

No. 17-7222

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

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
REPLY	4
I. THIS COURT HAS JURISDICTION TO CONSIDER PETITIONER'S DOUBLE- JEOPARDY CLAIMS	4
II. THIS COURT SHOULD REVIEW PETITIONER'S DOUBLE-JEOPARDY CLAIMS	8
CONCLUSION.....	14
PROOF OF SERVICE	15

Table of Authorities

Federal Cases

<i>Ball v. United States</i> , 470 U.S. 856 (1985)	<i>passim</i>
<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974)	6
<i>Kuhlmann v. Wilson</i> , 477 U.S. 436 (1986)	9
<i>Menna v. New York</i> , 423 U.S. 61 (1975)	6
<i>Missouri v. Hunter</i> , 459 U.S. 359 (1983)	11
<i>Morris v. Mathews</i> , 475 U.S. 237 (1986)	12
<i>Robinson v. Neil</i> , 409 U.S. 505 (1973)	6
<i>Rutledge v. United States</i> , 517 U.S. 292 (1996)	8
<i>Selsor v. Kaiser</i> , 22 F.3d 1029 (10th Cir. 1994)	8-9
<i>United States v. Martorana</i> , 629 F. Supp. 509 (D. Me. 1986)	12-13
<i>United States v. Mastrangelo</i> , 733 F.2d 793 (1984),	12
<i>Wallace v. Lockhart</i> , 12 F.3d 823 (8th Cir. 1994)	11

State Cases

<i>Ex parte Milner</i> , 394 S.W.3d 502 (Tex. Crim. App. 2013)	7, 10
<i>Ex parte St. Aubin</i> , 537 S.W.3d 39 (Tex. Crim. App. 2017)	<i>passim</i>

State Statutes

TEXAS CODE CRIM. PROC. ART. 11.07, § 4	<i>passim</i>
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REPLY BRIEF FOR PETITIONER

I. This Court has Jurisdiction to Consider Petitioner's Double-Jeopardy Claims

The State concedes that St. Aubin's four double-jeopardy claims are meritorious absent any procedural bar for subsequent habeas applications. (Opp. 7). However, the State argues that the TCCA's "determination under 11.07, § 4(a)(2) is necessarily independent of federal law because the TCAA did not interpret the Double Jeopardy Clause to deny—or to otherwise examine—the underlying merits of Aubin's double jeopardy claims." (Opp. 6-7). The State argues, "the TCCA announced that its resolution was for procedural reasons unrelated to the constitutional merits of Aubin's double-jeopardy claim." (Opp. 7). However, the State neglects the fact that the TCCA's decision to dismiss Petitioner's applications relied entirely on its interpretation of the United States Constitution's Double Jeopardy Clause.

The Texas Court of Criminal Appeals (TCCA) 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 was an exception to the subsequent-application bar." *Ex parte St. Aubin*, 537 S.W.3d 39, 42 (Tex. Crim. App. 2017). One 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.'" *Id.* (quoting TEX. CODE CRIM. PROC. Art. 11.07, § 4(a)(2))(emphasis added). The TCCA stated, "[t]his language requires, at the very

least, that the alleged [United States] constitutional violation occur at or before a finding of guilt.” *Id.* Therefore, the judgment below does not rest on adequate and independent state grounds as alleged by the State. (Opp. 5). The State agrees that the TCCA “determined that, because a single-trial double-jeopardy violation occurs when the defendant is *sentenced*” Aubin cannot satisfy the actual-innocence exception under Article 11.07, § 4(a)(2), “to overcome Texas’s abuse of writ bar.” (Opp. 9 n.7)(citing *Aubin*, 537 S.W.3d at 43). The opinion rests on the TCCA’s interpretation that it is not 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 judgments on those charges would violate the Fifth and Fourteenth Amendments to the United States Constitution.

Next, the State asserts that St. Aubin “has *changed* his double-jeopardy claims,” and therefore, this Court should deny certiorari. (Opp. 12-13). However, St. Aubin has argued the applicability of the actual-innocence exception to Article 11.07, § 4(a)(2) since he filed his applications for writ of habeas corpus with the 10th Judicial District Court of Galveston County, Texas on July 15, 2015. When St. Aubin filed his Applications, he attached a Memorandum of Law in Support of Application for Writ of Habeas Corpus, in which he asserted that his subsequent writ met the jurisdiction requirements of 11.07, §4(a)(2), the actual-innocence

exception, since but for a violation of the Federal Constitutional Prohibition against Double Jeopardy, no rational jury could have found applicant guilty beyond a reasonable doubt.¹ Applicant further argued in his memorandum,

Here, both the prosecution and the punishment are prohibited by double jeopardy. In *Robinson v. Neil*, the Supreme Court distinguished the constitutional protections and guarantees of the Double Jeopardy Clause from other constitutional violations and, in so doing, explained that while protections and guarantees of the Double [Jeopardy] Clause 'like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.' *Robinson v. Neil*, 409 U.S. 505, 509 (1973). Subsequently, in *Blackledge v. Perry*, the Court made it clear that a Double Jeopardy Clause claim asserts the right not to be haled into court at all and that the very initiation of criminal proceedings, in contravention of the Double Jeopardy Clause, operates to deny an accused Due Process of law. [*Blackledge v. Perry*, 417 U.S. 21, 30-31(1974)], accord *Menna v. New York*, 423 U.S. 61, 62 (1975).²

