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COURT OF CRIMINAL APPEALS
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PD-0365-16 & PD-0366-16

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

MICHAEL JOSEPH BIEN

Appellant,

v.

THE STATE OF TEXAS

Appellee.

STATE'S SUBSEQUENT PETITION FOR DISCRETIONARY REVIEW

ELEVENTH COURT OF APPEALS
CAUSE NOS. 11-14-00057-CR & 11-14-00058-CR

35TH JUDICIAL DISTRICT COURT CAUSE NOS. CR22319 & CR22320

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ORAL ARGUMENT REQUESTED

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Pursuant to Rule 74(a) of the Texas Rules of Appellate Procedure the State lists the names and addresses of all parties to the Trial Courts final judgment and their trial counsel in the trial court.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument be granted in this case. Double jeopardy issues arise frequently for appellate review. Additionally, a determination of the gravamen of an offense has ramifications beyond just double jeopardy cases to areas such as jury charges, jury unanimity and culpable mental states.

In light of the far-reaching consequences of a decision in this case, the State believes that oral argument would be beneficial.

STATEMENT OF THE CASE

Appellant met with an undercover officer posing as a "hitman" on two occasions to plan out the murder of Koh Box and to plan making the hit look like a robbery gone wrong. R.R. Vol. 5, pp. 222-26; R.R. Vol. 6, pp. 32-33, 39-40; State's Exhibits 18, 22. During the second meeting, Appellant not only planned out the murder with the "hitman," but also paid the "hitman" to carry out the murder. State's Exhibit 22.

Appellant was convicted for both criminal solicitation and attempted capital murder by a jury and was sentenced to life in prison on both cases. C.R. p. 81, 162 – CR22319; C.R. p. 162, 181 – CR22320; R.R. Vol. 11, pp. 1, 183. The Eleventh Court of Appeals found that both convictions violated Appellant's double jeopardy rights and reversed the conviction for attempted capital murder. *Bien v. State*, ---

S.W.3d ---, 2016 WL 859378 at *4, 7 (Tex. App.—Eastland March 3, 2016, pet. filed).

STATEMENT OF PROCEDURAL HISTORY

The Eleventh Court of Appeals issued its decision on March 3, 2016. No motions for rehearing were filed in the court of appeals.

Appellant filed a Petition for Discretionary Review on May 4, 2016 asking this Court to review the Eleventh Court of Appeals' determination of which offense constituted the most serious offense.

The State files this subsequent petition joining in Appellant's request for discretionary review by asking that this Court consider (1) whether an appellate court should determine the most serious offense, and (2) if so, how that determination should be made.

The State also asks that this Court grant discretionary review of the court of appeal's determination that double jeopardy was violated as the holding in this case by the court of appeals has no reasoned basis and has implications that impact several significant areas of law.

GROUNDS FOR REVIEW

1. Did the Eleventh Court of Appeals err by holding that convictions for criminal solicitation and attempted capital murder violate double jeopardy when significant factors indicate a legislative intent to punish

these offenses as separate steps in the continuum of a criminal transaction?

2. Assuming a double jeopardy violation, who should determine what the most serious offense is? If this Court answers that question by deciding that a court of appeals should make that determination, what role should the parole consequences of Article 42.12 §3g have in that analysis when the sentences, fine and restitution are all identical?

ARGUMENT – ISSUE ONE

The Eleventh Court of Appeals erred in concluding that the legislature did not intend for Appellant to receive separate convictions and punishments for his act of soliciting the undercover officer to kill Koh Box and for his act of actually paying the undercover officer to kill Box.

It is axiomatic that the legislature has the power and vested authority to establish and define crimes. *Phillips v. State,* 787 S.W.2d 391, 395 (Tex. Crim. App. 1990) (en banc). In fact, few, if any, limitations are imposed by the Double Jeopardy clause on the legislative power to define offenses. *Id.*

Furthermore, there is nothing in the Constitution which prevents a legislature from punishing separately each step leading to the consummation of a transaction which it has the power to prohibit and punishing also the completed transaction. *Garrett v. U.S.*, 471 U.S. 773, 779 (1985) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 303-04 (1932)) (emphasis omitted). The Supreme Court has steadfastly refused to adopt a "single transaction" view of the Double Jeopardy Clause. *Id.* at 790.

The limitations imposed by the double jeopardy clause are instead on the court assessing punishment. *See Ex parte Benson,* 459 S.W.3d 67, 71 (Tex. Crim. App. 2015) ("the double-jeopardy clause prevents a *court* from…."). This limitation prohibits courts from prescribing greater punishment than the legislature intended. *Id.*

Thus, the question of whether a person may be punished for the same criminal act under two distinct statutes is a matter of legislative intent. *Price v. State,* 434 S.W.3d 601, 609 (Tex. Crim. App. 2014).

To determine whether the legislature would have intended a particular course of conduct to be subject to multiple punishments under two separate statutory provisions, a reviewing court should look first to the statutory language. *Id.*

The legislature's intent to view criminal solicitation and attempted capital murder as two different steps along the continuum of inchoate offenses can be seen clearly in the statutory language where the offenses are located.

The legislature's codification of offenses in a single statute or in two distinct statutory provisions may assist in ascertaining the legislature's intent. *Ex parte Benson,* 459 S.W.3d at 71. The codification of offenses in two distinct statutory provisions is, by itself, some indication of a legislative intent to impose multiple punishments. *Id.*

Appellant's convictions arose for criminal solicitation under Section 15.03 of the Penal Code and for attempted capital murder under a combination of Sections 15.01 and 19.03 of the Penal Code. Therefore, there is at least some indication of a legislative intent to impose multiple punishments based upon the different statutes at issue in this case.

