NO. 24-5287 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PHILLIP BENDER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
To The Third Court of Appeals of Texas, and,
To The 331st District Court of Travis County, Texas.

PETITION FOR WRIT OF CERTIORARI

John Phillip Bender,
pro se Petitioner,
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QUESTIONS PRESENTED

1. Whether this Court must immediately confront record truth of the federal double jeopardy law acquittal event: jury's actual historic 2009 nonculpability factual determinations, now acknowledged in context of "now for then" proceedings? 2023 OPINION BELOW, Appendix A, at A-3, Texas Court of Appeals Third District (implicit "NOT GUILTY" ultimate factual determination by jury: evidence is insufficient to find guilt beyond a reasonable doubt, continuing nature Offense Charged, Tex.Pen.C. §§31.09, 32.03, verdicts rejected).

2. Whether this Court must immediately confront record truth of the federal double jeopardy law acquittal event: Texas Court of Appeals Third District 2011, 2023 nonculpability legal determinations, now acknowledged in context of "now for then" proceedings? 2023 OPINION BELOW, Appendix A, at A-3, Texas Court of Appeals Third District (implicit ultimate legal determination that evidence is insufficient to find guilt beyond a reasonable doubt, continuing nature Offense Charged, Tex.Pen.C. §§31.09, 32.03 verdicts rejected; and, appeals court rejected legal sufficiency thereof, implicitly).

3. Whether, given that Tex.Pen.C. §§31.09, 32.03 was invoked to the exclusion of §§31.03, 32.45, the now acknowledged actual historic 2009 jury findings can sustain conviction under federal double jeopardy law? 2023 OPINION BELOW, Appendix A, at A-3 (§§31.03, 32.45 Offense Convicted is repugnant to (rejects), different in kind, from indivisible §§31.09, 32.03 irrevocably elected; unindicted §§31.03, 32.45 findings judicially noticed in context of "now for then" state proceedings, are not discretely actionable units of prosecution of §§31.09, 32.03 Offense Charged).

QUESTIONS PRESENTED, cont'd

4. Whether state law jurisdicitonal dismissal classification, after acknowledging record truth of the federal double jeopardy law acquittal event in "now for then" context to correct state lables, is preempted by federal law? 2023 OPINION BELOW, Appendix A, at A-3, Texas Court of Appeals Third District (truth of fairly ascertainable actual historic adjudicative judicial record of factual and legal nonculpability determinations, federal double jeopardy law acquittal events).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is the subject of this petition includes The State of Texas, respondent, the "State", and petitioner, John Phillip Bender. There are no parties to the proceedings other than those named in the petition.

DIRECTLY RELATED PROCEEDINGS

Underlying State Criminal Trial Court Case. Lower state district court "criminal case" is: 331st District Court, Travis County, Texas, Case No. D-1-DC-08-904109, The State of Texas v. John Phillip Bender, "2009 Judgments" [CR2:265-270], Appendix E, Exhibit J, entered August 5, 2009.

Underlying Exhausted State Statutory Direct Appeal. Underlying lower state intermediate appeals court case AFFIRMED 2009 Judgments: The Texas Court of Appeals, Third District, Appeal No. 03-09-00652-CR, John Phillip Bender v. The State of Texas, "2011 Opinion", Appendix B, entered and filed April 19, 2011. Petition for Discretionary Review to: Court of Criminal Appeals of Texas, Case No. PD-0160-12, In re Bender, 2012 Tex.Crim.App. LEXIS 1071 (Tex.Crim.App. Aug 22, 2012) (PDR ref'd).

State Disbarment of Petitioner Upon 2009 Judgments. The Board of Disciplinary Appeals of the Supreme Court of Texas, "BODA" Case No. 45600, In the Matter of John Phillip Bender, State Bar Card No. 02126500, Final Judgment of Disbarment, filed April 23, 2012, "white card" notice AFFIRMED May 16, 2014, reh'g den., 2014 Tex. LEXIS 774, No. 13-0377 (Tex. Aug 29, 2014), cert. den.

State Habeas Corpus Upon 2009 Judgments. 331st District Court, Travis County, Texas, Case No. D-1-DC-08-904109-A, Ex parte Bender, filed November 15, 2015, "white card" notice, Court of Criminal Appeals of Texas, Case No. WR-84-453-01, Ex parte Bender, application denied August 10, 2016.

State Proceedings Directly On Review In This Case. This is petitioner's fourth certiorari petition to the Court, which now

seeks review in context of "now for then" legal remedial case, of:

1. **2023 OPINION BELOW.** Review is sought of lower state intermediate appeals court case, same court which AFFIRMED 2009 Judgments: The Texas Court of Appeals, Third District, Appeal No. 03-23-00019-CR, John Phillip Bender v. The State of Texas, "2023 Opinion", Appendix A, at A-2 to A-4, Judgment and Opinion entered February 10, 2023, dismissed sua sponte, w.o.j., non-statutory appeal of 2022 ORDER BELOW, freestanding appealable order, below.

2. **2022 ORDER BELOW.** Review is also sought of lower state district court case, same trial court which originated 2009 Judgments: 331st District Court, Travis County, Texas, Case No. D-1-DC-08-904109, The State of Texas v. John Phillip Bender, "2022 Order", Appendix A, at A-5, Order entered November 23, 2022, in "now for then" legal remedial proceeding initiated 2022 by petitioner, summarily denied.

Federal Habeas Corpus. United States District Court, Southern District of Texas, Case No. 4-16-CV-02740, John Phillip Bender v. Lorie Davis, Director, TDCJ-ID Division, filed March 7, 2017, COA den., cert. den.; Bender v. Davis, 2017 U.S.Dist. LEXIS 32400 (S.D. Tex. Mar 7, 2017), final judgment and order adopting Magistrate's recommendation, 2017 U.S.Dist. LEXIS 32976 (S.D. Tex. Feb 6, 2017), dismissed 28 U.S.C. §2254 petition, w.o.j., AEDPA limitations, founded on 2009 Judgments, AFFIRMED by 2011 Opinion. Application for certificate of appealability ("COA") made to: United States Fifth Circuit Court of Appeals, Case No. 17-20199, John Phillip Bender v. Lorie Davis, Director, TDCJ-ID Division, Order filed August 25, 2017, COA den., Bender v. Davis, 2017 U.S.App. LEXIS 28341 (5th Cir. Aug 25, 2017).

Prior Proceedings In This Court. The Court has denied three prior direcrtly related certiorari petitions, by petitioner:

1. "No. 12-640 Petition". John Phillip Bender v. The State of Texas, cert. den. January 22, 2013. Bender v. Texas, No. 12-640, 568 U.S. 1144, 113 S.Ct. 987, 184 L.Ed.2d 763 (Jan 22, 2013), cert. den., with respect to 2011 Opinion which AFFIRMED 2009 Judgments, in statutory direct appeal, now exhausted. [Erratta: No. 12-640 Petition, Count II Judgment, Appendix B thereto, at A-38 therein, "Offense for which Defendant Convicted", should read: "AGGREGATED MISAPPLICATION OF FIDUCIARY PROPERTY", as per actual 2009 Judgment.]

2. "No. 14-651 Petition". John Phillip Bender v. The Commission for Lawyer Discipline, State Bar of Texas, cert. den., January 12, 2015. Bender v. Comm'n for Lawyer Discipline of the State Bar of Texas, No. 14-651, 574 U.S. 1079, 135 S.Ct. 1004, 190 L.Ed.2d 838 (Jan 12, 2015), cert. den., with respect to 2011 Opinion which AFFIRMED 2009 Judgments, and BODA Judgment, filed April 23, 2013.

3. "No. 18-6051 Petition". John Phillip Bender v. Lorie Davis, Director, TDCJ-ID Division, cert. den., November 5, 2018. Bender v. Davis, No. 18-6051, 2018 U.S. LEXIS 6630, 139 S.Ct. 464, 202 L.Ed.2d 355 (Nov. 5, 2018), reh'g den., 2019 U.S. LEXIS 2278, 139 S.Ct. 1404, 203 L.Ed.2d 631 (Mar 25, 2019), cert.den., with respect to August 25, 2017 5th Circuit Order denying COA, with respect to March 7, 2017 final judgment and order adopting February 6, 2017 Magistrate's recommendation, dismissed 28 U.S.C. §2254 petition, w.o.j., AEDPA limitations, founded on 2009 Judgments, 2011 Opinion AFFIRMED. Respondent's "WAIVER" of right to respond, filed October 16, 2018.

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PETITION FOR WRIT OF CERTIORARI

John Phillip Bender, petitioner, an inmate in state custody, appearing pro se, proceeding in forma pauperis, respectfully petitions this Court that a writ of ceriorari, issue to review judgment below.

2023 OPINION BELOW

Review de novo of federal QUESTIONS PRESENTED herein is sought in the context of sua sponte dismissal, w.o.j. by the Texas Court of Appeals, Third District, at Austin, the lower state intermediate appeals court. The 2023 OPINION BELOW, Appendix A, at A-2 to A-4, is from the highest state court to review the merits of petitioner's federal double jeopardy legal claims of record acquittal event. Bender v. State, No. 03-23-00019-CR, 2023 Tex.App.Unpub. LEXIS 881 (Tex.App.-Austin Feb 10, 2023, pet. ref'd), "2023 Opinion".

