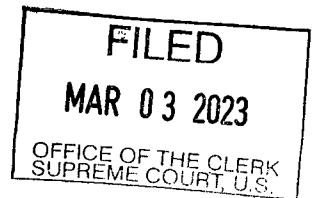


No. 22-7021



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IN THE  
SUPREME COURT OF THE UNITED STATES

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Victor Todd Williams — PETITIONER  
(Your Name)

vs.

BOBBY LUMPKIN, Director,  
TDCJ-CID. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS  
FOR THE  
FIFTH CIRCUIT

---

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Victor Todd Williams

(Your Name)

John M. Wynne State Farm  
810 FM 2821, West Hwy. 75, N.

(Address)

Huntsville, Texas. 77349-0005

(City, State, Zip Code)

(936) 295-9126

(Phone Number)

## QUESTION(S) PRESENTED

### QUESTION No. 1

Whether the court of appeals should have issued a Certificate of Appealability upon the Petitioner's claim and issue of whether the district court erred when it fail to determine whether the 1-Year limitation period was tolled until the issuance of Mandate on the Petitioner State post-conviction application by applying governing State procedural law in determining whether the Petitioner's State habeas application was pending within the meaning of Title 28 U.S.C., Section 2244(d)(2). Had the district court applied governing State procedural law in determining whether the Petitioner's State habeas application was pending within the meaning of Title 28 U.S.C., Section 2244(d)(2) the Petitioner's federal habeas petition would have been considered timely.

### QUESTION No. 2

Whether the court of appeals should have issued a Certificate of Appealability upon the Petitioner's claim and issue that the district court erred by failing to consider and address the the issue of whether this claim of Legal Innocence survived the application of the 1-Year limitation period because there is no valid statute on the books that allows for the conviction of the Aggravated Robbery of one person as a lesser-included offense of the offense charged of Murder of another person. Had the district court considered and addressed the issue the contours of the fundamental miscarriage of justice in the mist of preventing the unjust incarceration of the Petitioner would have been warranted.

### QUESTION No. 3

Whether the court of appeals should have issued a Certificate of Appealability upon the Petitioner's claim and issue that the district court erred by failing to consider and address the issues as presented by the Petitioner that deprived him of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution, when review of the claim as to whether a claim of Double-Jeopardy under the 5TH Amendment to the United States Constitution provides for an exception to the 1-Year limitation period as a prima facie claim of Actual Innocence? Absent the constitutional claim of Double-Jeopardy, no reasonable juror could have factually convicted the Petitioner.

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Nathan Tadema, Assistant Attorney General, State of Texas, P.O. Box 12548, Austin, Texas, 78711-2548.

## RELATED CASES

No. #1386052, 339TH Judicial District Court, State of Texas v. Victor Todd Williams.

No. #14-13-00708-CR, 14TH Court of Appeals, Victor Todd Williams v. The State of Texas.

No. #PD-1473-15, Texas Court of Criminal Appeals, Victor Todd Williams v. The State of Texas.

No. #WR-87,193-01, Texas Court of Criminal Appeals, Ex Parte Victor Todd Williams.

No. #WR-87,193-02, Texas Court of Criminal Appeals, Ex Parte Victor Todd Williams

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**APPENDIX B:** Unpublished written Memorandum Opinion and Order by the United States District Court, Southern District of Texas, Houston Division, in Case No. #4:21-0770.

**APPENDIX C:** Unpublished written Order entered on December 12, 2022, by the United State Court of Appeals for the Fifth Circuit, in Case No. #220217.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 12, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 12, 2022, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C., Section 2253(c)(1)(A); Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from; the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.

Title 28 U.S.C., Section 2253(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 U.S.C., Section 2244(d)(2); The time during which a properly filed application for State post-conviction or other collateral review is pending is not counted toward the limitation period.

Texas Code of Criminal Procedure, Article 11.07, Section 5: The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon review of the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases.



## STATEMENT OF THE CASE

Petitioner was charged with the alleged offense of Felony Murder under Texas Penal Code, Section 19.03(b)(3) before the 339TH Judicial District Court of Harris County, Texas in Case No. #1386052, Styled: The State of Texas v. Victor Todd Williams. (CR.Vol.I; p. 7).