Additionally, both the criminal solicitation statute and the criminal attempt statute provide that it is no defense to prosecution that the underlying offense was actually committed. Tex. Pen. Code §15.01(c) & 15.03(c)(4) (West, Westlaw through Sess. 2015). A similar provision has been held to be a clear indication of legislative intent to allow multiple punishments for the same offense. *See Littrell v. State*, 271 S.W.3d 273, 278-79 (Tex. Crim. App. 2008); *Garza v. State*, 213 S.W.3d 338, 352 (Tex. Crim. App. 2007). Therefore, the text of the statutes themselves also provide some support for the conclusion that the legislature intended multiple punishments for different steps along the continuum.

In addition to the actual text of the statute, when two distinct statutory provisions are at issue, the offenses must be considered the same under both an "elements" analysis and a "units" analysis for a double jeopardy violation to occur. *Ex parte Benson*, 459 S.W.3d at 71.

An elements analysis uses the *Blockburger* test as a starting point. *Id.* at 72. The Eleventh Court of Appeals correctly held that, as indicted, the criminal

solicitation offense and the attempted capital murder offense were not the same offense under *Blockburger*. *Bien v. State*, --- S.W.3d ---, 2016 WL 859378 at *2 (Tex. App.—Eastland March 3, 2016, pet. filed).

If the two offenses a defendant is convicted of have different elements under *Blockburger*, a judicial presumption arises that the offenses are different for double jeopardy purposes and cumulative punishments may be imposed. *Ex parte Benson*, 459 S.W.3d at 72. This presumption has to be rebutted by a showing that the legislature "clearly intended one punishment." *Id.*

The Eleventh Court of Appeals error began by failing to presume, once the *Blockburger* test was met in this case, that the legislature intended for defendants to be punished for both criminal solicitation and attempted capital murder. By failing to account for this presumption, the Eleventh Court of Appeals improperly applied the *Ervin* factors to conclude that Appellant's convictions violated double jeopardy.

In *Ervin v. State*, this Court established a list of non-exclusive factors relevant for determining whether the Legislature intended to impose multiple punishments under different statutes once the *Blockburger* test is satisfied. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014). Those factors are:

(1) whether offenses are in the same statutory section;
(2) whether the offenses are phrased in the alternative;
(3) whether the offenses are named similarly;
(4) whether the offenses have common punishment ranges;
(5) whether the offenses have a common focus;

(6) whether the common focus tends to indicate a single instance of conduct;
(7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and
(8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999).

The fifth factor, the gravamen of the offense, has been held to be the best indicator of legislative intent in this context. *Shelby v. State*, 448 S.W.3d at 436; *Garfias v. State*, 424 S.W.3d 54, 59 (Tex. Crim. App. 2014).

In its analysis on this case, the Eleventh Court of Appeals held that factors one and two were not dispositive. *Bien v. State*, --- S.W.3d ---, 2016 WL 859378 at *3 (Tex. App.—Eastland March 3, 2016, pet. filed). The court did not say whether it found these two factors to weigh against or in favor of a double jeopardy violation. *See id.*

The court should have, at a minimum, recognized that the different statutory sections involved and that the statutes were not phrased in the alternative provides some indication that the legislature intended theses offenses to be separate.

Then, under factor three, the Eleventh Court of Appeals concluded that the offenses were not similarly named. *Id.* However, the court again gave no analysis as to how their conclusion affected their reasoning. *See id.*

Under factor four, the court concluded that both offenses have identical punishment ranges – five to ninety-nine years or life, with a possibility of a fine up to $10,000. *Id.* The court concluded that this factor would then support a finding that the two offenses are the same. *Id.*

However, the court erred significantly in its analysis of factor four. Criminal solicitation and criminal attempt, while ultimately having the same punishment range in this case, do not have necessarily have the same punishment range. The differences in possible punishment ranges show legislative intent to treat these offenses as distinct and separate offenses.

The punishment range for the offense of criminal solicitation is a first degree felony if the offense solicited is a capital offense or a second degree felony if the offense solicited is a first degree felony. Tex. Pen. Code §15.03(d) (West, Westlaw through 2015 Sess.). The punishment range for the offense of criminal attempt is one category lower than the offense attempted. Tex. Pen. Code §15.01(d) (West, Westlaw through 2015 Sess.).

Although in practical effect, this resulted in the same punishment range in Appellant's cases, the issue under the *Ervin* factors is legislative intent.

When interpreting statutes, an appellate court should presume that every word has been used for a purpose and that each word, phrase, clause and sentence should be given effect if reasonably possible. *Crabtree v. State*, 389 S.W.3d 820, 825 (Tex.

Crim. App. 2012). An appellate court should also presume that the legislature intended for the entire statutory scheme to be effective. *Id.*

The offense of criminal attempt applies to a much wider range of underlying offenses than criminal solicitation. The offense of criminal solicitation only occurs if a defendant has an intent to commit a capital felony or a first degree felony. Tex. Pen. Code §15.03(a) & (d) (West, Westlaw through Sess. 2015). However, the offense of criminal attempt applies if a defendant has a specific intent to commit *an offense*. Id. (Emphasis added). Therefore, the potential range of punishment on criminal attempt can range from a first degree felony all the way down to a Class C misdemeanor. Whereas the potential punishment range for criminal solicitation is only a first or second degree felony. *See* Tex. Pen. Code §15.03(d) (West, Westlaw through Sess. 2015).

