

19-5973

Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
1 FIRST STREET N.E.
WASHINGTON, D.C. 20543-0001

WILFRED WARREN SHEPPARD,
Petitioner

v.

STATE OF TEXAS,
Respondent

ORIGINAL
ORIGINAL

FILED
AUG 26 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition to the, Texas Criminal Court of Appeals, Case No. PD-0553-19, Texas Court of Appeals, Third District at Austin, Case No. 03-19-00180-CR From The District Court of Bell County, 27th Judicial District Case No. 73471, Honorable John Gauntt, Judge Presiding, Texas Criminal Court of Appeals, Case No. PD-0627-19, PD-0628-19, PD-0269-19, Court of Appeals, Third District at Austin No. 03-19-00267-CR, No. 03-19-00268-CR, No. 03-19-00269-CR, From The County Court at Law No. 2 of Bell County, No. 2C14-01404, No. 2C14-02351, & No. 2C16-04640, The Honorable John Michael Michtian, Judge Presiding

(AMENDED)

PETITIONER'S MOTION FOR WRIT OF CERTIORARI

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September 9, 2019

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QUESTION PRESENTED

- (1.) Whether the Texas Criminal Court of Appeals has ruled in a manner which conflicts with the Fifth and Sixth Amendment of the U.S. Constitution.
- (2.) Whether the Texas Criminal Court of Appeals erred in denying my Constitutional challenge on appeal to it.
- (3.) Whether the decisions of the Texas Criminal Court of Appeals conflicts with the Supreme Court precedential rulings in, *United States v. Haymond*, 588 U.S. ____ (2019), *United States v. Jorn*, 400 U.S. 470, *Green v. United States*, 355 U.S. 184-188, *Ex parte Lange* 18 wall, 85 U.S. 163.

PARTIES TO THE PROCEEDINGS

The sole petitioner here is Wilfred Sheppard

IDENTITY OF TRIAL COURT JUDGE.

The Honorable John Gauntt
Judge 27th District Court
Bell County Law Enforcement Center
113 W. Central Avenue
Belton, Texas 76513

PARTIES TO THE JUDGMENT APPEALED

Wilfred Warren Sheppard, Appellant

The State of Texas, Appellee

TRIAL COUNSEL

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RULE 29.6 STATEMENT
(Not Applicable)

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TABLE OF AUTHORITIES

United States v. Haymond, 588 U.S. (____)2019

Ex parte Lange, 18 Wall, 85 U.S. 163,

United States v. Jorn, 400 U.S. 470

Green v. United States, *supra*, at 355 U.S. 188;

Duncan v. Louisiana, 391 U.S. 145, 149 (1968)

Ref: Supreme Court Rule 12.4

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The trial of all crimes, except in cases of impeachment, shall be jury."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The Right to a "Jury Trial" in a criminal prosecution is enforceable against the states through the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

MOTION FOR LEAVE TO FILE A PETITION FOR CERTIORARI AND WRIT OF HABEAS CORPUS

I, Wilfred Sheppard, respectfully submit a motion for leave to file a petition for Writ of Certiorari, to review the action of the Texas Criminal Court of Appeals in declining to allow an appeal to it

OPINION BELOW

The Denial of the Texas Criminal Court of Appeals is attached.

JURISDICTION

(i)The Third Court of Appeals, issued its initial decision on April 30, 2019.
(ii)The Texas Court of Criminal Appeals refused my Petition for Discretionary Review on July 3, 2019 and denied my Motion for Rehearing on August 21, 2019. *Ref: Supreme Court Rule 12.4*

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: “The trial of all crimes, except in cases of impeachment, shall be jury.”

The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

The Constitution of the United States, in the 5th Amendment, declares.

“Nor shall any person be subject to be twice put in jeopardy of life or limb.”

28 U.S.C.: 1291 provides in relevant part: “The Courts of Appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States....”¹⁰

STATEMENT OF THE CASE

On October 26, 2015, I was found guilty of Criminal Mischief greater than \$1500 less than \$20,000.00. At my sentencing hearing, conducted on September 19, 2016,(Exhibit, A4) the trial judge dismissed the jury without my consent and conducted a trial in the above referenced and unrelated cause,73471, (Exhibit A1, A6, A7), for assault, in which he used the State’s witness testimony to deprive me of my liberty for a period of 12 months.