Petitioner was charged in a two (2) Count Indictment wherein the State pled:

### COUNTY I

"did then and there unlawfully, intentionally, and knowingly commit the felony offense of Aggravated Robbery, to-wit: while in the course of committing theft of property owned by Tellie Simmons, and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and placed Tellie Simmons in fear of imminent bodily injury and death, and did then and there use and exhibit a deadly weapon, namely, a firearm and did thereby cause the death of Justin Thompson."

### COUNT II

"did then and there unlawfully, intentionally, and knowingly commit the felony offense of Aggravated Robbery, to-wit: while in the course of committing theft of property owned by Tellie Simmons, and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and placed Tellie Simmons in fear of imminent bodily injury and death, and did commit an act clearly dangerous to human life, to-wit: knowingly discharge a firearm at and in the direction of a building and did thereby cause the death of Justin Thompson."

(EEF No. 7)/

Upon a trial by jury, the Petitioner pled not guilty to the alleged offense of Murder. The jury acquitted the Petitioner of Murder, and convicted the Petitioner for the alleged offense of Aggravated Robbery of Tellie Simmons, the purported lesser included offense.

On March 01, 2021, Petitioner executed a federal habeas corpus petition pursuant to Title 28 U.S.C., Section 2254 before the United States District Court for the Southern District of Texas, Houston Division in Case No. #4:21-CV-0770, Styled: Victor Todd Williams v. Bobby Lumpkin, Director, TDCJ-CID.

Notwithstanding, the characterization of the Petitioner's claims before the district court, the Petitioner claimed that: (1) he was actually innocent of the offense of Aggravated Robbery because the offense was jeopardy-barred on the basis that the jury found him not guilty of the offense of Murder while in the course of committing the felonious act of Aggravated Robbery; (2) the trial court did not have jurisdiction over the offense for which he was convicted because the offense of Aggravated Robbery against one (1) person was not the lesser included offense of Murder against another person, thus, the Judgment was void ab initio; and (3) he was deprived of his constitutional rights to effective assistance of counsel under the 6TH and 14TH Amendments to the United States Constitution.

On March 30, 2022, a Memorandum Opinion and Order was entered that granted the Respondent's Motion To Dismiss, and dismissed the petition for habeas corpus with prejudice as time-barred, and denied a Certificate of Appealability. (Appendix B).

(A) The district court held that the in this case, the appellate court affirmed the Petitioner's conviction on October

13, 2015, and the Court of Criminal Appeals refused his petition for discretionary review on March 9, 2016. Because the Petitioner did not file a petition for a writ of certiorari to the United States Supreme court, his conviction became final on Tuesday, June 7, 2016, when his 90 day period for filing the petition ended. Therefore, the Petitioner's limitations period expired one year later, on Wednesday, June 7, 2017. The district court held that the Petitioner executed his federal habeas petition on March 1, 2021, over three and a half years late and time-barred unless a statutory or equitable exception applied. The district court held that the Petitioner filed his first State habeas application on February 23, 2017 and that the application was pending for 181 days before the Court of Criminal appeals denied habeas relief on August 23, 2017. The district court held that when the 181 days are added to the Petitioner's federal limitations period, his filing deadline extends from June 7, 2017 to Tuesday, December 5, 2017. The district court furthered, that because the Petitioner's federal habeas petition was not executed until March 1, 2021, the tolling provision in Title 28 U.S.C., Section 2244(d)(2) does not render the petition timely. The district court concluded that the Petitioner did not demonstrate the applicability of any provision in Section 2244(d)(1) that might warrant a later accrual date because the Petitioner did not identify a State-created impediment to filing for habeas relief, a constitutional right newly recognized and

made retroactive by the Supreme Court, or a new factual predicate for his claims. (Appendix B; pp. 4 & 5).

Before the district court relying on the holdings established in *Artuz v. Bennett*, 121 S.Ct. 361 (2000), *Carey v. Saffold*, 122 S.Ct. 2134 (2002), *Payne v. Kemna*, 441 F.3d 570 (8th Cir. 2006), *Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000), *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999), and State law, Article 11.07, Section 5 of the Texas Code of Criminal Procedure, the Petitioner argued that his federal habeas petition was not time-barred because the mandate had not issued after his State habeas proceedings.

Article 11.07, Section 5 of the Texas Code of Criminal Procedure provides, that:

"The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon review of the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases."