The court of appeals did not give meaning to the words and phrases contained in Sections 15.01(d) and 15.03(d) of the Penal Code. Failing to recognize and account for the differences in the possible ranges of punishment led the court of appeals to miss significant evidence of the legislature's intention with these statutes. At a minimum, the implications of the differences in the punishment ranges for these offenses should have been addressed by the court.

The Eleventh Court of Appeals also erred in its analysis of this fifth factor, the gravamina of the offenses.

The court of appeals held, with any truly supporting citations, that both criminal solicitation and attempted capital murder are both conduct oriented offenses. *See Bien v. State,* --- S.W.3d ---, 2016 WL 859378 at *3 (Tex. App.—Eastland March 3, 2016, pet. filed) ("the two offenses are conduct oriented…").

However, this conclusion was incorrect for several reasons: (1) it ignores or discounts a significant amount of case-law; (2) it ignores the "eighth grade-grammar" rule; and (3) it ignores the differences in the renunciation defenses.

Caselaw

In its opinion, the Eleventh Court of Appeals did not consider or discuss any of the cases that have relevance to determining the gravamen of criminal solicitation or attempted capital murder. *See id.*

The Eleventh Court of Appeals cited to *Shelby v. State* after its conclusion that both offenses were conduct oriented offenses. While *Shelby* is a double jeopardy case, it does not involve criminal solicitation or any type of murder. *See generally Shelby v. State,* 448 S.W.3d 431 (Tex. Crim. App. 2014). Rather *Shelby* involved convictions for assault with a deadly weapon against a public servant and intoxication assault. *Id.* at 434.

The court also cited to *Ex parte Benson* while discussing the gravamen of the two offenses. *See Bien v. State,* 2016 WL 859378 at *3. However, *Ex parte Benson*,

while again a double jeopardy case, does not relate to the gravamen of the two offenses involved in this case. *See Ex parte Benson*, 459 S.W.3d 67, 70 (Tex. Crim. App. 2015) (involving an intoxication assault conviction and a felony driving while intoxicated conviction).

Although appellate courts have not explicitly addressed the gravamen of these two particular offenses, there are several cases discussing the gravamen of similar or related offenses. *See Turner v. State*, 805 S.W.2d 423, 430 (Tex. Crim. App. 1991) (en banc) (holding that capital murder under Penal Code §19.03(a)(2) is a result oriented offense); *Morrow v. State*, 753 S.W.2d 372, 375 fn.3 (Tex. Crim. App. 1988) (en banc) (holding that intentional murder is a result of conduct offense); *Thompson v. State*, No. 05-99-01189-CR, 2000 WL 1337170, at *4-5 (Tex. App.—Dallas Sept. 18, 2000, no pet.) (holding that attempted murder is a result oriented offense); *Greene v. State*, 928 S.W.2d 119, 125 (Tex. App.—San Antonio 1996, no pet.) (noting that murder is a "specific result" offense); *Martinez v. State*, 833 S.W.2d 188, 194-95 (Tex. App.—Dallas 1992, pet. ref'd) (holding that murder is a result-oriented crime); *Richardson v. State*, 681 S.W.2d 683, 689 (Tex. App.—Houston [14th Dist.] 1984, pet. granted) (Ellis, J., dissenting) *aff'd* 700 S.W.2d 591 (discussing the gravamen of criminal solicitation); *Caldwell v. State*, 971 S.W.2d 663, 669 (Tex. App.—Dallas 1998, pet. ref'd) (Chapman, J., dissenting) (discussing the gravamen of criminal solicitation).

The court of appeals failed to address the implications of these cases. The court did not attempt to distinguish attempted capital murder from the case holding attempted murder to be a result oriented offense or discuss the difference between attempted capital murder and murder or capital murder in any way.

Eighth Grade Grammar

The court of appeals also did not attempt to even consider the "eighth grade-grammar" rule in its holding that both criminal solicitation and attempted capital murder are conduct oriented. *See Bien v. State,* --- S.W.3d ---, 2016 WL 859378 at *3 (Tex. App.—Eastland March 3, 2016, pet. filed).

This court has specifically outlined the helpfulness of the "eighth grade-grammar" rule when determining the gravamen of an offense. *See Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013); *Jones v. State,* 323 S.W.3d 885, 890-91 (Tex. Crim. App. 2010). Under the "eighth grade grammar" rule, the subject, the main verb, and the direct object constitute the gravamen of the offense. *Jones*, 323 S.W.3d at 890-91. Adverbial phrases and prepositional phrases are generally not the gravamen of the offense. *Id.* at 891.

Applying the eighth grade grammar rule to criminal solicitation, the subject of the statute is "a person." *See* Tex. Pen. Code §15.03(a) (West 2013). The verb is "requests, commands, or attempts to induce." *See* Tex. Pen. Code §15.03(a) (West

2013). The direct object is "another." *See* Tex. Pen. Code §15.03(a) (West 2013). Therefore, the gravamen of the offense is for someone to request, command or attempt to induce another.

The phrase "to engage in specific conduct" is a prepositional phrase. Therefore, the gravamen of the proscribed conduct is the act of soliciting, not the result that is being solicited.

However, when applying the eighth grade grammar rule to the attempted capital murder, the focus is on the act that amounts to more than mere preparation.

