NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MICHAEL JOSEPH BIEN,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

Whether a prosecutor who violates the Double Jeopardy Clause should have exclusive power to determine which of his unconstitutionally obtained convictions should be vacated by the courts.

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Petitioner Michael Joseph Bien asks that this Court issue a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

CITATION TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is attached to this petition as Appendix A. *Bien v. State*, 550 S.W.3d 180 (Tex.Crim.App. 2018). The opinion of the state court of appeals is attached as Appendix B. *Bien v. State*, 530 S.W.3d 177 (Tex.App. – Eastland 2016). The Texas Court of Criminal Appeals' denial of petitioner's motion for rehearing is attached as Appendix C. Order denying Petitioner's Motion for Rehearing.

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on June 6, 2018 and denied Petitioner's *Motion for Rehearing* on July 25, 2018. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Bien having asserted below and asserting in this petition the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb..." U.S. CONST., amend. V.

This case also involves the Fourteenth Amendment to the United States Constitution, which applies the Fifth Amendment to the States, providing in relevant part, "No State shall ... deprive any person of life, liberty, or property, without due process of law [.]" U.S. CONST., amend XIV, Section 1.

STATEMENT OF THE CASE

A. Prior Proceedings

Mr. Bien sought review in the state court of last resort, the Texas Court of Criminal Appeals. The state court refused his petition for discretionary review. U.S. Supreme Court Rule 13.1. The Court of Criminal Appeals denied his motion for rehearing. U.S. Supreme Court Rule 13.2.

Procedural History

The State of Texas charged Mr. Bien in one indictment with attempted capital murder and solicitation to commit capital murder in another indictment. On February 21, 2014, after a jury trial, he was convicted of both offenses and assessed two life sentences to run concurrently.

On appeal, the Eleventh Court of Appeals held that the two convictions violated the Double Jeopardy Clause. *Bien v. State*, 530 S.W.3d 177 (Tex.App. –

Eastland 2016). The Court vacated the conviction of capital murder and ordered an acquittal. The Court also affirmed the conviction for solicitation to commit capital murder.

The Texas Court of Criminal Appeals granted petitions for discretionary review. The discretionary court affirmed the opinion of the Eleventh Court of Appeals. *Bien v. State*, 550 S.W.3d 180 (Tex.Crim.App. 2018).

How the Issues Were Raised and Decided Below

The Court of Criminal Appeals correctly concluded that convictions for both attempted capital murder and solicitation to commit capital murder violated the Double Jeopardy Clause. However, the state court created a new remedy for violations of the Clause. The Court of Criminal Appeals declared that the remedy would be to empower prosecutors to decide which of their unconstitutionally obtained convictions to retain. *Bien*, 550 S.W.3d at 188.

REASON FOR GRANTING THE WRIT

The Texas Court of Criminal Appeals has interpreted the Double Jeopardy Clause in a way that is inconsistent with prior Supreme Court jurisprudence.

The Texas Court of Criminal Appeals' decision supplants courts with prosecutors as the ultimate authority that determines the remedy for violations of the Double Jeopardy Clause. This new approach conflicts with the procedure this Court has established for violations of the Double Jeopardy Clause, i.e., "to have the District Court exercise its discretion to vacate one of the convictions." *Ball v. United States*, 470 U.S. 856, 865 (1985). Since *Ball*, the federal judiciary has followed this procedure without difficulty or controversy. *United States v. Rivera-Martinez*, 931 F.2d 148, 154 (1st Cir. 1991); *United States v. Sperling*, 560 F.2d 1050, 1060 (2nd Cir. 1977); *United States v. Hodge*, 870 F.3d 184, 206 (3rd Cir. 2017); *United States v. Grubbs*, 829 F.2d 18, 20 (8th Cir. 1987). *See also United States v. Stavros*, 597 F.2d 108, 114 (7th Cir. 1979)(authorizing Government to elect, and once elected, "the court must then vacate the convictions on the counts not so elected and dismiss as to such counts.").

The propriety of this remedy for state courts was affirmed in *Jones v. Thomas*, 491 U.S. 376 (1989). This Court held that "the state-court remedy fully vindicated respondent's double jeopardy rights because the state court vacated one conviction

and sentence and credited the time served under the other conviction." *Id*. This Court has since reaffirmed this procedure. *Rutledge v. United States*, 517 U.S. 292 (1996)(remand to trial court, not prosecution, to set aside conviction).

Unlike the state court in *Jones v. Thomas*, the Texas Court of Criminal Appeals' decision has failed to fully vindicate the Double Jeopardy Clause. Worse, its decision affirmatively undermines it. If violators of law may choose their own penalties, the Double Jeopardy Clause prohibition against multiple punishments will be a dead letter in states that adopt the Texas remedy.

The recipient of two convictions where the Constitution would tolerate one would have no incentive to ever bother the judiciary about the violation. Under the rationale of the Texas Court of Criminal Appeals, a defendant who would complain about his multiple punishment for the same offense would only be asking the judiciary to empower the prosecution to decide which convictions to retain. By requiring judges to defer to prosecutors, there will be no point in raising the issue. This state court decision ensures that Texas courts and this Court will not hear about this form of Double Jeopardy violation again.

The remedy fashioned by the Court of Criminal Appeals is contrary to every other construct for resolving constitutional violations. For all other constitutional violations, judges determine the remedy. When the prosecution is the cause and

beneficiary of a constitutional violation, it bears the burden of proving its harmlessness beyond a reasonable doubt to the reviewing court:

> [C]onstitutional error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Chapman v. California, 386 U.S. 18, 24 (1967)(citing 1 Wigmore, Evidence 21 (3d ed. 1940)). The new Texas remedy upends this principle of appellate review. The prosecution is both the beneficiary of the constitutional violation and the master of its remedy.

This same basic principle of law is expressed in the civil context that it is the aggrieved party who chooses the remedy. *Dugan v. Jones*, 615 P.2d 1239, 1247 (Utah 1980)("choice of remedy belongs to the victim of the fraud"); *Page v. Allen*, 58 Pa. 338, 364 (1868)("the remedy belongs to the injured party"). Otherwise, it is the courts or lawmakers that provide remedies to wrongs. Nowhere in law does the violator dictate the terms of the remedy for its own wrong, particularly a wrong of constitutional magnitude.

The remedy this Court has provided for violation of the Double Jeopardy Clause for attempted retrials following convictions or acquittals for the same offense is to bar a second trial. *Currier v. Virginia*, 138 S. Ct. 2144, 2153 (2018)(regarding

judicial bar to retrial as the "only available remedy" traditionally provided). For multiple punishment violations, this Court has regarded the vacation of one of the judgments as "consistent with our approach to multiple punishments problems in other contexts." *Jones v. Thomas*, *supra*. In either case, it is courts and not prosecutors that provide the remedy. The decision of the Court of Criminal Appeals fundamentally conflicts with this Court's Double Jeopardy jurisprudence.

