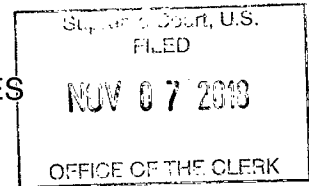


No. 18-6950

IN THE
SUPREME COURT OF THE UNITED STATES



Jason Wayne McBride — PETITIONER
(Your Name)

vs.

The State Of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

First Court of Appeals, Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jason Wayne McBride TOCS-10#02139484
(Your Name)
George Beto Unit
1391 FM 3328
(Address)

Tennessee Colony, Texas 75880
(City, State, Zip Code)

(903) 928-2217
(Phone Number)

QUESTION(S) PRESENTED

- ① Did the state decide an important Constitutional Double Jeopardy violation that conflicted with another court and the Supreme Court when it determined that a failure to object and raise the Double Jeopardy claim before or during trial was waived even though it is observed and Texas Penal Code § 25.11(d) prohibited the use of more counts for the same offense arising out of the same criminal episode, during the same time period, against the same victim and resulted in multiple punishments?
- ② Did the state violate Jason McBride's Constitutional Due Process rights when it held a hearing without his presence or notification in court on April 11, 2017 to make an amendment to his indictment six days before trial?
- ③ Is a threat to commit bodily injury enough to charge and convict someone of Aggravated Assault with a Deadly Weapon without violating the Cruel and Unusual Doctrine of the 8th Amendment?
- ④ Is it a Due Process violation to amend or Alter an indictment without notifying the defendant, without leave of court, without defendant's presence in court and without resubmitting the indictment back to the grand jury and still have the indictment read the same but only submit the charge to the jury different in order to try and avoid the double jeopardy same element test?
- ⑤ Did the court of Appeals err when it affirmed convictions for counts 2, 4 and 5 that violated defendant's double jeopardy rights?
- ⑥ Is it the fault of defendant or his counsel for failing to raise an objection to a Double Jeopardy violation in order to preserve error for review on direct appeal?
- ⑦ Did 3 trial resets and a delay of 15 months constitute a denial of a Constitutional right to a speedy trial?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Jason Wayne McBride TDCJ-ID#02139484 George Beto Unit
1391 FM 3328, Tennessee Colony, Tx. 75880

Respondents: Nicholas Robinson SBN#24067844 Assistant District Attorney
Clayten H. Hearrell SBN# N/A Assistant District Attorney
Jennifer Tharp SBN# N/A District Attorney
150 N. Seguin Ave., Suite 307, New Braunfels, Tx. 78130
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the First Court of Appeals court appears at Appendix A to the petition and is

- ☒ reported at 2018 Tex. App. Lexis 3735; 2018 WL 2341659; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 9/12/2018.
A copy of that decision appears at Appendix C.

☒ A timely petition for rehearing was thereafter denied on the following date: 10/10/2018, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment, U.S. Constitution Double Jeopardy Clause states that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Applied to the states by the 14th Amendment of U.S. Constitution, Due Process Clause and to ensure equal protection in all states. The double jeopardy clause embodies three essential guarantees: (1) it protects against a successive prosecution for the same offense after acquittal; (2) it protects against a successive prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.

STATEMENT OF THE CASE

McBride was indicted for Count 1 Continuous Violence Against The Family § 25.11, Count 2 Assault Family Violence by Impeding Breath or Circulation § 22.01(b)(2), Count 3 Assault Family Violence by Impeding Breath or Circulation, Count 4 Aggravated Assault with a Deadly Weapon § 22.02(a)(2), Count 5 Repeated Violations of Bond Conditions § 25.072(e) and count 6 Evading Arrest with previous conviction § 38.04(b)(1) on January 6, 2016. Trial was reset 8-8-16, 1-9-17 and 3-6-17. McBride's indictment was amended six days before trial on 4-11-17 the Tuesday before trial without the states leave of court, notice to defendant and defendant's presence in court. (C. R. - Pg. 204). McBride's trial counsel Eric Rosen filed a Discovery motion on 4-11-17 and a motion in Limine on 4-13-17 the following Thursday before trial. During trial on April 19, 2017 the indictment was further altered and amended without notice to defendant, Count 1 paragraphs were altered to prevent a same element test when compared to counts 2-4 and the date for count 4 was also changed in the charge to the jury to read May 25, 2015 instead of March 29, 2015. (R. R. Vol. 5 Pgs. 18-22). Indictment still reads the same but charge to the jury reads different with regards to alterations and amendments. On 4-19-2017 the jury convicted McBride of counts 2, 4, 5 and 6. Jury acquitted McBride of count 3. During sentencing McBride tried to raise objections to trial Judge and was told to bring the issues up on appeal. (R. R. Vol. 6 Pg. 16 Lines 24-25 and pg. 17 lines 3-4). McBride was sentenced to 20 years for counts 1, 2 and 5, 40 years for count 4 and 10 years for count 6. Neither trial counsel or appellate counsel filed a motion for New Trial for McBride to preserve errors for review during direct appeal. First court of Appeals affirmed convictions on March 24, 2018 for failure of trial counsel to raise a double jeopardy objection before or during trial to preserve error for direct appeal review. Rehearing filed in the First Court of appeals by appellate counsel denied on 7-12-18. Rehearing filed by McBride was ignored and all motions and requests filed by McBride were dismissed as moot on 3-24-18. Petition for Discretionary Review was filed Pro Se by McBride in the Texas highest Criminal Court and refused on 9-12-18 and a further Pro Se motion for rehearing on the P. D. R. was denied on 10-10-18. Writ of Certiorari now filed after exhausting direct appeal to the highest state court in Texas.

