

No.

In The Supreme Court of the United States

REGINALD EDWARD GREEN, PETITIONER

V.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

in forma pauperis

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QUESTION PRESENTED

Is displaying a picture of a defendant shackled, handcuffed, in prison garb and being held by prison staff, over objection, still more prejudicial than probative, and a violation of a fundamentally fair trial under the Fifth Amendment, in American courtrooms or can it be disregarded based upon unfounded procedural grounds?

TABLE OF CONTENTS

Opinion below	4
Jurisdiction	5
Statutory provisions involved	5
Statement of the Case	5
Reasons for granting the petition	10
Conclusion.....	12
Appendix.....	14

TABLE OF AUTHORITIES

Cases:

<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S.Ct. 1691 (1976)	11
<i>Holbrook v. Flynn</i> , 475 U.S. 560, 569, 106 S.Ct. 1340, 1346 (1986)	11
<i>Kennedy v. Cardwell</i> , 487 F.2d 101 (6th Cir.1973), <i>cert. denied</i> , 416 U.S. 959, 94 S.Ct. 1976 (1974)	12
<i>United States v. McRae</i> , 593 F.2d 7005 th Cir.), <i>cert. denied</i> , 444 U.S. 862, 100 S.Ct. 128 (1979)	11
<i>United States v. Reginald Green</i> , 787 Fed. Appx. 844, 2019 WL 6835950, No. 19-40097 (5 th Cir. Dec. 13, 2019)	10
<i>Wright v. Texas</i> , 533 F.2d 185 (5th Cir.1976)	12

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PETITION FOR A WRIT OF CERTIORARI

Don Bailey, on behalf of Reginald Edward Green, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 2) is reported at 787 Fed. Appx. 844, 2019 WL 6835950. The United States District Court for the Eastern District of Texas entered a Judgment, sentencing Mr. Green to 24 months, on January 23, 2019(Pet. App. 1).

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This appeal is submitted pursuant to Supreme Court rule 10(a) in that the underlying decision by the Fifth Circuit sanctioned a departure of normal judicial process by a lower court to such an extent as to call for this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right to a fundamentally fair trial under the Fifth Amendment to the Constitution when the Trial Court admits inherently prejudicial material in violation of both the Fifth Amendment and Rule 403 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

On February 2, 2018, Mr. Reginald Green was an inmate at the Federal Prison in Beaumont, Texas. On that date, he was subsequently charged with striking Officer Jonathan Cotter, with a closed fist, in the eye and cheek, causing bodily injury (ROA.12-13)

On July 9, 2018, jury selection began. (ROA.169-170) The specific facts set out at trial are that on February 2, 2018, Officer Jonathan Cotter was assigned to

the education corridor at the United States Penitentiary in Beaumont, Texas. He noticed that Mr. Green, an inmate, was hanging around the education corridor when he should not have been there. Mr. Green appeared to be disheveled with his shirt untucked, boots not tied and collar messed up. (ROA.250-260) Officer Cotter approached Mr. Green and asked him where he needed to be. Mr. Green would not respond. Officer Cotter had to leave to help with inmate movement but returned in 10-12 minutes. Mr. Green was still looking disheveled. Officer Cotter decided he was going to require Mr. Green to submit to a urinalysis. Mr. Green went with Officer Cotter to the urinalysis room. (ROA.260-266)

Once in the urinalysis room, Officer Cotter handed Mr. Green a urinalysis cup and began to fill out the paperwork. Officer Cotter then heard Mr. Green say “I guess I have to assault staff in this motherf---ker” and struck Officer Cotter in the side of the head with his fist. (ROA.267-272) Officer Cotter then pinned Mr. Green to the ground and hit his body alarm. Other officers arrived and were able to place restraints on Mr. Green. Officer Cotter was taken to medical where pictures of his injury was taken. There was also photos taken of the injury several days later when the area around the eye had bruised and swollen up. It took approximately 10-12 days before the swelling and discoloration was gone. (ROA.273-280)

Officer Brandon Gassiott responded to the sound of keys shuffling from Officer Cotter in the urinalysis room. Officer Gassiott assisted in placing restraints on Mr. Green. (ROA.304-310)

Lieutenant Jesse Robinson was working the special housing unit on February 2, 2018. Lt. Robinson responded to Officer Cotter's body alarm. When he arrived Lt. Robinson observed that Mr. Green had been restrained. Mr. Green was taken to medical and then the special housing unit. While checking on Mr. Green, Lt. Robinson heard him say "I had to get staff" about two times. (ROA.317-328)

