NO. 0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	227TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

PRETRIAL APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith files this Pretrial Application for Writ of Habeas Corpus pursuant to articles 11.01, 11.05, 11.08 and 11.23 of the Texas Code of Criminal Procedure, and Article V, § 8 of the Texas Constitution, and moves to bar trial on this indictment because it is prohibited by the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the Texas Constitution.

I.
Summary Of Argument

Two indictments charged Joe Smith with three offenses, all of which, according to the state, arose out of the same criminal transaction on August 15, 2010. One indictment charged capital murder and alleged that Mr. Smith intentionally caused the death of Rogelio Brown while burglarizing his home. The first count of the other indictment alleged that Mr. Smith committed aggravated assault against Mary Johnson; the second count charged that he burglarized Mr. Brown's home and attempted to commit and committed aggravated assault against Ms. Sanchez.

Mr. Smith moved that the two indictments be consolidated for trial but the state

objected, and trial was held only on the capital murder indictment. The state also objected to the submission of any lesser included offenses, and none were submitted. The jury found Joe Smith not guilty of capital murder on April 16, 2013. Trial on the second indictment is scheduled for September 9, 2013.

A subsequent trial, however, would violate Mr. Smith's right to be free from double jeopardy. The charges in this indictment – that Mr. Smith burglarized Mr. Brown's home in the course of committing or attempting to commit aggravated assault against Mary Johnson, and that he committed aggravated assault against Mary Johnson – are wholly subsumed within, and are lesser included predicate offenses of, the previously tried indictment – in which Mr. Smith was acquitted of intentionally causing the death of Rogelio Brown while burglarizing his home. Trial on the second indictment after acquittal on the first will violate the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the Texas Constitution.

Trial on the instant indictment is also barred by collateral estoppel, which is embodied within the constitutional prohibition against double jeopardy. The jury in the first trial heard the allegations against Mr. Smith and determined that the state failed to prove that he intentionally caused the death of Rogelio Brown during the course of committing or attempting burglary of his home. Since these issues of fact have been determined by a valid and final judgment, they can never again be litigated between the

State of Texas and Joe Smith.

II.
Unlawful Restraint

Mr. Smith is unlawfully restrained of his liberty by the Sheriff of Bexar County, where he is charged by bill of indictment in cause number 2010-CR-11317. He is presently out of jail on bond, awaiting trial on September 9, 2013. *See Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001)(a person is "restrained of his liberty within the meaning of article 11.01 of the Texas Code of Criminal Procedure" when he is charged with a crime and released on bond to await trial).

III.
Constitutional Bases Of Claims

The restraint against Mr. Smith is illegal because his prosecution under this indictment is barred by the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the Texas Constitution.

IV.
A Pretrial Application For Writ Of Habeas Corpus Is The Preferred Way Of Litigating This Jeopardy Issue

When a person asserts that further prosecution would constitute double jeopardy the proper, indeed, the preferred vehicle for litigating that matter is with a pretrial application for writ of habeas corpus. The concept of double jeopardy is meant to protect a person, not only from multiple convictions or punishments for the same crime, but also

from being subjected to the hazards that result from multiple trials. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957); *accord*, *Ex parte Chaddock*, 369 S.W.3d 880, 885-86 (Tex. Crim. App. 2012). The only way to avoid the danger of a second illegal trial is to bar that trial before it occurs. That is the purpose of the pretrial application for writ of habeas corpus, and that is why the procedure is recognized under both state and federal law. *See Ex parte Robinson*, 641 S.W.2d 552, 555 (Tex. Crim. App. 1982)(a pretrial writ of habeas corpus is the proper procedure to assert the "Fifth Amendment right not to be exposed to double jeopardy and [to insure that it is] reviewable before that exposure occurs"); *see also Abney v. United States*, 431 U.S. 651, 660-62 (1977); *Headrick v. State*, 988 S.W.2d 226, 228 (Tex. Crim. App. 1999)("the right not to be tried twice for the same offense would be meaningless if it could not be raised before the commencement of the second trial") .

V.
Factual Basis Of Claims

The allegations in the two indictments.

