No. 19-6417

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DORAN WALKER — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DORAN WILBURN WALKER #1295567
(Your Name)

CLEMENTS UNIT 9601 SPUR 591
(Address)

AMARILLO, TEXAS 79107
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. If a trial court wishes to cumulate sentences, must it so order at the time and place that sentence is orally pronounced? See Grays v State, 291 S.W. 3d 555, 558 (Tex.App.-Houston [14th Dist.] 2009, no pet.), citing Ex parte Madding, 70 S.W. 3d 131, 136 (Tex.Crim.App.2002).

2. Once a defendant is removed from the courtroom, is it to late to cumulate the sentence just imposed with an earlier one? See Ex parte Vasquez, 712 S.W.2d 754, 755 (Tex.Crim.App.1986); Ex parte Madding, 70 S.W.3d 131(Tex.Crim.App.2002).

3. Does a trial court have the statutory authority to orally pronounce one sentence in the defendant's presence, but enter a different sentence in its written judgment outside of the defendant's presence? Ex parte Madding, 70 S.W.3d 131.

4. Must a defendant be physically present and be able to hear and respond to the sentence? Ex parte Madding, 70 S.W.3d 131.

5. The trial court's signing of the cumulation order did not occur on the same day as the date that Petitioner was formally sentenced on March 10, 2005 and the cumulation order was signed eleven (11) days later without Petitioner being present. Is this a violation of the double jeopardy clause of the United States Constitution?

LIST OF PARTIES

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

[ ] 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:

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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[ ] is unpublished.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 A to the petition and is

[ ] reported at OPINION INCLUDED BUT UNPUBLISHED; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the TEXAS COURT OF CRIMINAL APPEALS court appears at Appendix B to the petition and is

[ ] reported at _____; 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 2/6/2019. A copy of that decision appears at Appendix A.

[✓] A timely petition for rehearing was thereafter denied on the following date: 9/6/2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when the actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The crux of petitioner's argument, which the State in RESPONDENT'S ORIGINAL ANSWER agreed and recommended that relief be granted, as did the trial court, best describes the statement of this case which Petitioner sets forth herein, and then will argue under reasons for granting the petition how the Texas Court of Criminal Appeals failed to follow precedent case law out of the same case they used to deny the writ of habeas corpus, in essence, violating the doctrine and principles behind stare decisis.

Applicant was indicted on November 7, 2003 for five counts of the felony offense of "Sexual Assault of a Child" (i.e., Count One-Three, Six and Seven) and two counts of the felony offense of "Indecency with a Child-Contact" (i.e., Counts Four and Five). (C.R., pp. 18-20). At trial, Applicant entered a plea of "not guilty" to all seven counts. (R.R. Vol. 17, pp. 27-31). After hearing all of the evidence, the jury found Applicant guilty on all but one count (i.e., Count Five) and sentenced Applicant to confinement in the Texas Department of Criminal justice-Institutional Division as follows: 15 years in Counts two, Three, Four and Count Six, and 20 years in Count Seven. A $10,000.00 fine was also assessed in Count Seven. (C.R., pp. 180-197, 213-225, 233-238; R.R. Vol.18, pp. 189-192; R.R. Vol. 19, pp. 64-68.). After formal sentencing (i.e., oral pronouncement of the sentence), the trial court announced that it would take under advisement the State's Notice of Intent to Cumulate [Sentences] (filed on February 17, 2005) and have its decision in a couple of days. (C.R., pp. 84-86; R.R. Vol. 19, pp. 68-74). On March 21, 2005, the trial court signed the order to cumulate sentences wherein Count Three would be stacked on top of Counts One, Two and Four, that Count Six would be stacked on top of Count Three, and that Count Seven would be stacked on top of Count Six for a total of 65 years. (C.R., pp. 86, 230-232). Thereafter, on March 29, 2005, the

Judgment of Conviction by Jury; Sentence by Jury to Institutional Division, TDCJ-ID was filed. (Id. At 233-238). The Tenth Court of Appeals affirmed the conviction on August 9, 2006. (Walker v State, 2006 WL2285657 (Tex.App.-Waco, pet. ref'd)(unpublished opinion). (***NOTE*** It should be noted to this Court that attorney, Danny Burns, did not argue the stacking order on direct appeal because there was no sentencing hearing, as now habeas counsel, Danny Burns states in the State habeas application. It should also be noted that the trial court judge appointed appellate attorney, Richard de los Santos, who brought the stacking order to Petitioner while Petitioner was in the jail waiting transport to TDCJ-ID. Petitioner informed attorney de los Santos that he had already hired attorney Danny Burns. Danny Burns requested a statement from attorney Richard de los Santos regarding this fact but was denied).

