No. 23-5568

In The

Supreme Court of the United States

Boaz Pleasant-Bey,

Petitioner

V.

Christopher Brun,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Boaz Pleasant-Bey No.: 473110
Propria Persona (Pro Se)
The Pleasant-Bey Legal Initiative
1499 R.W. Moore Memorial Hwy.
Only, Tenn. 37140
Telephone: 931-729-5161

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QUESTIONS PRESENTED

I.) WHETHER THE 6th CIRCUIT'S ORDER SO FAR DEPARTED FROM *HOUSTON V. LACK* AND *EVITTS V. LUCY,* REQUIRING THIS COURT'S SUPERVISORY POWERS TO PROTECT THE ***INTEGRITY, IMPARTIALITY,*** **AND** ***OVERALL FAIRNESS*** OF **THE** ***AMERICAN CRIMINAL JUSTICE SYSTEM***?

II.) WHETHER CONFUSION IN THE U.S. COURTS OF APPEALS ON THE XIVTH AMEND.'S RIGHT TO A SPEEDY APPEAL NEEDS UNIFORMITY, AND IF SO, DID THE 12 YEARS OF INORDINATE APPELLATE DELAY PREJUDICE PETITIONER'S XIVTH AMEND. DUE PROCESS AND EQUAL PROTECTION CLAUSE SPEEDY APPEAL RIGHTS?

PARTIES TO PROCEEDINGS & OPINIONS

In the District Court, Jason Clendenion was the Respondent, the Petitioner was named as: Petitioner. In the United States Court of Appeals for the Sixth Circuit, Petitioner was named as: Appellant/Petitioner and Jason Clendenion as: Appellee/Respondent. In the Supreme Court of Tennessee, Petitioner was known as Petitioner, and the State of Tennessee was known as Appellee.

- *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, U.S. District Court for the Western District of Tennessee, Western Division, Judgment entered April 3, 2023.

- *Pleasant-Bey V. Clendenion*, No. 23-5347, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 11, 2023

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PETITION FOR WRIT OF CERTIORARI

Petitioner *Boaz Pleasant-Bey*, Pro Se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit (6th Cir.) case no.: 23-5347, entered July 11th, 2023. This writ presents issues of a *Circuit Split* amongst the U.S. Circuit Courts, and issues of constitutional magnitude wherein denial of this writ would ***undermine the overall integrity, impartiality, and fairness of the American Criminal Justice System.***

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on July 11th, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The VIth Amendment Speedy Trial Clause, the XIVth Amendment Due Process and Equal Protection Clauses to the United States Constitution are the relevant constitutional provisions in this case. U.S. Const. Amend. VI and XIV

STATEMENT OF THE CASE

The history of this case can be found in the 6th Cir.'s Order. Appdx. A, 6th Cir. Order, No. 23-5347 at Pg. 1-2; Appdx. B, 2:19-cv-02136, ECF No. 78, Pg. 1-3; Appdx., C, Id ECF No. 61, Pg. 1-11

STATEMENT OF THE FACTS

No official statement of facts has been published by a Court. Petitioner's uncontroverted statement of the facts filed in the District Court record and will be referenced herein. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136-JTF-atc, ECF No. 71, at Pg. 13-39 The record was filed in *Pleasant-Bey V. McAllister*, 2:13-cv-02389-STA-dkv.

REASONS FOR GRANTING WRIT

A Need for Uniformity of Law

"[O]ne of this Court's primary functions is to resolve 'important matter[s] on which the courts of appeals are 'in conflict'." *Gee V. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2008) (citing U.S. Sup. Ct. R. 10(a)) (Thomas J., Alito J., and Gorsuch J., dissenting); *City of San Fransisco V. Seehan*, 575 U.S. 600, 610 (2015) ("Certiorari jurisdiction exists to clarify the law..."); *Bullock V. BankChampaign*, N.A., 569 U.S. 267, 276 (2013); *Boag V. MacDougall*, 454 U.S. 364, 368 (1982) (The purpose of the U.S. Supreme Court was "'...to secure the national rights [and] uniformity of the [judgments]." (Rehnquist, J., dissenting)

(citation omitted) In 1816, this Court recognized that its appellate jurisdiction highlights "...the importance, and even necessity of uniformity of decisions throughout the whole United States," finding that disuniformity "would be truly deplorable". *Martin V. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) This Court's primary function has also been described, "...to unite and assimilate the principles of national justice and the rules of national decisions." *The Federalist No. 82*, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 246* (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits."); *Amanda Frost, Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1631-32 (2008); (The "...presence of conflict remains by far the most important criteria in the Court's case selection..."); *Gee*, 139 S. Ct. 408, at 410 ("We are responsible for the confusion among the lower courts, and it is our job to fix it.") In the same vein, this writ presents matters of Federal Law that divide the circuits in confusion, that have not been, but should be, decided by this Court. *Simmons V. Beyer*, 44 F. 3d 1160, 1169 (3rd Cir. 1995) ("...the Supreme Court has not explicitly recognized a criminal defendant's right to a speedy appeal..."); *Post Pg. 12-38* The following are compelling reasons for this Court to grant certiorari herein under U.S. Sup. Ct. R. 10(a) and (c), establishing uniformity of law, protecting ***the integrity, impartiality, and overall fairness of the American Criminal Justice System***:

I.) THE 6th CIRCUIT"S ORDER DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS IN *HOUSTON V. LACK,* REQUIRING THIS COURT'S SUPERVISORY POWERS.

"[P]leasant-Bey argues that his 'timely filed' premature notice of appeal [PNOA] was sufficient to confer appellate jurisdiction under Tenn. Code Ann. § 16-3-201(d). But the trial court specifically declined to file Pleasant-Bey's [PNOA] when he submitted it." Appdx. A, 6th Cir. Order, 23-5347, Pg. 4 (6th Cir., July 11, 2023); *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 49-1, Pg. 37, PageID#1598 (The Court: "...Mr. Pleasant-Bey is here representing himself on this Motion For New Trial [MNT]. Mr. Bey, I've received several things from you...") The Petitioner submitted the following to the Shelby County Criminal Court Clerk with his motion for new trial [MNT] on Feb. 4th, 2011: (1) Pro Se Affidavit of Complaint (Id ECF No. 49-1, Pg. 39, PageID#1600-1601); (2) Motion for Leave To Proceed on Appeal In Forma Pauperis pursuant to Rule 18(b) of the Tenn. R. App. Proc. (Id 49-1, Pg. 41, PageID# 1602); and (3) Motion to File Attached Notice of Appeal As Timely Filed. Id ECF No. 49-1, Pg. 42-43, PageID#1603-04 Id ECF No. 28-1, Pg. 73, PageID#544 (MNT Signed under 28 U.S.C. § 1746 and mailed to Shelby County Criminal Court Clerk) The normal course of judicial proceedings for incarcerated Pro Se litigants is for courts to follow the rule outlined in *Houston V. Lack*, requiring them to hand their notices of appeal over to institutional authorities and those

documents are deemed filed at that point. 487 U.S. 266, 275 (1988) ("...a pro se prisoner has no choice but to hand his notice over to prison authorities for forwarding to the court clerk."); Tenn. R. App. P. 20(g)