Mr. Smith was charged in two indictments for an incident that occurred on August

15, 2010. Cause number 2010-CR-0000 alleged capital murder, namely, that he intentionally caused the death of Rogelio Brown by cutting and stabbing him with a deadly weapon, namely a knife, and that he was in the course of committing and attempting to commit burglary of Mr. Brown's habitation. In this application we will refer to this indictment as the "first," or the "capital murder" indictment. The "second" indictment – the indictment that is the subject of this case, cause number 2010-CR-0001 – contains two counts. The first alleged aggravated assault, namely, that Mr. Smith intentionally, knowingly, and recklessly caused serious bodily injury to Mary Johnson by cutting and stabbing her with a deadly weapon, namely, a knife, and that Ms. Sanchez was a member of his family. The second count alleged burglary, namely that Mr. Smith intentionally and knowingly entered a habitation without the consent of the owner Rogelio Brown and committed and attempted to commit aggravated assault against Mary Johnson. Certified copies of the indictments in 2010-CR-0000 and 2010-CR-0001 are attached as Exhibits A and B, respectively.

The initial pretrial motions hearings.

Pretrial motions were initially heard on both cases on the same dates, January 18 and 20, 2012. The Court heard Defendant's Motion To Set Aside The Indictment Number One, which asserted, among other things, that the capital murder indictment should be set aside because it failed to allege "the particular type of burglary, the specific acts defendant allegedly committed, or the constituent elements of burglary." This

motion was overruled. A certified copy of this motion is attached as Exhibit C.

Mr. Smith's motion to consolidate trials on the two indictments was opposed by the state and denied by the Court.

Trial was scheduled for April 10, 2013 in the capital murder case. Before trial began, Mr. Smith moved to consolidate this trial with the indictment alleging burglary of a habitation and aggravated assault, contending that consolidation made "perfect sense," that all transactions allegedly occurred at the same time, that they were "inextricably intertwined," that much if not all the evidence would be duplicative, that consolidation would promote judicial economy, and that it was required by Due Process and Due Course of Law. [R.II--18-19][1] The state opposed consolidation:

> The State objects to any consolidation. It's two separate indictments. The defense can't force us to consolidate, Nelson v. State, 864 SW 2d, 496. We don't want it. We want to reserve our options. It is, in essence, the State's choice, and we would like to sever these, keep them separate, they were indicted separately, and try Mr. Smith for the capital murder first.

[R.II--19]

The Court agreed with the state and announced that the capital murder indictment would be tried separately. [R.II--20] The defense reurged its objections, and made the following statement:

> We are just notifying everybody that we think Mr. Smith, not only his rights to due process would be violated, but if there is a subsequent trial, that his rights to double jeopardy under the United States and State's

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[1] In this application, the reporter's record in 2010-CR-0000 will be referred to as [R.__–___]. For example, [R.II–18-19] will reference matters found on pages 18 and 19 of volume two of that record. A copy of that seven-volume record is attached as Exhibit D.

> Constitution would also be violated, because if these cases are duplicative and if the evidence is basically presented to two different juries or even three different juries, then -- and that evidence would be used both to convict and punish Mr. Smith after he has been either acquitted or convicted in 0000, and that would violate his double jeopardy rights.

[R.II--20]

Defendant's Objections To Evidence Pursuant To Rule 103(a)(1), and the state's responses.

The next day, and before trial began, other pretrial motions were heard, including Defendant's Objections to Evidence Pursuant To Rule 103(a)(1). Among other things, this motion asserted that a number of items of evidence the state intended to introduce concerning Mary Johnson constituted inadmissible extraneous misconduct, including that Mr. Smith had threatened Ms. Johnson with a box cutter and almost run her over with a truck on July 2, 2010; that he had threatened to kill Ms. Johnson on August 14, 2010; and that on August 15, 2010 he had: intentionally, knowingly and recklessly caused serious bodily injury to Ms. Johnson by cutting and stabbing her with a knife; and that he had committed burglary of a habitation and attempted to commit and committed the felony offense of aggravated assault against Mary Johnson; and that he had strangled and choked Ms. Johnson; and that he had broken Ms. Johnson's teeth while committing aggravated assault against her. A certified copy of this motion is attached as Exhibit E.