In Applicant's Ground of Review Number One and Two, he argues in essence, that the cumulation order signed by the judge on March 27(sic) is void. **The State of Texas agrees.** Case law holds that if a trial court wishes to cumulate sentences, it must so order at the time and place that sentence is orally pronounced. *Grays v State,* 291 S.W.3d 555,558 (Tex.App.-Houston [14thDist] 2009, no pet.), citing *Ex parte Madding,* 70 S.W.3d 131, 136 (Tex.Crim.App.2002). Once a defendant is removed from the courtroom and begins serving his sentence, it is too late to cumulate the sentence just imposed with an earlier one. (Id.) A trial court does not have the statutory authority to orally pronounce one sentence in the defendant's presence, but enter a different sentence in its written judgment outside of the defendant's presence. (Id.) The rationale for this rule is that the imposition of sentence is the crucial moment when all parties are physically present and able to hear and respond to the sentence. (Id., citing, *Ex parte Madding*, 70 S.W.3d at 135). A trial court, however, retains plenary power to *modify* its sentence if the modification (i.e., order cumulating

sentences) is made on the same day as the assessment of the initial sentence, before the court adjourns for the day, and done in the presence of the defendant. (Id., citing, *State v Aguilar,* 165 S.W.3d 695, 698 (Tex.Crim.App.2005). Here, the trial court's signing of the cumulation order did not occur on the same day as the date that Applicant was formally sentenced (Applicant was formally sentenced on March 10, 2005 and the cumulation order was signed 11 days later) nor is there any evidence that Applicant was present when the cumulation order was signed. Therefore, the trial court's oral pronouncement in open court controls and the cumulation order is void.

Accordingly, Applicant should be granted relief. (The trial court judge, Honorable John E. Neill agreed).

****

Although the State of Texas agreed and cited the controlling, precedent case law, which the trial court judge, the Honorable John E. Neill agreed. The Texas Court of Criminal Appeals denied relief, however, in doing so, completely ignored their own case law out of the same precedent case law of *Ex parte Madding,* 70 S.W. 3d 131 (Tex.Crim.App. 2002). Applicant, pro se, with the assistance of a fellow inmate, filed directly with the court of criminal appeals: **"SUGGESTIONS TO RECONSIDER ON THE COURT'S OWN INITIATIVE,"** demonstrating that the Court's decision was incorrect in both fact and law. However, the court of criminal appeals denied relief without written order.

This Petition for Writ of Certiorari is based on the Texas court of criminal appeals denial, both of Petitioner's original habeas application, and Petitioner's suggestions for reconsideration on the Court's own initiative.

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals has entered a decision in conflict with a decision by that same court in which relief was granted and in doing so has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Specifically, in ***Ex parte Madding,*** 70 S.W.3d 131 (Tex.Crim.App.2002), the Texas Court of Criminal Appeals in granting relief held that: "judgment imposing consecutive sentences, despite an earlier oral pronouncement of concurrent sentences, violated due process rights to notice and opportunity to be heard." In the instant case, the trial court judge 11 days after formally pronouncing sentences according to the jury's verdict, signed an order cumulating the sentences.

The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Specifically, ***Pointer v Texas,*** 85 S.Ct. 1065 (1982); ***Lewis v United States,*** 13 S.Ct. 136 (1892), holding that an accused's right to be present in the courtroom at every stage of his trial. In the instant case, the petitioner, Doran Walker, was not present when the trial court judge cumulated the sentences 11 days after orally pronouncing concurrent sentences. Petitioner's absence from the courtroom was not wilful on his part, nor was it voluntary, but was effected by the trial court and the County Sheriff.

