24-6972 ORIGINAL

No: 24-5318

Originating Case No: 1:20-CU-01281-STA-jay

IN THE UNITED STATES SUPREME COURT

Michael John Stitts }
Petitioner

V }

Brian Eller
Warden }

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Michael John Stitts
Northeast Correctional Complex
5249 Hwy 67 W
Mountain City, TN 37683-5000

Pro Se Applicant

*i QUESTION PRESENTED

1) Whether the Sixth Circuit Court of Appeals erred when it held Appellant had waived his Double-Jeopardy claim that was premised on the illegal multiplicity of punishments for the same offense?

2) Whether the Sixth Circuit Court of Appeals holding that, Martinez no longer excuses procedural defaults for Post-Conviction Counsel's failure to raise Ineffective Assistance of Trial Counsel is contrary to existing Supreme Court Precedent?

*ii TABLE OF CONTENTS

INDEX TO APPENDICES

There are three parts to the Appendices presented to this court in support of his petition for a Writ of Certiorari. Each part is color coded and numerically identified by page number in the bottom right hand corner as required by **Rule 14(i)**.

Part A, contains the Orders and Memorandums of the State and Federal Courts which has denied relief.

Part B, contains relevant pages from the State and Federal Court filings of petitioner

Part C, contains relevant pages from the State Court record concerning the double-jeopardy argument presented.

Petitioner will point to the facts supported by the State and Federal Court Record, and reproduced for this court in the following fashion:

(App. A. Pg ID# A-20), i.e., this citation is found in **Appendix A,** located at the handwritten number shown in the bottom right hand corner **A-20.** Each fact relevant to petitioner's argument in the Writ of Certiorari is referred to in this manner.

APPENDIX A: (Blue Cover)
Court Briefs and Memorandum Opinions

Part A:1= March 4, 2024, Federal District Court, Western Division at Jackson, Tennessee, Denial of habeas Corpus Relief, Reported at ***2023 WL 2699973***
(APP. A, Part A:5, Pgs A 9-44)

Part A:2= September 14, 2024, Sixth Circuit Court of Appeals Denial of Certificate of Appealability.
(APP. A, Part A:2, Pgs A 1-8)

Part A:3= May 13, 2019, Evidentiary Hearing on Post-Conviction Relief
(APP. A, Part A:3, Pgs 45-52)

APPENDIX B: (Purple Cover)
MOTIONS, BRIEFS AND PETITIONS FILED BY PETITIONER

Part B:1= April 18, 2024, Appeal from Denial of Habeas Corpus and Request for COA.
(APP. B. Part B:1, Pgs B 1-17)

Part B:2= February 2, 2017, Original Post-Conviction Petition filed in Madison County Tennessee Circuit Court.
(APP. B. Part B:2, Pgs B 18-34)

APPENDIX C: (Orange Cover)

RELEVANT DOUBLE-JEOPARDY DOCUMENTS

Part C:1= September 19, 2016, Reading of Indictment

(APP. C, Part C:1, Pgs C 1-6)

Part C:2= September 20, 2016, Preliminary Jury Charge

(APP. C, Part C:2, Pgs C 7-22)

Part C:3= September 20, 2016, Jury Charge

(APP. C, Part C:3, Pgs C 23--47)

TABLE OF AUTHORITIES

CASES Pg #

STATUTES AND RULES:

OTHER:

*1 OPINIONS BELOW

The denial of relief for the Federal District Court, Western Division, Jackson, Tennessee, is found at **(App. A, Pg ID# A 9-44)**, and is unreported. United States Court of Appeals for the Sixth Circuit denial of COA unpublished opinion, is found at **(App. A, Pg ID# 1-8A)**,

JURISDICTION

The Sixth Circuit Court of Appeals denied a COA on September 17, 2024, and is unpublished. The jurisdiction of the court is invoked under **28 U.S.C. § 2106**.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the **Fifth Amendment,** which provides in relevant part: no person shall be subject for the same offence to be twice put in jeopardy of life or limb

Sixth Amendment, which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense; and,

Fourteenth Amendment, which provides in relevant part:

Nor shall any State deprive any person of life, liberty, or property, without the due process of law.

28 U.S.C. § 2106 **which provides**:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or Order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appro-private judgment, decree, or Order, or require such further proceedings to be had as may be just under the circumstances.

REASON FOR GRANTING WRIT

Under U.S. Supreme Court **Rule 10. Considerations Governing Review of Certiorari**, this instant case should qualify for this court's review because, both the State and Federal Appellate Courts have issued opinions that are contrary to existing U.S. Supreme Court precedent in the case of **Mathis v United States, 579 U.S. 500, 136 S. Ct. 2243 (2016)**. The opinion of the Sixth Circuit Court of appeals is also in conflict with the decisions of other United States Courts of Appeal on the same important matter. To wit: Whether an improper jury instruction lowered the State's 'beyond a reasonable doubt' standard, which in turn, denied Petitioner his Sixth Amendment right to a fair trial and his Fourteenth Amendment right to the due process of law.

In Tennessee, a criminal has "a constitutional right to complete and accurate jury instructions on the law, and the trial court's failure to provide complete and accurate jury instructions deprives a defendant of the constitutional right to a jury trial." ***State v Cole-Pugh, 588 S.W. 3d 254, 260 (Tenn. 2019)***. "An instruction is 'prejudicially erroneous, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law. ***State v Perrier, 536 S.W. 3d 388, 403 (Tenn. 2017)***. Petitioner shows this court that the jury was instructed on the elements of Simple Assault, yet the charge in the indictment was Aggravated Assault. Therefore, the State reduced its burden of proving "beyond a reasonable doubt" that an Aggravated assault occurred, but the court allowed him to be convicted of aggravated Assault based on the Simple assault jury instructions. Petitioner lays out in great detail the relevant statutes and how the 'plain error' occurred in his trial on pages 17-19 of this brief.

The Sixth Circuit Court of Appeals has also entered a decision in conflict with the decision of other United States Court of Appeals on the same important matter; that being, whether Petitioner was denied his constitutional right to a fair trial and the due process of law when the jury was allowed to convict him of aggravated assault

based on the jury instructions provided to them on the elements of simple assault.

In the case of ***Chelley v New York, 475 F. Supp. 3d 168 (2nd Cir. 2020)***, that court held, "Where an error in the jury instruction is alleged, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the fourteenth Amendment." (quoting ***Davis v Strack, 270 F. 3d 111, 123 (2nd Cir. 2011)***). Accordingly, while a federal court "may not grant habeas relief for a 'mere error of state law' a finding that Petitioner was erroneously deprived of a jury instruction to which he was entitled under state law is the first step in the determination whether that error violated the Petitioner's federal due process rights."

