

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2023

TRAVIS DWIGHT GREEN,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional
Institutions Division,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR
WRIT OF CERTIORARI PURSUANT TO RULE 13(5)

To the Honorable Samuel Alito, Justice of the United States Supreme Court and
Circuit Justice to the Fifth Circuit:

1. Petitioner, Travis Dwight Green, pursuant to Rule 13(5), Rules of the Supreme Court, respectfully seeks a sixty (60) day extension of time within which to file his petition for writ of certiorari in this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

2. The scheduled filing date for Petitioner's Petitioner for a Writ of Certiorari in this case is December 3, 2021. This is Petitioner's first request for an extension of time. This application is submitted more than ten (10) days prior to the scheduled filing date for the Petition.

3. Petitioner has conferenced this Motion with counsel for Respondent, Mr. Arie Cuenin, Assistant Attorney General for the State of Texas, who stated Respondent does **not** oppose the extension of time requested in the Motion.

4. For purposes of timing of this motion, the following dates are relevant:

On May 4, 2023, Petitioner filed a Petition for Rehearing En Banc.

On September 5, 2023, the Fifth Circuit the Fifth Circuit, treating the petition for rehearing as petition for panel rehearing, denied the Petition.

5. This is a complex capital case with a lengthy procedural history partially set forth below. Several issues potentially worthy of this Court's consideration on certiorari, which are set forth skeletally below, involve severe mental illness, abandonment of counsel under *Maples v. Thomas*, 565 U.S. 266 (2012), and the ramifications that these psychiatric and legal issues may have for establishing cause for procedural default under *Murray v. Carrier*, 477 U.S. 478 (1986). Finally, undersigned counsels' schedule precludes adequate briefing of these issues by the December 3, 2023, deadline.

6. Two decades ago, on March 26, 2001, Petitioner was convicted in of capital murder and sentenced to death in *State v. Green*, no. 832865, in the 209th District Court of Harris County, Texas. Twelve years later, on March 6, 2013, the Texas Court of Criminal Appeals ultimately denied state post-conviction relief.

7. On March 6, 2014, Petitioner timely filed a petition for federal habeas relief. On January 1, 2021, in the District Court for the Southern District of Texas, in cause no. 4:13-cv-01899, granted relief, after a three-day evidentiary hearing, on

Petitioner's competency to stand trial claim and his penalty phase ineffectiveness of counsel claim. *Green v. Davis*, 479 F. Supp. 3d 442, 448 (S.D.Tex. 2020) ("Green I").

8. On April 13, 2023, the Fifth Circuit reversed the District Court's decision to order relief. *Green v. Lumpkin*, 2023 U.S. App. LEXIS 8894, *1 (5th Cir. 2023) ("*Green II*"). The bases for reversal were procedural; according to the Panel, Petitioner had not shown that State Habeas Counsel had abandoned him under *Maples* and, further, the Panel was foreclosed by Fifth Circuit precedents from considering Petitioner's mental illness an excuse for procedural default. *Id.* at 12 & n. 2.

9. Relief in the District Court followed a six-day evidentiary hearing in which the District Court heard from multiple family members, trial counsel, both prosecutors, inmates and forensic psychologists from each side. *Green I*, 479 F. Supp. 3d at 463. As the District Court found, the developed record showed state habeas counsel never contacted Petitioner and filed, at the last minute, a state habeas application containing three claims already considered and denied on direct appeal, along with four other skeletal claims consisting in headings with no argument or authority. *Id.* at 459.

10. The state application therefore was not cognizable. *Id.* at 460. State habeas counsel promised to investigate the skeletal claims after the filing deadline but instead of doing so, he filed a pleading repudiating each one with the declaration that he could not in good faith argue for relief for his death sentence client. *Id.* at 460-461.

11. Because Petitioner represented himself, the District Court had the benefit of an extensive and rich record of Petitioner's speech. *Id.* at 482. With the aid of expert forensic testimony, the District Court found substantial evidence that Petitioner suffered at the time of trial and thereafter from a debilitating formal thought disorder definitive of schizophrenia. *Id.* 473. The diagnosis of schizophrenia had nonetheless remained completely unknown to the courts until federal proceedings commenced. One reason for the belated discovery is that state habeas counsel suppressed and misrepresented his own client's psychiatric records. *Id.* 460.

12. Six years after he filed Petitioner's non-cognizable state habeas application, state habeas counsel subpoenaed psychiatric records from the Texas Department of Criminal Justice. A psychiatric report dated May 17, 2007, found, *inter alia*, that Petitioner had "an elaborate delusional system" and paranoia, and reported specific examples, such as Petitioner stating he needed "someone to take this locator out of my head. The FBI put it in my brain some time ago." *Id.* However, state habeas counsel, citing, but not producing or identifying this very document, declared in state court that "I reviewed Mr. Green's most recent mental health examination dated May 17, 2007, at the Jester IV unit. There is no indication in those records that Mr. Green is mentally ill or incompetent." *Id.*

13. The District Court expressly found from the entire record that state habeas counsel's misrepresentations to the state court and his deliberate attempts to undermine his death sentence client's interests showed that state habeas counsel had

not acted as Petitioner’s agent, but rather, under *Maples*, had “abandoned [Petitioner] from the beginning.” *Id.* at 461.

