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### **Defendant-Appellant**

Joseph Dwain Gore

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument.

## **CERTIFICATE OF PDF SEARCHABLE COMPLIANCE**

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## **STATEMENT OF JURISDICTION**

The State's Third Amended Motion to Adjudicate Guilt and Revoke Appellant Joseph Dwain Gore's Community Supervision was presided over by Judge Jeth Jones in case number 19-CR-17983 before the 122nd Judicial District Court. The State alleged several violations by Appellant of his community supervision restrictions. At a hearing on August 22, 2024 Appellant's placement on six years of probation was revoked, and he was sentenced to seven years in the Institution Division of the Texas Department of Criminal Justice. On September 12, 2024 Appellant filed his Notice of Appeal in this cause.

This Court has jurisdiction over this appeal pursuant to the Texas Constitution, Article V, Sections 5 and 6 and Articles 38.04, 36.13 and 44.25 of the Texas Code of Criminal Procedure, which gives the 14<sup>th</sup> Court of Appeals of Texas jurisdiction over final decisions and sentences of the District Courts of Texas.

**ISSUE PRESENTED**

**ISSUE I.**

THE TRIAL COURT'S ORDER REVOKING APPELLANT'S  
COMMUNITY SUPERVISION AND SEVEN YEAR SENTENCE  
IN THE INSTITUTION DIVISION OF THE TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE WAS AN ABUSE OF  
DISCRETION.



## **STATEMENT OF THE CASE**

This is a criminal case in which Appellant seeks reversal of the revocation of his deferred entering an adjudication of guilt and being placed under the terms and conditions of community supervision.

Appellant was originally charged by an indictment with violating Texas statute 481.112(d) of the Health and Safety Code, a first degree felony:

“That Joseph Dwain Gore, on or about the 5<sup>th</sup> day of June, 2019 and anterior to the presentment of this indictment in the County of Galveston and State of Texas, did then and there knowingly possess with the intent to deliver, a controlled substance, namely, methamphetamine in an amount of four grams or more but less than 200 grams.”

On August 22, 2024 in case number 19-CR-1798 Judge Jeth Jones of the 122nd Judicial District of Galveston County, Texas, revoked Appellant’s deferred entering an adjudication of guilt and the probated terms and conditions of his community supervision. Found him guilty of the underlying crime, Appellant was sentenced to 7 years.

On September 12, 2024 Appellant’s Notice of Appeal was filed.

## STATEMENT OF FACTS

The indictment alleges that Appellant Joseph Dwain Gore knowingly possessed with the intent to deliver, a controlled substance, methamphetamine in an amount of four grams or more but less than 200 grams.

On August 17, 2021 Appellant pled guilty to that offense. A deferred adjudication of guilt was entered and Appellant was placed under the terms and conditions of various restrictions of community supervision for six years.

The State filed a Third Amended Motion to Adjudicate Guilt and Revoke Community Supervision, making allegations of various violations by Appellant of his listed restrictions.

At an August 22, 2024 hearing the State presented witnesses and exhibits to prove its allegations. Judge Jeth Jones of the 122nd Judicial District of Galveston County, Texas, heard the evidence and argument of counsel and found the following allegations to be true:

*1A. On or about the 15<sup>th</sup> day of February, 2024 in Brazoria County,*

*Texas, the said Joseph Dwain Gore did then and there commit the offense of theft of property of less than \$2500 with two more previous convictions.*

*4.Said Defendant failed to report in person to the Community Supervision officer for December 2023; March, April, May, June and July, 2024.*

*8A.Defendant traveled to Louisiana in May, 2024 without permission from this Court.*

*8B.Defendant traveled to Matagorda County in July, 2024 without permission from this Court.*

*10.Said Defendant failed to notify the Community Supervision officer of any arrests.*

*11A. On 01/04/2024 Defendant voluntarily admitted in writing to the Community Supervision officer Donoho to using methamphetamine on or about 01/01/2024.*

*26A. On 02/14/2024 Defendant submitted a sample which tested positive for the presence of methamphetamine confirmed by lab on 02/29/2024.*

*29.Said Defendant failed to perform Community Service hours at the*

*rate of no less than sixteen (16) hours per month until completed as ordered by the Court.*

During the punishment phase of the August 22, 2024 hearing, Appellant testified (T. II, 52-70) then presented his mother, Pamela Gore (T. II, 70-75) and his father, ex-Harris County policeman, Howard Gore. (T. II, 75-79) The testimony centered on Joseph Gore's intrinsic good character, his loving and very positive familial relationships, his family's continuing high level of support for him and the good probability of his completing the terms and conditions of community supervision if his deferred entering an adjudication of guilt and probation were allowed to continue.

Judge Jones revoked Appellant's deferred entering an adjudication of guilt and continuing under his terms and conditions of community supervision and sentenced him to 7 years in the Institutional Division of the Texas Department of Criminal Justice.

On September 12, 2024 Joseph Gore's Notice of Appeal was filed.