The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Specifically, ***Blockburger v United States,*** 284

U.S. 299 (1932), discussing violations of the double jeopardy clause. In the instant case, the Texas Court of Criminal Appeals failed to address this habeas claim by merely stating that: "Statute requires that sentence be pronounced in the defendant's presence at least absent a waiver, and it is ordinarily true that "fairness to the defendant requires that his sentence be pronounced orally in his presence." In doing so the court of appeals has decided a question of federal law in conflict with decisions of this Court.

The Texas Court of Criminal appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Specifically, there is no precedent legal authority to allow the trial court to cumulate sentences 11 days after formal sentencing, therefore denying Petitioner's rights to due process of law. See ***Thompson v Louisville,*** 362 U.S. 199 (1960); ***Jackson v Virginia,*** 443 U.S. 307 (1979).

ARGUMENTS & AUTHORITIES

The Texas Court of Criminal Appeals denial of relief in Petitioner's case is not only erroneous, their denial is in direct opposition and conflict with not only their precedent case law; but also with decisions from other court's of appeals. Because this Court's supervisory powers to resolve disagreements among lower courts about specific legal questions, and the importance to the general public of the issue, certiorari should be granted as the Texas Court of Criminal Appeals ignored the following, specific legal questions, supported by precedent case law from habeas counsel, Danny Burns; the State of Texas; and the trial/habeas judge. The questions Petitioner requests this Court to consider are as follows, in which the Texas court of criminal appeals failed to follow, all precedent, controlling case law (stare decisis).

1. If a trial court wishes to cumulate sentences, must it so order at the time and place that sentence is orally pronounced? See Grays v State, 291 S.W. 3d 555, 558 (Tex.App.-Houston [14th Dist.] 2009, no pet.), citing Ex parte Madding, 70 S.W. 3d 131, 136 (Tex.Crim.App.2002).

2. Once a defendant is removed from the courtroom, is it to late to cumulate the sentence just imposed with an earlier one? See Ex parte Vasquez, 712 S.W.2d 754, 755 (Tex.Crim.App.1986); Ex parte Madding, 70 S.W.3d 131(Tex.Crim.App.2002).

3. Does a trial court have the statutory authority to orally pronounce one sentence in the defendant's presence, but enter a different sentence in its written judgment outside of the defendant's presence? Ex parte Madding, 70 S.W.3d 131.

4. Must a defendant be physically present and be able to hear and respond to the sentence? Ex parte Madding, 70 S.W.3d 131.

5. The trial court's signing of the cumulation order did not occur on the same day as the date that Petitioner was formally sentenced on March 10, 2005 and the cumulation order was signed eleven (11) days later without Petitioner being present. Is this a violation of the double jeopardy clause of the United States Constitution?

The Texas Court of Criminal Appeals in this case states the following in its order: "Applicant claims that the stacking order in this case is void because the trial court did not pronounce the stacking of the sentences when it pronounced the sentences in open court. **The State agrees and also points out that Applicant was not present when the stacking order was signed. The parties thus agree that the stacking order should be set aside.** **We disagree**. An attack on a stacking order is not cognizable on habeas corpus. (Citations omitted) Even if the particular attack in this case were

somehow cognizable, however, it would fail"

"At the time the trial court pronounced sentence, it explicitly took the issue of the stacking under advisement, to be decided a few days later in a written order: "I'm going to take some time to consider this. I'll take it under advisement and rule on it no later than Friday of next week and I'll let you know in writing of my decision." This means that the trial court's oral pronouncement of the sentences was not a complete disposition of the case. (Citation omitted) That fact distinguishes this case from *Madding*, where the trial court purported to render a complete judgment during its oral pronouncement but later added a stacking provision in the written judgement. (Citation omitted) Because the judge said he was reserving judgment on stacking, there was clearly no conflict between the oral pronouncement and the written judgment in Applicant's case. (Citation omitted)"

"Statute requires that sentence be pronounced in the defendant's presence, at least absent a waiver, and it is ordinarily true that "fairness to the defendant requires that his sentence be 'pronounced orally in his presence.'" However, the parries were given the opportunity to argue the merits of stacking, and the defendant was given explicit notice that the trial court intended to make a final decision on stacking in a written order and did not object. Under those circumstances, we do not perceive any unfairness or harm to the defendant. We deny relief."