During the testimony of Lt. Robinson, the Government introduced Government's exhibit # 3 for admission. (ROA.323-325)(Pet. Appx. 3)

Government's exhibit number 3 is a picture prepared by the Federal Correctional Complex in Beaumont, Texas with a large title on the top with the Department of Justice and Bureau of Prisons logo on each side. It is labeled "evidence photograph(s)" and contains a picture of Mr. Green with shackles on his hands and a belly chain lock being held in his hand while sitting at the infirmary with officers holding him while a medical provider examines him. Below the picture there is a block which states this was an "inmate assault on staff" the person who took the picture, the staff members involved, (J. Cotter and B. Gassiott) and the inmate involved "Green, Reginald, Reg. No. 45657-007." (ROA.490)(attached as record

excerpt number 6) Mr. Green's attorney objected because the picture was more prejudicial than probative and Mr. Green was in handcuffs. The Court overruled the objection and admitted the exhibit.¹

Mr. Green testified that he had been in the Penitentiary at Beaumont since January 11, 2017, serving a sentence for voluntary manslaughter imposed in the District of Colombia. On February 2, 2018, Mr. Green went to the Lieutenant's office to request protective custody. Mr. Green informed an unidentified officer that he wanted protective custody. After talking to him for several minutes the officer went into the Lieutenant's office. A captain then asked Mr. Green what he was standing outside for and he again explained that he was requesting protective custody. Mr. Green pulled his shirt out due to frustration with not being able to get help. (ROA.340-347)

Officer Cotter then approached Mr. Green and asked him what he was doing. Mr. Green told Officer Cotter he was seeking protective custody. Officer Cotter made a comment about "f—cking checking in." Mr. Green responded by calling Officer Cotter a b-tch" Officer Cotter responded by calling Mr. Green a coward and Mr. Green responded by calling Officer Cotter a "b-tch." Officer Cotter stated that "you're going to get yours" and walked off. When Officer Cotter reappeared approximately 10 minutes later he told Mr. Green that the new policy

¹ Mr. Green's attorney did not make an objection based upon hearsay due to the picture containing a number of hearsay statements and statements that were intended to bolster the Government's case. But, it is certainly more prejudicial than probative.

for inmates seeking to be placed in protective custody was to provide a urine sample. Officer Cotter took Mr. Green to the urinalysis room or closet. When they got into the urinalysis room Officer Cotter confronted him with being called a name. The incident escalated to where Officer Cotter began swinging at him “40-50” times and Mr. Green defended himself. Officers then responded to the body alarm. (ROA.348-352)

After Mr. Green’s testimony and cross examination the defense rested. (ROA.374)

On July 10, 2018, the Court read final instructions to the jury and the parties made final arguments. (ROA.403-451) The jury initially could not reach a verdict but after further deliberation reached a verdict. The jury found Mr. Green guilty of the offense. (ROA.115, 452-459)

On January 23, 2019, the Court held sentencing for Mr. Green. (ROA.468-479) The Court sentenced Mr. Green to 24 months in prison to run consecutive to his current sentence. (ROA. 471-474) Judgment was entered on January 28, 2019. (ROA.123-129)

The specific basis of the objection was brought on direct appeal as a violation of Rule 403 and additionally the due process clause of the Fifth Amendment. The Fifth Circuit determined that because the error was couched in terms of a Constitutional error versus an evidentiary one, even though it was

brought as both, the issue was abandoned. *United States v. Reginald Green*, No. 19-40097 at 2 (5th Cir. Dec. 13, 2019)

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision is so far afield of normal judicial process in sanctioning the District Court's underlying erroneous determination that this Court's supervisory power is warranted.

The Fifth Circuit asserted that the claim presented was not the same as what was objected to at trial. However, this is simply not true. Mr. Green's counsel objected to the introduction of a picture based upon Rule 403 because it showed Mr. Green in handcuffs and was prejudicial which outweighed its probative value.

What was presented to the Fifth Circuit was that the picture introduced as Government's exhibit # 3 shows a framed shot of Mr. Green in his prison uniform in shackles, both a belly chain and handcuffs, surrounded and held by officers, with a border that sets out in a positive light the Government's case with hearsay statements. After viewing this picture, the question is what was the probative value? The Government asserted it showed what Mr. Green looked like after the event. But the question is, why did they need to show what Mr. Green looked like. There was no explanation of how this highly prejudicial, designed for conviction, picture was in any way probative to the trial.

