

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

21-5810

MANDELL RHODES JR.

Petitioner

v.

ORIGINAL

BOBBY LUMPKIN

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEALS

FILED

SEP 28 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

Mandell Rhodes, Jr. - Pro Se

T.D.C.J. #307498

Segovia Unit

1201 E. EL Cibolo Rd.

Edinburg, Texas 78542

QUESTION PRESENTED

Petitioner alleged that, the administrators of the Texas Department of Criminal Justice violated the Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution when they forfeited his earned good conduct time upon revocation of his parole. He alleged that this forfeited good conduct time was earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375 of the 68th Texas legislature. This Act contained the following language demonstrating Legislative intent:

"AN Act relating to credit for good conduct time EARNED BY A PRISONER TOWARD REDUCTION OF A SENTENCE..." (Emphasis added).

See Appendix E. This language demonstrates a clear intention of the 68th Texas legislature to allow a prisoners earned good conduct time to reduce his sentence. The Texas Courts has established that, the INTENT of a legislature is law itself and must be given effect and enforced. As such, petitioners earned good conduct time HAD OPERATED TO REDUCE HIS SENTENCE. The U.S. Supreme Court and 5th Circuit Court of Appeals has established that good

Conduct time that operates to reduce a prisoners sentence cannot be forfeited without violating the Double Jeopardy Clause. In determining the validity of his claim that his earned good conduct time had operated to reduce his sentence, the U.S. District Court REFUSED to construe and analyze Act of June 17, 1983, 68th Leg., R.S., Ch. 375 even though it was the APPLICABLE LAW that governs petitioners earned good conduct time. The case thus presents the following questions:

- 1). Was petitioner entitled to a Certificate of Appealability to determine whether the District Court ERRED when it REFUSED to construe or analyze Act of June 17, 1983, 68th Leg., R.S., Ch. 375 in determining the validity of his Double Jeopardy violation claim when this Act was the APPLICABLE LAW that governed his forfeited good conduct time?
- 2). Did the administrators of T.D.C.J. violate the Double Jeopardy Clause when they forfeited the good conduct time petitioner had earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375, upon revocation of his parole?

- 3). Did the administrators of T.D.C.J. violate Texas law and the Double Jeopardy Clause of the 5th Amendment when they REFUSED to credit good conduct time earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375, toward reduction of a prisoners sentence?
- 4). Did the Judges of the Court of Appeals err when they relied on Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 to deny petitioner a Certificate of Appealability, when that provision had been repealed by implication pursuant to the enactment of Act of June 17, 1983, 68th Leg., R.S., Ch. 375, in 1983?

TABLE OF CONTENTS

1). Questions presented	i
2). Table of Contents	iv
3). Table of Authorities	vi
4). Opinion below,	1
5). Jurisdiction	2
6). Statutory and Constitutional Provisions Involved.	2
7). Statement of the Case.	3
8). Reasons for Granting the Writ.	-

I. The District Court erred when it refused to construe or analyze Act of June 17, 1983, 68th Leg., R.S., Ch. 375, upon determining the validity of his Double Jeopardy claim. 12

II. The administrators of TDCJ violated the Double Jeopardy Clause... when they forfeited the good conduct time petitioner had earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375, upon revocation of his parole. 16

III. The administrators of TDCJ violated Texas law and the Double Jeopardy Clause... when they refused to credit good conduct time earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375, toward reduction of a prisoners sentence 20

IV. The Court of Appeals erred when it relied on Section 4
of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 to deny
petitioner a Certificate of Appealability, when that
provision had been repealed by implication pursuant
to the enactment of Act of June 17, 1983, 68th Leg., R.S.,
Ch. 375 in 1983. 22

9). Conclusion. 27

APPENDIX:

