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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-20765

[Filed January 10, 2019]

JOSEPH MONTANO,

Petitioner - Appellant

v.

STATE OF TEXAS,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-860

Before JONES, HAYNES, and OLDHAM, Circuit Judges.
PER CURIAM:[*]

After three days of trial, a state court declared a mistrial in Joseph Montano's trial for theft from a non-

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

profit. Montano now asserts through a federal habeas petition under 28 U.S.C. § 2241 that he cannot be retried without the Government violating the Double Jeopardy Clause of the United States Constitution. We agree with the district court that Montano implicitly consented to the mistrial and therefore AFFIRM.

I. Background

The facts on this summary judgment appeal are largely undisputed.[1] Joseph Montano's first state court trial for theft from a nonprofit organization ended in a mistrial. The mistrial came after one of the Government's witnesses began unexpectedly making incriminating statements on cross-examination. The state trial judge stopped the witness from testifying, called a recess, and eventually sent the jury home for the day to return the next morning.

The judge, Montano's counsel, and the Government began conferring about what to do. They decided the witness would need counsel and arranged for a public defender to advise him. After the public defender left with the witness, the judge raised the possibility that the witness would invoke his Fifth Amendment right to silence. Montano's counsel insisted that he needed to cross-examine the witness. The judge and both sides then discussed possible resolutions. Though the Government wanted only a short continuance, the idea

[1] We review de novo a district court's grant of summary judgment, applying the same standard as the district court. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017) (citing *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001)). We view all evidence in the light most favorable to Montano, the non-moving party. *See id.* at 328–29.

of a mistrial became the focus. During the discussion, the public defender representing the witness returned and confirmed that the witness would invoke the Fifth Amendment. Montano's counsel maintained that he needed to cross-examine the witness. At no point during the discussion did Montano's counsel object to a potential mistrial. Eventually, the trial judge concluded that he would declare a mistrial. Montano's counsel again did not object. Although the court reporter did not transcribe all of these proceedings, this recitation of facts was developed through testimony of those in attendance. Montano has not cited any record evidence on appeal that contradicts this timeline of events.

Before he could be tried again, Montano sought and was denied a pretrial writ of habeas corpus in Texas state court; he argued that a second trial would violate the Double Jeopardy Clause of the United States Constitution. The petition challenging the denial of the pretrial habeas petition was refused on appeal. The Texas Court of Criminal Appeals refused discretionary review originally and on a motion for rehearing.

Next, Montano filed a pretrial 28 U.S.C. § 2241 habeas petition in federal court, again asserting that retrial would violate his Double Jeopardy Clause rights. The State moved to dismiss the § 2241 petition arguing, among other things, that the petition was premature because Montano did not exhaust his state court remedies. The district court agreed issued a memorandum and order dismissing the § 2241 petition. On appeal, we reversed the dismissal and remanded to the district court to address the merits. *Montano v.*

Texas, 867 F.3d 540, 546-47 (5th Cir. 2017). We concluded, among other things, that the record at that time was not sufficiently developed to allow consideration in the first instance of whether Montano impliedly consented to the mistrial. *Id.*

On remand, the State filed a motion for summary judgment arguing that Montano consented to the mistrial and that the mistrial was a manifest necessity. The district court granted the motion for summary judgment and denied Montano's § 2241 petition. Montano timely filed a notice of appeal.

II. Discussion

Montano is not entitled to a writ of habeas corpus because he has not identified any potential Double Jeopardy Clause violation. Once a criminal defendant's trial has begun, the trial court may not declare a mistrial except under certain circumstances; otherwise, re-trying the defendant violates the Double Jeopardy Clause. *United States v. Palmer*, 122 F.3d 215, 218 (5th Cir. 1997). One of the exceptions to that general rule is when a defendant consents to a mistrial. *Id.* Consent can be either express or implied. *Id.*

Only implied consent is relevant to this case. "If a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later proceeding." *Palmer*, 122 F.3d at 218. "The determination of whether a defendant objected to a mistrial is made on a case-by- case basis, and the critical factor is whether a defendant's objection gave the court sufficient notice

and opportunity to resolve the defendant's concern." *United States v. El-Mezain*, 664 F.3d 467, 559 (5th Cir. 2011) (citing *United States v. Fisher*, 624 F.3d 713, 717 (5th Cir. 2010)).