"...So I'll—but I'll hold this [PNOA] here..." *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 49-1, at Pg. 42-43, PageID#1603-04 The trial court decided to hold Petitioner's PNOA until after it denied the MNT on Dec. 21, 2011. Id; Ex. A, 6th Cir. Order, at Pg. 1 Clearly, the trial court's decision to hold Petitioner's PNOA without filing it with the trial court clerk was not in accordance with procedures set forth in *Houston V. Lack*, nor in accordance with procedures in Tenn. R. App. Proc. 4(d), 20(g) Pre-July 1, 2017. Tenn. R. App. P. 5(b) requires the trial court clerk to submit the PNOA to the clerk of the Tenn. Ct. of Crim. App. [TCCA] after the MNT is denied. 487 U.S. 266, at 276 ("...the Court of Appeals had jurisdiction over petitioner's appeal because the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk."); Tenn. R. App. P. 4(a) pre-July 1, 2017 (requiring notices of appeal to be filed with trial court clerk); Tenn. R. App. P. 4(d), pre-July 1, 2017 (Allowing PNOA in Tenn.); Tenn. R. App. P. 5(b), Pre-July 1, 2017 (Requiring the trial court clerk to file notices of appeal with clerk of TCCA); Tenn. R. App. P. 20(g) (Inmate notices of appeal filed when handed to institution's authorities *Houston V. Lack*)

The 6th Cir.'s Order held "the trial court specifically declined to file Pleasant-Bey's" PNOA "when he submitted it" (Appdx. A, 6th Cir. Order,

23-5347, at Pg. 4), and his argument that his PNOA submitted to the court clerk, "was sufficient to confer appellate jurisdiction under Tenn. Code Ann. § 16-3-201(d)" is without merit. (Ibid) Clearly, the 6th Circuit's order "*...has so far departed from the accepted and usual course of judicial proceedings...*" under *Houston V. Lack, "as to call for an exercise of this Court's supervisory power*". U.S. Sup Ct. R. 10(a) Petitioner's subsequent notice of appeal submitted to the trial court clerk on Jan. 12th, 2012 was not received by the trial court clerk (Appdx. A, 6th Cir. Order, at Pg. 1), and his direct appeal as of right was never provided. (Id)

Petitioner filed: (1) a petition for writ of habeas corpus challenging the inordinate delay in the State appellate process (*Pleasant-Bey V. McAllister*, 2:13-cv-02389-STA-dkv; *ECF No. 1; Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 1); and (2) motions in Tenn. appellate courts seeking the right to appeal[1] (Id 2:19-cv-02136, ECF No. 49-1, Pg. 1-32, PageID#1562-1593 (Petition To Assume Jurisdiction [PAJ]); Id ECF No. 49-2, Pg. 1 (Order denying PAJ)) were all filed with no avail. Appdx. A, 6th Cir. Order 23-5347, at Pg. 2-3 If this Court's holding in *Houston V. Lack* is upheld in this case, Petitioner will be provided with a direct appeal as of right as other similarly situated persons in Tenn. The jurisdiction of the TCCA was properly conferred upon the denial of Petitioner's MNT on Dec. 21st, 2011 after he timely filed a PNOA with the court clerk on Feb. 4th, 2011. *Pleasant-Bey*,

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[1] Appdx. C, *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 61 at Pg. 2-11

2:19-cv-02136, ECF No. 49-1, at Pg. 42-43, PageID#1603-04 If certiorari is denied, the acquiescence of this Court permits the State of Tenn. to undermine the overall integrity, impartiality, and fairness of the American Criminal Justice System, discriminating against Pro Se litigants concerning appeal rights and rules of appellate procedure. 487 U.S. 266, at 275

II.) THE 6th CIRCUIT'S ORDER DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS IN *EVITTS V. LUCY*, REQUIRING THIS COURT'S SUPERVISORY POWERS.

"This case concerns Pleasant-Bey's protracted efforts to file a direct appeal from his criminal conviction." Appdx. A, 6th Cir. Order No.:23-5347, at. Pg. 1 (6th Cir., July 11, 2023) The 6th Cir. held "the trial court's failure to appoint counsel" for Petitioner's "direct appeal" did not constitute "cause" for his procedural "default". (Id at Pg. 4, ¶ 2) The Supreme Court of Tennessee [SCT] denied Petitioner's PAJ that argued his PNOA transferred the jurisdiction of the trial court to the TCCA after the denial of his MNT. *Pleasant-Bey*, 2:19-cv-02136, ECF. No. 49-1, Pg. 1-8, PageID#1562-1569 However, the SCT's denial of Petitioner's PAJ was because he did not have a case pending in an intermediate appellate court. Appdx. A, at Pg. 2, ¶ 3; *Pleasant-Bey*, 2:19-cv-02136, ECF No. 49-2, Pg. 1, PageID#1729; Id 49-4, Pg. 1, PageID#1734 Petitioner argued that his XIVth Amend. Due Process and Equal Protection Clause rights to a

speedy appeal were violated by the inordinate delay in the State appellate process. Id ECF No. 49-1, Pg. 8-30, PageID#1569-1591

"A first appeal as of right...is not adjudicated in accord with due process of law if the Petitioner does not have the effective assistance of an attorney." *Evitts V. Lucey*, 469 U.S. 387, 398 (1985); *Douglas V. California*, 372 U.S. 353, 358 (1963) (The right to a meaningful appeal) The 6th Cir.'s order holding, "*...Pleasant-Bey's arguments about the unfiled direct appeal following the denial of this new-trial motion in 2011 do not establish cause for the absence of a pending appeal in an intermediate state appellate court in 2017...*" (Appdx. A, 6th Cir. Order 23-5347, at Pg. 4, ¶ 2) "*...has so far departed from the accepted and usual course of judicial proceedings...*" (U.S. Sup. Ct. R. 10(a)) in *Evitts V. Lucy*. 469 U.S. 387, at 398 Petitioner's direct appeal requires the "effective assistance of an attorney" (Id), the absence of which, calls *"for an exercise of this Court's supervisory power*" (U.S. Sup Ct. R. 10(a)) ***for the protection of the overall integrity, impartiality and fairness of the American Criminal Justice System.***