One of the purposes of the Double Jeopardy Clause is the purposeful discouragement of its violation. *Green v. United States*, 355 U.S. 184, 188 (1957)(double jeopardy bar "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."). The state court's decision removes this discouragement and rewards prosecutors who violate the Clause with impunity. In this way, the Court of Criminal Appeals' decision squarely conflicts with the Double Jeopardy Clause itself.

CONCLUSION

This Court should grant certiorari and schedule this case for briefing and oral argument to ensure the Court of Criminal Appeals' compliance with the Double Jeopardy Clause and this Court's settled jurisprudence. Alternatively, this Court should summarily grant this petition and remand the case to the Texas Court of Criminal Appeals for proceedings not inconsistent with this Court's settled jurisprudence, or remand the case to the trial court for determination of the most serious offense.

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CERTIFICATE OF SERVICE

I, Keith S. Hampton, do swear or declare that on October 8, 2018, I served true and correct copies of the foregoing Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis*, as required by Supreme Court Rule 29, on each party to the above proceeding or that party's counsel, and on every other person required to be served, by electronically emailing or depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for

delivery within 3 calendar days. The names and addresses of those served are as follows:

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Appendix A

Bien v. State, 550 S.W.3d 180 (Tex.Crim.App. 2018)

Bien v. State

Court of Criminal Appeals of Texas

June 6, 2018, Decided; June 6, 2018, Filed

NO. PD-0365-16 & PD-0366-16

Reporter

550 S.W.3d 180 *; 2018 Tex. Crim. App. LEXIS 241 **; 2018 WL 2715380

MICHAEL JOSEPH BIEN, Appellant v. THE STATE OF TEXAS

Notice: PUBLISH

Subsequent History: Rehearing denied by In re Bien, 2018 Tex. Crim. App. LEXIS 675 (Tex. Crim. App., July 25, 2018)

Rehearing denied by In re Bien, 2018 Tex. Crim. App. LEXIS 685 (Tex. Crim. App., July 25, 2018)

Prior History: [**1] ON STATE'S AND APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS BROWN COUNTY.

Bien v. State, 530 S.W.3d 177, 2016 Tex. App. LEXIS 2228 (Tex. App. Eastland, Mar. 3, 2016)

Counsel: For Appellant: Keith S. Hampton, Cynthia L. Hampton, Attorneys at Law, Austin, Texas.

For State: Elisha Bird, Assistant District Attorney, Brownwood, Texas.

Judges: NEWELL, J., delivered the opinion of the Court in which KELLER, P.J., AND KEASLER, HERVEY, ALCALA, RICHARDSON, KEEL AND WALKER, JJ., joined. YEARY, J., filed a dissenting opinion.

Opinion by: NEWELL

Opinion

[*182] Appellant hired an undercover officer to kill his ex-wife's brother. Based on his efforts in this regard, Appellant was charged with and convicted of two crimes: attempted capital murder and criminal solicitation of capital murder. The court of appeals found that Appellant's convictions on both charges violated the Double Jeopardy Clause's prohibition against multiple punishments for the "same offense." The court, deeming criminal solicitation the "most serious" offense, upheld that conviction and vacated the conviction for attempted capital murder.[1] We agree with the court of appeals that conviction for these two offenses violated double jeopardy, but disagree with the court of appeals that these offenses each required proof of a different element. Applying the cognate-pleadings test we determine that the elements of the offense of attempted capital

[1] *Bien v. State*, 530 S.W.3d 177, 183 (Tex. App.—Eastland 2016).

murder are functionally equivalent to the elements of solicitation [**2] of capital murder. We affirm the court of appeals because we agree that criminal solicitation was the most serious offense.

I. Facts and Procedural History

Appellant and Mickey Westerman grew up in Brownwood and met in junior high. They played sports together and were friends. In 2005, they worked together in the Irving area, and Westerman lived on Appellant's property. Westerman got to know Lori, Appellant's wife. He also met Lori's parents, Gale and Hugh Box, and her brother, Koh Box. Westerman moved back to Brownwood that summer. Between 2005 and 2012 Westerman and Appellant talked on the phone five or six times. Appellant would call Westerman "out of the blue and he would have some big idea, going to make a million dollars, you know." Westerman said that "receiving a phone call from him, wasn't a surprise. It was, like, just like anybody; here is an old friend calling, you know." But in 2012 Appellant made a different and surprising kind of call: he "told me that he wanted to—the way I understood it from the first phone call, I was gathering that he wanted to have Lori killed." Westerman, encouraged by a friend to "do the right thing," called Lori, who was by then Appellant's [*183] ex-wife, [**3] and told her "Michael called and—and—and I believe that he is wanting to have you killed. And I don't know how to go about it, so, you need to get with somebody in Pecos and find out what we need to do to—to check this out." Lori notified the Pecos Police, and Chief Clay McKinney shortly contacted Westerman. Westerman told Chief McKinney that he was going to contact Appellant in a few days to make sure he was not just angry and talking "outside of his head."

That wasn't the case. Instead, Appellant made it clear that he wasn't talking about Lori; he was talking about Mr. and Mrs. Box, Gale and Hugh. At this point Texas Ranger Danny Briley began working with Westerman and monitoring his communications with Appellant. Discussion stopped when Appellant was sent to jail for about six months. But when he was released from jail, Appellant called Westerman and again talked about hiring a hit man. A series of meetings took place—all in a Walmart parking lot.

The first was between Appellant and Westerman on the 27th of November. A friend of Appellant's drove him to the Walmart. Appellant alone got out of his friend's car and got into the passenger side of the undercover vehicle that had been [**4] provided to Westerman. The vehicle had been rigged with recording devices. Appellant told Westerman he wanted to kill a member of Lori's family as "fucking flat-ass revenge." He now wanted that member to be Lori's brother Koh Box though "Koh Box never done me no wrong." Appellant told Westerman how he could get the money to pay for the "hit"; he would sell his property or his guns or "cook dope"—something he had learned in jail. "He had all kinds of ways to try to come up with money."

The next meeting was on December 1st. This meeting was between Appellant and Stephen Reynolds, an agent with the Texas Department of Public Safety who posed as a "hit man." This time Westerman drove Appellant to the Walmart, where Appellant alone got out of Westerman's vehicle and into Reynolds's rigged vehicle. Appellant began by asking the agent to kill Koh Box. Reynolds quoted Appellant a $10,000 price for the hit and said that he would need "some operating funds" up front. Appellant was empty-handed, but he told Reynolds he could come up with some money in about a week. Appellant then went ahead and described Box and his vehicles and business, and drew a map to Box's house. Appellant pressed that he [**5] wanted the hit to look like a robbery. Back in Westerman's vehicle on the ride home, Appellant asked for a loan.[2]

The third meeting took place on December 7th, and it is the focus of the indictments in this case. This meeting was between Appellant and the "hit man" Reynolds. Again, Westerman drove Appellant to the Walmart. At the direction of the Rangers, he loaned Appellant $1,000. At the Walmart, Appellant got out of Westerman's vehicle and into Reynolds's vehicle, while Westerman himself went into the Walmart. Appellant gave the $1,000 to Reynolds. After Appellant gave the partial payment to Reynolds, he was arrested and charged with solicitation of capital murder and attempted capital murder. A jury convicted Appellant of both offenses and assessed Appellant's punishment for each offense at confinement for life.

