IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,646-01

EX PARTE CHRISTOPHER ESTRADA, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 13-CR-2096-G IN THE 319TH DISTRICT COURT
FROM NUECES COUNTY**

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

DISSENTING OPINION

By summarily granting relief to Applicant on double jeopardy grounds, this Court overlooks the fact that only scant analysis has been afforded the issue of whether such a claim can even be raised in a post-conviction application for writ of habeas corpus brought under Article 11.07 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 11.07. The more appropriate disposition of this case, it seems to me, would be to remand it to the convicting court for a response from trial counsel to Applicant's alternative claim that counsel was constitutionally ineffective for failing to preserve Applicant's double jeopardy claim at trial. That would be a better alternative, I believe, to the Court's decision today,

which summarily grants relief on substantive double jeopardy grounds. The Court should at the very least undertake a more exacting analysis of why double jeopardy is actually cognizable in a post-conviction application for writ of habeas corpus—something the Court still has not yet done.

The Tension Between *Townsend* and *Gonzalez*

In *Ex parte Townsend,* this Court attempted to narrow the scope of cognizability in the post-conviction habeas context by reaffirming "that when a defendant has an adequate remedy at law, the merits of his claim may not be reviewed on an application for a writ of habeas corpus." 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2009). The conclusion in *Townsend* followed from our holding in *Ex parte Banks* that "[t]he Great Writ should not be used in matters that should have been raised on appeal." *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). But we did not intend for *Townsend* to be applied so sweepingly as to bar *all* claims from post-conviction habeas review simply because they could have been brought on appeal. This we made clear in *Ex parte Moss*, holding that a jurisdictional claim, which can be brought on appeal, is nevertheless also cognizable even when raised for the first time in habeas. *See Ex parte Marascio* 471 S.W.3d 832, 836 (Tex. Crim. App. 2015) (Keasler, J., concurring) (citing *Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014), for the proposition that "this Court held that the merits of Moss' claim could be entertained irrespective of *Townsend'*s broad holding" while "[n]oting that jurisdiction is a systemic requirement that operates independent of litigants' wishes[.]"). The "operates independent

of litigants' wishes" language we used in *Moss* essentially describes, I believe, the category-one rights mentioned in *Marin v. State*. 851 S.W.275 (Tex. Crim. App. 1993). *Moss* therefore indicates that *some* constitutional rights—specifically category-one *Marin* rights—are so important that we will entertain them on the merits in post-conviction habeas, irrespective of whether they could have been asserted on appeal. But is the right against double jeopardy one of those rights? More to the point, have we ever adequately addressed and answered that question?

In *Gonzalez v. State*, we held that double jeopardy claims could be forfeited by procedural default—simply by failing to make an objection at trial. 8 S.W.3d 640, 642 (Tex. Crim. App. 2000). Because of the "fundamental" nature of double jeopardy protections, however, we created an exception: A double jeopardy claim may be raised for the first time on appeal if two conditions are met: 1) the facts show a double jeopardy violation is apparent on the face of the record; and 2) enforcement of the usual rules of procedural default serves no legitimate state interest. *Id.* at 643. This Court also mentioned, in dicta,[1] that a double jeopardy claim may also be cognizable on post-conviction habeas review so long as the same two conditions are met. *Id.* But we have not stopped there. We later held that a successive-prosecution double jeopardy claim may be brought in post-conviction habeas even in a *subsequent* post-conviction writ application. *Ex parte Knipp* 236 S.W.3d 214 (Tex. Crim. App. 2007). Then, we held that such claims would be cognizable in an original application

[1] *Gonzalez* was a case on petition for discretionary review and therefore does not have any precedential value with regard to what is cognizable in post-conviction habeas.

even when an applicant failed to raise the issue at trial. *Ex parte Denton*, 399 S.W.3d 540 (Tex. Crim. App. 2013). But this Court has never placed the right against double jeopardy in any one of the *Marin* categories nor have we explained why double jeopardy claims—like jurisdictional claims under *Moss*—are of such importance as to escape the bar of *Townsend*.

In *Ex parte Marascio*, Judge Richardson's concurring opinion cited *Ex parte Knipp* and *Ex parte Denton* for the proposition that double jeopardy claims may be brought in post-conviction habeas. 471 S.W.3d 832, 843-44 (Tex. Crim. App. 2015) (Richardson, J., concurring). Judge Richardson correctly noted that, in *Knipp*, this Court "unanimously held that applicant raised a meritorious double jeopardy claim in his 11.07 writ application[,]" and that, "[e]ven though such claim was first raised in a subsequent application for a writ of habeas corpus, and thus would have been procedurally barred from review under Article 11.07, Sec.4(a), we determined that such claim was cognizable, and we granted the applicant relief." *Id.* (citing *Knipp* 236 S.W.3d at 216 n. 3). Judge Richardson also accurately observed that, in *Denton*, this court held that a double jeopardy violation "could be remedied in a habeas proceeding . . . even though [the applicant] failed to raise such claim in the trial court." *Id*. (citing *Denton*, 399 S.W.3d at 545).

Knipp and *Denton* are indeed cases that treat double jeopardy claims as cognizable in post-conviction habeas. A further examination of those two cases, however, reveals that we have conducted surprisingly little analysis on the issue. In *Knipp*, this Court seemed to assume without analysis that "applicant raise[d] a meritorious double-jeopardy claim in a

subsequent application for a writ of habeas corpus filed pursuant to Article 11.07 of the Texas Code of Criminal Procedure," by establishing "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." 236 S.W.3d at 214, 217. *Knipp*, however, did not endeavor to explain why a double-jeopardy claim is not subject to the *Townsend* bar nor whether it is a category-one *Marin* right. *See id.* Instead, we granted post-conviction habeas corpus relief on double jeopardy grounds without a proper analysis of whether such relief is consistent with our habeas jurisprudence. I propose that we *Knipp* that problem in the bud.