Oppression Induced Pre-Trial Waiver

The Petitioner was convicted of one count of T.C.A. § 39-13-522 by a jury in "2010...in the Shelby County Criminal Court" where he "represented himself with assistance of advisory counsel. He was sentenced to serve 23 years and 6 months prison." Appdx. A, 6th Cir. Order at Pg. 1 Petitioner's decision to be Pro Se was involuntarily

oppressive. *Pleasant-Bey,* 2:19-cv-02136-JTF-atc, ECF No. 71, at Pg. 13-28 (citing record references to pre-trial proceedings) Petitioner was appointed three attorneys: Clifford Abeles, Larry Fitzgerald, and John Parker. (Id at Pg. 14-19) All of them scheduled Petitioner for trial while the State was prosecuting him on the State's Injury Theory.[2] Petitioner was given the ultimatum by those attorneys of accepting the State's guilty plea offer or proceeding to trial on the State's Injury Theory. (Id at Pg. 14-20) Petitioner's Pro Se efforts to obtain the LBH reports while represented by Counsel caused friction and conflicts of interests them. Petitioner has stated, "...for well over two years I was being...scheduled for trial without those [LBH] reports [exonerating me from the State's Injury Theory]...that was the basis of the disagreements between Counsel and I." Id at Pg. 17; Id at Pg. 16-17 (Bell stated Fitzgerald scheduled Petitioner for trial with "an obvious lack of communication between Mr. Fitzgerald and the defendant...not agreeing with the defendant's way of arguing the case.") After two years of being neglected by Counsel, Petitioner was convinced they were not going to help him, even though they could. Id at Pg.

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[2] The State's Injury Theory was a theory formulated by Prosecutor Marianne "Bell", furnishing Petitioner with medical examination records of the child witness November 3rd, 2006, MSARC examination, purporting it revealed an injury to her genitalia, while suppressing medical records of her October 24th, 2006 Le Bonheur Hospital [LBH] medical examination, revealing no injuries to her genitalia. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136-JTF-atc, ECF No. 49-1, Pg. 138, PageID#1699

17-18 Counsels deliberate failure to make efforts to obtain the suppressed LBH reports exonerating him from the State's Injury Theory caused him to feel destitute of counsel although he wanted assistance. Ibid

Parker not only refused to obtain the suppressed LBH reports, offering Petitioner the State guilty plea offers, scheduling him for trial twice[3] to be tried on the State's Injury Theory. Id at Pg. 19 Parker told Petitioner he had to proceed Pro Se in order to obtain the suppressed LBH reports from the State. Id at Pg. 19, 28 (record citations omitted) Under extreme pressures, Petitioner reluctantly waived his right to counsel in Jan. of 2009, and filed a motion for the exculpatory LBH reports Pro Se.[4] At the hearing requesting for the LBH reports Pro Se, Parker told Petitioner to "withdraw the motion for exculpatory evidence". In fear, Petitioner complied.[5] Nervousness and pressure caused Petitioner to scraped the skin off of his face and eventually cut his wrist of not knowing what to do.[6] *Moore V. Michigan*, 355 U.S. 155, 164 (1957) ("[A] rejection of federal constitutional rights motivated by fear cannot...constitute an intelligent waiver.) Petitioner eventually obtained the LBH reports on April 13th, 2009, after he filed a complaint against Bell and Parker with the Federal Bureau of

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[3] *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, at Pg. 17-21

[4] Petitioner requested for Parker to argue his Pro Se motion for exculpatory evidence, but Parker refused, encouraging him to remain Pro Se. Id at Pg. 21-22

[5] Id at Pg. 22-23

[6] Ibid

Investigations [FBI] for conspiring to withhold those exculpatory medical records from him while prosecuting him on the State's Injury Theory.[7] After furnishing the LBH reports, Bell changed the State's Injury Theory to a new trial theory, purporting there were never any injuries caused to the child's genitalia; but persisted in theory Petitioner committed the acts.[8] Petitioner's pre-trial requests for replacement of Parker were denied.[9] Bell also furnished exculpatory statements on Apr. 13th, 2009 of the child witness confessing a jealous motive for accusing him, which Petitioner used to cross-examine her with at trial. *Pleasant-Bey V. Clendenion, ECF No. 49-1, Pg. 165, PageID#1726 (Q.) "You just saw when you told Claire...you told your mother Boaz raped you because he said he was going to make you and her happy, but he only made her happy, right?" A. "Yes.")*

Petitioner was given an ultimatum between Parker and being Pro Se. Rather, he said: "Under these circumstances" being Pro Se is "the best decision" that's "appropriate" for his "case."[10] Thus, Petitioner was oppressively traumatized by his three lawyers, and overwhelmingly induced by oppressive pressures into proceeding Pro Se under the circumstances. [11] *Pazden V. Maurer*, 424 F. 3d

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[7] Id at Pg. 23-24

[8] Id at Pg. 23-24

[9] Id at Pg. 25 ("Defendant wants advisory counsel discharged..."); Id at Pg. 27

[10] Id at Pg. 28

[11] Id at Pg. 13-28 (Pre-trial appointment of three lawyers prior to Pro Se decision)

303, 318 (3rd Cir. 2005) (A "defendant will not normally be deemed to have waived the right to counsel by reluctantly agreeing to proceed pro se under circumstances where it may appear that there is no choice.") (citation omitted)); *Pouncy V. Palmer*, 846 F. 3d 144, 165 (6th Cir. 2017) (Citing *Pazden*, at 315-19)); *James V. Brigano*, 470 F. 3d 636, 644 (6th Cir. 2006) ("[T]he choice between unprepared counsel and self-representation is no choice at all.") (quoting *Fowler V. Collins*, 253 F. 3d 244, 249-50 (6th Cir. 2001)) Under these circumstances, Petitioner's decision to proceed Pro Se was "no choice at all." (Id) (citation omitted); *United States V. Patterson*, 140 F. 3d 767, 776 (8th Cir. 1998) (The "'Hobson's Choice' between proceeding to trial with an unprepared counsel or no counsel at all may violate the right to counsel...")

