

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH MICHAEL ST. AUBIN
Petitioner

v.

THE STATE OF TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

Question One: Whether it is a violation of the prohibition against multiple punishments for the same offense afforded by the Double Jeopardy Clause of the Fifth Amendment, extended to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment, to indict a defendant on multiple charges, placing the defendant in jeopardy as to each charge and to obtain guilty verdicts on each charge, when it is clear that entering judgment on those charges would violate the Fifth and Fourteenth Amendments to the United States Constitution.

Question Two: Whether a person is convicted in violation of the prohibition against multiple punishments for the same offense afforded by the Double Jeopardy Clause of the Fifth Amendment, extended to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment, upon a finding of guilt by the jury, or after a judgment is entered after sentencing.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals appears at Appendix A to the petition and has been designated for publication but is not yet reported. *Ex Parte St. Aubin*, No. WR-49,980-12 through -16, 2017 Tex. Crim. App. LEXIS 885 (Tex. Crim. App., September 20, 2017)(designated for publication). Appendix A.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

On September 20, 2017, the Texas Court of Criminal Appeals issued its opinion dismissing Petitioner's Applications for Writs of Habeas Corpus. This petition, filed within 90 days of the opinion dismissing Petitioner's Applications for Writs of Habeas Corpus, is therefore timely. *See* SUP. CT. R. 13(3). This Court's jurisdiction is invoked through 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

FIFTH AMENDMENT

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 in 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.

U.S. CONST. AMEND. V.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV § 1.

ARTICLE 11.07, SECTION 4 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

(a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

TEX. CODE OF CRIMINAL PROCEDURE ART.11.07, § 4.

STATEMENT OF THE CASE

Petitioner shot five people at the 1998 Mardi Gras celebration in Galveston, Texas. *Ex Parte St. Aubin*, No. WR-49,980-12 through -16, 2017 Tex. Crim. App. LEXIS 885, at *1 (Tex. Crim. App., September 20, 2017)(designated for publication). Appendix A. “He was charged with one count of murder and four counts of attempted capital murder. [Oscar] Nava was the victim alleged in the murder count and he was the second victim alleged in each of the attempted capital murder counts.” *Id.* at *2. As the record reflects, in the trial of the murder case and the four cases of attempted capital murder, the prosecution contended that the shooting of the complainants by the Petitioner were wanton and without legal justification. Defense counsel countered that the shootings were justified in that Petitioner had acted in self-defense. Petitioner was found guilty of all five charges and sentenced to life imprisonment in each case, with the sentences to run concurrently. *Id.*

Petitioner’s Subsequent Applications for Writs of Habeas Corpus were filed on July 15, 2015. *Id.* On October 14, 2015, the trial court issued Findings of Fact and Conclusions of Law recommending that relief be “dismissed.” Appendix E. The Texas Court of Criminal Appeals issued an order on November 13, 2015, remanding the case to the trial court and instructing the trial court to make findings of fact as to whether any of these convictions violate double jeopardy, and if so, to then make findings as to which conviction should stand. Appendix D. The Texas Court of Criminal Appeals restated St. Aubin’s claims that all of these convictions allege the murder of the same victim as an element to the offenses and therefore only one

conviction can stand under the court's double jeopardy laws. Appendix D. The Texas Court of Criminal Appeals stated, "Applicant has alleged facts that, if true, might entitle him to relief." Appendix D. The trial court ordered the State and the defense to submit briefs.

Petitioner filed Applicant's Brief in Support of His Application for Post Conviction Writ of Habeas Corpus on January 11, 2016. The State filed the State's Second Supplemental Answer to Application for Post Conviction Writ of Habeas Corpus on January 11, 2016, conceding that the face of the record shows double jeopardy and recommending that St. Aubin's murder conviction should stand and the remaining four attempted capital murder convictions should be set aside.

On January 25, 2016, the trial court issued Supplemental Findings of Fact and Conclusions of Law Without Evidentiary Hearing on 11.07 Application for Writ of Habeas Corpus finding that Petitioner showed that his conviction and sentencing for the murder in addition to the four attempted capital murders violates double jeopardy and recommended that relief be granted. Appendix C. The trial court recommended that Petitioner's murder conviction be retained, and the four judgments and convictions for attempted capital murder charges be vacated and set aside. Appendix C.

On June 15, 2016, the Texas Court of Criminal Appeals issued an order that the applications be filed and set for submission to determine whether Applicant's claim that he has received multiple punishments for the same conduct in violation of the Double Jeopardy Clause of the Fifth Amendment overcomes the statutory

procedural bar against successive habeas applications and ordered the parties to brief these issues. *Ex parte St. Aubin*, 2016 Tex. Crim. App. Unpub. LEXIS 484 (Tex. Crim. App. June 15, 2016)(per curiam)(not designated for publication). Appendix B. Petitioner's filed his brief on July 15, 2016, asserting that Petitioner's double jeopardy claim is not procedurally barred in this subsequent writ and requested that the court vacate the unlawfully obtained convictions and sentences on the four attempted capital murder convictions, and grant Petitioner a new trial as to punishment on the single remaining charge of murder. The State filed its brief on August 15, 2016, agreeing with Petitioner that his double jeopardy claim is not procedurally barred in this subsequent writ, however the State believed that the murder conviction and sentence should be upheld without a punishment retrial and the remaining four attempted capital murder convictions be set aside. On September 20, 2017, the Texas Court of Criminal Appeals issued a published opinion dismissing the current applications under Tex. Code Crim. Proc. art. 11.07, § 4. *Ex Parte St. Aubin*, No. WR-49,980-12 through -16, 2017 Tex. Crim. App. LEXIS 885 (Tex. Crim. App., September 20, 2017)(designated for publication). Appendix A. The Texas Court of Criminal Appeals found that since the current applications were filed after the final disposition of initial applications that challenged the convictions at issue, the question was whether "there is an exception to the subsequent-application bar." *Id.* at *2-3. The court found,

One such exception is the "innocence gateway" exception, which requires a showing by a preponderance of the evidence that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt. This language requires, at the very least,

that the alleged constitutional violation occur at or before a finding of guilt. A claim based on the “successive prosecutions” strand of double-jeopardy jurisprudence satisfies such a requirement. This is so because a successive-prosecutions violation involves two separate criminal proceedings. If the offenses in the two proceedings are the same for double jeopardy purposes, then the second proceeding never should have occurred – the issue of the applicant’s guilt would never have been submitted to a jury. . . .

The reasoning that applies to a successive-prosecutions double-jeopardy claim does not apply to a multiple-punishments double-jeopardy claim. When the convictions occur at a single criminal trial, the role of the double-jeopardy guarantee “is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” The Supreme Court has explicitly recognized that the State has the right to prosecute and obtain jury verdicts on two offenses in a single trial, even if the offenses are the same for double jeopardy purposes. Because the protection against double jeopardy does not prohibit multiple jury verdicts of guilty within a single trial, it cannot be said that “but for a violation of the protection against double jeopardy, no rational juror would have found the applicant guilty of both offenses.” A rational juror might well be able to find a defendant guilty of both offenses, and doing so would not violate the Constitution. It is only upon entry of a judgment for multiple offenses, after sentencing, that a multiple-punishments violation even occurs. A multiple-punishments violation occurs after sentencing, so a necessary precondition for the innocence-gateway exception—that a constitutional violation occur at on or before a finding of guilty—is typically not met. . . . Applicant’s multiple-punishment claim . . . fails to meet the “at or before a finding of guilt” precondition for invoking the innocence-gateway exception.

Id. at 3-6. The Court held that the applicant’s “multiple-punishments double-jeopardy claims meet neither the innocence-gateway nor the new-legal-basis exception to the subsequent-application bar” and found that the subsequent-application bar applies and that the court “may not consider the merits of applicant’s claims.” *Id.* at *8.

Judge Keasler filed a concurring opinion, and Judge Newell filed a dissenting opinion, in which Judges Alcala, Richardson and Walker joined. *Id.* at *10-15. The dissenting opinion noted that both the trial court and the State agreed that

Petitioner received multiple punishments for the same conduct in violation of Double Jeopardy and both the State and the trial court asked the Texas Court of Criminal Appeals to vacate and set aside Petitioner's attempted capital murder convictions and leave the murder conviction and its life sentence in place. *Id.* at *14 (Keasler, J., dissenting). The dissent also noted that the State waived any procedural default. *Id.* at *15 (Keasler, J., dissenting). Additionally, the dissent stated, "we treat Applicant's double-jeopardy claim as punishment error even though the constitutional error occurred when Applicant was convicted rather than when he was punished." *Id.* (Keasler, J., dissenting)(citing *Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009)("A double jeopardy violation occurs even when, as in the case before us, the sentences are concurrent and the impermissible conviction does not result in a greater sentence.")). The dissent stated, "[w]e should just do what the State and the trial court ask us to do; reform the judgment to reflect a single conviction for murder with a life sentence." *Id.* (Keasler, J., dissenting).

REASONS FOR GRANTING THE PETITION

Question One: Whether it is a violation of the prohibition against multiple punishments for the same offense afforded by the Double Jeopardy Clause of the Fifth Amendment, extended to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment, to indict a defendant on multiple charges, placing the defendant in jeopardy as to each charge and to obtain guilty verdicts on each charge, when it is clear that entering judgment on those charges would violate the Fifth and Fourteenth Amendments to the United States Constitution.

Question Two: Whether a person is convicted in violation of the prohibition against multiple punishments for the same offense afforded

by the Double Jeopardy Clause of the Fifth Amendment, extended to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment, upon a finding of guilt by the jury, or after a judgment is entered after sentencing.