The prosecutor opposed these objections, arguing that this evidence was admissible because the alleged capital murder of Rogelio Brown charged in the first indictment, and the burglary of a habitation and aggravated assault of Mary Johnson charged in the second

indictment, were "the same criminal transaction:"

- "we are alleging the -- in very legal terms, an aggravated assault with a deadly weapon against Mary, which again is – will come out in the facts of the case, meaning that he is stabbing her with a knife, causing her serious bodily injury. That's part of the State's case. . . . It's the same criminal transaction." [R.III--7]

- "We allege again same date. We say that he entered a habitation and therein committed the felony offense of aggravated assault against Mary; again, same criminal transaction, same facts." [R.III--7]

- "again August 15, 2010, defendant strangled and choked Mary Johnson. That's part of the offense. It's part of within the same criminal transaction. It's what he did. She is going to testify to that as far as what was done to her. [R.III--8]

- "that he broke her teeth in the course of committing his aggravated assault against her. Again, same criminal transaction, same episode, same facts. That's what she will testify to. *That's what was done to her as part of the capital murder*." [R.III--8][emphasis supplied]

Much of the state's case was devoted to proving the aggravated assault of Ms. Johnson, and the prosecutors's arguments suggested that the jury find Mr. Smith guilty of capital murder based on this alleged assault.

Jury selection began on April 10, 2013, and the jury was sworn on the next day, at which time trial began. [RII--29; R.III--35] Trial continued until April 15, when both sides rested. [R.V--114, 119]

The state's first and principal witness in the capital murder case was Mary Johnson, the complaining witness in the second indictment that alleged aggravated assault and burglary. She testified that Mr. Smith punched her several times, stabbed her 11 times with multiple knives, that he fractured her arm, bit her finger and blackened her eye, and that she spent a week in the hospital where she received a colonoscopy. [R.III-89-95] A

deputy who arrived on the scene testified to seeing the blood from Ms. Johnson's injuries, and a paramedic testified to the number and type of stab wounds she had, and the treatment he provided her. [R.IV–30-31] Twenty photographs of her injuries, taken some four days after the incident were introduced into evidence. [R.IV–90][2]

The Court denied Mr. Smith's motion for instructed verdict based on the state's failure to prove either an intentional murder or the underlying burglary.

The defense moved for an instructed verdict because the evidence was insufficient to prove either that Mr. Smith intentionally caused the death of Mr. Brown or that he had committed the predicate offense of burglary underlying the capital murder charged in the indictment. The state opposed both arguments, and the Court denied the motion. [R.V--114-120]

This Court did not instruct the jury on any lesser included offense.

The jury was excused for the day and a charge conference was held. The defense specially requested several jury instructions. Special Requested Jury Instruction Number One sought submission of the lesser included offense of Murder on the theory that there was a question whether Mr. Smith had intentionally caused the death of Mr. Brown. [Exhibit F, attached] The defense made a lengthy argument in support of this lesser included offense, and the prosecutors opposed the request. [R.V--123-144] Special Requested Jury Instruction Number Three sought submission of the lesser included offense

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[2] Those photographs were introduced as state's exhibits 97 - 116, and can be found in Volume Seven of the reporter's record, attached as Exhibit D.

of Murder, on the theory that there was a question whether Mr. Smith had committed the underlying offense of burglary. [Exhibit G, attached] Again the defense argued in support of the lesser, and the state argued against it. [R.V--145-147] This Court denied both requests. [R.V--154] The defense reurged Special Requested Jury Instruction Number One before summation, the request was again denied, and no lesser of any sort was submitted to the jury. [R.VI--8-9]

The jury was authorized to find that Mr. Smith committed the burglary underlying the capital murder allegation if it believed beyond a reasonable doubt that he committed aggravated assault against anyone.