- 1). Appendix A - Decision of Circuit Judge, Leslie H. Southwick
denying Certificate of Appealability. 1a
- 2). Appendix B - Order of Panel of Court denying Motion for
Rehearing. 4a
- 3). Appendix C - Decision of U.S. District Court denying Writ
of Habeas Corpus pursuant to 28 U.S.C. 2254. 7a
- 4). Appendix D - Copy of Act of June 10, 1977, 65th Leg., R.S.,
Ch. 347, of the 65th Texas legislature. 19a
- 5). Appendix E - Copy of Act of June 17, 1983, 68th Leg., R.S.,
Ch. 375, of the 68th Texas legislature. 21a

14). <u>Pruett v. State of Texas</u> , 468 F.2d. 51, 57-58 (5 th Cir. 1972)	7, 19, 22
15). <u>St. Luke's Episcopal Hosp. v. AGBOR</u> , 952 S.W.2d. 503, 505 (Tex. 1997).	5, 17
16). <u>State v. Shoppers World, Inc.</u> , 380 S.W.2d. 107, 110-111 (Tex. 1964).	16
17). <u>Trawalter v. Schaefer</u> , 179 S.W.2d. 765, 767 (Tex. 1944)	6, 17

CONSTITUTIONAL AMENDMENTS:

1). U.S. Constitutional Amendment V.	2, 7, 10, 20, 22
--	------------------

STATUTES:

1). <u>Act of June 10, 1977, 65th Leg., R.S., Ch. 347</u>	2, 3, 4, 9, 11, 12, 13, 22, 23, 24, 26, 27
2). <u>Act of June 17, 1983, 68th Leg., R.S., Ch. 375</u>	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 26
3). Texas Government Code, § 311.031(a)(1) and (2)	14
4). Texas Government Code, Ch. 498.	15
5). Texas Rules of Appellate Procedure, Rule 56.1(c).	18
6). 28 U.S.C. 1254 (1).	2
7). 28 U.S.C. 2253(c)(2).	3
8). 28 U.S.C. 2254.	1, 8

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Mandell Rhodes, Jr., respectfully prays that a Writ of Certiorari issues to review the opinions of the Fifth Circuit Court of Appeals, rendered in these proceedings on March 31, 2021, and May 17, 2021, denying petitioner a "Certificate of Appealability".

OPINION BELOW

The opinion of Fifth Circuit Court of Appeals Judge, Leslie H. Southwick, denying petitioner a Certificate of Appealability in the Courts case no. 20-40475 appears at Appendix A and is unpublished. The Order of a "Panel" of that court, denying his Petition for Reconsideration appears at Appendix B and is unpublished. The decision of the U.S. District Court, denying the Petition for Writ of Habeas under 28 U.S.C. §2254 appears at Appendix C and is unpublished.

JURISDICTION

The original opinion of Fifth Circuit Judge, Leslie H. Southwick was entered March 31, 2021. A timely Motion for reconsideration to that court was denied on May 17, 2021.

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1) and this court's decision in Hohn v. U.S., 118 S. Ct. 1969, 1978 (1998) ("We hold this court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeal").

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case:

- 1). U.S. Const., AMEND V: This amendment protects against Double Jeopardy violations. It consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after con-

viction. And, it protects against multiple punishments for the same offense.

- 2). 28 U.S.C. § 2253 (c)(2): This statute authorizes a "certificate of appealability" upon denial of a writ of habeas corpus if the applicant "has made a substantial showing of the denial of a constitutional right".
- 3). Act of June 10, 1977, 65th Leg., R.S., Ch. 347 of the 65th Texas Legislature, which appears at Appendix D.
- 4). Act of June 17, 1983, 68th Leg., R.S., Ch. 375 of the 68th Texas Legislature, which appears at Appendix E.

STATEMENT OF THE CASE

On January 13, 2015, petitioner was released to a parole. Prior to his release he had earned 16 years, 3 months, and 7 days of good conduct time pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375. He alleged that, pursuant to the INTENT of the 68th Texas legislature, that earned good conduct

time had lawfully OPERATED TO REDUCE HIS SENTENCE.
In support of that position petitioner alleged the following:

In 1980 petitioner was convicted of a felony offense and was sentenced to 50 years in the Texas Department of Criminal Justice (hereafter, TDCJ). At the time his offense occurred, the good conduct time law in effect for prisoners in Texas was, Act of June 10, 1977, 65th Leg., R.S., Ch. 347. A copy of this Act appears at, Appendix D. Section 4 of that Act contained language, stating in part:

"Good conduct time applies only to eligibility for parole or mandatory supervision... and shall not otherwise affect the inmates term..."

