

No. 21-1268

In the
Supreme Court of the United States

Supreme Court, U.S.
FILED

DEC 08 2021

OFFICE OF THE CLERK

PAKEYBEY, ET AL.,

Petitioners,

v.

LUMINANT MINING COMPANY, LLC,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAWUD BEY
KENDI PAKEYBEY
ANU ZION EL
PETITIONERS PRO SE
105 KEYSTONE CREST COURT
SANFORD, FL 32771
(305) 972-4422

MARCH 14, 2022

SUPREME COURT PRESS

♦ (888) 958-5705

♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the Petitioners' 5th and 14th Amendment rights were violated under its procedural due process clause by being denied procedural protections.

PARTIES TO THE PROCEEDINGS

Petitioners

- Kendi Narmer PakeyBey,
also known as Narmer Bey, Chief
- Dawud Allantu Bey,
First Trustee of Amexemnu Taysha Trust
- Anu Tafari Zion El,
Second Trustee of Amexemnu Taysha Trust
Amexemnu City State, Incorporated;

Respondent

- Luminant Mining Company, L.L.C.

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit
No. 20-40803

LUMINANT MINING COMPANY, L.L.C., *Plaintiff-Appellee* v. KENDI NARMER PAKEYBEY, Also Known as NARMER BEY, CHIEF, Also Known as KENNETH PARKER; DAWUD ALLANTU BEY, First Trustee of AMEXEMNU TAYSHA TRUST; AMEXEMNU CITY STATE, INCORPORATED; ANU TAFARI ZION EL, Second Trustee of AMEXEMNU TAYSHA TRUST, *Defendants-Appellants*

Date of Final Opinion: September 17, 2021

Date of Rehearing Denial: October 15, 2021

United States District Court, Eastern District of Texas
No. 6:19-cv-00372

LUMINANT MINING COMPANY, LLC, *Plaintiff v.* KENDI NARMER PAKEYBEY, ET AL., *Defendants*

Date of Final Order: August 28, 2020

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	5
CONCLUSION.....	9

TABLE OF CONTENTS – Continued

	Page
APPENDIX TABLE OF CONTENTS	
OPINIONS AND ORDERS	
Opinion of the United States Court of Appeals for the Fifth Circuit (September 17, 2021)	1a
Order of the United States District Court for the Eastern District of Texas (August 28, 2020) ...	11a
Report and Recommendation of United States Magistrate Judge (September 26, 2019)	15a
REHEARING ORDER	
Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing (October 15, 2021)	25a
OTHER DOCUMENTS	
Defendants No Evidence Motion for Final Summary Judgment and Memorandum in Support Thereof, Relevant Excerpts (January 12, 2019).....	27a
Defendants' Objections to Magistrate Judge's Proposed Findings and Recommendations, Relevant Excerpts (August 5, 2020)	34a
Defendants' Answer to Plaintiff's Second Amended Complaint, Relevant Excerpts (April 14, 2020)	38a
Brief of Appellants, Relevant Excerpts (February 25, 2021)	44a

TABLE OF CONTENTS – Continued

	Page
Reply Brief of Appellants, Relevant Excerpts (May 24, 2021)	54a
Appellants Motion for Reconsideration, Relevant Excerpts (October 1, 2021)	61a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adams v. Slattery,</i> 295 S. W.2d 859 (Tex. 1956)	3
<i>Chavez v. Kan. City S. Ry. Co.,</i> 520 S.W.3d 898 (Tex. 2017).....	6
<i>Davis v. Lund,</i> Tex.Com.App., 41 S.W.2d 57 (1931)	5
<i>Fair v. Arp Club Lake, Inc.,</i> 437 S.W.3d 619 (Tex. App.-Tyler 2014).....	3
<i>Granato v. Bravo,</i> 498 S.W.2d 499 (Tex. Civ. App-San Antonio 1973)	3
<i>Hardaway v. Nixon,</i> 544 S.W.3d 402 (Tex. App.-San Antonio 2017).....	6
<i>Lawrence v. Chater,</i> 516 U.S. 163 (1996)	8
<i>Magee v. Paul,</i> 221 S. W. 254 (Tex. 1920).....	3
<i>Matthews v. Eldridge,</i> 424 U.S 319, 344 (1976)	2, 6
<i>Mauritz v. Thatcher,</i> 140 S.W.2d 303 (Tex. App.-Galveston 1940).....	6
<i>Morrissey v. Brewer,</i> 408 U.S. 471, 408 U.S. 481 (1972)	2
<i>Phillipson v. Flynn,</i> 83 Tex. 580, 19 S.W. 136 (1892)	7