Montano never objected to a mistrial, despite multiple opportunities, and he thus impliedly consented. Montano contends that his counsel objected to a mistrial by telling the trial court that he needed to be able to cross-examine the witness. But that was not an objection to a mistrial; it was further support for it. The witness had already begun to testify on behalf of the Government but then began invoking his Fifth Amendment right. Montano would not be able to meaningfully cross-examine the witness so long as the witness invoked the Fifth Amendment. The trial court's decision to declare a mistrial was thus driven by Montano's concerns. Montano had the opportunity to object to the trial court's course and to clarify that he preferred continuing the case rather than having a mistrial. Indeed, the Government did just that, but Montano never raised such a concern either during the long afternoon where the mistrial concept was first raised or the next morning before the jury was dismissed. Because Montano did not object to the mistrial despite being given the opportunity to do so, he impliedly consented to the mistrial and the Double Jeopardy Clause does not bar retrial. *See El-Mezain*, 664 F.3d at 559; *Palmer*, 122 F.3d at 218.

Consequently, we AFFIRM the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-15-860

[Filed November 21, 2017]

JOSEPH MONTANO,	)
	)
Plaintiff,	)
	)
v.	)
	)
STATE OF TEXAS,	)
	)
Defendant.	)
	)

ORDER

The State of Texas moved for summary judgment that Joseph Montano consented to a mistrial and waived his double jeopardy rights; Montano responded; and Texas replied. (Docket Entries No. 18, 19, 20). Based on the findings and conclusions stated in detail on the record, Texas's motion for summary judgment, (Docket Entry No. 18), is granted. Montano's petition for a writ of habeas corpus is denied, and the case is dismissed, with prejudice.

SIGNED on November 21, 2017, at Houston, Texas.

s/_____
Lee H. Rosenthal
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20083

[Filed August 11, 2017]

JOSEPH MONTANO,	)
	)
Petitioner – Appellant,	)
	)
v.	)
	)
STATE OF TEXAS,	)
	)
Respondent – Appellee.	)
	)

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY and ELROD, Circuit Judges, and STARRETT, District Judge.*
JENNIFER WALKER ELROD, Circuit Judge:

Joseph Montano's felony trial was terminated when the state trial judge declared a mistrial after a witness invoked his Fifth Amendment right against self-incrimination while testifying at trial. After Texas

* District Judge of the United States District Court for the Southern District of Mississippi, sitting by designation.

determined to retry him, Montano unsuccessfully sought relief in Texas court, arguing that a retrial would violate his rights under the Fifth Amendment's Double Jeopardy Clause. Montano then filed a habeas petition in federal district court, but the district court dismissed his habeas petition without prejudice for failure to exhaust available state remedies. Because Montano has exhausted all available state remedies in accordance with our precedent, we REVERSE the dismissal of his habeas petition and REMAND for adjudication of his Double Jeopardy claim.

I.

Joseph Montano was indicted in Harris County, Texas, for the felony offense of aggregate theft from a nonprofit. His trial began in September 2013, but never reached fruition. Instead, the state trial judge declared a mistrial after a prosecution witness incriminated himself during cross-examination and thereafter invoked his Fifth Amendment right against self-incrimination. Texas determined to retry Montano on the same charge.

Montano sought habeas relief in state court, arguing that a retrial would violate the Fifth Amendment's Double Jeopardy Clause.[1] The state habeas court denied relief, as did the court of appeals, the latter concluding that Montano had consented to a mistrial. *See Ex parte Montano*, 451 S.W.3d 874, 877–80 (Tex. App.—Houston [1st Dist.] 2014, pet ref'd).

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[1] The Double Jeopardy Clause provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V.

The Texas Court of Criminal Appeals denied Montano's petition for review as well as his subsequent motion for rehearing.

Montano then filed a habeas petition in federal court under 28 U.S.C. § 2241, arguing again that a retrial would violate the Double Jeopardy Clause. The federal district court determined that Montano failed to exhaust all available state remedies as is required before a federal district court may entertain a Section 2241 petition. In particular, the district court cited two provisions of the Texas Code of Criminal Procedure that allows a defendant to submit a special plea of Double Jeopardy at trial. *See* Tex. Crim. Proc. Code arts. 45.023(a)(3), 27.05. If Montano entered the special plea and was convicted, the district court concluded, he would "have the opportunity to appeal that conviction in state court and, if unsuccessful, to seek state habeas relief." The district court dismissed his Section 2241 petition without prejudice, and Montano timely appealed.

II.

"We review for abuse of discretion a dismissal of a § 2241 petition for failure to exhaust administrative remedies." *Gallegos-Hernandez v. United States*, 688 F.3d 190, 194 (5th Cir. 2012); *see also Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994) (same). Any factual issues underlying the district court's decision are reviewed for clear error and issues of law are reviewed *de novo*. *Gallegos-Hernandez*, 688 F.3d at 194; *see also Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001).

III.

Montano raises two arguments on appeal. First, he contends that the federal district court was wrong to conclude that he failed to exhaust available state remedies. Second, he argues the merits of his Double Jeopardy claim.

