No. _____

In The
Supreme Court of the United States

MATTHEW FREEMAN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

GERALD H. GOLDSTEIN*
DESTINEE N. RUSSELL
JOHN S. GILMORE, III
GOLDSTEIN & ORR
310 S. St. Mary's Street
29th Floor – Tower Life Building
San Antonio, TX 78205
(210) 226-1463
ggandh@aol.com

**Counsel of Record*
Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Due Process Clause and Fourteenth Amendment to the United States Constitution affords the accused in a criminal case protection against successive prosecutions for the same offense. The law is clear; once a judgment of acquittal is entered, that determination is inviolate. The question presented is:

Whether placing the Petitioner in a position to be twice tried for the same offense after a judgment of acquittal violates Petitioner's constitutional right to due process.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Texas Court of Appeals, Third District, at Austin were Petitioner Matthew Freeman and the Respondent State of Texas.

RELATED CASES

- *The State of Texas v. Matthew Freeman*, No. D-15-0520-SA, 391st District Court of Tom Green County, Texas. Judgment entered Jan. 26, 2016.
- *Matthew Freeman v. The State of Texas*, No. 03-16-00130-CR, Texas Court of Appeals for the Third District of Texas at Austin. Judgment entered Mar. 22, 2017. Subsequent judgment entered on motion for rehearing May 9, 2017.
- *Matthew Freeman v. The State of Texas*, No. PD-0594-17, Texas Court of Criminal Appeals. Petition refused Sept. 27, 2017.
- *The State of Texas v. Matthew Freeman*, No. 03-18-00050-CR, Texas Court of Appeals for the Third District of Texas at Austin. Judgment entered Nov. 14, 2018.
- *The State of Texas v. Matthew Freeman*, No. PD-1370-18, Texas Court of Criminal Appeals. Petition refused Apr. 3, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

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

REFERENCE TO OPINIONS IN THE CASE

The substitute opinion of the Court of Appeals for the Third District of Texas, published as *Freeman v. State*, 525 S.W.3d 755 (Tex. App. – Austin, 2017), appears at page 15 of the Appendix hereto. The unpublished opinion of the Court of Appeals for the Third District of Texas is reproduced in the Appendix at 1. The Texas Court of Criminal Appeals' unpublished Refusal of Petitioner's Petition for Discretionary Review is reproduced in the Appendix at 28.

JURISDICTION

The date on which the Texas Court of Criminal Appeals refused Petitioner's case was April 3, 2019. A copy of that court's refusal of discretionary review appears at page ___ of the appendix hereto. This Court has jurisdiction of this timely Petition for Certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

The Fourteenth Amendment to the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of law."

STATEMENT OF THE CASE

On July 8, 2015, Matthew Freeman was charged by way of indictment in Tom Green County, Texas with assault on a family member by impeding normal circulation, a third-degree felony. The indictment alleged a prior felony conviction,[1] enhancing the offense to a second-degree felony. Freeman pled not guilty to the charged offense of assault on a family member by impeding normal circulation but pled guilty to the lesser included offense of assault on a family member

[1] This prior conviction stemmed from a Driving While Intoxicated allegation.

with bodily injury and pleaded true to the enhancement paragraph. Mr. Freeman was held in custody at the Tom Green County Jail from the date of his arrest on May 8, 2015, through the disposition of his bench trial on January 27, 2016.

At the end of his first trial, the trial Court found Freeman guilty by the "***clearer and greater weight and degree of credible testimony***."[2] At sentencing, Freeman was sentenced to serve fifteen years in the Texas Department of Criminal Justice and was immediately taken into custody.

Freeman timely filed a Motion for New Trial and Motion in Arrest of Judgment on February 12, 2016, arguing that the verdict was contrary to the law and the evidence presented before the Court. The Court denied his Motion for New Trial. Freeman then filed his notice of appeal on February 26, 2016. The Court of Appeals for the Third District of Texas [hereinafter Court of Appeals] issued its original opinion on March 22, 2017, holding that "[b]y applying the incorrect standard, the trial Court denied Freeman his right to a conviction based on proof beyond a reasonable doubt" and reversed the trial court's judgment of conviction, remanding the case for further proceedings consistent with the court's opinion.[3] The State of Texas then filed

---

[2] RR Vol. 2 at 91 ("[JUDGE]: The Court finds ***by the clearer greater weight and degree of credible testimony*** that the Defendant is guilty of the offense of assault by impeding the breath or circulation, as alleged in Paragraph 1 of the indictment.") (emphasis added).