* * * * * * * *

Starting from the beginning of the court of criminal appeals order. The court of criminal appeals first claims that Petitioner's claim is not cognizable on habeas corpus. However, the court then addresses the issue. However, as Petitioner argued and the State agreed. Petitioner's claim is that the stacking order in this case is void because the trial court did not pronounce the stacking of the sentences when it pronounced the sentences in open court. The court of criminal appeals disregards

their own case law because an improper cumulation order is considered to be a void sentence, and such an error cannot be waived. See *LaPorte v State,* 840 S.W.2d 412, 415 (Tex.Crim.App.1992)(en banc). The court also stated in *Ex parte Rich,* 194 S.W.3d 508 (Tex.Crim.App.2006)("This Court has long held that " a defect that renders a sentence void may be raised at any time, no matter how or when relief was sought").

The above stated is just for this Court's information as the court of criminal appeals choose to address Petitioner's claim. The court of criminal appeals states that because at the time that trial court pronounced sentence, it explicitly took the issue of stacking under advisement, that this means that the trial court's oral pronouncement was not a complete disposition of the case. The court of criminal appeals cites to *Bailey v State,* 160 S.W.3d 11, 12, 13, 16 (Tex.Crim.App.2004)(Case was not final and appealable after oral pronouncement of sentence and suspension of its imposition because the issue of restitution had been reserved for later determination). The case of *Bailey v State*, supra, is simply not on point. In *Bailey*, the only issue to be decided was the amount of restitution. This issue did not affect the sentence the court handed down to Bailey. **That is a far cry to Petitioner's case where the trial court's order 11 days after formal sentencing changed Petitioner's sentence from 15 years maximum to 65 flat calendar years.**

Setting Bailey aside, Petitioner's main argument is supported by precedent case law, and was properly argued by the State in her original answer. The State, who conducted Petitioner's trial, and as noted, gave Notice of Intent to Cumulate Sentences , nonetheless, agreed that Petitioner's sentence is void because precedent case law holds that if a trial court wishes to cumulate sentences, it **must** so order at the time and place that sentence is orally pronounced. That once a defendant is removed from the courtroom and begins serving his sentence, it is too late to cumulate the sentence

just imposed with an earlier one. That a trial court does not have the statutory authority to orally pronounce one sentence in the defendant's presence, but enter a different sentence in its written judgment outside of the defendant's presence and the rationale for this rule is that the imposition of the sentence is the crucial moment when all parties are physically present and able to hear and respond to the sentence. All of the above stated is held as controlling precedent case law in ***Ex parte Madding.*** However, the court of criminal appeals states that somehow because the trial court judge explicitly stated he was taking the issue of stacking under advisement that none of the above stated case law matters. With all due respect to the court of criminal appeals, that is a distinction without a difference, and, it violates the fundamental doctrine of stare decisis. Stare decisis is Latin for "to stand by things decided." In short, it is the doctrine of precedent. According to this Court, stare decisis "promotes the evenhanded, predictable, and consistent developement of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. In practice, this Court, like the court of criminal appeals and appeals court's, will usually defer to its previous decisions even if the soundness of the decision is in doubt. A benefit of this rigidity is that a court need not continually reevaluate the legal underpinnings of past decisions and accepted doctrines.

Without trying to be redundant, it must be stated again. The State recognized the precedent case law that despite the fact that the trial court took their Notice of Intent to Cumulate Sentences under advisement, that precedent case law stated that if the trial court wanted to cumulate the sentences, it must so order at the time and place that sentence is orally pronounced and that, once the Petitioner left the courtroom he began serving his sentence and its too late to cumulate his sentence. The court of criminal appeals, despite the proper arguments by habeas counsel, the State, and the trial court

judge, choose to reevaluate the legal underpinnings of *Ex parte Madding,* but at the same time ignoring the rest of the case law that *Ex parte Madding* holds. The soundness of the court of criminal appeals decision in *Ex parte Madding* was not in doubt. The State, habeas counsel and the trial court judge, relied on *Ex parte Madding* believing that they would receive an evenhanded, predictable decision by the court of criminal appeals based on consistent legal principles. Then, the court of criminal appeals ignores several other legal principles in the same case and denies relief.