In 1983, the 68th Texas legislature enacted into law Act of June 17, 1983, 68th Leg., R.S., Ch. 375. This Act AMENDED Act of June 10, 1977, 65th Leg., R.S., Ch. 347. It increased the amount of good conduct time a prisoner could earn. The amendatory act also included language that said, it was:

"An Act relating to credit for good conduct time EARNED BY A PRISONER TOWARD REDUCTION OF A SENTENCE..." (Emphasis added).

The 68th Texas legislature applied the changes retroactively to prisoners, like petitioner whose offense predated the effective date of that amendatory act (Act of June 17, 1983, 68th Leg., R.S., Ch. 375, at §2). A copy of Act of June 17, 1983, 68th Leg., R.S., Ch. 375 appears at, Appendix E.

In Texas, when there is an Amendment of a statute, the rule is to ascertain the INTENT of the legislature who amended the statute and give effect to that intent. McNeil v. Time Inc. Co., 205 F.3d. 179, 183 (5th Cir. 2000) ("In Texas, cardinal rule of statutory construction is to ascertain the legislatures intent and give effect to that intent."). In Texas, a legislatures intent is determined from the meaning of the words it included in an amendatory act. Episcopal Hosp. v. AGBOR, 952 S.W. 2d. 503, 505 (Tex. 1997) ("The legislatures intent is determined from the plain and common meaning of the words used."). Furthermore, EVERY WORD INCLUDED in an amendatory act must be presumed to have been placed therein with a purpose in mind. Love v. State Bar of Texas, 982 S.W. 2d. 939, 942 (Tex. App. - 1st Dist. - Houston 1998) ("a cardinal rule of statutory construction is that every word used must be presumed to have been used for a purpose."), and this includes language in the CAPTION (Preface) of that amendatory act, which cannot be

Ignored, and must be taken into consideration in determining the INTENT of a legislature. See Trawalter v. Schaefer, 179 S.W. 2d. 765, 767 (Tex. 1944) and, Davidson v. Upton County, 624 S.W. 2d. 927, 932-933 (Tex. App. - EL Paso 1981) (Writ Refused, n.r.e.). When Act of June 17, 1983, 68th Leg., R.S., Ch. 375 is construed and analyzed pursuant to the above judicially established procedures, the plain and common meaning of the language in that Act that says, it was:

"An Act relating to credit for good conduct time
EARNED BY A PRISONER TOWARD REDUCTION OF
A SENTENCE..."

demonstrates that in enacting this legislative act, it was the INTENT of the 68th Texas legislature that good conduct time provided thereto was to go toward reduction of a prisoners sentence. In Texas, the INTENT of a legislature is law itself and MUST be given effect and enforced. See, Crimmins v. Lowry, 691 S.W. 2d. 582, 584 (Tex. 1985), where the Texas Supreme Court stated:

"Legislative intent is the law itself and must be enforced...";

and, Dillehey v. State, 815 S.W. 2d. 623, 625 (Tex. Crim. App. 1991), where the Texas Court of Criminal Appeals stated:

"Once determined the intent of a legislature must be enforced..."

In light of those court rulings, the good conduct time earned by a prisoner pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375 OPERATED TO REDUCE A PRISONERS SENTENCE.

On October 31, 2017, petitioner's parole was revoked by the Texas Board of Pardons and Paroles, and he was returned to TDCJ on November 7, 2017. Upon revocation of his parole the administrators of TDCJ FORFEITED the good conduct time he had earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (appendix E). On November 28, 2017, petitioner mailed a State Habeas application alleging that, because his earned good conduct time had operated to reduce his sentence, the FORFEITURE of that good conduct time violated the Double Jeopardy Clause of the 5th Amendment to the United States Constitution. In support of his claim, he cited the court case of Pruett v. State of Texas, 468 F. 2d. 51, 57-58 (5th Circuit 1972), where the Fifth Circuit U. S. Court of Appeals, relying upon

the U.S. Supreme Courts decision in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d. 656 (1969), established that good conduct time that operated to reduce a prisoners sentence could not be taken or denied without violating the Double Jeopardy Clause because it would result in the prisoner serving the same time again, which would amount to "multiple punishment for the same offense". On March 21, 2018, the Texas Court of Criminal Appeals denied the State Habeas Corpus application "without written order".