In the state district court, the State agreed "double jeopardy was violated" and also agreed, "[b]ecause the face of the record shows double jeopardy, St. Aubin's murder conviction should stand and the remaining four attempted capital convictions should be vacated and set aside."³ Again, in the TCCA the State agreed "[b]ecause the face of the record shows double jeopardy, the murder conviction should stand and the remaining four attempted capital convictions should be set

¹ See Applicant's Memorandum of Law in Support of Applications for Writ of Habeas Corpus, p. 4-5, publicly accessibly at: <http://www.galvestoncountytexas.gov/dc/Pages/SearchCriminal.aspx>, Record Search, Case No. 98CR0360-83-3, Post-Conviction Writ (the same Memorandum was filed with each application).

² See Applicant's Memorandum of Law in Support of Applications for Writ of Habeas Corpus, p. 9-10, publicly accessibly at: <http://www.galvestoncountytexas.gov/dc/Pages/SearchCriminal.aspx>, Record Search, Case No. 98CR0360-83-3, Post-Conviction Writ (the same Memorandum was filed with each application).

³ See State's Supplemental Answer to Application for Post-Conviction Writ of Habeas Corpus, p. 7-8, filed January 11, 2016, publicly accessibly at: <http://www.galvestoncountytexas.gov/dc/Pages/SearchCriminal.aspx>, Record Search, Case No. 98CR0360-83-3.

aside agreeing that “Applicant’s double jeopardy claim is cognizable in his subsequent writ.”⁴

In his brief with the TCCA, St. Aubin argued,

Applicant can be guilty of only one charge of attempted capital murder or the charge of murder because the other convictions violate the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Applicant is actually innocent of the other convictions and that, but for a double-jeopardy violation, no rational juror could have found the applicant guilty of the challenged offense beyond a reasonable doubt. Therefore, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. As a result, his subsequent writ meets the jurisdictional requirements of 11.07 § 4(a)(2). *Ex parte Milner*, 394 S.W.3d 502 (Tex. Crim. App. 2013).⁵

It was only in the published decision issued in this case, in which the TCCA distinguished the *Milner*⁶ case (“successive-prosecutions double-jeopardy claim”) from St. Aubin’s case (“multiple-punishment’s double-jeopardy claim”) finding that it is “only upon entry of a judgment for multiple offenses, after sentences, that a multiple-punishments [double-jeopardy] violation even occurs.” *Ex parte St. Aubin*, 537 S.W.3d at 43. Therefore the court held, “[a] multiple-punishments [double-jeopardy] violation occurs after sentencing, so a necessary precondition for the innocence-gateway exception—that a constitutional violation occur at or before a finding of guilty—is typically not met.” *Id.* at 43-44.

⁴ Brief for the State of Texas at 10-11, publicly accessibly at: <http://www.txcourts.gov/cca/>, case search, case no. WR-49,980-12 (same brief was filed in all cases).

⁵ Brief for Appellant at 12-13, publicly accessibly at: <http://www.txcourts.gov/cca/>, case search, case no. WR-49,980-12 (same brief was filed in all cases).

⁶ *Ex parte Milner*, 394 S.W.3d 502 (Tex. Crim. App. 2013).

II. This Court Should Review Petitioner's Double-Jeopardy Claims

The State asserts, “a ruling on the issue would provide him no relief because he was not prejudiced by any alleged error.” (Opp. i). Its explanation for this assertion is that “[b]ecause the sentences are concurrent, vacating Aubin’s four life sentences for attempted capital murder would still leave him with a life sentence for first-degree murder. Accordingly, review in this Court would not provide Aubin with any meaningful relief.” (Opp. 12). However, as this Court stated in *Ball*,

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant’s eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant’s credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

United States v. Ball, 470 U.S. 856 (1985)(internal citations omitted); *see also Rutledge v. United States*, 517 U.S. 292 (1996).

Additionally, the State claims, “the TCCA’s procedural resolution is consistent with circuit authority on the same subject.” (Opp. 10). In support of this assertion, the State cites to *Selsor v. Kaiser*, stating this case “confirmed that a meritorious double-jeopardy claim is not—by—itself—sufficient to prove one’s *factual* innocence to overcome a procedural default. (Opp. 10)(citing *Selsor v. Kaiser*, 22 F.3d 1029, 1034-35 (10th Cir. 1994)). The State also cited to *Selsor* trying to distinguish between legal and factual innocence. *Id.* However, the State’s reliance on *Selsor* is misplaced. In *Selsor*, the Petitioner filed his petition for relief pursuant