Arguing further, although the trial court in Petitioner's case had the option to either order Petitioner's sentences to run concurrently or consecutively. Case law states that the trial court must have pronounced the cumulative sentencing at the same time he pronounced the oral sentencing. This is what the case law requires. There is no case law that states otherwise. Had the trial court stated that he would take the request to stack the sentences under advisement and in the ***same*** day decided to cumulate the sentences, he had the statutory authority to do so. A trial court simply does not have the statutory authority to stack sentences 11 days after he formally pronounced concurrent sentences. When case law states the word **"must"** it compels the use of the word **"must"** to mean **"mandatory."** Therefore, unless we ignore Legislative enacted statutory language, the word **must** in the very same case law that the court of criminal appeals choose to overrule Petitioner's claim. The trial court, despite the court of criminal appeals stating that the trial court took the stacking request under advisement, the trial court still **must** have stacked the sentences on the very same day. It should be noted also that the case law that the court of criminal appeals stated: "Under those circumstances, we do not perceive any unfairness or harm to the defendant." See Ex parte Parrott, 396 S.W.3d 531, 533 (Tex.Crim.App.2013)(even when sentence is illegal, habeas applicant must show harm).

Harm could not be anymore prevalent in this case, under the trial court's untimely cumulation order, Petitioner would have to serve 65 years flat time versus 15 years flat time to serve the total sentence if not stacked and running concurrently. Further, the cases the court of criminal appeals cites to, the defendants were brought back into court the same day the sentences were pronounced, or, the defense attorney was given the opportunity/option of whether the defendant should be present or not. The court of criminal appeals actions, with a careful reading of the record, despite the court of appeals stating that the parties were given the opportunity to argue the merits of stacking, confirms that the trial court did not pronounce its intention to cumulate Petitioner's sentences when it pronounced his sentence in open court. Rather, the trial court heard the State's Notice of Intent to Cumulate Sentences and withheld ruling on the motion taking it under advisement. Such statements do not clearly establish the trial court's intention to cumulate sentences. Furthermore, these statements do not constitute an oral pronouncement of cumulation as required by the court of criminal appeals holding in *Ex parte Madding,* supra.

Additionally, nor do these statements by the court of criminal appeals establish that Petitioner agreed to allow the trial court to cumulate his sentences at a later date outside Petitioner's presence. Even assuming that Petitioner did agree to such additional sentencing in absentia, the court of criminal appeals offers no authority establishing an exception to the statutory requirement that sentencing for a felony offense must be pronounced in Petitioner's presence. See Texas Code of Criminal Procedure, Article 42.03, Section 1(a)(Vernon Supp. 2008).

Petitioner would also address the statement by the court of criminal appeals that the court states that under the circumstances of this case "we do not perceive any unfairness or harm to the defendant." Petitioner will demonstrate/illustrate to this Court just how erroneous the above

statement by the court of appeals is by their own words in *Ex parte Madding*, supra, and then show this Court exactly what Petitioner argued in his suggestions for reconsideration:

In *Ex parte Madding,* the court of criminal appeals state: " In *Vasquez*, this Court stated that entering a cumulation order in a written judgment which had not been orally pronounced to the defendant at his sentencing rendered the judgment "void." the Court's use of the term "void" in that context was simply a shorthand rendition of a longer legal proposition: a defendant is constitutionally entitled to due process. At a bare minimum, due process requires that a defendant be given notice of the punishment to which he has been sentenced.(The Court cites to footnote # 9 which states: See e.g., Lankford v Idaho, 111 S.Ct. 1723 (1991)("notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure'); Baldwin v Hale, 68 U.S. 223, 1 Wall. 223, 233, 17 L.Ed. 531 (1863)("common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense"); In re Oliver, 68 S.Ct. 1948)(due process requires that a person be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense[,]...to examine the witnesses against him, to offer testimony, and to be represented by counsel")). To orally pronounce one sentence to defendant's face and then to sign a written judgment more than a month later, when the defendant is not present, that embodies an extravagantly different and more severe sentence than the oral sentence, violates any notion of constitutional due process and fair notice. A defendant has a due process "legitimate expectation" that the sentence he heard orally pronounced in the courtroom is the same sentence that he will be required to serve. (The Court cites to footnote #10 which states: See e.g., Downey v United States, 67 App. D.C. 192, 196, 91 F.2d.223, 229 (1937)(changes in the record of judgment made without notice to defendant or opportunity to be heard would deprive person of liberty without due process

of law; [p]roceedings in the absence of the appellate to correct the record would have been improper, since the ultimate question involved, the extent of valid imprisonment to which he might be subjected, was one of vital interest to him"); compare United States v Spiers, 82 F.3d 1274, 1282 (3d Cir. 1996)(because defendant had notice and was present in courtroom when judge imposed federal sentence consecutive to state sentence, due process notice was not violated simply because judge did not tell him the exact day his "stacked" federal sentence would begin to run))."

" Thus, we follow the well-established law set out in Vasquez, not because the written judgment was "void," but because it violates a defendant's constitutional right to due process to orally pronounce sentence to him and then later, without notice to the defendant and without giving him an opportunity to be heard, enter a written judgment imposing a significantly harsher sentence."

* * * * * * * *

With the above stated by the court of criminal appeals in *Ex parte Madding,* Petitioner stated the following to the court of criminal appeals in his suggestions for reconsideration as follows: "This Court states that under the circumstances of this case, "we do not perceive any unfairness or harm to the defendant." This statement flies in the face of Applicant's right to due process of law under the United States Constitution and Applicant's right to due course of law under the Texas Constitution. An improper cumulation order is considered to be a void sentence, and such error cannot be waived. See LaPorte v State, supra; Hendrix v State, supra. Applicant is challenging the propriety of the March 21st, 2005 cumulation order based on the fact that the trial court lacked authority to cumulate his sentences more than 11 days after pronouncing his sentences in open court after the jury's verdict was returned, and, Applicant was removed from the courtroom awaiting transport to the Texas Department of Criminal Justice, Applicant's sentence commences on the day

it is pronounced by the trial court and Applicant leaves the courtroom. When there is a conflict between pronouncement of sentence in open court and the sentence set out in the written oral judgment, the oral pronouncement controls. See Thompson v State, 108 S.W.3d 287, 290 (Tex.Crim.App.2003). The solution in such a situation is to modify the written judgment to conform to the trial court's oral pronouncement. This Court's order further overrules long standing precedent cases of Ex parte Vasquez, 712 S.W. 2d 754, 755 (Tex.Crim.App.1986); Ex parte Voelkel, 517 S.W. 2d 291, 292 (Tex.Crim.App.1975)("Holding that if a trial court wants to stack a defendant's sentence so that they run consecutively, he **must** make such an order at the time and place that sentence is orally pronounced").

The court of criminal appeals as stated above in Ex parte Madding, states the following: "Thus, we follow the well-established law set out in Vasquez, not because the written judgment was "void," but because it violates a defendant's constitutional right to due process to orally pronounce sentence to him and then later, without notice to the defendant and without giving him an opportunity to be heard, enter a written judgment imposing a significantly harsher sentence."

Looking at the court of criminal appeals decision/order denying relief in this case they state the following as the reason they distinguish Petitioner's claim different than the case of Ex parte Madding: "At the time the trial court pronounced sentence, it explicitly took the issue of stacking under advisement, to be decided a few days later in a written order: "I'm going to take some time to consider this. I'll take it under advisement and rule on it no later than Friday of next week and I'll let you know in writing of my decision." This means that the trial court's oral pronouncement of the sentences was not a complete disposition of the case. That fact distinguishes this case from *Madding,* where the trial court purported to render a complete judgment during its oral pronouncement but later

added a stacking provision in the written judgment. Because the judge said he was reserving judgment on stacking, there was clearly no conflict between the oral pronouncement and the written judgment in Applicant's case."