On April 19, 2018, petitioner filed a Federal Writ of Habeas application pursuant to 28 U.S.C. § 2254, alleging the same claims and argument as presented to the State Courts and as described herein. Upon deciding petitioners Double Jeopardy claim, the District Court REFUSED to construe or conduct an analysis of Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E) to determine the validity of petitioners claim. The District Court IGNORED the fact that this was the APPLICABLE LAW governing petitioners earned good conduct time and formed the basis of his claim. Instead, the District Court chose to MISAPPLY Texas current statutory law (i.e., Texas Government Code, Chapter 498) to deny his claim, rather than analyze Act of June 17, 1983, 68th Leg., R.S., Ch. 375 and give him the relief to which he is entitled. District

Counts Order, pg. 4-5 (appendix C). The District Court also denied petitioner a Certificate of Appealability, sua sponte on July 2, 2020.

On July 20, 2020, petitioner filed timely Notice of Appeal. On July 29, 2020, his Application for Certificate of Appealability was filed by the Clerk of the Fifth Circuit Court of Appeals, seeking to have that Court determine whether the District Court:

"Erred when it REFUSED to construe or analyze Act of June 17, 1983, 68th Leg., R.S., Ch. 375 upon determining the validity of his Double Jeopardy violation claim, when this Act was the APPLICABLE LAW governing petitioners FORFEITED good conduct time and formed the basis of his claim."

On March 31, 2021, Circuit Judge, Leslie H. Southwick denied petitioner a Certificate of Appealability. Judge Southwick relied on the 1977 law, Act of June 10, 1977, 65th Leg., R.S., Ch. 347 (appendix D) in denying petitioner a certificate of appealability, without recognizing or taking into consideration that this Act had been AMENDED in 1983

and superseded by Act of June 17, 1983, 68th Leg., R.S., Ch. 375. (Appendix E). Judge Southwick's order makes no reference to Act of June 17, 1983, 68th Leg., R.S., Ch. 375, even though petitioner brought to that Court's attention that this Act was the APPLICABLE LAW governing his earned good conduct time and supported his Double Jeopardy violation claim. Judge Southwick did everything possible to AVOID construing or analyzing Act of June 17, 1983, 68th Leg., R.S., Ch. 375 ^① to avoid having to grant a certificate of appealability in this case.

On April 13, 2021, petitioner filed a Petition for Reconsideration of his application for certificate of appealability, and on May 17, 2021, a Panel of the Fifth Circuit Court of Appeals, consisting of Circuit Judges Dennis, Southwick, and Engelhardt denied the petition for reconsideration.

Note (1): There are no PUBLISHED court cases where either a state or federal court has ever construed or directly analyzed Act of June 17, 1983, 68th Leg., R.S., Ch. 375.

Like Circuit Judge Southwick on the original application, the Panel REFUSED to construe or analyze Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E) in determining whether a Certificate of Appealability should have been granted in this case. It also did not matter to the Panel that this Act was the APPLICABLE LAW governing petitioners earned good conduct time and supported his double jeopardy violation claim. Furthermore, like Judge Southwick, the Panel also relied on Act of June 10, 1977, 65th Leg., R.S., Ch. 347 (Appendix D) in support of its decision to deny reconsideration of the application for certificate of appealability, without taking in consideration the changes made to that Act by Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E). See Panels Order (Appendix B).