Bifurcated highest state court's "white card" notices, Appendix A, at A-6, A-7, from the Supreme Court of Texas, No. 23-0752, In re Bender, denied discretionary review (Tex. Nov 10, 2023), reh'g den. (Tex. Mar 1, 2024), Appendix A, at A-6; and, from the Court of Criminal Appeals of Texas, No. PD-0193-23, In re Bender, 2023 Tex.Crim.App. LEXIS 426 (Tex.Crim.App. Jne 21, 2023)(denied discretionary review), reh'g den., 2023 Tex.Crim. LEXIS 599 (Tex.Crim.App. Aug 23, 2023).

2022 ORDER BELOW

Review de novo of federal QUESTIONS PRESENTED is also sought in the context of summary denial, "now for then" legal claims, by the 331st District Court of Travis County, Texas, the lower state district court. The 2022 ORDER BELOW, Appendix A, at A-5, accepted jurisdiction, "2022 Order", The State of Texas v. John Phillip Bender, No. D-1-DC-08-904109 (331st Jud.Dist.Ct, Travis Co., Tex. Nov 23, 2022).

JURISDICTION

The date of judgment, unpublished 2023 OPINION BELOW, is February 10, 2023, of the highest state court to review the merits of federal double jeopardy legal claim of record acquittal event. Nonculpability legal determination arises from factfinding in petitioner's favor, acknowledged judicially noticed record truth, jury's nonculpability factual determination, "offense" to which jeopardy attached. Appeal of the lower state court's November 23, 2022 ORDER BELOW, disposed as a state law jurisdictional matter, dismissed sua sponte, w.o.j., evading federal double jeopardy law. The dates rehearings were denied are August 23, 2023 and March 1, 2024, of bifurcated highest state courts which denied timely requested discretionary review. The petition is due within 90 days of that last date. Rules 13.1, 13.3, 14.1(e)(i),(ii). The date of Honorable Justice Alito's Order on Application 23A1116, is June 18, 2024, granting extension of time of 60 days, to July 29, 2024. Rule 13.5. The statutory provision which confers jurisdiction of the Court to review on writ of certiorari the judgment, order in question, is 26 U.S.C. §1257(a). Rule 14.1(e)(iv).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions, set out verbatim with appropriate citation, Appendix C, at A-33, Rule 14(f), are: U.S.C.S. Const.Art. VI, Cl2, "Supremacy Clause"; and, U.S.C.S. Const.: Amend. V, Cl2, "Double Jeopardy Clause". The following Texas statutory provisions involving federal double jeopardy law questions herein, set out in Appendix C, at A-33 to A-35, Rule 14.1(f), are: Tex.Pen. C. §§12.32, 31.01(1)(A), 31.01(3)(A), 31.03(a),(b)(1),(e)(7), 31.09; and, §§32.03, 32.45(a)(1)(D),2(A),(b),(c)(7).

STATEMENT OF THE CASE

Introduction. "QUESTIONS PRESENTED", supra, at i-ii, subject matter is post-jeopardy termination state lables attached to fairly ascertainable historic record acquittal events, evading federal double jeopardy law. The case arises, long after statutory appeals exhausted, plenary powers expired, in context of state "now for then" non-statutory legal remedial proceedings and appeals from denial.

Statutory Offense Convicted. No fact issue remains, the only factfinding by jury in 2009, framed "guilty", unindicted named singular discrete incident, amount value, nature offenses. Tex.Pen.C. §§31.03, 32.45. 2023 OPINION BELOW, Appendix A, at A-3; Bender, 2023 Tex.App. LEXIS 881, at, *1. Named "Offense Convicted", §§31.03, 32.45, is the precise state invoked purported "lesser included" alternative verdict forms were framed to find. See Appendix E, Exhibits E, F, G, at A-119 to A-168 (showing state responsibility).

State Lables Attached To Jury Findings. A state judicial official deliberately recorded named continuing nature §§31.09, 32.03 Offense Charged, jury rejected, as "Convicted", in 2009 Judgments:

> Offense for which Defendant Convicted: AGGREGATED THEFT [JUDGMENT OF CONVICTION BY JURY (COUNT I) [CR2:266], Appendix E, Exhibit J, at A-183]
>
> Offense for which Defendant Convicted: AGGREGATED MISAPPLICATION OF FIDUCIARY PROPERTY [JUDGMENT OF CONVICTION BY JURY (COUNT II) (CR2:269], Appendix E, Exhibit J, at A-186]

Clearly, entries are wrong. Cf. 2023 OPINION BELOW, id. There is no record the jury (or bench) adjudicated, rendered, pronounced guilty §§31.09, 32.03 Offense Charged, it never happened. Record truth is: 2009 jury nonculpability factual determination of §§31.09, 32.03 "offense" to which jeopardy attached, an acquittal event.

Statutory Offense Charged. Named "Offense Charged", Tex.Pen.C. §§31.09, 32.03, is the precise "offense" identified by initial state pleadings, to which jeopardy attached. Indictment [CR1:4-6], Appendix E, Exhibit C, at A-98 [CR1:4]:

> Indictment- COUNT I-Aggregated Theft-1st Degree Felony
> COUNT II-Aggregated Misapplication of Fiduciary Property-1st Degree Felony

"June 16, 2009 Transcript" [RR9:7-10], Appendix E, Exhibit D, at A-114 to A-115 (ADA read Indictment, id., to which not guilty pleas were entered before sworn, impaneled jury). Indictment was framed to irrevocably elect unique statutory aggregation principle of indivisible named §§31.09, 32.03 "one offense" controlling penal statute subject matter, to the exclusion of unindicted §§31.03, 32.45. See "Aggregation Principle", infra, at 27.

State Lables Attached to Offense Charged. A state judicial official deliberately recorded singular discrete incident, amount value, nature offenses, Tex.Pen.C. §§31.03, 32.45 Offense Convicted, as Offense Charged by indictment, to which pleas were entered before a sworn impaneled jury, in 2009 Judgments entered:

> Charging instrument: INDICTMENT Statute for Offense: 31.03(e)(7)
> Penal Code Date of Offense: 2/1/2003
> [JUDGMENT OF CONVICTION BY JURY (COUNT I) [CR2:266], Appendix E, Exhibit J, at A-183]

> Charging instrument: INDICTMENT Statute for Offense: 32.45
> Penal Code Date of Offense: 2/1/2003
> [JUDGMENT OF CONVICTION BY JURY (COUNT II) [CR2:269], Appendix E, Exhibit J, At A-186]

2009 Judgments [CR2:266,269], Appendix E, Exhibit J, at A-183, A-186, declared petitioner:

> ****pleaded as shown above [NOT GUILTY] to the charging instrument.
> ****A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and the Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

There is no record indictment charging, no pleas before a jury to, or trial for, named §§31.03, 32.45 Offense Convicted, it never happened. Record truth is: §§31.09, 32.03 was invoked by State to the exclusion of §§31.03, 32.45 offenses. See "AUOP", infra, at 27 (not discretely actionable under federal double jeopardy law).

Relation Of Offense Convicted/Charged. §§31.03, 32.45 Offense Convicted stands in relation of repugnancy to §§31.09, 32.03 Offense Charged. "Aggregation Principle", infra, at 27 (different in kind). 2009 jury findings, 2023 OPINION BELOW, id., unindicted §§31.03, 32.45 singular named incident, amount value, nature offenses, reject finding named Offense Charged, of a continuing nature. §§31.09, 32.03 is comprised of plural, two or more incidents bundle: aggregated conduct, aggregated amount obtained value, pursuant to one scheme or continuing course of conduct. "Aggregation Principle", infra, at 27. Finding singular, one incident, amount value, §§31.03, 32.45 Offense Convicted, 2023 OPINION BELOW, id., rejects finding plural, two or more incidents, aggregated amounts obtained value, pursuant to one scheme or continuing course of conduct, §§31.09, 32.03 Offense Charged, an acquittal event. There is no record §§ 31.09, 32.03 factual culpability, finding one rejects two or more.

2023 OPINION BELOW Now Acknowledges Jury Acquittal On Charge Made And Tried. The same state intermediate appeals court which AFFIRMED 2009 Judgments now acknowledges the jury's 2009 factual nonculpability §§31.09, 32.03 determinations, reaffirming its 2011 legal determinations, evidence is insufficient to sustain conviction for §§31.09, 32.03, i.e. no jury verdicts therefor.

1. Jury's Factual Tex.Pen.C. §§31.09, 32.03 Nonculpability Determinations. 2023 OPINION BELOW, Appendix A, at A-3; Bender, 2023 Tex.App. LEXIS 881, at *1, acknowledges guilty finding for unindicted named §§31.03, 32.45 offenses, a §§31.09, 32.03 nonculpability determination, evidence is insufficient to find guilt for Offense Charged, the jury rejected.

2. State Intermediate Appeals Court's Tex.Pen.C. §§31.09, 32.03 Nonculpability Legal Determinations. 2023 OPINION BELOW, id., referenced its 2011 Opinion, without changing its conclusions that evidence is sufficient to sustain conviction for unindicted §§31.03, 32.45 offenses, an implicit §§31.09, 32.03 nonculpability legal determination, i.e. no jury findings therefor.

Rule 14.1(i) Materials. Although an acquittal event under federal double jeopardy law can be judicially acknowledged and then raised at any time, Appendix D presents a summary of the stage in proceedings, both in the court of first instance, and in the appellate courts when federal QUESTIONS PRESENTED were raised, the method or manner of raising them and the way in which they were passed on by the courts, to show federal questions were timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Appendix (Vol. 2), Appendix E, Exhibits, proffered certified copies of official court records, were proffered by formal bill of exception, overruled by operation of law, in the state lower district court. Appendix D. Record of "now for then" case consists of about 500 pages. See Appendix D, at A-69 to A-75, on-line register of actions. The Court has access to the full record and can require State to respond, and order filing of necessary records.