At trial, Parker celebrated the child witness' "detachment" from Petitioner, bragging that she had "well-seasoned" testimony against him.[12] Parker then celebrated Petitioner's conviction with the biggest smile Petitioner ever witnessed on Parker's face, saying: "*Hay Boaz! It's all over with now! You're convicted! Don't drop the soap and don't get brown on your nose*!"[13] The trial court's reason for failing to appoint assistance of counsel for Petitioner's appeal was that Petitioner was too "controlling", had an "inability to relinquish control, trust or work with others" because he

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[12] Id *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, at Pg. 29

[13] Id at Pg. 36-37 (citation omitted)

wouldn't "relinquish control" "trust" or "work with" Parker.[14] Petitioner has been appointed two civil lawyers by Federal District Courts, demonstrating he has the ability to work with others.[15] Parker had an obvious conflict of interest with the Petitioner. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, at Pg. 19-34 The choice between Counsel having a conflict of interest and appearing Pro Se is a "'Hobson's Choice'" (*Patterson*, 140 F. 3d 767, at 776), which is in essence, "no choice at all." *James V. Brigano*, 740 F. 3d 636, at 644 (citation omitted) **THEREFORE**, when the 6th Cir. denied Petitioner's COA, it ***undermined the overall integrity, impartiality, and fairness of the American Criminal Justice System***, which calls for this Court's supervisory powers. ***U.S. Sup. Ct. R. 10(a)***; *Kansas V. Marsh*, 458 U.S. 163, 183 (2006) ("...Our principal responsibility under current practice...and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions...is to ensure the ***integrity and uniformity*** of *federal law.*") (Scalia, J., concurring))

III.) CONFUSION IN THE UNITED STATES CIRCUIT COURTS OF APPEALS ON THE XIVTH AMEND. RIGHT TO A SPEEDY APPEAL NEEDS UNIFORMITY, AND HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

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[14] Id at Pg. 45-47 (citation omitted)

[15] Ibid (citations omitted)

"[A]n appeal from a judgment of conviction is not a matter of absolute right", but "...is wholly within the discretion of the state to allow or not to allow such a review." *McKane V. Durston*, 153 U.S. 684, 687(1894) Since *Durston*, this Court has held, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts*, 469 U.S. 387, at 393; *Matthews V. Eldridge*, 424 U.S 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and...manner.'") United States Circuit Courts have held that the XIVth Amend. Due Process Clause "...'guarantees a reasonably speedy appeal if the state has choosen to give defendants the right'" to appeal. *Simmons V. Beyer*, 44 F. 3d 1160, at 1169 (citation omitted); *Harris V. Champion*, 15 F. 3d 1538, 1558 (10th Cir. 1994) ("...an appeal...inordinately delayed is as much a 'meaningless ritual,'...as an appeal that is adjudicated without...effective counsel or a transcript of the trial...") (citations omitted))

The etymology of the legal term "*Right to a Speedy Appeal*" originates from cases wherein inordinate delayed appeals violated Due Process. Generally, a state guaranteed *right to appeal* inherently becomes *the right to a speedy appeal,* because "...excessive delay in the processing of a criminal defendant's state appeal can be a denial of due process of law." *Allen V. Duckworth*, 6 F. 3d 458, 459 (7th Cir. 1993), cert. denied 510 U.S. 1132 (1994)); *United States V. De Leon*, 444 F. 3d 41, 56-57 (1st Cir. 2006); *Elcock V. Henderson,* 947 F. 2d 1004, 1007 (2nd Cir. 1991) ("Once a state has

provided defendants in criminal cases with the right to appeal, due process requires that an appeal be heard promptly.") (Internal quotation marks omitted); *Roberties V. Colly*, 546 Fed Appx. 17, 20-21 (2nd Cir. 2013); *Simmons V. Beyer*, 44 F. 3d 1160, at 1169 n. 6 (citing Circuit cases acknowledging the right to a speedy appeal); *United States V. Chand*, 86 Fed Appx. 674, 674-75 (4th Cir. 2004) (citing *United States V. Johnson*, 732 F. 2d 379, 381 (4th Cir.), cert. denied, 469 U.S. 1033 (1984)); *Rheuark V. Shaw*, 628 F. 2d 297, 302-04 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); *United States V. Smith*, 94 F. 3d 204, 206 (6th Cir. 1996) ("The Right to A Speedy Appeal"); *U.S. V. Howard*, 216 Fed. Appx. 463, 447 (6th Cir. 2007) (Acknowledging right to speedy appeal 13 month delay in receiving trial transcripts); *Williams V. Sheahan*, 80 F. Appx. 471, 472 (7th Cir. 2003) "Although the Supreme Court has never explicitly acknowledged a...right to a speedy appeal, a number of courts of appeals have recognized that excessive delay in processing appeals can violate due process." *United States V. Hawkins*, 78 F. 3d 348, 350-51 (8th Cir. 1996) (citing U.S. Circuit cases); *Pleasant-Bey*, 2:19-cv-02136, ECF No. 71, at Pg. 60-95; Id ECF No. 49-1. Pg. 8-30, PageID# 1569-1591

The dissent from the Ninth Circuit held, "...No Supreme Court decision 'squarely addresses' the right to a speedy appeal, nor does the right to a speedy trial 'clearly extend' to the appellate context" as held by Sister Circuits. *Hayes V. Ayers*, 632 F. 3d 500, 523 (9th Cir. 2011) The *Hayes* Court held there is "no 'clearly established Federal law,

as determined by the Supreme Court of the United States' " recognizing "a due process right to a speedy appeal". Id (citing 28 U.S.C. § 2254(d)(1)); *Cody V. Henderson*, 936 F. 2d 715, 718 (2nd Cir. 1991) (Same) Other Circuits have acknowledged this fact, granting habeas relief. Id; *Turner V. Bagley*, 401 F. 3d 718, 722-23 (6th Cir. 2005) ("...the right to a speedy appeal has not been established by a decision of the Supreme Court", but recommending conditional writ, granting unconditional writ) Even more confusing is the 9th Cir.'s pre-AEDPA holding contrarily: "While the Sixth Amendment guarantees the accused a speedy trial, excessive delay in the appellate process may also rise to the level of a due process violation." *Coe V. Thurman*, 922 F. 2d 528, 530 (9th Cir. 1990) (citing cases); *Westfall V. Lampert*, 42 F. 3d 1151, 1157 (9th Cir. 2002) (Applying *Coe V. Thurman* to delayed appeal claim); *Blair V. Martel*, 645 F. 3d 1151, 1157 (9th Cir. 2011) (Upholding *Hayes* denying habeas relief holding no right to speedy appeal, and denying due process claim) The U.S. Circuit Courts are "in conflict with the decision[s]" of other U.S. Circuit Courts "on the same important matter" (U.S. Sup Ct. R. 10(a)), in confusion on *"federal law that has not been, but should be, settled by this Court"*. U.S. Sup. Ct. R. 10(c)

More confusion on this "important question of federal law" (U.S. Sup. Ct. R. 10(c)) has been instigated by the 6th Cir.'s recent decision, purporting: "By all accounts, the 'inordinate delay' standard is more a product of judicial decisionmaking (and confused decision making at that) than an effort to interpret a statutory text."