A. The Texas Court of Criminal Appeals' decision encourages the State of Texas to tilt the scales of justice against the defendant.

The Texas Court of Criminal Appeals relied on the United States Supreme Court case in *Ball v. United States*, 470 U.S. 856, 865 (1985) in support of its holding that Petitioner did not meet the “innocence gateway” exception to Texas Code of Criminal Procedure 11.07, § 4(a)(2), which requires a showing by a preponderance of the evidence that “but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.” *Ex Parte St. Aubin*, No. WR-49,980-12 through -16, 2017 Tex. Crim. App. LEXIS 885, *3-5 (Tex. Crim. App., September 20, 2017)(designated for publication). Appendix A. The Court, referring to the opinion in *Ball*, stated the “Supreme Court has explicitly recognized that the State has the right to prosecute and obtain jury verdicts on two offenses in a single trial, even if the offenses are the same for double jeopardy purpose.” *Id.* at *4-5. The Court stated, “[b]ecause the protection against double jeopardy does not prohibit multiple verdicts of guilt within a single trial, it cannot be said that ‘but for a violation of the protection against double jeopardy, no rational juror would have found the applicant guilty of both offenses.’” *Id.* at *5. The Court found that a “rational juror might well be able to find a defendant guilty of both offenses, and doing so would not violate the Constitution.” *Id.* The Court held, “[i]t is only upon entry of a judgment for multiple

offenses, after sentencing, that a multiple-punishments violation even occurs. A multiple-punishments violation occurs after sentencing, so a necessary precondition for the innocence-gateway exception—that a constitutional violation occur at or before a finding of guilt—is typically not met.” *Id.*

Justice Stevens authored a concurring opinion in *Ball*. Justice Stevens stated,

The Court correctly holds that petitioner’s conduct may support a conviction under either § 922(h)(1) or § 1202(a)(1), but not both. In reaching that conclusion the Court unnecessarily volunteers the opinion that there is no bar to the Government proceeding with prosecution simultaneously under the two statutes. Even if that opinion were well founded, I see no reason why this Court should go out of its way to encourage prosecutors to tilt the scales of justice against the defendant by employing such tactics.

The views that Justice Marshall expressed in his dissent in *Missouri v. Hunter*, 459 U.S. 359, 371-72 (1983), succinctly express why I concur in the Court’s judgment today:

‘[The] entry of two convictions and the imposition of two sentences cannot be justified on the ground that the legislature could have simply created one crime but prescribed harsher punishment for that crime. This argument assumes that the total sentence imposed is all that matters, and that the number of convictions that can be obtained is of no relevance to the concerns underlying the Double Jeopardy Clause.[’]

‘When multiple charges are brought, the defendant is ‘put in jeopardy’ as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution’s ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. Moreover, where the prosecution’s evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. The submission of two charges rather than one gives the prosecution ‘the advantage of offering the jury a choice—a situation which is apt to induce a

doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence.'

Ball, 470 U.S. at 867-88 (Stevens, J., concurring)(internal citations omitted)(emphasis added).

Additionally, in *Morris v. Mathews*, the Supreme Court discussed the fact that a jeopardy-barred charge can taint a conviction for an unbarred offense. 475 U.S. 237 (1986). The Court found held "that when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy barred offense absent the presence of the jeopardy barred offense. *Id.* at 246-47.

In *United States v. Martorana*, the Court considered the Defendant's Motion to Dismiss Counts of his Indictment. The Court held that,

In regard to the Defendant's charge that Counts III and IV are duplicitous, the United States has conceded that even if the Defendant were found guilty of both counts, the Court could enter judgment against him *only* on one count. However, the Government urges this Court to allow both counts to proceed to trial, and then, in the event that the jury finds the Defendant guilty on both counts, to enter judgment on only one. The Government cites *Ball v. United States*, 470 U.S. 856 [] (1985), and *United States v. Mastrangelo*, 733 F.2d 793 (1984), in support of its position.

Ball, however, involves prosecution under overlapping statutes . . . and *Mastrangelo* involves prosecutions for two types of conduct. Both cases are distinguishable from this case which involves multiple charges under a single statute arising out of a single instance of conduct. This Court can perceive no reason why, on the facts of this case, the Government should be allowed, even if the rationale of *Ball* and *Mastrangelo* were applicable, to put Defendant in jeopardy by trial of any counts on which the Government cannot possibly obtain a judgment of conviction and secure the imposition of sentence. It is more fair to the Government to permit it to make its own pretrial election as to the charge to be pursued at trial than for the Court to dismiss a count of its

own selection. Such a procedure adequately protects the Defendant from any unfair prejudice that may result from disclosure to the jury of multiple charges.

629 F. Supp. 509 (D. Me. 1986). Petitioner believes that the method offered by the Court in *Martorana* is the proper way to acknowledge “Government’s broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case” as discussed in *Ball*, with the right of a defendant to be free from any unfair prejudice that may result from disclosure to the jury of multiple charges whose convictions the State cannot obtain. *See id*; *Ball*, 470 U.S. at 859.

In this case, allowing the jury to convict on all four charges of attempted capital murder and the charge of murder and then allowing them to consider the punishment for all of these charges simultaneously substantially increased the likelihood of a compromise verdict and that Mr. Aubin would receive a life sentence, which he did.

B. The Texas Court of Criminal Appeals’ decision conflicts with a decision from a United States court of appeals that found that the prosecution can pursue multiple charges but the jury must be instructed that they may only convict on one of these charges.

In *United States v. Brown*, the Court found that since a defendant may not be convicted for both stealing and possessing the same property, the “district court committed obvious and substantial error in failing to so instruct the jury.” 996 F.2d 1049, 1053 (10th Cir. 1993). The Court cited to the Supreme Court’s decision in *United States v. Gaddis*. *Id.* at 1054.

In *Gaddis*, the defendant was convicted of three counts under 18 U.S.C. 2113 for aggravated bank robbery, possession of the funds stolen in the robbery, and assault with a dangerous weapon during the robbery. The defendant received 20 years on the robbery count, 10 years on the possession count, and 25 years on the assault count. As in *Milanovich*, the Court held that the defendant's conviction for both robbery and possession was improper. However, the Court concluded that the appropriate remedy was to vacate the defendant's conviction for possession, not to remand the case for a new trial. The Court distinguished its opinion in *Milanovich* on the grounds that the "very unusual facts" in *Milanovich* clearly supported a conviction for both theft and possession, while in *Gaddis* there was no evidence that the defendant had ever received the bank's funds. Thus, the Court found that the trial judge should have dismissed the possession conviction and concluded that 'his error in not doing so can be fully corrected now by the simple expedient of vacating the conviction and sentences under that count.'

The Court went on to discuss the situation where the evidence is sufficient to support both a conviction for theft and possession. The Court stated that in such a situation both charges should go the jury, but that the jury must be instructed that they may only convict on one of these charges and that they must first consider the charge of theft. The Court did not mention what the proper remedy would be if the jury were not so instructed

Accordingly, we conclude that the proper remedy in the instant case is simply to vacate the defendant's conviction for possession. In light of *Gaddis*, such a remedy would put the defendant in the same position he would have been in had the jury been properly instructed. Given this result, a new trial would simply involve the "unnecessary expenditure" of judicial resources.

Id. at 1054-55. (citing *United States v. Gaddis*, 424 U.S. 544 (1976) and *Milanovich v. United States*, 365 U.S. 551 (1961))(emphasis added).

C. The Texas Court of Criminal Appeals unreasonably attempts to distinguish Petitioner's case from another case out of its court.

In *Ex parte Knipp*, Knipp was indicted for delivery of methamphetamine of one gram or more but less than four grams. *Ex parte Knipp*, 236 S.W.3d 214 (Tex. Crim. App. 2007). He was also indicted for delivery of methamphetamine in an amount of four grams or more but less than 200 grams, on the same date. *Id.* He pleaded

guilty. *Id.* The original judgment erroneously reflected that the offenses were committed one year apart. *Id.* The convicting court filed a nunc pro tunc judgment to correct the date of the offense. *Id.* Knipp filed a subsequent writ asserting that there was only one delivery of methamphetamine and that he was twice convicted of the same offense. *Id.* After investigation, the State conceded that there was only one delivery and the amount was less than four grams. *Id.* The State waived the procedural default. *Id.* The Court held that the inmate's subsequent writ and the record established that, but for the double jeopardy violation, no rational juror could have found him guilty beyond a reasonable doubt. *Id.*

However, the Texas Court of Criminal Appeals unreasonably distinguishes Mr. Aubin's case from *Ex parte Knipp*. *St. Aubin*, 2017 Tex. Crim. App. 885 at *3-6; *Ex parte Knipp*, 236 S.W.3d 214 (Tex. Crim. App. 2007). The Court stated,

It is not clear whether *Ex parte Knipp* involved a successive-prosecutions claim or a multiple punishments claim. Even if it involved a multiple-punishments claim, though, Knipp's claim differed from typical multiple-punishments claims where, for instance, two offenses have overlapping elements that render them "the same" for double jeopardy purposes. In *Knipp*, the State simply made a mistake in charging Knipp twice for one drug delivery. The offense upon which we granted relief under Art. 11.07 §4(a)(2) never occurred at all. At the very least, it would be incorrect to say that *Knipp* held that a multiple-punishments claim necessarily meets the innocence-gateway exception."