A.

Unlike 28 U.S.C. § 2254, Section 2241's text does not require exhaustion. However, it has long been settled that a Section 2241 petitioner must exhaust available state court remedies before a federal court will entertain a challenge to state detention. As we explained before,

> [d]espite the absence of an exhaustion requirement in the statutory language of section 2241(c)(3), a body of case law has developed holding that although section 2241 establishes jurisdiction in the federal courts to consider pre-trial habeas corpus petitions, federal courts should abstain from the exercise of that jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner.

Dickerson v. Louisiana, 816 F.2d 220, 225 (5th Cir. 1987); *see also Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993). At the same time, we have recognized that "[e]xceptions to the exhaustion requirement are appropriate where the available . . . remedies either are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies

would itself be a patently futile course of action." *Fuller*, 11 F.3d at 62; *see also Gallegos- Hernandez*, 688 F.3d at 194 (same).

The district court determined that Montano still had state remedies available to him that he was required to exhaust before utilizing Section 2241. Specifically, the district court concluded that Montano had failed to exhaust Articles 45.023[2] and 27.05[3] of the Texas Code of Criminal Procedure, which allow a defendant to enter a special plea of Double Jeopardy at trial. The district court further reasoned that "[i]f Montano is retried and convicted, he will have the opportunity to appeal that conviction in state court and, if unsuccessful, to seek state habeas relief."

We disagree. In *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), *reh'g en banc denied*, (5th Cir. Mar. 1, 1974), we confronted this precise issue. There, Florida sought to

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[2] Article 45.023 provides: "(a) After the jury is impaneled, or after the defendant has waived trial by jury, the defendant may: . . . (3) enter the special plea of double jeopardy as described in Article 27.05."

[3] Article 27.05 provides:

> A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution: (1) resulted in acquittal; (2) resulted in conviction; (3) was improperly terminated; or (4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

try a defendant (Fain) for rape after he had already been adjudicated delinquent for the same offense. *Id*. at 220–21. After having raised a Double Jeopardy challenge at every level of the state judiciary and ultimately not prevailed, Fain brought a Section 2241 petition in federal district court raising the same claim, and the district court granted relief. *Id*. at 221.

We held that Fain satisfied Section 2241's exhaustion requirement because he had raised and received a ruling on his Double Jeopardy claim at every level of the state judiciary; there was, then, "nothing more for the courts of Florida to say on [the] issue." *Id*. at 224. We acknowledged that "a petition for habeas corpus relief could be brought *after* the trial in state court," and that this would "leav[e] open the possibility that a finding of not guilty in state court would make resort to federal habeas corpus unnecessary." *Id*. (emphasis added). Despite this, we concluded that requiring a defendant to endure a second prosecution in order to fully exhaust a Double Jeopardy claim was incompatible with the nature of the Double Jeopardy Clause's protection:

> Fain is not asserting merely a federal defense to a state prosecution. He is asserting a constitutional right not to be twice put in jeopardy for the same offense. Although double jeopardy (if shown) would certainly be a proper defense to assert at trial and in postconviction proceedings, the right consists of more than having the second conviction set aside. It consists of being protected from having to undergo the rigors and dangers of a second-

> illegal-trial. Double jeopardy is not a mere defense to a criminal charge; it is a right to be free from a second *prosecution*, not merely a second *punishment* for the same offense . . . . The prohibition of the Double Jeopardy Clause is "not against being twice punished, but against twice being put in jeopardy."

Id. (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)). So, because Fain had pressed his Double Jeopardy claim at every level of the state judiciary up to the point of enduring a second trial, we held that he had fully exhausted his state remedies, even though he could be acquitted at trial or obtain relief through post-trial state proceedings. *Id*.

We hold, in accordance with *Fain*, that Montano has satisfied Section 2241's exhaustion requirement. There is no dispute that Montano has asserted his Double Jeopardy claim before every available state judicial forum, short of undergoing a second trial. Requiring Montano to endure a second prosecution before being able to assert his claim in federal court places him in precisely the same impermissible position as the petitioner in *Fain*: forced to forfeit the protections of his federal right before being permitted to seek its vindication in federal court.

The district court identified several state remedies that Montano had yet to exhaust. First, it observed that "[i]f Montano is retried and convicted, he will have the opportunity to appeal that conviction in state court and, if unsuccessful, to seek state habeas relief." That, however, is precisely the argument we rejected in *Fain*. *See id*. There, as here, the fact that Montano might

prevail at trial—or in a post-trial proceeding—cannot provide relief, and is not a "remedy" in any meaningful sense, since the Double Jeopardy Clause protects against "having to undergo the rigors and dangers of a second-illegal-trial" in the first place. *Id*.