See also the similarly situated case of ***United States v Simmons, 11 F. 4th 239 (4th Cir. 2021)***, where that appellate court found that the state had correctly charged the defendant in the indictment with one of the two state law predicates supporting the assault count, but incorrectly referenced the wrong predicate offense in the jury instructions. This is exactly the error that occurred in this instant case. The fourth Circuit went on to hold, "These errors permeated the court's final jury instructions on all of the assault counts. The court incorrectly explained and referenced the wrong section as to the state law predicate, instead of the actual predicate charged in the indictment. Neither the Defendants or the Government brought this mistake to the attention of the court. Because Defendant's did not object to the trial court's faulty instructions on the assault counts, we can only review for plain error."

The court went on to opine, "It appears that a clear and obvious error occurred here. ***Olano, 507 U.S. at 734, 113 S. Ct. 1770***. The court shouldnot have instructed the jury on Va. Code Ann. § 18.2-53 which proscribes a different criminal offense than the one charged in the section 18.2-53.1. By instructing the jury on the proper section, the jury instructions broadened the possible basis for a conviction. Without a special jury verdict form we cannot know whether the jury convicted the defendant on the properly indicted or the improperly instructed offense. We are constrained to find that a constructive amendment occurred and that defendant's convictions on the

assault count must be reversed on plain error review.

The Fifth Amendment's Grand Jury Clause guarantees that a criminal defendant will be tried only on the charges in a grand jury indictment, so, only the grand jury may broaden or alter the charges in the indictment. As this court has previously explained, "courts cannot permit a defendant to be tried on charges that are not in the indictment against him." ***Stirone v United States, 361 U.S. 212, 217, 80 S. Ct. 270 (1960)***. Thus the resulting incongruity between the indictment and the conviction that a constructive amendment causes, "destroys the defendants substantial right to be tried only on the charges presented in the indictment." ***Id***. By allowing the jury to convict Petitioner in this instant case on the uncharged allegations of simple assault, then allowing the sentence court to sentence him on the higher crime of aggravated assault interfered with the basic protections the grand jury was designed to afford have been defeated. Because the possibility of allowing the state to lower its 'beyond a reasonable doubt' standard in convicting the defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner that is most serious, Petitioner requests this honorable to grant Certiorari in this case for a plain error review of the complained of constitutional error that violated his Sixth and Fourteenth Amendment rights under the U.S. constitution.

STATEMENT OF THE CASE

On April 6, 2015, Mary Ann Greer was shot once in the chest and once in the arm by someone who entered her home brandishing a shotgun. She underwent multiple surgeries and eventually had to have her arm amputated due to the extent of the injuries. She testified at trial that she had a stroke shortly after the shooting incident and could not recall the facts of what happened on the morning of April 6, 2015. She did testify that her and the defendant had a relationship for several years before the shooting occurred, and identified him as the perpetrator of the crime at trial.

The defendant has claimed since the day of his arrest that he was involuntarily intoxicated by a friend prior to the crime he allegedly committed. Officers confirmed that he was acting like he was under the influence of something prior to his interview at the police station; some said he was playing possum, while others put off the interview until the following day due to the possibility of his intoxication. He was never administered a drug test to verify whether he was under the influence of any drugs or not.

While there is extensive video footage from multiple officer's vehicle and body cams during the initial arrest, there is no footage showing officers pulling 23 shotgun shells out of the front pocket of the defendant, as testified to at trial. Amazingly, there is also testimony that a shotgun was found near to the defendant, who was passed put in the neighbors backyard when first responders arrived. A forensic examination was performed for DNA on the alleged weapon used to commit the attempted murder of Mary Ann Greer. However, the contamination evidence was never tested for fingerprints to know who handled or fired the weapon.

While Ms. Greer testified that she was shot once through the door of the bathroom she was hiding in, and once through a bedroom door, two important questions of fact have never been answered by any experts, or laymen for that matter, as to why, **1)** there was only one drop of blood in the bathroom, and **2)** how she saw the defendant pull the trigger on the gun that wounded her.

The arresting officer testified that he saw no blood on the clothes of the defendant, which is reasonable considering the victim said she was shot from the other side of a door by a perpetrator she did not see but knew it was the defendant. However, the same clothing presented at trial was covered in blood and the crime scene investigator testified that he did not pick up the defendant's clothing. On cross examination, the investigating officer recanted his testimony when confronted with a document showing he did in fact receive the clothing from the county jail. He then stopped by the crime scene before dropping them off for a DNA forensic analysis. There was now large amounts of blood on the clothing, most of which was in places that it should not have been.

Petitioner was subsequently indicted by a Madison County, Tennessee Grand Jury, for Attempted First Degree Murder, stating, "In **Count 1**, Michael John Stitts did unlawfully, knowingly, intentionally and with premeditation attempt to kill Mary Ann Greer by taking the following substantial step, to wit, shooting the said Mary Ann Greer, and where the said Mary Ann Greer suffered serious bodily injury as defined in **T.C.A. § 39-11-106** in violation of **T.C.A. § 39-13-202** and **T.C.A. § 39-12-101.**"

They went on to hold, "On **Count 2**: Michael John Stitts did intentionally and knowingly cause bodily injury to Mary Ann Greer by the use of a deadly weapon, to wit, a gun, a more particular description of which to Grand Jurors aforesaid is unknown, in violation of **T.C.A. § 39-13-102**." See **(APP. C, Pg ID# 78)**. The jury was instructed by the court using this same language, thus, causing the 'plain error' complained of because "serious bodily injury" was listed in the elements necessary to convict defendant for Criminal Attempt to Commit First-Degree Murder, in the jury instructions. (See **(APP. A, Pg ID# 27)**

The statute for Aggravated Assault, **T.C.A. § 39-13-102**, expressly states in **§ (a) (1)**, a person commits Aggravated Assault who: **(A)** intentionally or knowingly commits an assault as defined in **§ 39-13-101** and the assault: **(i)** Results in the serious bodily injury to another. Yet only 'bodily injury' was instructed. **(APP. A, Pg ID# 38)**

ARGUMENT

1: AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO A FAIR TRIAL

"An accused has a constitutional right to complete and accurate jury instructions on the law, and the trial court's failure to provide complete and accurate jury instructions deprives a defendant of the constitutional right to a jury trial." ***Cauthern v State, 145 S.W. 3d 571, 600 (Tenn. 2004)***. "In criminal cases, trial courts the duty, without request, to give proper jury instructions as to the law governing the issues raised by the nature of the proceeding and the evidence introduced at trial." ***State v Hawkins, 406 S.W. 3d 121, 129 (Tenn. 2013)***. See also ***State v Faulkner, 154 S.W. 3d 48, 58 (Tenn. 2005)***, "An instruction should be considered prejudicially erroneous when the jury charge, read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law."

In this instant case, Petitioner was convicted in **Count 1** of attempted first degree murder, and **Count 2** of aggravated assault, and **Count 3** of aggravated burglary, and **Count 4** of employing a firearm during the commission of a dangerous felony. His claim is that the indictment in this case clearly alleged he committed attempted first-degree murder causing serious bodily injury by using a gun in the act; it also found that he committed aggravated assault on the same victim, at the same time, with the same gun, and caused the same serious bodily injury. Thereby, using the Blockburger Test, receiving two different sentences and running them consecutively to one another violates his Constitutional Fifth Amendment right under the Double-Jeopardy Clause.