Petitioner states that, these violations actually occurred because the administrators of TDCJ REFUSED to give effect to the INTENT of the 68th Texas legislature and credit the good conduct time prisoners had earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E) toward reduction of their sentences, which they had a DUTY to do under Texas law. Crummins v. Lovey, 691 S.W.2d., at 584 "Legislative intent is the law itself and must be enforced...". This refusal on part of the administrators of

TDCJ not only affected petitioner; it affected THOUSANDS OF PRISONERS who also earned good conduct time pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375, which resulted in many of those prisoners (including petitioner) being subjected to excessive confinement and/or prolonged periods of parole beyond that authorized by law.

REASONS FOR GRANTING THE WRIT

I. REASON NO. ONE (1):

THE DISTRICT COURT ERRED WHEN IT REFUSED TO CONSTRUE OR ANALYZE ACT OF JUNE 17, 1983, 68th TEX. LEG., R.S., CH. 375, UPON DETERMINING THE VALIDITY OF HIS DOUBLE JEOPARDY CLAIM.

Petitioner's offense occurred in 1980. The law that governed the earned good conduct time of a prisoner whose offense occurred in 1980, originally, was Act of June 10, 1977, 65th Leg., R.S., Ch. 347, as enacted into law in 1977, by the 65th Texas legislature

(Appendix D). Petitioner originally earned good conduct time pursuant to that Act. In 1983, Act of June 10, 1977, 65th Leg., R.S., Ch. 347 was AMENDED and superseded by Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E). The 68th Texas legislature included a provision in this amendatory Act, at Section 2 of that Act, that said:

"The change in law made by this Act applies to credit awarded for good conduct time ... during time served BEFORE, ON, OR AFTER the effective date of this Act." (Emphasis added).

In light of that provision, Act of June 17, 1983, 68th Leg., R.S., Ch. 375 became the APPLICABLE LAW governing the earned good conduct time of prisoners, like petitioner whose offense predated its effective date, and the administrators of TDCJ began to credit petitioner, and similar situated prisoners with good conduct time pursuant to the provisions of that amendatory Act.

It should be noted that, Act of June 17, 1983, R.S., Ch. 375 68th Leg., was REPEALED in 1989 by Act of 1989, 71st Leg., R.S., Ch. 212, § 3.03 of the 71st Texas legislature, BUT, it should also be noted that the repeal did NOT affect prisoners, like petitioner whose offense predated the effective date of

the repeal in light of the provisions of Texas Government Code, § 311.031 (a)(1) and (2), which states:

- (a) Except as provided by Subsection (b) the reenactment, revision, amendment, or REPEAL of a statute does not affect:
- (1) The prior operation of the statute or any prior action taken under it;
- (2) any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under it.

Those provisions kept Act of June 17, 1983, 68th Leg., R.S., Ch. 375 in lawful effect, as the APPLICABLE LAW governing the good conduct time of prisoners, like petitioner whose offense predated the repeal. In light of this, after its repeal, the administrators of TDCJ continued, and continues to credit petitioner, and similar situated prisoners with good conduct time pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E).

In light of the fact that Act of June 17, 1983, 68th Leg., R.S.,

Ch. 375 (Appendix E) is the APPLICABLE LAW governing petitioners earned good conduct time the District Court had a DUTY to construe or analyze that Act in determining whether his earned good conduct time had operated to reduce his sentence upon determining whether a double jeopardy violation had occurred, as alleged by petitioner.⁽²⁾ Instead, the District Court chose to MISAPPLY and utilize the provisions in Texas current statutory law; i.e., Texas Government Code, Chapter 498 to deny his claim, irregardless of the fact that petitioner does not earn good conduct time pursuant to that statute, and never has because of the date of his offense.

Petitioner states that, in REFUSING to construe or analyze the governing law in this case, i.e., Act of June 17, 1983, 68th Leg., R.S., Ch. 375, upon determining the validity of his double jeopardy violation claim, the District Court ERRED. As such, petitioner respectfully requests that this court grant certiorari.

Note 2: The District court also has a DUTY to construe Act of June 17, 1983, 68th Leg., R.S., Ch. 375 as the Texas Courts would. See Erie R.R. Co. v. Thompkins, 384 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and, McNeil v. Time Ins. Co., 205 F.3d. 179, 183 (5th Cir. 2000) ("Our analysis of Texas law begins with statutory construction, a process we approach as a Texas court would.").