Second, the district court concluded that Montano could have availed himself of the special plea of Double Jeopardy provided by Texas law. *See* Tex. Crim. Proc. Code arts. 45.023, 27.05. Article 45.023 of the Texas Code of Criminal Procedure provides in relevant part that "*[a]fter the jury is impaneled* . . . the defendant may . . . enter the special plea of double jeopardy as described in Article 27.05." Tex. Crim. Proc. Code art. 45.023 (emphasis added). Texas law elsewhere provides that "[a]ll issues of fact presented by a special plea *shall be tried by the trier of the facts on the trial on the merits*." Tex. Crim. Proc. Code art. 27.07 (emphasis added).

These provisions, however, do not solve the fundamental problem identified in *Fain*. It is well-established that, "[f]or a jury trial, jeopardy attaches when the jury is empaneled and sworn." *United States v. Jones*, 733 F.3d 574, 580 (5th Cir. 2013). These provisions of the Texas Code of Criminal Procedure are crystal clear that a special plea of Double Jeopardy may only be entered *after* the jury is impaneled and that the jury will not decide the merits of the special plea until the end of trial. The special plea is therefore just as incapable of protecting Montano's Double

Jeopardy right as is the potential for acquittal at trial or post-trial proceedings.[4]

Texas relies on *Dickerson v. Louisiana*, 816 F.2d 220 (5th Cir. 1987) and *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), but to no avail. *Braden* held that a defendant could bring a Speedy Trial Clause claim in a Section 2241 petition prior to trial. 410 U.S. at 489–93. In finding Section 2241's exhaustion requirement satisfied, the Supreme Court observed, first, that the defendant had presented his federal constitutional claim to the state courts, and second, that the defendant was not seeking to "forestall a state prosecution, but to enforce the [state's] obligation to provide him with a state court forum." *Id.* at 491.

Importantly, *Fain* addressed *Braden* in the context of its exhaustion ruling and concluded that its holding was in harmony with *Braden*. *See Fain*, 488 F.2d at 224 ("Again, this can be analogized to *Braden*. . . . [J]ust as in the case of speedy trial, the [Double

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[4] Texas also argues that *Fain* is distinguishable "because [Montano] has other state court remedies available which would allow for further state appellate review," presumably a reference to the "special plea." However, as just discussed, the special plea is not materially different than the situation addressed in *Fain*. Texas also relies on *Davis v. Anderson*, No. 4:10-cv-057, 2010 WL 2300407 (N.D. Tex. May 24, 2010), *report and recommendation adopted*, No. 4:10-CV-057-Y, 2010 WL 2300393 (N.D. Tex. June 7, 2010). Aside from the fact that we are not bound by *Davis*, the magistrate judge there found that "Davis ha[d] provided no proof of his efforts to exhaust state remedies or that state court remedies are unavailable or inadequate." *Id.* at *2. That is simply not so in this case. Montano raised his Double Jeopardy claim to every level of the Texas judiciary and was denied relief.

Jeopardy] right is one which can and should be vindicated without waiting until the state decides to conduct a trial."). *Fain*'s interpretation of Supreme Court precedent is binding under our rule of orderliness. *See Barber v. Johnson*, 145 F.3d 234, 237 (5th Cir. 1998) ("Even if persuaded that [our prior panel opinion] is inconsistent with [an earlier Supreme Court opinion], we may not ignore the decision, for in this circuit one panel may not overrule the decision of a prior panel.").

As to *Dickerson*, that decision held that a defendant could not assert a Speedy Trial claim before trial in a Section 2241 petition. 816 F.2d at 226–28. We distinguished *Braden* on the ground that the habeas petitioner in that case had not sought to derail his criminal prosecution, only to compel the state to carry out the trial in a prompt fashion. *Id.* at 226. By contrast, the petitioner in *Dickerson* sought to have the charges against him dismissed due to the asserted Speedy Trial violation.[5] *Id.* Texas argues that Montano, like the petitioner in *Dickerson*, is seeking to derail his criminal prosecution.

This argument, however, disregards the critical differences between the rights at issue in these cases. The Speedy Trial Clause does not prohibit prosecution; it requires prompt prosecution. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). The

[5] We also held that, to the extent the petitioner was seeking merely to compel the state to carry out a speedy trial, he had not exhausted all pre-trial remedies as had the petitioner in *Braden*. *See id.* at 228.

petitioner in *Dickerson* was not seeking to enforce this requirement, but sought instead to use the Speedy Trial Clause as a means of preventing prosecution from occurring at all. *Dickerson*, 816 F.2d at 226–27. By contrast, the whole point of the Double Jeopardy Clause *is* to bar prosecution. Montano's Section 2241 petition seeks nothing more than to enforce this protection, just as the petitioner in *Braden* sought nothing more than to enforce the Speedy Trial Clause's guarantee. To ignore the differences between Double Jeopardy and Speedy Trial protections is to fundamentally misunderstand these cases.[6]

Moreover, even if *Dickerson* were in conflict with *Fain*—which we do not read it to be—*Fain* would control under our rule of orderliness. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.").[7]

* * * * *

[6] Our decision in *Brown v. Estelle*, 530 F.2d 1280 (5th Cir. 1976) is distinguishable for these same reasons.