[3] *See* App. 22-27.

a Motion for Rehearing, which the Court denied. In response, the Court of Appeals then issued a duplicate of its original opinion with an additional footnote addressing preservation of error.[4] The State of Texas sought a Petition for Discretionary Review to the Texas Court of Criminal Appeals challenging the opinion of the Court of Appeals. The Court of Criminal Appeals refused the State's Petition for Discretionary Review.

On September 28, 2017, Freeman filed an Application for Writ of Habeas Corpus Seeking Judgment of Acquittal and Immediate Release in the trial Court, this time with the Honorable Brock Jones presiding.[5] The writ was premature because the Court of Appeals had not issued its Mandate on its latest opinion. The trial Court denied the writ and set bond for Freeman. On November 7, 2017 the Court of Appeals issued its mandate, reversing the trial Court's incorrect application of the burden of proof at trial and remanding the case for further proceedings consistent with its opinion.

Pursuant to the Court of Appeals Mandate, ordering further proceedings, Freeman filed an amended Writ of Habeas Corpus on January 4, 2018. On January 10, 2018, the Court heard Freeman's Second Amended Application for Writ of Habeas Corpus and Special Plea of Double Jeopardy. After argument from

---

[4] *See* App. 20.

[5] The Honorable Tom Gossett retired and did not run for reelection in 391st District Court bench in 2016. Brock Jones was thereafter elected for his seat.

counsel for both sides, and in keeping with the Court of Appeals' opinion that the trial court "enter a judgement consistent with its opinion," the trial Court entered a judgment of acquittal.[6]

On January 22, 2018, the State appealed.[7] Thereafter, on November 14, 2018 the Court of Appeals issued its third opinion, this time holding that the Trial Court's order granting habeas corpus relief was reversible error. Freeman filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals on December 20, 2018 arguing that the Court of Appeals erred in reversing the trial Court's judgment of acquittal. The Texas Court of Criminal Appeals refused Freeman's Petition on April 3, 2019 and the trial Court has since set several dates for a successive trial against Mr. Freeman.

REASONS FOR GRANTING THE PETITION

The law is clear; once a judgment of acquittal is entered, that determination is inviolate. The Fifth Amendment to the United States Constitution, provides in pertinent part that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The protections against successive prosecutions for the same offense come into play only after the accused has actually been placed in jeopardy. *Serfass v. United States*, 420 U.S. 377 (1975).

[6] *See* App. 12-14.

[7] Cr. Vol. 1 P. 119

Jeopardy attaches during a bench trial when the judge begins to receive evidence. *Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (White, J., dissenting); *Downum v. United States*, 372 U.S. 734 (1963).

Petitioner Freeman has been acquitted of the very offense for which he now faces trial.[8,9] *Moreno v. State*, 294 S.W.3d 594, 598 (Tex. Crim. App. 2009) (*citing United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (where the Court held that a defendant is acquitted when "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."). Pursuant to the substitute opinion and judgment of the Court of Appeals, the trial Court heard the matter, granted habeas relief and entered a

---

[8] The Trial Court at the original trial found that:

> "The Court finds ***by the clearer greater weight and degree of the credible testimony*** that the Defendant is guilty of the offense of assault by impeding breath or circulation, as alleged in Paragraph one of the indictment."

See App. 17, 24.

[9] The Trial Court below, upon review of habeas corpus, found that:

> "In accordance with the opinion of the Court of Appeals and the mandate issued by that Court directing this court to ***enter a judgment consistent with its opinion***, it will be the judgment of the Court the relief prayed for in [Defendant's] writ application will be granted.
>
> The Court enters a judgment of ***acquittal***."

See App. 13.

judgment of acquittal in favor of Mr. Freeman. The moment the Court entered this judgment of acquittal, the bar against successive prosecutions for the same offense attached, affording Petitioner Freeman the full protections guaranteed by the Double Jeopardy Clause of the Fifth Amendment. "[A] verdict of acquittal [in our justice system] is final," operating as "a bar to a subsequent prosecution for the same offense." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016) (*quoting Green v. United States*, 355 U.S. 184, 188 (1957)); *see also United States v. Ball*, 163 U.S. 662, 671 (1896) ("A verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.").