Id. at *3-4. The Court further stated, Applicant's multiple-punishments claim does not fall within the unusual fact situation at issue in *Knipp*, so his claim fails to meet the "at or before a finding of guilt" precondition for invoking the innocence-gateway exception." *Id.* at *6. However, this distinction is unfounded. In *Knipp*, the Court found that "innocence gateway" exception applied and that the record established

“that, by a preponderance of the evidence, but for [the double jeopardy violation] no rational juror could have found the applicant guilty beyond a reasonable doubt.” *Knipp*, 236 S.W.3d at 217 (citing Tex. Code Crim. Proc. 11.07, § 4(a)(2)). Either a double jeopardy violation occurs at or before a finding of guilt, or it does not, for purpose of Tex. Code of Crim. Proc. 11.07 § 4(a)(2). Any further distinction is not founded in the Double Jeopardy Clause.

D. The Texas Court of Criminal Appeals’ decision conflict with its decisions on other cases out of its court.

In *Saenz v. State*, the San Antonio Court of Appeals addressing a claim that the trial court should not have entered three separate judgments for each three counts of capital murder arising from a single criminal transaction, concluded that although Texas law generally recognizes that “for assault type offenses, the allowable unit of prosecution is each victim,” unlike other assault-type offense that require only one victim, the relevant penal statute in this case provides that in committing capital murder, a person must murder more than one victim, and, as such, the penal statute applicable to this case necessarily requires the murder of more than one person. *Saenz v. State*, 131 S.W. 43 (Tex. App.—San Antonio 2003, pet. granted).

Subsequently, in *Saenz*, the State’s Petition for Discretionary review was granted. The Texas Court of Criminal Appeals affirmed the court of appeals judgment and held that the most reasonable interpretation of the statute and its legislative intent is that the statute allows only a single capital murder conviction. *Saenz v. State*, 166 S.W.3d 270, 274 (Tex. Crim. App. 2005). Therefore, the court

held “that the Double Jeopardy Clause of the Fifth Amendment was violated when the State charged appellant with three separate charges of capital murder under Section 19.03(a)(7)(A) because the charges rely on the same three murders for each charge.” *Id.* (emphasis added).

Additionally, in *Ex parte Milner’s*, *Milner* was contending in his sixth subsequent writ application that he could be guilty of only one of the two alleged attempted capital murders because the second conviction violates the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Ex Parte Milner*, 394 S.W.3d 502, 505 (Tex. Crim. App. 2013).

The Texas Court of Criminal Appeals stated, “Based on the statutory construction and legislative intent, we conclude that the allowable unit of prosecution for attempted capital murder under section 19.03(a)(7)(B) and 15.01 is the attempted murders of “more than one person” in the same scheme or course of conduct, and the attempted killing of more than one person allows the state to charge a single count of attempted capital murder.” *Id.* at 509 (emphasis added).

The Court of Criminal Appeals noted,

As in *Saenz*, applicant’s two convictions for attempted capital murder resulted from allegations involving the same three victims. The victim, Frankie Garcia, was included as a victim in both of the attempted capital murder convictions for which applicant was convicted. Because each attempted capital murder conviction under Penal Code §§ 19.03(a)(7)(B) and 15.01(b) requires at least two victims not included as victims in other capital murder provisions under those same penal code sections, only one of these attempted capital murder convictions may be upheld.

Id. at 510.

In *Ex Parte Milner*, the Texas Court of Criminal Appeals held that applicant's conviction for attempted capital murder in Cause No. 2405, violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. *Id.* at 504. The Court stated, "Applicant has proven that he is actually innocent of the second conviction for attempted capital murder, and that, but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt." *Id.*

E. A finding of guilt by a jury is itself a conviction, nothing remains but to give judgment and determine punishment.

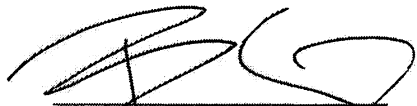
As the dissent stated in the opinion issued by the Texas Court of Criminal Appeals, "[the Court] treat[ed] Applicant's double-jeopardy claim as punishment error even though the constitutional error occurred when Applicant was convicted rather than when he was punished." *Id.* (Keasler, J., dissenting)(citing *Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009)("A double jeopardy violation occurs even when, as in the case before us, the sentences are concurrent and the impermissible conviction does not result in a greater sentence.")). Similarly, a plea of guilty is tantamount to conviction. *Forstner v. INS*, 579 F.2d 506 (9th Cir. 1978), cert. denied 439 U.S. 1071 (1979). Additionally, in *United States v. McCroskey*, the Court held that a plea of guilty in state court followed by an imposition of probation, but withholding of judgment of conviction, constitutes a conviction. 681 F.2d 1152, 1153 (9th Cir.), cert. denied 459 U.S. 1019 (1982). Additionally, the United States Supreme Court stated in *Boykin v. Alabama*, "A plea of guilty is more than a

confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” 395 U.S. 238, 242 (1969). Similarly, a finding of guilt by a jury is itself a conviction, nothing remains but to give judgment and determine punishment. *See id.* As stated in *Ball*, a “second conviction, even if it results in no greater sentence, in an impermissible punishment.” *Ball*, 470 U.S. at 865. Therefore, it was a violation of the United States Constitution’s Fifth and Fourteenth Amendments for the jurors to find Petitioner guilty, thereby convicting Petitioner, of double jeopardy barred offenses when a judgment could not be entered on those charges. Consequently, the Texas Court of Criminal Appeals erred by finding that “[i]t is only upon entry of a judgment for multiple offenses, after sentencing, that a multiple-punishment violation even occurs.” *Ex parte St. Aubin*, 2017 Tex. Crim. App. LEXIS 885 at *7. No rational juror could find Applicant guilty of multiple offenses because there was only one offense. As a result, the “innocence-gateway” exception, which requires a showing by a preponderance of the evidence that “but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt,” was satisfied and the Texas Court of Criminal Appeals erred in denying Petitioner’s Applications for Writs of Habeas Corpus.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'BC' with a stylized flourish.

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ATTORNEY FOR PETITIONER,
KEITH MICHAEL ST. AUBIN

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH MICHAEL ST. AUBIN
Petitioner

v.

THE STATE OF TEXAS
Respondent

APPENDIX

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- E. Trial Court's Original Findings of Facts and Conclusions of Law.²

¹ Petitioner did not attach the findings for each case number, since it is the same exact findings issued for each case with a different number circled at the top of the document.

² Petitioner did not attach the findings for each case number, since it is the same exact findings issued for each case with a different number exposed at the top of the document.

Appendix A

**Opinion from the Texas Court of Criminal Appeals Dismissing Petitioner's
Applications for Writs of Habeas Corpus**

Lexis Advance®
Research

Document:Ex parte St. Aubin, 2017 Tex. Crim. App. LEXIS 885

Ex parte St. Aubin, 2017 Tex. Crim. App. LEXIS 885

Copy Citation

Court of Criminal Appeals of Texas

September 20, 2017, Delivered

NO. WR-49,980-12, NO. WR-49,980-13, NO. WR-49,980-14, NO. WR-49,980-15, NO. WR-49,980-16

Reporter

2017 Tex. Crim. App. LEXIS 885 *

Ex parte **KEITH MICHAEL ST. AUBIN**, Applicant

Notice: PUBLISH

Subsequent History: As Corrected Aepther 22, 2017.

Prior History: [*1] ON APPLICATIONS FOR WRITS OF HABEAS CORPUS. CAUSE NOS. 98CR0358 THROUGH 0362 IN THE 10TH DISTRICT COURT OF GALVESTON COUNTY.

Ex parte **St. Aubin**, 2015 Tex. Crim. App. Unpub. LEXIS 843 (Tex. Crim. App., Nov. 11, 2015)

Core Terms

double-jeopardy, parte, applications, sentence, convictions, cognizable, merits, murder, subsequent application, multiple-punishments, jeopardy, double, offenses, capital murder, rights, procedural default, double jeopardy, innocence-gateway, innocence, indictment, same offense, purposes, requires, waived, guilt, non-cognizable, counts, occurs, initial application, multiple punishment

Case Summary

Overview

HOLDINGS: [1]-The subsequent-application bar applied because the applicant's multiple-punishments double-jeopardy claims meet neither the innocence-gateway nor the new-legal-basis exception to the subsequent-application bar; the multiple-punishments double-jeopardy claim did not satisfy the innocence-gateway exception, and since the double-jeopardy principles used to resolve the new case upon which the applicant relied were not new, he had not satisfied the new-legal-basis exception.