The court of criminal appeals ignore the fact that the trial court **did** pronounce sentence, and therefore, Applicant/Petitioner began serving his sentence when he left the courtroom that day (March 10, 2005). The trial court's **ORDER CUMULATING SENTENCES** states: "On the 10th day of March, 2005, the Court received and accepted the jury's punishment verdicts in the case." However, the trial court then signs the stacking order on March 21st, 2005, 11 days later as exhibit number three of the suggestions to reconsider demonstrates. The court of criminal appeals ignore *Ex parte Madding,* which states: "The defendant begins serving the sentence imposed when he leaves the courtroom." Further, "Once the defendant has suffered punishment under the sentence originally imposed, it is beyond the authority of the trial court to add a cumulation order to the judgment. See *Ex parte Voelkel,* 517 S.W.2d 291, 292 (Tex.Crim.App.1975); *Ex parte Reynolds*, 462 S.W.2d 605, 608 (Tex.Crim.App.1970)."

In *State v Aguilera,* 165 S.W.3d 695, 698 (Tex.Crim.App.2005), the court of criminal appeals held that: "A trial court has plenary power to modify its sentence if the modification is made on the ***same day*** as the assessment of the initial sentence and ***before*** the court adjourns for the day. **But the resentencing *must be done in the presence of the defendant, his attorney, and counsel for the State."***

Therefore, under a clear line of authority as presented throughout this argument, the trial court, having failed to cumulate the sentences when it was orally pronounced, was not authorized to add the cumulation order to the written judgment of conviction signed 11 days later. The court of

criminal appeals order, stating that this case is distinguishable from *Ex parte Madding,* is a distinction without a difference. The court of criminal appeals ignores their own precedent case law, *(e.g., State v Aguilera),* and in several other court of criminal appeals cases in denying relief in the instant case. Moreso, the court of criminal appeals in denying Petitioner relief in this case has denied Petitioner's constitutional rights to due process of law under the United States Constitution. This Court should grant certiorari on the due process violation alone.

The court of criminal appeals decision in denying relief in this case is in direct conflict with decisions by this court. Habeas counsel, Danny Burns, properly argued in the habeas memorandum: "The United States Constitution protects the right to be present at one's trial and sentencing. Constitution of the United States, Fifth, Sixth, and Fourteenth Amendments. This Court has held "that the Fourteenth Amendment makes the guarantee of [the Confrontation Clause] obligatory upon the States." Pointer v Texas, 380 U.S. 400, 85 S.Ct. 1065, 131 L.Ed. 2d 1011 (1982). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v United States, 146 U.S. 370, 13 S.Ct. 136 (1892)." All parties agreed that Petitioner's absence from the courtroom was not a wilful or voluntary act on his part. The State agreed with habeas counsel, that there is no evidence that Petitioner was present when the cumulation order was signed 11 days after the trial court formally sentenced Petitioner. This is because Petitioner was removed from the courtroom on March 10th, 2005 after being sentenced and remanded to the custody of the Sheriff for transporation to the Texas Department of Criminal Justice. Therefore, as stated by the State, the trial court's oral pronouncement in open court controls and the cumulation order is void, and relief should be granted. This Court would certainly agree that "sentencing," is a critical stage of the proceedings in which

the defendant (Petitioner) must be present. This Court should grant certiorari on this issue alone.

The trial court's cumulation order (March 21st, 2005), 11 days after formally sentencing Petitioner in line with the jury's verdicts on March 10th, 2005, is a violation of the double jeopardy clause of the United States Constitution. This fact is supported by Petitioner's SENTENCE & JUDGMENT as follows:

Regardless that the court of criminal appeals in this case states that because the trial court took the State's Notice of Intent to Cumulate Sentences under advisement, the fact remains that case law, precedent, stare decisis case law, states the following: " Caselaw holds that if a trial court wishes to cumulate sentences, it must so order at the time and place that sentence is orally pronounced. Once the defendant is removed from the courtroom and begins serving his sentence, it is too late to cumulate that sentence just imposed with an earlier one. A trial court does not have the statutory authority to orally pronounce one sentence in the defendant's presence, but enter a different sentence in its written judgment outside the defendant's presence. The rationale for this rule is that the imposition of the sentence is the crucial moment when all parties are physically present and able **to** hear and respond to the sentence."