[*184] On appeal, Appellant argued that the trial court erred when it authorized the jury to return multiple verdicts for the same offense. Based on its application of *Blockburger*[3] and *Ervin*,[4] the court of appeals agreed. Deeming both offenses, as charged, conduct-oriented, the court held that Appellant's double jeopardy rights were violated when he was punished for both solicitation [**6] and attempt for the same conduct—employment of Stephen Reynolds to kill Koh Box.[5] The court upheld the solicitation conviction and vacated the attempt conviction, figuring that, as a 3g crime, solicitation to commit capital murder was the most serious offense.[6] We granted review of the court's holdings that 1) Appellant's convictions on both charges violated double jeopardy, and 2) the remedy for the double jeopardy violation was to affirm the solicitation conviction and vacate the attempt conviction.[7]

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[2] The State did not argue to the court of appeals that this meeting on December 1st constituted a separate offense of criminal solicitation. Neither does the State make this argument on discretionary review. Consequently, we need not decide that issue as it was not a part of the lower court's decision.

[3] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[4] *Ex parte Ervin*, 991 S.W.2d 804 (Tex. Crim. App. 1999).

[5] *Bien*, 530 S.W.3d at 180-83.

[6] *Id.* at 183, (noting that a 3g offense affects parole eligibility and limits a trial court's ability to suspend a defendant's sentence).

[7] We granted both parties petitions. The State's asked,

> 1. Did the Eleventh Court of Appeals err by holding that convictions for criminal solicitation and attempted capital murder violate double jeopardy when significant factors indicate a legislative intent to punish these offenses as separate steps in the continuum of a criminal transaction?

II. Multiple Punishments for the Same Offense

The Fifth Amendment offers protection against multiple punishments for the "same offense."[8] To determine whether there have been multiple punishments for the same offense, we begin by applying the "same elements" test set forth in *Blockburger*. Under that test, two offenses are not the same if "each provision requires proof of a fact which the other does not."[9] In Texas, we look to the pleadings to inform the *Blockburger* test.[10] If the two offenses have the same elements under the cognate-pleadings approach, then a judicial presumption arises that the offenses are the same for purposes of double jeopardy and the defendant may not be convicted of both offenses.[11] That presumption can be rebutted by a clearly expressed legislative intent to create two separate offenses.[12] Conversely, if the two [*185] offenses, as pleaded, have different elements under the *Blockburger* test, the judicial presumption is that the offenses are different for double-jeopardy purposes and multiple punishments may be imposed.[13] This presumption [**8] can be rebutted by a showing, through various factors, that the legislature clearly intended only one punishment.[14]

III. Under the Cognate-Pleadings Approach, the Elements of Solicitation of Capital Murder are Subsumed Within The Elements of Attempted Capital Murder

In this case Appellant hired Reynolds to kill Box. This was alleged as the conduct comprising violations of two separate statutes: criminal solicitation and criminal attempt. According to the court of appeals, these two charged offenses were not the same under the *Blockburger* test because one offense required proof of an element that another does not. As set out by the court of appeals, the allegations in the indictment for criminal solicitation to commit capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December

> 2. Assuming a double jeopardy violation, who should determine what the most serious offense is? If this Court answers that question by deciding that a court of appeals should make that determination, what role should the parole consequences of Article 42.12 § 3g have in that analysis when the sentences, fine and restitution are all identical?

And Appellant's petition asked,

> 1. The Court of Appeals erred when it held that parole eligibility may determine [**7] the "most serious" offense for purposes of double jeopardy.
>
> 2. What is the proper remedy for multiple punishment when the "most serious" offense cannot be determined?

[8] *Bigon v. State*, 252 S.W.3d 360, 369 (Tex. Crim. App. 2008).

[9] *Blockburger*, 284 U.S. at 304.

[10] *Bigon*, 252 S.W.3d at 370.

[11] *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015).

[12] *Id. See, e.g.*, *Garza v. State*, 213 S.W.3d 338, 352 (Tex. Crim. App. 2007) (noting that Legislature, via Section 71.03(3) of the Penal Code, indicated with sufficient clarity its intention that a defendant charged with engaging in organized criminal activity may also be charged (at least in the same proceeding) with the underlying offense and punished for both).

[13] *Benson*, 459 S.W.3d at 72.

[14] *Id.*

2012,

• in Brown County

• with intent that capital murder, a capital felony, be committed

• did request, command, or attempt to induce

• Stephen Reynolds

• to engage in specific conduct

• to-wit: kill Koh Box

• for remuneration, and

• that under the circumstances surrounding the conduct of the defendant or Stephen Reynolds, as the defendant believed them to be, would have constituted capital [**9] murder.[15]

The allegations in the indictment for attempted capital murder are:

• Michael Joseph Bien

• on or about the 7th day of December, 2012

• in Brown County

• with the specific intent to commit the offense of capital murder of Koh Box

• did do an act

• to-wit: employ Stephen Reynolds

• by remuneration or the promise of remuneration

• which amounted to more than mere preparation

• that tended but failed to effect the commission of the offense intended.[16]

As the court of appeals noted, to make its attempt case, the State was required to prove that Appellant actually employed Reynolds to kill Box rather than just requesting that he do so.[17] To make its solicitation case, the State was required to prove that Appellant intended that Reynolds commit capital murder by killing Box and that under the circumstances as Appellant believed them to be, killing Box would constitute capital murder.[18]

To determine whether an offense qualifies as a lesser-included offense, we employ the cognate-pleadings approach.[19] Under this approach, elements of a lesser-included offense do not have to be [*186] pleaded in the indictment if they can be deduced from the facts alleged in the indictment.[20] In such situations, the functional-equivalence [**10] concept can be employed in the lesser-included-offense analysis.[21] When utilizing functional equivalence, the court examines the elements of the lesser offense and decides whether they are "functionally the same or less than those required to prove the charged offense."[22]

Here, the act alleged as amounting to "more than mere preparation" under the criminal attempt indictment was the employment of Reynolds to kill Koh Box. This was the same act alleged in the criminal solicitation

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[15] *Bien*, 530 S.W.3d at 181.

[16] *Id.*

[17] *Id.* at 181-82.

[18] Tex. Pen. Code. § 15.03.

[19] *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013).