Outcome

Application dismissed.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > ... > Order & Timing of Petitions ▼ > Filing of Petitions ▼ > Pleadings ▼

HN1 **Filing of Petitions, Pleadings**

One exception to the subsequent-application bar is the innocence gateway exception, which requires a showing by a preponderance of the evidence that but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt. Tex. Code Crim. Proc. Ann. art. 11.07, § 4(a)(2). This language requires, at the very least, that the alleged constitutional violation occur at or before a finding of guilt. A claim based on the successive prosecutions strand of double-jeopardy jurisprudence satisfies such a requirement. This is so because a successive-prosecutions violation involves two separate criminal proceedings. If the offenses in the two proceedings are the same for double jeopardy purposes, then the second proceeding should never have occurred—the issue of the applicant's guilt would never have been submitted to a jury.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Double Jeopardy ▼ > Double Jeopardy Protection ▼ > 

Multiple Punishments ▼

Criminal Law & Procedure > ... > Order & Timing of Petitions ▼ > Filing of Petitions ▼ > Pleadings ▼

HN2 **Double Jeopardy Protection, Multiple Punishments**

When the convictions occur at a single criminal trial, the role of the double-jeopardy guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. The U.S. Supreme Court has explicitly recognized that the State has the right to prosecute and obtain jury verdicts on two offenses in a single trial, even if the offenses are the same for double jeopardy purposes. Because the protection against double jeopardy does not prohibit multiple jury verdicts of guilt within a single trial, it cannot be said that but for a violation of the protection against double jeopardy, no rational juror would have found the

applicant guilty of both offenses. A rational juror might well be able to find a defendant guilty of both offenses, and doing so would not violate the Constitution. It is only upon entry of a judgment for multiple offenses, after sentencing, that a multiple-punishments violation even occurs. A multiple-punishments violation occurs after sentencing, so a necessary precondition for the innocence-gateway exception—that a constitutional violation occur at or before a finding of guilt—is typically not met.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Order & Timing of Petitions ▼ > Filing of Petitions ▼ > Pleadings ▼

HN3 Filing of Petitions, Pleadings

An exception to the bar against subsequent applications is the new legal basis exception, which requires a showing that the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the legal basis for the claim was unavailable on the date the applicant filed the previous application. Tex. Code Crim. Proc. Ann. art. 11.07, § 4(a)(1).  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Order & Timing of Petitions ▼ > Filing of Petitions ▼ > Pleadings ▼

HN4 Filing of Petitions, Pleadings

To show that an applicant is entitled to consideration of a subsequent application on the basis of new law, an applicant must show that the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before the date of the previous application. Tex. Code Crim. Proc. Ann. art. 11.07, § 4(b).  More like this Headnote

Shepardize - Narrow by this Headnote

Judges: KELLER ▼, P.J., delivered the opinion of the court as to part II.C. in which KEASLER ▼, HERVEY ▼, YEARY ▼, and KEEL ▼, JJ., joined and otherwise announced the judgment of the court and filed an opinion in which HERVEY ▼, YEARY ▼, and KEEL ▼, JJ., joined. KEASLER ▼, J., filed a concurring opinion. NEWELL ▼, J., filed a dissenting opinion in which ALCALA ▼, RICHARDSON ▼, and WALKER ▼, JJ., joined.

Opinion by: KELLER ▼

Opinion

Applicant claims that the Double Jeopardy Clause was violated when the State obtained multiple convictions against him in a single trial. He raises this claim for the first time in this subsequent habeas application under Article 11.07.  We hold that this *multiple-punishments* double-jeopardy claim does not satisfy the innocence-gateway exception. Furthermore, because the double-jeopardy principles used to resolve the "new" case upon which applicant relies were not new, he has not satisfied the new-legal-basis exception. Because an exception to the prohibition against subsequent applications has not been satisfied, we dismiss these applications.

I. BACKGROUND

Applicant shot five people at the 1998 Mardi Gras celebration in Galveston. [*2] He was charged with one count of murder and four counts of attempted capital murder. Nava was the victim alleged in the murder count and he was the second victim alleged in each of the attempted capital murder counts. At a single trial, applicant was found guilty of all five charges and sentenced to life imprisonment in each case, with the sentences to run concurrently. [2]

In 2001, applicant filed a number of habeas applications in which he alleged ineffective assistance of counsel and jury instruction error in these cases. While these applications were on remand to the trial court, applicant filed more habeas applications. We denied relief on these later applications in November 2001, and on the initial applications in May 2002. The current habeas applications were filed in the trial court on July 15, 2015.

II. ANALYSIS

A. Subsequent-Application Bar Generally

After the final disposition of an initial application that challenges a conviction, we may not consider the merits of a subsequent habeas application for that conviction unless the applicant satisfies an exception to the statutory prohibition against subsequent applications. [3] The current applications were filed after the final disposition [*3] of initial applications that challenged the convictions at issue. [4] The question, then, is whether there is an exception to the subsequent-application bar.

B. Innocence-Gateway Exception

HN1 One such exception is the "innocence gateway" exception, which requires a showing by a preponderance of the evidence that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." [5] This language requires, at the very least, that the alleged constitutional violation occur at or before a finding of guilt. [6] A claim based on the "successive prosecutions" strand of double-jeopardy jurisprudence satisfies such a requirement. This is so because a successive-prosecutions violation involves two separate criminal proceedings. [7] If the offenses in the two proceedings are the same for double jeopardy purposes, then the second proceeding should never have occurred—the issue of the applicant's guilt would never have been submitted to a jury. [8] In *Ex parte Milner*, the double jeopardy claim was clearly a successive-prosecutions claim. [9] It is not clear whether *Ex parte Knipp* involved a successive-prosecutions [*4] claim or a multiple-punishments claim. [10] Even if it involved a multiple-punishments claim, though, Knipp's claim differed from typical multiple-punishments claims where, for instance, two offenses have overlapping elements that render them "the same" for double jeopardy purposes. In *Knipp*, the State simply made a mistake in charging Knipp twice for one drug delivery. [11] The offense upon which we granted relief under Art. 11.07 §4(a)(2) never occurred at all. At the very least, it would be incorrect to say that *Knipp* held that a multiple-punishments claim necessarily meets the innocence-gateway exception.

The reasoning that applies to a successive-prosecutions double-jeopardy claim does not apply to a multiple-punishments double-jeopardy claim. **HN2** When the convictions occur at a single criminal trial, the role of the double-jeopardy guarantee "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." [12] The Supreme Court has explicitly recognized that the State has the right to prosecute and *obtain jury verdicts* on two offenses in a single trial, even if the offenses are the same for double jeopardy [*5] purposes. [13] Because the protection against double jeopardy does not prohibit multiple jury verdicts of guilt within a single trial, it cannot be said that "but for a violation of the protection against double jeopardy, no

rational juror would have found the applicant guilty of both offenses." A rational juror might well be able to find a defendant guilty of both offenses, and doing so would not violate the Constitution. It is only upon entry of a judgment for multiple offenses, after sentencing, that a multiple-punishments violation even occurs. A multiple-punishments violation occurs after sentencing, so a necessary precondition for the innocence-gateway exception—that a constitutional violation occur at or before a finding of guilt—is typically not met.^[14] The only possible exception would be the unusual type of claim at issue in *Knipp* where a duplicate offense is mistakenly charged. Applicant's multiple-punishments claim does not fall within the unusual fact situation at issue in *Knipp*, so his claim fails to meet the "at or before a finding of guilt" precondition for invoking the innocence-gateway exception.

C. "New Legal Basis" Exception

HN3 Another exception to the bar against subsequent applications is the "new legal basis" exception, which requires a showing that "the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the . . . legal basis for the claim was unavailable on the date the applicant filed the previous application."^[15] Applicant relies upon *Ex parte Milner* for the proposition that he has suffered a double jeopardy violation. It is true that *Milner* was decided after applicant filed his prior applications and it involved the same types of charges as those at issue in this case: a murder and multiple attempted murders that all alleged the killing of the same victim.^[16] But *Milner* received relief under the innocence-gateway exception. In *Milner*, we expressly declined to address whether the new-legal-basis exception was satisfied.^[17]

We conclude that it was not. Neither *Milner* nor *Saenz* [*7],^[18] on which *Milner* partially relied,^[19] satisfy the new-legal-basis exception. **HN4** To show that he is entitled to consideration of a subsequent application on the basis of new law, an applicant must show that "the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before" the date of the previous application.^[20] Although this Court had not previously addressed a double-jeopardy claim involving the type of charges before us until the decision in *Milner*, the principles of double-jeopardy law that were used to resolve *Milner* (and *Saenz*) were not new, but were familiar principles articulated in earlier cases from the Supreme Court and this Court. *Milner*, in fact, cited and relied upon well-established caselaw from the Supreme Court and this Court that articulated how to analyze multiple-punishment double jeopardy claims (*Ball v. United States* and *Ex parte Ervin*) and unit-of-prosecution issues (*Sanabria v. United States* and *Ex parte Hawkins*).^[21] *Saenz* likewise relied upon the familiar analyses set forth in *Sanabria*, *Hawkins* [*8], and *Ervin*.^[22] The double-jeopardy claim applicant makes could have been, and in *Milner* and *Saenz* was, reasonably formulated from double-jeopardy decisions from the Supreme Court and this Court that existed before applicant filed his earlier applications.^[23]

D. Disposition

In summary, applicant's multiple-punishments double-jeopardy claims meet neither the innocence-gateway nor the new-legal-basis exception to the subsequent-application bar. Finding no other potentially applicable exception, we hold that the subsequent-application bar applies and that we may not consider the merits of applicant's claims. We dismiss the current applications under TEX. CODE CRIM. PROC. art. 11.07, § 4.

Delivered: September 20, 2017

Publish

Concur by: KEASLER ▼

Concur

KEASLER ▼, J., filed a concurring opinion.

CONCURRING OPINION

Because I cannot join much of the Court's reasoning, I join only Part II.C. of its opinion and concur in the judgment. Based on my views of a double-jeopardy claim's noncognizability, the Court's resolution of Michael St. Aubin's double-jeopardy claims under Code of Criminal Procedure Article 11.07, § 4 is largely academic. It is not clear to me how a non-cognizable claim could ever satisfy § 4(a)(2)'s

"innocence [*9] gateway."¹ Resolving St. Aubin's claims under § 4 based on the type of double-jeopardy claim he asserts poses larger implications concerning this Court's interpretation of Article 11.07 as it relates to initial and subsequent applications.

I.

In *Ex parte Marascio*, I asserted that, because double-jeopardy claims in most instances are record claims available on appeal, they should not be cognizable in an application for habeas corpus.² I reassert the argument here.