The State of Tennessee concedes in ***State v Cook, 2010 WL 1293785*** that his argument has merit, "It is apparent that the state relied on the same evidence to support defendant's convictions. His shooting of the victim and the victim sustaining gunshot wounds supported both the attempted murder conviction and the aggravated assault conviction, which violates Double-Jeopardy principles." The exact wording in the indictment is shown above and at **(APP. C, Pg ID# 76-78)**

In **United States v Gibbons, 994 F. 2d 299, 301 (6th Cir. 1993)**, the Sixth Circuit Court of Appeals held, "The Double-Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Because the Clause's focus is on the statutory offenses for which a defendant is prosecuted, the general test for compliance with the double-jeopardy clause looks to whether each statute requires proof of a fact the other does not." Quoting ***Blockburger v United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932)***.

TRIAL COURT ERRED BY FAILING TO CONDUCT PLAIN ERROR REVIEW

It is well settled in Tennessee that, under certain circumstances, two convictions or dual guilty verdicts must merge into a single conviction to avoid double-jeopardy implications. See ***State v Berry, 503 S.W. 3d 360, 362 (Tenn. 2015)***. "Whether multiple convictions violate double-jeopardy is a mixed question of law and fact that is reviewed de novo with no presumption of correctness. ***State v Smith, 436 S.W. 3d 751, 766 (Tenn. 2014)***. The Tennessee Supreme Court has observed, "in single prosecutions, multiple punishment challenges ordinarily fall into one of two categories: unit prosecution claims and multiple description claims." ***State v Allison, 618 S.W. 3d 24, 43 (Tenn. 2021)*** (***Citing Watkins, 362 S.W. 3d at 543***). This case presents a multiple description claim, which arises when a defendant has been convicted of violating two different statutes.

In 1996, Tennessee developed the four-part same evidence test in **State v Denton. 938 S.W. 2d 373 (Tenn. 1996)**, that it relied on analyze Double-Jeopardy claims. However, in 2012, the Tennessee Supreme Court specifically abandoned the ***Denton*** analysis in favor of the Blockburger same elements test. ***Watkins 362 S.W. 3d at 556 (Tenn. 2012)***. This gave rise to the two-pronged Blockburger test for multiple description claims such as presented here. The first step of the Blockburger test is the threshold question of whether convictions arise from the same act or transaction. ***Id.***

> If the threshold is surpassed, meaning the convictions arise from the same act or transaction, the second step of the Blockburger test requires courts to examine the statutory elements of the offenses. If the elements of the offenses are the same, or one offense is a lesser included of the other, then the court will presume that multiple convictions are not intended by the General Assembly, and that multiple convictions violate the double jeopardy.

It is well established that Petitioner was convicted of both Attempt to Commit First Degree Premeditated Murder Which Caused Serious Bodily Injury, and Aggravated Assault, when the evidence proved that he committed both of these crimes on the morning of April 6, 2016, when he shot Mary Ann Greer with a gun.

A: THE JURY INSTRUCTIONS MISLED THE JURY

In this case, Petitioner contends that the State of Tennessee put him twice in jeopardy for the same crime when they prosecuted him for Criminal Attempt of First-Degree Murder Where the Victim Suffers Serious Bodily Injury, and Aggravated Assault, because both offenses have a knowing and intentional mens rea element, and both have a serious bodily injury element, **(APP. C, Pg ID# 58) (APP. C, Pg ID# 60)** Then, Aggravated Assault does ***not*** have a 'bodily injury' element, yet they were instructed that they must find that Petitioner knowingly and intentionally ***attempted*** to commit the crime of First-Degree Murder, and that 'bodily injury' had to have occurred to convict on that charge in the indictment. To be clear, the statutory definition in the Aggravated Assault statute, as required by the Tennessee Legislature is "serious bodily injury', not simply 'bodily injury' as required in the lesser included offense of Assault. **(APP. C, Pg ID# 38)**

The **Tenn. Code Ann. § 39-13-202: First Degree Murder** statute has been provided to this court at **(APP. C, Pg ID# 56-57)**, showing in element **(a)(3)** "A killing of another committed as a result of the unlawful throwing, placing or discharging of a destructive device or bomb." This element constitutes the use of a gun as charged in the indictment. **(ADD. C, Pg ID# 56 at *(a)(3). Tenn. Code Ann. § 39-13-102: Aggravated Assault**, is also provided to this court at **(Id. Pg ID# 60-65)** showing

at § **(a)(1)(A)** the statute contains the intentionally and knowingly element, and at § **(a)(1)(A)(i)** the statute contains the 'serious bodily injury' element as charged in the indictment, and **(a)(1)(A)(ii)** contains the use or display of a deadly weapon as charged in the indictment. **See (APP. C, Pg ID# 58-60)**. This is where the problem complained of is manifested.

The Jury Instructions clearly show the jury was misled when those instructions were not properly presented to reflect the law and elements necessary to convict. As a matter of fact, in **Count 2**, the law and elements presented and the verdict of the jury only convicted Petitioner of Simple Assault, not Aggravated Assault. See **(APP. C, Pg ID# 8-10)**, where the judge charged the jury, compelling them to refer to the instructions in applying the law in the case. The Aggravated Assault charge in **Count 2**, shows that Assault is a lesser included offense. **(Id. at Pg ID# 24)**. The Jury Instructions named only two elements to be found guilty of this offense, they are **1)**, "that the defendant intentionally or knowingly caused 'bodily injury' to another; and **2)**, that the act involved the use or display of a deadly weapon. **(Id. at Pg ID# 38)**. The statute is clear that 'serious bodily injury' is required to convict for Aggravated Assault, not 'bodily injury' as stated in the jury instructions. Had the court properly instructed the jury as to the elements required for them to find the Petitioner guilty, the only two elements presented in **Count 2:** were also presented to them in **Count 1** of the instructions. ***Blockburger*** requires under these circumstances the Aggravated Assault charge be dismissed or merged for violating the Double-Jeopardy Clause of the U.S. Constitution, or in the alternative resentence him for the lesser included offense of Assault as instructed, which is a Class A Misdemeanor requiring 11 months and 29 days maximum sentence to run concurrent with the Attempted Murder charge.

The **Tenn. Code Ann. § 39-13-101: Assault** statute is provided to this court at **APP. C, Pg ID# 66-67)**, showing that only 'bodily injury' as presented in the jury instructions is required to be found to convict on this lesser included offense to Aggravated Assault, which requires the 'serious bodily injury' element to be found to convict.

As a matter of plain meaning, and applying the ***Blockburger*** test, one obviously cannot attempt to commit First-Degree Murder Which Caused Serious Bodily Injury without also causing some kind of 'serious bodily injury' that is a required element of Aggravated Assault as shown in the Tennessee Statute, and shown in the jury instruction explaining the meaning of 'bodily injury' and 'serious bodily injury' in both Counts of the indictment. **(APP. A, Pg ID# 28** and **37-38)** Therefore, only the Attempted First-Degree Murder Statute contains an element the other does not, Aggravated Assault contains the same elements as Attempted First Degree Murder Which Caused Serious Bodily Injury.