[20] ***Ex parte Watson*, 306 S.W.3d 259, 273-74 (Tex. Crim. App. 2009)** (opin. on reh'g).

[21] *McKithan v. State*, 324 S.W.3d 582, 588 (Tex. Crim. App. 2010).

[22] *Id.* (citing *Farrakhan v. State*, 247 S.W.3d 720, 722-23 (Tex. Crim. App. 2008)).

indictment. To the extent that criminal attempt required a showing of an employment agreement, the act of soliciting that employment in the criminal solicitation indictment was subsumed within the elements necessary to prove criminal attempt under these indictments.

Similarly, both indictments required proof of the intent to commit the offense of capital murder. Criminal solicitation carries with it the requirement that the State prove Appellant believed the conduct he was soliciting would constitute capital murder. Under the pleadings in this case, the State was required to prove that Appellant believed the conduct he was soliciting constituted capital murder. But this element was also subsumed within the greater [**11] proof in both offenses that Appellant intended that Reynolds commit capital murder. In this regard the "belief in the circumstances surrounding the conduct" aspect of criminal solicitation is the functional equivalent of the intent to commit capital murder in attempted capital murder.

Finally, the criminal solicitation indictment also required proof that, under the circumstances as Appellant believed them to be, the conduct solicited actually would constitute capital murder.[23] Arguably, this would require the State to prove that the offense solicited was not legally impossible, as the statute could be read to require proof of what the actor intends, but also proof that the circumstances surrounding the conduct the actor intends actually constitutes a criminal offense.[24] As we have explained, legal impossibility exists where the act, if completed, would not be a crime, although what the actor intends to accomplish would be a crime.[25] [*187] Nevertheless, it has been previously argued that the doctrine of impossibility should not be a defense under the Texas Penal Code.[26] And though we have recognized that the common-law defense of legal impossibility is valid defense, we do not appear to have ever [**12] applied it.[27]

A natural reading of the text leads us to the conclusion that the State proves the offense of criminal solicitation by proving what a defendant believes the circumstances to be surrounding the solicited conduct and that such conduct would be a crime under those

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[23] Tex. Pen. Code § 15.03 (a) ("A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.").

[24] This stands in contrast to the offense of criminal attempt where it is immaterial whether the attempted crime is impossible to complete. *Chen v. State*, 42 S.W.3d 926, 930 (Tex. Crim. App. 2001).

[25] *Chen*, 42 S.W.3d at 929. Cited examples of legal impossibility include attempt to receive stolen property that was not stolen, attempt to murder a corpse, attempt of a minor to commit rape, attempt to bribe a public official for purposes of securing a particular vote when the official had no authority to vote on the matter, and the attempt to bribe a person believed to be a juror when that person is not actually a juror. *See* *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (citing WAYNE R. LAFAVE, AUSTIN W. SCOTT, 2 SUBSTANTIVE CRIMINAL LAW § 6.3, at 46 (1986); CHARLES E. TORTIA, IV WHARTON'S CRIMINAL LAW § 747, at 581 (14th ed. 1981)).

[26] *Lawhorn*, 898 S.W.2d at 894 (Meyers, J., dissenting).

[27] *Chen*, 42 S.W.3d at 929; *see also* *Lawhorn*, 898 S.W.2d at 894 (Meyers, J., dissenting) ("In fact, there are no Texas cases in the last 30 years that even allude to the doctrine of impossibility, let alone employ it to decide whether evidence of guilt is sufficient for conviction.").

circumstances. The statute does not require the State to prove that those circumstances actually exist. We hold that this element of criminal solicitation was also subsumed within the proof necessary to establish the intent to commit capital murder under the attempted capital murder indictment. Consequently, we reject the court of appeals' determination that under the pleadings in this case, attempted capital murder and solicitation of capital murder were not the same offense under *Blockburger*.[28]

IV. The *Blockburger* Rule Controls Here Because There Is No Clearly Expressed Legislative Intent to Impose Multiple Punishments

As the court of appeals held, "the offense of attempted capital murder requires proof that Appellant solicited Stephen Reynolds to kill Koh Box."[29] The State points out that the Supreme Court held in *Garrett v. United States* that, "'There is nothing in the Constitution which prevents [**13] Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.'"[30] But the Court also noted in that case that, "We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."[31] This is reflected in *Benson*, where we held that, if two offenses are the same under the Texas *Blockburger* test, then a judicial presumption arises that the offenses are the same for purposes of double jeopardy and a defendant may not be punished for both absent "a clearly expressed legislative intent to impose multiple punishments."[32]

That intent is not clear here. There is no express provision that a person who is subject to prosecution for criminal solicitation and criminal attempt may be prosecuted under either or both sections.[33] Nothing clearly indicates a legislative intent to impose multiple punishments.[34] [*188] Though we arrive at the same location by a different path, we ultimately agree with the court of appeals that Appellant was convicted in a single criminal trial of two offenses that are considered [**14] the same for double jeopardy purposes.

V. The Appropriate Remedy is to Vacate the Conviction the State Chooses

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[28] *Bien*, 530 S.W.3d at 182 ("Under a strict application of the *Blockburger* test, the two offenses have differing elements and, therefore, would not be the same offense.").

[29] *Id.* at 183.

[30] State's Br. 6 (quoting *Garrett v. United States*, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985)).

[31] *Garrett, id.*

[32] *Benson*, 459 S.W.3d at 72.

[33] *Cf.* Tex. Penal Code § 22.04(h) ("A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections.").

[34] We have previously held that solicitation was meant to capture conduct short of attempt. *Schwenk v. State*, 733 S.W.2d 142 (Tex. Crim. App. 1987) (opin. on reh'g) (citing Searcy and Patterson, "Practice Commentary," V.T.C.A., Penal Code, Section 15.03). We held that the solicitation statute was "designed to make conduct which does not rise to the level of attempt or conspiracy a criminal offense." *Id.* at 148.