Background Facts. Appendix E, Exhibit C to J, J-7, J-14, self-authenticated official public records, underlying criminal case, exhausted statutory appeal, were proffered in "now for then" case initiated in state lower district court originating 2009 Judgments. Texas Court of Appeals, Third District, No. 03-09-00652-CR, Bender v. State, "2011 Opinion", Appendix B, AFFIRMED "2009 Judgments", Appendix E, Exhibit J, of the 331st District Court, Travis County, Texas, No. D-1-DC-08-904109, State v. Bender. Exhausted statutory appeal No. 03-09-00652-CR, appellate record, underlying criminal case, is cited: "CR[vol.#]:[page#]", Clerk's Record (2 vols.), "RR[vol.#]:[page#]", Reporter's Record (17 vols.). Following specific actual historic events are fairly ascertainable from adjudicative judicial record presented, the entire record available to the Court.

2009 Acquittal Event: Jury's §§31.09, 32.03 Nonculpability Factual Determination. No fact issue remains, the only factfinding by jury's 2009 final Tex.Pen.C. §§31.09, 32.03 nonculpability factual fact determination adjudicated, rendered, accepted, jury discharged. Cf. Indictment [CR1:4], Appendix E, Exhibit C, at A-98; 2009 Verdicts, Charge, pp.13,15 [CR2:243,245], Appendix E, Exhibit G, at A-148, A-150; 2009 Judgments [CR2:266,269], Appendix E, Exhibit J, at A-183, A-186. After jury discharge terminated jeopardy upon §§31.09 32.03 Offense Charged (no jury finding), a state lower district court official in 2009 labled jury findings "Convicted:" "AGGREGATED THEFT" [CR2:266], id., at A-183; "AGGREGATED MISAPPLCIATION OF FIDUCIARY PROPERTY" [CR2:269], id., at A-186, which never happened. 2023 OPINION BELOW, Appendix A, at A-3, 2023 Tex.App. LEXIS 881,

at *1, judicially noticed record truth of jury's 2009 §§31.09, 32.03 nonculpability factual determination, i.e. no jury finding:

> In 2009, a jury found John Phillip Bender guilty of theft and misapplication of fiduciary property, and Bender was sentenced to twenty years' imprisonment for each count. See Tex. Penal Code §§12.32, 31.03, 32.45. This Court affirmed the judgment of conviction. See Bender v. State, No. 03-09-00652-CR, 2011 Tex. App. LEXIS 3096[, at *1, *33] (Tex.App.-Austin Apr 19, 2011, pet. ref'd)(mem.op., not designated for publication). [Bender v. State, No. 03-23-00019-CR, 2023 Tex.App. LEXIS 881, at *1) (Tex.App.-Austin Feb 10, 2023, pet.ref'd)(mem.op., not designated for publication)(dism'd, w.o.j.).]

Above cited 2011 "mem.op", subject of prior No. 12-640 petition to this Court, labled jury findings, 2011 Opinion, Appendix B, at A-10:

> A jury found appellant John Phillip Bender guilty of theft and misapplication of fiduciary property. See Tex. Penal Code Ann. §§31.03, 32.45 (West Supp. 2010). The jury also found that the amounts stolen and misapplied had an aggregate value of $200,000 or more. See id. §§31.09, 32.03 (West 2003). The trial court assessed punishment for each count at twenty years' imprisonment. [Bender v. State, No. 03-09-00652-CR, 2011 Tex.App. LEXIS 3096, at *1 (Tex.App.-Austin Apr 19, 2011, pet.ref'd, cert. den.).]

The second sentence above repeats 2009 Judgments' false state lables attached to historic events, which never happened. A State appellate judicial official in 2011 affirmatively labled jury findings, in the second sentence "§§31.09, 32.03", "amounts", "aggregate", which never happened. As with the state lower district court, there is no judicial record to support fabricated jury factual culpability determination of statutory elements of §§31.09, 32.03 Offense Charged, which jury verdicts rejected. The first sentence above speaks the record truth. As shown immediately next, below, 2011, 2023 Opinions, actually judicially noticed jury's historic nonculpability factual determination for §§31.09, 32.03, implicit judicial notice that contrary state lables "Convicted", are erroneous. Unindicted sigular §§31.03, 32.45 findings are repugnant to, reject §§31.09, 32.03.

2011, 2023 Acquittal Event: §§31.09, 32.03 Nonculpability Legal Determinations. The 2011 Opinion first two sentences above, id., labled jury factual culpability determination Tex.Pen.C. §§31.03, 32.45 and §§31.09, 32.03. However, the state intermediate appeals court made a 2011 culpability determination evidence is legally sufficient to sustain named §§31.03, 32.45, theft, misapplication of fiduciary property, Offense Convicted. 2011 Opinion, pp.18,21, Appendix B, at A-27, A-30; Bender, 2011 Tex.App. LEXIS 3096, at *28, *31. Ultimately, it rejected making culpability determinations evidence is legally sufficient to sustain named §§31.09, 32.03, aggregated theft, aggregated misapplication of fiduciary property, for which there are no jury verdicts. In form and in substance, this is an implicit §§31.09, 32.03 Offense Charged nonculpability legal determination. The 2023 OPINION BELOW, 2023 Tex.App. LEXIS 881, at *1, first three sentences quoted above, Appendix A, at A-3, acknowledge jury's actual historic 2009 §§31.09, 32.03 nonculpability factual determinations; and, also, declined to make a culpability determination evidence is legally sufficient to sustain named §§ 31.09, 32.03 Offense Charged, for which there are no jury verdicts, reaffirming its 2011 legal nonculpability determinations.

Named Statutory Offense Charged: §§31.09, 32.03, Exclusively. Indictment, p.1 [CR1:4], Appendix E, Exhibit C, at A-98, names Tex. Pen.C. §§31.09, 32.03 Offense Charged, which the 2011 Opinion itself cites and acknowledges, making no contrary legal determinations. See 2011 Opinion, pp.8-9, Appendix B, at A-17 to A-18: Bender, 2011 Tex.App. LEXIS 3096, at *11 to *13. It also cites predicate elements, definitions, §§31.01(A),(3)(A), 31.03(a),(b)(1), 32.45(a),(b), id.

Contrary to the truncated quotation-id., record truth is Indictment [CR1:4-6], Appendix E, Exhibit C, at A-98 to A-100, full text, invoked §§31.09, 32.03 to the exclusion of §§31.03, 32.45, as a matter of law. See "Aggregation Principle", infra, at 27. A state appellate court judicial official in 2011, quoted state pleadings truncating the continuing conduct gravamen, §§31.09, 32.03, and aggregation portion, id., obfuscating record truth of "one offense" charged. This corresponds with state lower district court judicial official's 2009 state lables attached to the Indictment, recorded in 2009 Judgments [CR2:265-270], Appendix E, Exhibit J, at A-183, A-186: "Charging Instrument: INDICTMENT", "Statute for Offense:" "31.03(e)(7)" "32.45". No pleas were entered before a jury to unindicted §§31.03, 32.45, and there is no support in the judicial record thereof.

Review was previously sought and denied by this Court, of the 2013 BODA Judgment, AFFIRMED 2014, by the Supreme Court of Texas. See No. 14-651 Petition, BODA Judgment [Appendix A, at A-3, thereto]. The Indictment [CR1:4-6] was judicially noticed and a legal determination was made therein, id., that named Tex.Pen.C. §§31.09, 32.03 "offense" was charged exclusively:

> John Phillip Bender was indicted on the charges of (1) Aggregated Theft, A First Degree Felony and (2) Aggregated Misapplication of Fiduciary Property, A First Degree Felony.

Review was also previously sought and denied by this Court, of the 2017 United States Fifth Circuit Court of Appeals Order denying COA, in federal habeas corpus proceedings. See No. 18-6051 Petition. Again, the Indictment [CR1:4-6] was judicially noticed, and again, a legal determination was made that named Tex.Pen.C. §§31.09, 32.03 "offense" was charged exclusively. 2017 U.S.App. LEXIS 28341, at *1

("aggregated theft and aggregated misapplication of fiduciary property"). The 2017 Magisstrate's recommendation expressly and implicitly judicially noticed the indictment and made a legal determination named §§31.09, 32.03 "offense" was charged, exclusively:

> Bender, an attorney, was convicted in 2009 on charges of aggregated theft and aggregated misapplication of fiduciary property [2017 U.S.Dist. LEXIS 32976, at *1, adopted by Final Judgment and Order, 2017 U.S.Dist. LEXIS 32400, at *1, COA den., 2017 U.S.App. LEXIS 28341.]

The State entered an appearance in No. 18-651 Petition to this Court. Respondent's "WAIVER" of right to respond, filed electronically October 16, 2018, was signed by Joseph Corcoran, Assistant Attorney General, Appeals Division, P.O. Box 12548, Austin, Texas 78711-2548 (tel. 512-936-1400). The State's prior prevailing strategy in 28 U.S.C. §2254 proceedings, that Tex.Pen.C. §§31.09, 32.03 is the Offense Charged, not §§31.03, 32.45, is a judicial admission. Petitioner asks the Court to judicially notice its own court records, and apply the Doctrine of Judicial Estoppel, Clause component, against the State, barring any claim that §§31.03, 32.45 is the Offense Charged, to sustain conviction for unindicted Offense Convicted. See, false 2023 record, Appendix D, at A-53.

