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Case Name: Ex parte Eric Reed Marascio

- OFFENSE: Post-Conviction Habeas Corpus (Bail Jumping & Failure to Appear)
- COUNTY: Collin
- CCA. CASE No. WR-80,939-01 DATE OF OPINION: October 7, 2015
- DISPOSITION: Habeas Corpus Relief Denied
- OPINION: Per Curiam VOTE: 1-5-3
- TRIAL COURT: 380th D/C; Hon.
- LAWYERS: John Schomburger (Defense); John Rolater (State)

61 Challenges to Prosecution / Double Jeopardy: Applicant was convicted of three charges of felony Bail Jumping and Failure to Appear and was sentenced to eight years' imprisonment for each charge, to run concurrently. In these applications for writ of habeas corpus under Article 11.07, C.Cr.P., Applicant contends that these multiple convictions violate the constitutional prohibition against double jeopardy. The Court filed and set the applications to determine "several issues associated with Applicant's double-jeopardy claims." Specifically: 1. Whether the double jeopardy issue was preserved by trial counsel's plea of prior jeopardy; 2. Whether double jeopardy is available as a free-standing claim on post-conviction habeas review where the issue was preserved at trial but not raised on direct appeal; and 3. Whether convictions for multiple charges of failure to appear arising from a single failure to appear constitute double jeopardy.

Holding: We now conclude that Applicant is not entitled to relief. Relief is denied.

Concurring / Dissenting Opinions: Judge Keasler concurred, agreeing with the denial of relief, but arguing the denial should be based on Ex parte Townsend, 137 S.W.3d 791 (Tex.Cr.App. 2004)(see , Vol. 12, No. 24; 06/21/2004), "and its underlying logic and intent," because the double jeopardy claim could have been raised on direct appeal. He was joined by Judge Hervey and Judge Yeary, and asserted that the Court's "habeas corpus jurisprudence lacks a consistent theory of cognizability -- a term this Court understands to mean which claims are entitled to merits review." Judge Richardson also concurred. He was joined by Judge Newell and argued that the claim is not cognizable now because "a double jeopardy violation is clearly apparent from the face of the record." Judge Yeary filed an additional concurring opinion. He was joined by Judge Keasler, and argued the Court's opinion "does not resolve the tension" between Gonzalez v. State, 8

S.W.3d 640 (Tex.Cr.App. 2000)(see ☙, Vol. 8, No. 1; 01/10/2000), and Ex parte Townsend -- "especially in light of last year's opinion in Ex parte Moss, 446 S.W.3d 786 (Tex.Cr.App. 2014)(see ☙, Vol. 22, No. 45; 11/10/2014). Judge Meyers filed a dissenting opinion, arguing that, "because the per curiam opinion does not indicate on what basis we are denying relief, it is impossible to know what rationale or legal theory was applied in order to conclude that Applicant is not entitled to relief. His evaluation of the double jeopardy claim "is that it had merit and it is a shame that the per curiam opinion is not telling us on what legal or procedural basis relief is being denied." Judge Johnson also dissented arguing that the Court, "at least in this case," has "reverted" to the days when "magic words" were required to "accomplish a legal act." She would have the Court address, on its own motion, "a claim of ineffective assistance as to appellate counsel for failing to appeal the preserved claim of constitutional error that subjected applicant to double jeopardy. Further, I would hold that a single act of failure to appear is subject to a single punishment, no matter how many individual charges are pending." Judge Alcala filed a separate dissenting opinion. She was joined by Judge Johnson and argued that the double jeopardy claims "should not be rejected on the basis of procedural default." She concluded that the application should be granted.