When a defendant is convicted in a single criminal trial of two offenses that are considered the same for double jeopardy purposes, the remedy is to vacate one of the convictions. In *Landers v. State*, we set out the "most serious punishment" test for determining which of the same offenses in the double jeopardy context should be retained.[35] The determination of the "most serious punishment" we said, is "the longest sentence imposed, with rules of parole eligibility and good time serving as a tiebreaker."[36] In *Ex parte Cavazos*, we eschewed those rules-based tiebreakers and established the "most serious offense" test.[37] The "most serious offense" is the offense of conviction for which the "greatest sentence was assessed."[38] There, the tiebreaker was the fact that restitution had been imposed for only one of the offenses.[39] In *Villanueva v. State*, we revived parole eligibility as a factor by retaining the one conviction which included a deadly weapon finding.[40] Other tie breakers that have been used in the past include degree of felony,[41] first-indicted,[42] and offense named first in the judgment. [**15] [43]

In *Almaguer v. State*, the Corpus Christi Court of Appeals—faced with a situation in which no tie-breaker worked—followed the suggestion of Presiding Judge Keller in *Bigon* and remanded the case so that the prosecution could elect the offense of conviction.[44] The court cited this passage from the dissent:

Although I authored *Landers*, the practical impossibility of determining in some cases which offense is really the most serious has convinced me that it would be preferable to simply give the local prosecutor the option to choose which conviction to retain. Making the matter a function of prosecutorial discretion seems to be most consistent with our prior recognition that a prosecutor in this type of situation is entitled to "submit both offenses to the jury for consideration" and receive "the benefit of the most serious punishment obtained." If a subjective decision is to be made, let the local prosecutor who exercised the decision to bring the case make [*189] it.[45]

We here do likewise—this is a question to be answered by the prosecutor. Here, the prosecutor has requested that the 3g offense—the criminal solicitation conviction—be retained. This is the offense that was upheld by the court of [**16] appeals. We affirm the court of appeals'

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[35] *Landers v. State*, 957 S.W.2d 558 (Tex. Crim. App. 1997).

[36] *Id.* at 560.

[37] 203 S.W.3d 333, 338 (Tex. Crim. App. 2006).

[38] *Id.*

[39] *Id.* at 338-39.

[40] *Villanueva v. State*, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007).

[41] *Berger v. State*, 104 S.W.3d 199, 206 (Tex. App.—Austin 2003, no pet.).

[42] *Ruth v. State*, No. 13-10-00250—CR, 2011 Tex. App. LEXIS 7006, 2011 WL 3840503, at *8-9 (Tex. App.—Corpus Christi Aug. 29, 2011, no pet.) (not designated for publication).

[43] *Nickerson v. State*, 69 S.W.3d 661, 671 (Tex. App.—Waco 2002, pet. ref'd).

[44] 492 S.W.3d 338, 348-49 (Tex. App.—Corpus Christi 2014, pet. ref'd).

[45] *Bigon*, 252 S.W.3d at 374 (Keller, P.J., dissenting).

judgment in whole.

Date: June 6, 2018

Publish

Dissent by: YEARY

Dissent

DISSENTING OPINION

When the same act or conduct violates more than one statutorily defined penal offense, in order to determine whether punishment for both statutorily defined offenses violates double jeopardy, we have said that an "elements" analysis is appropriate.[1] This is the so-called *Blockburger*/cognate-pleadings approach to double jeopardy analysis, upon which we expounded at length several years back in *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015). In this case, both indictments alleged that, "on or about the 7th day of December, 2012," Appellant committed certain conduct in recruiting Stephen Reynolds to commit murder for remuneration. Thus, on their faces, the indictments *seem* to allege that the same act or conduct simultaneously violated both the Penal Code proscription against criminal solicitation of capital murder and the separate Penal Code proscription against criminal attempt to commit capital murder.[2] It is therefore understandable that both the court of appeals,[3] and now this Court,[4] have approached the question as simply a matter of whether, under *Benson*'s "elements" approach, Appellant could be punished for both of these [**17] statutorily defined offenses without violating double jeopardy protections.

But the double jeopardy analysis in this case does not end there. Here, the evidence shows that Appellant engaged in conduct on *two* discrete occasions whereby he approached Stephen Reynolds in an attempt to engage him to commit murder for remuneration: first on December 1, 2012 (which was "on or about the 7th of December, 2012"),[5] and then again on December 7, 2012. It is at least arguable that the double jeopardy issue in this case is not fully governed by the *Blockburger*/cognate pleadings "elements" approach; that there is a "units of prosecution" component to the double jeopardy analysis that must be addressed as well.[6] "When two distinct [*190] statutory

[1] *See* *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Hall v. State*, 225 S.W.3d 524, 532-33 & n.39 (Tex. Crim. App. 2007).

[2] *See* Tex. Penal Code §§ 15.03(a) (criminal solicitation) & 15.01(a) (criminal attempt), respectively.

[3] *Bien v. State*, 530 S.W.3d 177, 181-83 (Tex. App.—Eastland 2016).

[4] Majority Opinion at 8-13.

[5] *See* *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997) ("It is well settled that the 'on or about' language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period.").

[6] In *Benson*, we observed:

> Even when the offenses in question are prescribed by a single statute *or are otherwise the same under an "elements" analysis*, the protection against double jeopardy is not violated if the offenses constitute separate allowable units of prosecution. This latter inquiry involves determining such things as whether there were two murder victims, *whether a victim who was assaulted on Monday was assaulted again on Tuesday*, or

provisions are at issue, the offenses must be considered the same under both an 'elements' analysis and a 'units [of prosecution]' analysis for a double jeopardy violation to occur." *Benson*, 459 S.W.3d at 71. A jury in this case might rationally have found that Appellant committed criminal solicitation of capital murder, during his December 1st meeting with Reynolds, and also that he separately committed the offense of attempted capital murder when, on December 7th, he made a down [**18] payment for services rendered and obtained a commitment from Reynolds to carry out the offense. I do not think the double jeopardy issue is fully resolved until this possibility is explored.

For that reason, the Court errs to affirm the judgment of the court of appeals on an "elements" analysis alone. I would [**19] remand the cause for the court of appeals to conduct a "units of prosecution" analysis. Because the parties have yet to brief that facet of the double jeopardy analysis, I would invite the court of appeals to solicit additional briefing. Instead, the Court simply affirms the lower court's judgment, to which I respectfully dissent.

FILED: June 6, 2018

PUBLISH

> whether multiple kinds of sex acts were committed against a victim. A "units" analysis consists of two parts: (1) what the allowable units of prosecution is, and (2) *how many units have been shown*. The first part of the analysis is purely a question of statutory construction and generally requires ascertaining the focus or gravamen of the offense. *The second part requires an examination of the trial record, which can include the evidence presented at trial*.

459 S.W.3d at 73-74 (emphasis added).

Appendix B

Bien v. State, 530 S.W.3d 177 (Tex.App. – Eastland 2016)

Bien v. State

Court of Appeals of Texas, Eleventh District, Eastland

March 3, 2016, Decided; March 3, 2016, Opinion Filed

Nos. 11-14-00057-CR & 11-14-00058-CR

Reporter
530 S.W.3d 177 *; 2016 Tex. App. LEXIS 2228 **

MICHAEL JOSEPH BIEN, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PUBLISH. SEE TEX. R. APP. P. 47.2(B).