The subject of the criminal attempt statute is "a person." *See* Tex. Pen. Code §15.01(a) (West 2013). The verb of the criminal attempt statute is "does." *See* Tex. Pen. Code §15.01(a) (West 2013). The direct object is "an act." *See* Tex. Pen. Code §15.01(a) (West 2013). Simple grammatical rules indicate that the focus of the criminal attempt statute is on the act that is done.

These grammatical differences were not addressed in the court of appeals decision. This failure to even consider grammatical differences ignores precedent from this Court regarding the appropriate tools for determining the gravamen of an offense. At a minimum, this Court should grant discretionary review in order to emphasize to courts of appeals the necessity of applying the tools recognized as helpful by this Court when determining the gravamen of an offense.

Renunciation Defenses

Additionally, the Eleventh Court of Appeal's decision did not address the differences in the renunciation defenses when determining the gravamen of the offenses. *See Bien v. State,* --- S.W.3d ---, 2016 WL 859378 at *3 (Tex. App.—Eastland March 3, 2016, pet. filed).

The legislature has created an affirmative defense of renunciation for criminal solicitation and criminal attempt, however there are different requires merits for each defense. *See* Tex. Pen. Code §15.04 (West, Westlaw through Sess. 2015).

For a defendant to withdraw, or renounce his involvement in a criminal attempt, the defendant must avoid commission of the offense by *abandoning* his criminal conduct *or,* if abandonment was insufficient, taking further affirmative action that would prevent the commission of the offense. Tex. Pen. Code §15.04(a) (West, Westlaw through Sess. 2015) (emphasis added).

However, for a defendant to withdraw, or renounce his involvement in criminal solicitation, the defendant must *countermand* his solicitation before commission of the object offense *and* take further affirmative action to prevent the commission of the object offense. Tex. Pen. Code §15.04(b) (West, Westlaw through Sess. 2015).

The differences in the renunciation defenses should have been addressed by the court of appeals. These differences not only show the different gravamen of each

offense, they highlight a critical part of this case that the court of appeals failed to appreciate.

Appellant's offense of criminal solicitation was complete the moment the Appellant requested Reynolds to kill Koh Box for remuneration. The act of soliciting itself completed the offense with nothing else required. Appellant could not renounce his involvement in the criminal conduct at issue because abandonment would not undo the wrong that was done. To renounce his involvement, he would have had to issue a countermand and then also take further affirmative action to ensure that Koh Box was not killed.

However, the offense of attempted capital murder was not completed when Appellant solicited the hitman. Instead, Appellant had to do an act that amounted to more than mere preparation to have Koh Box killed. In this case, that act was Appellant's hiring of the hitman – the actual payment of money. Simply asking the hitman to kill Box was not enough. To renounce his involvement in this criminal activity, since an actual act was required, Appellant could have simply abandoned his criminal conduct by not paying the hitman. No countermand or further affirmative action would be required because it is the result of the offense – the death of Box – that the statute focuses on preventing.

Import of the Lack of Analysis Done by the Eleventh Court of Appeals

This failure to even consider these issues has significant import for this area of case law. As the first case to directly deal with the issue of the gravamen of criminal solicitation or attempted capital murder, future appellate decisions will rely on the result and reasoning contained in this published opinion.

Additionally, a determination of the gravamen of an offense affects more than just double jeopardy analyses. The gravamen of an offense is relevant to discussions of jury charges, jury unanimity, and culpable mental states as well. *See Kent v. State,* ---S.W.3d ---, 2016 WL 735813 at *2-4 (Tex. Crim. App. Feb. 24, 2016); *Robinson v. State,* 466 S.W.3d 166, 170-72 (Tex. Crim. App. 2015); *Price v. State,* 457 S.W.3d 437, 441-43 (Tex. Crim. App. 2015).

While the Eleventh Court of Appeal's decision has the appeal of simplicity in its implication that all inchoate offenses are all conduct-related offenses, this area of law is too important to the jurisprudence of Texas to allow a courts of appeals to set published precedent regarding the gravamen of two different offenses when no analysis at all has been done to support its conclusions.

This Court should grant review of this issue to ensure that appellate courts have a well-reasoned decision articulating the appropriate reasoning and applying the appropriate rules for determining the gravamina of offenses.

ARGUMENT – ISSUE TWO

Grounds the State Wishes to Join With Appellant in Asking for Discretionary Review – How to Determine the Most Serious Offense to Retain

The State joins Appellant in asking that this Court issue guidance and clarification on how an appellate court should proceed in determining the most serious offense once a double jeopardy violation has been found when the sentences, fine and restitution are all identical.

The State agrees that precedent from the Court of Criminal Appeals has left lower courts with a struggle in how to address which offense is the most serious for the purpose of determining which to discard and which to retain.

The State believes that this inconsistent body of law on how to determine the most serious offense has resulted from appellate courts attempted to make decisions that fundamentally should remain within the sole purview of the prosecuting authority. This Court has struggled with how to make the determination of the most serious offense in a non-arbitrary method, and yet no clear solution has arisen.

The State therefore asks that this Court grant discretionary review to consider whether an appellate court should determine what the most serious offense is in light of the difficulty of reaching a non-arbitrary decision or whether an appellate court should remand the case to the trial court to allow the prosecutor to elect which conviction to retain.

Assuming that this Court chooses only to consider what factors an appellate court should apply to determine the most serious offense, the State asks that this Court limit its review to what effect Article 42.12 §3g of the Code of Criminal Procedure should have on determining the most serious offense.

