

No. \_\_\_\_\_

**IN THE  
SUPREME COURT OF THE UNITED STATES**

LANCE GREEN,

*Petitioner*

vs.

UNITED STATES OF AMERICA,

*Respondent*

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

**LANCE GREEN’S PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Should the Supreme Court grant certiorari to consider whether Green's Sixth Amendment right of confrontation was violated by the procedures utilized by the trial court in deciding whether there had been improper information presented to the grand jury prior to his indictment in this case?
2. Should the Supreme Court grant certiorari to consider whether the evidence in support of his conviction for possession of a firearm was an obliterated serial number was so insufficient as to constitute a violation of his right to due process of law?
3. Should the Supreme Court grant certiorari to consider whether Green's rights under the Speedy Trial Act and/or the Sixth Amendment were violated when the Court dismissed the charges against him on July 19, 2019 and July 19, 2020 for violations of the Speedy Trial Act, but did so without prejudice to the right of the United States to refile the charges against him.
4. Should the Supreme Court grant certiorari to consider whether the trial court erred in admitting into evidence the statistical DNA testimony of Ut N. Dinh in violation of the standards set forth in Daubert v. Merrel Dow, 569, U.S 579 (1993) and Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999).

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## **CORPORATE DISCLOSURE STATEMENT**

None of the parties to this case are corporations.

## **OPINIONS DELIVERED BY OTHER COURTS**

Judgment and Opinion of the United States Court of Appeals for the Third Circuit dated September 15, 2022.

Memorandum Opinion of the United States District Court for the Middle District of Pennsylvania dated November 10, 2021.

Memorandum of the District Court for the Middle District of Pennsylvania dated March 17, 2021.

Bench ruling on Green's Motion to Dismiss of the United States District Court for the Middle District of Pennsylvania.

## **STATEMENT OF JURISDICTION**

Green was indicted on July 14, 2020, by a Grand Jury sitting in the United States District Court for the Middle District of Pennsylvania. (3d. Cir. Appendix 162-165). He entered a plea of not guilty on July 22, 2022. (3d. Cir. Appendix 056). Green was found guilty by a jury on March 18, 2021, (3d. Cir. Appendix 060).

The United States District Court for the Middle District of Pennsylvania had original jurisdiction over these proceedings pursuant to 18 U.S.C. §3231 which provides that district courts have subject matter jurisdiction over all offenses against the laws of the United States.

The United States District Court sentenced Green on November 19, 2021. (3d. Cir. Appendix 063). Green filed a timely Notice of Appeal on November 22, 2021. (3d. Cir. Appendix 064).

The United States Court of Appeals for the Third Circuit had appellate jurisdiction over these proceedings pursuant to 28 U.S.C. §1291 which provides that the Court of Appeals shall have jurisdiction over appeals from all final decisions of the District Courts of the United States of America.

The United States Supreme Court has jurisdiction over the Petition for a Writ of Certiorari pursuant to 28 U.S.C. §1254 which provides that the Supreme Court has jurisdiction to review, by certiorari, final decisions of the United States Court of Appeals.

**CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,  
ORDINANCES AND REGULATIONS INVOLVED**

Fourth Amendment

Sixth Amendment

18 U.S.C. § 922(g)

18 U.S.C. § 922(k)

**STATEMENT OF THE CASE**

On or about January 23, 2018, Green was indicted by a federal grand jury sitting in the Middle District of Pennsylvania for Prohibited Person in Possession of a Firearm, 18 U.S.C. § 922(g) and Possession of a Firearm with an Obliterated Serial Number, 18 U.S.C. § 922(k) underdocket 3:18-CR-21. ((3d. Cir. Appendix

614).

On June 19, 2019, Green filed a Motion to Dismiss the charges filed to 3:18-CR-21 on Speedy Trial grounds and on July 19, 2019, the Honorable A. Richard Caputo entered an Order dismissing the Indictment without prejudice, (3d. Cir. Appendix 618-629).

On the same day as the dismissal of Indictment at 3:18-CR-21, the Bureau of Alcohol, Tobacco and Firearms (ATF) filed a Criminal Complaint and charged Green again with Prohibited Person in Possession of a Firearm and Possession of a Firearm with Obliterated Serial Number. (3d. Cir. Appendix 002). The grand jury subsequently indicted Green on July 30, 2019. (3d. Cir. Appendix 003).