Johnson V. Bauman, 27 F. 4th 384, 391-92 (6th Cir. 2022) (Holding § 2254(b)(1)(B)(ii) is improperly applied regarding inordinate appellate delay and to "whether the State court process is 'ineffective to protect the rights of the applicant'") (citation omitted)) Furthermore, the U.S. Circuits differ on the time-length of appellate delay that creates a point of inquiry into Due Process violations. *Coe V. Thurman*, 922 F. 3d 528, at 531 ("There is no talismanic number of years or months, after which due process is automatically violated."); *Harris V. Champion*, 15 F. 3d 1538, 1560 (Two-year delay "...will give rise to a presumption of inordinate delay..."); *Dozie V. Cody*, 430 F. 3d 637, 638 (7th Cir. 1970) (17 month delay in filing opening brief warranted inquiry); *U.S. V. Antione*, 906 F. 2d 1379, 1382-83 (9th Cir.) (3 year delay in adjudicating federal appeal, "substantial"), cert. denied, 498 U.S. 963 (1990); *Snyder V. Kelly*, 769 F. Supp 108, 111 (W.D.N.Y. 1991) (3 years delay was "excessive" to resolve the appeal), Aff'd 972 F. 2d 1328 (Table) (2nd Cir. 1992); *Burkett V. Fulcomer*, 951 F. 2d 1431, 1445 (3rd Cir. 1991) (18 months from filing notice of appeal to dissolution of appeal) Apparently, there's abundant "confusion among the lower courts," and it's the Supreme Court's "job to fix it." *Gee*, 139 S. Ct. 408, at 410; *Robinson V. Dept. of Educ.*, 140 S. Ct. 1440, 1442 (2020) ("Because the question presented in this petition has divided the Circuits and concerns a matter of great importance, it warrants our review.") (Thomas J., with Kavanugh J., join dissenting) The issues herein presents "...an opportunity to provide lower courts with much—needed guidance, ensures

adherence" to this Court's "precedents, and resolve a Circuit split." *Rogers V. Grewal*, 140 S. Ct. 1865, 1875 (2020) ("Each of these reasons is independently sufficient to grant certiorari.") (Thomas J., with Kavanaugh J., join dissenting))

A State "...is not permitted with one hand to grant such a right" to appeal "and with the other to take it away in an arbitrary fashion" by "...preventing a prisoner from filing a timely notice of appeal...or simply refusing to decide an appeal." *U.S. ex rel. Green V. Washington*, 917 F. Supp. 1238, 1270 (N.D. Ill., E.D. 1996) (internal citations omitted)); Ante Pg. 3-12 The State cannot deny Pro Se litigants appellate rights altogether. Id; *Ross V. Moffitt*, 417 U.S. 600, 612 (1974) ("...the state appellate system" must "be 'free of unreasoned distinctions'"); *City of Cleburne V. Cleburne Living Center*, 473 U.S. 432, 439 (1985) In this case, the State of Tenn. has granted the right to appeal a criminal conviction (Tenn. R. App. P. 3(b)), but denied Petitioner the right to appeal his conviction, violating *Huston V. Lack*, and *Evitts V. Lucy*, and causing 12 years of inordinate appellate delay. Ante Pg. 3-12 These issues violate the Equal Protection Clause in accessing the State appellate system for Pro Se litigants. U.S. Const. amend. XIV

Sixth Circuit Standard

The following interests should be considered in evaluating Speedy Appeal denial and Due Process appellate delay claims: "...(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the

possibility that the defense will be impaired." Id *Smith*, at 207 (quoting *Barker V. Wingo*, 407 U.S. 514, 532 (1972)) The "convicted parties on appeal" alleging prejudice from appellate delay must identify: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." Id at 207 (quoting *Harris*, 15 F. 3d at 1559) (quotation omitted))

Speedy Appeal Analysis

Length of Delay

The "...delay in adjudicating a direct criminal appeal beyond two years creates a presumption that the State corrective process is ineffective, and..." the "two year period should be calculated from the filing of the Notice of Appeal unless a delay in filing the Notice of Appeal is also attributable to the State." *Carpenter V. Young*, 50 F. 3d 869, 870 (10th Cir. 1995) (quoting *Harris V. Champion*, at 1556)); *Pleasant-Bey*, 2:19-cv-02136, ECF No. 78, at Pg. 6-7 (PNOA filed under *Houston V. Lack*, but not filed by court or clerk to TCCA) Petitioner's PNOA was supposed to have been filed with the clerk of the TCCA on December 21, 2011, after his MNT was denied. Id; Tenn. R. App. Proc. 5(b) Pre-July 1, 2017; Tenn. R. App. P. 20(g) From December 21, 2011, when the MNT was denied, to December 21, 2023 would be a twelve (12) year

appellate delay, which is not an appeal within a "meaningful time" and "manner". *Eldridge*, 424 U.S. 319, at 333 A 12 year delayed appeal "is facially unreasonable under the circumstances" (*Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 67 at Pg. 29 at ¶ 1, PageID#1850 (Warden citing cases)), is "excessive delay" (*United States V. Ferreria*, 655 F. 3d 701, 706 (6th Cir. 2011) (citation omitted)) which "compromises the reliability of a trial in ways neither party can prove or...identify" on remand. (Id)

Reason for the Delay

In addition to the Trial Court's holding Petitioner's PNOA in violation of *Houston V. Lack*, the trial court erroneously believed Parker was an "excellent attorney" (*Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 28-1, Pg. 10, PageID#482), that the Petitioner "tends to be a very controlling individual, which has caused much of the problems between himself..." the judges and the "attorneys". (Ibid) The record indicated Parker was oppressive and forced Petitioner to waive his right to counsel. Id ECF No. 71, Pg. 14-28, 36-37, 45-47; Id ECF No. 28-1 Pg. 23-24, PageID#495-96 The Trial Court's holding Petitioner's PNOA and failing to appoint counsel for his direct appeal must be attributable to the State of Tenn., and can reasonably be linked to cause of appellate delay in this case. Id ECF No. 78, at Pg. 6-7; Appdx. A, 6th Cir. Order at Pg. 1; Tenn. R. App. P. 5(b), Pre-July 1, 2017; *Ferreira*, 655 F. 3d 701, at 706 ("Where the delay has been caused by negligence, 'our toleration of such negligence

varies inversely within its protractedness.' ") (quoting *Doggett V. United States*, 505 U.S. 647, 657 (1992))

