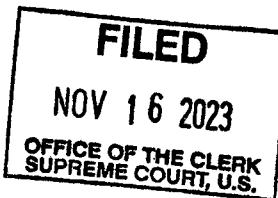


IN THE UNITED STATES SUPREME COURT
USAP5 NO. 23-40186

TRAY DEWAYNE GREEN 24-6355 ORIGINAL
Petitioner,

v.

BOBBY LUMPKIN
Respondent,



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

PETITION FOR WRIT OF CERTIORARI

Tray Dewayne Green
Power of Attorney in Fact
McConnell Unit
3001 S. Emily Drive
Beeville, TX 78102
(361) 362-2300 (Unit Telephone #)

IDENTITY OF PARTIES AND COUNSEL

PARTIES

Petitioner:
TRAY DEWAYNE GREEN

COUNSEL

TRAY Dewayne Green
Power of Attorney in Fact
McConnell Unit
3001 S. Emily Drive
Beeville, TX 78102
(361) 362-2300 (Unit Telephone #)

Respondent:
BOBBY LUMPKIN

Susan Frances San Miguel
Assistant Attorney General,
Criminal Appeals Division
300 West 15th St.
Austin, TX 78701
State Bar No. 24037425
(512) 936-1400

Question(s) Presented

- ① Did Green mail Pro Se petition in the form for Writ of certiorari to the wrong jurisdiction (Court)? (5th Circuit Court of Appeals - Gretna, Louisiana) and (U.S. Court of Appeals for the 5th Circuit of - New Orleans, Louisiana) on November 20, 2017; December 6, 2017; and December 29, 2017? (See Attachments F and G)
- ② Is Green's federal petition subject for review under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")?
- ③ For AEDPA purposes is an order of deferred adjudication Community Supervision a judgment for "AEDPA" purposes?
- ④ On April 18, 2013 did Green Waive his right to appeal Cause # 11-11-8685? (24th Judicial District Court of Jackson County, Texas) (See Attachment B)
- ⑤ If Green Waived his right to appeal do the provisions in Tex.R.App.Proc. 41(b)(1) and 26.2(a)(1) still apply to his sentence.
- ⑥ Does the thirty (30) day period which Green could have filed a notice of appeal and the computation of the limitations period outlined in Fed.R.Civ. Proc. 6(a) still apply to Green if he waived his right to appeal?
- ⑦ Did Green conviction become final on May 20, 2013 after the thirty (30) day period during which Green could not have filed a notice of appeal?
- ⑧ Did Green have one (1) year, until May 20, 2014 to file his petition in federal court, unless a properly filed state writ of habeas corpus tolled limitations period under 28 U.S.C. § 2254 (d)(2)?

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IN THE UNITED STATES SUPREME COURT

TRAY DEWAYNE GREEN,
TDCJ-CID NO. 02106292
SID NO. 06645776
Petitioner,

USAPS case NO. 23-40186

V.

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

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Comes now TRAY DEWAYNE GREEN, Petitioner and files this petition for Certificate of Certiorari in accordance with Sup. Crt. Rule 13(3); and 28 U.S.C. '1254(1) within 90 days from the date of the denial of his rehearing en-banc.

In support of this petition, Green shows the court the following:

Official and Unofficial reports of Opinions and Orders

I.

On April 18, 2013 Green was convicted in the 24th Judicial District Court of Jackson County, Texas for Aggravated Assault with Deadly Weapon by threats (Tex. Penal Code 22.02) for "ORDER OF DEFERRED ADJUDICATION" Cause No. 11-11-8685, styled STATE OF TEXAS V. TRAY DEWAYNE GREEN. The Judge Skipper Koetter assessed against Green a punishment of 10

Years deferred adjudication community supervision as a plea agreement if Green waived his right to appeal and "testify truthfully" at another inmate (Christian Robinson) Capital Murder trial that was later down graded. A copy of this judgment is attached as "Exhibit B".

II.

On April 18, 2013 for Cause Number: 11-11-8685 in the 24th Judicial District Court of Jackson County, Texas waived his right to trial by jury in writing, in accordance with Articles 1.13 and 1.14 (Tex. Code Crim. Proc.). The evidence was stipulated when Green consented in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consented to an oral stipulation of the evidence and other documentary evidence in support of the judgment of court. Waivers and Consent was approved by the court in writing, and failed in the file papers of the Cause Number: 11-11-8685. The consent and approval by the Court was entered of record on the minutes of the trial court, and the consent and approval of Pam Guenther, District Attorney for Jackson County, Texas was in writing and signed by Guenther and filed in the papers of the cause before Green entered his defendants plea. Green knowingly and voluntarily waived his right to challenge any aspect of his sentence including any sentencing guidelines determinations because he was told he would only receive deferred adjudication Community supervision. See "plea memorandum" attached as "Exhibit D".