The charge authorized the jury to convict Mr. Smith of capital murder if it found beyond a reasonable doubt that he intentionally caused Mr. Brown's death in the course of committing or attempting to commit burglary of his home. The burglary, in turn, was predicated in the jury charge on the underlying offense of aggravated assault. The charge did not require that the jury find that Mr. Brown was assaulted though; it was enough that an aggravated assault was committed against *anyone*. Burglary and aggravated assault were defined as follows:

> Our law provides that a person commits the offense of burglary if, without the effective consent of the owner, the person enters the habitation with intent to commit an aggravated assault or enters a habitation and commits or attempts to commit an aggravated assault.
>
> Our law provides that a person commits the offense of aggravated assault if the person intentionally or knowingly causes bodily injury to *another* and uses or exhibits a deadly weapon during the commission of such assault.

[R.VI--12][emphasis supplied] A certified copy of the court's charge to the jury is

attached as Exhibit H.

The prosecutors's arguments concerning Ms. Johnson and the predicate offenses of burglary and aggravated assault.

Prosecutor Spiegel argued this to the jury in her summation: "If you enter somebody's house with the intent to attack them with a deadly weapon, to harm *someone* inside the house, that's still a burglary even though it doesn't involve theft, so I hope that's clear to everybody." [R.VI--25][emphasis supplied]

Prosecutor Molina argued: "well, you can't kill the new boyfriend and *you can't assault your estranged wife with a knife*. You just can't do that. The law says you can't. And there is no question. There was no question. There is no question for Mary about what happened that night, and there is no question for Roy about what happened last night -- that night, because what happened was capital murder, and it is for the worst of the worst, because that's what happened and that's what he did, and that is why we believe that there is no question and that you will find Joe Smith guilty of capital murder." [R.VI--60-61]

The jury found Mr. Smith not guilty of capital murder.

The jury deliberated approximately three and a half hours before returning a verdict of not guilty. As noted previously, a copy of the reporter's record is attached as Exhibit D. A certified copy of the judgment of acquittal is attached as Exhibit I. Mr. Smith requests that this Court take judicial notice of the contents of its files in cause numbers 2010-CR-0000 and 2010-CR-0001.

VI.
Argument And Authorities

A.
First Ground For Relief

It Violates The Double Jeopardy Clause of The Fifth and Fourteenth Amendments To The United States Constitution To Try A Person For A Lesser Included Offense After He Has Been Tried And Acquitted Of A Greater Offense

1. *Brown v. Ohio*: It is "invariably true" that greater and lesser offenses are the "same" for double jeopardy purposes, and successive trials are therefore prohibited.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against a second prosecution for the same offense of which the accused has previously been acquitted or convicted. *Brown v. Ohio*, 432 U.S. 161, 164-166 (1977).

In *Brown*, the first indictment charged that the defendant took another's car without consent (joyriding) on December 8, 1973. After Brown was tried and convicted of that offense, Ohio tried and convicted him of the theft of the same car on November 29, 1973, and he complained that prosecution and punishment for the latter offense was barred by double jeopardy. The Supreme Court agreed, holding that auto theft and joyriding, which were greater and lesser offenses under state law, constituted the "same offense," and that therefore multiple prosecutions were unconstitutional. "As is invariably true of a greater and lesser included offense, the lesser offense joyriding requires no proof beyond that which is required for conviction of the greater auto theft. The greater offense is therefore

by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Brown v. Ohio*, 432 U.S. at 168.

2. *Ex parte Chaddock* prohibits successive prosecutions for a greater offense and any "lesser-included predicate" offenses.

In *Ex parte Chaddock*, 369 S.W.3d 880 (Tex. Crim. App. 2012), the defendant was first convicted of engaging in organized criminal activity by committing aggravated assault against David Cunniff. After being sentenced to 18 years imprisonment for this conviction, he was convicted of the aggravated assault of Cunniff and sentenced to 10 years. The Texas Court of Criminal Appeals vacated the aggravated assault prosecution and dismissed that indictment with prejudice. "To the extent that Section 71.03(3) purports to authorize successive prosecutions for engaging in organized criminal activity and for the commission of one of the lesser-included predicate offenses listed in 71.02(a), we hold that it does indeed operate unconstitutionally." *Id*. at 886.