The exclusion of evidence under Rule 403 should occur only sparingly:

Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance. It is not designed to permit the court to “even out” the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none. *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979).

In 1976, the Supreme Court set out the principle that a defendant should not be forced to appear at trial in jail clothes. When this is objected to by trial counsel, it is a constitutional due process violation. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). A jury's observation of a defendant in custody may under certain circumstances “create the impression in the minds of the jury that the defendant is dangerous or untrustworthy” which can unfairly prejudice a defendant's right to a fair trial notwithstanding the validity of his custody status. *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S.Ct. 1340, 1346, 89 L.Ed.2d

525 (1986) (quoting *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir.1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974)).

In the present case, the Court admitted the prejudicial evidence of Mr. Green in jail clothes and heavily restrained, but did not even give a limiting instruction on the admission. In *Wright v. Texas*, 533 F.2d 185 (5th Cir.1976), the Fifth Circuit held that “rational jurors would understand and follow a proper instruction that handcuffing persons in custody for transportation to and from the courtroom is a reasonable precaution that in no way reflects upon the presumption of innocence or the individual propensities of any defendant.” *Id.* at 188.

In sum, exhibit # 3 had no demonstrated probative value and was highly prejudicial. The trial court erred in admitting it and further erred in not giving a limiting instruction. This claim was properly preserved and presented to the Fifth Circuit. The Fifth Circuit is in error in denying the petition based upon unfounded procedural grounds.

CONCLUSION

The Fifth Circuit’s determination on the single issue presented is in error. The conviction should be reversed and remanded for a new trial.

Respectfully Submitted;

/s/Don Bailey
Don Bailey

Attorney for Mr. Green
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309 N. Willow
Sherman, Texas 75090

No.

In The Supreme Court of the United States

Reginald Edward Green, Petitioner

V.

UNITED STATES OF AMERICA

PETITION APPENDIX

Exhibit:

1. *United States v. Reginald Green*, District Court Judgment (E.D.Tx. January 28, 2019)
2. *United States v. Reginald Green*, 787 Fed. Appx. 844, No. 19-40097 (5th Cir. Dec. 13, 2019)
3. Government's Exhibit 3 in *United States v. Reginald Green*, 1:18cr18(1) (E.D.Tx. 2019)
4. 18 U.S.C. § 111

Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

UNITED STATES OF AMERICA

v.

REGINALD EDWARD GREEN

§ JUDGMENT IN A CRIMINAL CASE

§

§

§ Case Number: **1:18-CR-00018-001**

§ USM Number: **45657-007**

§ **Gary R Bonneaux**

§ Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	1 of the Indictment
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18:111(a)(1), 18:111(b) Resisting A Federal Officer-Bodily Injury

Offense Ended

02/02/2018

Count

1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 23, 2019

Date of Imposition of Judgment


Signature of Judge

THAD HEARTFIELD
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

1/28/19

Date

19-40097.123

DEFENDANT: REGINALD EDWARD GREEN
CASE NUMBER: 1:18-CR-00018-TH(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months

The term of imprisonment imposed by this judgment shall run consecutively with the defendant's imprisonment under any previous state or federal sentence specifically, District of Columbia Superior Court, Docket No. 2012-CFI-3165.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends to the Bureau of Prisons that the defendant receive appropriate mental health treatment while imprisoned.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: REGINALD EDWARD GREEN
CASE NUMBER: 1:18-CR-00018-TH(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years**
This term of supervised release shall run concurrently to the supervised release terms imposed in the District of Columbia Superior Court, Docket No. 2012-CFI-3165. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: REGINALD EDWARD GREEN
CASE NUMBER: 1:18-CR-00018-TH(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txep.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: REGINALD EDWARD GREEN
CASE NUMBER: 1:18-CR-00018-TH(1)

SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information for purposes of monitoring your efforts to obtain and maintain lawful employment.

You must participate in a program of testing and treatment for drug abuse and follow the rules and regulations of that program until discharged. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You must pay any cost associated with treatment and testing.

You must participate in any combination of psychiatric, psychological, or mental health treatment programs and follow the rules and regulations of that program, until discharged. This includes taking any mental health medication as prescribed by your treating physician. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You must pay any cost associated with treatment and testing.