III.

On April 18, 2013 the trial court sentenced Green to an below-guidelines 10 year deferred adjudication community supervision followed by 400 hours community service for Aggravated Assault with deadly weapon by threats. Green was not sentenced "in accordance with" the plea agreement because he was also given 40 years confinement under same cause number (11-11-8685). The plea agreement was ambiguous and the phrase is susceptible to more than one interpretation in which the Plea colloquy does not eliminate any ambiguity. Green was not sentenced "in accordance with" the Plea agreement because the trial courts "Crime of Violence" enhancement, he was ineligible for deferred adjudication community supervision. See "Indictment" attached as "Exhibit A and Exhibit E."

IV.

On December 9, 2016 the 24th Judicial District Court of Jackson County, Texas sentenced Green to 40 years confinement in the Texas Department of Criminal Justice - Correctional Institutions Division directed by BOBBY LUMPKIN, Respondent who now has Green in custody. Green was double sentenced for the same cause number (11-11-8685) during revocation

trial by Judge Jack W. Marr. See "Judgment Adjudicating Guilt" attached as "Exhibit C".

II.

On May 20, 2022 Susan Frances San Miguel, Assistant Attorney General, Criminal Appeals Division (attorney for Respondent) filed "Document 19 motion to dismiss petition for Writ of Habeas Corpus and Proposed Order" electronically with the United States District Court of Texas, Victoria Division for Civil Action No. 6:22-CV-00007.

Susan Frances San Miguel claims:

- ① Green did not appeal the "Order of Deferred Adjudication" (Cause Number: 11-11-8685).
- ② Therefore conviction became final on May 20, 2013 after the thirty (30) day period during which he could not have filed a notice of appeal.
- ③ Green had one (1) year, until May 20, 2014 to file his petition in federal court, unless a properly filed state Writ of habeas corpus tolled the limitations period under 28 U.S.C. § 2244 (d)(2).
- ④ That Green missed the deadline over seven (7) years and eight (8) months.

III.

On February 23, 2023 Honorable Judge Drew B. Tipton of the United States District Court for the Southern District, Victoria Division issued a final judgment for Civil Action No. 6:22-CV-00007 "DISMISSED WITH PREJUDICE." All relief requested by Green was denied. All relief not expressly granted therein was denied. Judge Drew B. Tipton dismissed Green's 28 U.S.C. § 2254 application as time barred, claiming that Green did not appeal the "Order of deferred adjudication" (Cause No. 11-11-8685) which was entered on April 18, 2013 by trial court.

As a plea deal Green waived his rights to appeal which is shown on the "Order of deferred adjudication" for Cause No. 11-11-8685, so the provisions in Tex. R. App. Proc. 41(b)(1), and Tex. R. App. Proc. 26.2 (a)(1) did not apply to Green's sentence. The thirty (30) day period which Green could have filed a notice of appeal and the computation of the limitations period outlined in Fed. R. Civ. Proc. 6(a) did not apply to Green. See Flanagan v. Johnson, 154 F.3d 196, 202 (5th Cir. 1998).

VII.

On March 27, 2023 Honorable District Judge Drew B. Tipton of the United States District Court for the Southern District, Victoria Division issued the "ORDER DENYING A CERTIFICATE OF APPEALABILITY" for Civil Action No. 6:22-cv-00007. Green was ultimately denied habeas corpus relief by federal court for untimely filed petition and "failure to exhaust remedies." The district court dismissed Green's 28 U.S.C. § 2254 application as time barred. (See Appendix "B")

VIII.

On June 22, 2023 Honorable United States Circuit Judge Dana M. Douglas of the U.S. Court of Appeals for the Fifth Circuit "DENIED" Green's motion for appealability for Case No. 23-40186.

IX.

On July 14, 2023 The U.S. Court of Appeals for the Fifth Circuit, Honorable Circuit Judge Dana M. Douglas "GRANTED" Green's motion for leave to file petition for rehearing en-banc out of time.

X.