Grounds for Review that the State Believes Should Not be Granted – Whether Retaining the Most Serious Offense is the Appropriate Remedy for a Double Jeopardy Violation

The State does ask that this Court limit its review to the proper method of determining the most serious offense. The State believes that there is a difference between asking for review of the proper method of applying a settled remedy and asking that the remedy as a whole be changed.

Appellant's Petition implies that he would ask this court to reconsider the settled remedy for a double jeopardy violation.

Settled case law indicates that when a double jeopardy violation is found, the conviction for the most serious offense is retained and the other conviction is set aside. *E.g., Shelby v. State,* 448 S.W.3d 431, 440 (Tex. Crim. App. 2014); *Ex parte Denton,* 399 S.W.3d 540, 547 (Tex. Crim. App. 2013); *Ex parte Cavazos,* 203 S.W.3d 333, 337 (Tex. Crim. App. 2006).

However, Appellant claims in his Petition that reversal of both convictions and sentences would be the appropriate remedy. *See Appellant's Petition for Discretionary Review*, p. 7-8.

This Court should not grant review related to whether both convictions should be set aside. Appellant has not presented any grounds that would support such a broad review in this case. The Eleventh Court of Appeals did not commit any error in this regard and there is no controversy or dispute in this area.[1]

Therefore, review should be limited solely to the issues listed above.

PRAYER FOR RELIEF

Therefore, the State asks that this Court would grant its Subsequent Petition for Discretionary Review on both grounds.

Respectfully submitted,
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[1] In fact, the State would point out that granting such a broad review would likely create additional issues for this Court to address. The State argued to the court of appeals that Appellant had waived any Double Jeopardy claims by not raising this issue during his jury trial or sentencing. *Bien v. State*, --- S.W.3d ---, 2016 WL 859378 at *1-2 (Tex. App.—Eastland March 3, 2016, pet. filed). The Eleventh Court of Appeals, in holding that the issue was not waived, relied upon the fact that finding a violation of double jeopardy would not require a retrial. *Bien v. State,* --- S.W.3d ---, 2016 WL 859378 at *1-2 (Tex. App.—Eastland March 3, 2016, pet. filed).

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed by U.S. Mail to Keith S. Hampton, Attorney at Law and Cynthia L. Hampton, Attorney at 1103 Nueces Street, Austin, Texas 76801, on the 13th day of May, 2016.

/s/ELISHA BIRD
Elisha Bird, Assistant District Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed by U.S. Mail to Lisa McMinn, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on the 13th day of May, 2016.

/s/ELISHA BIRD
Elisha Bird, Assistant District Attorney

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 3,819 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ELISHA BIRD
Elisha Bird, Assistant District Attorney

APPENDIX

Opinion filed March 3, 2016

In The

Eleventh Court of Appeals

Nos. 11-14-00057-CR & 11-14-00058-CR

MICHAEL JOSEPH BIEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause Nos. CR22319 & CR22320

O P I N I O N

The jury convicted Michael Joseph Bien of the offenses of criminal attempt—capital murder (Cause No. CR22319) and criminal solicitation to commit capital murder (Cause No. CR22320) and assessed Appellant's punishment for each offense at confinement for life. *See* TEX. PENAL CODE ANN. §§ 15.01, 15.03 (West 2011), § 19.03 (West Supp. 2015). The trial court ordered that the sentences were to run

concurrently. We affirm the judgment in Cause No. CR22320 and reverse the judgment in Cause No. CR22319.

Appellant presents two identical issues in each appeal. In his first issue, Appellant argues that the trial court erred when it authorized the jury to return multiple verdicts for the same offense. Appellant contends that his convictions violate the Double Jeopardy Clause of the United States Constitution and the Texas constitution. In his second issue, Appellant complains that the evidence is insufficient to support the convictions because the State failed to refute Appellant's entrapment defense.

Appellant asks this court to decide this appeal under the Texas constitution rather than under the federal constitution. Appellant details the textual differences between the double jeopardy provisions of each constitution, but concedes that the result would be the same under either constitution. Further, we have previously said that the Texas constitution's double jeopardy clause does not provide broader protection than the federal constitution. *In re Morris*, No. 11-05-00381-CR, 2006 WL 1431122, at *2 n.1 (Tex. App.—Eastland May 25, 2006, pet. ref'd) (not designated for publication); *Ex parte Beeman*, 946 S.W.2d 616, 617 (Tex. App.—Fort Worth 1997, no pet.). Accordingly, our analysis is the same under both constitutions.

Under the U.S. Constitution, the Double Jeopardy Clause provides, in part, that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The Double Jeopardy Clause protects criminal defendants from three things: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense." *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013) (citing *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

The double jeopardy protections are fundamental in nature. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). Because they are fundamental in nature, a double jeopardy complaint may be raised for the first time on appeal when (1) the undisputed facts show that a double jeopardy violation is clearly apparent on the face of the record and (2) enforcement of the usual rules of procedural default would serve no legitimate state interests. *Id.* Here, Appellant did not raise a double jeopardy issue either during trial or when he was sentenced. Thus, we must first decide whether Appellant can raise a double jeopardy argument for the first time on appeal or whether that right has been waived. *See id.*

In this case, the record is fully developed. *See Saenz v. State*, 131 S.W.3d 43, 50 (Tex. App.—San Antonio 2003), *aff'd*, 166 S.W.3d 270 (Tex. Crim. App. 2005). Appellant stood trial for both offenses before the same judge and jury. Therefore, the trial court either knew or should have known of a possible double jeopardy issue. *See id.* Additionally, we have received the complete record of the trial, and we can resolve Appellant's jeopardy claims based on the record presented. There is no need for further proceedings to add new evidence to the record. *See id.* Appellant has satisfied the first prong of the *Gonzalez* test. *See Gonzalez*, 8 S.W.3d at 643.