Subsequent History: Petition for discretionary review granted by In re Bien, 2016 Tex. Crim. App. LEXIS 1063 (Tex. Crim. App., Sept. 14, 2016)

Petition for discretionary review granted by In re Bien, 2016 Tex. Crim. App. LEXIS 1065 (Tex. Crim. App., Sept. 14, 2016)

Petition for discretionary review granted by In re Bien, 2016 Tex. Crim. App. LEXIS 1092 (Tex. Crim. App., Sept. 14, 2016)

Petition for discretionary review granted by In re Bien, 2016 Tex. Crim. App. LEXIS 1090 (Tex. Crim. App., Sept. 14, 2016)

Affirmed by Bien v. State, 2018 Tex. Crim. App. LEXIS 241 (Tex. Crim. App., June 6, 2018)

Prior History: [**1] On Appeal from the 35th District Court, Brown County, Texas. Trial Court Cause Nos. CR22319 & CR22320.

Judges: Panel consists of: Wright, C.J., Willson, J., and Bailey, J.

Opinion by: JIM R. WRIGHT

Opinion

[*179] The jury convicted Michael Joseph Bien of the offenses of criminal attempt—capital murder (Cause No. CR22319) and criminal solicitation to commit capital murder [*180] (Cause No. CR22320) and assessed Appellant's punishment for each offense at confinement for life. *See* Tex. Penal Code Ann. §§ 15.01, 15.03 (West 2011), § 19.03 (West Supp. 2015). The trial court ordered that the sentences were to run concurrently. We affirm the judgment in Cause No. CR22320 and reverse the judgment in Cause No. CR22319.

Appellant presents two identical issues in each appeal. In his first issue, Appellant argues that the trial court erred when it authorized the jury to return multiple verdicts for the same offense. Appellant contends that his convictions violate the Double Jeopardy Clause of the United States Constitution and the Texas constitution. In his second issue, Appellant complains that the evidence is insufficient to support the convictions because the State failed to refute Appellant's entrapment defense.

Appellant asks this court to decide this appeal under the Texas constitution rather than under the federal constitution. [**2] Appellant details the textual differences between the double jeopardy provisions of each constitution, but concedes that the result would be the same under either constitution. Further, we have previously said that the Texas constitution's double jeopardy clause does not provide broader protection than the federal constitution. *In re Morris*, No. 11-05-00381-CR, 2006 Tex. App. LEXIS 4502, 2006 WL 1431122, at *2 n.1 (Tex. App.—Eastland May 25, 2006, pet. ref'd) (not designated for publication); *Ex parte Beeman*, 946 S.W.2d 616, 617 (Tex. App.—Fort Worth 1997, no pet.). Accordingly, our analysis is the same under both constitutions.

Under the U.S. Constitution, the Double Jeopardy Clause provides, in part, that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The Double Jeopardy Clause protects criminal defendants from three things: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense." *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013) (citing *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)).

The double jeopardy protections are fundamental in nature. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). Because they are fundamental in nature, a double jeopardy complaint may be raised for the first time on appeal when (1) the undisputed facts show that a double jeopardy violation is clearly apparent on the face of the record and (2) enforcement of the usual rules of procedural default would [**3] serve no legitimate state interests. *Id.* Here, Appellant did not raise a double jeopardy issue either during trial or when he was sentenced. Thus, we must first decide whether Appellant can raise a double jeopardy argument for the first time on appeal or whether that right has been waived. *See id.*

In this case, the record is fully developed. *See Saenz v. State*, 131 S.W.3d 43, 50 (Tex. App.—San Antonio 2003), *aff'd*, 166 S.W.3d 270 (Tex. Crim. App. 2005). Appellant stood trial for both offenses before the same judge and jury. Therefore, the trial court either knew or should have known of a possible double jeopardy issue. *See id.* Additionally, we have received the complete record of the trial, and we can resolve Appellant's jeopardy claims based on the record presented. There is no need for further proceedings to add new evidence to the record. *See id.* Appellant has satisfied the first prong of the *Gonzalez* test. *See Gonzalez*, 8 S.W.3d at 643.

[*181] In regard to the second prong of the *Gonzalez* test, enforcement of the usual rules of procedural default, in this case, would serve no legitimate state interests. The appropriate remedy for any double jeopardy violation is to affirm the conviction for the "most serious" offense and vacate any other conviction that is in violation of the double jeopardy clause. *Ex parte Cavazos*, 203 S.W.3d 333, 338-39

(Tex. Crim. App. 2006). An effective double jeopardy [**4] challenge would not require a retrial or a remand to the trial court; therefore, there are no legitimate state interests that would be negatively impacted if Appellant is allowed to raise his double jeopardy claim for the first time on appeal. *See* *Saenz*, 131 S.W.3d at 50. Thus, Appellant has satisfied the second prong of the *Gonzalez* test, and we will review the merits of the double jeopardy issue. *See* *Gonzalez*, 8 S.W.3d at 643.

The first step in a double jeopardy challenge is to determine whether criminal solicitation to commit capital murder and attempted capital murder are the "same offense." *See* *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App 2008). When multiple punishments arise out of one trial, we begin our analysis with the *Blockburger* test. *Id.*; *see* *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "Under the *Blockburger* test, two offenses are not the same if one requires proof of an element that the other does not." *Bigon*, 252 S.W.3d at 370. To resolve a double jeopardy issue, we look at the elements alleged in the charging instrument. *Id.*

Appellant was charged under two indictments, and each indictment alleged a separate and distinct offense that took place on or about December 7, 2012. The allegations in the indictment for criminal solicitation to commit capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in [**5] Brown County
- with intent that capital murder, a capital felony, be committed
- did request, command, or attempt to induce
- Stephen Reynolds
- to engage in specific conduct
- to-wit: kill Koh Box
- for remuneration, and
- that under the circumstances surrounding the conduct of the defendant or Stephen Reynolds, as the defendant believed them to be, would have constituted capital murder.

The allegations in the indictment for attempted capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in Brown County
- with the specific intent to commit the offense of capital murder of Koh Box
- did do an act
- to-wit: employ Stephen Reynolds
- by remuneration or the promise of remuneration
- which amounted to more than mere preparation
- that tended but failed to effect the commission of the offense intended.

In comparison, the two charges are similar, but not the same. In order to obtain a conviction for criminal solicitation to commit capital murder, the State must prove that Appellant did "request, command, or attempt to induce" Stephen Reynolds to kill Koh Box for remuneration. On the other hand, in order to obtain a conviction for attempted capital murder, the State must prove [**6] that Appellant employed

Stephen Reynolds by remuneration [*182] or the promise of remuneration, which amounted to "more than mere preparation." Under a strict application of the *Blockburger* test, the two offenses have differing elements and, therefore, would not be the same offense. However, the *Blockburger* test is a rule of statutory construction and is not the exclusive test to determine whether the two offenses are the same. *Bigon*, 252 S.W.3d at 370.

In *Ervin v. State*, the court provided a nonexclusive list of factors to consider when analyzing a multiple-punishment claim. 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Those factors include whether the offenses are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the offenses are similarly named, whether the offenses have common punishment ranges, whether the offenses have a common focus ("gravamen"), whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the same under *Blockburger*, and whether there is legislative history that contains an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin*, 991 S.W.2d at 814. However, the ultimate [**7] question is whether the legislature intended to allow the same conduct to be punished under both of the offenses. *Bigon*, 252 S.W.3d at 371.