The district court evaded the contours of State law, and held that the mandate issued on October 13, 2015, at the conclusion of the Petitioner's direct appeal, and during the Petitioner's State habeas proceedings, the trial court issued findings and conclusions recommending that habeas relief be denied and that the Court of Criminal Appeals denied relief based on those findings, as premitted by the statutory provision. The

district court held that the record in this case and the authorities cited by the Petitioner did not support his assertion that a mandate in his proceedings has yet to issue or that his State habeas petition remains pending. (Appendix B; pp. 4 & 5).

Before the United States Court of Appeals for the Fifth Circuit, the Petitioner argued that the district court erred in its determination that his first State habeas application remained pending as to toll the 1-year limitations period because the Court of Criminal Appeals had not issued mandate, thus, the application remained pending absent the issuance of mandate. The Petitioner argued that reasonable jurists could debate whether the district court was correct on this procedural aspect, because federal courts are required to apply governing State procedural law in determining whether an application for State post-conviction relief is "properly filed" or is "pending" within the meaning of Section 2244(d)(2). Citing, Artuz and Garey. The Petitioner argued that the district court fail to examine the particularity of the Texas habeas corpus procedure to determine when the process has reached completion or final resolution, where under such procedure the process is not final or complete until the issuance of mandate. Citing, Nyland, Mills, and Payne.

The Petitioner argued that if the district court properly analyze and apply State law correctly, the 1-year limitation period was tolled during the pendency of his State post-conviction

application, that remain pending until the issuance of mandate.

The Petitioner argued that the record in this case was sufficient to support his claim, because of the absence of a mandate issued by the Court of Criminal Appeals in accordance with Article 11.07, Section 5 of Texas Code of Criminal Procedure.

The Petitioner furthered, that since this record was provided by the Respondent it was either complete or incomplete on the subject matter as relied upon the district court in its determination. To the contrary, since it was provided by the Respondent it was complete, and the absent of mandate contained in the record demonstrated that the Court of Criminal Appeals did not issue mandate.

The Payne Court held that a State post-conviction proceeding remains pending within the meaning of Title 28 U.S.C., Section 2244(d)(2) until the issuance of mandate. See., also Nyland, Supra.

The United States Court of Appeals for the Fifth Circuit paid-lip service to the issue presented for the issuance of a Certificate of Appealability (COA) to appeal the determination of the district court, and summarily denied the Petitioner's application for a COA by holding that the Petitioner failed to meet the COA standard. (Appendix A).

(B) Before the district court, the Petitioner argued that the "Actual Innocence Exception" applied to his case upon several exceptions. (1) in view of his Double Jeopardy Claim, the claim presented a prima facie claim of actual innocence

because had it not been for such constitutional violation nor reasonable jury would have voted to convict him; (2) in view of his Double Jeopardy Claim, it would be a fundamental miscarriage of justice not to consider the claim; (3) no court could have confidence in the outcome of the proceedings; and (4) that his claim of legal innocence survived the application of the 1-year limitation period because there was no valid statute on the books that allowed for the offense of aggravated robbery of one person to be the lesser-included offense of murder of another person.

The district court in considering and addressing each of the issues set forth above, did not consider and address issue (4) set out above.

The district court held that the Petitioner's arguments regarding double jeopardy all relied on information that was in the trial record and was available to him at the time of his trial and direct appeal, and that the Petitioner cites to no "new evidence" that is material to his conviction and could satisfy the actual innocence standard, as the governing authorities require. Citing, *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013), and *Hancock v. Davis*, 906 F.3d 387 (5th Cir. 2018).

Before the United States Court of Appeals for the Fifth Circuit, citing *Clisby v. Jones*, 960 F.2d 925, 935-36 (11th Cir. 1992, en banc), the Petitioner argued for the purpose of the issuance of a COA that the district court erred by

failing to consider and address the issue that his claim of legal innocence survived the application of the 1-year limitation period because there was no valid statute on the books that allowed for the offense of aggravated robbery of one person to be the lesser-included offense of murder of another person. The court of appeals itself did not consider the issue within its perfunctory denial of the Petitioner's application for the issuance of a COA.