On August 25, 2023 Circuit Judges; ELROD, HAYNES, and DOUGLAS of the United States Court of Appeals for the Fifth Circuit issued an "Unpublished Order Per Curiam" for Case No. 23-40186. Treating the motion for rehearing en-banc as a motion for reconsideration (5th Cir. R. 35 I.O.P.), the motion for reconsideration was DENIED. Stating "because no member of the panel or judge in regular service requested that the court be polled on rehearing en-banc (Fed. R. App. Proc. 35 and 5th Cir. R. 35) the petition for rehearing en-banc is DENIED."

XI.

STATEMENT OF JURISDICTION

Green seeks review of the order dated June 22, 2023 for which a timely rehearing was denied on August 25, 2023 by the Fifth Circuit of Appeals in Case No. 23-40186. This court has jurisdiction over the petition for Writ of Certiorari under Sup. Crt. Rule 13(3); and may be reviewed by the U.S. Supreme Court by the following method: 28 U.S.C. § 1254 (1).

XII.

CONSTITUTIONAL PROVISIONS

- ① Tex. Const. Art. I, § 3(a) - "Equality Under the Law."
- ② Tex. Const. Art. I, § 13 - "Cruel and Unusual Punishment; Remedy for Due Course of Law."
- ③ Tex. Const. Art. I, § 18 - "Imprisonment for Debt."
- ④ Tex. Const. Art. I, § 19 - "Deprivation of Life, Liberty, Property, etc. by Due Course of Law."
- ⑤ USCS Const. Amend. 4 - "Unreasonable searches and seizures."
- ⑥ USCS Const. Amend. 5 - "Double Jeopardy; Due process of Law."
- ⑦ USCS Const. Amend. 8 - "Cruel and Unusual Punishment inflicted."
- ⑧ Tex. Const. Art. I, § 14 - "Double Jeopardy."
- ⑨ USCS Const. Amend. 14 - Sec. 1 [citizens of the United States.]

XIII.

STATEMENT OF THE CASE

On February 24, 2022 TRAY DEWAYNE GREEN, Petitioner, filed federal habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, Western District of Texas for Civil Action No. 5:22-CV-00179-JKP against BOBBY LUMPKIN, Respondent.

On February 28, 2022 the case was transferred to the United States District Court, Southern District of Texas, Victoria Division for case No. 6:22-CV-00007 with Judge Drew B. Tipton assigned.

XIV.

ISSUES PRESENTED

Green attempted to exhaust all available remedies within time limits. On April 18, 2013 Green waived his right to appeal for Cause No. 11-11-8685 ("ORDER OF DEFERRED ADJUDICATION") and was placed on deferred adjudication community supervision. The Respondant and the STATE OF TEXAS claim is that Green is barred and failed to exhaust remedies.

XV.

STATEMENT OF FACTS

Green exhausted all available remedies:

- ① April 7, 2017 an Anders Brief was filed with the 13th Court of Appeals (COA No. 13-16-00702-CR).

② April 27, 2017 an "Order Per Curiam" was filed by the 13th Court of Appeals (COA NO. 13-16-00702-CR).

③ May 17, 2017 filed Pro Se brief with 13th Court of Appeals (COA NO. 13-16-00702-CR).

④ August 17, 2017 13th Court of Appeals "AFFIRMED" Judgment (COA NO. 13-16-00702-CR).

⑤ September 8, 2017 filed Pro Se petition for discretionary review with Court of Criminal Appeals of Texas (PDR NO. PD-0994-17).

⑥ October 25, 2017 Court of Criminal Appeals of Texas refused discretionary review (PDR NO. PD-0994-17).

⑦ December 5, 2017 Green filed pro se brief/Certiorari in wrong jurisdiction (Gretna, Louisiana - Court of Appeals - Fifth Circuit).

⑧ December 9, 2017 Honorable Clerk Lyle W. Cayce from the U.S. Court of Appeals - Fifth Circuit received forwarded brief from Gretna, Louisiana for processing. Green was notified that his brief was filed in the wrong jurisdiction.

⑨ August 11, 2020 a writ of habeas corpus pursuant to Article 11.07 of the Tex. Code Crim. Proc. in the Court of Criminal Appeals of Texas (WR-91, 792-01).

⑩ February 3, 2021 habeas corpus was denied by Court of Criminal Appeals of Texas (WR-91, 792-01).

⑪ February 22, 2021 Green mailed habeas corpus en-banc to Court of Criminal Appeals of Texas (WR-91, 792-01). Green received no notification of en-banc signaling neglection from court.