[7] Texas also argues that the district court was correct to dismiss Montano's petition based on the abstention doctrine recognized in *Younger v. Harris*, 401 U.S. 37 (1971). But whatever might follow from *Younger* in another context, *Fain* holds that a federal court may adjudicate a Double Jeopardy claim even though the possibility exists that the defendant could obtain a favorable result at or after trial. *See Fain*, 488 F.2d at 224.

The requirement that state criminal defendants exhaust available state remedies is vital to "preserv[ing] the respective roles of state and federal governments and avoid[ing] unnecessary collisions between sovereign powers." *Fain*, 488 F.2d at 224. While exceptions to this requirement appropriately apply "only in extraordinary circumstances," we do not require defendants to pursue state remedies that are "wholly inappropriate to the relief sought." *Fuller,* 11 F.3d at 62 (quotation marks omitted); *see also Gallegos-Hernandez*, 688 F.3d at 194. Such is the case here. As we recognized in *Fain*, Section 2241's exhaustion requirement does not mandate that defendants asserting a Double Jeopardy claim subject themselves to the very harm the Double Jeopardy clause protects against before being able to assert the right in federal court.

B.

The Texas court of appeals rejected Montano's Double Jeopardy claim because it concluded that he implicitly consented to being retried—which is a recognized exception to the Double Jeopardy Clause's protections. *See Ex parte Montano*, 451 S.W.3d at 879–80. Montano argues that the state trial judge *sua sponte* ordered a mistrial and so he did not have time to object. He also argues that declaring a mistrial was improper because the witness had already incriminated himself and should not have been permitted to invoke his Fifth Amendment rights after the fact. And Montano notes that the witness who incriminated himself has now been granted immunity by Texas, which he claims will prejudice him if he is retried.

Texas, by contrast, argues that Montano implicitly consented to the mistrial. Though the federal district court did not reach Montano's Double Jeopardy claim, Montano urges us to address it in the first instance.

We decline to do so. "As a court for review of errors," we do "not . . . decide facts or make legal conclusions in the first instance," but "review the actions of a trial court for claimed errors." *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991). In other words, "a court of appeals sits as a court of review, not of first view." *United States v. Vicencio*, 647 F. App'x 170, 177 (4th Cir. 2016) (quotation marks omitted); *see also United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015) ("Like the Supreme Court, we are a court of review, not first view."). Given that the district court did not reach Montano's claim, the normal course would be to remand for the district court to do so. *See, e.g.*, *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993 n.6 (5th Cir. 1999) ("We decline to examine these claims, because the district court never addressed [them].").

Adhering to this approach is particularly advisable here, where the record is not sufficiently developed to adjudicate Montano's Double Jeopardy claim. It is settled that "Double jeopardy may be waived by consent," *United States v. Nichols*, 977 F.2d 972, 974 (5th Cir. 1992), and consent "can either be express or implied." *United States v. Palmer*, 122 F.3d 215, 218 (5th Cir. 1997). In rejecting Montano's Double Jeopardy claim, the Texas court of appeals concluded that Montano had impliedly consented to the mistrial and therefore waived his Double Jeopardy rights. *See Ex parte Montano*, 451 S.W.3d at 880. However, the record

on appeal does not contain any of the transcripts or other materials from the trial proceedings necessary to adjudicate whether Montano provided such consent. The only record "evidence" as to what actually took place in the state proceeding comes in the form of the Texas court of appeals opinion, which reproduces snippets of the record in the course of its decision. Because the district court did not address Montano's Double Jeopardy claim and because the record is not sufficiently developed to enable us to do so in the first instance, we do not address it. *See, e.g.*, *United States v. Gonzalez*, 540 F. App'x 267, 268 (5th Cir. 2013) ("The record is not adequately developed to enable us to review Gonzalez's IAC claim in the first instance, so we decline to address it on direct appeal.").

IV.

Accordingly, because Montano has exhausted all available state remedies in accordance with our precedent, we REVERSE the dismissal of his habeas petition and REMAND for adjudication of his Double Jeopardy claim.[8]

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[8] Montano asks us to grant him a certificate of appealability. Because Montano is correctly proceeding under 28 U.S.C. § 2241, a certificate of appealability is not required. *See Ojo v. I.N.S.*, 106 F.3d 680, 681 (5th Cir. 1997); *see also Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005).