## STANDARD OF REVIEW

The State has the burden of showing by a preponderance of the evidence that the Appellant committed a violation of the conditions of community supervision. *Cobb v. State*, 851 S.W. 2d 871, 873 (Tex. Crim.App. 1993); *Kulhanek v. State*, 587 S.W. 2d 424, 426 (Tex. Crim. App. 1979) The trial court's order revoking community supervision is reviewed under an abuse of discretion standard. *Rickels v. State*, 202 S.W. 3d 759, 763 (Tex.Crim.App. 2006); *Cardona v. State*, 665 S.W. 2d 492, 493 (Tex. Crim. App. 1984) The trial court is the sole judge of the credibility of the witnesses and the weight given to their testimony, and the evidence is reviewed in a light most favorable to the trial court's ruling. *Cardona v. State*, 665 S.W. 2d at 493; *Garrett v. State*, 619 S.W. 2d 172, 174 (Tex. Crim. App. 1981) If the State fails to meet its burden of proof, the trial court abuses its discretion in revoking the community supervision. *Cardona* at 493-494. Proof by a preponderance of the evidence of any one of the alleged violations of the conditions of supervision is sufficient to support a revocation order. Tex. Code Crim. Proc. Ann. at 42.12 Sec. 21(b) (Vernon Supp. 2007); *Moore v. State*, 605 S.W.

2d 924, 926 (Tex. Crim. App. 1980)

A claim of insufficient evidence is limited to the traditional legal sufficiency analysis that requires the Court to view the evidence in a light most favorable to the decision to revoke. It does not extend to a factual sufficiency review. *Becker v. State*, 33 S.W. 3d 64, 66 (Tex.App.—El Paso 2000 no pet.)

Revocation involves the loss of liberty and therefore implicates due process. *Caddell v. State*, 605 S.W. 2d 276, 277 (Tex. Cr. App. 1980) The central issue to be determined in reviewing a trial court's exercise of discretion in a community supervision revocation case is whether the defendant was afforded due process of law. *DeGay v. State*, 741 S.W. 2d 450 (Tex.App.—El Paso 2000 no pet.)

Appellant has a right to due process of law, to equal protection and a right to a fair trial under the 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution as well as the Texas Constitution.



## **SUMMARY OF THE ARGUMENT**

### **ISSUE I.**

THE TRIAL COURT'S ORDER REVOKING APPELLANT'S  
COMMUNITY SUPERVISION AND SEVEN YEAR SENTENCE  
IN THE INSTITUTION DIVISION OF THE TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE WAS AN ABUSE OF  
DISCRETION.

## ARGUMENT

### ISSUE I.

THE TRIAL COURT'S ORDER REVOKING APPELLANT'S  
COMMUNITY SUPERVISION AND SEVEN YEAR SENTENCE  
IN THE INSTITUTION DIVISION OF THE TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE WAS AN ABUSE OF  
DISCRETION.

In a revocation hearing, the trial court has the discretion to revoke community supervision when a preponderance of the evidence supports one of the State's allegations that the defendant violated a condition of his community supervision. This discretion is not absolute. *Scamardo v. State*, 517 S.W. 2d 512, 293, 297, 298 (Tex. Crim. App. 1974) *Caddell*, 605 S.W. 2d at 277.

Though defendants are not entitled to community supervision as a matter of right, once a defendant is assessed community supervision in lieu of other punishment, this conditional liberty "should not be arbitrarily withdrawn by the court." *DeGay v State*, 741 S.W. 2d 445, 449 (Tex. Cr. App., 1987)

On appeal from a trial court's decision to revoke, therefore, appellate courts review the record only to ensure that the trial court did not abuse its discretion. *Leonard v. State*, 385 S.W. 3d 570, 577 (Tex. Crim. App. 2012)

Weighting the testimony and evidence of the defense witnesses and reviewing it in a light most favorable to the trial court's ruling, as in *Cardona v. State*, 665 S.W. 2d at 493 and *Garrett v. State*, 619 S.W.2d at 174, the verdict revoking Mr. Gore's community supervision is an abuse of the trial court's discretion. This is made clear when analyzing the defense witnesses' testimony.

Appellant Joseph Dwain Gore testified in his own behalf. (T. II, 52-70) He testified that he and his probation officer agreed that he should not try to do all the community service classes at once, that he would maintain a job and do community service through the League City Legions for a few hours a week. (T. II, 59-60) He testified that he was not aware that he could pay off his community service hours with money and fell behind on the payments when he was at the ISF, a lockdown rehabilitation center. (T. II, 60, 67) Had

he known, he testified that with the help of his parents he would have paid them off (T. II, 61) and been able to “get back in the saddle again.” (T. II, 63)

Mr. Gore explained that in late December he was disturbed and had fallen into a depression because his father, Howard Gore, had been diagnosed with cancer and dementia. (T. II, 61) He testified that he went to Narcotics Anonymous meetings and maintained a close relationship with his parents, wife and especially his seven year old daughter, adding that he planned to get past his problems for all of them. (T. II, 62, 63)

Mr. Gore testified that he was working at the Gold Tank Inspection Company in Gonzales, Louisiana, (T. II, 64) and e-mailed his probation officer about it. (T. II, 68)