In regard to the second prong of the *Gonzalez* test, enforcement of the usual rules of procedural default, in this case, would serve no legitimate state interests. The appropriate remedy for any double jeopardy violation is to affirm the conviction for the "most serious" offense and vacate any other conviction that is in violation of the double jeopardy clause. *Ex parte Cavazos*, 203 S.W.3d 333, 338–39 (Tex. Crim. App. 2006). An effective double jeopardy challenge would not require a retrial or a remand to the trial court; therefore, there are no legitimate state interests that would be negatively impacted if Appellant is allowed to raise his double jeopardy claim for the first time on appeal. *See Saenz*, 131 S.W.3d at 50. Thus, Appellant has satisfied

the second prong of the *Gonzalez* test, and we will review the merits of the double jeopardy issue. *See Gonzalez*, 8 S.W.3d at 643.

The first step in a double jeopardy challenge is to determine whether criminal solicitation to commit capital murder and attempted capital murder are the "same offense." *See Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App 2008). When multiple punishments arise out of one trial, we begin our analysis with the *Blockburger* test. *Id.*; *see Blockburger v. United States*, 284 U.S. 299 (1932). "Under the *Blockburger* test, two offenses are not the same if one requires proof of an element that the other does not." *Bigon*, 252 S.W.3d at 370. To resolve a double jeopardy issue, we look at the elements alleged in the charging instrument. *Id.*

Appellant was charged under two indictments, and each indictment alleged a separate and distinct offense that took place on or about December 7, 2012. The allegations in the indictment for criminal solicitation to commit capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in Brown County
- with intent that capital murder, a capital felony, be committed
- did request, command, or attempt to induce
- Stephen Reynolds
- to engage in specific conduct
- to-wit: kill Koh Box
- for remuneration, and
- that under the circumstances surrounding the conduct of the defendant or Stephen Reynolds, as the defendant believed them to be, would have constituted capital murder.

The allegations in the indictment for attempted capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in Brown County
- with the specific intent to commit the offense of capital murder of Koh Box

- did do an act
- to-wit: employ Stephen Reynolds
- by remuneration or the promise of remuneration
- which amounted to more than mere preparation
- that tended but failed to effect the commission of the offense intended.

In comparison, the two charges are similar, but not the same. In order to obtain a conviction for criminal solicitation to commit capital murder, the State must prove that Appellant did "request, command, or attempt to induce" Stephen Reynolds to kill Koh Box for remuneration. On the other hand, in order to obtain a conviction for attempted capital murder, the State must prove that Appellant employed Stephen Reynolds by remuneration or the promise of remuneration, which amounted to "more than mere preparation." Under a strict application of the *Blockburger* test, the two offenses have differing elements and, therefore, would not be the same offense. However, the *Blockburger* test is a rule of statutory construction and is not the exclusive test to determine whether the two offenses are the same. *Bigon*, 252 S.W.3d at 370.

In *Ervin v. State*, the court provided a nonexclusive list of factors to consider when analyzing a multiple-punishment claim. 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Those factors include whether the offenses are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the offenses are similarly named, whether the offenses have common punishment ranges, whether the offenses have a common focus ("gravamen"), whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the same under *Blockburger*, and whether there is legislative history that contains an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin*, 991 S.W.2d at 814. However, the ultimate question is whether the legislature intended

to allow the same conduct to be punished under both of the offenses. *Bigon*, 252 S.W.3d at 371.

Criminal solicitation and criminal attempt are both in the "preparatory offenses" chapter under the "Inchoate Offenses" title of the Texas Penal Code. *See* PENAL ch. 15 (West 2011 & Supp. 2015). However, in this case, criminal attempt also requires the application of Section 19.03, which is the applicable statute for the underlying felony of capital murder. *Id.* § 19.03. Additionally, while the two charged offenses are in the same chapter of the Penal Code, they are not phrased in the alternative, and there is no language in either statute that suggests that the legislature intended the two offenses to be phrased in the alternative. *See Ex parte Benson*, 459 S.W.3d 67, 78–79 (Tex. Crim. App. 2015). Because criminal solicitation and attempted capital murder are not phrased in the alternative, this factor is not dispositive in this case. *Bigon*, 252 S.W.3d at 371.

Offenses are similarly named if they share a common word in the title. *Ex parte Benson*, 459 S.W.3d at 79. Here, the titles share only the word "criminal." PENAL § 15.01 (Criminal Attempt), § 15.03 (Criminal Solicitation). In *Garfias v. State*, the defendant was charged with aggravated robbery by threat and aggravated assault causing bodily injury. 424 S.W.3d 54, 56 (Tex. Crim. App 2014). The court said that those two offenses were not named similarly. *Id.* at 61. Here, the general nature of "criminal" in the name of the offenses charged is similar to the use of "aggravated" in the name of the offenses charged in *Garfias*. Thus, the two offenses are not similarly named.

The two offenses in this case have identical punishment ranges. Criminal solicitation to commit capital murder and criminal attempt—capital murder are both first-degree felonies, and both offenses carry a punishment range of five to ninety-nine years or life, with a possibility of a fine up to $10,000. Thus, this factor supports a finding that the two offenses are the "same."