XVI.

POINT OF ERROR

Where on April 18, 2013 Green was convicted of Aggravated Assault with deadly weapon by threats in violation of Tex. Penal Code § 22.02, the trial court did err by failing to include a finding of use of a deadly weapon in accordance with Tex. Code Crim. Proc. Ann. art. § 42.12, 3g (a)(2) [repealed by Acts 2015 84th Leg., Ch 770 (H.B. 2299), § 3.01]. The indictment used the phrase "deadly weapon" and the trial court found defendant "guilty of the offense as charged in the indictment" but did not enter the finding in the Judgment "ORDER OF DEFERRED ADJUDICATION" for Cause No. 11-11-8685. See attached Exhibits "A and B".

Where on April 18, 2013 Green pleaded guilty to aggravated assault with deadly weapon by threats and signed a judicial confession stating that he committed each and every act allowed and alleged in the indictment, the trial court erred by not entering the deadly weapon in the judgment "ORDER OF DEFERRED ADJUDICATION" for Cause No. 11-11-8685. See attached Exhibit "B".

Where on April 18, 2013 the trial court erred by ordering deferred adjudication community supervision. Due to grand jury's affirmative deadly weapon finding (see Exhibit "A") rendered Green ineligible for judge-ordered community supervision. Holding pursuant to Tex. Code Crim. Proc. Ann. art. § 42.12 that a trial judge could not grant deferred was eligible for judge-ordered community supervision.

Where on April 18, 2013 the trial court had erred by modifying the judgment of the cause "ORDER OF DEFERRED ADJUDICATION" and suspended the execution of the sentence and placed Green on deferred adjudication community supervision. The trial court lacked the jurisdiction to grant deferred adjudication community supervision.

Where on April 18, 2013 the court erred by ordering Green a grossly disproportionate sentence as well as on December 9, 2016 with excessive punishment assessed by the judge was not within the limits prescribed by the statute, the punishment was cruel and unusual with the constitutional prohibition.

Where on December 9, 2016 the trial court erred by denying Green's protected and vested rights to the Tex. Constitution 1st/4 and the 5th and 4th Amendments to the U.S. Constitution. The double jeopardy provision was violated when Green was subjected to multiple convictions and punishments for the same cause No. 11-11-8685 as shown in the "ORDER OF DEFERRED ADJUDICATION" and "JUDGMENT ADJUDICATING GUILT". See attached Exhibits "B and C".

Where on December 9, 2016 the trial court erred by subjecting Green to cruel and unusual punishment when he was sentenced to a 40 year erroneous and impermissibly enhanced sentence in prison without committing a new felony. This violated Green's protected and vested rights pursuant to Tex. Constitution 1st/3 and 8th Amendment of the U.S. Constitution. See attached Exhibit "C".

Where on December 9, 2016 the trial court erred by imprisoning Green for debt pursuant to the Tex. Constitution 1st 18 and 28 U.S.C. ^{et} 2007. Green is imprisoned for technical violations of probation conditions of number 17 and 18 in "STATES AMENDED PETITION FOR REVOCATION AND FINAL ADJUDICATION" for cause No. 11-11-8685. The violations state Green owes \$1,200 in past supervision fees for the months of April 2013 through November 2014. The violations started while Green was incarcerated still. Green wasnt released from prison until December 13, 2013, months after violations started.

Where on December 9, 2016 the trial court erred by subjecting Green to vindictive and selective prosecution violating his constitutional rights pursuant to Tex. Constitution 1st 19, 1st 3(a); and the 14th Amendment to the U.S. Constitution. On April 18, 2013 Green received deferred adjudication community supervision as a plea agreement to testify against another inmate for capital murder. Due to incarceration Green was unable to testify against Robinson. The Due Process Clause was violated and prohibits the Prosecutors using criminal charges in attempt to penalize Green's valid exercise of constitutional or statutory rights. The presumption of vindictiveness arose with the increased sentence, from deferred adjudication community supervision to 40 years confinement in prison without committing new felony. Green was subjected to an additional affirmative finding of a deadly weapon for Cause No. 11-11-8685 after affirmatively exercising his constitutional rights. The prosecutorial decisions were based on unconstitutional motives. See attached Exhibits "B and C".

XVII.

