Jail for 3 1/2 months before being extradited to Galveston County, Texas. (C.R.R. 20-21, 28.) Ms. Griffin testified that due to his incarceration at the Brazoria County Jail, it would be physically impossible for him to report to the Galveston County Probation Department and it would be impossible for the Petitioner to pay any alleged arrearages and to perform community service. (C.R.R. 28-29.) Ms. Griffin testified the Petitioner was not given any monetary credit towards costs and fees for the time he spent in the Brazoria County Jail awaiting extradition to Galveston County, Texas. (C.R.R. 29.) Lastly, Ms. Griffin testified that there was no final conviction from Brazoria County that the Petitioner broke any other laws of the State of Texas or the United States. (C.R.R. 29-30.)

The Petitioner testified that he was not able to make his appointments with the Galveston County Probation Department while he was incarcerated in the Brazoria County Jail, that he was not able to work during that time period and that he was not able to pay any fees or costs during that time period. (C.R.R. 47-48, 51-52, 54-55.) The Petitioner testified that although he diligently looked for employment, he was not able to obtain gainful employment. (C.R.R. 51-52, 54.) The Petitioner further testified, under cross-examination, that he couldn't finish his community service hours because the Galveston County Probation Department decertified the facility where he was performing community service and he did not get final approval to

perform community service at a new facility until after February, 2017. (C.R.R. 56-57.)

BLACK'S LAW DICTIONARY 60 (6th ed. 1990), defines an affirmative defense as:

[M]atter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it.

BARRON'S LAW DICTIONARY 122 (2d ed. 1984), defines an affirmative defense as:

[O]ne which serves as a basis for proving some new fact; in such a defense, defendant does not simply **deny** a **charge**, but offers new **evidence** to avoid **judgment** against him; . . .

(Emphasis in original). *See also* TEX. PEN. CODE § 2.04.

This Court in *Bearden v. Georgia*, 461 U.S. 660, 668-669 (1983), held:

But if the probationer has made all reasonable to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a “substantial reason which justifies or mitigate[s] the violation and make[s] revocation inappropriate.”

(Emphasis added.) (Citations omitted.)

This Court in *Black v. Romano*, 471 U.S. 606, 615 (1985), held:

“[D]epriving of his conditional freedom simply because, through no fault of his own, he cannot pay the fine” would be “contrary to the fundamental fairness required by the Fourteenth Amendment.”

(Emphasis added.) (Citation omitted.)

The trial court nor the Court of Appeals ever conducted such a factual analysis. The Court in *Hill v. State*, 719 S.W.2d 199, 201-203 (Tex. Crim. App. 1986), held that if a defendant presented affirmative defense(s) that have been rejected by the trier of fact, a court of appeals must conduct a factual sufficiency review of a defendant’s affirmative defense(s). *See also Matlock v. State*, 392 S.W.3d 662, 670-674 (Tex. Crim. App. 2013); *Debusk v. State*, No. 05-16-00947-CR, 2017 WL 3275904, at *9 (Tex. App.--Dallas Jul. 27, 2017, pet. ref’d); *Munguia v. State*, No. 11-16-00048-CR, 2018 WL 826751, at *7 (Tex. App.--Eastland Feb. 8, 2018, no pet.).

The opinion of the Court of Appeals is completely devoid of any required factual sufficiency review of the evidence concerning the Petitioner’s affirmative defenses and such is reversible error. *See Bearden*, 461 U.S. at 673-674; *Black*, 471 U.S. at 620 (Marshall, J., concurring); *Matlock*, 392 S.W.3d at 670; *Debusk*, 2017 WL 3275904, at *9. The Equal Protection and Due Process Rights of the Petitioner guaranteed by U.S. CONST. amend. XIV, TEX. CONST. art. I, §§ 3 and 19 and TEX. CONST. art. V, § 6 have been violated. The opinion of the Court of Appeals should be reversed and the case

remanded to the trial court to reinstate the Petitioner's community supervision or, in the alternative, the opinion of the Court of Appeals should be reversed and remanded to the Court of Appeals to conduct a factual sufficiency review of the Petitioner's affirmative defenses.

II. Concerning indigency, the Court of Appeals' opinion conflicts with this Court's binding precedent as well as precedent of various state courts of last resort.

On pages 2 through 4 of the Brief of Appellant, pages 5 through 6 of the Reply Brief of the Appellant and Appellant's Motion for Rehearing *En Banc* that were filed in the Court of Appeals, the Petitioner conclusively provided appellate record evidence, appellate record references and case law pertinent to his affirmative defenses of indigency and that the State failed to carry its burden of proof that the Petitioner's conduct concerning fees was intentional. *Standfield v. State*, 718 S.W.2d 734, 738 (Tex. Crim. App. 1986). Additionally, the Petitioner provided uncontroverted evidence of his affirmative defenses of his incarceration in the Brazoria County Jail pending his extradition to Galveston County and that the Galveston County Probation Department decertified the facility where the Petitioner was performing community service and that the Petitioner did not get final approval to perform community service at a new facility until after February, 2017. Thus, the evidence was factually insufficient to affirm the judgment of the trial court. See *Standfield, supra*; *Washington v. State*, 731 S.W.2d 648, 650 (Tex. App.--Houston [1st Dist.] 1987, no pet.); *Ortega v. State*, Nos. 07-99-0228-CR & 07-99-0233-CR,

2001 WL 667887, at *4 (Tex. App.--Amarillo Jun. 14, 2001, pet. ref'd). The Court of Appeals did not address the issue that was properly before it.

The Court of Appeals' opinion concerning the affirmative defenses of indigency and awaiting extradition are in conflict with *Bearden*, *Black*, the Court of Criminal Appeals of Texas and its own precedent, as enumerated above, seven (7) state courts of last resort and one state court of appeals. See *State ex el. Fleming v. Missouri Board of Probation and Parole*, 515 S.W.3d 224, 229-230 (Mo. 2017); *Commonwealth of Massachusetts v. Henry*, 55 N.E. 943, 950-951 (Mass. 2016); *Commonwealth of Kentucky v. Marshall*, 345 S.W.3d 822, 827-834 (Ky. 2011); *Smith v. Whatcom County District Court*, 52 P.3d 485, 492-493 (Wash. 2002); *Molinias v. Commissioner of Corrections*, 652 A.2d 481, 485-486 (Conn. 1994); *State v. Fowlie*, 636 A.2d 1037, 1039 (N.H. 1994); *State v. Jimenez*, 810 P.2d 801, 803-807 (N.M. 1991); *Drain v. State*, 664 S.W.2d 484, 485-488 (Ark. Ct. App. 1984). This Court is respectfully requested to resolve the jurisprudential conflicts. The opinion of the Court of Appeals should be reversed and the case remanded to the trial court to reinstate the Petitioner's community supervision or, in the alternative, the opinion of the Court of Appeals should be reversed and remanded to the Court of Appeals to conduct a factual sufficiency review of the Petitioner's affirmative defenses.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the June 26, 2018 Opinion and Judgment of the Court of Appeals for the First Supreme Judicial District of Texas.

Respectfully submitted,

Joseph R. Willie, II, D.D.S., J.D.
Counsel of Record
WILLIE & ASSOCIATES, P.C.
4151 Southwest Freeway, Suite 490
Houston, Texas 77027
(713) 659-7330
attyjrwii@wisamlawyers.com

Counsel for Petitioner