The focus, or "gravamen," of the two offenses is a key factor in the *Ervin* analysis. *Garfias*, 424 S.W.3d at 59. Here, each offense has a similar focus. The focus for criminal solicitation to commit capital murder is to "request, command, or attempt to induce" Stephen Reynolds to kill Koh Box for remuneration. The focus of attempted capital murder is to do an act—employment of Stephen Reynolds by remuneration—which amounted to more than mere preparation in an attempt to kill Koh Box. Further, both offenses have the same *type* of focus. *See Ex parte Benson*, 459 S.W.3d at 81 (holding that felony DWI and intoxication assault are not the "same" for double jeopardy purposes because they have two different focuses and two different types of focuses). In addition, the two offenses are conduct oriented and, in this case, punish Appellant for the same act—employment of Stephen Reynolds to kill Koh Box. *See Shelby v. State*, 448 S.W.3d 431, 439 (Tex. Crim. App 2014). Specifically, the offense of attempted capital murder requires proof that Appellant solicited Stephen Reynolds to kill Koh Box. Thus, the focus of each offense tends to indicate a single instance of conduct and weighs heavily in favor of treating the offenses as the same for double jeopardy purposes. *Id.*

The last two *Ervin* factors are not applicable in this case. There are no imputed theories of liability at issue, and there is no legislative history with respect to the legislature's intent to treat the offenses the same. *See id.* at 440. Based upon our application of the *Blockburger* test and the *Ervin* factors, we hold that Appellant's double jeopardy rights were violated when he was convicted of both criminal solicitation to commit capital murder and criminal attempt—capital murder. Appellant's first issue is sustained.

The remedy for a double jeopardy violation is to affirm the conviction for the "most serious" offense and vacate the other conviction. *Bigon*, 252 S.W.3d at 372. The "most serious" offense is the offense for which the greatest sentence was assessed. *Ex part Cavazos*, 203 S.W.3d at 338. In this case, the same term of years

was assessed for each conviction—confinement for life. Additionally, both offenses are first-degree felonies. Because the sentences and the degree of felony is the same for both offenses, we must examine the rules governing parole eligibility and the good-conduct time. *See Bigon*, 252 S.W.3d at 372–73. Here, criminal solicitation is a "3g" offense and attempted capital murder is not. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)(K) (West Supp. 2015). A "3g" offense limits a trial court's ability to suspend a defendant's sentence and also affects parole eligibility. *See Shankle v. State*, 119 S.W.3d 808, 813–14 (Tex. Crim. App. 2003); *see also* TEX. GOV'T CODE ANN. § 508.145(d) (West Supp. 2015). Because criminal solicitation to commit capital murder is the "most serious" offense, we will uphold that conviction and vacate the conviction for criminal attempt—capital murder.

In Appellant's second issue, he argues that the evidence shows that Mickey Westerman, Appellant's childhood friend, induced and encouraged Appellant to proceed as Appellant did. Appellant thus asserts that he was entrapped, that the State did not refute the entrapment evidence beyond a reasonable doubt, and that the evidence was insufficient to support both convictions.

To review the jury's rejection of an entrapment defense, we review the sufficiency of the evidence. *Hernandez v. State*, 161 S.W.3d 491, 500 (Tex. Crim. App. 2005). We review all the evidence in the light most favorable to the verdict, and we will affirm the conviction if, after reviewing all the evidence in the light most favorable to the verdict, we find that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against Appellant on the entrapment issue beyond a reasonable doubt. *Id.*

Entrapment is a defense to prosecution if (1) the defendant engaged in the conduct charged (2) because he was induced to do so by a law enforcement agent (3) who used persuasion or other means and (4) those means were likely to cause persons to commit the offense. PENAL § 8.06(a). A defendant has the initial burden

to produce evidence that raises the defense of entrapment, but when he does, the burden of persuasion shifts to the State to disprove the defense beyond a reasonable doubt. *Hernandez*, 161 S.W.3d at 498.

Entrapment includes both a subjective and an objective component: the defendant must show both that he was actually induced to commit the charged offense and that the persuasion was such as to cause an ordinarily law-abiding person of average resistance to commit the crime. *England v. State*, 887 S.W.2d 902, 913–14 (Tex. Crim. App. 1994). "Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." PENAL § 8.06(a).

Westerman became friends with Appellant in junior high school. After Westerman dropped out of school, he only "ran into" Appellant a couple of times, and the last time was around 2000. In 2005, Westerman and Appellant began to work together in the Irving area, and while Westerman was working with Appellant, he lived in Appellant's horse trailer on Appellant's property in Ponder. While living on Appellant's property, Westerman became acquainted with Lori, Appellant's ex-wife. She often cooked supper for Westerman. Westerman worked with Appellant until Westerman moved back to Brownwood in the summer of 2005.

Westerman had not seen Appellant since 2005 and had only spoken with him three or four times after Westerman moved from Ponder. However, in March 2012, after three years with no contact, Appellant called Westerman. Based on what Appellant told him during the phone call, Westerman believed that Appellant wanted to kill Lori. Westerman called Lori to discuss the conversation that he had had with Appellant. Westerman advised Lori to call the authorities in Pecos where she lived. Lori told Westerman that she had expected Appellant to do "something like this."