Truth of fairly ascertainable actual adjudicative judicial record is that named "offense" charged is aggregated theft, aggregated misapplication of fiduciary property, Tex.Pen.C. §§31.09, 32.03, to the exclusion of §§31.03, 32.45. Indictment named Offense Charged, §§31.09, 32.03 controlling penal statute subject matter irrevocably invoked under state law. It is the indivisible "offense" charged, identified by unique statutory text pled, to which jeopardy attached. Indictment [CR1:4-6], Appendix E, Exhibit C, see [CR1:4], at A-98.

See "Aggregation Principle", infra, at 27. An ADA read the State pleadings and the trial court held pleas thereto before a sworn, impaneled jury. "June 16, 2009 Transcript" [RR9:1-10], Appendix E, Exhibit D, at A-112. See also, 2009 "Charge", CHARGE OF THE COURT, p.1, 1st par. [CR2:231], Appendix E, Exhibit G, at A-136:

> The defendant, John Phillip Bender, stands charged by indictment with the offenses of aggregated theft and of aggregated misapplication of fiduciary property, both alleged to have been committed pursuant to one scheme or continuing course of conduct starting on or about August 1, 2000 and continuing through on or about February 1, 2003, in Travis County, Texas. The defendant has pleaded not guilty to this indictment and each count thereof.

Having no support in the judicial record, a state lower district court judicial official, recorded petitioner was charged with discrete incident, amount value §§31.03, 32.45 nature offenses "Date of Offense: 2/1/2003", rather than date range §§31.09, 32.03 continuing nature offenses actually charged. 2009 Judgments, [CR2:266,269], Appendix E, Exhibit J, at A-183, A-186. See also, lower state district court's 2009 DOCKET SHEET [CR2:298], Appendix E, Exhibit J-7, at A-195:

> *****Indicted Offense: CTI AGG THEFT Degree 1st Offense Date 2-1-03 CT2 AGG Misapplication of Fiduciary Property 1st**** Plea: NOT GUILTY [circled]****

Febuary 1, 2003, is the end date of continuing Offense Charged. Cf., 2009 DISTRICT CLERK'S INFORMATION SHEET (exhausted state statutory direct appeal), Appendix E, Exhibits J-14, J-15, at A-197 to A-200 (Offense Charged: "AGGREGATED THEFT" COUNT I "AGGREGATED MISAPPLICATION OF FIDUCIARY PROPERTY" COUNT II); 2015 CLERK'S SUMMARY SHEET (exhausted state habeas corpus), Appendix D, at A-55 (same). Prior indictments charged §§31.09, 32.03 to the exclusion of §§31.03, 32.45. See Appendix D, at A-41, A-76, A-79.

REASONS TO GRANT THE PETITION

Conflicting Sworn Certifications of Offense Charged. Disposition of federal QUESTIONS PRESENTED implicates essential judicial function: post-jeopardy termination entry of record truth. Duty to faithfully record actual historic events is at its height, object of state "now for then" case, to make state lables speak record truth thereof.

Duty to Correct Material Record Discrepency. State lower district court judicial officials filed three sworn certifications: 2009, 2016, 2023. Sworn 2009, 2023 certifications for appeals of 2009 Judgments and 2022 ORDER BELOW, show:

> Offense Convicted: THEFT>=$200K MISAPP FIDUCIARY/FINANCE PROPERTY >=$200K [DISTRICT CLERK'S INFORMATION SHEET, filed November 16, 2009, Appendix E, Exhibit J-14, A-198.]
>
> Offense Convicted of: THEFT PROP>=$200K, MISAPP FIDUCIARY/FINANCE PROPERTY>=$200K [DISTRICT CLERK'S INFORMATION SHEET, filed January 24, 2023, Appendix D, at A-53.]

Both sworn certifications were transferred to the state intermediate appeals court, id., at A-200, A-53, respectively. 2009, 2023 sworn certifications acknowledge jury's actual 2009 Tex.Pen.C. §§31.09, 32.03 nonculpability factual determination acquittal event, see "2009 Acquittal Event", supra, at 7 to 9. Petitioner's 2022 Motion, p.1, Appendix E, Exhibit B, at A-84, presented the material record discrepency between acknowledged truth, and later recording of the historic event in 2009 Judgments [CR2:265-270], Appendix E, Exhibit J, at A-183, A-186. The material record discrepency remains.

2009 Judicial Officials' Affirmative Acts Violate Public Duty. Not just any discrepency is involved, state labled the 2009 acquittal event, actual jury findings, as convicted Offense Charged, post-jeopardy termination, supra, at 7 (2009 state lower district court

judicial official). Facially, 2009 Judgments are afforded deference record truth would not; however, verdicts speak for themselves. Importantly, statutorily mandated standard JUDGMENT OF CONVICTION BY JURY forms were modified in 2009 by a state lower district court judicial official to declare bench conviction, which never happened, omitting jury adjudication, obfuscating the truth. See Motion, p.2, Appendix E, Exhibit B, at A-85 (bench conviction is declared in the jury trial post-jeopardy termination).

2011 Judicial Officials' Affirmative Acts Violate Public Duty. Again, the discrepency involves jury findings, the State labled the 2009 acquittal event, actual jury findings, as convicted Offense Charged, post-jeopardy termination. Supra, at 8 (2011 state appeals court judicial official).

2023 Judicial Officials' Affirmative Acts Violate Public Duty. Following exhaustion of state and federal statutory appeals and exhaustion of plenary powers, state lower district court judicial officials have taken further acts obfuscating record truth.

1. **Offense Charged Docket Entries.** Official 331st District Court, Travis County, Texas Register of Actions for the case tried and two prior dismissed indictments were materially changed after appeals. See Appendix D, at A-48 to A-49, A-68 to A-79. Offense Charged-to which pleas were entered-has been changed to unindicted named Offense Convicted, Sentence has been changed from "Concurrent" to "Consecutive". See id., at A-68, A-74, A-77; and, at A-73, "Dispositions". Petitioner's name has also been changed.

2. **Offense Charged-False Sworn Certification.** State lower district court judicial officials filed three sworn certifications, as noted

above: 2009, 2016, 2023. Sworn 2009, 2016 certifications for appeal of 2009 Judgments and for 2015 state habeas corpus, show:

> Offense Charged: AGGREGATED THEFT (COUNT I) & AGGREGATED MISAPPLICATION OF FIDUCIARY PROPERTY (COUNT II) [DISTRICT CLERK'S INFORMATION SHEET, filed November 16, 2009, Appendix E, Exhibit J-14, at A-198]
>
> OFFENSE: AGGREGATED THEFT COUNT I; AGGREGATED MISAPPLICATION OF FIDUCIARY PROPERTY COUNT II [DISTRICT CLERK'S SUMMARY SHEET, filed January 7, 2016, Appendix D, at A-55]

The first sworn certificate was transferred to the state intermediate appeals court, id, at A-200, the second to the Court of Criminal Appeals. The 2009, 2015 sworn certifications acknowleged State elected Offense Charged, invoking Tex.Pen.C. §§31.09, 32.03 controlling penal statute, to the exclusion of §§31.03, 23.45. See "Named Statutory Offense Charged", supra, at 9 to 12.

State lower district court judicial officials previously filed 2009, 2016 sworn certifications of Offense Charged, at A-198, A-55, above. The Offense Charged appears across the extensive appellate record, as stated above. Supra, at 9 to 12. In 2023, a state lower district court official filed a directly conflicting sworn certification for appeal of the 2022 ORDER BELOW:

> Offense Charged: THEFT PROP>=$200K, MISAPP FIDUCIARY/FINANCE PROPERTY>=$200K [DISTRICT CLERK'S INFORMATION SHEET, filed January 24, 2023, Appendix D, at A-53.]

The 2023 sworn certification, conflicting with 2009, 2016 prior sworn certifications was transferred to the state intermediate appeals court, id., at A-53.

The false sworn certificate was filed in lieu of preparing 2009 Judgments "now for then" to speak record truth of the acquittal. The 2023 false certification has no support in the record. Prior certifications speak the record truth and required no change.

2023 false sworn information sheet for appeal of 2022 ORDER BELOW purports to show there is no record "discrepency" to correct, i.e., that OFFENSE CONVICTED/CHARGED are the same, when they are not. See 2023 OPINION BELOW, Appendix A, at A-3, Bender, 2023 Tex.App. LEXIS 881, at *1, which shows the object of "now for then" remedy is to correct record "discrepency". The 2023 sworn certification also shows: "Date Motion for New Trial Filed: 1/6/23." Text of state procedural rule precludes "now for then" if a new trial is pending. Again, the certification is false, no such motion for new trial was ever filed. Deliberate acts of public judicial officials sworn to abide by record truth of jury verdicts, violated their public duty, obfuscating 2009 false entries with 2023 false entries, successfully sabatoging petitioner's state remedy to make the record speak the truth of 2009 jury verdicts acquittal events. Such acts do not change QUESTIONS PRESENTED outcome, having no effect on ultimate consequences under federal double jeopary law the Court determines.

2011 Opinion, 2009 Judgments Remain Uncorrected. Petitioner's STATEMENT OF JURISDICTION, Appendix D, at A-57 to A-61, docketed January 6, 2023, state intermediate appeals court, requested judicial notice of record truth and objected to false statements of the record in the 2011 Opinion. Purporting to quote the Indictment, the 2011 Opinion truncated the Offense Charged statutory text pled, omitting aggregation portion statutory text pled, entirely. Summary denial, sua sponte dismissal, denial of discretionary review, leaves in place erroneous 2009 Judgments ackowledged failure to abide by jury verdicts; and 2011, 2023 Opinions which facially materially conflict with respect to now acknowledged actual 2009 findings.