As charged in the indictment, First Degree Murder is a "premeditated and intentional killing of another." **T.C.A. § 39-13-202(a)(1)**; and, "A killing of another as the result of the unlawful throwing, placing, or discharging of a destructive device or bomb." Criminal Attempt occurs when a person "acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. **T.C.A. § 39-12-101(a)(3)**. This is the exact language the Grand Jury used when finding a True Bill in this case. They determined the "substantial step" necessary to reach their determination was found in the "shooting of Mary Ann Greer where she suffered serious bodily injury." To wit:

> "Michael John Stitts did unlawfully, knowingly, intentionally and with Premeditation, attempt to kill Mary Ann Greer by taking the following substantial step, to wit, shooting of said Mary Ann Greer, and where the said Mary Ann Greer suffered serious bodily injury as defined in T.C.A. 39-11-106 in violation of T.C.A. 39-13-202 and T.C.A. 39-12-101, all of which is against the peace and dignity of the State of Tennessee."

(APP.C, Pg ID# 4)

As charged in the indictment, Aggravated Assault is defined in **T.C.A. § 39-13-102(a)(1)(A)** and occurs when one, "Intentionally or knowingly commits an assault as defined in **§ 39-13-101 and the assault:** "Results in serious bodily injury to

another;" **T.C.A. § 39-13-102(a)(1)(A)(i),** which, "Involved the use or display of a deadly weapon; **T.C.A. § 39-13-102(a)(1)(A)(iii).** This is the exact language the Grand Jury used when finding a True Bill in this case. To wit:

> "Michael John Stitts did intentionally and/or knowingly cause bodily injury to Mary Ann Greer by the use of a deadly weapon, to wit, a gun, a more particular description of which to the Grand Jurors aforesaid is unknown, in violation of **T.C.A. § 39-13-102.**"

(APP. C, Pg ID# 5)

The jury instructions for **CRIMINAL ATTEMPT, TO WIT: FIRST DEGREE MURDER WHERE THE VICTIM SUFFERS SERIOUS BODILY INJURY**, required the jury to find (3) facts beyond a reasonable doubt. To wit:

1) that the defendant intended to commit First-Degree Murder; and,
2) that the defendant did some act intending to cause an essential element of First-Degree Murder to occur, and at the time believed the act would cause the element to occur without further action on the defendant's part; and,
3) that the victim suffered serious bodily injury.

(APP. C, PG ID# 27)

The indictment and evidence presented at trial, to which was properly before the jury, showed beyond a reasonable doubt that Michael John Stitts intended to commit First-Degree Murder when he allegedly assaulted Mary Ann Greer with a gun, which caused serious bodily injury as defined in **T.C.A. 39-13-202, and T.C.A. 39-12-101**.

The jury instructions for **AGGRAVATED ASSAULT**, required the jury to find (2) facts beyond a reasonable doubt, To Wit:

(1) that the defendant knowingly and intentionally caused bodily injury to another; and,
(2) that the act involved the use or display of a deadly weapon;

(APP. C, Pg ID# 38)

The indictment and evidence presented at trial, to which was properly before the jury, showed beyond a reasonable doubt that Michael John Stitts intentionally caused

seriously bodily to another when he allegedly assaulted Mary Ann Greer with a deadly weapon, i.e. a gun, as defined in **T.C.A. 39-13-102, and T.C.A. 39-11-106**. Therein lies the controversy in this double-jeopardy claim, to wit: 'Bodily Injury' is ***not*** an element of Aggravated Assault as presented to the jury for consideration; it is however, an element of simple assault, **(APP. C, Pg ID# 66 at § (a)(1)**, which is a lesser included offense of aggravated assault as shown in the jury instructions. **(APP. C, Pg ID# 24 at Count 2 and Pg ID# 46)**. Therefore, it is evident from the face of the record that the jury was misled and improperly instructed, because the elements of the charged offenses presented, which they must have found beyond a reasonable doubt, were not the statutory definitions that were required to be found, beyond a reasonable doubt, to convict Petitioner.

The jury instructions define both 'bodily injury' and 'serious bodily injury' see **(APP. C, Pg ID# 28)**. Bodily Injury is defined as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." While 'serious bodily injury' is defined as "involving a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." 'Deadly Weapon' was also defined in the Aggravated Assault jury instructions at **(APP. C, Pg ID# 38)**, "Deadly Weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or 'serious bodily injury' or anything that in the manner of its use or intended use is capable of causing death or 'serious bodily injury.' " This shows by clear and convincing evidence on the face of the record that the court took the two elements of simple assault, shown at **(APP. C, Pg ID# 46)** and combined them in the first element of the Aggravated Assault, shown at **(APP. C, Pg ID# 38),** which confused and misled the jury, which violated Petitioner's constitutional right to a complete and correct charge of the elements of the crime in his jury instructions as held in **U.S. v Tarwater, 308 F. 3d 494 (6th Cir. 2002)**, (quoting ***Sandstrom v Montana, 442 U.S. 510, 520, 99 S. Ct. 2450(1979)***

(relying on ***In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970)***, "It is well settled that jury instructions that relieve the prosecution of proving beyond a reasonable doubt every fact necessary to each element of the offense charged violate a defendant's due process rights and therefore constitute constitutional error under the 14th Amendment."

The alleged victim Mary Ann Greer testified at trial, **(APP. C, Pg ID# 81-8)**, that she was shot from a shotgun blast through a bathroom door, hitting her in the upper chest and arm area. She went through fifteen surgeries, which culminated in the removal of her arm, suffered strokes, memory loss and decreased eyesight. The description of her injuries, corroborated by medical records, and the jury's own sight of the missing limb, easily adhere to the legislative description of "serious bodily injury", as shown above.

It is clear on the face of the record that the jury fully intended to convict Michael John Stitts of the Aggravated Assault charge, based on the evidence presented at trial, and the heading of the jury instruction, i.e. Aggravated Assault. What they did find Michael John Stitts guilty of, based on the elements presented in the jury instructions, was Simple Assault, which is the lesser included Misdemeanor offense of Aggravated Assault. For arguments sake, let's assume the proper element pertaining to Aggravated Assault, i.e. 'serious bodily injury' would have been presented in the jury instruction instead of 'bodily injury'. It may be properly presumed the jury still would have found Petitioner guilty of Aggravated Assault because it is clear that was their intention. However, by being convicted of committing 'serious bodily injury' with the use of a dangerous weapon he was twice put in jeopardy for the same elements required to find him guilty of **CRIMINAL ATTEMPT, TO WIT: FIRST DEGREE MURDER WHERE THE VICTIM SUFFERS SERIOUS BODILY INJURY**, which violated his Fifth Amendment Right to be free of such action by the courts.