The judge’s sole discretion acting without a jury denied me of my valued right to a “jury trial” to determine the validity of the testimony and present evidence in my defense. *United States v. Haymond*, 588 U.S. ___(2019). The impropriety of the unconstitutional trial was first raised by my trial attorney at my sentencing hearing, (see attached **RR: VI-15, Lines 3-17**), subsequently, I filed a Motion for Review of Reversible Error in the Third Court of Appeals on December 5, 2016

(Exhibit, A9) which was dismissed by the Texas Criminal Court of Appeals on September 13, 2017. The State is now attempting to conduct a “second trial” for the same offense of assault, after I have already been punished predicated on the alleged facts which were never proven to be true by a “jury”(Exhibit C). *United States v. Haymond* 588 U.S. ____ (2019). I argued in a Plea to the Jurisdiction(Motion to Dismiss) in the trial court, which was denied(see appendix) and raised a constitutional challenge, in the Third Court of Appeals on March 21, 2019, (Exhibit A10), a violation of the Fifth and Sixth Amendment. My appeal to the Third Court Of Appeals was denied on April 31, 2019, Discretionary Review to the Texas Criminal Court of Appeals was Refused, July 3, 2017 and Rehearing Denied, August 21, 2019.

REASONS FOR GRANTING THIS CLAIM

The Record On Appeal provides evidence of the substantial denial of my valued constitutional right to a “jury trial” in this case and I assert a violation of the Fifth Amendment Double Jeopardy Clause.

I. ARGUMENT

TO THE HONORABLE JUSTICES, UNITED STATES SUPREME COURT:

The Fifth Amendment's Double Jeopardy Clause represents a constitutional policy of finality for the defendant's benefit in criminal proceedings. The Supreme Court has concluded that a defendant is placed in "jeopardy" in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. See *Green v. United States*, *supra*, at 355 U.S. 188; *Wade v. Hunter*, 336 U.S. 684, 336 U.S. 688 (1949).

The Constitution of the United States, in the 5th Amendment, declares. "Nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial, as said by Mr. Justice Miller, in *Ex parte Lange*, 18 Wall, 85 U.S. 163, 21 L. ed. 872:

" The common law not only prohibited a second punishment for the same offense, but went further, and *forbid a second trial for the same offense, whether the accused had suffered punishment or not*, and whether, in the former trial, he had been acquitted or convicted.

Undoubtedly in those jurisdiction where a trial of one accused of a crime

can only be to a jury, and a verdict of acquittal or conviction can only be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction, he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. **People v. Miner**, 144 Ill. 308, 19 L.R.A. 342. 33 N. E. 40; **State v. Bowen**, 45 Minn. 145, 47 N.W. 650; **State v. tayne**, 96 Tenn. 668, 36 S.W. 390.

The Record On Appeal provides evidence that an unconstitutional trial for the above referenced cause no. 73471 was previously held before the 27th District Court, of competent jurisdiction, and disposed of on September 19, 2016 at 11:42am (see Exhibit , A8). I assert a second trial for the same offense is barred by the Fifth Amendment Double Jeopardy Clause and provide the following evidence in support.

CASE FACTS

On October 26, 2015, I was found guilty of Criminal Mischief greater than \$1500 less than \$20,000.00. At my sentencing hearing, conducted on September 19, 2016, the trial judge dismissed the jury without my consent (**RR:VI-4**, line#9,

“*At that time I released the jury*”) and conducted a trial in the above referenced and unrelated cause no. 73471, for assault, (Exhibits, A1,A6,A7,A8), which intricately included the above referenced Misdemeanor charges. The “*alleged facts*”, not proven to be true by a jury, were used to unconstitutionally deprive me of my liberty for a period of 12 months. *United States v Haymond*. 588 U.S. __ 2019.

Evidence of my assertions are attached hereto as Exhibit A11 :

(see, certified copy of previously assigned court appointed council, Mr. Wade Faulkner, May 11, 2018, for the misdemeanor cause numbers stated above.)

- Review of the appointment order reveals the offense dates provided for the above stated misdemeanors are “12/31/09”.
- The offense date of “12/31/09” provides evidence the State intricately ties the misdemeanor charges to the felony charge in cause no. 73471, which bares the exact offense date “12/31/09” (Exhibits A6,A7,A8,A9,A10).