On January 21, 2020, Green filed a second Motion to Dismiss for Speedy Trial Violation, which the Court granted on July 9, 2020, without prejudice. (3d. Cir. Appendix 007-0053).

On July 15, 2020, a grand jury indicted Green again with Prohibited Person in Possession of a Firearm and Possession of a Firearm with Obliterated Serial Number and it was filed under docket number 3:20-CR-165. (3d. Cir. Appendix 162-165).

Green filed pretrial motions to suppress evidence and the Court held a hearing on November 23, 2020. (3d. Cir. Appendix 625). On January 8, 2021, the Court denied Green's pretrial motions and scheduled trial to commence March 15, 2021. (3d. Cir. Appendix 675).



On March 15, 2021, prior to jury selection, Green made, on the record, an Oral Motion to Dismiss the Indictment raising matters relating to the testimony presented before the grand jury on July 14, 2020. (3d. Cir. Appendix 167). The Court, after hearing argument, denied the Motion. (3d. Cir. Appendix 191-202). The Court issued a formal written opinion denying the Motion on March 17, 2021. (3d. Cir. Appendix 099-117).

On March 18, 2021, following a bifurcated jury trial, Green was convicted on all charges contained in the Indictment. (3d. Cir. Appendix 0601).

Green subsequently filed a Motion for Judgment of Acquittal and New Trial. (3d. Cir. Appendix 090).

The Court denied Green's Motion for Judgment Acquittal and a New Trial on November 10, 2021. (3d. Cir. Appendix 122).

On November 19, 2021, the Court sentenced Green to a term of imprisonment of 235 months and 3 months supervised release. (3d. Cir. Appendix 083-089).

Green filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit on November 22, 2021. (3d. Cir. Appendix 065).

The Court of Appeals affirmed the District Court.

### **REASONS FOR GRANTING THE WRIT**

- I. The Supreme court should grant a writ of certiorari to consider a violation of Green's Sixth Amendment confrontation right in the procedures that

were utilized in deciding his Motion to Dismiss the Indictment made shortly before trial.

Following disclosure on the eve of trial, defense counsel made an oral motion immediately preceding trial to dismiss based on the fact that the only evidence presented to the grand jury preceding the Indictment was hearsay, that the jury was informed that there had been a prior grand jury and that a search warrant was obtained for Green's DNA after the testimony before the prior grand jury. (3d. Cir. Appendix 167-168). Defense counsel argued that the grand jury was prejudiced by the fact that the evidence presented to the grand jury was solely hearsay, even though non-hearsay evidence was available, that the testimony before the grand jury inferred that there had been a prior indictment and that there was a substantial probability that if there had been no indictment the grand jury proceedings been conducted in an appropriate fashion. (3d. Cir. Appendix 161-160).

Before ruling on the Motion, the Court directed the United States Attorney to submit an Affidavit answering the following questions: 1) What was the new Grand Jury told regarding prior indictments in this case? 2) What was the new Grand Jury told about their functions in considering the second superseding indictment, with respect to their opportunity to call and cross-examine witnesses and their opportunity to accept or reject the testimony contained in the transcripts? 3) What other measures were taken to ensure the procedural

regularity of the new Grand Jury proceedings? 4) Did any Grand Juror ask to call witnesses? If so, what happened? 5) What other information supports the regularity of the procedure used for the new Grand Jury's consideration of the evidence supporting the second superseding indictment? The Court then adjourned court for the day. (3d. Cir. Appendix 177).

The United States Attorney submitted the requested Affidavit to the Court in camera prior to the Court reconvening at 9:30a.m. the next morning. The content of the Affidavit was read by the Court and can be found in pages 196 and 197 of the Appendix D which was filed in the Third Circuit Court of Appeals Appendix. The Court did not allow defense counsel to study the Affidavit, present additional witnesses or argument, or in any way to confront the statements made therein by the United States Attorney. Rather, immediately after convening Court, the Court announced its decision on the record and denied the Motion. The Court's decision is found at pages 191 through 202 of the Appendix filed in the Third Circuit Court of Appeals. The Court concluded that the answers provided by the United States Attorney in the Affidavit indicated that despite the fact that the evidence presented to the grand jury was all hearsay, the procedures followed by the grand jury were not so irregular as to require dismissal of the

indictment. The Court followed up its denial of the Motion to Dismiss from the Bench in a Memorandum Opinion filed on March 17.<sup>1</sup>