On the matter of double jeopardy, the Petitioner argued that the district court erred by not extending the double jeopardy claim as an exception to the 1-year limitation period because it was necessary and constitutes a fundamental miscarriage of justice if not considered. The Petitioner position himself on the concept that the enforcement of the 1-year limitation period would serve no legitimate Federal or State interest upon a claim of double jeopardy because it is an integral part of a constitutional guarantee, that when applicable, its sweep is absolute and there are no equities to be balanced, for the Double Jeopardy Clause of the United States Constitution (5<sup>TH</sup> Amendment) is declared a constitutional policy based on grounds which are not open to judicial examination or scrutiny. The Petitioner argued that the matter deserved further encouragement to proceed further, because it had been decided by the State court(s) that a claim of double jeopardy presents a prima facie claim of actual innocence under *Ex Parte Knipp*, 236 S.W.3d 214 (Tex.Cr.App. 2007).



The court of appeals summarily slammed dunked the Petitioner's application for the issuance of a COA by holding that the Petitioner failed to meet the COA standard. (Appendix A).

## **REASONS FOR GRANTING THE PETITION**

Under the Antiterrorism Effective Death Penalty Act of 1996, (AEDPA), Title 28 U.S.C., Section 2253(c)(1) and (2) is straight forward, that:

"Unless a circuit justice or judge issues a certificate of appealability (COA), an appeal may not be taken to to the court of appeals. A COA may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

This Court has held that it has jurisdiction to review a federal court of appeals' denial of a COA. See., Hohn v. United States, 118 S.Ct. 1969 (1998).

It is clear, that Congress in the enactment of the AEDPA, was explicitly clear both in text and language, that a "Justice" of this Court can issue a COA, however, this Court has not stated and/or proscribed the process to be used by a criminal defendant in seeking the issuance of a COA from this Court?

However, in the context of a writ of certiorari to this Court, the question is whether the court of appeals should have issued a COA from the district court's determination; or whether the issue presented is adequate to deserve encouragement to proceed further. See., Miller-El v. Cockrell, 123 S.Ct. 1029 (2003).

It is permissible to argue that a "court" has no discretion in determining what the law is or in applying the law to the particular facts of a case. Further, a "court" has no authority to reewrite the law or vary from the clear text and meaning of the law. Congress in the enactment of the

AEDPA, was explicitly clear both in text and language as to the statutory requirements for a habeas corpus applicant to meet for the issuance of a COA to appeal a decision of a district court, is to make a substantial showing of the denial of a constitutional right. Not that the applicant must prove or make clear by reasoning or evidence the denial of a constitutional right. All is required in view of the statutory context, is that the applicant make the denial of a constitutional violation be existing as or in substance.

However, this Court has defined the stare decisis and letter of law by interpreting Section 2253(c)(2) to something that is not contained within the statutory context of the statute, by holding that in order for a habeas corpus applicant to fulfill the "substantial showing of the denial of a constitutional right," where the district court has rejected a constitutional claim on the merits, he must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong, or that jurists could conclude that the issue presented is adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595 (2000) and *Miller-El*. Where the district court has dismissed a federal habeas petition without addressing the merits of the claim or claims presented on procedural grounds, he must show that reasonable jurists could debate whether the district court was correct in its procedural ruling and that reasonable jurists could find it debatable

that the petition states a valid claim of the denial of a constitutional right. Slack, Supra.

The statute is *res ipsa loquitur*, it means what it says, and this Court has added something to the statute that clearly is not there... How this interpretation of the text and language of Section 2253(c)(2) was derived is truly amusing given the contours of the explicit textual language of the statute, thus, a re-writing and wording apart from the statute itself that is straight forward in nature and structure, that a habeas corpus applicant only has to make a substantial showing of the denial of a constitutional right and nothing else. Any other "judge" made rhetoric is outside the clear wording of the statute which a court is forbidden to do...

To the contrary, and holding of this Court's "judge" made principle, it is not the standing as to the debate of the issue, but the debatability of the issue. Thus, if the habeas petitioner has stated a debatable issue concerning the correctness of the district court's procedural denial of habeas relief; or if the habeas petitioner shows that the issue presented is adequate to deserve encouragement to proceed further, then, if the district court's pleadings, the record, and COA application demonstrates that reasonable jurists could debate whether the habeas petitioner has made a valid claim of a constitutional deprivation, a COA will issue. If, those materials are unclear or incomplete, then a COA should be granted, and the appellate panel, if it decides the procedural

issue favorably to the petition, may have to remand the case for further proceedings.

In *Dretke v. Haley*, 124 S.Ct. 1847 (2004) this Court clearly recognized that the "cause and prejudice" standard is not a perfect safe guard against fundamental miscarriages of justice, thus, recognized a narrow exception to the cause requirement where a "constitutional violation" has "probably" resulted in the conviction of one who is actually innocent of the substantive elements of the offense charged. Cf., *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992); but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable State law.