Assertion of Right To Speedy Appeal

Petitioner's filing a federal habeas corpus "constitutes a sufficient assertion of" the right "to a timely appeal". *Harris V. Champion*, 15 F. 3d at 1563 Petitioner has made other assertions of that right. *Pleasant-Bey V. Clendenion*, ECF No. 36-1, Pg. 9-11, PageID#1243-45 (Petitioner Filed Motion For Leave To Appeal In Form Pauperis and PNOA on 2/4/11 and NOA on 1/12/12); Id ECF No. 28-8, Pg. 3, PageID912 (Notice Ad Informandum Judiciem); ECF No. 71, Pg. 49-51 (TCCA Motion To Waive Timely Filing of MNT, PNOA 2/4/11); Id ECF No. 28-8, Pg. ID#912 (Petitioner's NOA 1/12/12); ECF 29-15, Pg. 48, PageID#1113 (Motion To Appeal As of Right filed in TCCA); Id ECF No. 28-3, Pg. 16, PageID#795 (Motion For Speedy Appeal); Id ECF No. 28-3, Pg. 16, PageID#783 (Motion To Appeal As of Right); Id ECF No. 28-3, Pg. 26-39, PageID#793-806 (PAJ)

Prejudice Ensued From Delay

"When a defendant is unable to articulate the harm caused by the delay, the reason for the delay...will be used to determine whether the defendant was presumptively prejudiced." *Ferreria*, 655 F. 3d 701, at 706 (citing *United States V. Mundt*, 29 F. 3d 233, 236 (6th Cir. 1994)) The

following demonstrates oppressive incarceration, anxieties and concerns pending appellate delay:

i. News Propaganda

False news articles were posted purporting Petitioner's arrest occurred after a name change clerk googled him. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 49-1, Pg. 115, PageID#1676; Id ECF No. 49-1, Pg. 116, PageID#1677 However, testimony from Lt. Robinson with the Memphis Police Department [MPD] provided Henderson gave the MPD information about his whereabouts in Baltimore. Lt. Robinson then called Baltimore City Police Department [BPD] and the BPD stopped him in his car while he was driving down the street in Baltimore in January of 2007. Id ECF No. 49-1, Pg. 108-114, PageID#110-114

ii. First, Eighth and Fourteenth Amendment & RLUIPA Violations

Petitioner experiencing several First, Eighth, and Fourteenth Amendment and Religious Land Use and Institutionalized Person's Act [RLUIPA] violations. *Pleasant-Bey V. Shelby County Government, et al.*, 2019 WL 11768342 *6 (6th Cir. Nov. 7th); *Pleasant-Bey V. Luttrell Jr., et al.*, 2021 WL 328882 *1-20 (W.D. Tenn. Feb. 1, 2021); *Pleasant-Bey V. Shelby County Government, et al.*, 2019 WL 5654993 *4 (W.D. Tenn. Oct. 31, 2019); *Pleasant-Bey V. Shelby County, et al.*, 6th Cir. No. 20-5908, Pg. 6 (Aug. 20th 2021) (J. Thapar

concurring); *Pleasant-Bey V. Tennessee Department of Corrections, et al.*, 2019 WL 11880267 *6 (6th Cir. April 4th) ("...We remand this case for consideration of Pleasant-Bey's Free Exercise claims" and "Establishment Clause Claim."); *Pleasant-Bey V. Tennessee Department of Corrections, et al.*, 2020 WL 5791789 *23 (E.D. Tenn. Sept. 28th); *Pleasant-Bey V. Tennessee, et al.*, 2020 WL 707584 *12 (M.D. Tenn.) (..."Free Exercise Clause, RLUIPA, the Establishment Clause, and the Equal Protection Clause")[16]

iii. Sex-Offender Registration

On Aug. 1, 2011, Tenn. law required Petitioner to register as a convicted sex offender pending oppressive appellate delay. T.C.A. § 40-39-203(b)(3)

v.) Impaired Defenses On Remand

Petitioner's only witness, Antoinette Brittenum was 60 years old in 2010. As of today, she will likely be around 73, or possibly deceased by the time of re-trial in this case. *Pleasant-Bey V.*

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[16]https://mtsu.edu/first-amendment/post/2179/2-muslim-inmates-religious-liberty-claims-go-forward
https://www.prisonlegalnews.org/news/2023/feb/1/after-federal-judge-censors-lawyers-tweets-about-corecivic-company-settles-suit-over-tennessee-prisoners-murder-cellmate/
https://www.tennessean.com/story/news/religion/2022/05/18/trousdale-turner-tennessee-prison-muslim-inmates-quran-banned/9735400002/

McAllister, 2:13-cv-02389-STA-dkv, ECF No. 2-5, Trial Vol. VI, Pg. 563-68

vi.) Direct Appeal Grounds For Relief

The following grounds for relief would have been granted had Petitioner been provided a timely appeal as of right with assistance of counsel:

GROUND I

I.) PROSECUTING PETITIONER ON THE STATE'S INJURY THEORY WHILE SCHEDULING THE CASE FOR TRIAL VIOLATED PETITIONER'S VITH AMEND. RIGHT TO A SPEEDY TRIAL AND XIVTH AMEND. DUE PROCESS RIGHTS.

Violation of Right To Speedy Trial

The State aware that Petitioner's three lawyers refused to formally request for the suppressed LBH reports was done as Petitioner made several Pro Se requests for that evidence while being represented by them. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, Pg. 13-28, 36-37 The State insisted on suppressing the LBH reports and prosecuting Petitioner on the State's Injury Theory, while scheduling him for trial three times with appointed counsel, April 1st, 2008, Nov. 10th, 2008, and Feb. 11th, 2009 without the LBH reports. Id ECF 49-1, Pg. 145, PageID#1706; Id ECF No. 49-1, Pg. 82-86, PageID#1643-1647 Clearly, all three

defense lawyers and Bell knew Petitioner needed the LBH reports and made Pro Se requests for it, but they insisted on scheduling him for trial on the State's Injury Theory without the LBH reports. Id During this time, the case was not ready for trial. Id ECF No. 28-1, Pg. 170, PageID#642 (Transfer Order: "[C]ase is not ready for trial...Defendant wants advisory counsel [Parker] discharged because counsel 'is working with the State against me.'"); Id at Pg. 72-73, PageID#1306-07 ("...However, the state is not ready for trial unless they've complied with...*Brady V. Maryland*...." The State "had every intention of proving that the defendant caused an injury to the child...So the State has helped cause issues...and has used the suppression of *Brady* material to cause problems in the pre-trial proceedings between counsel and the defendant... if...[timely] furnished...would of alleviated a lot of issues."); *Barker*, 407 U.S. 514 at 527 ("[A] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process."); U.S. Const. amend. XIV § 1