to 28 U.S.C 2254 arguing that his separate convictions and sentences for felony murder and the underlying felony (robbery) violated the Double Jeopardy Clause of the Fifth Amendment. *Selsor*, 22 F.3d at 1031. The federal district court held that since Petitioner had not raised the issue in his direct appeal or in his first post-conviction proceeding in Oklahoma courts, he had procedurally defaulted the claim under Oklahoma law and was barred from raising the matter in a federal habeas corpus petition. *Id.* at 1034. The federal district court further concluded that Petitioner did not come within any exception to the federal procedural default rule and that refusing to entertain it would not result in a fundamental miscarriage of justice. *Id.* The court in *Selsor* cited to *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), holding that “the fundamental miscarriage of justice applies when a prisoner ‘supplements his constitutional claim with a colorable showing of *factual innocence*.’” *Id.* The federal court further noted that the federal miscarriage of justice exception is concerned with factual as compared to legal innocence. *Id.* In comparison, the TCCA did *not* distinguish between legal or factual innocence regarding applicability of the actual-innocence exception under Texas law. *St. Aubin*, 537 S.W.3d at 41-44; *see* TEX. CODE CRIM. PROC. Art. 11.07, § 4(a)(2). Rather, the TCCA’s distinction was regarding at what point a double jeopardy violation occurs. *Id.* The State Prosecuting Attorney’s Office filed an “Amicus Statement” with the TCCA asking the court to distinguish claims of factual innocence from claims of legal innocence for purposes of TEX. CODE CRIM. PROC. Art. 11.07, §

4(a)(2).⁷ Significantly, the TCCA found that legal innocence is sufficient. *See Ex parte St. Aubin*, 537 S.W.3d at 42-43. The court found that a claim based on the “successive prosecutions” strand of double-jeopardy jurisprudence satisfies the requirements of the “innocence gateway” exception without any regard to whether the person is factually innocent. *Id.* at 42. The court found, “[t]his 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 the jury.” *Id.* (citing *Ex parte Milner*, 394 S.W.3d 502, 505 (Tex. Crim. App. 2013)). The court stated, “[i]n *Ex parte Milner*, the double jeopardy claim was clearly a successive-prosecutions claim.” *Id.* at 42-43. In *Ex parte Milner*, Milner pled guilty to the attempted capital murders and was assessed consecutive life sentences in each cause. *Id.* at 42-43 n.9 (citing Milner, 394 S.W.3d at 504). The three pleas were entered in separate proceedings conducted on the same day. *Id.* (citing Milner, 394 S.W.3d at 504). The TCCA found that Milner proved that he was actually innocent of the second conviction for attempted capital murder since that plea should never have occurred based on double jeopardy. *Id.* (citing Milner, 394 S.W.3d at 504).

Therefore, the analysis used in *Selsor* is inapplicable to St. Aubin’s case. The same is true regarding the State’s attempt to claim that St. Aubin’s case is

⁷ State Prosecuting Attorney’s Amicus Statement, publicly accessibly at: <http://www.txcourts.gov/cca/>, case search, case no. WR-49,980-12, (Event Type: Letter Br Filed) (same brief was filed in all cases).

consistent with *Wallace v. Lockhart*, 12 F.3d 823, 826-27 (8th Cir. 1994). For the same reasons *Selsor* is inapplicable, *Wallace* is also inapplicable. *Id*; *see supra*.

The State further argues, “it is not possible to predict the potential turmoil Aubin’s proposed rule could engender.” (Opp. 15). Justice Stevens’s concurring opinion in *Ball* illustrates the problems with the arguments made by the State (Opp. 15-17),

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.

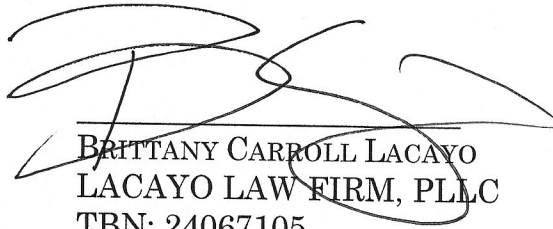
629 F. Supp. 509 (D. Me. 1986). Petitioner believes that the method offered by the Court in *Martorana* is the proper way to acknowledge the “Government’s broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case” as discussed in *Ball*, 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 its final attempt to argue for denial of certiorari, the State tries to compare the Texas statute to the §2255(h) arguing, “federalism and comity are directly implicated.” (Opp. 18-19). The State asserted that Texas may enforce a similar forfeiture rule in its own postconviction proceedings. (Opp. 19). However, the TCCA has made it clear that its forfeiture rule does not distinguish between legal and factual innocence, in contrast to §2255. *See supra*. Instead, its distinction is at what point a violation of the United States Constitution occurred. Therefore, this is not a case of federalism and comity, but rather the need for an interpretation of timing regarding a violation of the United States Constitution’s Double Jeopardy Clause, which Texas on its own prerogative, incorporated into TEX. CODE CRIM. PROC. Art. 11.07, § 4(a)(2) and its decision in *St. Aubin’s* case.

CONCLUSION

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

Respectfully submitted,



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PROOF OF SERVICE

I, BRITTANY CARROLL LACAYO, on May 11, 2018, as required by Supreme Court Rule 29, have served the enclosed REPLY BRIEF FOR PETITIONER 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 and electronic mail.

The name and addresses of those served are as follows:

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

Executed on May 11, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Brittany Carroll Lacayo', is written over the printed name and firm information.

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