ARGUMENT AND AUTHORITIES

Green was misled by the state about the cause of action and prevented in a extraordinary way from asserting his rights as he shown in his "Brief Supporting COA" Case No. 23-40186 with the U.S. Court of Appeals for the Fifth Circuit. (see Grooms V. Johnson, 208 F.3d 488, 489-90 (5th Cir. 1999) (citing Coleman V. Johnson, 189 F.3d 398, 402 (5th Cir. 1999)). Green established prejudice by showing "not merely that the errors at his trial created a possibility of prejudice, but that they worked on his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. (see U.S. V. Frady, 456 U.S. 152, 170 (1982)). In Green's appeal for his 2254 habeas corpus application, Fed. R. Section 2254 Rule 11 (a), by way of Fed. R. App. P. Rule 22 (b)(1) he requested a circuit judge to issue it, because if the judge has "grave doubt" meaning "the matter is so evenly balanced" as to whether the error had a substantial and injurious effect, the judge must find in favor of the habeas petitioner. (see O'Neal V. McAninch, 513 U.S. 432, 435 (1995); Robinson V. Cain, 324 F.3d 297, 309-10 (5th Cir. 2003)).

Green "exhausted the remedies" in state courts, utilizing procedures available under state law to raise claim. (28 U.S.C. § 2254 (c) and (b)(1)). Green properly pursued a claim through the entire appellate process of the state and exhaustion requirement was satisfied because Green's brief to appellate division adequately alerted the courts for appeal.

The district Court dismissed Green's 28 U.S.C. § 2254 application as being time-barred but Green exhausted the remedies available in state courts. Green has presented a substantial showing of the denial of constitutional rights by the state courts. (28 U.S.C. § 2253 (c)(2)). Green was denied on procedural grounds even though he showed constitutional right violations.

Green's federal petition should not be dismissed with prejudice and he should be GRANTED a certificate of certiorari because he exhausted available remedies.

Green's federal petition is subject to review under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See 28 U.S.C.A. § 2254 (d); Williams V. Cain, 125 F.3d 269, 274 (5th Cir. 1997) (holding "the AEDPA amendments to chapter 153 of Title 28 apply to cases where a petition for habeas corpus is filed on or after April 24, 1996").

For AEDPA purposes an order of deferred adjudication community supervision is a "judgment" for AEDPA purposes. See Caldwell V. Dretke, 429 F.3d 521, 528 (5th Cir. 2005).

Due Process Claim

Green established a procedural due process claim, demonstrating that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty, and property, and (2) the procedures available to him did not provide due process of law. See McCarthy V. Darman, 372 Fed. APPX. 346.

XVIII.

PRAYER FOR RELIEF

For those reasons, TRAY DEWAYNE GREEN, Petitioner, respectfully request that his petition for Writ of certiorari be "GRANTED" and awarded all relief requested:

- ① A declaration that the acts and omissions described herein violated Petitioner's rights under the Constitution and laws of the United States and Texas,
- ② A preliminary and permanent injunction ordering respondent BOBBY LUMPKIN to release Petitioner from unlawful restraint and confinement.
- ③ Granting Petitioner compensatory damages in the amount of \$700,000 against respondent.

- ④ Granting petitioner Punitive damages in the amount of \$300,000 against respondent.
- ⑤ Petitioner also seek a jury trial on all issues triable by jury.
- ⑥ Petitioner also seek recovery of his past cost in this civil action, and
- ⑦ Any additional relief this court deems just, proper, and equitable.

Dated: 1-6-2025

Respectfully submitted,

TRAY DEWAYNE GREEN
TDCJ-CID NO. 02106292
SID NO. 06645776
McConnell Unit
3001 S. Emily Drive
Beeville, TX 78102

XIV.
CONCLUSION

Green respectfully request that his petition for writ of certiorari be GRANTED and awarded damages and immediately released from unlawful restraint and confinement. Furthermore, Green request his past illiteracy, deafness, and lack of legal training to not support an abuse of writ. (see United States V. Flores, 981 F.2d 231, 236 (5th Cir. 1993)). Green has attempted to exhaust all available remedies and his past ignorance of the law and lack of legal assistance should excuse prompt filing.

V.
VERIFICATION

I have read the foregoing petition for writ of certiorari and hereby verify that the matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed in Beeville, TX on 1-6-2025

Wherefore, petitioner prays that the court grant the relief to which is entitled.



Tray DeWayne Green, Agent
Power of Attorney in Fact
With the Autograph

Petitioner's current address: 3001 S. Emily Drive Beeville, TX 78102