APPENDIX D

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

NO. 01-13-01081-CR

Opinion issued November 20, 2014

EX PARTE JOSEPH MONTANO

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1408110

O P I N I O N

The State charged appellant, Joseph Montano, with the second-degree felony offense of theft from a nonprofit organization of property valued between $20,000 and $100,000.[1] After a State witness

[1] *See* TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 2013) (providing elements of offense of theft); *id.* § 31.03(e)(5) (providing that theft of property valued between $20,000 and $100,000 is third-degree felony); *id.* § 31.03(f)(3) (providing that offense is increased to next higher category of offense if owner of appropriated property was nonprofit organization).

incriminated himself during cross examination, the trial court declared a mistrial. The State indicated its intent to retry appellant, and appellant applied for a writ of habeas corpus, arguing that double jeopardy barred any retrial of the offense. The trial court denied habeas corpus relief. In his sole issue on appeal, appellant contends that the trial court erred in denying habeas corpus relief on double jeopardy grounds.

We affirm.

Background

The State charged appellant with aggregate theft from a nonprofit organization. The State alleged that appellant, an employee of Memorial Hermann Hospital, created fraudulent invoices and submitted them to Memorial Hermann for payment. Appellant then allegedly cashed the checks issued by Memorial Hermann at local convenience stores.

One of the State's witnesses at trial was Omar Faraz. On the third day of trial, Faraz testified that he worked at the convenience store, owned by his father, where Montano allegedly cashed some of the checks from Memorial Hermann. Faraz testified on cross-examination that appellant would sometimes give him checks to cash that had not been endorsed. Faraz testified that, when this occurred, he would endorse the checks himself before cashing them. After Faraz testified to these actions, the trial court stopped the cross-examination and, outside the presence of the jury, called the public defender's office to appoint counsel for Faraz. Both appellant and the State agree that several discussions between the parties and the trial court

occurred off the record. After one of these discussions, Faraz's appointed counsel informed the trial court that Faraz would be invoking his Fifth Amendment right. Following this, the trial court stated on the record:

> The Court: I will declare a mistrial. This will go back on the trial docket. We will give you another date to try the case, and then we can represent the evidence however you guys need to present it to prove it up. Because like I said, to me, it was pretty clean until we got there. It really was.
>
> I believe he's got a right to cross-examine, and I believe the way this happened is by him getting out this direct testimony, and now you can't do a cross. He's denied a cross. You've got a direct out there, but there's no cross. That's the problem.
>
> So, we will start—we are going to start over. Let me do this. You guys will come back tomorrow morning and we will discuss how we are going to proceed. And I'll give you as much time as you need to, again, reevaluate

	your presentation and what you want to do, knowing that he doesn't want to testify, have the Fifth. I guess anybody—I don't know if the—it's his father, right, that owns the business?
[Defense counsel]:	That's what he stated, Judge.
The Court:	I'm sorry?
[Defense counsel]:	That's what he stated.
The Court:	I don't know if his father did the same thing. . . .

The trial court then signed a mistrial order which stated: "As a result of conduct occurring during trial, the court grants the motion for mistrial." The trial court set the case on the docket for a later date.

Appellant applied for a writ of habeas corpus, contending that retrial violated double jeopardy because he did not consent to the mistrial and there was no manifest necessity for the mistrial. At the hearing on appellant's habeas corpus application, appellant maintained that he did not consent to the mistrial because, during an off-the-record conversation, he noted that he wanted to continue to cross-examine Faraz. Appellant also stated that the trial court did not ask the parties on the record for input before declaring a mistrial. Appellant argued that manifest necessity for the mistrial did not exist because Faraz should not have been able to invoke his Fifth Amendment right

against self-incrimination as he waived this right when he freely answered questions about his actions. Appellant also contended no manifest necessity existed because the trial court did not consider less drastic alternatives to a mistrial.

At the habeas hearing, the State provided further information about what had occurred off the record at trial. According to the State, after the trial court called the public defender's office, the court, off the record, informed the parties that it was considering granting a mistrial if Faraz later invoked his Fifth Amendment right against self-incrimination. The State argued that there was ample opportunity at this point to object or to argue against mistrial and that it was appellant's choice not to present any argument or make any objection at that time. The State noted, "At no point in time did the Court cut [appellant] off or not allow him to make any kind of argument against the mistrial." The State also argued that appellant's objection to the mistrial was not timely because appellant did not object to the mistrial until he applied for habeas corpus relief on November 11, 2013, two months after the trial court declared a mistrial.