In Tennessee, "An accused has a constitutional right to complete and accurate jury instructions on the law, and the court's failure to provide complete and accurate jury

instructions deprives a defendant of the constitutional right to a jury trial." ***Cauthern v State, 145 S.W. 3d 571 (Tenn. Crim. App. 2004***). "In criminal cases, trial courts have the duty, without request, to give proper jury instructions as to the law governing the issues raised by the nature of the proceeding and the evidence introduced at trial." ***State v Hawkins, 406 S.W. 3d 121, 129 (Tenn. 2013***).

This court used the same reasoning in ***Ball v United States, 470 U.S. 856, 105 S. Ct. 1668***, that should be used in this instant case, when it considered whether a felon could conceivably be convicted for both receiving and possessing a firearm. The Court's answer was "NO". This court should find that Petitioner could not be found guilty of Attempted First Degree Murder Which Caused Serious Bodily Injury, by the use of a gun; and at the same time be found guilty of Aggravated Assault, causing serious bodily injury, by use of a gun, without violating Petitioner's Fifth Amendment Constitutional right to be free from twice being put in jeopardy for the same offense. In this case, Petitioner was sentenced to 40 years for the Attempted Murder conviction and an additional fifteen-year consecutive sentence for the Aggravated Assault conviction.

Not with-standing the sufficiency of the convicting evidence, state courts are constrained to consider as plain error whether a defendant's multiple convictions violate double jeopardy protections. See **Tenn.R.App.P. Rule 36(b)** (providing that, "when necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for new trial or assigned as error on appeal.") Dual convictions resulting in the violation of a defendant's protection against double jeopardy constitute 'plain error.' See ***State v Lewis, 958 S.W. 2d 736, 738 (Tenn. 1997***), (applying the plain error doctrine to review whether the defendant's dual convictions violated double-jeopardy principles.) Based on the above precedent, the state appeals court should have sua sponte analyzed the double jeopardy claim for plain error. Instead, they chose to argue that the claim was waived, even though **TN.R.App.P. Rule 36(b)** gave them jurisdiction to analyze the claim as shown above.

In order for a court to find plain error, the following must be met, "**a)** the record must clearly establish what occurred in the trial court; and, b) a clear and unequivocal rule of law must have been breached; and c) a substantial right of the accused must have been adversely affected; and, d) the accused did not waive the issue for tactical reasons; and, e) consideration of the error is necessary to do substantial justice." ***State v Smith, 24 S.W. 3d 274, 282 (Tenn. 2000)***.

Here, the record clearly establishes that Petitioner was convicted of both Attempted First Degree Murder Which Caused Serious Bodily Injury, and Aggravated Assault, which requires 'serious bodily injury to convict upon. **Second**, multiple convictions for the same offense breach a clear and unequivocal rule of law. **Third**, a fundamental constitutional right of Petitioner, his Fifth Amendment right to be free from double-jeopardy, is affected. **Fourth**, the record is devoid of any evidence that Petitioner waived the issue for tactical reasons, i.e. he raised it in his post-conviction brief and in his habeas corpus petition. **Fifth**, Petitioner has shown that consideration of a violation of his double-jeopardy protections is 'necessary to do substantial justice', and no other court has analyzed the denial of that important constitutional right throughout his trial and appellate procedures.

APPLYING THE BLOCKBURGER SAME ELEMENTS TEST

This case involves a multiple description claim because the petitioner has been convicted of multiple offenses under different statutes. In these types of cases, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not." ***Blockburger v United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932)***. See also ***Lannelli v United States, 420 U.S. 770, 785 n. 17, 95 S. Ct. 1284 (1975)***, "The court's application of the test focuses on the statutory elements of the offense. Focusing on the proof necessary to prove the statutory elements of each offense." The Blockburger Test evaluates the statutory elements of the offenses without reference to the proof offered

at trial, so, a court can review a multiple punishment claim without a time-consuming review of the trial transcript.

When the Blockburger same elements test is applied in this instant case, it is clear that the Legislature intended to require 'serious bodily injury', in the Aggravated Assault statute, **(APP. C, Pg ID# 60)** and the jury instructions clearly show that the instructions were flawed, incorrect and incomplete, **(APP. C, Pg ID# 38-39)**. The main required element of 'serious bodily injury' was omitted. This is contrary to the jury instruction standard as required by U.S. Supreme Court precedent. See ***Sandstrom v Montana, 442 U.S. 510, 520, 99 S. Ct. 2450 (1979)*** (relying on ***In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970)***), "It is well settled that jury instructions that relieve the prosecution of proving beyond a reasonable doubt every fact necessary to each element of the offense charges violate a defendant's due process rights and therefore constitute constitutional error."

In this instant case, Petitioner was found guilty of **Attempted First Degree Murder Where The Victim Suffers Serious Bodily Injury**, to which he received a (40) forty year sentence. He was found guilty of **Aggravated Assault** to which he received a (15) fifteen-year sentence. He was found guilty of **Aggravated Burglary**, to which he also received a (15) fifteen-year sentence. He was convicted of **Employing a Firearm During The Commission of a Dangerous Felony**, to which he received a (6) six year sentence. The Aggravated Assault, and Aggravated Burglary convictions were run concurrent to each other, to be served consecutive to the other convictions for a total of (61) sixty-one years.

Petitioner's argument is as follows: **1)** The crime of **Criminal Attempt, To Wit: First Degree Murder Where The Victim Suffers Serious Bodily Injury**, with **§ (a)(3) of T.C.A. § 39-12-101** used as the descriptor in the jury instructions, **(APP. C, Pg ID# 27)**, as shown in the Criminal Attempt statute, **(APP. C, Pg ID# 58)**, so in this case only **T.C.A. 39-13-202 § (a)(2)** and **(3)** apply. In **§ (a)(2)**, the statute states, "A killing of another committed in the perpetration or attempt to perpetrate ***any*** First-Degree Murder, Arson, Robbery, **Burglary**, Theft, Kidnapping, ...

Therefore, because ***any*** attempted or actual burglary is an element of the offense of Attempted First Degree Murder, the state has no authority or jurisdiction to charge a defendant with a crime which is the element of, or lesser included offense of, the higher charge in the indictment, without offending the Double-Jeopardy Clause. ***Brown v Ohio, 432 U.S. 161, 168-69, 97 S. Ct. 2221(1977)***. The court committed plain error when it allowed an overzealous prosecutor to overcharge the Petitioner in this case, and the Aggravated Burglary conviction should be dismissed in the interest of justice and fairness in the judicial process, because he received two convictions for the same action and offense.