The various exceptions to the "procedural default doctrine" are "judge" made rules that the court(s) as their stewards must exercise restraint, adding to or expanding them only when necessary,

For review before this Court is whether the "court of appeals" should have issued a COA from the district court's determination? See., *Miller-El*, *Supra*.

On this matter, the Petitioner argues that the court of appeals decision and/or determination not to issue a COA from the district court's determination of the case is highly questionable, and the district court's determination in this case is at best suspect...

(1) Whether the court of appeals should have issued a COA from the district court's determination that the petition

was time-barred in view of the Petitioner's claim that the petition was not time-barred because mandate had not issued by the Texas Court of Criminal Appeals upon his first State habeas corpus application and thus remained pending as to toll the limitation period under Title 28 U.S.C., Section 2244(d)(1).

For this Court, the Petitioner argues that the answer to the question is yes, because (a) the petition states a valid claim of the deprivation of a constitutional right, and (b) reasonable jurists could debate whether the district court was correct in its procedural ruling. Further, the district court's determination of the procedural issue was contrary to this Court's legal standards, and in conflict with other United States Court of Appeals on the same matter.

This Court in Artuz has instructed that the federal court(s) are required to apply govern State procedural law in determining whether an application for State post-conviction relief "is properly filed" or "is pending" within the meaning of Section 2244(d). The Texas court(s) have consistently held that a criminal case is pending until the issuance of mandate. See., *Ex Parte Johnson*, 12 S.W.3d 472 (Tex.Cr.App. 200). Whether a State habeas petitioner's first State habeas application remains pending and tolled the limitation period is a matter of federal law. See., *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999). This Court held in *Saffold* that until the State habeas application has achieved "final resolution" through the

State post-conviction procedures, by definition it remains pending.

Several Circuit(s) have followed this standard and to hold that for the purpose of Section 2244(d) a post-conviction application is pending in the court until the issuance of mandate, and that the court must examine the State court procedures of the particular State to determine when the process has reached completion or final resolution. See., *Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000), *Payne v. Kemna*, 441 F.3d 570 (8th Cir. 2006) and *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1989).

In the instant case, the district court held that the record in this case and the authorities cited by the Petitioner did not support his assertion that a mandate in his proceedings has yet to issue or that his State habeas petition remains pending, however, Article 11.07, Section 5 of the Texas Code of Criminal Procedure requires the Texas Court of Criminal Appeals to issue a mandate what signifies the complete and/or final resolution of the proceedings as well as case authorities, which the Petitioner referred to. The record before the district court did not contain a mandate issued by the Texas Court of Criminal Appeals, because the Texas Court of Criminal Appeals never issued one... Had mandate issued by the Texas Court of Criminal Appeals, it should have been contained within the State court record that was before the district court.

The Petitioner argued before the court of appeals this same argument and claim, however, the court of appeals just simply slam dunked the issue and denied a COA. (Appendix A).

Therefore, this Court should grant a writ of certiorari, finding that the court of appeals should have issued a COA in this case because reasonable jurists could debate whether the district court was correct in its procedural ruling.

Further, this Court should grant a writ of certiorari because the court of appeals decision is in conflict with the decision of another United States Court of Appeals on the same important matter; and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power under Rule 10(a) of the Supreme Court Rules

(2) Whether the court of appeals should have issued a COA from the district court's determination that the petition was time-barred in view of the Petitioner's claim that his Double Jeopardy Claim presented a prima facie claim of "Actual Innocence" to survive the 1-year limitation period; it would be a fundamental miscarriage of justice not to consider the claim; no court could have confidence in the outcome of the proceedings; and his claim of "Legal Innocence" survives the application of the 1-year limitation period because there is no valid statute on the books that allows for the offense of aggravated robbery of one person to be the lesser-included



offense of Murder of another person.

For this Court, the Petitioner argues that the answer to the question is yes, because (a) the petition states a valid claim of the deprivation of a constitutional right, and (b) reasonable jurists could debate whether the district court was correct in its procedural ruling.

(A).

The district court did not consider and address the Petitioner's argument that his claim of legal innocence survived the application of the 1-year limitation period because there was no valid statute on the books that allowed for the offense of aggravated robbery of one person to be the lesser-included offense of murder of another person.