3. The rules in *Brown* and *Chaddock* applied to the facts of Mr. Smith's case.

As in *Brown* and *Chaddock*, successive prosecutions of Mr. Smith will unconstitutionally expose him to double jeopardy. In his first trial, the capital murder indictment alleged that he had intentionally caused the death of Rogelio Brown in the course of burglarizing or attempting to burglarize Mr. Brown's home on August 15, 2010. The second indictment alleged that, on the same date, Mr. Smith burglarized Mr. Brown's home in the course of committing and attempting to commit aggravated assault against Mary Johnson, and that he actually committed aggravated assault against Ms. Johnson.

The two offenses alleged in the second indictment – burglary and aggravated assault – are lesser included offenses of the capital murder alleged in the first indictment. The *Brown* Court observed that greater and lesser offenses will "invariably" constitute the "same" offense for purposes of double jeopardy, and when it compared the pleadings and the facts of the two criminal proceedings the Court found that auto theft and joyriding were the "same" because the lesser joyriding required "no proof beyond that which is required for conviction of the greater auto theft." *Brown v. Ohio*, 432 U.S. at 168.

The *Chaddock* Court reached the same ultimate conclusion – that double jeopardy barred successive prosecutions – but used slightly different language, namely, that a prior prosecution for a greater offense would prevent the state from later prosecuting a "lesser-included predicate offense[ ]." *Ex parte Chaddock*, 369 S.W. 3d at 886.

Second prosecutions were unconstitutional in *Brown* and *Chaddock* because they involved lesser-included offenses and lesser-included predicate offenses. In Mr. Smith's case, when the pleadings and the facts developed in the first capital trial are compared with the pleadings in the second indictment and the facts that will be developed if that case is allowed to go to trial, it is clear that the allegations in the second indictment are lesser-included offenses and lesser-included predicate offenses of the accusation that was pled in the first indictment and that was the subject of the first trial.

a. The indictments compared.

Both indictments name Mr. Smith as the accused person. Both allege that he

burglarized a habitation owned by Rogelio Brown. Both allege that the burglary occurred on or about August 15, 2010. Mr. Smith moved for more notice in his motion to set aside the capital murder indictment, specifically complaining that it did not allege "the particular type of burglary, the specific acts defendant allegedly committed, or the constituent elements of burglary." This motion was denied. [Exhibit C, attached]

b. The state declared that what was done to Mary Johnson "was done to her as part of the capital murder."

At the first trial, when the defense objected to the introduction of a variety of evidence concerning the alleged assault of Ms. Johnson, the state responded that the assault against Ms. Johnson was "part of the State's case," that it was "part of the offense," that it was "*what was done to her as part of the capital murder*." [R.III–7-8][emphasis supplied]

c. Much of the evidence at the capital murder trial in which Rogelio Brown was the named complainant concerned the injuries suffered by Mary Johnson, the named complainant in the second case.

A significant portion of the capital trial concerned the injuries suffered by Mary Johnson. Ms. Johnson, the state's first witness, testified that Mr. Smith stabbed her some 11 times with various knives, that he punched her repeatedly and bit her, and that she was hurt "really bad" and suffered several injuries to her head, elbow, arm, shoulder, and back, and required hospitalization for a week and a colonoscopy. [R.III–90-95] A paramedic testified that Ms. Johnson had "blood all over her," multiple stab wounds to "basically all of her body," some of which penetrated all the way to the bone and "showed underlying

tissues," and that she was transported to a Level I trauma center. [R.IV–30-32] Additionally, some 20 photographs were introduced by the state showing Ms. Johnson's injuries, and were accompanied by testimony describing stab wounds, lacerations, and bruises to her face, torso, arm, shoulder, elbow, hand, stomach, and hip [R.IV–90-93]; other photos and a videotape showed Ms. Johnson's blood and medical materials used to treat her at the scene. [R.IV–16-18; 58-60]

d. Under the court's charge, to convict Mr. Smith of capital murder the jury had to find not only that he intentionally caused the death of Mr. Brown, but also that he had committed or attempted to commit, or intended to commit aggravated assault of "another" while burglarizing Mr. Brown's home.