The Petitioner also argues that the Aggravated Assault conviction was based on the incomplete, jury instruction that allowed the prosecution to only have to prove beyond a reasonable doubt, the elements of simple assault as shown in the jury instructions, to wit:

See the jury instruction for **Count 1, Criminal Attempt, To W: First Degree Murder Where The Victim Suffers Serious Bodily Injury**, at (**ADD. C, Pg ID# 27**). Where the state was required to prove beyond a reasonable doubt: **1)** That the defendant intended to commit first degree murder; and **2)** that the defendant did some act intending to cause an essential element of First-Degree Murder to occur, and at the time believed the act would cause the element to occur without further action on the defendant's part; and, **3)** that the victim suffered serious bodily injury. The court goes on to describe Intended, Serious Bodily Injury and Bodily Injury. The Grand Jury made sure to inform the court they found the defendant intentionally and knowingly attempted to kill Mary Ann Greer by taking the substantial step of shooting her with a gun, causing serious bodily injury, as shown in the indictment. (**APP. C, Pg ID# 77**)

Now see the jury instruction for **Count 2, Aggravated Assault** at (**APP. C, Pg ID# 38-39**). Where the state was required to prove beyond a reasonable doubt: **1)** that the defendant intentionally or knowingly caused bodily injury to another; and **2)** that the act involved the use or display of a deadly weapon. The court goes on to instruct

the jury on the definitions of deadly weapon, knowingly and intentionally. The Grand Jury made sure to inform the court they found the defendant intentionally and knowingly caused bodily injury to Mary Ann Greer by the use of a deadly weapon. (**APP. C, Pg ID# 78**) Although they cited to **T.C.A. § 39-13-102** as the controlling Tennessee statute for their finding, the 'bodily injury' element was incorrect, because that is an element shown in **T.C.A. § 39-13-101**, which is simple assault, see (**APP. C, Pg ID# 66**). While 'serious bodily injury' is a required element of the Aggravated Assault statute, (**APP. C, Pg ID# 60**) which is the statute named by the Grand Jury in the indictment.

It is obvious from the face of the record that the intent of the Grand Jury was to indict the Petitioner under the named Aggravated Assault statute, (**APP. C, Pg ID# 24**), not the named elements of the lesser included offense of the named statute as shown at, (**APP. C, Pg ID# 24 at Count 2**).

Petitioner has shown that if the court had properly instructed the jury on the Aggravated Assault charge, as is required by the due process of law, the elements the state would have had to prove were the same as those required by the Attempted First-Degree Murder statute as charged in the jury instructions. To clarify, in Count 1, the statute required the state to prove: **1)** that the defendant intended to commit First-Degree Murder; and, **2)** intended to cause an element of first-degree murder and believed the act would cause the element to occur without further action on his part. The jury informed the court this element was the discharging of the gun as shown at (**APP. C, Pg ID# 77**) as is required in the statute as shown at (**APP. C, Pg ID# 56 at (a)(3)**; and finally, **3)** the victim suffered serious bodily injury.

Therein lies the plain error that caused the prejudice to Petitioner. Had the court properly instructed the jury according to the elements that must be proven beyond a reasonable doubt in **T.C.A. § 39-13-102**, as is required by the due process of law, the only two elements that would have been submitted to the jury as required by the statute were **1)** that the defendant knowingly and intentionally caused 'serious bodily injury' to another; and **2)** the act involved the use or display of a deadly weapon. See

(APP. C, Pg ID# 38) showing the incorrect 'bodily injury' element submitted to the jury, and see **(APP. C, Pg ID# 60),** showing the correct statutory elements of knowing and intentionally, causing serious bodily injury to another, involving the use or display of a deadly weapon. Petitioner was already found guilty of these same elements in Count 1. Therefore, by using them again in Count 2 was duplicitous and a clear violation of the Double-Jeopardy Clause of the Fifth Amendment. Remembering that Criminal Attempt only requires the element intentionally or knowingly, so both of these charges contained identical elements to be proven to convict.

Because the jury instructions at issue negated the government's proving 'beyond a reasonable doubt' a fact necessary to an element of the charged offense is subject to harmless error review. See ***Neder v United States, 527 U.S. 1, 8, 119 S. Ct. 1827 (1999***). According to this Supreme Court. "a limited class of fundamental constitutional errors...defy analysis by harmless error standards, because they include defects affecting the framework from which the trial proceeds, rather than simply an error in the trial process itself. These errors necessarily render a trial fundamentally unfair." ***Id. at 7, 8, 119 S. Ct. 1827***.

The erroneous jury instructions at issue in this case should not be subject to harmless-error analysis. This court has established that jury instructions that misdescribe or omit an element of an offense is subject to harmless-error review. **Id.** However, in Sullivan, the court held that jury instructions that consist of a misdescription of the burden of proof, which vitiates all the jury's findings, is a structural error, and as such it could not be subject ot this type of analysis. **Sullivan 508 U.S. at 281, 113 S. Ct. 2078**. The instruction in Sullivan generally misdescribed the reasonable doubt standard, as opposed to misdescribing the burden of proof for just one element of the offense. However, inasmuch as the constitutionally erroneous jury instructions in this case involved the only element at issue in Petitioner's trial, and one of only two elements of the offense itself-the misdescription of the burden of proof in this case has the same general effect as the general misdescription in the

Sullivan case. Because Burglary is listed as one of the crimes that is associated with first degree murder in **T.C. A. § 39-13-202**, and, 'serious bodily injury' the essential fact to the element at issue in the Aggravated Assault charge in this case, the erroneous jury instructions do vitiate all the jury's findings. As to the Burglary charge, the double jeopardy prohibition against multiple punishments functions to prevent prosecutors and courts from exceeding the punishment legislatively authorized. See ***Albernaz, 450 U.S. at 344, 101 S. Ct. 1137***. As a Canon of statutory construction, the U.S. Supreme Court presumes "that where two statutory provisions proscribe the 'same offense,' a legislature does not intend to impose two punishments for that offense." ***Rutledge v United States, 517 U.S. 292, 297, 116 S. Ct. 1241, (1996)***.

To sum it up, Petitioner was entitled to an instruction informing the jury of the elements of 'serious bodily injury', but the jury instructions did not include that element, it was instead, replaced with a 'bodily injury' element. Accordingly, the omission had the effect of diminishing the government's burden of proof. Consideration of the error is necessary to do substantial justice because the error affected a 'substantial right' of Petitioner, namely the "right to the proof of every element of the offense," for the Aggravated Assault charge. Also, the Double-Jeopardy clause of the United States Constitution provides that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb." **U.S. Const. Amend. V**. Similarly under the Tennessee Constitution under **Article 1 § 10**.

Criminal Attempt, To Wit: First Degree Murder Where the Victim Suffers Serious Bodily Injury as the jury was instructed, requires a defendant to have **1)** intentionally or knowingly; **2)** caused 'serious bodily injury'; **3)** by discharging a gun, as charged in the indictment. While **Aggravated Assault**, which was not properly instructed in the jury instruction requires a defendant to have **1)** intentionally or knowingly; **2)** caused 'serious bodily injury'; **3)** by discharging a gun, as shown in the indictment and elements of **T.C.A. § 39-13-102. Aggravated Assault**.