REASONS FOR GRANTING THE PETITION

The Texas Legislation as well as the U.S. Constitution prohibits a person from a second prosecution for the same offense after acquittal, a second prosecution for the same offense after a conviction and the imposition of multiple punishments for the same offense. See further protections under Texas Code of Criminal Procedure Art. 1.10, Texas Constitution Art. 1 section 14 and the 5th and 14th amendments of the U.S. Constitution. Tex. Penal Code § 25.11(d) states "a defendant may not be charged with more than one count under Subsection (a) if all the specific conduct is alleged to have been engaged in is alleged to have been committed against a single victim or members of the same household". The state violated this double jeopardy clause when it indicted, prosecuted, convicted, acquitted and sentenced McBride for counts 2-5 in a single trial with count 1 also being the first conviction by jury. With a not guilty verdict of an illegal count one must look to Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 when this has occurred. When a not guilty verdict is rendered the defendant is no longer subject to prosecution for that crime or any other offense containing the same elements. (Id.) Count 3 is a part of Count 1. Count 1 contains counts 2-5 which involve the same alleged victim and alleged offenses during the same time period. In order to eliminate a same elements test the state altered wording from the indictment Count 1 paragraphs to read different in the charge to the jury, but never changed indictment R.R. Vol. 5 Pgs. 20-22. See indictment and compare count 1 to jury charge. Then count 4 date with count 4 jury charge. The state of Texas 14th Court of Appeals ruled that the use of Tex. Penal Code § 25.11 and more counts of assaultive conduct was apparent from the face of the record and violated double jeopardy. In Ellison v. State 425 S.W. 3d 637 (Tex. App. 2014) a double jeopardy violation results if the state attempts to punish appellant for any underlying bodily injury assault both under a separate assault count and as part of continuous family violence. This double jeopardy violation has stemmed from the impermissible overlap of two of the same underlying instances of bodily injury assault against the same victim during the same time period as count 1. See R.R. Vol. 5 Pg. 20 Lines 8 and 9. Compare McBride v. State 2018 Tex. App. Lexis 3735 with Ellison v. State 425 S.W. 3d 637. To convict McBride of count 4 Aggravated Assault with a deadly weapon by threat was insufficient. To prove aggravated assault the state has to show that the defendant caused serious bodily injury to another. Tex. Pen. Code § 22.01(a)(1) and 22.02(a)(1). On April 11, 2017 the Tuesday before trial a hearing was held to amend and alter the indictment without notifying the defendant McBride and without his presence. This was a clear violation of Texas Code of Criminal Procedure Art. 28.01, 28.10 and 28.11. There was no leave of court and the only record of this is on the C.R. pg. 204 Judges docket sheet and R.R. Vol 5 Pg 22 Lines 4-6. The court reporter excluded all pretrial hearings from the record except pretrial hearing on 3-13-18 denying McBrides constitutional right to a speedy trial after 15 months delay and 3 previous trial resets. McBride filed several motions to dis miss in trial court for failure to provide a constitutional speedy trial all in clerks record. McBride has a constitutional right to effective assistance of counsel before, during and after trial. To deny McBride relief

for his counsels failures to object and preserve his double jeopardy claim for review on direct appeal would be a denial of equal protection and due process and thus depriving him of a fair trial and exposing him to cruel and unusual punishment. The miscarriage of Justice must not be ignored. McBride has exhausted all state court appeals and now sends this writ for relief. I do declare under penalty of perjury that everything said by me and written is true and correct. Jason Wayne McBride

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jason Wayne McBride

Date: November 7, 2018