The trial court subsequently denied habeas corpus relief. Appellant timely filed a notice of appeal. *See* TEX. R. APP. P. 26.2(a)(1), 31.1.

Double Jeopardy

In his sole issue, appellant contends that the trial court erred in denying habeas corpus relief on double jeopardy grounds because (1) he did not consent to the

mistrial and (2) manifest necessity for the mistrial did not exist.

A. Standard of Review

Generally, an appellate court reviews a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion. *See Sandifer v. State*, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Ex parte Ayers*, 921 S.W.2d 438, 440 (Tex. App.—Houston [1st Dist.] 1996, no pet.)). In reviewing the trial court's decision to grant or deny habeas corpus relief, we view the evidence in the light most favorable to the trial court's ruling. *See Ex parte Masonheimer*, 220 S.W.3d 494, 507 (Tex. Crim. App. 2007).

We afford almost total deference to the trial court's determination of historical facts supported by the record, especially when the fact findings are based on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Because issues of consent are necessarily fact intensive, a trial court's finding must be accepted on appeal unless it is clearly erroneous. *See Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011). When there are no written findings explaining the factual basis for the trial court's ruling, we imply findings of fact that support the ruling so long as the evidence supports those implied findings. *See id.*

B. Consent to Mistrial

The United States and Texas Constitutions both prohibit a defendant from twice being put in jeopardy for the same offense. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. Jeopardy attaches when a jury is

impanelled and sworn. *Husain v. State*, 161 S.W.3d 642, 645 (Tex. App.—San Antonio 2005, pet. ref'd) (citing *Ex parte Little*, 887 S.W.2d 62, 64 (Tex. Crim. App. 1994)); *Ex parte Perusquia*, 336 S.W.3d 270, 275 (Tex. App.—San Antonio 2010, pet ref'd). Once jeopardy attaches, the defendant possesses the right to have his guilt or innocence determined by the first trier of fact. *Torres v. State*, 614 S.W.2d 436, 441 (Tex. Crim. App. 1981); *Ellis v. State*, 99 S.W.3d 783, 786 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Consequently, as a general rule, if, after jeopardy attaches, the jury is discharged without having reached a verdict, double jeopardy will bar retrial. *Brown v. State*, 907 S.W.3d 835, 839 (Tex. Crim. App. 1995); *Ex parte Rodriguez*, 366 S.W.3d 291, 296 (Tex. App.—Amarillo 2012, pet. ref'd). An exception to this rule exists if the defendant consents to a retrial, or if some form of manifest necessity mandates a retrial. *Torres*, 614 S.W.2d at 441; *Ex parte Rodriguez*, 366 S.W.3d at 296; *see Ex parte Perusquia*, 336 S.W.3d at 275.

Our first inquiry is whether appellant consented to a mistrial. Consent in this context need not be express; consent "may be implied from the totality of circumstances attendant to a declaration of mistrial." *Torres*, 614 S.W.2d at 441 (citing *United States v. Gori*, 367 U.S. 364, 369, 81 S. Ct. 1523, 1526 (1961)); *Garner v. State*, 858 S.W.2d 656, 658 (Tex. App.—Fort Worth 1993, pet. ref'd). Before a defendant's failure to object constitutes implied consent to a mistrial, however, a defendant must be given an adequate opportunity to object to the court's action. *Torres*, 614 S.W.2d at 441–42; *Garner*, 858 S.W.2d at 659. A defendant who

does not object to a declaration of mistrial, despite an adequate opportunity to do so, has impliedly consented to the mistrial. *Torres*, 614 S.W.2d at 441; *Ledesma v. State*, 993 S.W.2d 361, 365 (Tex. App.—Fort Worth 1999, pet ref'd).

Appellant contends that he did not consent to the trial court's declaration of a mistrial. He admits that he never expressly objected to the trial court's declaration of a mistrial, but he argues this was because he did not have an opportunity to do so. Appellant argues that he never had an opportunity to object because the trial court's first statement on the record after dismissing the jury for the day was "I will declare a mistrial." Appellant relies on the Dallas Court of Appeals' opinion in *Harrison v. State* to support the proposition that he did not consent to the mistrial. 772 S.W.2d 556, 558 (Tex. App.—Dallas 1989), *rev'd on other grounds*, 788 S.W.2d 18 (Tex. Crim. App. 1990).

In *Harrison*, the trial court disqualified the defendant's counsel, in response to a motion by the State, on the ground that counsel was a potential fact witness. *Id.* at 557. The court then announced that it intended to declare a mistrial. *Id.* The parties and the trial court held an off-the-record discussion, during which the prosecutor stated that he was within his rights to call Harrison's attorney as a witness. *Id.* at 557–58. The trial court then declared a mistrial on the record. *Id.* at 558.