Clause Controlling Constitutional Principle. Applicable to the states through the Fourteenth Amendment, the Fifth Amendment Double Jeopardy Clause ("Clause") command and guarantee is: "[n]o person shall....be subject for the same offence to be twice put in jeopardy of life or limb." U.S.C.S. Const. Art. VI, Cl 2; Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); see, U.S.C.S. Const. Art. VI, Cl2, Supremacy Clause. Appendix C, at A-33. Clause protects against second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 415, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). The controlling Constitutional principle of the Clause focuses on prohibition against multiple trials. McElrath v. Georgia, 601 U.S. 87, 94-95, 144 S.Ct. 651, 217 L.Ed.2d 419 (2024) and Evans v. Michigan, 568 U.S. 313, 318-319, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013)(reaffirming existing federal double jeopardy law).

Implicit Acquittal Events. Black's Law Dictionary (10th ed. 2014), p.28, defines implied acquittal:

> An acquittal in which a jury convicts the defendant of a lesser offense without convicting on the greater offense. Double jeopardy bars the retrial of a defendant on the higher offense after an implied acquittal.

Herein, the jury convicted of purported §§31.03, 32.45 lesser included offenses of purported §§31.09, 32.03 Texas controlling penal statue greater offenses. 2023 OPINION BELOW, Appendix A, at A-3. This can be treated no differently than if the jury had returned verdicts that expressly read: We find the Defendant NOT GUILTY of AGGREGATED THEFT, AGGREGATED MISAPPLICATION OF FIDUCIARY PROPERTY, but GUILTY of Theft and Misapplication of Fiduciary Property in the first degree. Green v. United States, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2nd 199

(1957)("implicit acquittal"). The Green jury rendered "GUILTY" upon a lesser crime than pled, the jury silent on the greater and the alternative findings were accepted, the jury discharged. 355 U.S., at 185-186. The Clause command barred placing Green again in jeopardy for the "offense" identified by pleadings to which jeopardy attached, and the jury rejected by their verdict, id., at 190 & n.11.

Critical inquiry herein is: whether jury's 2009 factfinding actually decided petitioner did not violate Tex.Pen.C. §§31.09, 32.03? Bravo-Fernandez v. United States, 580 U.S. 5, 20, 137 S.Ct. 352, 196 L.Ed.2d 242 (2016). By its verdicts, jury's 2009 factfinding rejected §§31.09, 32.03, a nonculpability final factual determination, jury acquittal events; and, conviction cannot be reached by applying speculation to findings after jury is discharged. McElrath, 601 U.S., 94-95; Smith v. United States, 599 U.S. 236, 252-253, 143 S.Ct. 1594, 216 L.Ed.2d 238 (2023); Bravo-Fernandez, 580 U.S., at 8-9. Jury acquittal is afforded special status, McElrath, 601 U.S., at 94:

> Once rendered, a jury's verdict of acquittal is inviolate. We described this principle-"that '[a] verdict of acquittal.... could not be reviewed, on error or otherwise'-as '[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." [quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)] This bright-line rule exists to preserve the jury's "overriding responsibility....to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal system." [quoting Martin Linen, 430 U.S., at 572.]

The jury's nonculpability determination in McElrath, 601 U.S., at 95, established failure of proof as a matter of law:

> For double jeopardy purposes, a jury's determination that a defendant is not guilty by reason of insanity is a conclusion that "criminal culpability has not been established," just as much as any other form of acquittal. [quoting Burks v. United States, 437 U.S. 1, 10, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)]

In McElrath, 601 U.S., at 95, as herein, jury's verdict fell within Court defined "acquittal" for federal double jeopardy law:

> The jury determination was unquestionably a "ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." [quoting Evans, 568 U.S., at 318]; see also, Burks, 437 U.S., at 10****As we have long recognized, jeopardy clearly terminates under these circumstances [citing United States v. Ball, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).]

Consequences of Acquittal Events. Merits-related substantive rulings herein go to the ultimate question of guilt or innocence, resulting in 2009 factual determinations and 2011, 2023 legal determinations, which necessarily establish petitioner lacks necessary criminal culpability, Tex.Pen.C. §§31.09, 32.03 Offense Charged, having crucial federal double jeopardy consequences. Otherwise, a general guilty verdict could have been pursued or the jury could have found guilty aggregated theft, aggregated misapplication of fiduciary property, which they did not. Likewise the 2011 and/or 2023 Opinion would have determined evidence is sufficient to support conviction for aggregated theft, aggregated misapplicaiton of fiduciary property, which it could not because the jury rejected the Offense Charged, §§31.09, 32.03, and did not.

Evans, 568 U.S., at 319, quoting United States v. Scott, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), stressed: "[T]he law attaches particular significance to an acquittal; so a merits-related ruling concludes proceedings absolutely." McElrath, 601 U.S., at 89-90 ("The jury's verdict consituted an acquittal for double jeopardy purposes notwithstanding its apparent inconsistency with other verdicts the jury may have returned."). See Bravo-Fernandez, 580 U.S. at 14-15. See also, id., at 9 and McElrath,

601 U.S., at 94 ("[A] verdict of acquittal [in our justice system] is final," the last word on a criminal charge, and therefore operates as "a bar to a subsequent prosecution for the same offense.") Bravo-Fernandez, 580 U.S., at 14, reaffirmed federal double-jeopardy law:

> A jury "speaks only through its verdict," [quoting Yeager v. United States, 557 U.S. 110, 121, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009)]; "only 'a jury's decision, not its failure to decide.' identify 'what the jury necessarily determined at trial.'" [quoting Yeager, 557 U.S., at 122.]

Rule in Fong Foo. Evans, 568 U.S., at 318, broadly reaffirmed that the Fifth Amendment Double Jeopardy Clause:

> ****bars retrial following a court-decreed acquittal, even if the acquittal is "based upon an egregiously erroneous foundation." Fong Foo v. United States, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962)(per curiam). A mistaken acquittal is an acquittal nontheless,****.

See Evans, 568 U.S., at 318-319 (cases collected), reaffirmed that:

> ****an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence; a mistaken understanding of what evidence would suffice to sustain a conviction; or a misconstruction of the statute defining the requirements to convict. In all circumstances, the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of the determination, but it does not alter its essential character.****Our cases have defined an acquittal to encompass any ruling that prosecutor's proof is insufficient to establish criminal liability for an offense. [internal citations, quotation marks, omitted.)] [citing Smith v. Massachusetts, 543 U.S. 462, 467-468, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005)(collecting cases); Smalis v. Pennsylvania, 476 U.S. 140, 144-145, n.7, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986); Arizona v. Rumsey, 467 U.S. 203, 211, 164 S.Ct. 2305, 81 L.Ed.2d 64 (1984); Burks, 437 U.S., at 10; Sanabria v. United States, 437 U.S. 54, 68-69, 78, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); Scott, 437 U.S., at 98; Martin Linen, 430 U.S., at 571.]

Acquittal. McElrath, 601 U.S., at 94, and Evans, 568 U.S., at 318-319, reaffirmed that this Court's "cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." This Court has long

held there is no limit to the magnitude of the error that could yield an acquittal. Evans, 568 U.S., at 318, 325-326 (applying a presumption judicial duties are exercised in good faith). No such presumption can apply in this case, "REASONS", supra at 13 to 16. An "acquittal" has been defined as a decision that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Martin Linen, 430 U.S., at 571. See Smith, 543 U.S., at 468; Sanabria, 437 U.S., at 64, 71. Evans, 568 U.S., at 321-324, rejected any claim a narrow application is implied-acquittal does not depend on resolution of an element, id., at 325. See Burks, 437 U.S., at 10 ("defendant has been acquitted because the court decided that criminal culpability has not been established.").

Acquittal Event. Evans, 568 U.S., at 319, listed acquittal events:

> Thus an "acquittal" includes a ruling by the court that the evidence is insufficient to convict, a factual finding that necessarily establishes the criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence. These sorts of substantive rulings stand apart from procedural rulings****. [(internal citations, quotation marks, brackets, omitted).]

Judicial §§31.09, 32.03 Nonculpability Legal Determination Acquittal Events. Applying the acquittal event critical inquiry to 2011, 2023 Opinions, state intermediate appeals court rejected Offense Charged culpability and actually determined petitioner did not violate Tex.Pen.C. §§31.09, 32.03. 2011 Opinion, pp.18, 21:

> The evidence is legally sufficient to sustain the jury's verdict convicting appellant of theft. [Appendix B, at A-27; Bender, 2011 Tex.App. LEXIS 3096, at *28.]
>
> The evidence is legally sufficient to sustain the jury's verdict convicting appellant of misapplication of fiduciary funds. [Appendix B, at A-30; Bender, 2011 Tex.App. LEXIS 3096, at *31.]

Ultimately there is no determination of §§31.09,32.03 violation.

Only p.1 and pp.8-9, 2011 Opinion, references Tex.Pen.C. §§31.09, 32.03. 2011 Opinion, Appendix B, at A-10, A-17 to A-18; Bender, 2011 Tex.App. LEXIS 3096, at *1, *11-*13. Contrary to p.1, the jury did not find "amounts stolen and misapplied had an aggregate value of $200,000 or more." [Citing §§31.09, 32.03.] Actual historic verdicts rejected §§31.09, 32.03 culpability. Supra, at 7-9. Jury found "theft and misapplication of fiduciary property". 2023 OPINION BELOW, Appendix A, at A-3; Bender, 2023 Tex.App. LEXIS 881, at *1 (§§"31.03, 32.45"). The 2011 Opinion, pp.18,21, id., at A-27, A-30, Bender, 2011 Tex.App. LEXIS 3096, at *28, *31, determined legal sufficiency on that basis, entirely-that evidence is legally sufficient to sustain jury's verdicts of conviction, unindicted theft, misapplication of fiduciary property.

