



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

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

EX PARTE KEITH MICHAEL ST. AUBIN, Applicant

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

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

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

conviction, and its attendant life sentence, in place. That is also what the trial court recommends.

But we are not granting Applicant relief. Instead, we reject the State's waiver of procedural default.¹ Then, we treat Applicant's double-jeopardy claim as punishment error even though the constitutional error occurred when Applicant was convicted rather than when he was punished. *Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009) ("A double jeopardy violation occurs even when, as in the case before us, the sentences are concurrent and the impermissible conviction does not result in a greater sentence."). We should just do what the State and the trial court ask us to do; reform the judgment to reflect a single conviction for murder with a life sentence. *Bigon v. State*, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008) ("When a defendant is subjected to multiple punishments for the same conduct, the remedy is to affirm the conviction for the most serious offense and vacate the other convictions."). Because we do not, I dissent.

¹ In its brief, the State agreed that denying relief in this case would serve no legitimate state interests. In *Ex parte Knipp*, we construed a similar concession by the State as a waiver of procedural default. 236 S.W.3d 214, 216 n. 3 (Tex. Crim. App. 2007) ("[T]he State has indicated its willingness to forego its substantial interest in the finality of applicant's plea, and it would serve no legitimate state interests to enforce usual rules of procedural default.").

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