Denton similarly failed to provide much analysis on the issue. First, the Court simply declared that "we have previously addressed such [double-jeopardy] claims via writ of habeas corpus application." 399 S.W.3d at 544 (citing *Ex parte Cavazos*, 203 S.W.3d 333 (Tex. Crim. App. 2006), *Ex parte Hawkins*, 6 S.W.3d 554 (Tex. Crim. App. 1999), and *Ex parte Ervin*, 991 S.W.2d 804 (Tex. Crim. App. 1999)), for the proposition that this Court has previously treated double jeopardy claims as cognizable in post-conviction habeas).[2] The Court then justified the recognition of double jeopardy claims in post-conviction habeas with the conclusory statement that, "[b]ecause of the fundamental nature of the double-jeopardy protections, a double-jeopardy claim may be raised for the first time on appeal or on collateral attack[.]" *Id.* But, as in *Knipp*, nowhere in *Denton* does the Court discuss why such

[2] These cases do not explicitly address the issue of double jeopardy cognizability in post-conviction habeas. Rather, they all appear to presume, without explanation, that the right is cognizable by simply addressing the merits of the claim.

double jeopardy claims should be regarded as cognizable in post-conviction habeas proceedings when they could have been raised on appeal.

Furthermore, there appears to be a tension between *Townsend*'s categorical bar in the post-conviction habeas context against claims that could have been brought on appeal and the notion in *Gonzalez* that double-jeopardy claims can be brought for the first time in habeas so long as the two-prong *Gonzalez* exception is met. *Gonzalez v. State*, 8 S.W.3d at 643. Unfortunately, this Court has merely glossed over this tension. *Marascio*, 471 S.W.3d at 850 (Yeary, J., concurring). I believe that we need further analysis of the issue before we grant relief on the double jeopardy ground in this case.

Is Double Jeopardy Cognizable in Post-Conviction Habeas?

The correct approach to determining post-conviction habeas cognizability of a double jeopardy claim, in my view, is essentially the one Judge Keasler laid out in his concurring opinion in *Marascio.* As Judge Keasler's concurring opinion in *Marascio* points out, a double-jeopardy right can be affirmatively waived. 471 S.W.3d at 838-39 (Keasler, J., concurring) (citing *Ex parte Birdwell*, 7 S.W.3d 160 (Tex. Crim. App. 1999)). Because it can be waived, it cannot be a category-one *Marin* right. But double jeopardy rights are still "prominent fixtures within our criminal-justice system[,]" and "[t]he United States Supreme Court has consistently noted that, with its foundation in common law, double-jeopardy rights are deeply ingrained in our system of jurisprudence." 471 S.W.3d at 839-40 (Keasler, J., concurring). For this reason, I believe double jeopardy more appropriately belongs in *Marin*'s

second category of waiver-only rights. That means it can ordinarily be raised for the first time on appeal as long as it has not been affirmatively waived, even if the defendant took no action to preserve it in the trial court. But it should not ordinarily be regarded as cognizable in a post-conviction application for writ of habeas corpus—unless, perhaps, it could not have been raised on direct appeal because a record was not made to substantiate the claim.[3]

Even if the Court today disagrees with the outcome of this categorical approach to cognizability, it should at least explain why. Unfortunately, we have so far simply assumed that, if a right is "fundamental," it is cognizable in post-conviction habeas even if it is a record-based claim. We have assumed that double jeopardy claims, which are in many instances claims that can be demonstrated from an examination of the appellate record, are still cognizable in post-conviction habeas with little analysis as to why they should escape "*Townsend's* gatekeeping-like holding." *Id.* at 836.

I believe the issue of double jeopardy cognizability in post-conviction habeas should be more fully explained in the context of *Townsend*, *Moss*, and *Marin*. Even if we do not reach that issue, I would still consider granting relief in this case on the ground of ineffective

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[3] I certainly do not rule out the possibility that a claim of double jeopardy that is *not* based on the appellate record could be brought in post-conviction habeas corpus proceedings. There may well be scenarios in which a claim of double jeopardy might exist although the facts that would establish it were not developed before appeal. In that case, an applicant should arguably be given the opportunity to allege and prove those facts in post-conviction proceedings, just as he would be allowed to allege and prove the quintessentially non-record-based constitutional claims of ineffective assistance of counsel or a violation under *Brady v. Maryland*, 373 U.S. 83 (1963). In the instant case, however, the appellate record appears to have supported Applicant's double jeopardy claim on appeal.

assistance of counsel, which Applicant has raised alternatively.[4] Typically, however, before we grant such relief, we give counsel a chance to respond to the allegation of ineffective assistance of counsel. Having received no such response at this point, I would remand to the trial court for further findings of fact and ask for counsel's response to the allegation of ineffective assistance of counsel.

Because the Court grants summary relief based on Applicant's double jeopardy claim, I respectfully dissent.

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[4] *See Hobbs v. State*, 175 S.W.3d 777, 779 (Tex. Crim. App. 2005) (explaining that, for purposes of the charge of evading arrest, different means of locomotion are not separate "allowable units of prosecution" in a double jeopardy analysis). Applicant was convicted in 2013, many years after we decided *Hobbs*. "It is evident that a criminal defense lawyer must have a firm command of the facts of the case as well as the governing law before he can render reasonably effective assistance of counsel." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990).