The 2011 Opinion, pp.8-9, id., at A-17 to A-18, Bender, 2011 Tex.App. LEXIS 3096, at *11-*13, cites §§31.09, 32.03 controlling penal statute, charged to the exclusion of §§31.03, 32.45. Supra, at 9-12. The 2011 Opinion did not deny §§31.09, 32.03 was charged and rejected any legal determination evidence is sufficient to sustain conviction of aggregated theft, aggregated misapplication of fiduciary property, id., for which there is no jury verdict. Cf. 2011 Opinion, pp.18,21, id., at A-27, A-30, Bender, 2011 Tex.App. LEXIS 3096, at *28, *31; Indictment [CR1:4-6], Appendix E, Exhibit C, at A-98 to A-100 (actual text charged §§31.09, 32.03, exclusively). Neither the jury nor the 2011, 2023 Opinions determined petitioner violated §§31.09, 32.03. Actual verdicts the 2023 Opinion now acknowledges, id., at A-3, Bender, 2023 Tex.App. LEXIS 881, at *1, are §§31.09, 32.03 final nonculpability factual jury determinations. There are no verdicts finding guilty §§31.09, 32.03 Offense Charged.

Scott Distinction. Finding singular named §§31.03, 32.45 is repugnant to, rejects plural Tex.Pen.C. §§31.09, 32.03 two or more incident aggregated conduct, aggregated amounts obtined value, continuing conduct. 2023 Opinion, id., at A-3. The 2011 Opinion, pp.18,21, id. at A-27, A-30, determined evidence is legally sufficient to sustain conviction for unindicted §§31.03, 32.45, rejecting, as an implicit determination, legally sufficient evidence to sustain §§31.09, 32.03, jury rejected. Determination of ultimate question of criminal culpability, §§31.09, 32.03 statutory violation, defines whether a legal determination is an acquittal event, nonculpability §§31.09, 32.03 factual, legal determinations, in this case. See Evans, 568 U.S., at 323-324:

> Scott confirms that the relevant distinction is between judicial determinations that go to "the criminal defendant's lack of criminal culpability," and those that hold "that a defendant, although criminally culpable, may not be punished because of supposed" procedural error. [Citing 437 U.S., at 98.] Culpability (i.e., "the ultimate question of guilt or innocence") is the touchstone not whether any particular elements were resolved or whether the determination of nonculpability was legally correct. [Citing ibid., at 98, & n.11] (internal quotation marks omitted).

Existing federal double jeopardy law has not been ruled unworkable so as to justify overruling precedent. Evans, 568 U.S., at 328:

> The distinction drawn in Scott[, 437 U.S., at 98, n.11,] has stood the test of time, and we expect courts will continue to have little "difficulty in distinguishing between those rulings which relate to the ultimate question of guilt or innocence and those which serve other purposes."

Evans, 568 U.S., at 328 ("the logic of these cases still holds."). In addition to jury's factual determinations of not guilty Offense Charged §§31.09, 32.03 by operation of law, "aquittal" includes substantive rulings which stand apart from procedural rulings, "a ruling by the court that evidence is insufficient to convict" and

any other "ruling which relates to the ultimate question of guilt or innocence." [internal brackets omitted.] Evans, 568 U.S., at 318-319, reaffirmed that this Court's "cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability."

The determination is made, no matter how erroneous antecedent legal rulings culminating in the acquittal event. Evans, 568 U.S., at 326 ("There is no question the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the state needed to prove under state law. But this is of no moment."). See Sanabria, 437 U.S., at 78, explaining that the Clause does not permit states to obtain relief from trial rulings adverse or not:

> ****that lead to the termination of a criminal trial in defendant's favor,****to hold that defendant waives his double jeopardy protection whenever a trial court error in his favor on a mid-trial motion leads to an acquittal would undercut the advesary assumption on which our system of criminal justice rests**** and would vitiate one of the fundamental rights established by the Fifth Amendment. The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As Fong Foo v. United States makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances.

Rule in Burks. Burks, 437 U.S., at 10, nonculpability legal determination "depended upon equating a judicial acquittal with an order finding insufficient evidence of culpability, not insufficient evidence of any particular element of the offense." Evans, 568 U.S., at 324; id., n. 6 ("the issue is whether the bottom-line question of 'criminal culpability' was resolved."). See Burks, 437 U.S., at 11 ("it should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient.").

State intermediate appeals court determined evidence is legally sufficient to sustain conviction upon a lesser crime than pled,

unindicted named theft, misapplication of fiduciary property upon the jury's verdict. 2011 Opinion, Appendix B, at A-27, A-30; Bender, 2011 Tex.App. LEXIS 3096, at *28, *31. Upon truth of the actual historic record, the jury was silent on the greater continuing conduct Offense Charged, Tex.Pen.C., §§31.09, 32.03. 2023 OPINION BELOW, Appendix A, at A-3; Bender, 2023 Tex.App. LEXIS, at *1. Since the 2011 Opinion was silent as to a legal determination that evidence is sufficient to sustain conviction thereon, or even that petitioner violated §§31.09, 32,03, acquittal is implied as a matter of law. Reviewing court must abide by verdicts its 2023 Opinion acknowledged.

Herein, as McElrath, 601 U.S., at 95, reaffirmed, the jury's 2009 implicit §§31.09, 32.03 nonculpability factual determination "is a conclusion that 'criminal culpability had not been established' just as any other form of acquittal." Burks, 437 U.S., at 10. Final legal determinations, correct or not, as to nonculpability with respect to named Offense Charged, §§31.09, 32.03, for which Opinions were silent, just as 2009 Verdicts, acquit. It is clearly a final determination that petitioner's criminal culpability required therefor had not been established because the state failed to come forward with sufficient proof aggregated conduct, two or more incidents, sharing a spatial, temporal nexus, aggregate amounts obtained within threshold value, pursuant to scheme or continuing course of conduct. It is clearly a determination of what the state lower district court should have done in remedial proceedings, enter judgment of acquittal by jury "now for then", barring further prosecution.

Bravo-Fernandez, 580 U.S., at 20, also reaffirmed:

> For double jeopardy purposes, a court's evaluation of evidence as insufficient to convict is equivalent to an acquittal and therfore bars a second prosecution for the same offense. [Citing Burks, 437 U.S., at 10-11.]

The critical inquiry is whether the state intermediate appeals court's legal determinations decided that petitioner did not violate Tex.Pen. C. §§31.09, 32.03 Offense Charged, id. Petitioner has met his burden by showing this has been "determined by a valid and final judgment of acquittal." Bravo-Fernandez, 580 U.S., at 22 (quoting Yeager, 557 U.S., at 119). The State "has been given one full opportunity to offer whatever proof it could assemble." Burks, 437 U.S., at 16, n.10:

> In holding the evidence insufficient to sustain guilt, an appellate court's determines that the prosecution has failed to prove guilt beyond a reasonable doubt. See American Tobacco v. United States, 328 U.S. 781, 787 n.4 (1946).

Just as in Burks, 437 U.S., at 16, state intermediate appeals court implicit §§31.09, 32.03 nonculpability legal determinations:

> ****means that the government's case was so lacking that it should not have been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal-no matter how erroneous its decision-it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is determined as a matter of law that the jury could not properly have returned a verdict of guilty.

As Burks, 437 U.S., at 18, concluded:

> ****the Double Jeopardy Clause precludes a trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available to the court is the direction of a judgment of acquittal.

Sole remedy herein is entry of Judgment of Acquittal by Jury, "now for then". Id.

Relief can be granted based on applying core federal double jeopardy law principles above, federal QUESTIONS PRESENTED 1 & 2, supra, at i, to fairly ascertainable actual historic adjudicative judicial record acquittal events.

Aggregation Principle. Tex.Pen.C. §§31.09, 32.03 is a substantial legislative departure from common law pleading and proof for property crimes, enacted to address continuing conduct scenarios where reprehensibility is not determined by a discrete incident, amount value.[1] Unique statutory "aggregation principle", Kent v. State, 483 S.W.3d 557, 560 (Tex.Crim.App. 2016), noted Kent, id., at 562:

> ****creates one offense for purposes of severance, jurisdiction, punishment, limitaitons and venue. [Citing State v. Weaver, 982 S.W.2d 892, 893 (Tex.Crim.App. 1998); Graves, 795 S.W.2d, at 187; Wages, 573 S.W.2d, at 806]"

Clause protections were invoked in 2009 by jeopardy attachment to §§31.09, 32.03 controlling penal statute subject matter invoked under state law, to the exclusion of §§31.03, 32.45, when the jury was impaneled and sworn. Crist v. Brentz, 437 U.S. 28, 29 & 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). See "June 16, 2009 Transcript" [RR9:7-10], Appendix E, Exhibit D, at A-114 to A-115.

1. **"AUOP".** Because federal double jeopardy law leaves crime definition to state legislatures,[2] Texas Legislature designates whether two offenses are the same for prosecution,[3] applicable Clause concept, "allowable unit of prosecution", "AUOP", arises therefrom. Sanabria, 437 U.S., at 69-70. Although same alleged conduct sharing spatial, temporal nexus, violates §§31.03 and 31.09,

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[1] Graves v. State, 795 S.W.2d 185, 186-187 (Tex.Crim.App. 1990); Wages v. State, 573 S.W.2d 804, 805 (Tex.Crim.App. 1978).

[2] Sanabria, 437 U.S., at 69; Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

[3] Ex parte Hawkins, 6 S.W.3d 554, 556-557 & n.7 (Tex.Crim.App. 1999) (The Double Jeopardy Clause "concept that applies is the 'allowable unit of prosecution' which is ultimately determined by the penal statute.****which is a distinguishable discrete act that is a separate violation of the statute.").