II. REASON NO. TWO (2):

THE ADMINISTRATORS OF TDCJ VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE U.S. CONSTITUTION WHEN THEY FORFEITED THE GOOD CONDUCT TIME PETITIONER HAD EARNED PURSUANT TO ACT OF JUNE 17, 1983, 68TH LEG., R.S., CH. 375, UPON REVOCATION OF HIS PAROLE.

Petitioner alleged that, when the 68th Texas legislature enacted Act of June 17, 1983, 68th Leg., R.S., Ch. 375 into law (Appendix E), it was the INTENT of that legislature to allow good conduct time, earned thereunder, to go toward reduction of a prisoners sentence. In support of this claim petitioner states the following:

In Texas, when a legislature enacts or amends a statute, the first step in construing that act is to determine the legislatures INTENT pursuant to such enactment. See, State v. Shoppers World, Inc., 380 S.W. 2d. 107, 110-111 (Tex. 1964) ("The guiding rule of statutory interpretation is to ascertain the legislatures intent..."); also see, McNeil v. Time Ins. Co.

205 F.3d. 179, 183 (5th Cir. 2000) ("In Texas, cardinal rule of statutory construction is to ascertain the legislatures intent and give effect to that intent."). In determining a state legislatures intent, federal courts are bound by law to determine that intent as the State courts would. McNeil v. Tume Inc., Co., Id., at 183. The Texas courts established the following procedures to determine a legislatures intent:

- 1). A legislatures intent is to be determined from the "plain and common meaning" of the words it included in a legislative act, St. Luke's Episcopal Hosp. v. AGBOR, 952 S.W.2d. 503, 505 (Tex. 1997), and Osterberg v. PECA, 12 S.W.3d. 31, 38 (Tex. 2000);
- 2). In ascertaining a legislatures intent it must be presumed that EVERY WORD the State legislature placed in a amendatory act was included with a purpose in mind. Love v. State Bar of Texas, 982 S.W.2d. 939, 942 (Tex. App. - 1st Dist. - Houston 1998);
- 3). Under Texas law, the language in the CAPTION (Preface) of a legislative act cannot be ignored and MUST BE CONSIDERED in determining a legislatures intent. Trawalter v. Schaefer, 179 S.W.2d. 765, 767 (Tex. 1944);

4). Under Texas law, the language in the CAPTION (Preface) of a legislative act can be used to determine and give effect to a legislatures intent, EVEN IF THAT LANGUAGE IS NOT EXPRESSED IN THE BODY OF THAT LEGISLATIVE ACT. Davidson v. Upton County, 624 S.W.2d. 927, 932-933 (Tex. App. - El Paso 1981) (Writ Refused, n.r.e.)^③

When Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (appendix E) is construed and analyzed pursuant to the above judicially established procedures, the "plain and common meaning" of the language in that act that says, it was:

"An Act relating to credit for good conduct time
EARNED BY A PRISONER TOWARD REDUCTION OF A
SENTENCE..."

demonstrates that in enacting this amendatory act, it was

Note 3: A decision by a court of appeals in which the Texas Supreme Court "refuses a writ", is as binding as a decision of the Supreme Court itself, as mandated by Texas Rules of Appellate Procedure, Rule 56.1 (c).

the INTENT of the 68th Texas legislature to allow a prisoners earned good conduct time TO GO TOWARD REDUCTION OF HIS SENTENCE. In Texas, the INTENT of a legislature is law itself and must be given effect and enforced. See, Crimmins v. Lowry, 691 S.W.2d. 582, 584 (Tex. 1985), where the Texas Supreme Court stated:

"Legislative intent is the law itself and must be enforced..."

and, Dillehey v. State, 815 S.W.2d. 623, 625 (Tex. Crim. App. 1991), where the Texas Court of Criminal Appeals stated:

"Once determined the intent of a legislature must be enforced..."