Under the court's charge the only way the jury could convict Mr. Smith of capital murder was if it found that he intentionally caused Mr. Brown's death in the course of burglarizing his home. The burglary, in turn, was predicated on the underlying offense of aggravated assault. The charge did not require that the jury find that Mr. Brown was assaulted though; it was enough that an aggravated assault was committed against *anyone*. Burglary and aggravated assault were defined as follows:

> Our law provides that a person commits the offense of burglary if, without the effective consent of the owner, the person enters the habitation with intent to commit an aggravated assault or enters a habitation and commits or attempts to commit an aggravated assault.
>
> Our law provides that a person commits the offense of aggravated assault if the person intentionally or knowingly causes bodily injury to *another* and uses or exhibits a deadly weapon during the commission of such assault.

[R.VI--12][emphasis supplied]

e. The prosecutors's arguments suggested that the jury convict Mr. Smith of capital murder because he had committed aggravated assault against Ms. Johnson.

Although neither prosecutor spent much time talking about the burglary or the underlying aggravated assault in either their opening statement or their summations, what they did say about these issues suggested that Mr. Smith had committed aggravated assault against Ms. Johnson, and that this could constitute the lesser-included predicate offense underlying the burglary, which in turn was the lesser-included predicate offense underlying the capital murder. Prosecutor Molina brought up the assault in her opening statement: " He then starts *assaulting* and stabbing Mary repeatedly, chasing her through the house from that bedroom." [R.III.-41-42]. Prosecutor Spiegel said this in her summation: "If you enter somebody's house with the intent to attack them with a deadly weapon, to harm *someone* inside the house, that's still a burglary even though it doesn't involve theft, so I hope that's clear to everybody." [R.VI--25] And Ms. Molina concluded her summation for the state with this reference that clearly connected the primary offense – the killing of Brown – and the underlying predicate lesser offense – the aggravated assault of Johnson which elevated Brown's murder to capital murder:

> [w]ell, *you can't kill the new boyfriend and you can't assault your estranged wife with a knife.* You just can't do that. The law says you can't. And there is no question. There was no question. There is no question for Mary about what happened that night, and there is no question for Roy about what happened last night -- that night, because what happened was capital murder, and it is for the worst of the worst, because that's what happened and that's what he did, and that is why we believe that there is no question and that you will find Joe Smith guilty of capital murder. Thank you."

[R.VI--60-61][emphasis supplied]

f. Considering the totality of circumstances, the burglary and aggravated assault alleged in the instant indictment are clearly lesser-included offenses and lesser-included predicate offenses of the greater offense of capital murder, and therefore their successive prosecution is barred by jeopardy.

When one considers the pleadings in the two indictments, the evidence offered at first trial, and the jury instructions and arguments of counsel at that trial, it cannot be doubted that the two offenses alleged in the second indictment – aggravated assault and burglary of a habitation – are lesser included offenses of the capital murder that was tried in the first trial. Joe Smith was in jeopardy in his first trial of being convicted of intentionally causing the death of Rogelio Brown while in the course of burglarizing his house and committing, attempting to commit, or intending to commit the aggravated assault of Mary Johnson. He may not now be constitutionally tried for the same allegation in the second indictment: burglarizing the Brown home while assaulting or attempting to assault Ms. Johnson, or for actually attempting or assaulting her. As in *Brown*:

> the lesser offense[s] [burglary and aggravated assault] require[ ] no proof beyond that which is required for conviction of the greater [capital murder]. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it."

Brown v. Ohio, 432 U.S. at 168.

Similarly, just as the aggravated assault in Chaddock's second indictment was a "lesser-included predicate offense[ ]" of his first indictment that alleged engaging in organized criminal activity, so are both the aggravated assault and the burglary allegations

in Mr. Smith's second indictment "lesser-included predicate offense[s]" to his first indictment for capital murder.

4. *Ex parte Nielsen*: Double jeopardy prohibits successive prosecutions when a material part of one charge is comprised within another of which the defendant has been already convicted.

A similar, but perhaps slightly different formulation of the test for a jeopardy violation is found in *Ex parte Nielsen*, 131 U.S. 176 (1889). There two indictments were presented against the defendant on the same day; one charged that he cohabitated with two different women, and the other that he had committed adultery with one of these same women when he was married to another. He pled guilty to the first indictment (cohabitation), then asserted that the second indictment (adultery) was barred by double jeopardy because the two charged offenses were in fact one and the same offense. *Id*. at 177. "Cohabitation" as charged in the first indictment meant living together as husband and wife. And that is also an "integral part" of adultery, which was charged in the second indictment.