Claim preclusion is essential to the U.S. Constitution's prohibition against successive criminal prosecutions. This doctrine instructs that a final judgment on the merits "foreclos[es] successive litigation of the very same claim." *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001); *see* Restatement (Second) of Judgments 19, p. 161 (1980). No person, the Double Jeopardy Clause states, shall be subject for the same offense to be twice put in jeopardy of life or limb. U.S. CONST. amend. V. The Clause protects against a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

I. The Court's Judgment of Acquittal was a Final Judgment, Upon Which Jeopardy Attached

The original trial judge in this case, the Honorable Tom Gossett, received evidence at the Petitioner's first trial beginning on January 26, 2016. Jeopardy attached as soon as the bench trial commenced. *See Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (White, J., dissenting); *Downum v. United States*, 372 U.S. 734 (1963); *State v. Torres*, 805 S.W. 2d 418, 421 (Tex. Crim. App. 1991) (holding that in Texas, jeopardy attaches in a bench trial once the defendant pleads to the charging instrument and both parties have announced ready.). At the original trial, the incorrect burden of proof was applied,[10] resulting in a fifteen-year sentence in the Texas Department of Criminal Justice; of which, Petitioner served roughly three years before being released. In essence, the original trial court concluded the trial without making an affirmative finding of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"); Texas Penal Code §2.01 ("All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."). *See also*

[10] *In re Winship*, 397 U.S. 358, 362 (1970) (holding that the beyond a reasonable doubt burden is "basic in our law and rightly one of the boasts of a free society.").

Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("This beyond a reasonable doubt requirement, which was adhered to by virtually all common law jurisdictions applies in State as well as Federal proceedings.").

The Court of Appeals, in accordance with this Court's precedent, reversed the original trial Court's judgment and remanded Petitioner's case for further proceedings consistent with its opinion. On remand, and pursuant to the further proceedings which had been ordered by the Court of Appeals, Petitioner proceeded by filing a Writ of Habeas Corpus asserting double jeopardy and seeking judgment of acquittal. After hearing the matter and argument of counsel, Freeman was acquitted by Judge Brock Jones and an order of acquittal was signed and entered.[11] A verdict of acquittal is final. The guarantee against double jeopardy prevents a new trial of the old offense upon which acquittal is the result. *Kepner v. United States*, 195 U.S. 100, 130 (1904).

a. The Court of Appeals Erred in Reversing the Trial Court's Habeas Relief Judgment of Acquittal.

This Court has long held that the "most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . [can] not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the constitution." *United States v. Martin Linen*

[11] *See* App. 12-14.

Supply, 430 U.S. 564, 571 (1977) (*quoting United States v. Ball*, 163 U.S. 662, 671 (1896)); *Sanabria v. United States*, 437 U.S. 54, 64 (1979). "The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). Unquestionably, an acquittal functions as the quintessential bar to the State twice trying a defendant for the same offense of which he has been acquitted. In criminal cases only one side (the defendant) has recourse to an appeal from an adverse judgment. *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016). The prosecution is not entitled to appellate review of an acquittal, even one based upon an egregiously erroneous foundation. *Standefer v. United States*, 447 U.S. 10, 23 (1980); *Arizona v. Washington*, 434 U.S. 497, 503 (1978). In a bench trial, courts enjoy an "unreviewable power to return a verdict of not guilty for impermissible reasons, for the [State] is precluded from appealing or otherwise upsetting such an acquittal by the U.S. Constitution's Double Jeopardy Clause." *United States v. Powell*, 469 U.S. 57, 63 (1984). The absence of appellate review of acquittals calls for guarded application of the "preclusion doctrine" in criminal cases. *See Standefer v. United States*, 447 U.S. 10, 22-23 (1980).

After an affirmative finding of acquittal, the State appealed the trial Court's judgment to the Court of Appeals. The State argued an abuse of discretion when

the trial Court entered a judgment of acquittal. It relied upon the notion that the trial Court did not act in accordance with the Court of Appeals' mandate reversing and remanding Petitioner's case for further proceedings. This argument is unfounded. The Court of Appeals' mandate plainly remanded the case for "further proceedings." Further proceedings, wholly consistent with the Court of Appeals' mandate, were held before the trial Court. In scrupulously following this mandate, the trial Court then granted habeas relief and entered a judgment of acquittal barring any further action by the State. The trial Court had full jurisdiction of Freeman's case pursuant to the remand. The entry of a Judgment of acquittal was fully within that court's authority, and in any event, the law makes clear that courts enjoy an "unreviewable power to return a verdict of not guilty" even "for impermissible reasons, for the [State] is precluded from appealing or otherwise upsetting such an acquittal by the U.S. Constitution's Double Jeopardy Clause." *United States v. Powell*, 469 U.S. 57, 63 (1984).