The question in this case is: "Did the trial court formally pronounce sentence in Petitioner's presence, but then enter a different sentence in its written judgment outside of Petitioner's presence?" This question, which supports Petitioner's claim that he suffered double jeopardy sentences, is proved unequivocally, in the SENTENCE & JUDGMENT:

On the front page of the Judgment & Sentence attached as "EXHIBIT "A" under DATE SENTENCE IMPOSED: It states <u>March 10, 2005.</u>

On the second page of the Judgment & Sentence, the jury found Petitioner guilty, and then

deliberated as to punishment and that was entered upon the minutes of the court.

On the third page of the Judgment & Sentence demonstrates without a doubt that the trial court orally pronounced the sentence in Petitioner's presence: "And thereupon the Court asked the Defendant whether the Defendant had anything to say why said sentence should not be pronounced upon said Defendant, and the Defendant answered nothing in bar thereof. Whereupon the Court proceeded to pronounce sentence upon said Defendant as stated above. <u>It is therefore ORDERED, ADJUDGED AND DECREED by the Court that the defendant is guilty of the offense stated above, the punishment is fixed as stated above, and the State of Texas do have and recover of said defendant all costs in this prosecution expended, for which execution will issue."</u>

This Sentence & Judgment then adds that the following special findings or order apply which is then signed by the trial court judge on **<u>March 29th, 2005.</u>** Therefore, as demonstrated above, the trial court pronounced sentence on **<u>March 10th, 2005</u>**, and did not enter an order cumulating sentences on that same day. Therefore, Petitioner has suffered double jeopardy sentences which the United States Constitution forbids. This Court should grant certiorari on this issue alone.

There is no precedent legal authority to allow a trial court to cumulate sentences 11 days after formal sentencing. This Court would agree that Petitioner has been denied due process of law. *Thompson v Louisville,* 362 U.S. 199 (1960); Jackson v Virginia, 443 U.S. (1979). And because that constitutional error clearly and concededly resulted in the imposition of an unauthorized sentence, it also follows that Petitioner is a "victim of a miscarriage of justice," *Wainwright v Sykes,* 433 U.S. 72, 91 (1977), and entitled to relief.

The Johnson County District Attorney, Dale Hanna, the trial court judge, the Honorable John E.

Neill, all concluded that Petitioner was entitled to relief. There is not a word in any state statute or any provision of the United States or Texas Constitution that provides any basis for challenging their conclusion. The court of criminal appeals decision to deny this case rests entirely on a distinction of its own invention. The State of Texas, in her "obligation to serve the cause of justice," See United States v Agurs, 427 U.S. 97, 111 (1976), recognized this fact and did not dispute the granting of relief. Further, the trial/habeas court judge readily agreed with the State to grant relief. The court of criminal appeals had precedent, confident case law that supported the granting of relief but chose to deny relief, and in doing so, overrules both State and Supreme Court case law that under "stare decisis" should have been followed by the court of criminal appeals.

This Court should grant certiorari because the court of criminal appeals decision is totally erroneous. The importance of this case not only to Petitioner but to others similarly situated. Petitioner has no other recourse, if this Honorable Court does not grant certiorari, Petitioner will serve 65 flat calendar years on a sentence that the trial court judge was not statutorily authorized to render. Petitioner's claim is easily remedied, Petitioner does not claim that he is entitled to a new trial or a new sentencing. Petitioner requests this Court to grant certiorari and order the court of criminal appeals to have his sentences reformed to delete the unauthorized cumulation order. See *Beedy v State,* 250 S.W.3d 107, 109 (Tex.Crim.App.2008)("An unlawful cumulation order is remedied by reforming the judgment to set aside the order").

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant certiorari in this case.

Respectfully submitted,

Nora Walker

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: OCTOBER, 18, 2019