TABLE OF AUTHORITIES – Continued

	Page
<i>Poenisch v. Quarnstrom</i> , Tex. Sup.Ct., 361 S.W.2d 367 (Tex. Sup. 1962)	7
<i>Republic Nat'l Bank of Dallas v. Stetson</i> , 390 S.W. 2d (Tex. 1965)	3
<i>Science Spectrum, Inc. v. Martinez</i> , 941 S.W.2d 910 (Tex. 1997).....	5
<i>Stephens v. LNV Corp.</i> , 488 S.W.3d 366 (Tex. App. 2015).....	5
<i>Tex-Wis Co. v. Johnson</i> , 534 S.W.2d 895 (Tex. 1976).....	6
<i>Zobel v. Slim</i> , 576 S.W.2d 362 (Tex. 1978)	4

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	i, 2
U.S. Const. amend. XIV.....	i, 2

STATUTES

28 U.S.C. § 1257(a)	1
---------------------------	---



OPINIONS BELOW

The order from the District Court issued on August 28, 2020 is attached at App.11a. The affirmance/opinion of the Fifth Circuit Court of Appeals, which was issued on September 17, 2021, is attached at App.1a. The Fifth Circuit Court of Appeals one-page order denying a petition for rehearing dated October 15, 2021, is attached at App.25a. These opinions have not been designated for formal publication.



JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). The decision of the Fifth Circuit Court of Appeals for which petitioner seeks review was issued on October 15, 2021. The Fifth Circuit Court of Appeals denying Petitioners' timely petition for discretionary review was filed on February 25, 2021. This petition is filed within 90 days of the Fifth Circuit Court of Appeals' denial of discretionary review, under Rules 13.1 and 29.2 of this court. Petitioners applied for an extension of time, which was granted on January 14, 2022 and extended the time to, and including, March 14, 2022. Sup. Ct. No. 21A324.



CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment rights were violated under the procedural due process clause whereas, "Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). "Due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 408 U.S. 481.

United States Constitution, amend. XIV provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF THE CASE

Petitioners were denied summary judgment in the federal district court in the state of Texas on a trespass-to-try title suit. Petitioners challenged the recordation of deeds in the 1848 land patent to Jesse Walling and Isham Chisum (Doc. 56, pages 19-22). In Petitioners' Motion for Summary Judgment Abstract of Title Argument: Petitioners created a fact issue challenging that Luminant's Abstract title lacks any partition or other disposition of the Walling-Chism co-tenancy. A fatally defective land description is the

reference to a certain number of acres or a tract of a certain size “out of” or “being a part of” some larger described tract. Without any reference to a more particular description or other guide to the location of the tract, Petitioners argue that “a conveyance with such a description is void.” *Republic Nat'l Bank of Dallas v. Stetson*, 390 S.W. 2d (Tex. 1965); *Granato v. Bravo*, 498 S.W.2d 499 (Tex. Civ. App—San Antonio 1973, no writ).

At the granting of the final judgment on July 6, 2020, the District Court ruled in Luminant’s favor based on the presumed grant doctrine. The magistrate’s report and recommendation did not discuss any evidence supporting Appellants’ alleged acquiescence, and the district court’s order granting Luminant’s motion for summary judgment states only that the doctrine of presumed grant “create[d] a conclusive presumption that moots” Appellants’ claims to title. (ROA. 7581.) It offered no argument or evidence about Appellants’ supposed acquiescence in Luminant’s claim to exclusive title—i.e., a claim to title by Luminant that would, by its nature, conflict with Appellants’ co-tenancy interest. Without evidence proving Appellants’ (or Appellants’ predecessors’) acquiescence to Luminant’s claim adverse to the interests of any cotenants, Luminant was not entitled to Summary judgment. Texas appellate courts have described *Magee v. Paul*, 221 S. W. 254 (Tex. 1920), as the “leading case” on presumed grant. *Adams v. Slattery*, 295 S. W.2d 859, 868 (Tex. 1956). In *Fair*, (*Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 627 (Tex. App.—Tyler 2014, no pet.), the court of appeals reversed a summary judgment for the party seeking application of the presumed-

grant doctrine. (See Direct Appeal pages 27-32 at App.44a).