Green submits that the procedure followed by the trial court violated his right to confrontation under the Sixth Amendment to the United States Constitution. The Sixth Amendment's Confrontation Clause provides: "in all criminal prosecutions, the accused shall enjoy the right....to be confronted with the witnesses against him." Ohio v. Clark, 576 U.S., 237, 242 (2015); citing Ohio v. Roberts, 448 U.S. 56, 66, (1980). In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court explained that "witnesses" under the Confrontation Clause are those "who bear testimony" and defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51.

Based on the above, Green submits that his rights were violated in the manner by which the Court handled his Motion to Dismiss. The trial court was obviously concerned about the manner the grand jury proceedings were conducted. Thus, in addition to a review of the testimony presented to the grand jury and the arguments of counsel, the trial court requested additional evidence in the form of the Affidavit from the United States Attorney to enable it to decide whether the Indictment was so tainted as to require dismissal. The Affidavit

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<sup>1</sup> The Court affirmed its denial of its Motion to Dismiss in its Memorandum and Opinion denying post-trial motions dated November 10, 2021. See Appendix C to this Petition.

clearly contained “testimony” as it was used by the court in determining that the grand jury proceedings were not so prejudicial as to require dismissal of the Indictment. Yet the trial court made its determination without allowing defense counsel any access or any ability to challenge this key evidence upon which the court made its decision on the Motion to Dismiss.

Green submits that this decision of the trial court is contrary to the settled decisions of the Supreme Court which require that a Defendant in a criminal proceeding be given the right to confront witnesses who offered testimony against him. Green requests therefore that the Court grant Certiorari to consider this serious error by the trial court.

**II.** The Supreme Court should grant Certiorari to consider whether the evidence in support of Green’s conviction for the crime of possession of a firearm with an obliterated serial number was so devoid of supporting evidence that his right to due process of law was violated.

Green contends that the record in this case contains no evidence that he knew or should have known the firearm had an obliterated serial number and that therefore his right to due process of law has been violated. In Re: Winship, 397 U.S. 356, 364 (1970)(“Lest there remains any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged.”)

The Government presented the testimony of Agent Ryan Kovach and Corporal Joseph Gober of the Pennsylvania State Police stating that the firearm in question had an obliterated serial number “directly under the barrel.” (3d. Cir. Appendix 312).

The evidence of record places the firearm in Green’s possession for only a limited period of time. Testimony indicated Green took it from his pants and pointed it at the others on the porch during the second altercation (3d. Cir. Appendix 359) and later Curry put the firearm in the attic above her bedroom, as Green was holding her up to reach the attic (3d. Cir. Appendix 260-261). Williams testified that she saw “Green with a gun on the side of him walking up the steps” and that she had never seen the gun prior to that. (3d. Cir. Appendix 278).

One can hardly infer from this testimony that Green had seen the obliterated number. Moreover, the record contained absolutely no evidence had the type of experience or expertise with firearms that could lead to an inference that he would naturally have known that the serial number was obliterated.

Based on the above, Green submits that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that he knew the firearm had an obliterated serial number. Green requests therefore that the Court grant Certiorari

to consider whether his conviction violated the principles set forth in In. Re. Winship, *supra*, i.e., that the conviction of a defendant under circumstances was not established beyond a reasonable doubt violates the defendant's right to due process of law.

**III.** The Court should grant certiorari to consider whether the approximate 898-day delay in bringing the defendant to trial in violation of his statutory and constitutional right to a speedy trial.

Green's charges were twice dismissed without prejudice due to a violation of the Speedy Trial Act, 18 U.S.C. §3161<sup>2</sup>, while he remained incarcerated. Green was briefly released following the filing of the third indictment in this matter.

The Speedy Trial Act, 18 U.S.C. §3161 et seq., requires that Green be brought to trial in a case where a not guilty plea is entered within seventy (70) days from the filing of the indictment or information. The Trial Court found that Green had "not satisfied his burden of showing that the facts and circumstances that lead to dismissal in this case warrant dismissal with prejudice."