DEFENDANT: REGINALD EDWARD GREEN
CASE NUMBER: 1:18-CR-00018-TH(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		\$.00	\$.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: REGINALD EDWARD GREEN
CASE NUMBER: 1:18-CR-00018-TH(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payments of \$ 100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to: the Clerk, U.S. District Court. Fine & Restitution, 211 West Ferguson Street Rm 106, Tyler, TX 75701.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Exhibit 2

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-40097
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 13, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

REGINALD EDWARD GREEN,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:18-CR-18-1

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Reginald Edward Green challenges his jury-trial conviction for, as an inmate, forcibly resisting a federal officer engaged in the performance of his official duties, in violation of 18 U.S.C. § 111(a). Green asserts the district court abused its discretion in admitting into evidence “Government’s Exhibit 3”, a photograph of Green in the prison medical center shortly after the

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

No. 19-40097

incident. Green objected to the exhibit's admission at trial under both Federal Rules of Evidence 401 and 403; he addresses only Rule 403 on appeal.

Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence". Fed. R. Evid. 403. Green's overruled district-court objection was based solely on "the fact that the defendant [was] photographed in handcuffs [was] prejudicial and it outweigh[ed] the probative value". Green does not address this specific issue on appeal. He has, therefore, abandoned it for failure to brief. *E.g.*, *Frank v. Garner*, 95 F.3d 54, 54 (5th Cir. 1996) (per curiam) (unpublished) (citation omitted).

Instead, Green presents two new contentions on appeal: (1) the exhibit's admission was more prejudicial than probative, in violation of due process; and (2) the court erred in not providing a limiting instruction. Because these objections were not preserved in district court, review is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). (Our court does not consider Green's contention, raised for the first time in his reply brief, that the court abused its discretion in admitting Government's Exhibit 3 because it contains various notations and prejudicial indicia. *See, e.g.*, *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co.*, 861 F.3d 566, 573 (5th Cir. 2017) (citation omitted) (Generally, "this court will not consider issues raised for the first time in a reply brief"), *cert. denied*, 138 S. Ct. 669 (2018). Green does not present an exception to this rule.)

Under the plain-error standard, Green must show a forfeited plain error (clear or obvious, rather than subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he

No. 19-40097

makes that showing, we have the discretion to correct such reversible plain error, but generally should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.*

Regarding his due-process contention, Green cites only *Holbrook v. Flynn*, 475 U.S. 560 (1986), and *Estelle v. Williams*, 425 U.S. 501 (1976). These cases concern constitutional implications of “compel[ling] an accused to stand trial before a jury while dressed in identifiable prison clothes”, *Estelle*, 425 U.S. at 512, and “the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial”, *Holbrook*, 475 U.S. at 568. They do not compel error in the court’s admitting the challenged photograph. Consequently, Green has not shown the requisite plain (clear or obvious) error. *See United States v. Francisco*, 644 F. App’x 358, 359 (5th Cir. 2016) (per curiam) (citation omitted).

As for a limiting instruction, Green cites only *Wright v. Texas*, in which our court concluded that, in the context of “handcuffing a defendant being transported to and from the courtroom”, “[t]he inadvertent view by a juror of the defendant in such a situation cannot be said to be so inherently prejudicial as to be incapable of correction [via a limiting instruction] had the defendant made a timely objection”. 533 F.2d 185, 188 (5th Cir. 1976). Green’s reliance on *Wright* is, therefore, also inapposite. Consequently, he has again failed to show the requisite plain (clear or obvious) error. *See Francisco*, 644 F. App’x at 359 (citation omitted).

AFFIRMED.

Judge Engelhardt concurs in the judgment only.