II. The Double Jeopardy Clause Does Not Permit a Court of Appeals to Retract a District Court's "Judgment of Acquittal" Entered on Remand, Particularly, Where, as Here, the Remand is a General Remand, Not Limited to any Particular Question or Issue.

Although the Texas Court of Criminal Appeals has not addressed the scope of general remands, several Circuit Courts as well as the Texas Supreme Court

have addressed the issue. Generally, when appellate courts remand cases for "further proceedings," and the mandate does not provide special instructions, the lower court is to rule "on all issues of fact, and the case is reopened in its entirety." *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). The Sixth Circuit defines a limited remand as one that "explicitly outline[s] the issues to be addressed by the district court and create[s] a narrow framework within which the district court must operate." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). On the other hand, a "general remand give[s] district courts authority to address all matters as long as remaining consistent with the remand." *Id*. A remand is presumed to be general unless it "convey[s] clearly the intent to limit the scope of the district court's review by outlining the procedure the district court is to follow, articulating the chain of intended events, and leaving no doubt as to the scope of the remand." *United States v. Shafer*, 23 F.App'x 380, 382 (6th Cir. 2001); *see also United States v. Moore*, 131 F.3d 595, 598 (6th Cir. 1997) (*discussing United States v. Young*, 66 F.3d 830 (7th Cir. 1995); *United States v. Caterino*, 29 F.3d 1390 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992)).

The Court of Appeals in its original opinion issued on March 22, 2017, reversed the trial court's judgment that utilized the incorrect burden of proof and "remanded for further proceedings." There were no special instructions or limitations as to the scope of the remand.

After a motion for rehearing by the State, the Court of Appeals issued a substitute opinion on May 9, 2017 that reasserted its original judgment in that the trial court utilized the incorrect burden of proof and "remanded for further proceedings." The only additional language included in this substitute opinion related to an issue regarding preservation of error. Identical to the original opinion, there were no special instructions or limitations as to the scope of the remand.

Petitioner filed a Writ of Habeas Corpus seeking a judgment of acquittal and special plea in double jeopardy. Consistent with the general remand, the writ was heard by the trial court which subsequently granted habeas relief and entered a judgment of acquittal.[12] At this point, jeopardy attached and barred any further prosecution of the Petitioner.

The State erroneously filed an appeal with the Court of Appeals arguing an abuse of discretion by the trial court. The State rested upon the language ***"further proceedings consistent with this opinion"*** utilized by the Court of Appeals in their opinion and mandate. This language is the precise language that the Supreme Court of Texas and other circuits have found to be general remands, in which the scope is not limited or bound by any special instructions. By generally remanding Petitioner's case for further proceedings, the Court of Appeals authorized the lower court to rule "on all issues of fact," which reopened the case

[12] *See* App. 12-14.

in its entirety. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).

Courts of Appeals are permitted to recall their mandates in only the most "extraordinary" circumstances. *Calderon v. Thompson*, 523 U.S. 538, 550 (1998).[13] Such a burden is circumvented when the prosecution is permitted to appeal a lower court's acquittal. Allowing the State to appeal Petitioner Freeman's "judgment of acquittal" violates both the spirit and letter of the double jeopardy clause. In accordance with the Court of Appeals' general remand, the trial court conducted further proceedings. Those proceedings resulted in a judgment of acquittal for Petitioner Freeman, barring further prosecution for that same offense.

Granting this Petition will also provide this Court an opportunity to address and bring further clarity in future cases regarding a trial court's authority to proceed with the disposition of a case reversed on appeal and generally remanded without any express instructions regarding specific questions or issues.

[13] "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstance. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* (internal citations omitted).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GERALD H. GOLDSTEIN*
DESTINEE N. RUSSELL
JOHN S. GILMORE, III
GOLDSTEIN & ORR
310 S. St. Mary's Street
29th Floor – Tower Life Building
San Antonio, TX 78205
(210) 226-1463
ggandh@aol.com

**Counsel of Record*
Attorneys for Petitioner