§§32.45 and 32.03, respectively, same elementally for jeopardy attachment, acquittal bar,[4] are not same for prosecution, conviction, punishment. Sanabria, 437 U.S., at 69-70 (plain statutory text AUOP approach). Clause analysis begins and ends with consistent plain text "one offense" §§31.09, 32.03 construction. Garrett v. United States, 471 U.S. 773, 778, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). §§31.09, 32.03 controlling penal statute unique aggregation principle was invoked to the plain text exclusion of repugnant §§31.03, 32.45 discrete incident, amount value, nature offenses-different in kind.

State Legislature did not define each unindicted §§31.03, 32.45 incident, amount value, as independently discretely actionable units of prosecution of §§31.09, 32.03, the State's theory of prosecution. See Sanabria, 437 U.S., at 70-71. §§31.09, 32.03 Offense Charged is "one offense", which the jury rejected by its verdicts. 2023 OPINION BELOW, Appendix A, at A-3; Bender, 2023 Tex.App. LEXIS 881, at *1 (§§"31.03, 32.45"). This leaves no doubt petitioner was truly acquitted. See Sanabria, 437 U.S., 71. In this case, the jury made a final §§31.09, 32.03 nonculpability factual determination, an acquittal event upon jury's discharge, "a substantive determination that the prosecution has failed to carry its burden." Smith, 543 U.S., at 468.

Once trial commenced for §§31.09, 32.03, there is no statutory authorization to prosecute, convict, punish unindicted §§31.03, 32.45 offenses, which are not discretely actionable AUOP thereof,

[4] Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932)(traditional elements approach rule of federal double jeopardy law, with respect to jeopardy attachment).

not severable. Stuhler v. State, 218 S.W.3d 706, 718 (Tex.Crim.App. 2007); Jefferson v. State, 189 S.W.3d 306, 314-316 (Tex.Crim.App 2006)(Cochran, J., concur); Wages, 573 S.W.2d, at 806. Otherwise "subverts legislative intent to create 'one offense'", Kent, 483 S.W.3d, at 560 (collecting cases), §31.09 read in pari materia with "identical" §32.03, Black v. State, 551 S.W.3d 819, 832 (Tex.App.-Corpus Christi 2018, no pet.). Purported "lesser included" §§31.03, 32.45 is not an AUOP because statutory "offense" identified to which jeopardy attached, §§31.09, 32.03 controlling penal statute subject matter, was irrevocably invoked to the exclusion thereof.

Hawkins, 6 S.W.3d, at 556-557, noted that Sanabria, 437 U.S., at 69-70, 73-74, relied on this Court's earlier decisions defining the doctrine of continuing nature offenses and plain text legislative answer to AUOP inquiry.[5] In Ortiz v. State, 623 S.W.3d 804, 806 (Tex.Crim.App. 2021), because purported greater statutory offense was pled to the exclusion of purported lesser included offense, i.e. not included in the indictment as an AUOP, as herein, federal double jeopardy law AUOP concept was applied to plain statutory text, rather than a traditional elements approach to construction:

> The application of the "allowable unit of prosecution" analysis to the lesser-included-offense context would be consistent with our jurisprudence in other areas, and it would answer the question that in these cases the Hall test [elements pleading approach] does not, namely, what facts are "required" to prove the offense charged. Consequently, we apply the "allowable unit of prosecution" analysis*****. [Hall v. State, 255 S.W.3d 524 (Tex.Crim.App. 2007)]

Oritz, 364 S.W.3d, at 294, noted, although the Hall test did not

[5] Braverman v. United States, 317 U.S. 49, 52-54, 63 S.Ct. 99, 87 L.Ed. 23 (1942); In re Nielson, 131 U.S. 176, 182-183, 9 S.Ct. 672, 33 L.Ed. 118 (1889). See also, Brown, 432 U.S., at 169, citing Braverman, id., at 52 (continuing nature offense fragmentation bar).

resolve the statutory question for purported "lesser-included-offense" instruction, i.e. what facts are required to prove the offense charged?, it is answered "in other context by identifying the allowable unit of prosecution."

State statutory aggregation principle irrevocably elected defines an indivisible continuing nature "one offense" AUOP, aggregated "conduct", aggregated "amounts" obtained value, §§31.09, 32.03. This AUOP determines the scope of Clause protections afforded prior conviction or acquittal. Sanabria, 437 U.S., at 69-70. There is no exception to the Clause command, id., at 75. Federal double jeopardy law absolutely bars further proceedings after 2009 jury discharge, see id., at 78. Now acknowledged actual §§31.03, 32.45 findings are nonculpability §§31.09, 32.03 factual determinations evidence is insufficient to support conviction therefor, which 2011, 2023 Opinions confirm by §§31.09, 32.03 nonculpability legal determinations evidence is insufficient to sustain conviction therefor (no jury verdict). 2023 OPINION BELOW, Appendix A, at A-3; Bender, 2023 Tex. App. LEXIS 881, at *1. All theories of liability are brought in a single trial for one §§31.09, 32.03 continuing nature theory of prosecution, ending in acquittal thereof, with no further prosecution anticipated by plain statutory text. See Sanabria, 437 U.S., at 71-72.

Even if "based upon an erroneous foundation", Fong Foo, 369 U.S., at 143, jury's final §§31.09, 32.03 nonculpability factual determination is unassailable. Yeager, 557 U.S., at 123; Sanabria, id., at 64. See Evans, 568 U.S., at 320:

> There is no question the trial court's ruling was wrong: it was predicated upon a clear misunderstanding of what facts the State needed to prove under state law. But that is of no moment.

Final jury findings convict of named §§31.03, 32.45 offense, repugnant to, and not discretely actionable AUOP of §§31.09, 32.03. See Kent, 483 S.W.3d, at 560 (cases collected). Antecedent legal error affects the accuracy of final §§31.09, 32.03 nonculpability factual jury determination but cannot be used to impeach jury verdicts and do not alter its essential character, acquittal. Smalis, 476 U.S., at 142; Sanabria, 437 U.S., at 64; Scott, 437 U.S., at 98. Statutory plain text Legislative intent prescribes the AUOP.

Statutory construction is a question of state law, Legislature understood to mean what it enacted plainly in literal text. Boykin v. State, 818 S.W.2d 787, 785 (Tex.Crim.App. 1991). Well-settled consistent judicial construction of required statutory culpability for jury unanimity in due process context, applies equally for federal double jeopardy analysis, it is the law of the case until overruled. Nawaz v. State, 663 S.W. 3d 739, 746 (Tex.Crim.App. 2022); Pizzo v. State, 235 S.W.3d 711, 714 - 719 (Tex.Crim.App. 2007).

Sanabria, 437 U.S., at 72-74, reaffirmed the doctrine of continuing nature offenses, applicable to §§31.09, 32.03, different in kind from (repugnant) §§31.03, 32.45 discrete incident nature offenses. See Brown, 432 U.S., at 169:

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. Cf. Braverman v. United States, 317 U.S. 49, 52 (1942).

Sanabria, 437 U.S., at 72, added to the foregoing, "or as we hold today, into 'discrete bases of liability' not defined as such by the legislature." [citing Brown, 437 U.S., at 169 n.8] See Sanabria, 437 U.S., at 72 n.8 ("Governemnt may not under the Double Jeopardy

Clause fragment what is in fact a single crime into its components." [internal quotations, citations omitted]). See also, Richardson v. United States, 526 U.S. 813, 815-824, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The issue is post-acquittal jeopardy termination evasion of federal double jeopardy law herein by state lables attached to events having no support in the actual record, for which "now for then" relief was sought.

2. **Fragmentation Prohibition.** Unindicted Tex.Pen.C. §§31.03, 32.45 jury findings cannot be reconciled with applicable federal double jeopardy law continuing nature offense fragmentation bar. Sanabria, 437 U.S., at 72, above: "Government may not under Double Jeopardy Clause, fragment what is in fact a single crime into its components." Id., at 73 ("the discrete violations of state law**** are not severable in order to avoid the Double Jeopardy Clause bar on retrials for the 'same offense.'"). Clause fragmentation bar arises from §§31.09, 32.03 plain text prohibition.[6] There is no motion or order amending indictment, which would have terminated prosecution, Weaver, 982 S.W.2d, at 899; see Sanabria, id., at 65.[7]

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[6]State law absolute systemic prohibition against trial amendment to sever §§31.09,32.03 "one offense", plain text statutory construction, has been consistently applied since 1973 enactment. State v. Weaver, 945 S.W.2d 334, 336 (Tex.App.-Houston [1st Dist.] 1997)("the severance effectively terminated the prosecution."), aff'd, 982 S.W.2d 892, 894 (Tex.Crim.App. 1998); Graves, 795 S.W.2d, at 187; Wages, 573 S.W.2d at 806 ("It is axiomatic that you cannot sever One offense.")

[7]Acquittal jeopardy bar applies regardless of antecedent legal errors and acts evading Clause protections. Green, 355 U.S., at 188 ("This prevents a prosecutor or a judge from subjecting defendants to a second prosecution by discontinuing the trial when it appears that the jury might not convict."). Trial court held pleas to §§31.09, 32.03 charged to exclusion of §§31.03, 32.45. Trial court yielded to State's §§31.03, 32.45 end of trial strategy jury found, rejecting §§31.09, 32.03. Appendix E, Exhibits E, F, G. §§31.03, 32.45 are in fact unindicted, outside indictment, not AUOP of §§31.09, 32.03.