The Supreme Court in ***Neder, 527 U.S. at 15***, explained that, for a constitutional

error to be harmless, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Petitioner argues that had the jury been properly instructed it would have had to have found that he was guilty of 'serious bodily injury' to the victim by the 'use of a deadly weapon'. Therefore, it seems impossible that a jury instruction that omitted the higher burden of 'serious bodily injury' did not contribute to the verdict. Because the jury instruction shifted the government's burden of proof to Petitioner as to a fact going to the main element at issue in his duplicitous charges, the errors are structural and therefore mandate a remand for resentencing at the very least.

U.S. Supreme Court Shows Claim Was Forfeited Not Waived

This court has previously rejected a threshold Waiver argument through its holdings in ***Menna v New York, 423 U.S. 61, 96 S. Ct. 241 (1975***), that a "prisoner does not waive a claim that-judged on its face-is one the state may not constitutionally prosecute." See ***Broce, 488 U.S. at 575, 109 S. Ct. 757, (***quoting ***Menna, Id***.), "The New York court of Appeals concluded that ***Menna*** had waived his double jeopardy claim. We reversed, citing ***Blackledge*** for the proposition that 'where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a plea of guilty." ***423 U.S. at 62, 96 S. Ct. at 242***.

This court rejected the waiver of a double jeopardy claim in the case of ***Blackledge v Perry, 417 U.S. 21, 94 S. Ct. 2098 (1974***), where this court held, "the potential for prosecutorial vindictiveness raised sufficiently serious due process concerns to require a rule forbidding the state to bring more serious charges against defendants who have the due process right not to be haled into a court at all upon a duplicitous felony charge. The very initiation of the proceedings against him...thus operated to deny him due process of law. ***417 U.S. at 30-31, 94 S. Ct. at 2104***." In both ***Menna*** and ***Blackledge***, as in this case, the determination that the case could not go forward

should have been made by the presiding judge on the existing record. The constitutional infirmity in the proceedings lay in the state's power to bring any indictment at all. In ***Menna***, as here, the indictment was facially duplicative, and could not conceivably be construed to extend beyond the charged offenses.

In this instant case, The Court of Appeals acknowledges the double-jeopardy argument made by the Petitioner at **(APP. A, Pg ID# Pg 38A)**, and is confirmed in Petitioner's post-conviction brief at **(APP. B, Pg ID# Pg 22-23B)**. Accordingly, Petitioner shows that he could not waive a double-jeopardy challenge to charges that, judged from the face of the indictment and the record existing at the time, the charges are such that the government could not constitutionally prosecute under the double-jeopardy clause of the U.S. Constitution, or **Article 1 § 10** of the Tennessee Constitution. ***United States v Smith, 532 F. 3d 1125 (11th Cir. 2008)***; ***United States v Garcia-Valenzuela, 232 F. 3d 1003, 1007 n. 2 (9th Cir. 2000)***; ***United States v Ragland, 3 Fed. App'x 279, 284 n. 3 (6th Cir. 2001)***; ***United States v Grant, 114 F. 3d 323, 329 (1st Cir. 1997)***; ***Sellers v Morris, 840 F. 2d 352 (6th Cir. 1988)***. As explained below, Petitioner's charges for attempted first degree murder, aggravated assault, aggravated burglary, and employing a firearm during the commission of a dangerous felony, are just the type of charges where the reasoning in *Menna* logically applies to separate charges for the same criminal conduct. Petitioner argues that no matter how validly his factual guilt was established, the charges, judged on their face, are those that the state may not constitutionally prosecute. Therefore, there is no logical basis for not applying the ***Menna*** analysis to simultaneous prosecutions.

The U.S. Supreme Court distinguished ***Menna***, and cases from sister circuits have accordingly declined to find a double-jeopardy waiver in cases where it was not necessary to look beyond the indictments to see whether the defendant received multiple sentences for the same crime. See ***Smith, 532 F. 3d at 1127-28; Grant, 114 F. 3d at 328-29***. The Eleventh Circuit in Smith relied on a prior holding in ***United States v Kaiser, 893 F. 2d 1300-1302 n. 2 (11th Cir. 1990)***. The Sixth Circuit itself

reasoned in ***United States v Ragland***, albeit unpublished, supporting rejection of the waiver argument in these types of cases. In **Ragland**, the government argues that the defendant waived the double-jeopardy challenge by failing to properly raise it. The court rules against that argument, holding, "The defendant did not waive the double-jeopardy challenge, since the court permits review of those cases in which the multiplicity of charges is apparent in the record and resulted in multiple sentences" and because, "the Supreme Court has suggested and many circuits have found double-jeopardy issues cannot be waived when predicated on multiple punishments for the same offense, and where as here, the issues appear on the face of the indictment and can be resolved without an additional evidentiary hearing." ***Id. citing Broce, 488 U.S. at 575-76, 109 S. Ct. 757***.

The Sixth Circuit went on to hold that waiver had not been shown in ***Ragland, Id***. and they were not limited to plain error review, finding that "the double-jeopardy challenge was forfeited, rather than waived, and was subject to plain error review. The court relied on their application of plain error review in ***United States v Branham, 97 F. 3d 835, 841-42 (6th Cir. 1996)***, which held that a double-jeopardy claim premised on multiplicity of punishments was forfeited (not waived) when the claim had not been properly raised with the state court. In the present case, in contrast, Petitioner made arguments that support a double-jeopardy claim, by relying on the double jeopardy clause of the U.S. Constitution, in both his post-conviction and habeas corpus petitions. He argued the premise that there was only one crime, and challenged the concept of how you can attempt to kill someone, without assaulting them, and then be charged with using a weapon during the attempted murder and assault of the victim. Petitioner has shown the elements of the crimes are the same in the statutes, passing the Blockburger Test. Therefore, this court is not intruding on the finality and comity interests of the state court proceedings when it conducts a plain error review of the double-jeopardy claim. The Fifth Amendment is clear on the subject of double-jeopardy, stating, "....nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Sixth Circuit Court of Appeals held at (**APP. A, Pg ID# 7A**), "This claim is procedurally defaulted. He seeks to excuse his procedural default by showing 'cause and prejudice. Petitioner seems to be seeking relief under Martinez." The Appellate Court erroneously applies ***Abdur-Rahman v Carpenter, 805 F. 3d 710, 714 (6th Cir. 2015***), "declining to apply Martinez to claims of Brady violations, prosecutorial misconduct, trial errors, ineffective assistance of appellate counsel, and cumulative error. The Sixth Circuit has also concluded that Martinez does not apply when the federal claim was defaulted in state collateral appellate proceedings." Citing ***Middlebrooks, 843 F. 3d at 1139***.