> We are satisfied that a conviction was a good bar, and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted, and for which he had suffered punishment.

Ex parte Nielsen, 131 U.S. at 187.

Mr. Smith also prevails under this test. As the prosecutors admitted, and as has been shown in this application, the burglary and the aggravated assault charged in the second indictment are an "integral part" of the capital murder charged in the first

indictment. Also, "the material part of the [burglary/aggravated assault] charged was comprised within the [capital murder] of which" Mr. Smith has already been tried.

B.
Second Ground For Relief

It Violates The Double Jeopardy Clause of Article I, § 14 Of The Texas Constitution To Try A Person For A Lesser Included Offense After He Has Been Tried And Acquitted Of A Greater Offense

The Fifth Amendment's Double Jeopardy Clause says that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

The Texas constitutional prohibition against double jeopardy is worded differently than its Federal counterpart:

> No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

TEX. CONST. Art. 1, § 14. The Texas Constitution speaks not only of twice being put in jeopardy of life or liberty, but also contains a specific and separate reference to retrial being barred "after a verdict of not guilty in a court of competent jurisdiction."

In *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991), the Texas Court of Criminal Appeals held that when analyzing and interpreting the search and seizure provision of the Texas Constitution, it is not bound by United States Supreme Court decisions addressing comparable Fourth Amendment issues. Rather, Courts can interpret our state constitution as providing additional rights to its citizens. *Id*. at 690.

Mr. Smith has demonstrated his entitlement to relief under the Federal Double Jeopardy Clause in his First Ground For Relief, and he is also entitled to relief under Article I, § 14 of the Texas Constitution. This case does not involve a subsequent trial following conviction, or the danger of multiple punishments. Instead, it is a second effort by the State of Texas to convict one of its citizens "after a verdict of not guilty in a court of competent jurisdiction." As noted, this latter situation – trial following acquittal – is specifically and separately referenced in Article I, § 14 of the Texas Constitution, and indicates that Texas has chosen to provide an even greater level of protection than does the Double Jeopardy Clause of the United States Constitution. *But see Ex parte Williamson*, 924 S.W.2d 414, 415 n. 4 (Tex. App.–San Antonio 1996, pet. ref'd)("Texas Constitutional protection against multiple punishments is not broader than that provided in the federal constitution").

C.
Third Ground For Relief

It Violates The Double Jeopardy Clause of The Fifth and Fourteenth Amendments To The United States Constitution To Try A Person Multiple Times For A Single Habitation Entry

1. Texas cases also consider "allowable units of prosecution."

In *Ex parte Cavazos*, 203 S.W.3d 333 (Tex. Crim. App. 2006), the indictment charged in separate counts two burglaries that arose out of the same incident. The first count alleged that the defendant entered a habitation without consent and intended to commit theft against Maria Regalado. The second count alleged that the defendant entered

the same habitation on the same date, but that he intended to commit sexual assault against Norma Regalado. Cavazos was convicted of both counts and sentenced to concurrent prison terms, and later filed a writ of habeas corpus contending that his right to be free from double jeopardy had been violated. The Court of Criminal Appeals agreed. "[T]he allowable unit of prosecution in a burglary is the unlawful entry. Applicant's convictions violate double jeopardy because he was punished multiple times for a single unlawful entry." *Id*. at 337. Similarly, Mr. Smith has already been tried for the unlawful entry of Mr. Brown's home. Because a subsequent trial for burglary of the Brown home under the Count II of the instant indictment will violate his right to be free from double jeopardy, this writ should be granted, that prosecution should be barred, and that indictment should be dismissed with prejudice.

D.
Fourth Ground For Relief

It Violates The Double Jeopardy Clause of Article I, § 14 Of The Texas Constitution To Try A Person Multiple Times For A Single Habitation Entry

Mr. Smith has demonstrated his entitlement to relief under the Federal Double Jeopardy Clause in his Third Ground For Relief. He is also entitled to relief under Article I, § 14 of the Texas Constitution, which grants Texans even greater protection than its Federal counterpart. *But see Ex parte Williamson*, 924 S.W.2d 414, 415 n. 4 (Tex. App.–San Antonio 1996, pet. ref'd)("Texas Constitutional protection against multiple punishments is not broader than that provided in the federal constitution").