Criminal solicitation and criminal attempt are both in the "preparatory offenses" chapter under the "Inchoate Offenses" title of the Texas Penal Code. *See* PENAL ch. 15 (West 2011 & Supp. 2015). However, in this case, criminal attempt also requires the application of Section 19.03, which is the applicable statute for the underlying felony of capital murder. *Id.* § 19.03. Additionally, while the two charged offenses are in the same chapter of the Penal Code, they are not phrased in the alternative, and there is no language in either statute that suggests that the legislature intended the two offenses to be phrased in the alternative. *See Ex parte Benson*, 459 S.W.3d 67, 78-79 (Tex. Crim. App. 2015). Because criminal solicitation and attempted capital murder are not phrased in the alternative, this factor is not dispositive in this case. *Bigon*, 252 S.W.3d at 371.

Offenses are similarly named if they share a common word in the title. *Ex parte Benson*, 459 S.W.3d at 79. Here, the titles share only the word "criminal." PENAL § 15.01 (Criminal Attempt), § 15.03 (Criminal Solicitation). In *Garfias v. State*, the defendant was charged with aggravated robbery by threat and aggravated assault causing bodily injury. 424 S.W.3d 54, 56 (Tex. Crim. App 2014). The court said [**8] that those two offenses were not named similarly. *Id.* at 61. Here, the general nature of "criminal" in the name of the offenses charged is similar to the use of "aggravated" in the name of the offenses charged in *Garfias*. Thus, the two offenses are not similarly named.

The two offenses in this case have identical punishment ranges. Criminal solicitation to commit capital murder and criminal attempt—capital murder are both first-degree felonies, and both offenses carry a

punishment range of five to ninety-nine years or life, with a possibility of a fine up to $10,000. Thus, this factor supports a finding that the two offenses are the "same."

The focus, or "gravamen," of the two offenses is a key factor in the *Ervin* analysis. *Garfias*, 424 S.W.3d at 59. Here, each offense has a similar focus. The focus for criminal solicitation to commit capital murder is to "request, command, or attempt to induce" Stephen Reynolds to kill Koh Box for remuneration. The focus [*183] of attempted capital murder is to do an act—employment of Stephen Reynolds by remuneration—which amounted to more than mere preparation in an attempt to kill Koh Box. Further, both offenses have the same *type* of focus. *See Ex parte Benson*, 459 S.W.3d at 81 (holding that felony DWI and intoxication [**9] assault are not the "same" for double jeopardy purposes because they have two different focuses and two different types of focuses). In addition, the two offenses are conduct oriented and, in this case, punish Appellant for the same act—employment of Stephen Reynolds to kill Koh Box. *See Shelby v. State*, 448 S.W.3d 431, 439 (Tex. Crim. App 2014). Specifically, the offense of attempted capital murder requires proof that Appellant solicited Stephen Reynolds to kill Koh Box. Thus, the focus of each offense tends to indicate a single instance of conduct and weighs heavily in favor of treating the offenses as the same for double jeopardy purposes. *Id.*

The last two *Ervin* factors are not applicable in this case. There are no imputed theories of liability at issue, and there is no legislative history with respect to the legislature's intent to treat the offenses the same. *See id.* at 440. Based upon our application of the *Blockburger* test and the *Ervin* factors, we hold that Appellant's double jeopardy rights were violated when he was convicted of both criminal solicitation to commit capital murder and criminal attempt—capital murder. Appellant's first issue is sustained.

The remedy for a double jeopardy violation is to affirm the conviction for the "most serious" [**10] offense and vacate the other conviction. *Bigon*, 252 S.W.3d at 372. The "most serious" offense is the offense for which the greatest sentence was assessed. *Ex part Cavazos*, 203 S.W.3d at 338. In this case, the same term of years was assessed for each conviction—confinement for life. Additionally, both offenses are first-degree felonies. Because the sentences and the degree of felony is the same for both offenses, we must examine the rules governing parole eligibility and the good-conduct time. *See Bigon*, 252 S.W.3d at 372-73. Here, criminal solicitation is a "3g" offense and attempted capital murder is not. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 3g(a)(1)(K) (West Supp. 2015). A "3g" offense limits a trial court's ability to suspend a defendant's sentence and also affects parole eligibility. *See Shankle v. State*, 119 S.W.3d 808, 813-14 (Tex. Crim. App. 2003); *see also* TEX. GOV'T CODE ANN. § 508.145(d) (West Supp. 2015). Because criminal solicitation to commit capital murder is the "most serious" offense, we will uphold that conviction and vacate the conviction for criminal attempt—capital

murder.

In Appellant's second issue, he argues that the evidence shows that Mickey Westerman, Appellant's childhood friend, induced and encouraged Appellant to proceed as Appellant did. Appellant thus asserts that he was entrapped, that the State did not refute the entrapment evidence beyond a reasonable doubt, and [**11] that the evidence was insufficient to support both convictions.

To review the jury's rejection of an entrapment defense, we review the sufficiency of the evidence. *Hernandez v. State*, 161 S.W.3d 491, 500 (Tex. Crim. App. 2005). We review all the evidence in the light most favorable to the verdict, and we will affirm the conviction if, after reviewing all the evidence in the light most favorable to the verdict, we find that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against Appellant on the entrapment issue beyond a reasonable doubt. *Id.*

[*184] Entrapment is a defense to prosecution if (1) the defendant engaged in the conduct charged (2) because he was induced to do so by a law enforcement agent (3) who used persuasion or other means and (4) those means were likely to cause persons to commit the offense. PENAL § 8.06(a). A defendant has the initial burden to produce evidence that raises the defense of entrapment, but when he does, the burden of persuasion shifts to the State to disprove the defense beyond a reasonable doubt. *Hernandez*, 161 S.W.3d at 498.

Entrapment includes both a subjective and an objective component: the defendant must show both that he was actually induced to commit the charged offense [**12] and that the persuasion was such as to cause an ordinarily law-abiding person of average resistance to commit the crime. *England v. State*, 887 S.W.2d 902, 913-14 (Tex. Crim. App. 1994). "Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." PENAL § 8.06(a).

Westerman became friends with Appellant in junior high school. After Westerman dropped out of school, he only "ran into" Appellant a couple of times, and the last time was around 2000. In 2005, Westerman and Appellant began to work together in the Irving area, and while Westerman was working with Appellant, he lived in Appellant's horse trailer on Appellant's property in Ponder. While living on Appellant's property, Westerman became acquainted with Lori, Appellant's ex-wife. She often cooked supper for Westerman. Westerman worked with Appellant until Westerman moved back to Brownwood in the summer of 2005.