The Petitioner argued before the court of appeals that the district court erred by failing to consider and address the issue, and the court of appeals did not consider and address the issue within its perfunctory denial of the Petitioner's application for the issuance of a COA. (Appendix A & B).

The Petitioner argues that he was deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution because the district court fail to consider and address the matter that was necessary to a final disposition of the case as to whether the petition was time-barred under the 1-year limitation period.

Thus, a question is presented to this Court as to whether the Petitioner was deprived of his constitutional rights

to Due Process by the district court's failure to consider and address the issue, when the issue was necessary to a final disposition of the case.

This Court has made clear that the fundamental requirements of Due Process as implicated by the 14TH Amendment to the United States Constitution mandates that a person be provided with the opportunity to be heard, present evidence, and have judicial findings based on that evidence. See., *Fuentes v. Shevin*, 92 S.Ct. 1983 (1972).

The court of appeals for the Eleventh Circuit has held that ~~the~~ havoc a district court's failure to address all claims in a habeas petition may wreak in the federal and State court systems compels to require all district courts to address all such claims... See., *Clisby v. Jones*, 960 F.2d 925, 935-936 (11th Cir. 1992, en banc).

It can be left and said that the decision delivered by the court of appeals in *Clisby* holds true not only to the claims presented for federal habeas corpus relief, but extends to all issues relevant to the disposition of the habeas corpus petition itself... It was in the interest of justice, that the Petitioner's claim of "legal innocence" should have been considered and addressed by the district court, notwithstanding that the court of appeals in this case did not issue a COA on the matter of the district court's failure to consider and address the issue.

The Ninth Circuit court of appeals has held that where

there is no valid statute on the books prohibiting such conduct, a criminal defendant is entitled to collateral relief, as the defendant is legally innocent. See., U.S. v. X-Citement Video Inc., 982 F.2d 1285 (9th Cir. 1992). Further, this Court has articulated that if one is actually innocent, a federal court can excuse an impediment or procedural bar to correct a fundamental unjust incarceration. See., Dugger v. Adams, 109 S.Ct. 1211 (1989).

The Petitioner was charged with the alleged offense of Murder under Section 19.03(b)(3) of the Texas Penal Code.

Specifically, that the Petitioner caused the death of Justin Thompson while in the course of committing the Aggravated Robbery of Tellie Simmons.

The jury was instructed that before they could convict the Petitioner of Murder of Justin Thompson, they had to find beyond a reasonable doubt that the Petitioner was in the course of committing the offense of Aggravated Robbery of Tellie Simmons. The jury found the Petitioner not guilty of Murder, and convicted the Petitioner for the alleged offense of Aggravated Robbery of Tellie Simmons as a lesser-included offense.

The matter is that there is no statute on the books which allows for the conviction of the Petitioner for the offense of Aggravated Robbery against Tellie Simmons as the lesser-included offense of Murder of Justin Thompson...

For instance, the Texas Court of Criminal Appeals has

held that the determination of whether an offense is a lesser-included offense is a matter of State law by comparing the elements of the greater offense, as the State pled it in the indictment, with the elements of the statute that defines the lesser offense. If a crime is a lesser-included offense under this analysis, the judicial presumption is that they are the same for double-jeopardy purposes and that the accused may not be punished for both. *Littrell v. State*, 271 S.W.3d 273 (Tex.Cr.App. 2008). In a multi-count indictment Littrell was charged, inter alia, with felony murder under Section 19.02(b)(3) of the Texas Penal Code and aggravated robbery under Section 29.03(a)(2) of the Texas Penal Code, committed against the same victim on the same date.

In the instant case, the Petitioner was charged with the alleged offense of murder under Section 19.02(b)(3) of the Texas Penal Code. Specifically, that he caused the death of Justin Thompson while in the course of committing the alleged offense of aggravated robbery of Tellie Simmons.