E.
Fifth Ground For Relief

It Violates The Double Jeopardy Clause of The Fifth and Fourteenth Amendments To The United States Constitution To Attempt To Relitigate An Issue – Namely, Whether The Defendant Committed Burglary Of A Habitation--When Another Jury Has Previously Determined By A Final And Valid Judgment That The Defendant Did Not Commit The Burglary

1. In light of the first verdict – that Mr. Smith did not intentionally cause the death of Mr. Brown in the course of committing burglary of Mr. Brown's home – the state is collaterally estopped from attempting to prove that he burglarized Mr. Brown's home in a subsequent prosecution.

Trial on the instant indictment is also barred by collateral estoppel, which is embodied within the constitutional prohibition against double jeopardy. *See Ladner v. State*, 780 S.W. 2d 247, 250 (Tex. Crim. App. 1989).

In *Ashe v. Swenson*, 397 U.S. 436 (1970), the defendant was arrested for robbing several people at a card game. He was indicted for the robbery of one person and his jury acquitted him. The state then attempted to try him for the armed robbery of one of the other card players. The Supreme Court held that this successive attempt to prosecute the defendant was barred by principles of collateral estoppel and double jeopardy.

> 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443.

In our case, the jury in the capital murder case determined an issue of ultimate fact,

namely that Joe Smith did not intentionally cause the death of Rogelio Brown in the course of burglarizing his home. In light of that determination, the state is barred by concept of double jeopardy from relitigating that issue again, and that issue, including the burglary and aggravated assault, is what is alleged in the instant indictment. This trial is therefore barred.

F.
Sixth Ground For Relief

It Violates The Double Jeopardy Clause of Article I, § 14 Of The Texas Constitution To Attempt To Relitigate An Issue – Namely, Whether The Defendant Committed Burglary Of A Habitation-- When Another Jury Has Previously Determined By A Final And Valid Judgment That The Defendant Did Not Commit The Burglary

Mr. Smith has demonstrated his entitlement to relief under the doctrine of collateral estoppel that is embodied in the Federal Double Jeopardy Clause in his Fifth Ground For Relief. He is also entitled to relief under Article I, § 14 of the Texas Constitution, which grants Texans even greater protection than its Federal counterpart. *But see Ex parte Williamson*, 924 S.W.2d 414, 415 n. 4 (Tex. App.–San Antonio 1996, pet. ref'd)("Texas Constitutional protection against multiple punishments is not broader than that provided in the federal constitution").

Respectfully submitted:

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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of this Pretrial Application For Writ Of Habeas Corpus has been delivered to the Bexar County District Attorney's Office in San Antonio, Texas, on this the _____day of August, 2013.

MARK STEVENS

THE STATE OF TEXAS)

AFFIDAVIT

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared Joe Smith, who after being duly sworn stated:

My name is Joe Smith. I am the defendant and applicant in the above-entitled and numbered cause. I have read this Pre-Trial Application For Writ Of Habeas Corpus and swear that all of the allegations of fact contained therein are true and correct.

_____
Joe Smith

SUBSCRIBED AND SWORN to before me this ____ day of August, 2013 to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

ORDER OF SETTING

On this day of , 2013, came on to be heard the application of Joe Smith for a Pretrial Writ of Habeas Corpus, and it appearing to the Court that defendant is entitled to a hearing on said application. It is therefore ordered that the Clerk of this Court issue a Writ of Habeas Corpus and that a hearing on this application for writ of habeas corpus be held in the courtroom of the , on the

day of , 2013 at o'clock .m., then and there to show cause why the said Joe Smith should not be released from restraint.

JUDGE PRESIDING

NO. 2013-CR-0001

STATE OF TEXAS	)	IN THE DISTICT COURT
VS.	)	227TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

ORDER

On this the _____ day of _____, 2013, came on to be considered Defendant's Special Plea of Double Jeopardy, and said Motion is hereby

(GRANTED) (DENIED).

_____

PRESIDING JUDGE