Further evidence is found in the Reporter’s Record (Exhibit A1) :

RR: VI-15, Lines 24-25:

MR. BARNES (prosecutor): The person you see in front of you, as I know you saw in the trial itself, is someone who.....

RR: VI-16, Line 1: is violent, is aggressive.

RR: VI-16, Lines 2-5:

..as the court can see from the “PSI”, has picked up “assaultive offenses” that are currently pending in the County Attorney’s Office as well as a “misdemeanor drug charge” all while on bond “in regards to this case”(73471).

RR: VI-16, Line 12,

....He needs to go to jail.

RR:VI-16, Lines 14-17,

....And I think about 18 months in the state jail is appropriate on who you have sitting in front of you, not just for what you have sitting in front of you.

THE COURT: (Reading) For the record I have read the presentence reports. Are there “any other” victim impact statements?

Evidence of Trial and Testimony

(Exhibit A2) JUDGE’S DOCKET: 9/19/16 – PUNISHMENT

State called witness Ciara Doyle 04-30-1999 – he molested her, fingered her anus-offered her 1000 to open her legs – teacher outcry before that told her mom took \$ from him, her mom worked for him- her mom and brother 2009-2013- thought that it was a dream – she reported both to police(month) after she ran away.–Argument – 12 months TDCJSJ

(Exhibit A1): RR VI-17, Lines 7-10

SENTENCE

THE COURT: All right, sir, The jury having previously found you guilty(72147, Criminal Mischief), I have listened to the **evidence** (73471, assault) and considered the whole file. I am going to assess your punishment at **12 MONTHS in the state jail facility.**

The record also provides evidence that my trial attorney raised the impropriety of the testimony proffered by the State’s witness for assault during my sentencing hearing for Criminal Mischief and attempted to re-direct the court to the original cause.

Evidence the impropriety of trial for 73471 was raised at sentencing hearing

(Exhibit A1) RR:VI-15, Lines 3-17

Mr. Harris (my trial attorney): Your Honor, this case started out because my client ran over a gentleman's motorcycle (correction made), which is Criminal Mischief. The Court heard that case. The Court was present during the course of that jury trial. The Court knows what the jury verdict was and what the facts were. I would say to the Court that we need to return to that case. That file, that trial. (see, Exhibit B, Charge of Court)

I'm sorry for whatever may have happened to Miss Doyle, but that case is not on trial. And this young lady has had a—as she described her mother “a colorful person,” I would say she has had a pretty “colorful” life herself.

And it begs my question to believe that a daughter would tell her mother this is what happened to me and the mother would be so callous then to take a cruise on one or more times with the theoretic perpetrator. It just—it doesn't equal out, Your Honor.

Despite my attorney's request, the trial judge proceeded to conduct an unconstitutional trial in Cause 73471, evidence of my assertion is attached hereto as Exhibit A1,A6,A7,A8, and he ordered Certification, pursuant art. 38.33, Texas Code of Criminal Procedure, disposing of the cause on September 19, 2016 at 11:42 am, , expressly stated on the document:

**THIS IS TO CERTIFY THAT THE FINGERPRINTS ABOVE ARE THE
ABOVE NAMED DEFENDANT'S FINGERPRINTS TAKEN AT THE
TIME OF DISPOSITION OF THE ABOVE STYLED AND NUMBERED
CAUSE. (73471).**

Legal Definition: *Disposition*. Act of disposing; The final settlement of a matter, In Criminal Procedure, the sentencing or other final settlement of a criminal case. : final arrangement: SETTLEMENT // the disposition of the case.

Source: Marriam –Webster since 1828

This document by definition of its term, “*Disposition*” represents “*Finality*” of the Cause and not a Continuance, therefore, my Constitutional and Jurisdictional challenge on appeal, predicated on the rendition and filing of this document questions the trial court’s authority to issue orders and conduct further proceedings “*after*” it has finalized and disposed of this cause, without any authority from a higher court to do so, via Writ of Error, Bill of Review and after its period of “**plenary power**” has ended. This document distinguishes that a trial was held and not just mere consideration of the allegations.