Shortly after Westerman's phone call to Lori, he received a call from the chief of police in Pecos. Westerman told the chief of police that he was going to call Appellant back in a few days to make sure he was not just angry and talking "outside

of his head" and that he would call the chief of police as soon as he talked to Appellant again. In Westerman's phone call to Appellant, Appellant made it clear to Westerman that who he actually wanted to kill were Lori's parents, Gale and Hugh Box. Westerman testified that he tried to talk Appellant out of it, but it seemed that he was set on killing Gale and Hugh Box. Appellant told Westerman that he had a plan but that he did not want to talk about it on the phone. Appellant expressed to Westerman that he wanted Westerman to help find someone to "get this done." Westerman testified that he did not know why Appellant called him other than perhaps Appellant thought that he could trust him because of their history of drug use together.

Texas Ranger Danny Briley was assigned to work with Westerman. Ranger Briley and Westerman met to discuss general instructions about protocol and what Ranger Briley expected of Westerman. Westerman explained that, from that point on, he was to contact Ranger Briley before he answered any calls or responded to any texts from Appellant to ensure that communications could be documented, recorded, or supervised. Ranger Briley was present for phone calls between Westerman and Appellant so that it could be shown what had transpired throughout the investigation. Ranger Briley explained to Westerman that he was not to instigate the commission of an offense but, rather, was only there to give Appellant the opportunity to make his own plans.

Ranger Briley testified that Westerman performed exceptionally well as a confidential informant and was the best informant that he had ever seen. Ranger Briley explained that he gave Westerman guidelines of what he should or should not say during phone calls with Appellant. Ranger Briley stated that he wanted the communication to be in a format that would allow them to determine what Appellant really wanted and would also allow Appellant the opportunity to back out completely.

At trial, the State presented recorded phone conversations between Westerman and Appellant as well as voicemails left by Appellant on Westerman's phone. In one of the phone calls, Appellant can be heard telling Westerman, "I gotta plan how to make this deal work," and Appellant expanded on what that plan was. In another phone conversation, Appellant discussed ideas on how to make Gale and Hugh disappear. He even suggested that he could personally dig a hole with a backhoe to help with the plan.

Stephen Reynolds, an agent with the Texas Department of Public Safety, posed as a "hit man." The face-to-face interactions between Agent Reynolds and Appellant were recorded, and the recordings were presented at trial. In the first meeting between "the hit man" and Appellant, Appellant discussed how he could get the money to pay for the "hit." Those ideas included selling his guns, getting a loan from Westerman, getting a loan from his mom, and selling his land and making payments to "the hit man" from the proceeds of the sale. Ranger Briley stated that the idea that Westerman loan Appellant the money originated with Appellant, not Westerman.

At some point during the investigation, Appellant went to jail for approximately six months, and the investigation stalled. However, on the day Appellant got out of jail, he called Westerman and expressed his intent to continue with his plan to hire a hit man, but this time, he said that his target was now Koh Box, Gale and Hugh's son and Lori's brother. Westerman testified that Appellant told him that "Koh Box never done me no wrong. I just want [Gale and Hugh] to pay." Appellant apparently blamed Gale and Hugh for problems Appellant had with custody issues that involved his children.

Agent Reynolds testified that, after Appellant changed his mind about the desired target of the hit, Appellant drew a map to show the location of Koh Box's house. Agent Reynolds wrote notes on the drawing of the map based on the

conversation that he had with Appellant. The notes included the name of the street where Koh Box lived, a business that Koh Box owned, and vehicle descriptions. Before the initial meeting concluded, Agent Reynolds gave Appellant an opportunity to back out. He asked Appellant if he just wanted him to hurt Koh Box or if he wanted him gone, and Appellant responded, "I want him gone."

In the final meeting between Appellant and Agent Reynolds, Appellant gave one thousand dollars to Agent Reynolds to kill Koh Box. Agent Reynolds explained that he again gave Appellant an opportunity to back out, but Appellant again stated, "No, I want him gone." Agent Reynolds testified that Appellant did not appear to have any reservations about the final plan.

Although Appellant did not testify at trial, he concedes on appeal that the plan to kill Koh Box originated with him, but he argues that he had "cooled" to the idea. He asserts that he probably would not have gone through with it if Westerman had not encouraged him. Appellant also states that Westerman made him fearful of what might happen if he did not pay the hit man. Appellant cites to Ranger Briley's testimony that Westerman had told Appellant that Westerman had been "scolded" by "the hit man" because Appellant could not pay the money. Appellant also cites to the fact that Westerman told him that "it would be less obvious" if Appellant did it now rather than wait six months as suggested by Appellant.

But Ranger Briley testified that Appellant's prevailing concern was that Appellant did not want it to come back to him. He also indicated that Appellant never tried to "put the brakes" on the plan. Additionally, Appellant had months to "cool off" while, as we have noted, he was in jail on an unrelated charge. Instead, Appellant called Westerman the day he got out of jail to tell him to find a hit man soon.

The State argues that the evidence was sufficient to support the jury's rejection of Appellant's entrapment defense. A jury is authorized to weigh the evidence and

decide whether the evidence establishes entrapment. *Hernandez*, 161 S.W.3d at 500. We agree with the State. When viewed in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to support the convictions and the rejection of Appellant's entrapment defense. Appellant's second issue is overruled.

We vacate Appellant's attempted capital murder conviction in Cause No. CR22319 because that conviction violates the Double Jeopardy Clause of the U.S. Constitution. Accordingly, we reverse the judgment of the trial court in Cause No. CR22319, and we render a judgment of acquittal. *See Saenz*, 131 S.W.3d at 53. We uphold Appellant's criminal solicitation conviction and affirm the judgment of the trial court in Cause No. CR22320.

JIM R. WRIGHT
CHIEF JUSTICE

March 3, 2016

Publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.