We have long recognized the principle that habeas corpus proceedings may not be used for claims that should have been raised on appeal.³ If a claim was available on appeal but was not asserted in the court of appeals, an applicant has generally forfeited his claim and the claim may not be heard in a collateral attack.⁴ But this rule must permit two exceptions: (1) claims that by their nature require subsequent record development; and (2) claims asserting a violation of an absolute requirement or prohibition—critical components to the proper functioning of our adjudicatory process—that we categorized as immune from procedural default in *Marin v. State*,⁵ our watershed decision on procedural default and error preservation.⁶

Ex parte Moss is a recent example of the latter.⁷ Moss challenged the trial court's jurisdiction to revoke her community supervision. After revocation, Moss absconded and her direct appeal was dismissed.⁸ Moss asserted her jurisdictional complaint for the first time in a habeas corpus application. Noting that jurisdiction is a systemic requirement that operates independent of litigants' wishes, this Court held that the merits of Moss's claim could be entertained irrespective of the Court's embrace of procedural default in the habeas corpus context.⁹

Double-jeopardy rights fall outside of *Marin*'s most vaunted category because they may be waived, and therefore they cannot be absolute rights or prohibitions by definition—they are more appropriately labeled waiver-only rights.¹⁰ We have previously held that a defendant may affirmatively waive his right to the Fifth Amendment's double-jeopardy protections.¹¹ While a guilty plea alone does not waive a defendant's double-jeopardy rights, the record of a proceeding may indicate that a defendant effectuated a waiver by agreeing to subject himself to double jeopardy if it benefits him.¹² In *Ex parte Birdwell*, we held "that the applicant agreed [*11] to subject himself to a second trial for the same offense, and to receive a lesser sentence which he had already earned enough credit to have discharged."¹³ Because double-jeopardy rights may be waived, they cannot be placed in *Marin*'s first category.

Further, finding that double jeopardy is an absolute right or prohibition would stifle the ability of the State and a defendant to engage in free negotiations and arrive at mutually beneficial resolutions of criminal cases. If a defendant chooses to subject himself to a potential double-jeopardy violation because, in his judgment, it results in a beneficial outcome of a pending case instead of standing on his double-jeopardy rights, he should be free to do so.¹⁴ In a negotiated plea bargain, a defendant already expressly gives up a whole host of rights, including the right to a jury trial, the right to require the State to prove guilt beyond a reasonable doubt, the right to confront and cross-examine witnesses, and the right to be sentenced by a judge considering the entire range of punishment in certain

circumstances.^[15] It makes little sense to elevate double-jeopardy rights to a station so sacrosanct that the defendant himself—for [*12] whom those rights exist—may not intentionally forego them.

In a single trial, **St. Aubin** was tried and convicted for the murder of Oscar Nava; the attempted capital murder of Christina Gonzales, Michael Lopez, Juan Garcia, and Luis Martinez; and an assault on a public servant. The underlying aggravating factor for each of the attempted capital murders was Oscar Nava's murder. The jury assessed life sentences for the murder and attempted capital murder convictions, and ten years for the assault on a public servant conviction. **St. Aubin** challenged his convictions on appeal and in initial habeas corpus applications, but he never complained that the convictions violated double jeopardy. He raises his double-jeopardy claims for the first time in these subsequent applications.

St. Aubin's failure to assert his available double-jeopardy claims on appeal renders those claims forfeited regardless of whether they are alleged in an initial or subsequent habeas corpus application.^[16] **St. Aubin's** multiple-punishment double jeopardy claims neither require factual development nor assert *Marin* category-one violations of an absolute requirement or prohibition. Accordingly, the Court should declare [*13] **St. Aubin's** double-jeopardy claims non-cognizable regardless of the particular double-jeopardy strand they assert and regardless of whether they appear in an initial or subsequent application.^[17] Because **St. Aubin** asserts non-cognizable federal constitutional violations in his subsequent applications, I would dismiss the claims without an analysis of whether such claims meet § 4(a)(2).

II.

The Court misses an opportunity to define a unifying principle for the cognizability of habeas corpus claims. Instead, the Court resolves **St. Aubin's** applications by parsing the particular strand of double-jeopardy jurisprudence his claims advance and whether that particular strand satisfies the temporal requirement the Court summarily declares § 4(a)(2) requires.^[18] Despite the Court's legally correct differentiation of multiple-punishments and successive-prosecution double-jeopardy rights, it gets the Court no closer to developing a cohesive theory of cognizability.

The Court's reasoning suggests that a non-cognizable federal constitutional claim could, in theory, overcome the § 4(a)(2) "actual innocence" subsequent application bar. Yet, the same non-cognizable federal constitutional claim asserted in an initial application [*14] would not entitle the same applicant to a true merits review.^[19] In *Ex parte Torres*, we stated that § 4 demonstrated a legislative intent to limit an applicant to "one bite of the apple" subject only to limited exceptions.^[20] It then makes little sense to suppose, as this Court does today, that perhaps the right claim, cognizable or not, could satisfy the § 4(a)(2) exception. **St. Aubin's** applications are more intuitively decided on cognizability. Why proceed with a § 4 analysis that, even if satisfied, requires this Court to reject the claim because it is not cognizable?

FILED: September 20, 2017

PUBLISH

Dissent by: NEWELL ▼

Dissent

NEWELL, J., filed a dissenting opinion in which ALCALA, RICHARDSON AND WALKER, JJ., joined.

Applicant was convicted of one count of murder, and four counts of attempted capital murder. In these post-conviction applications, Applicant contends that he has received multiple punishments for the same conduct in violation of the Double Jeopardy Clause. The State and the trial court agree. The State asks that we vacate and set aside Applicant's attempted capital murder convictions and leave the murder conviction, and its attendant life sentence, in place. That is also what the trial court recommends.

But we are not granting [*15] Applicant relief. Instead, we reject the State's waiver of procedural default.^[1] Then, we treat Applicant's double-jeopardy claim as punishment error even though the

constitutional error occurred when Applicant was convicted rather than when he was punished. *Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009) ("A double jeopardy violation occurs even when, as in the case before us, the sentences are concurrent and the impermissible conviction does not result in a greater sentence."). We should just do what the State and the trial court ask us to do; reform the judgment to reflect a single conviction for murder with a life sentence. *Bigon v. State*, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008) ("When a defendant is subjected to multiple punishments for the same conduct, the remedy is to affirm the conviction for the most serious offense and vacate the other convictions."). Because we do not, I dissent.

Filed: September 20, 2017

Publish

Footnotes

1

TEX. CODE CRIM. PROC. art. 11.07.

2

Applicant was also convicted of assault on a public servant and sentenced to ten years' imprisonment, but that conviction is not at issue in this case.

3

TEX. CODE CRIM. PROC. art. 11.07, § 4 ("If a subsequent application for a writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court *may not consider the merits of* or grant relief based on the subsequent application unless" one of the exceptions is met.) (emphasis added). We do not consider the question that divided judges on this Court in *Ex parte Marascio*, 471 S.W.3d 832 (Tex. Crim. App. 2015), whether double-jeopardy claims that could have been raised on direct appeal are cognizable on habeas corpus. Compare *id.* at 833-40 (Keasler ▼, J., concurring) (contending that such claims are not cognizable) with *id.* at 855-59 (Alcala ▼, J., dissenting) (contending that such claims are cognizable). Even a holding that a claim is not cognizable because it could have been raised on appeal is considered to be a disposition on the merits for purposes of the § 4 bar. See *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) ("A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided.") (citing *Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995), for the proposition that a "disposition is considered 'on the merits' if the court refuses to determine the merits because of state procedural default"). Because cognizability is a merits question for the purpose of § 4, we must consider the § 4 bar before considering a cognizability question. The concurrence contends that we miss the opportunity to define a unifying principle of cognizability for habeas claims, but the legislature has explicitly prohibited us from considering the merits of a claim if § 4 is not met. We would disregard that explicit legislative command if we were to consider the cognizability of applicant's claim.

4

See *Ex parte Evans*, 964 S.W.2d 643, 646 (Tex. Crim. App. 1998) (a challenge to the conviction, for the purpose of § 4, involves claims regarding "the final consummation of the prosecution," "the judgment or sentence that the accused is guilty as charged," or "a judgment of guilty and the assessment of punishment."); *Torres*, 943 S.W.2d at 472-74 (a denial on the merits of all claims raised is a final disposition of a habeas application for the purpose of § 4).

5

TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(2).

6

See *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007) ("Upon satisfactory proof at trial that a capital murder defendant is mentally retarded or was a juvenile, no rational juror would answer any of the special issues in the State's favor, if only for the simple reason that the statutory special issues would not be submitted to the jurors in the first place.") (construing innocence of the death penalty exception for capital cases). Whether the statutory language requires more than that—e.g. a showing of factual as opposed to legal innocence—is an issue we need not address in this opinion. See *Selsor v. Kaiser*, 22 F.3d 1029, 1035 (10th Cir. 1994) (holding that a showing of factual innocence, as opposed to legal innocence, required to invoke federal innocence-gateway exception).

7

See *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) ("The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.") (internal quotation marks omitted).

8

Id.; *Abney v. United States*, 431 U.S. 651, 662, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) ("Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.") (emphasis in original).

9

See *Ex parte Milner*, 394 S.W.3d 502, 505 (Tex. Crim. App. 2013) ("Applicant plead guilty to the attempted capital murders in Cause Nos. 2404 and 2405 . . . was assessed consecutive life sentences in each cause. The three pleas were entered in separate proceedings conducted consecutively on the same day."); *id.* at 504 ("Applicant has proven that he is actually innocent of the second conviction for attempted capital murder.").