Petitioner demanded a Speedy Trial. *Pleasant-Bey V. McAllister*, 2:13-cv-02389-STA-dkv, ECF No. 32, Transcript of Feb. 12th, 2010 at Pg. 47 L. 22-25 ("[t]he court finds and knows of its own accord in the past record that you have asked this court as far as a speedy trial is concerned....") Facing an indictment as humiliating as T.C.A. § 39-13-522, the State's Injury Theory placed additional pressures upon Petitioner professing actual innocence to seek the suppressed LBH reports. The State's Injury Theory misled the trial court and

undermined the integrity of the American Criminal Justice System, misusing child rape accusations purporting: 1.) "[I]n reference to the injury, the defense can argue at trial that those aren't much injuries"; 2.) "the State has given over the medical report"; and 3.) "I don't know exactly what the defense is looking for here, but we have given them what they are entitled to and what they are looking for as far as her injuries." *Pleasant-Beyr*, 2:19-cv-02136-JTF-atc, ECF No. 49-1, Pg. 138, PageID#1699 Under the perjred analysis rule of suppressed *Brady* material in *United States V. Agurs,* "...[t]he undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known of the perjury." 427 U.S. 97, 103 (1976) (..."the knowing use of perjured testimony is fundamentally unfair...") Therefore, Bell was aware that suppressing the LBH reports from the Petitioner demonstrated her theory contained perjured testimony of him causing an injury to the child witness. (Id) However, she deliberately instigated the oppressive pre-trial delay, forcing Petitioner to either: (a) unwillingly plead guilty to the State's offer; (b) proceed to trial Pro Se without assistance of counsel and without the LBH reports; or (c) proceed to trial with counsel who is unwilling to request for the LBH reports and face the maximum sentence of being found guilty on the State's Injury Theory of T.C.A. § 39-13-522. *Pleasant-Bey V. Clendenion*, 2:19-cv-02135, ECF No. 71, at Pg. 14-27

"There may be a situation in which the defendant was represented by incompetent counsel, was

severely prejudiced..." *Barker V. Wingo*, at 536 Petitioner was faced with the Hobson's Choice of accepting unfair advice from Parker to proceed Pro Se to obtain the suppressed LBH reports from Bell. *Pleasant-Bey*, 2:19-cv-02136, ECF No. 71, at Pg. 19-21 Parker knew being Pro Se, "...is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant..." *McKaskle V. Wiggins*, 465 U.S. 168, 177 n.8 (1984) Yet, Parker insisted on providing oppressive advice to Petitioner for him to proceed Pro Se, demonstrating Parker's active conflicting interests secretly desiring Petitioner's conviction. *Pleasant-Bey*, 2:19-cv-02136, ECF No. 71, at Pg. 19-21, Pg. 36-37 (Parker celebrating Petitioner's conviction) Combined efforts of Bell prosecuting Petitioner on the State's Injury Theory with Parker encouraging him to proceed Pro Se, added oppressive pressures mercilessly eroding Petitioner's rights to a fair and speedy trial with assistance of counsel. Id; Id ECF No. 71, at Pg. 17-25 Knowing Petitioner's decision to proceed Pro Se was being influenced by the deliberate suppression of the LBH reports prosecuting him on the State's Injury Theory, Bell continued her oppressive pre-trial actions, causing two and a half years of oppressive pre-trial delay before that pressure forced Petitioner to proceed Pro Se in Jan. of 2009. Id ECF No. 71, at Pg. 21-24 Petitioner's oppressive pre-trial experiences were instigated when Parker told him to withdraw the motion for exculpatory evidence, specifically requesting for the LBH reports on Feb. 25th, 2009. Id at Pg. 22-24 Under the apex of oppression, Petitioner scraped the skin off of the side of his face

and cut his wrist from the oppressive pressures from the pre-trial proceedings. Ibid; ECF No. 71, Pg. 14-24; Id ECF No. 36-1 Pg. 65, PageID#1299 Petitioner was placed inside an oppressively uncompromising " 'dilemma constitutional magnitude' ". *United States V. Padilla*, 819 F. 2d 273, 278 (1st Cir. 1987) (citation omitted) There has never been any other case wherein a criminal defendant has demonstrated evidence as the case sub judice.

There is a reasonable probability that, but for the prosecutions' untimely disclosed evidence in this case when a speedy trial was demanded by Petitioner, the result of this proceeding would "have been different" (*Strickler V. Greene*, 527 U.S. 263, 280 (1999)), the pre-trial proceedings wouldn't have been unreasonably delayed in such an oppressively prejudicial manner. (Id) The case was further delayed due to the clerk's refusal to serve defense subpoenas. *Pleasant-Bey,* 2-19-cv-02136, ECF No. 28-1, Pg. 170, PageID#642 (May 11, 2009, Transfer Order: "[C]ase is not ready for trial. The Defendant has unserved subpoenas..."); Id ECF No. 67, Pg. 30, PageID#1851 ("...[a] valid reason, such as a missing witness, should serve to justify appropriate delay.") (Warden's Second Amendment quoting *Barker*, at 531 (Citation omitted)); *Barker V. Wingo*, at 527-28 When the right to a speedy trial is denied, the "severe remedy of dismissal of the indictment" (*Barker*, at 552) is the only appropriate remedy. (Id) This is not considering Petitioner's claim of actual innocence later discussed herein. Post Pg. 31-34

GROUND II

II.) INFLAMMATORY MISSTATEMENTS MADE BY ABBY WALLACE' LAST WORDS IN REBUTTAL DISTRACTED THE JURY FROM ACQUITTING, TO RENDERING GUILTY IN FEAR OF HIM KILLING HENDERSON IF ACQUITTED. THE DOUBLE JEOPARDY CLAUSE BARS REPROSECUTION.