Westerman had not seen Appellant since 2005 and had only spoken with him three or four times after Westerman moved from Ponder. However, in March 2012, after three years with no contact, Appellant called Westerman. Based on what Appellant told him during the phone call, Westerman believed that Appellant wanted to kill Lori. Westerman called Lori to discuss [**13] the conversation that he had had with Appellant. Westerman advised Lori to call

the authorities in Pecos where she lived. Lori told Westerman that she had expected Appellant to do "something like this."

Shortly after Westerman's phone call to Lori, he received a call from the chief of police in Pecos. Westerman told the chief of police that he was going to call Appellant back in a few days to make sure he was not just angry and talking "outside of his head" and that he would call the chief of police as soon as he talked to Appellant again. In Westerman's phone call to Appellant, Appellant made it clear to Westerman that who he actually wanted to kill were Lori's parents, Gale and Hugh Box. Westerman testified that he tried to talk Appellant out of it, but it seemed that he was set on killing Gale and Hugh Box. Appellant told Westerman that he had a plan but that he did not want to talk about it on the phone. Appellant expressed to Westerman that he wanted Westerman to help find someone to "get this done." Westerman testified that he did not know why Appellant called him other than perhaps Appellant thought that he could trust him because of their history of drug use together.

Texas Ranger [**14] Danny Briley was assigned to work with Westerman. Ranger Briley and Westerman met to discuss general instructions about protocol and what Ranger Briley expected of Westerman. Westerman explained that, from that point on, he was to contact Ranger Briley before he answered any calls or responded to any texts from Appellant to ensure that communications could be documented, recorded, [*185] or supervised. Ranger Briley was present for phone calls between Westerman and Appellant so that it could be shown what had transpired throughout the investigation. Ranger Briley explained to Westerman that he was not to instigate the commission of an offense but, rather, was only there to give Appellant the opportunity to make his own plans.

Ranger Briley testified that Westerman performed exceptionally well as a confidential informant and was the best informant that he had ever seen. Ranger Briley explained that he gave Westerman guidelines of what he should or should not say during phone calls with Appellant. Ranger Briley stated that he wanted the communication to be in a format that would allow them to determine what Appellant really wanted and would also allow Appellant the opportunity to back out completely. [**15]

At trial, the State presented recorded phone conversations between Westerman and Appellant as well as voicemails left by Appellant on Westerman's phone. In one of the phone calls, Appellant can be heard telling Westerman, "I gotta plan how to make this deal work," and Appellant expanded on what that plan was. In another phone conversation, Appellant discussed ideas on how to make Gale and Hugh disappear. He even suggested that he could personally dig a hole with a backhoe to help with the plan.

Stephen Reynolds, an agent with the Texas Department of Public Safety, posed as a "hit man." The face-to-face interactions between Agent Reynolds and Appellant were recorded, and the recordings were presented

at trial. In the first meeting between "the hit man" and Appellant, Appellant discussed how he could get the money to pay for the "hit." Those ideas included selling his guns, getting a loan from Westerman, getting a loan from his mom, and selling his land and making payments to "the hit man" from the proceeds of the sale. Ranger Briley stated that the idea that Westerman loan Appellant the money originated with Appellant, not Westerman.

At some point during the investigation, Appellant went [**16] to jail for approximately six months, and the investigation stalled. However, on the day Appellant got out of jail, he called Westerman and expressed his intent to continue with his plan to hire a hit man, but this time, he said that his target was now Koh Box, Gale and Hugh's son and Lori's brother. Westerman testified that Appellant told him that "Koh Box never done me no wrong. I just want [Gale and Hugh] to pay." Appellant apparently blamed Gale and Hugh for problems Appellant had with custody issues that involved his children.

Agent Reynolds testified that, after Appellant changed his mind about the desired target of the hit, Appellant drew a map to show the location of Koh Box's house. Agent Reynolds wrote notes on the drawing of the map based on the conversation that he had with Appellant. The notes included the name of the street where Koh Box lived, a business that Koh Box owned, and vehicle descriptions. Before the initial meeting concluded, Agent Reynolds gave Appellant an opportunity to back out. He asked Appellant if he just wanted him to hurt Koh Box or if he wanted him gone, and Appellant responded, "I want him gone."

In the final meeting between Appellant and Agent Reynolds, [**17] Appellant gave one thousand dollars to Agent Reynolds to kill Koh Box. Agent Reynolds explained that he again gave Appellant an opportunity to back out, but Appellant again stated, "No, I want him gone." Agent Reynolds testified that Appellant did not appear to have any reservations about the final plan.

[*186] Although Appellant did not testify at trial, he concedes on appeal that the plan to kill Koh Box originated with him, but he argues that he had "cooled" to the idea. He asserts that he probably would not have gone through with it if Westerman had not encouraged him. Appellant also states that Westerman made him fearful of what might happen if he did not pay the hit man. Appellant cites to Ranger Briley's testimony that Westerman had told Appellant that Westerman had been "scolded" by "the hit man" because Appellant could not pay the money. Appellant also cites to the fact that Westerman told him that "it would be less obvious" if Appellant did it now rather than wait six months as suggested by Appellant.

But Ranger Briley testified that Appellant's prevailing concern was that Appellant did not want it to come back to him. He also indicated that Appellant never tried to "put the brakes" [**18] on the plan. Additionally, Appellant had months to "cool off" while, as we have noted, he was in jail on an unrelated charge. Instead, Appellant called Westerman the day he got out of jail

to tell him to find a hit man soon.

The State argues that the evidence was sufficient to support the jury's rejection of Appellant's entrapment defense. A jury is authorized to weigh the evidence and decide whether the evidence establishes entrapment. *Hernandez*, 161 S.W.3d at 500. We agree with the State. When viewed in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to support the convictions and the rejection of Appellant's entrapment defense. Appellant's second issue is overruled.

We vacate Appellant's attempted capital murder conviction in Cause No. CR22319 because that conviction violates the Double Jeopardy Clause of the U.S. Constitution. Accordingly, we reverse the judgment of the trial court in Cause No. CR22319, and we render a judgment of acquittal. *See* *Saenz*, 131 S.W.3d at 53. We uphold Appellant's criminal solicitation conviction and affirm the judgment of the trial court in Cause No. CR22320.

JIM R. WRIGHT

CHIEF JUSTICE

March 3, 2016

Publish. *See* Tex. R. App. P. 47.2(b).

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Appendix C

Order denying Petitioner's Motion for Rehearing

In re Bien

Court of Criminal Appeals of Texas

July 25, 2018, Decided

PD-0366-16

Reporter
2018 Tex. Crim. App. LEXIS 675 *

MICHAEL JOSEPH BIEN

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] FROM BROWN COUNTY - 11-14-00058-CR.

Bien v. State, 2018 Tex. Crim. App. LEXIS 241 (Tex. Crim. App., June 6, 2018)

Opinion

APPELLANT'S MOTION FOR REHEARING DENIED

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