14. The Fifth Circuit panel’s reversal of the District Court’s fact intensive determination of abandonment under *Maples* narrowed the already restrictive exception to procedural default to a formulaic question of whether state habeas counsel had filed an application for relief in state court no matter the quality, no matter the circumstance. *Id.* at 11. Whereas the District Court had considered facts subsequent to filing of the application – e.g., state habeas counsel’s repudiation of the writ and suppression of mental health records – the Fifth Circuit held that such evidence was nugatory because these events occurred after the date that Petitioner could amend his original state writ and, consequently, did not affect the default of constitutional claims. *Green II*, at *9-11.

15. Certiorari is therefore justified so as to preserve a *Maples* doctrine that has acquired increased importance after *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). In the wake *Ramirez*, negligence of habeas counsel is never an excuse for default. *Id.* at 1735. Consequently, there is a heightened need to ensure that state habeas counsel who act not just negligently but grossly so, or who make decisions, as here, intentionally adverse to their client’s interest, are not tolerated to the point of defaulting their client’s right to federal review of important constitutional claims.

16. Certiorari is also potentially warranted to consider whether *Carrier*’s requirement that “some objective factor external to the defense impeded” the presentation of a sixth amendment competency claim in state proceedings should be

applied in a literal fashion such that severe mental illness, not being “external” to the defendant, cannot excuse default. *Carrier*, 477 U.S. at 488.

17. This Court has recognized that when it comes to mental disabilities common law doctrines are not a substitute for current medical standards. *Moore v. Texas*, 581 U.S. 1, 13 (2017). (Additionally, penalizing rather than accommodating persons who are severely mentally is antithetical to the way disabilities are treated across lines of cases, including those brought under Title II, Americans with Disabilities Act.) A potentially cert worth objective that Petitioner’s case provides a vehicle for reaching is that of ensuring the legal distinction between impediments external and internal to the defense is applied with the same respect for medical knowledge and advances as counseled by this Court in *Moore*.

18. Within the procedural default doctrine, the distinction between internal and external impediments has normative dimensions. An impediment internal to the defense is one that the defense has an opportunity to overcome and, therefore, can be held responsible for not calling to the state court’s attention. Even if the source of an impediment originates from an outside source, such as suppression of evidence by the state, awareness of the suppression during state habeas proceedings undermines assertions that default is excusable because awareness of the state’s conduct gives a prisoner the opportunity to raise a *Brady* claim.

19. A fundamental characteristic of Petitioner’s mental illness is that it left him with no insight into his condition. Petitioner could not reflect on his behavior nor his mentation, and thus could not volitionally bring his disabilities to the

attention of court or counsel. Indeed, Petitioner was compelled by his disease to deny he suffered from a mental illness. That is to say Petitioner was compelled to deny an essential component of a competency claim. A potential cert worthy issue is therefore whether mental illness, depending on the severity, can be functionally equivalent to an objective external impediment, beyond a Petitioner's control, that prevents a Petitioner from raising this constitutional issue of fundamental importance to a fair trial.

20. Moreover, schizophrenia is perhaps the most misunderstood of any serious disease, mental or physical. In this case, Petitioner's condition was misdiagnosed at trial and misunderstood by laypersons, including court personnel, prosecutors, and relatives. A second issue potentially worth of the Court's attention on certiorari is whether the inability of others, on whom a Petitioner is completely dependent, to diagnose or comprehend the nature of Petitioner's mental condition constitutes external factors that prevented Petitioner from raising a competency claim.

21. Adequately briefing the potentially cert worth issues outlined above has taken and will take considerable time and resources. However, undersigned counsel and undersigned co-counsel have been and are litigating several matters that require close to full attention.

22. Counsel is appointed to represent Petitioner under the Criminal Justice Act. He is also appointed under the Act to represent two other death sentenced clients, Eugene Broxton, and Mabry Landor. In addition, he represents both clients

in Texas courts, which, while federal proceedings are abated, ordered evidentiary hearings in both cases.

23. The convicting court scheduled an evidentiary hearing for November 28-29, 2023, in Ex Parte Broxton, no. in the 209th District Court, Harris County. Undersigned counsel is currently preparing for this hearing which involves the presentation of DNA and other forensic evidence.

24. Undersigned counsel also represents a client with Special Immigrant Juvenile Status in removal proceedings in Immigration Court, Houston, Texas, Lead Number 205 463 953. The Immigration Judge has scheduled an Individual Hearing or Removal Hearing for December 8, 2023, at which the court will determine whether to deport client. This also an evidentiary hearing for which counsel is presently preparing witnesses and evidence.

25. Undersigned co-counsel, Tivon Schardl, represented David Santiago Renteria who was scheduled for execution November 16, 2023. Co-counsel has actively engaged in litigation in Mr. Renteria's case since June of this year. Since the Fifth Circuit denied rehearing in Petitioner's case, co-counsel has been consumed preparing Mr. Renteria's petition for writ of certiorari filed in this Court and a habeas corpus petition filed in the Texas Court of Criminal Appeals.

26. Finally, intervening holidays provide additional reasons for a sixty-day (60) extension of time.

27. For the foregoing reasons, the Petitioner, who is indigent and incarcerated in state prison at the Polunsky Unit, Livingston, Texas, respectfully requests that this Court grant an extension of sixty (60) days to and including February 1, 2024, within which to file his petition for writ of certiorari.

Respectfully submitted,
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