In light of this, good conduct time provided, and earned pursuant to Act of June 17, 1983, 68th Leg., R.S., Ch. 375 OPERATED TO REDUCE A PRISONERS SENTENCE.

Petitioner alleges that, in Pruett v. State of Texas, 468 F.2d. 51, 57-58 (5th Cir. 1972), the 5th Circuit Court of Appeals, relying upon the U.S. Supreme Courts decision in North Carolina's

5TH AMENDMENT TO THE U.S. CONSTITUTION WHEN THEY REFUSED TO CREDIT GOOD CONDUCT TIME EARNED PURSUANT TO ACT OF JUNE 17, 1983, 68TH LEG., R.S., CH. 375, TOWARD REDUCTION OF A PRISONERS SENTENCE.

Petitioner alleges that, as established and shown herein, at REASON NO. TWO (2), pg. 16-19, it was the INTENT of the 68TH Texas legislature to allow good conduct time provided under Act of June 17, 1983, 68TH Leg., R.S., Ch. 375 (Appendix E) to be earned by a prisoner toward reduction of his sentence. Both, the Texas Supreme Court and the Texas Court of Criminal Appeals established that, the INTENT of a legislature is law itself and must be given effect and enforced. Crimmins v. Lowry, 691 S.W. 2d., at 584, and Dillehey v. State, 815 S.W. 2d., at 625. In light of those court rulings, the administrators of TDCJ had a DUTY to give effect to the INTENT of the 68TH Texas legislature and credit good conduct time earned under Act of June 17, 1983, 68TH Leg., R.S., Ch. 375, TOWARD REDUCTION OF A PRISONERS SENTENCE. Instead, the administrators of TDCJ REFUSED to apply and credit that good conduct time toward reduction of a prisoners sentence. This refusal was in CONFLICT with the rulings

of the Texas courts in Cummins and Dillehey and resulted in THOUSANDS OF PRISONERS (including petitioner) who earned good conduct time under Act of June 17, 1983, 68th Leg., R.S., Ch. 375 to be subjected to excessive confinement and/or prolonged periods of parole beyond that authorized by law and forced them to serve the same time again in violation of the Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution. Pruett v. State of Texas, 468 F.2d, at 57-58. In light of this, petitioner respectfully requests that this Court grant certiorari.

IV. REASON NO. FOUR (4):

THE COURT OF APPEALS ERRED WHEN IT RELIED ON SECTION 4 of ACT OF JUNE 10, 1977, 65th LEG., R.S., CH. 347 TO DENY PETITIONER A CERTIFICATE OF APPEALABILITY, WHEN THAT PROVISION HAD BEEN REPEALED BY IMPLICATION PURSUANT TO THE ENACTMENT OF ACT OF JUNE 17, 1983, 68th LEG., R.S., CH. 375 IN 1983.

Upon deciding to deny petitioner a Certificate of Appeals-

bility, Circuit Judge Leslie H. Southwick relied on Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 (Appendix D). Also, a Panel of the Court of Appeals, consisting of Circuit Judges Dennis, Southwick, and Engelhardt relied on the provisions of Section 4 of that same Act to deny petitioners Motion for Reconsideration. Petitioner alleges that Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 had been REPEALED BY IMPLICATION pursuant to the enactment of Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E) in 1983, therefore Judge Southwick and the Panel of the Court of Appeals ERRED when they relied on Section 4 to deny him a Certificate of Appealability. In support of this claim, petitioner presents the following:

Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 was enacted into law in 1977, and reads, in part:

"Good conduct time applies only to eligibility for parole or mandatory supervision... and shall not otherwise affect the inmates term..."

In 1983, the 68th Texas legislature AMENDED Act of June 10, 1977, 65th Leg., R.S., Ch. 347 pursuant to the enactment of

Act of June 17, 1983, 68th Leg., R.S., Ch. 375 (Appendix E).
This amendatory act contained language that says, it was:

"An Act relating to credit for good conduct time
EARNED BY A PRISONER TOWARD REDUCTION OF
A SENTENCE..."