A defendant's right to a speedy trial has a constitutional as well as a statutory basis. In Barker v. Wingo, 407 U.S. 514, 530 (1972), the United States Supreme Court established a four (4) part test to determine whether or not a

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<sup>2</sup> The first case was dismissed on July 19, 2019; the second on July 9, 2020.

constitutional violation of the right to a speedy trial has occurred.<sup>3</sup> 1) The length of the delay, 2) reason for the delay, 3) Green’s assertion of right to a speedy trial, and 4) prejudice are all to be considered.

In the context of this case, the following factors are significant:

**1. LENGTH OF DELAY**

Approximately eight hundred and ninety-eight (898)<sup>4</sup> days passed from indictment to dismissal without prejudice, which surpassed all relevant caselaw standards, thus triggering an examination of the other factors.

**2. REASON FOR THE DELAY**

While some of the delay may have been attributed to Green’s pretrial motions, the extent of the delay cannot be explained by a simple reference to procedural matters.

**3. ASSERTION OF SPEEDY TRIAL RIGHTS**

Green repeatedly asserted his Speedy Trial rights by twice asking the trial court to dismiss his case for Speedy Trial violations.

**4. PREJUDICE TO GREEN**

Regarding prejudice, Barker elucidates: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to

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<sup>4</sup> Of these, Green was incarcerated for approximately 884.



limit the possibility the defense will be impaired.” Barker, 407 U.S. at 532.<sup>5</sup>

Green’s pre-trial incarceration, as stated above, was both excessive and oppressive. Green was incarcerated from his initial indictment, on January 23, 2018, until his conditional release on June 25, 2020, a period of eight hundred and eighty-four (884) days.

Green brought forth claims of psychic injury, health problems, and familial strife attributable to his lengthy pre-trial incarceration. Defense counsel also argued that two potentially exculpable witness were unable to be located.

Based on the above, Green submits that the failure of the United States to bring him to trial for almost 900 days constitutes a major departure from the accepted and usual courses of judicial proceedings, and that the Court should grant certiorari and consider this claim.

**IV.** The Supreme Court should grant certiorari to consider whether the testimony of the United States’ DNA expert witness met the standards set forth in Daubert v. Merrel Dow, 569, U.S 579 (1993) and Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999).

At trial, the Government introduced the testimony of Ut N. Dinh (“Dinh”), as an expert witness. Ms. Dinh’s testimony was related to DNA found on the

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<sup>5</sup> See Also, Moore v. Arizona, 414 U.S. 25, 94 S. Ct. 188 (1973); Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564 (1970).

weapon seized by the United States at the crime scene. She testified as to the statistical likelihood that the DNA was that of Green. (3d. Cir. Appendix 361).

Prior to Dinh's testimony, defense counsel objected on the grounds that the methodology she used did not meet the Daubert and Kumho standards for admissibility. (3d. Cir. Appendix 367). In determining admissibility of expert's testimony, a federal trial judge may properly consider one or more of some specific factors - whether theory or technique (1) can be and has been tested, (2) has been subjected to peer review or publication, (3) has (a) high known or potential rate of error, and (b) standards controlling technique's operation, and (4) enjoys general acceptance within relevant scientific community - where such factors are reasonable measures of testimony's reliability. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

Ut N. Dinh, the Government's DNA expert, did not testify as to whether the likelihood formula she had used to produce the testimony had been tested, or had been subject to peer review. She also did not offer any testimony as to its potential rate of error. All she could say was that it was a formula she used and could be done either through a computer or by hand. She offered no testimony as to the source of the formula, or how it was developed. (3d. Cir. Appendix p. 355-381).

Based on the above, Green submits that the United States did not establish that the methodology used by Dinh should be accepted as the basis for expert

testimony. Thus, because the testimony which tied Green into the weapon found at the scene and allegedly used in the crime was extremely prejudicial to Green and could very likely have contributed to the jury's decision. Green submits that the error of the court was such that would require a new trial. Green further submits that the Supreme Court has not had occasion to rule on the admissibility of testimony based on the methodology used by Dinh and that this issue is very likely to occur in other cases. Thus, because this an important federal question which is likely to be presented in other cases, it therefore constitutes a basis for the Court to exercise its supervisory power and review the case.

### **CONCLUSION**

Green requests, therefore, that the Court grant his Petition for Certiorari.

Respectfully submitted,

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