These findings have resulted in a decision that was contrary to, and is an 'unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, leaving this finding in direct contravention to **28 U.S.C.A. 28 § 2254(d)(1)** and **AEDPA**. The Sixth Circuit Court of Appeals confirms at (**APP. A, Pg ID# 38-39A**) that the U.S. Supreme Court held that ***Martinez, Id.*** "applies to the ineffective assistance of post-conviction counsel as cause for a procedural default of a claim of ineffective assistance of trial counsel. ***566 U.S. at 9***. Martinez also does not apply where, as Petitioner claims, the procedural default occurred in his post-conviction appeal due to the alleged ineffective assistance of post-conviction appellate counsel." **(Id. at Pg ID# 39A)**

The record clearly shows that Petitioner brought his Double Jeopardy claim under both ineffective assistance of trial counsel and trial court error in his Post-Conviction petition, see (**APP. B, Pg ID # 22B at *1**), "Petitioner asserts that his conviction and sentence are constitutionally infirm, resulting from the fact that petitioner suffered from violations of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Due Process provisions of the Tennessee Constitution in that his conviction was the result of ineffective assistance of legal counsel." Petitioner's underlying defaulted claim is that his convictions violate the Double-Jeopardy Clause because his trial counsel was ineffective when he failed to bring this constitutional violation to the court's attention at trial or on direct appeal. Petitioner testified to

such during his Post-Conviction evidentiary hearing at **(APP. A, Pg ID# 49-52A)**

Up to this point in Tennessee, the accused has the right to the effective assistance of counsel at trial and direct appeal as provided by the U.S Supreme Court in ***Strickland v Washington, 466 U.S. 668, 104 S. Ct. 2052***, and the Tennessee Supreme Court under ***Baxter v Rose, 523 S.W. 2d 930, (TN 1975)***. See also **(APP. B, Pg ID# 18B,)** "Petitioner submits his conviction was obtained in violation of the 5th, 6th and 14th Amendments in that he was denied the effective assistance of counsel. Thus, Martinez clearly applies in this instance in trial counsel's failure to move to dismiss the duplicative charges in the indictment before trial, and direct appeal counsel failing to raise the issue in the direct appeal brief.

MARTINEZ HOLDING IN CONFLICT WITH SISTER CIRCUITS

The Tennessee Federal District Court at Jackson, opined in their denial of habeas relief that, "Petitioner raised his double-jeopardy claim in his post-conviction petition. He did not however, raise it before the TCCA in his post-conviction appeal. Petitioner only argued his claims of ineffective assistance of counsel. **(APP. A, Pg ID# 38A)**. Petitioner no longer has an available state court remedy to properly exhaust his claim, it is procedurally defaulted. (Id. **Pg ID# 39A**).

The Sixth Circuit Court of Appeals opined, "Stitts argues that his default should be excused because post-conviction counsel was ineffective for failing to raise the issues on appeal. Although the failure of post-conviction counsel to raise an issue can in some circumstances excuse a default, see ***Martinez v Ryan, 566 U.S. 1,14 (2012)***, that principle does not extend beyond the trial court's initial post-conviction review. Thus, alleged ineffective assistance on appeal from the denial of the post-conviction petition cannot serve as cause for a procedural default." This opinion is in direct contradiction to the U.S. Supreme Court, the Tennessee Federal District Court, and all of her sister circuits on this issue.

Keeping in mind the Tennessee Federal District Court conceded that Petitioner

raised the double-jeopardy issue in both his initial post-conviction petition, and again in his initial habeas corpus petition, he is not at fault for not adhering to the procedural processes of the State of Tennessee. In Tennessee, a prisoner has to file a timely post-conviction petition, with all constitutional claims he wishes to raise, within one-year of the state court decision on his direct appeal, or denial of his Rule 11 petition. **T.C.A. § 40-30-102**. After a Petitioner files his initial petition, without the aide of counsel, **TN.Sup.Ct. Rule 13 § 6(c)**, requires "counsel to amend the petition if necessary, and **TN.Sup.Ct. Rule 14,** requires **counsel to** file an appeal on behalf of an indigent Petitioner, unless a motion is filed with the trial court to withdraw from representation within the 14-day time period to file the appeal from denial of post-conviction relief. This shows the holdings of the state and federal court that Petitioner has no right to the assistance of post-conviction counsel on appeal from the denial of his post-conviction petition for relief is erroneous. Because counsel did not move to withdraw himself from appellate representation, and the issues complained of by Petitioner were, in fact, ineffective assistance of trial counsel during the trial and direct appeal as of right from his initial conviction.

The sister circuits, as well as this court, are in disagreement with the Sixth Circuit on whether a Petitioner has the right to raise ineffective assistance of trial counsel on appeal, under the U.S. Supreme Court precedent in ***Martinez***, as reiterated in ***Shinn v Ramirez, 142 S. Ct. 1718 at *43***, "A federal habeas court may not hold an evidentiary hearing or consider new evidence to assess cause and prejudice under our previous holding in ***Martinez***."

The U.S. District Court, Mass., in Martinez v Alves, 2024 WL 4349239, held, "A habeas Petitioner must show errors of trial counsel worked to his disadvantage, infecting the entire trial with error of constitutional dimension."

The Second Circuit in the case of ***Fellows v Baker, 2021 WL 4200875 (2nd Cir. 2021***), the Supreme Court has recognized a narrow exception to the rule of Ineffective Assistance of post-conviction counsel. "Where State law requires Ineffective assistance of Trial Counsel claims to be brought in initial review collateral

proceedings (rather than on direct appeal), or channels such claims into collateral proceedings, a procedural default will not bar a federal habeas court from hearing a substantial claim of the Ineffective Assistance of Trial Counsel. (Citing ***Arthur v Thomas, 739 F. 3d 611, 630 (11th Cir. 2014)***, "Martinez Rule explicitly relates to excusing a procedural default of Ineffective Assistance of trial counsel claims, on post-conviction appeal."

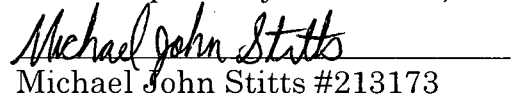
The case of ***Richardson v Superintendent Coal Township SCI, 905 F. 3d 750 (3rd Cir. 2021)***, held, "Prisoner had cause for Procedural Default of 6th Amendment claim where post-conviction counsel was ineffective for failing to rebut ineffective assistance of trial counsel on appeal."

Mahdi v Sterling, 20 F. 4th 846 (4th Cir. 2021), "Supreme Court created narrow exception to overcome procedural default under Martinez v Ryan, 132 S. Ct. 1309, applicable to ineffective assistance of trial counsel by post-conviction counsel on appeal." ***Mahood v Ames, 2024 WL 1339526 (4th Cir. 2024)***, "Cause for procedural default exists where something external to Petitioner, something not fairly attributable to him impeded his efforts to comply with a procedural rule on post-conviction appeal."

Based on the evidence presented above, in concert with, the split in the circuits shown, Petitioner suffered a substantial violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, when he was subjected to double-jeopardy of offenses that increased his sentence by 15 years, and the ineffective assistance of trial counsel, that his post-conviction counsel failed to raise the double-jeopardy issues on appeal."

All premises considered, Petitioner is entitled to the relief sought from this court.

Respectfully Submitted,



Michael John Stitts #213173
Northeast Correctional Complex
5249 Hwy 67 W
Mountain City, TN 37683-5000