Petitioners' reply brief (Case 20-40803, Doc. 00515874038, pages 5-10, Date filed May 24, 2021. *See* App.54a), it was challenged that there is a fact issue on Petitioners' co-tenancy interest. Petitioners met their burden to defeat summary judgment by presenting a fact issue on their interest as tenants in common in the Tracts as the heirs of Jesse Walling. Certain facts are undisputed. First, Luminant does not dispute that Jesse Walling and Isham Chisum were assigned the tracts in an 1848 land patent. Second, Luminant does not dispute that Petitioners have traced their lineage back to John C Walling. The will of Jesse Walling specifically identifies John Walling as one of his children who had received lands before the creation of the will. These are recitations of ancient documents probative of an heirship between Jesse Walling and John C. Walling. (*See Zobel*, 576 S.W. 2d at 365.) Petitioners established a fact issue on their ownership of an interest in the Tracts descending from Jesse Walling. The 1852 deed from Jesse Walling to John C. Walling shows that John Walling received a portion of Jesse Walling's interest of the Tracts originally derived from the E.R. Jones survey that were assigned to Jesse Walling and Isham Chisum in 1848. It was further asserted that "Luminant has possessed the Tracts adverse to any other party's claimed interest for a time sufficient to satisfy the three-year, five-year, and twenty-five-year statutes." Petitioners appealed to the Fifth Circuit Court and it affirmed the lower court's decision (September 17, 2021) but based it on constructive notice of ouster, and Luminant's uncontested evidence of its adverse

and peaceable possession of the disputed tracts under a claim of right for at least ten years. (See Motion for Reconsideration at App.61a).

Issues not expressly presented to the trial court in the written motion cannot be considered on appellate review as grounds for affirmance of a summary judgment. *Science Spectrum, Inc.*, 941 S.W. 2d at 912; *Stephens*, 488 S.W. 3d at 373. The rule is thus stated in *Davis v. Lund*, Tex.Com.App., 41 S.W.2d 57: When A enters upon the land in recognition of the title of B, in order for A to prevail under the 10 year statute of limitations three things must be established, (1) there must be a repudiation of the relationship thus established and claim of title adversely to that of B, (2) this repudiation and adverse claim must be clearly brought home to B, as limitations will only been to run from that date: (3) there must be adverse possession for 10 years after notice of repudiation and adverse claim has been brought home to B, (Doc. 105, page 7). Petitioners filed for a rehearing (October 15, 2021) and were denied.



REASONS FOR GRANTING THE PETITION

This case presents an important issue over whether the lower courts ignored certain laws and precedents. This is uncommon, because a judge typically cannot ignore a law without explaining their reasoning. Petitioners' pro se arguments, however unartful, created a set of triable material fact issues, all of which went ignored throughout the District Court and the Fifth Circuit Court of Appeals proceedings. "Parties

whose rights are to be affected are entitled to be heard.” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). In Petitioners’ direct appeal, (Case: 20-40803, Doc. 00515756672, Pages 38-41, Date filed: February 25, 2021), it was argued that constructive notice of ouster can occur when the adverse claim of title is “so long-continued, open, notorious, exclusive, and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the co-tenant or owner out of possession, or from which a jury might rightfully presume such notice.” *Tex-Wis Co. v. Johnson*, 534 S.W.2d 895, 899 (Tex. 1976) (quoting *Mauritz v. Thatcher*, 140 S.W.2d 303, 304 (Tex. App.-Galveston 1940, writ ref’d)). In other words, constructive notice through long-continued, exclusive possession “raises an inference” of notice from which a jury might rightfully presume notice of co-tenant ouster. *Id.* Here, the District Court erred by accepting this inference as conclusive proof. Texas Fourth Court of Appeals recently explained, a trial court must not allow this presumption to “shift the burden to a nonmovant in a summary judgment proceeding.” *Hardaway v. Nixon*, 544 S.W.3d 402, 409 (Tex. App.-San Antonio 2017, pet. denied) (citing *Chavez v. Kan. City S. Ry. Co.*, 520 S.W.3d 898, 900 (Tex. 2017)). A party seeking summary judgment based on constructive notice of ouster must “assert and prove their entitlement to judgment based on something more than possession and absence of a claim . . . [such as] other unequivocal, unmistakable, and hostile acts taken to disseize other co-tenants.” *Id.* (emphasis added) (internal quotations omitted) (reversing summary judgment granted in favor of parties claiming ouster). “The inference, alone, does not entitle the claimant to summary judgment. A long-held,