3. Two-part, Two Paragraph Pleading. Federal QUESTIONS PRESENTED, at i, number 3, addresses that State irrevocably invoked indivisible "one offense", Tex.Pen.C. §§31.09, 32.03 "aggregation principle", Wages, 573 S.W.2d, at 806, to the exclusion of §§31.03, 32.45.[8] Indictment [CR1:4-6], Appendix E, Exhibit C. Kent, 482 S.W.3d, at 562 (cases collected) specifies the Legislative prescribed AUOP for purposes of federal double jeopardy law. Forbidden conduct, required culpability textually defined AUOP §§31.09, 32.03 "one offense", is to "obtain" "amounts" "in violation" of [Tex.Pen.C. Chapter 31: Theft; Chapter 32: Fraud, respectively] "pursuant to one scheme or continuing course of conduct" (gravamen, or focus), Kent, 483 S.W.3d, at 561 (rather than each predicate incident alleged to prove the scheme or course of conduct). See Appendix C, at A-34 to A-35, identical §§31.09, 32.03, plural "amounts" appears three times in each continuing nature offense statutes enacted 1973.

State framed Indictment [CR1:4-6], id., to invoke §§31.09, 32.03 controlling penal statute subject matter by name, alleging gravamen in first and second paragraphs, each Count (four times), electing statutory aggregation principle by well-understood two-part pleading.[9]

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[8] Each Count, 1st par., Indictment [CR1:4,5], id, at A-98, A-99, does not allege discrete incident amount value, nature §§31.03, 32.45 offenses, because §§31.09, 32.03, different in kind, dispenses with common law pleading, proof. Specific incident singular amount value, required to charge discete act offenses separately, is not pled because §§31.09, 32.03 is repugnant to §§31.09, 32.03 invoked, i.e. not included in the Indictment; and, only aggregated "amounts", plural, "obtained" threshold value is pled, each Count, 2nd par., Indictment [CR1:5,6], id., at A-99, A-100.

[9] Wages, 573 S.W.2d, at 804-805; Brown v. State, 640 S.W.2d 275, 277 (Tex.Crim.App. 1982); see Cashion v. State, 657 S.W.2d 517, 520 (Tex.App.-Corpus Chisti 1983, pet. ref'd). §§31.09, 32.03 controls, not §§31.03, 32.45, lesser-included, joinder-statutory exceptions.

Kent, 483 S.W.3d, at 560, reaffirmed existing law, quoting Wages, 573 S.W.2d, at 806 (statutory aggregation principle operates to create one offense). Pleas were held to unique §§31.09, 32.03 aggregation principle statutory text charged in the Indictment, id., which must be submitted to the jury, proved, otherwise acquits. Kellar v. State, 108 S.W.3d 311, 313 (Tex.Crim.App. 2003); Whitehead v. State, 745 S.W.2d 374, 377 (Tex.Crim.App. 1988); Turner v. State, 636 S.W.2d 189, 195 (Tex.Crim.App. 1982). See Kent, 483 S.W.3d, at 560-562 (cases collected).

The Tex.Pen.C. §§31.09, 32.03 AUOP aggregated "bundle"[10] was pled in two paragraphs, each Count: statutory aggregated "conduct", predicate violations; statutory aggregated "amounts" "obtained" value, "pursuant to one scheme or continuing course of conduct."

First paragraph, each Count, Indictment [CR1:4-6], id., pled predicate elements, as modified, mutiple §§31.03, 32.45 incidents, spatial, temporal nexus pled, statutory aggregated "conduct" bundle. Although multiple thefts, misapplications were alleged committed, pusuant to unique statutory allegations, they constitute the single §§31.09, 32.03 offense invoked. Kent, 483 S.W.3d, at 561, reaffired Graves, 795 S.W.2d, at 187 [in turn, citing Brown, 640 S.W.2d, at 278], i.e. plural, "two or more incidents", thefts/misapplications of fiduciary property, are made one §§31.09, 32.03 offense. Cashion,

[10] Kent, 483 S.W.3d, at 561, reaffirmed that the aggregation principle is invoked with respect to "a certain 'bundle' of property", reaffirming Lehman v. State, 792 S.W.2d 82, 84 (Tex.Crim.App. 1990). Wages, 573 S.W.2d, at 806, resolved any latent statutory ambiguity: aggregated "bundle", multiple Chapter 31, 32 incident violations, cannot be unbundled. Lehman, 792 S.W.2d, at 84-85. Once trial commenced for §§31.09, 32.03, it continued until final jury adjudication-aggregstion principle prosecution theory invoked-jury rejected, no further proceedings anticipated after jury acquittal on Indictment, id.

657, S.W.2d, at 520, stressed the jury was required to find the defendant committed at least two constituent incidents before authorizing conviction under the statutory aggregation principle, as Lehman, 792 S.W.2d, at 85, noticed. See Kent, 482 S.W.3d at 561.

First paragraph, each Count, Indictment [CR1:4-6], does not plead unindicted §§31.03, 23.45 offenses-repugnant to §§31.09, 32.03-finding one rejects "two or more". No specific theft, misapplication incident is pled, Kent, 483 S.W.3d, at 561, reaffirming Kellar, 108 S.W.3d, at 313, and Whitehead, 745 S.W.2d, at 377, or proved, Kent, id., reaffirming holdings in Lehman; and, the jury does not need to agree on any specific incident of theft or misapplication, because only §§31.09, 32.03 is pled in the first part. Kent, 483 S.W.3d, at 562 (any number of incidents are combined as elements of continuing nature offense). Conviction for §§31.03, 32.34 is cannot be sustained-not required to be pled, not pled-unindicted.

The second separate paragraph, each Count, Indictment [CR1:4-6], id., aggregation portion, pled "aggregated" "amounts" "obtained" value threshold, §§31.09, 32.03 statutory aggregated "amounts" obtained, value bundle. Statutes work differently for federal double jeopardy law and unanimity. See Kent, 483 S.W.3d at 561:

> The evidence will be sufficient if the State proves that the defendant illegally appropriated enough property to meet the aggregated value alleged. [Internal quotation marks, citation omitted, referring back to Lehman, 792 S.W.2d, at 84.]

Plain text Legislative intent shows "[w]hen amounts are obtained in violation of [Chapter 31: Theft; Chapter 32: Fraud, respectively] pursuant to one scheme or continuing course of conduct", Kent, 483 S.W.3d, at 560, "one offense", "amounts aggregated" can be invoked.

Statutory text: "amounts" "obtained" "pursuant to one scheme or continuing course of conduct" gravman for AUOP was pled; which the jury rejected. 2023 OPINION BELOW, Appendix A, at A-3 (singular unindicted §§31.03, 32.45 incident, amount value nature offenses reject §§31.09, 32.03 two or more incidents "aggregated value alleged"). Kent, 483 S.W.3d, at 561. Aggregated "bundle" AUOP statutory text refers to plural, as does Kent, id., at 562, which the jury rejected. Predicate incident amount value is not discretely actionable §§31.09, 32.03 AUOP, otherwise subverts "one offense" text. Kent, id., at 560.

Jurisdiction. Question 4, supra, at ii, raises a substantial question to fill a precedential void. 2023 Opinion Below, Judgment, Appendix A, at A-2, mischaracterized: "This is an appeal from the judgment of conviction by the trial court." It sidestepped its clerical role and duty to accept jurisdiction by rechariterizing petitioner's 2022 pleadings, readjudicating district court's ab intio jurisdiction.[11] Texas significantly restrains statutory direct appeal while leaving in place inherent authority to correct state lables "now for then". State lacks authority to dispose of federal QUESTIONS PRESENTED by wrapping "now for then" case in nonapplicable jurisdictional garb of a second statutory appeal. Such is not basis for determining Court's jurisdiction. Court retains jurisdiction for federal QUESTIONS PRESENTED until exhausted.

In context of acquittal events, state lables do not control federal QUESTIONS PRESENTED. McElrath, 601 U.S., at 95. Clause protections are self-executing and do not depend "on the happenstance

[11] 2022 motion sought "now for then" legal remedy, district court denied, petitioner complied with procedures invoking jurisdition.

of how an appellate court chooses to describe a trial court's error." Evans, 568 U.S., at 322-323:

2023 OPINION BELOW, Appendix A, at A-4, addressed error as jurisdictional; however, issue is one of QUESTIONS PRESENTED (acquittal events labeled Convicted post-jeopardy termination). McElrath, 601 U.S., at 96:

> ****it is well settled that whether an acquittal has occurred for purposes of the Double Jeopardy Clause is a question of federal, not state law****Because of this focus on substance over lables, a state's characterization, as a matter of double jeopardy law of a ruling is not binding on us.

Precise forum to correct state lables is "now for then" proceeding. Inherent jurisdiction to address federal QUESTIONS PRESENTED continues until exhausted. otherwise renders Clause meaningless.

Conclusion. Petitioner prays that the Court grant his writ of certiorari, modify the judgment, 2023 OPINION BELOW, 2022 ORDER BELOW, reverse in whole or in part, render the judgment and orders that should have been rendered, order entry of judgment of acquittal by jury now for then, or reverse and remand, or grant other or additional relief.

RESPECTFULLY SUBMITTED, 7/26/24

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Petitioner, Memorial Unit, TC2-22
59 Darrington Road, Rosharon, TX 77583

28 U.S.C. §1746 DECLARATION UNDER PENALTY OF PERJURY

I, John Phillip Bender, petitioner, certify under penalty of perjury that the foregoing is true and correct, Executed July 26, 2024.

7/26/24

John Phillip Bender, TDCJ #01600287