10

See *Ex parte Knipp*, 236 S.W.3d 214, 214-15, 217 (Tex. Crim. App. 2007) (offenses were in separate indictments with separate cause numbers).

11 ¶ *Id.* at 216 ("The State apparently mistook the gross weight in the DEA lab report as being the weight of methamphetamine delivered in some other delivery than that reported by Det. Womack, which was indicted as Count 2 in Cause No. 03-12-08654-CR, and again indicted Applicant in this cause. . . . Applicant has accompanied the meritorious double-jeopardy claim in his subsequent writ with a prima facie showing of actual innocence of delivering between 4 and 200 grams of methamphetamine on or about September 12, 2003, as alleged in the indictment in this case.").

12 ¶ *Brown*, 432 U.S. at 165.

13 ¶ *Ball v. United States*, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985) (After finding two offenses to be the same for double-jeopardy purposes: "We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a) involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment. If, upon the trial, the district judge is satisfied that *there is sufficient proof to go to the jury on both counts, he should instruct [*6] the jury as to the elements of each offense. Should the jury return guilty verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses.*") (emphasis added).

14 ¶ The dissent claims that we reject the State's "waiver of procedural default" but we have held that procedural default cannot be waived) and we have, in fact, held to the contrary. In *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002), we rejected the State's confession of error in the Supreme Court because it was "contrary to our procedural law for presenting a claim on appeal." And in *Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex. Crim. App. 2016), we held that error preservation is a systemic requirement, which would indicate that it is not subject to waiver. Moreover, § 4 prohibits any court from even considering the merits of a claim in a subsequent application absent an enumerated exception, *see supra* at n.3, and waiver by the State is not enumerated as an exception in § 4. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4.

The dissent further claims that the double-jeopardy violation in applicant's case occurred when he was convicted rather than when he was punished. The dissent is incorrect, because applicant's claim is of the "multiple punishments" variety, *see supra* at part II.B. *Evans*, cited by the dissent, does not address the timing of when a double-jeopardy violation occurs. *See Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009) ("In this context the State may seek a multiple-count indictment based on violations of different statutes, even when such violations are established by a single act; but the defendant may be convicted and sentenced for only one offense. A double jeopardy violation occurs even when, as in the case before us, the sentences are concurrent and the impermissible conviction does not result in a greater sentence.") (citation omitted). More to the point, the innocence-gateway exception in § 4 requires that no rational juror could have found the applicant guilty beyond a reasonable doubt, *see supra* at n.5 and accompanying text, and the Supreme Court in *Ball* recognized that the State could legitimately obtain a jury determination of guilt for offenses that are the same for double jeopardy purposes and that a constitutional violation occurred only if the judge entered judgment on both offenses. *See supra* at n.13.

15

TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(1).

16

See *Milner*, 394 S.W.3d at 504. *Milner* differs from the present case in that the attempted-capital-murder counts alleged attempted *serial* murders under TEX. PENAL CODE § 19.03(a)(7)(B) (murders pursuant to the same scheme or course of conduct) while applicant's attempted-capital-murder counts alleged attempted *mass* murders under TEX. PENAL CODE § 19.03(a)(7)(A) (murders committed in the same transaction). This difference between the two cases does not affect our analysis. See *Milner*, 394 S.W.3d at 508 (court failed to see a differentiation between the two types of multiple-murder capital murders for double-jeopardy purposes).

17

394 S.W.3d at 505.

18

Saenz v. State, 166 S.W.3d 270 (Tex. Crim. App. 2005).

19

See *Milner*, 394 S.W.3d at 506 n.12, 507-08 & n.18 & nn.21-27, 509 n.31 (discussing or citing *Saenz*).

20

TEX. CODE CRIM. PROC. art. 11.07, §4(b) (emphasis added). See also *Ex parte Hood*, 211 S.W.3d 767, 775 (Tex. Crim. App. 2007), *different result reached on reconsideration by*, 304 S.W.3d 397 (Tex. Crim. App. 2010).

21

See *Milner*, 394 S.W.3d at 507 nn.15-17 (citing *Ball v. United States*, 470 U.S. 856, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *Ex parte Hawkins*, 6 S.W.3d 554 (Tex. Crim. App. 1999); *Ex parte Ervin*, 991 S.W.2d 804, 807 (Tex. Crim. App. 1999)).

22

Saenz, 166 S.W.3d at 272 (citing *Sanabria*, *Hawkins*, and *Ervin*).

23

See *supra* at the two immediately preceding footnotes.

1 ¶

TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(2) (West 2015) (permitting the Court to consider claims in a subsequent application only if "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.").

2 ¶

Ex parte Marascio, 471 S.W.3d 832, 834 (Tex. Crim. App. 2015) (Keasler ▼, J., concurring).

3 ¶

See generally *Ex parte Wilcox*, 128 Tex. Crim. 146, 79 S.W.2d 321, 321 (Tex. Crim. App. 1935); *Ex parte Gardner*, 959 S.W.2d at 199 (quoting *Ex parte Groves*, 571 S.W.2d 888, 890 (Tex. Crim. App. 1978), "It is well-settled 'that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.'").

4 ¶

Ex parte Townsend, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004).

5 ¶

See *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993), overruled [***10**] on other grounds by *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).

6 ¶

Ex parte Marascio, 471 S.W.3d at 835-36 (Keasler ▼, J., concurring).

7 ¶

Ex parte Moss, 446 S.W.3d 786, 788-89 (Tex. Crim. App. 2014).

8 ¶

Id. at 788.

9 ¶

Id. at 789; see *Sledge v. State*, 391 S.W.3d 104, 108 (Tex. Crim. App. 2013) ("[W]e have recognized them to be cognizable without regard to ordinary notions of procedural default—essentially because it is simply not optional with the parties to agree to confer subject matter jurisdiction on a convicting court where that jurisdiction is lacking.").

10 ¶

See *Ex parte Marascio*, 471 S.W.3d at 838-40 (Keasler ▼, J., concurring); *Marin*, 851 S.W.2d at 278-79 (holding waiver-only rights may not be forfeited by inaction, but are waivable if the waiver is affirmatively, plainly, freely, and intelligently made).

11 ¶

Ex parte Birdwell, 7 S.W.3d 160, 164 (Tex. Crim. App. 1999) (holding that applicant waived his double-jeopardy right to be free from a second prosecution because the record of this proceeding shows that the applicant agreed to subject himself to a second trial for the same offense); *Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997).

12 ¶

Ex parte Birdwell, 7 S.W.3d at 163-64 (citing *Menna v. New York*, 423 U.S. 61, 63 n.2, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975) and *United States v. Broce*, 488 U.S. 563, 575, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)).

13 ¶

Id. at 164; see *Jeffers v. United States*, 432 U.S. 137, 153, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977) (holding that Jeffer's affirmative request for separate trials "deprived him of any right that he might have had against consecutive trials.").

14 ¶

See *Ex parte Birdwell*, 7 S.W.3d at 160 (holding that applicant waived his double-jeopardy right to be free from a second prosecution because the record of the proceeding shows that the applicant agreed to subject himself to a second trial for the same offense).

15 ¶

Grado v. State, 445 S.W.3d 736, 740 (Tex. Crim. App. 2014); see *Mendez v. State*, 138 S.W.3d 334, 344 (Tex. Crim. App. 2004).

16 ¶

See *Ex parte Marascio*, 471 S.W.3d at 840 (Keasler ▼, J., concurring).

17 ¶

Id.

18 ¶

Ante, op. at 3-4.

19 ¶

See, e.g., *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004) (denying a challenge to the legality of a search and seizure because Applicant forfeited his claim by failing to raise it on direct appeal); *Ex parte Kirby*, 492 S.W.2d 579, 580-81 (Tex. Crim. App. 1973).

20 ¶

Ex parte Torres, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997).

1 ¶

In its brief, the State agreed that denying relief in this case would serve no legitimate state interests. In *Ex parte Knipp*, we construed a similar concession by the State as a waiver of procedural default. 236 S.W.3d 214, 216 n. 3 (Tex. Crim. App. 2007) ("[T]he State has indicated its willingness to forego its substantial interest in the finality of applicant's plea, and it would serve no legitimate state interests to enforce usual rules of procedural default.").

Content Type: Cases

Terms: Keith St. Aubin

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Appendix B

The Texas Court of Criminal Appeals' Order Ordering Briefing of Issues.

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Research

Document:Ex parte St. Aubin, 2016 Tex. Crim. App. Unpub. LEXIS 484

Ex parte St. Aubin, 2016 Tex. Crim. App. Unpub. LEXIS 484

Copy Citation

Court of Criminal Appeals of Texas

June 15, 2016, Filed

NOS. WR-49,980-12; WR-49,980-13; WR-49,980-14; WR-49,980-15; WR-49,980-16

Reporter

2016 Tex. Crim. App. Unpub. LEXIS 484 * | 2016 WL 9001135

Ex parte KEITH MICHAEL ST. AUBIN, Applicant

Notice: DO NOT PUBLISH.

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] ON APPLICATIONS FOR WRITS OF HABEAS CORPUS. CAUSE NOS. 98CR0360; 98CR0362; 98CR0358; 98CR0359; 98CR0361. IN THE 10TH DISTRICT COURT OF GALVESTON COUNTY. Ex parte St. Aubin, 2015 Tex. Crim. App. Unpub. LEXIS 843 (Tex. Crim. App., Nov. 11, 2015)

Core Terms

Applicant's, convictions, murder, habeas corpus relief, Jeopardy, Double, days

Opinion

Per curiam.

ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court these applications for writs of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of four counts of attempted capital murder and one count of murder and sentenced to life imprisonment in each cause. The First Court of Appeals affirmed his convictions. *St. Aubin v. State*, Nos. 01-98-01340-CR; 01-98-01342-CR; 01-98-01318-CR; 01-98-01339-CR; 01-98-01341-CR, 2000 Tex. App. LEXIS 3480 (Tex. App.—Houston [1st Dist.] May 25, 2000)(not designated for publication). Applicant's initial applications for habeas corpus relief were denied in 2002.

Applicant filed these subsequent applications for habeas corpus relief contending that all of his convictions involve the murder of the same victim as an element to the offenses and therefore only one conviction can stand under this Court's double jeopardy laws. We order that this application be filed and set for submission to determine whether Applicant's claim that he has received multiple punishments for the same conduct in violation of **[*2]** the Double Jeopardy Clause of the Sixth Amendment overcomes the statutory procedural bar against successive habeas applications. The parties shall brief these issues. Oral argument is not permitted.

It appears that Applicant is represented by counsel. Applicant's brief shall be filed with this Court within 30 days of the date of this order. The State's response shall be filed within 30 days after the filing of Applicant's brief.

Filed: June 15, 2016

Do not publish

Content Type: Cases

Terms: 2016 Tex. Crim. App. Unpub. LEXIS 484

Narrow By: -None-

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Appendix C

Supplemental Findings of Fact and Conclusions of Law from the Trial Court.

Cause Nos. 98CR0358-83-3, 98CR0359-83-3, 98CR0360-83-3, 98CR0361-83-3, 98CR0362-83-3 JAN 26 AM 10: 51

EX PARTE:

§ IN THE DISTRICT COURT
OF DISTRICT CLERK
GALVESTON COUNTY, TEXAS

§ GALVESTON COUNTY,
TEXAS

KEITH ST. AUBIN

§ 10TH JUDICIAL
DISTRICT

**SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITHOUT EVIDENTIARY HEARING ON
11.07 APPLICATION FOR WRIT OF HABEAS CORPUS**

This Trial Court finds that there is no necessity for a fact finding hearing because there is ample evidence from the Application, the Applicant's Memorandum of Law In Support of Application For Writ Of Habeas Corpus, the State's answer, the State's supplemental answers, and the Trial Court's record to rule on the relief sought.

FINDINGS OF FACT

1. In February 1998, the Applicant, Keith Michael St. Aubin, attended the Galveston Mardi Gras festival. Juan Garcia, Oscar Nava, Luis Martinez, Christina Gonzales, and Michael Lopez were also at the festival. Garcia and St. Aubin engaged in a heated argument that ended with St. Aubin shooting a semi-automatic handgun into the crowd, killing Oscar Nava and injuring the other four. *See St. Aubin v. Quarterman*, 470 F.3d 1096, 1097-98 (5th Cir. 2006); *see also St. Aubin v. State*, 01-98-01318-CR, 2000 WL 675705, at *1 (Tex. App.—Houston [1st Dist.] May 25, 2000, no pet.) (not designated for publication).



2. In Cause No. 98CR0358, Applicant was charged with the offense of attempted capital murder. The indictment charged that Applicant, on or about February 21, 1998... "did then and there with the specific intent to commit the offense of Capital Murder did then and there intentionally and knowingly attempt to cause the death of an individual, to-wit: Christina Gonzalez, by shooting the said Christina Gonzalez with a deadly weapon, to-wit: a handgun, said attempt amounting to more than mere preparation that tends to but fails to effect the commission of the offense intended, and the said [Applicant] did then and there intentionally and knowingly cause the death of another person, to wit: Oscar Nava, by shooting the said Oscar Nava with a deadly weapon, to -wit, a handgun, during the same criminal transaction."

3. In Cause No. 98CR0359, Applicant was charged with the offense of attempted capital murder. The indictment charged that petitioner, on or about February 21, 1998... "did then and there with the specific intent to commit the offense of Capital Murder did then and there intentionally and knowingly attempt to cause the death of an individual, to-wit: Michael Lopez, by shooting the said Michael Lopez with a deadly weapon, to-wit: a handgun, said attempt amounting to more than mere preparation that tends to but fails to effect the commission of the offense intended, and the said [Applicant] did then and there intentionally and knowingly cause the death of another person, to wit: Oscar Nava, by shooting the said Oscar Nava with a deadly weapon, to -wit, a handgun, during the same criminal transaction."

4. In Cause No. 98CR0360, Applicant was charged with the offense of attempted capital murder. The indictment charged that petitioner, on or about February 21, 1998... "did then and there with the specific intent to commit the offense of Capital Murder did then and there intentionally and knowingly attempt to cause the death of an individual, to-wit: Juan Garcia, by shooting the said Juan Garcia with a deadly weapon, to-wit: a handgun, said attempt amounting to more than mere preparation that tends to but fails to effect the commission of the offense intended, and the said [Applicant] did then and there intentionally and knowingly cause the death of another person, to wit: Oscar Nava, by shooting the said Oscar Nava with a deadly weapon, to -wit, a handgun, during the same criminal transaction."

5. In Cause No. 98CR0361, Applicant was charged with the offense of Murder. The indictment charged that petitioner, on or about February 21, 1998 ... "did then and there intentionally and knowingly cause the death of an individual, Oscar Nava, by shooting the said Oscar Nava with a deadly weapon, to-wit: a handgun."

6. In Cause No. 98CR0362, Applicant was charged with the offense of attempted capital murder. The indictment charged that petitioner, on or about February 21, 1998 ... "did then and there with the specific intent to commit the offense of Capital Murder did then and there intentionally and knowingly attempt to cause the death of an individual, to-wit: Luis Martinez, by shooting the said Luis Martinez with a deadly

weapon, to-wit: a handgun, said attempt amounting to more than mere preparation that tends to but fails to effect the commission of the offense intended, and the said [Applicant] did then and there intentionally and knowingly cause the death of another person, to wit: Oscar Nava, by shooting the said Oscar Nava with a deadly weapon, to-wit, a handgun, during the same criminal transaction.”

7. On November 13, 1998, a jury convicted Applicant of murder and the attempted capital murders convictions, Cause Nos. 98CR0358, 98CR0359, 98CR0360, 98CR0361, and 98CR0362.

8. The underlying aggravating factor for each of the attempted capital murders was the murder of Oscar Nava during the same scheme and course of conduct.

9. On July 15, 2015, St. Aubin filed subsequent Writs of Habeas Corpus. At issue in the Applications are the murder and the attempted capital murders convictions, Cause Nos. 98CR0358, 98CR0359, 98CR0360, 98CR0361, and 98CR0362.

10. On October 14, 2015, this Court signed the State’s proposed Findings of Fact and Conclusions of Law stating that St. Aubin’s subsequent writs were not cognizable.

11. On November 11, 2015, the Court of Criminal Appeals issued an Order relating to these Writs. In the Order, the Court of Criminal Appeals restated St. Aubin’s claims that all of these convictions allege the murder of the same victim as an

element to the offenses and therefore only one conviction can stand under this Court's double jeopardy laws. The Court of Criminal Appeals said, "Applicant has alleged facts that, if true, might entitle him to relief." *Ex parte St. Aubin*, WR-49,980-12, 2015 WL 6994492, at *1 (Tex. Crim. App. Nov. 11, 2015).

12. The Court of Criminal Appeals instructed this Court to make findings of fact as to whether any of these convictions violate double jeopardy. If double jeopardy was found, the Court of Criminal Appeals instructed this Court to make findings as to which conviction should stand and any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of St. Aubin's claim for habeas corpus relief. *Ex parte St. Aubin*, WR-49,980-12, 2015 WL 6994492, at *1.

13. The presiding judge of the trial court at this time is not the judge who presided over the underlying trial.

CONCLUSIONS OF LAW

1. The Double Jeopardy Clause of the United States Constitution is applicable to the states through the Fourteenth Amendment, and it protects an accused from impermissible multiple punishments or successive prosecutions for the same offense after an acquittal or conviction. U.S. Const. amend. V, cl. 2; *see Ex parte Amador*, 326 S.W.3d 202, 205 (Tex. Crim. App. 2010).

2. In Cause Nos. 98CR0358, 98CR0359, 98CR0360, 98CR0361, and 98CR0362, St. Aubin received four convictions for attempted capital murder under Texas Penal Code §§ 15.01 (criminal attempt) with 19.03(a)(7)(B) (capital murder) and one for murder under Texas Penal Code § 19.02(b)(1). Because the convictions are legally the same, it is only necessary to determine whether the offenses are factually the same. *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015).

3. Factual sameness is determined by identifying the allowable unit of prosecution and reviewing the trial record to establish how many units have been shown. The allowable unit of prosecution of an offense turns on statutory construction and usually requires ascertaining the gravamen, or gravamina, of the offense. *Ex parte Benson*, 459 S.W.3d at 72.

4. After reviewing the record, if a court concludes that the offenses are based on the same unit of prosecution, then the offenses are factually the same for successive prosecution purposes. To prevail, the claimant must prove legal sameness and factual sameness. *Ex parte Benson*, 459 S.W.3d at 72.

5. In order to be convicted pursuant to section 19.03(a)(7)(B), the capital-murder statute, a defendant must commit both a murder under Texas Penal Code § 19.02(b)(1) and at least one additional murder during different criminal transactions, but pursuant to the same scheme or course of conduct. TEX. PENAL CODE §§ 19.02(b)(1) & 19.03(a)(7)(B).