Thus, unlike *Littrell*, where there was only one victim in the mist of the murder offense and the aggravated robbery offense. In the instant case, there was only one victim in the mist of the murder offense and a different victim in the mist of the aggravated robbery offense. Therefore, the alleged offense of aggravated robbery allegedly committed against Tellie Simmons by law was not the lesser-included offense of Murder of Justin Thompson. There is no statutory

law or statute on the books that allows the Petitioner to be convicted for an offense alleged to be a lesser-included offense of murder of one (1) individual and the aggravated robbery of another individual. Furthermore, the Texas Court of Criminal Appeals has held that when an indictment for felony murder under Section 19.2(b)(3) of the Texas Penal Code alleges multiple "predicate" felonies, the specifically named felonies are not elements of the offense charged about which a jury must be unanimous, because the named felonies constitute the manner or means that make up the felony element of felony murder, that the defendant committed or attempted to commit a felony. *White v. State*, 208 S.W.3d 467 (Tex.Cr.App. 2006). Thus, the predicate offense of aggravated robbery against Tellie Simmons was not the or a lesser-included offense of the charged offense, i.e., (the murder of Justin Thompson).

In sight of the applicable provision of the Double-Jeopardy Clause under the 5TH Amendment to the United States Constitution, this Court has explicitly held that where the Double-Jeopardy Clause is applicable, it's sweep is absolute and there are no equities to be balanced, for the "Clause" is declared a constitutional "policy" based on grounds which are not open to "judicial examination." *Benton v. Maryland*, 89 S.Ct. 2056 (1968), and *Crist v. Bretz*, 98 S.Ct. 2156 (1978), *Burks v. U.S.*, 98 S.Ct. 2141 (1978). Extending the law delivered by this Court, this Court settled an issue in view of the defendant's rights under the Double-Jeopardy Clause in *Harris*

v. Oklahoma, 97 S.Ct. 2912 (1977) wherein the State of Oklahoma prosecuted Harris for murder for shooting and killing a grocery store clerk, thereafter, the State of Oklahoma sought to prosecute Harris for the component offense of robbery with a firearm. This Court explicitly held that double-jeopardy barred the second prosecution.

Unlike Harris that involved a single victim, in the instant case, the Petitioner was charged with murder with the predicate offense consisting of ~~the~~ aggravated robbery of Tellie Simmons.

The jury was instructed that before they could convict the Petitioner for the offense of murder, it had to find that the Petitioner was in the course of committing or attempting to commit the offense of aggravated. The jury found the Petitioner not guilty of murder, thus, finding that the Petitioner was not in the course of committing or attempting to commit the offense of aggravated robbery of Tellie Simmons. However, the Petitioner's conviction now hinges upon the aggravated robbery of Tellie Simmons, the predicate offense now labeled as a lesser-included offense.

On the blink of two (2) towers under Harris the component and/or predicate offense is jeopardy barred, i.e., the aggravated robbery of Tellie Simmons. Further, the issue had been resolved in the Petitioner's favor when he was found not guilty of the offense of murder that required the jury to find that he was in the course of committing or attemptation to commit the offense of aggravated robbery of Tellie Simmons.

Therefore, on this matter and as demonstrated by the Petitioner, the court of appeals should have issued a COA, because the district court fail to consider and address the matter. It can be reasonably concluded that the court of appeals' decision and/or determination not to issue a COA is at best suspect in view of a clear violation of the Petitioner's constitutional rights to Due Process as implicated by the 14TH Amendment to the United States Constitution.

Further, had it not been for the constitutional violation of the Petitioner's rights under the Double-Jeopardy Clause of the 5TH Amendment to the United States Constitution no reasonable jurists would have voted to convict the Petitioner of the alleged and purported lesser-included offense of Aggravated Robbery of another person that was the component offense of the alleged Murder of another person as to survive the application of the 1-year limitation period as a claim of "Actual Innocence."

This Court should consider whether a prima facie claim of Double-Jeopardy is a sufficient to constitute a gate-way exception to the 1-year limitation period.

In light of the fact that the issue was not considered and addressed by the district court or the court of appeals as the court of appeals decline to issue a COA on this matter, and in view of the arguments presented by the Petitioner on this matter, this Court should determine whether an exception to the 1-year limitation period should apply when it has

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been shown that there is no statutory offense for which the Petitioner was convicted, and that the purported offense if any is jeopardy barred as to survive the 1-year limitation.

The Texas court(s) have consistently held that a claim of "Double-Jeopardy" presents a prima facie claim of "Actual Innocence." Ex Parte Knipp, 236 S.W.3d 214 (Tex.Cr.App. 2007), and Ex Parte Miller, 394 S.W.3d 502 (Tex.Cr.App. 2013). Thus, this matter deserves further encouragement to proceed further, and is clearly a matter of federal law that has not been settled by this Court.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ \_\_\_\_\_

Victor Todd Williams

Date: March 03, 2023