The "plain and common meaning" of that language demonstrates that in enacting this amendatory act, it was the INTENT of the 68th Texas legislature, that good conduct time provided thereunder was to GO TOWARD REDUCTION OF A PRISONERS SENTENCE. That legislative intent is clearly in CONFLICT with Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 (Appendix D).⁴ Never-the-less, under Texas law, that legislative intent had to be given effect and enforced. Crimmins v. Lowry, 691 S.W. 2d., at 584, and Dillehey v. State, 815 S.W. 2d., at 625.

Note 4: The 68th Texas legislature did not include a clause EXPRESSLY repealing Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 in the amendatory act (i.e., Act of June 17, 1983, 68th Leg., R.S., Ch. 375). Never-the-less, under Texas law repeals are of two kinds, expressed or implied. See Gordon v. Lake, 356 S.W. 2d. 138, 139 (1962).

Petitioner alleges that, the U.S. Supreme Court, Fifth Circuit Court of Appeals, and Texas Supreme Court has all established that, when there is a CONFLICT between legislative acts, passed at different times, the legislative intent as expressed in the latter passed act supersedes, controls, and IMPLIEDLY REPEALS THE CONFLICTING PROVISION IN THE EARLIER PASSED ACT. See, Poasadas v. National City Bank, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936), where the U. S. Supreme Court ruled:

"Where provisions in two Acts are in irreconcilable conflict, the latter act to extent of the conflict constitutes an IMPLIED REPEAL of the earlier one". (Emphasis added).

and, Martin v. Sheppard, 102 S.W. 2d. 1036, 1039 (Tex. 1937), where the Texas Supreme Court stated:

"It is only where acts are so inconsistent as to be irreconcilable that a REPEAL BY IMPLICATION will be indulged. If there exists such CONFLICT then there is a presumption of the intention to REPEAL all laws and parts of laws in CONFLICT with the clear intention OF THE LAST ACT." (Emphasis added)

Also see, Jackson v. Stinnett, 102 F.3d. 132; 135-136 (5th Cir. 1996).

Petitioner states that, Act of June 17, 1983, 68th Leg., R.S. Ch. 375 (Appendix E) was enacted into law in 1983, whereas, the provision in Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 was enacted into law in 1977. Act of June 17, 1983, 68th Leg., R.S., Ch. 375 was the latter passed Act. In light of this, the INTENT of the 68th Texas legislature to allow a prisoner earned good conduct time to go toward reduction of his/her sentence operated to REPEAL BY IMPLICATION the CONFLICTING provision in Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347, that said:

"Good conduct time applies ONLY to eligibility for parole or mandatory supervision... and shall not otherwise affect the inmates term..." (emphasis added).

Posadas v. National City Bank, 296 U.S., at 503; Martin v. Sheppard, 102 S.W.2d., at 1039; and Jackson v. Stinnett, 102 F.3d., at 135-136, as such, Fifth Circuit Judge Leslie H. Southwick and the Panel of that court, consisting

of Circuit Judges Dennis, Southwick, and Engelhardt ERRED when they relied on the REPEALED provision in Section 4 of Act of June 10, 1977, 65th Leg., R.S., Ch. 347 to deny petitioner a "Certificate of Appealability".

Petitioner therefore, respectfully requests that this Court grant certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgement and opinion of the Fifth Circuit Court of Appeals.

Respectfully Submitted
Mandell Rhodes, Jr.
MANDeLL Rhodes, Jr. - Pro Se
T.D.C.J. #307498

APPENDIX

Contents of Appendix:

- 1). Appendix A - Decision of Circuit Judge, Leslie H. Southwick denying Certificate of appealability 1a
- 2). Appendix B - Order of Panel of Court denying Motion for Rehearing 4a
- 3). Appendix C - Decision of U.S. District Court denying Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, 7a
- 4). Appendix D - Copy of Act of June 10, 1977, 65th Leg., R.S., Ch. 347, of the 65th Texas legislature 19a
- 5). Appendix E - Copy of Act of June 17, 1983, 68th Leg., R.S., Ch. 375, of the 68th Texas legislature 21a

APPENDIX A