Cause No. 19-5973

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

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 Mischtian, Judge Presiding

PETITIONER'S MOTION FOR REHEARING

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November 25, 2019

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, ***Ex parte Siebold,*** 100 U.S. 371(1879), ***Hans Nielson, Petitioner,*** 131 U.S. 176(1889)

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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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...."

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. I argue that the proceeding for the unrelated cause was unconstitutional in concert with this court's precedential decisions in ***Hans Nielson, Petitioner,*** 131 U.S. 176(1889), ***Ex parte Siebold,*** 100 U.S. 371(1879), ***United States v. Dixon,*** 509 U.S. 688(1993).

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 question whether a right or privilege claimed under the Constitution or the Laws of the United States was distinctly and sufficiently pleaded and brought to the attention and the notice of a state court is itself a federal question, in the decision of which the Supreme Court, on Writ of Error, is not concluded by the view taken by the state. ***Carter v. Texas,*** 177 U.S. 442 at 443.

The jurisdiction of the court, when not restrained by some special law, extends

generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous, and such case occurs when the proceedings are had under an unconstitutional act. ***Ex parte Siebold,*** 100 U.S. 371 (1879), ***Ex parte Lange, 18 Wall.*** 163.

On the above stated premise, I present this Petition for Rehearing and provide the following cases in support of my contentions:

- ***Hans Nielson, Petitioner,*** 131 U.S. 176(1889)

Held: A judgment in a criminal case denying to the prisoner a constitutional right or inflicting a constitutional penalty is void and he may be discharged on habeas corpus.

- ***United States v. Dixon,*** 509 U.S. 688(1993)

Held: Subsequent convictions or prosecutions for offenses that contained the same elements were violative of the Double Jeopardy Clause.

- ***Waller v. Florida,***397 U.S. 387(1970)

Held: The Double Jeopardy Clause protects defendants from successive prosecutions by states and municipalities for offenses based on the same criminal conduct.

THE INSTANT CASE:

Pursuant Texas Code of Criminal Procedure; Article 38.33

Sec. 1. The court shall order that a defendant who is convicted of a felony or a misdemeanor offense that is punishable by confinement in jail have a thumbprint of the defendant's right thumb rolled legibly on the judgment or the docket sheet in the case.

Attached hereto is, Exhibit A8, Certification, pursuant art. 38.33, Texas Code of Criminal Procedure, disposing of Cause 73471, Assault, 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, ASSAULT).**

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 #73471(Assault) and not a Continuance, in accordance with art. 38.33 Texas Code of criminal procedure. In order to produce this document, implies that a trial or legal proceeding was held. Record Evidence of such trial is attached hereto as Exhibit A1, A6, A7, via testimony proffered by the State's witness.

It is noted that the State's witness testimony has not been produced in any other court as evidence other than the 27th District Court, this is important because it identifies that the evidence of conviction pursuant art.38.33 could only be produced by the trial court. I argue that this document represents an unconstitutional conviction, it was given beyond the jurisdiction of the court, because it was against an express provision of the Constitution (jury trial) which bounds and limits all jurisdictions. ***Hans Nielson, Petitioner,*** 131 U.S. 176(1889), ***Ex parte Siebold,*** 100 U.S. 371(1879), ***Ex parte Lange, 18 Wall.*** 163.

It is noted that this trial (73471) was held at the same time and date as the sentencing hearing for Cause No. 72147 (Criminal Mischief). September 19, 2016 at 10:00 am and disposed of at 11:42 am as noted above.

The Sixth Amendment inquiry is whether the case of Assault has relevance to the Criminal Mischief case. The fact that the evidence of convictions for both cases were sent to the Third Criminal Court of Appeals, for review in conjunction of each other under cause number 72147, implies an included offense.

The Double Jeopardy Clause bar applies if the two offenses for which the defendant is punished or tried cannot survive the ***"sameelements"*** or "***Block burger"*** test. See, e.g., ***Blockburger v. United States,***284 U.S. 299, 304. That test inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" within the Clause's meaning, and double jeopardy bars subsequent punishment or prosecution.

The indictments for Assault and Criminal Mischief reveals that they contain "Separate" and "Distinct" elements requiring differing burdens of proof, in short, they do not pass the "sameelements" test under ***Blockburger*** and therefore can not be considered the same offense.

Example:

- **Criminal Mischief** (72147): requires the state to prove willful intent to **damage property** (motorcycle).
- **Assault** (73471): requires the state to prove willful intent to cause **injury to a person by performance of a certain act.**
- The offense of Assault requires proof of specific intent to cause injury to a person by performance of a certain act, which the offense of Criminal Mischief does not. The two crimes are different offenses under the ***Blockburger*** test.