adverse possession of land, coupled with a lack of claim by the ostensible owner alone, is not enough to support a conclusive finding of ouster.” *Hardaway*, 544 S.W.3d at 409. Thus, to support the summary judgment here, the record must prove that Luminant acted unequivocally, unmistakably, and hostilely to disseize Petitioner. *See id.*

In *de novo*, Petitioners objected to the finding that Respondent has proven title by limitation periods to be granted a presumption of grant deed (Doc. 126, Pages 7-8). “The possession of a co-tenant or tenant in common will be presumed to be right on the common title. He will not be permitted to claim the protection of the statute of limitations unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to it.” *See, Phillipson v. Flynn*, 83 Tex. 580, 19 S.W. 136; *Poenisch v. Quarnstrom*, Tex. Sup. Ct., 361 S.W.2d 367. Petitioners’ Direct Appeal, (Case 20-48003, Doc. 00515756672, Pages 38-41, Date filed: February 25, 2021), contended that under Texas law there is significantly more evidence required before a court can grant Plaintiff’s summary judgment. Petitioners assert that there still remains an issue as to fact regarding a lost deed, voluntary partition, judicial partition, heirship, and void deeds.

As mentioned above, these arguments and case laws were expressed throughout the proceedings but were overlooked, which created an obvious error, therefore creating a conflict with previous case precedent set by the Texas Supreme Court. This is also in conflict with rulings between the 4th and 5th Circuit Courts of Appeal.

Petitioners ask this Court to grant GVR review of a decision by the lower courts, holding that when a lower court blatantly ignores a previous Supreme Court ruling, the Supreme Court may decide to hear a case to correct or simply override the lower court's ruling. It is common and functional for this Court to issue a GVR order in light of this Court's own intervening-apposite authority. GVR orders have been observed to have a number of advantages: (i) assisting the lower court by flagging an issue that might not have received due consideration; (ii) assisting this Court by permitting the lower court to weigh in prior to granting plenary review; and (iii) conserving this Court's scarce resources. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Any or all would fully justify a GVR order.



CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this court grant a writ of certiorari in this case.

Respectfully submitted,

DAWUD BEY
KENDI PAKEYBEY
ANU ZION EL

PETITIONERS PRO SE
105 KEYSTONE CREST COURT
SANFORD, FL 32771
(305) 972-4422

MARCH 14, 2022

BLANK PAGE

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion of the United States Court of Appeals for the Fifth Circuit (September 17, 2021)	1a
Order of the United States District Court for the Eastern District of Texas (August 28, 2020) ...	11a
Report and Recommendation of United States Magistrate Judge (September 26, 2019)	15a

REHEARING ORDER

Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing (October 15, 2021)	25a
---	-----

OTHER DOCUMENTS

Defendants No Evidence Motion for Final Summary Judgment and Memorandum in Support Thereof, Relevant Excerpts (January 12, 2019).....	27a
Defendants' Objections to Magistrate Judge's Proposed Findings and Recommendations, Relevant Excerpts (August 5, 2020)	34a
Defendants' Answer to Plaintiff's Second Amended Complaint, Relevant Excerpts (April 14, 2020)	38a
Brief of Appellants, Relevant Excerpts (February 25, 2021)	44a

APPENDIX TABLE OF CONTENTS (Cont.)

Reply Brief of Appellants, Relevant Excerpts (May 24, 2021)	54a
Appellants Motion for Reconsideration, Relevant Excerpts (October 1, 2021)	61a