Joseph Dwain Gore’s mother, Pamela Gore, testified in her son’s behalf. (T. II, 70-75) She testified that she had been close to him for his whole life; that he often stayed at her husband’s and her house, that he had graduated from San Jac High School and was an excellent landscaper. (T. II, 71) She testified that her son was not an alcoholic; that he was

a very good family man and that “his little girl thinks he hung the moon.” (T. II, 72) “She loved Joseph and he loved her very much. She still does. He still does.” (T. II., 74) Mrs. Gore testified that to have Joseph on the outside working would help his wife keep up her household, help with the costs of everything and help maintain a place for them to live. (T. II., 74)

Joseph Dwain Gore’s father, Howard Gore, next appeared on behalf of his son. (T. II, 70-75) He testified that he had been a Harris County police officer in the sheriff’s department, worked for the District Attorney’s office, as a bailiff in Judge Joe Kegan’s court for 20 years and also worked as a process server. (T. II., 76) He told the court that his son got addicted to methamphetamine, that it takes time to break away from it, but that “he finally broke away from it.” (T. II., 77) He testified that he “would seek help for him physically, mentally and medically to keep him from doing drugs. I know my son. My son is a good person and a great father. And I know that he would walk away from this today in good shape.” (T. II., 77) “My wife and I believe in our son, that he is going to kick the habit and is going to raise his daughter the right way.” (T. II., 79)



On final argument, Mr. Gore's attorney asked the court to give Mr. Gore "an opportunity to become a better family man for his daughter and his parents; an opportunity to get methamphetamine out of his life." (T. II., 82) The judge commented that "your attorney's argument and your testimony is well-taken that this is a very horrible thing that you have gotten caught in with using methamphetamine." (T. II., 86)

By revoking Mr. Gore's deferred acceptance of guilty, not leaving him on community service and incarcerating him, the court deprived Mr. Gore of the opportunity of getting the horrible thing that is methamphetamine use out of his life and abused its discretion.

A revocation hearing is not a criminal trial, it is an administrative hearing. *Bradley v. State*, 608 S.W. 2d 652, 656 (Tex. Crim. App. 1984) In reviewing a trial judge's determination of the appropriate punishment in any given case a great deal of discretion is allowed the sentencing judge. *Hogan v. State*, 529 S.W. 2d 515 (Tex. Cr. App. 1975); *Ben-Schoter v. State*, 634 S.W. 2d 28 (Tex.App.-Beaumont 1982)

To summarize the mitigation factors presented by the defense at the



revocation hearing: (1) his sentence was assessed at seven years; (2) Mr. Gore was convicted of a non-violent crime; (3) an absence of any aggravating factors surrounded the offense; (4) his criminal history was very limited; (5) he has a high school education and ability to pursue gainful employment; (6) his willingness to work and to pay any and all costs of community service; (7) his strong family ties to Galveston; (8) his ex-police officer father's pledge to help him rehabilitate; (9) his being amenable to drug treatment and willingness make a good faith effort to obtain medical and psychological assistance to overcome his addiction and (9) his remorsefulness about his actions and strong wish to make amends to his family and to the community.

Mr. Gore receiving a seven year sentence is a disproportionate punishment. The concept of proportionality is embodied in the Constitution's ban on cruel and unusual punishment and requires that the punishment be graduated and proportionate to the offense. U.S. Const., Am. 8.; *Harmelin v Michigan*, 501 U.S. 957 (1991)

To determine whether a sentence for a term of years is grossly

disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim (the victim was Mr. Gore himself), the culpability of the offender (Mr. Gore suffered from an addiction), and the offender's prior adjudicated and un-adjudicated offenses. (Minimal) *Graham v Florida*, 560 U.S. 48, 60 (2010)

The trial court abused its discretion by not considering the defense evidence for mitigation, and the punishment assessed was not graduated and proportionate to the offense committed. The court committed error by revoking Mr. Gore's deferred acceptance of guilty and not leaving him on community service.

When a reversible error occurs at the penalty hearing before the trial judge alone, the case on appeal may be remanded to the trial court for the proper assessment of punishment. *Bullard v State*, 548 S.W. 2d 13, 18 (Tex. Cr. App. 1977).

Appellant Joseph Dwain Gore was denied his right to due process of

law, to equal protection and a right to a fair trial under the 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution as well as the Texas Constitution. Appellant asks for his guilty verdict to be reversed and his case remanded for a new revocation hearing.

## **CONCLUSION**

Appellant Joseph Dwain Gore respectfully requests that this court reverse the judgment entered against him and remand his case to the trial court below with instructions to hold a new revocation hearing.

### **CERTIFICATE OF PROOF OF SERVICE AS PER TEX.R.APP.PROC. 9.5:**

I certify that a true and correct copy of the foregoing Appellant's Brief has been furnished through E-mail to rebecca.klaren@galvestontx.gov at the Office of the Galveston Criminal District Attorney, 600 59<sup>th</sup> Street, Suite 1001, Galveston, Texas 77551, (409) 766-2355 on or before February 20, 2025.

Valid signature as per Tex.R.App.Proc. 9.1(c):

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