Furthermore, this means that the jury's finding of "Guilt" for Criminal Mischief cannot be considered a finding of "Guilt" for Assault. A Separate trial would be required for Assault under ***Blockburger***, therefore the question at this juncture is whether I have a right to a jury trial, for cause no. 73471, assault. This question was answered by this Supreme Court in the precedential case, ***Duncan v. Louisiana.***

In re, ***Duncan v. Louisiana,*** 391 U.S. 145 (1968), Justice White, in the Majority Opinion, noted that the right to a jury trial for Criminal offenses is a deeply enshrined value in the British and American legal traditions. Thus, right to a jury trial in criminal cases is within the 14th Amendment and so is applicable to the states. The question for the court was whether an offense subject to two years imprisonment is a "serious offense."

The majority noted that at the time of ratification, crimes punishable by more than six months imprisonment were typically subject to jury trial. Furthermore, both federal law and 49 states recognized that a crime carrying a sentence of over one year **necessitated** a jury trial. The Court found that Louisiana law was out of sync with both the historical and current standards of the justice system and so was ruled unconstitutional. The statutory punishment for assault (73471) is beyond the range established in ***Duncan,*** and therefore would require a jury trial, an expressed "valued right," established by the U.S. Constitution enforceable against the states through the 14th Amendment.

It is firmly established that if the court which renders the judgment has no jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional or for any other reason, the judgment is void, and may be questioned collaterally. This was so decided in the cases of ***Ex parte Lange, 18 Wall.*** 163, and ***Ex parte Siebold,*** 100 U.S. 371, and several other cases referred to therein.

In the present case, the judgment of conviction, ordered by the court, pursuant Article 38.33 for 73471 would be considered void under the cases cited herein, it was given beyond the jurisdiction of the court, because it was against an express provision of the Constitution (jury trial) which bounds and limits all jurisdictions. ***Hans Nielson, Petitioner,*** 131 U.S. 176(1889), ***Ex parte Siebold,*** 100 U.S. 371(1879), ***Ex parte Lange, 18 Wall.*** 163.

This explains the State's attempt to conduct a second trial for the same offense of Assault, the statutory penalty for assault would require a jury verdict in the context of ***Duncan,*** which also explains why the conviction ordered by the court/judge on September 16, 2019 and disposed of did not announce any statutory punishment within the range for assault.

The issue with a second trial at this point is, the State filed evidence of a conviction for Assault (73471) during the sentencing hearing for Criminal Mischief (72147) on September 19, 2016, which was used to stiffen punishment in

that case, and now the same evidence of conviction (73471), filed, September 19, 2016, would constitute a conviction "***prior to***" the second trial for 73471(assault), three years after the initial filing of its evidence of conviction. In short, the validity of the evidence of conviction filed, September 19, 2016 is in question and falls in line with my arguments raised in this petition for rehearing. Specifically stated, the first conviction (9/16/19), would have to be overturned as an invalid conviction in order to move forward to a jury trial to obtain a conviction in the second trial which is being attempted by the state, otherwise I would enter the second trial having already been convicted for the same offense, which would negate the need for a second trial in the first place.

Furthermore, a second trial would constitute a second "jeopardy" since the evidence of conviction (9/16/19) demonstrates the first jeopardy before a competent tribunal (Judge), which I assert in this petition is barred by the Fifth Amendment, "Double Jeopardy Clause.")

The State's attempt to conduct a second trial, provides evidence that I did not waive my right to a jury trial for cause no. 73471(assault), contrary to the evidence of conviction filed September 19, 2016, (Exhibit A8).

I was deprived of my liberty for a period of 12 months, predicated on evidence of an unconstitutional conviction. I was denied my right to a jury trial for 73471, in accordance with ***Duncan v. Louisiana,*** when the first jury was

assembled, and proceedings were had under an unconstitutional act. ***Ex parte Siebold,*** 100 U.S. 371(1879), ***Hans Nielson, Petitioner,*** 131U.S. 176(1889), which invokes the jurisdiction of the Supreme Court as previously decided in the cases of ***Ex parte Lange, 18 Wall.*** 163, and ***Ex parte Siebold,***100 U.S. 371, and several other cases referred to therein.

My objection to a second trial for the same offense has been presented to the State courts in a timely Motion to Dismiss. (Exhibit A13, Judge's Docket, Exhibit A14).

It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but in the other, it has no authority to render judgment against the defendant. This was the case in ***Ex parte Lange,*** where the court had authority to hear and determine the case, but this Supreme Court held that it had no authority to give the judgment it did.

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 State has declined to file a response to my petition after a request by this Court, therefore, my allegations must be assumed to be true. ***Williams v. Kaiser,*** 323 U.S. 471, 323 U.S. The allegations I present to this U.S. Supreme Court are supported by record evidence and exhibits attached hereto in the appendix.

CONCLUSION

Wherefore premises considered, and the evidence attached hereto, I pray this Court, *GRANTS* my petition for rehearing, and enter all relief to which I may be entitled.

Respectfully Submitted,

I declare under the penalty of perjury that the forgoing is true and correct.
Executed on: November 25, 2019

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CERTIFICATE OF SERVICE

This certifies a copy of this motion was mailed to the Bell County, District Attorney's Office, 1201 Huey Road, Belton, Texas 76513 on November 25, 2019.

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