The Dallas Court of Appeals held that, based on the brevity of the record, it could not conclude that the appellant was given an adequate opportunity to object. *Id.* The court emphasized that the trial court declared

a mistrial almost immediately after first announcing its intention, noting that the trial court did not discuss this intention to declare a mistrial with the parties or provide an opportunity for the parties to object. *Id.* The *Harrison* court concluded that, based on the totality of the circumstances, Harrison did not consent to the mistrial. *Id.*

Harrison is distinguishable from the present case. The sequence of events leading up to the declaration of the mistrial in *Harrison* was more condensed than that in the case before us. Given the quick nature in which the declaration of mistrial came about, Harrison had a short window of time in which to object. *See id.* at 558. Here, the events leading up to the declaration of the mistrial were more protracted.

After Faraz made a possibly self-incriminating statement on the witness stand, the trial court stopped appellant's cross-examination of Faraz and contacted the public defender's office, outside the presence of the jury, to appoint counsel for Faraz. The State argued at the habeas hearing that, during the time that Faraz was waiting for and consulting with his appointed counsel, the trial court spoke with the parties off the record and informed them that it was considering granting a mistrial if Faraz subsequently invoked his Fifth Amendment right against self-incrimination. After Faraz informed the trial court that he would invoke his Fifth Amendment right, the court went on the record and declared a mistrial.

The court explained on the record its reason for granting the mistrial:

> The Court: I will declare a mistrial. This will go back on the trial docket. We will give you another date to try the case, and then we can represent the evidence however you guys need to present it to prove it up. Because like I said, to me, it was pretty clean until we got there. It really was.
>
> I believe he's got a right to cross-examine, and I believe the way this happened is by him getting out this direct testimony, and now you can't do a cross. He's denied a cross. You've got a direct out there, but there's no cross. That's the problem.
>
> So, we will start—we are going to start over. Let me do this. You guys will come back tomorrow morning and we will discuss how we are going to proceed. And I'll give you as much time as you need to, again, reevaluate your presentation and what you want to do, knowing that

	he doesn't want to testify, have the Fifth. I guess anybody—I don't know if the—it's his father, right, that owns the business?
[Defense counsel]:	That's what he stated, Judge.
The Court:	I'm sorry?
[Defense counsel]:	That's what he stated.
The Court:	I don't know if his father did the same thing. . . .

The record of appellant's trial, combined with statements from both appellant and the State at the habeas hearing concerning discussions that occurred off the record, demonstrates that appellant had ample opportunity to object to the mistrial both on and off the record.

The situation here is, instead, similar to that in *Garner*. In *Garner*, the trial court declared a mistrial after the first witness had testified because the court realized that a clerical error had caused the wrong juror to be placed on the jury. 858 S.W.2d at 658. Before declaring a mistrial, the trial court held an off-the-record conference with the parties in chambers. *Id.* Following the conference, the trial court declared a mistrial on the record and explained its reasoning; neither party objected to the mistrial on the record. *Id.* The Fort Worth Court of Appeals held: "The totality of the circumstances in this case reflects that appellant in effect consented to the mistrial. Even though appellant did not object on the record, he had ample opportunity

to object at both the conference in the judge's chambers and in open court on the record." *Id.* at 659. Similarly, here, appellant had opportunities to express his objection to the mistrial declaration in discussions off the record as well as in open court, where the trial court explained its reasoning for granting a mistrial. Under the totality of the circumstances, we may infer appellant's consent to the mistrial. *See Torres*, 614 S.W.2d at 441; *Ledesma*, 993 S.W.2d at 365; *Garner*, 858 S.W.2d at 659. We therefore conclude that the trial court did not abuse its discretion in denying appellant's request for habeas corpus relief.[2]

We overrule appellant's sole issue.

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[2] We further note that, in a habeas corpus proceeding, the applicant bears the burden of alleging and proving specific facts which, if true, would entitle him to relief. *See Druery v. State*, 412 S.W.3d 523, 538 (Tex. Crim. App. 2013). In *Garza v. State*, the Corpus Christi Court of Appeals addressed a situation in which the defendant argued that double jeopardy barred a retrial after the trial court declared a mistrial, but the defendant did not introduce a record of what happened at his prior trial. 803 S.W.2d 873, 875 (Tex. App.—Corpus Christi 1991, pet. ref'd). The court observed that defense counsel's testimony at the subsequent habeas hearing did not "indicate whether [Garza] consented or objected to the district court's declaration of mistrial." *Id.* The court further noted that Garza bore the burden of establishing his entitlement to relief in a habeas proceeding and held that he had "failed to prove that jeopardy barred his second trial." *Id.*

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Huddle.

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