6. A charge of capital murder pursuant to section 19.03(a)(7)(A) requires multiple homicides in the same criminal transaction. In order to be convicted of capital murder under section 19.03(a)(7), a defendant must kill "more than one person." These two provisions of the capital-murder statute require a minimum of two victims. The Court of Criminal Appeals has found that the allowable unit of prosecution for section 19.03(a)(7)(A) is more than one victim. *Ex Parte Milner*, 394 S.W.3d at 507; TEX. PENAL CODE §19.03(a)(7)(A); *Saenz v. State*, 131 S.W.3d 43 (Tex. Crim. App. 2003).

7. The allowable unit of prosecution for attempted capital murder under sections 19.03(a)(7)(B) and 15.01 is the attempted murders of "more than one person" in the same scheme or course of conduct, and the attempted killing of more than one person allows the state to charge a single count of attempted capital murder. *Ex Parte Milner*, 394 S.W.3d at 507.

8. Because the killing of at least two people allows the State to charge a single count of capital murder when the aggravating circumstance is the killing of more than one person during the same scheme or course of conduct, the allowable unit of prosecution, for double jeopardy purposes, is not each individual, but the killing of more than one individual. U.S.C.A. Const. Amend. 5; TEX. PENAL CODE § 19.03(a)(7)(A, B); *Ex Parte Milner*, 394 S.W.3d at 507.

9. St. Aubin was indicted for 4 separate charges of attempted capital murder and one charge of murder. Because the allowable unit of prosecution under 19.03(a)(7)(A) necessitates more than one victim and, here, each charge contains the same victim, Oscar Nava, in one allowable unit of prosecution, St. Aubin's double jeopardy rights were violated. Accordingly, this Court finds a violation of Applicant's double jeopardy rights; Applicant has received multiple punishments for the same offense.

10. When a defendant is convicted of multiple offenses and those convictions violate double-jeopardy protections, the conviction for the more serious offense is retained, and the other convictions are set aside. The most serious offense is the offense of conviction for which the greatest sentence was assessed. *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006); *see also Saenz*, 131 S.W.3d 43.

11. Applicant's sentences were the same. Applicant received five life sentences.

12. This Court recommends that Applicant's judgment of the 405th Judicial District Court of Galveston County in Cause Nos. 98CR0361 (the murder conviction) be retained.

13. This Court recommends that Applicant's judgments of the 405th Judicial District Court of Galveston County in Cause Nos. 98CR0358, 98CR0359, 98CR0360, 98CR0362 (the attempted capital murders) be vacated and set aside.

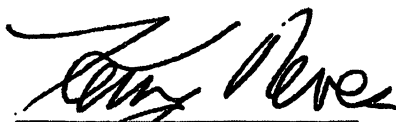
14. Applicant has shown that his conviction and sentencing for the murder in addition to the four attempted capital murders violates double jeopardy. Thus, Applicant's sole ground for relief is hereby granted.

15. In reviewing the facts of the underlying incident which led to Applicant's convictions, the trial court concludes there is not a reasonable probability that Applicant would have received a sentence of less than the life sentence imposed by the jury. Therefore, there is no necessity for a new trial as to punishment.

ORDER

1. The Trial Court orders the Clerk of this Court to file this Finding and Order, and promptly transmit it with the Writ Transcript to the Clerk of the Court of Criminal Appeals, Austin, Texas.
2. The Clerk of this Court is further ordered to send a copy of this Finding and Order to the Applicant and the appellate section of the Galveston County Criminal District Attorney's Office.

Signed on this the 25TH day of JAN., 2016.


Judge Presiding

Appendix D

**Order Remanding Applications for Further Fact Finding
and the Dissenting Statement.**



2015 NOV 13 PM 6:45

David S. Keasler
CLERK OF COURT
COURT OF CRIMINAL APPEALS
OF TEXAS

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NOS. WR-49,980-12; WR-49,980-13; WR-49,980-14; WR-49,980-15; WR-49,980-16

EX PARTE KEITH MICHAEL ST. AUBIN, Applicant

**ON APPLICATIONS FOR WRITS OF HABEAS CORPUS
CAUSE NOS. 98CR0360; 98CR0362; 98CR0358; 98CR0359; 98CR0361
IN THE 10TH DISTRICT COURT OF GALVESTON COUNTY**

Per curiam. KEASLER, J. filed a dissenting statement, joined by HERVEY and YEARY, JJ. KELLER, P.J. dissents.

ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court these applications for writs of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of four counts of attempted capital murder and one count of murder and sentenced to life imprisonment in each cause. The First Court of Appeals affirmed his convictions. *St. Aubin v. State*, Nos. 01-98-01340-CR; 01-98-01342-CR; 01-98-01318-CR; 01-98-01339-CR; 01-98-01341-CR (Tex. App.—Houston [1st Dist.], May 25, 2000)(not designated for publication).

98CR0358-83-3
DCAPOR
Appeal - Order
1135007



Applicant contends that but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt in these cause numbers. TEX. CODE CRIM. PROC. Art. 11.07 § 4(a)(2). He alleges that all of these convictions allege the murder of the same victim as an element to the offenses and therefore only one conviction can stand under this Court's double jeopardy laws. Applicant has alleged facts that, if true, might entitle him to relief. *Ex parte Milner*, 394 S.W.3d 502 (Tex. Crim. App. 2013). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1997), the trial court is the appropriate forum for findings of fact. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). In the appropriate case, the trial court may rely on its personal recollection. *Id.*

The trial court may also order depositions, interrogatories or a hearing. It appears that Applicant is represented by counsel. If the trial court elects to hold a hearing, it shall determine if Applicant is represented by counsel, and if not, whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact first as to whether any of these convictions violate double jeopardy. If so, the trial court shall then make findings as to which conviction should stand. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. If any continuances are granted, a copy of the order granting the continuance shall be sent to this Court. A supplemental transcript containing all

affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be returned to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: November 11, 2015
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2015 NOV 13 PM 6:46

John D. Keasler
DISTRICT CLERK

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

**NOS. WR-49,980-12, WR-49,890-13, WR-49,890-14,
WR-49,890-15, & WR-49,890-16**

EX PARTE KEITH MICHAEL ST. AUBIN, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NOS. 98CR0360, 98CR0362, 98CR0358, 98CR0359, & 98CR0361
IN THE 10TH DISTRICT COURT
FROM DALLAS COUNTY**

KEASLER, J., filed a dissenting statement, in which HERVEY and YEARY, JJ.,
joined.

DISSENTING STATEMENT

I dissent to the Court's remanding Keith St. Aubin's applications for a writ of habeas corpus. For the reasons outlined in my concurring opinion in *Ex parte Marascio*,¹ I would deny St. Aubin's double-jeopardy claims because a double-jeopardy claim may not be raised for the first time in a collateral proceeding.

Filed: November 11, 2015
Do not publish

¹ *Ex parte Marascio*, Nos. WR-80,939-01, WR-80,939-02, & WR-80,939-03,
___ S.W.3d ___, 2015 WL 5853202, *1 (Tex. Crim. App. Oct. 7, 2015).

98CR0358-83-3
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Appendix E

Trial Court's Original Findings of Facts and Conclusions of Law.

OCT 9 2015

Cause Nos. 98CR0358-83-3, ~~98CR0359-83-3~~, ~~98CR0360-83-3~~,
~~98CR0361-83-3~~, ~~98CR0362-83-3~~

EX PARTE:

§ IN THE DISTRICT COURT
OF

§ GALVESTON COUNTY
TEXAS

KEITH ST. AUBIN

§ 10TH JUDICIAL
DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITHOUT EVIDENTIARY HEARING ON 11.07 APPLICATION
FOR WRIT OF HABEAS CORPUS

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This Trial Court finds that there is no necessity for a fact finding hearing because there is ample evidence from the Application, the State's answer, the State's supplemental answer, and the Trial Court's record to rule on the relief sought.

The Trial Court further finds that pursuant to article 11.07, sec. 3(c), C.C.P., there are no controverted, unresolved facts which are material to the legality of the Applicant's confinement, and that Applicant's claim has no legal merit.

The Trial Court additionally finds that Applicant has not fulfilled the article 11.07, Section 4(a) requirements to file a subsequent writ. This Trial Court recommends that relief be dismissed.

98CR0360-83-3
DCFIFCL
Findings of Fact and Conclusions of Law
1115905



ORDER

1. The Trial Court orders the Clerk of this Court to file this Finding and Order, and promptly transmit it with the Writ Transcript to the Clerk of the Court of Criminal Appeals, Austin, Texas.
2. The Clerk of this Court is further ordered to send a copy of this Finding and Order to the Applicant and the appellate section of the Galveston County Criminal District Attorney's Office.

Signed on this the 14TH day of OCT., 2015.


Judge Presiding

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH MICHAEL ST. AUBIN
Petitioner

v.

THE STATE OF TEXAS
Respondent

PROOF OF SERVICE

I, BRITTANY CARROLL LACAYO, on December 19, 2017, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and the PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The name and addresses of those served are as follows:

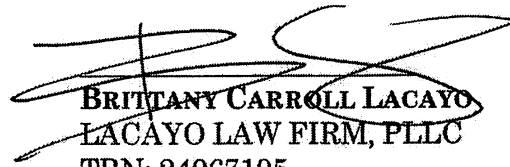
MR. JACK ROADY
Galveston County District Attorney
600 59th Street, Suite 1001
Galveston, Texas 77551
Tel No. 409-766-2355

MR. KEN PAXTON,
Texas State Attorney General,
P.O. Box 12548, Austin,
Texas 78711-2548.
Tel. No. (512) 463-2100

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 19, 2017.

Respectfully submitted,



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