Exhibit 3

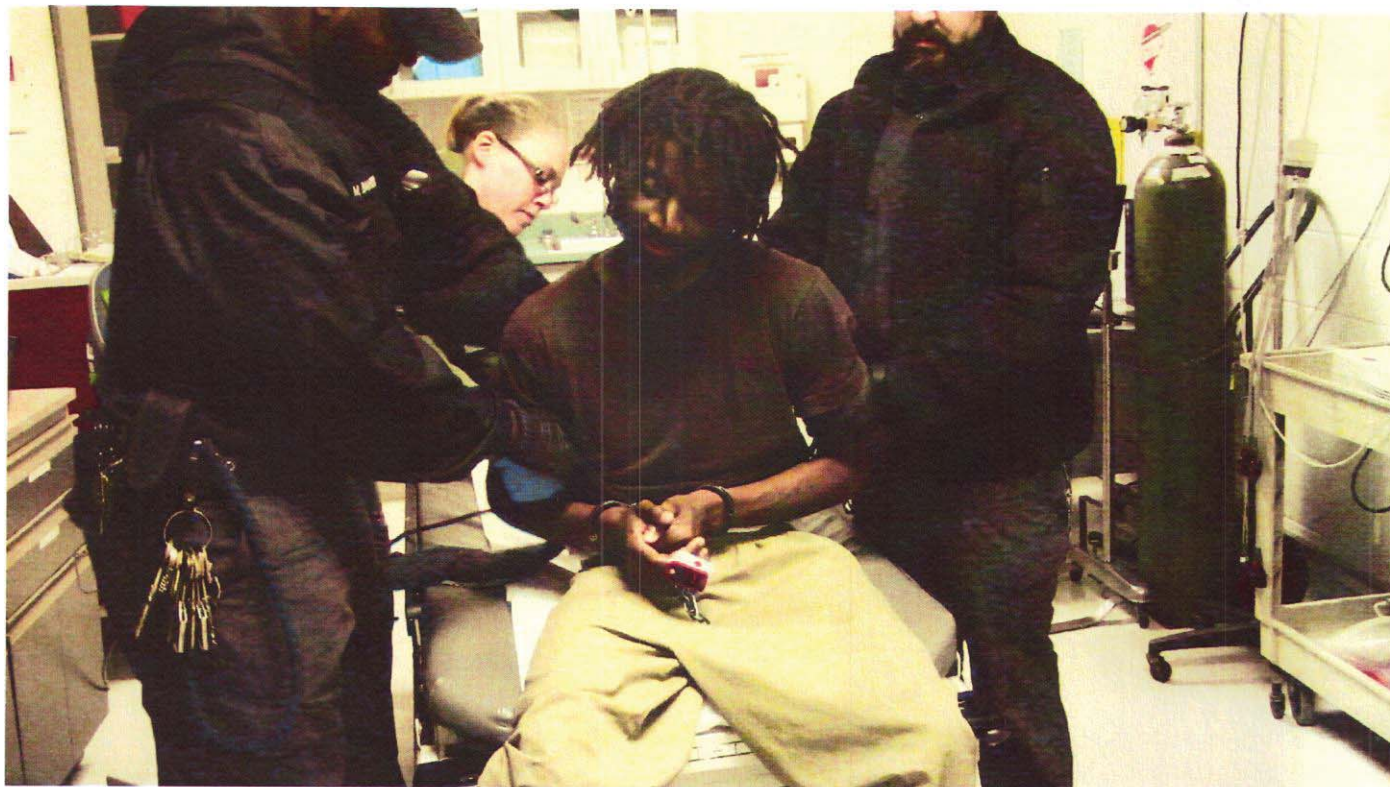


FEDERAL CORRECTIONAL COMPLEX



BEAUMONT, TEXAS (USP)

EVIDENCE PHOTOGRAPH(s)



Type of Incident:	Inmate assault on staff.
Date/ Time of Incident:	02-02-2018
Photograph (s) By:	J. L. Craig, Lieutenant <i>JS</i>
Staff Member(s) involved:	J. Cotter B. Gassiott
Inmate (s) involved:	Green. Reginald, Reg. No. 45657-007

COPY

JS

2/2/18

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Exhibit 4

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

§ 111. Assaulting, resisting, or impeding certain officers or employees

18 USCA § 111 | United States Code Annotated | Title 18. Crimes and Criminal Procedure | Effective: January 7, 2008 (Approx. 2 pages)

Effective: January 7, 2008

18 U.S.C.A. § 111

§ 111. Assaulting, resisting, or impeding certain officers or employees

Currentness

(a) In general.--Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in [section 1114](#) of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in [section 1114](#) on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.--Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 688; [Pub.L. 100-690, Title VI, § 6487\(a\)](#), Nov. 18, 1988, 102 Stat. 4386; [Pub.L. 103-322, Title XXXII, § 320101\(a\)](#), Sept. 13, 1994, 108 Stat. 2108; [Pub.L. 104-132, Title VII, § 727\(c\)](#), Apr. 24, 1996, 110 Stat. 1302; [Pub.L. 107-273, Div. C, Title I, § 11008\(b\)](#), Nov. 2, 2002, 116 Stat. 1818; [Pub.L. 110-177, Title II, § 208\(b\)](#), Jan. 7, 2008, 121 Stat. 2538.)

Notes of Decisions (455)

18 U.S.C.A. § 111, 18 USCA § 111

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

**End of
Document**

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