SPECIAL NOTE: My attorney’s challenge to the impropriety of the unconstitutional trial provides evidence that I did not enter a plea of “Guilty” to the charge of assault, he expressly states that the case is not on trial and attempts to redirect the court to the Criminal Mischief charge, in the end he in fact questions the credibility of the State’s witness testimony. If a plea of “Guilt” had been entered for assault, he would have informed the court of such. Furthermore, a review of the Charge of Court, (Exhibit, B), reveals that the jury was not charged nor found me “Guilty” for assault, further proof that the Thumbprint Certification, pursuant, Article 38.33, Texas Code of Criminal Procedure was ordered at the sole discretion of the trial judge, acting without a jury.

The United States Supreme Court precedential decision in *United States v. Haymond*, 588 U.S. ___ (2019), (held, “A *jury* must find *beyond a reasonable doubt* every “*fact*” which the law makes essential to [a] punishment that a judge might seek later to impose, Blakley, 542 U.S. 296, 304, quoting 1 Bishop 87, at 55.) I contend and the record on appeal, provides “**evidence**” (Exhibit B, Charge of Court), that none of the alleged facts for cause no. 73471, (assault) entered into the record as evidence, have been proven to be true

by a jury. The absence of a jury's finding beyond a reasonable doubt not only infringed on my rights; it also divested the "people at large" the men and women who make up a jury of a defendant's peers---of their constitutional authority to set the meets and bounds of judicially administered criminal punishments. *Blakely*, 542 U.S. at 306(quoting Letter XV by the Federal Farmer (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 320(H. Storing ed. 1981)).

The judge's sole discretion acting without a jury denied me of my valued right to a "jury trial" to determine the validity of the testimony and present readily available evidence in my defense.

Although it is recognized that a defendant can be represecuted after successful appeal, double jeopardy policies are not confined to the prevention of prosecutorial or judicial overreaching. *United States v. Jorn*, 400 U.S. 470.

The crucial difference between represecution after appeal by the defendant and represecution after a *sua sponte* judicial declaration is that, in the first situation, the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal.⁷⁷

"On the other hand, where a judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived his "valued right" to have his trial completed by a particular tribunal.

The defendant has the option to have his case considered by the first jury, the judge in this case, acting without my consent, aborted the trial and dismissed the first jury, I was deprived of my "valued right to have my trial completed by a particular tribunal."

In the absence of the defendant's motion for mistrial, the doctrine of "manifest necessity," *United States v. Perez*, 9 Wheat. 579, 22 U.S.580, commands trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion warrants the conclusion that justice would not be served by continuation of the trial.

A judge must temper the decision whether or not to abort the trial by considering the importance to the defendant of being able finally to conclude his confrontation with society through the verdict of a tribunal that he might believe to be favorably disposed to his fate."

"Applying these considerations to the record in this case, the trial judge here abused his discretion in discharging the jury, and accordingly appellant's reprocsecution would violate the Double Jeopardy provision of the Fifth Amendment."

III. CONCLUSION

The **evidence** attached hereto and the authorities cited herein demonstrate a substantial showing of the denial of my valued constitutional right to have the

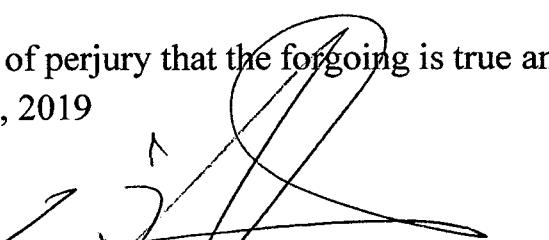
“jury” determine beyond a reasonable doubt, *every fact* “which the law makes essential to [a] punishment” that a judge might later seek to impose, *Blakely v. Washington*, 542 U.S. 296, 304, *Alleyene v. United States*, 570 U.S. 99, *United States v. Haymond*, 588 U.S. ____ (2019). I have been deprived of my liberty without the due process of law, a substantial right guaranteed by the constitution, which I was denied in this case.

IV. PRAYER

I pray, after review of the evidence attached herein and the authorities cited above, the court GRANTS my motion for Writ of Certiorari and finds that subsequent prosecution would violate the Fifth Amendment, Double Jeopardy Clause.

Respectfully Submitted,

I declare under the penalty of perjury that the forgoing is true and correct.
Executed on: September 9, 2019


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