Standard of Review

"The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from multiple prosecutions for the same offense." *United States V. Colvin*, 138 Fed. Appx. 816, 819 (6th Cir. 2005) (citing *Oregon V. Kennedy*, 456 U.S. 667, 671 (1982)); U.S. Const. amend. V However, the Double Jeopardy Clause bars reprosecution under *Oregon V. Kennedy* "when prosecutorial behavior was intentionally calculated to cause or invite a mistrial." *Oregon V. Kennedy*, 456 U.S. 667, at 678-79; Accord *United States V. White*, 914 F. 2d 747, 752 (6th Cir. 1990); Pleasant-Bey, 2:19-cv-02136, ECF No. 71, at Pg. 29-31; Id ECF No. 28-1, Pg. 24, PageID#496 (Sworn Affidavit of Improper Comments) With her final words in rebuttal, prosecutor Abby Wallace stood before the Petitioner in front of the jury, pointing at him with her finger, while yelling at the top of her lungs shouting out: "HE'S TALKING ABOUT KILLING HER IN LESS THAN FIVE SECONDS! DO NOT HESITATE TO FIND HIM GUILTY! GUILTY! GUILTY AS

CHARGED! GUILTY! GUILTY! GUILTY AS CHARGED!"[17] Id; Id ECF No. 36-1 Pg. 60, PageID#1294; Id ECF No. 36-1, Pg. 69 at PageID#1303 (Bell concurring: "... Ms. Wallace argued that...that Ms. Wallace in rebuttal...mentioned that..."); Id ECF No. 71, Pg. 35-36, Pg. 91-93 (Judge Craft agreeing it was said); Id ECF No. 28-1, Pg. 41, PageID#513(18)(5) (Motion For New Trial Correcting the Record)

Wallace's last words to the jury in rebuttal those stentorian inflammatory comments "intentionally calculated to cause or invite a mistrial" (*Kennedy*, 456 U.S. 667, 678-79), a "foul" blow to Petitioner's trial. *Burger V. United States*, 295 U.S. 78, 88 (1935) The State is not "at liberty to strike foul" blows. Id; *Colvin*, 138 Fed. Appx. 816, at 820 (citing *Kennedy*, 456 U.S. 667, at 673) (citing *United States V. Dinitz*, 424 U.S. 600, 611 (1976))

"Cases involving sexual abuse exert an almost irresistible pressure on the emotions of the bench and bar alike. Because such cases typically turn on the relative credibilities of the defendant and the prosecuting witness...a strict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial." *Martin V. Parker*, 11 F. 3d 613, 616-17 (6th Cir. 1993) In *Martin*, "The prosecutor's improper comments"

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[17] The Shelby County Court Reporter omitted Wallace's improper comments from the trial record, but Petitioner's Affidavit and Motion for New Trial Hearing both displays evidence of it. *Pleasant-Bey V. McAllister*, ECF No. 2-5, Trial Vol. VI Pg. 674 l. 5-13 (Omitting Wallace's comments); *Pleasant-Bey*, 2:19-cv-02136-JTF-atc, ECF. No. 28-1 Pg. ID#469 (Noting Wallace's improper comments in rebuttal)

denied the Petitioner "his right to a fair trial." Id at 617 More severe than *Martin*, this case of Wallace's "prosecutorial improprieties" were "so egregious" that it not only rendered "the entire trial 'fundamentally unfair'" (*Martin*, 11 F. 3d 613, at 616) (citation omitted)), but it was "intentionally calculated to cause or invite a mistrial". *Kennedy*, 456 U.S. 667, 678-79; Pleasant-Bey, 2:19-cv-02136, ECF No. 71, at Pg. 35-36 [Wrongful Conviction Obtained] Considering the fact Petitioner never took the stand to testify, Wallace commenting on a series of Pro Se questions asked to a State's witness was also an erosion of his right not to testify. *Lent V. Wells*, 861 F. 2d 972, 975 (6th Cir. 1988) ("[A] 'probing analysis' of the record in this case gives rise to our conclusion that the prosecutor's remarks were manifestly intended to call attention to Petitioner's failure to testify, or at least that the remarks would have been so construed by the jury."); *United States V. Jamieson*, 427 F. 3d 394, 414 (6th Cir. 2005) ("Of course, a prosecutor should not directly or implicitly impugn the integrity or institutional role of defense counsel.") The Sixth Circuit's standards for proving such "prosecutorial misconduct that triggers double jeopardy, the defendant must demonstrate more than a deliberate act on part of the prosecutor: 'there must be a showing that the prosecutor's deliberate conduct was intended to provoke the defendant into moving for a mistrial.'" Id *Colvin*, 138 Fed. Appx. 816, at 82 (quoting *White*, 914 F. 2d 747, at 752) "[I]n reviewing prosecutorial misconduct cases on direct appeal, or on habeas claims where AEDPA deference does not apply, this Court has fleshed out

the *Darden* standard by formalizing a two-step framework for assessing prosecutorial misconduct." *Stermer V. Warren*, 959 F. 3d 704, 726-27 (6th Cir. 2020); *Parker V. Matthews*, 567 U.S. 37, 48-49 (2012); *United States V. Hall*, 979 F. 3d 1107, 1119 (6th Cir. 2020) (Discussing 4 Carroll factors); *United States V. Krebs*, 788 F. 2d 1166, 1177 (6th Cir. 1986) Sixth Circuit's framework first determines "whether the prosecutor's conduct or statements were improper" (*Stermer*, 959 F. 3d 704, at 726) and "whether this conduct was 'flagrant', in which case it would violate the defendant's due process rights." (Id) (citations omitted) Under the *Goltz* Analysis used by the SCT, "It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." *State V. Sexton*, 368 S.W. 3d 371, 419 (Tenn. 2012) (Quoting *State V Goltz*, 111 S.W. 3d 1, 6 (Tenn. Crim. App. 2003)) Furthermore, "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." Ibid (quoting *Goltz*, at 6)) Wallace's comments were calculated to distract the jury from acquitting Petitioner based upon the following evidence before them at trial:

(1) The child witness denied accusations of the Petitioner sexually penetrating her anus with his tongue. *Pleasant-Bey*, 2:19-cv-02136, ECF No. 71, Pg. 29-31; ECF No. 49-1, Pg. 166-67, PageID#1727-28 ("I can smell I have a nose");
(2) The child witness testified on cross-examination to smelling both his hands as her definition of sexual penetration. Id at Pg. 30-31;
(3) Child witness testified on redirect-

examination that she smelled Petitioner's fingers, not feeling them inside of her. *Pleasant-Bey V. McAllister*, 2:13-cv-02389-STA-dkv, ECF No. 2-1, Trial Vol. II, Pg. 205 L. 3-8 (Child witness testifying to smelling Petitioner's hands as her definition of sexual penetration); (4) *Q.) "You just saw when you told Claire...you told your mother Boaz raped you because he said he was going to make you and her happy, but he only made her happy, right?" A.) "Yes." Pleasant-Bey V. Clendenion, ECF No. 49-1, Pg. 165, PageID#1726; Pleasant-Bey V. McAllister*, 2:13-cv-02389-STA-dkv, ECF No. 2-1, Trial Vol. II, Pg. 151 (Jealous motive of Child Witness); (5) Henderson testified she would never say she would not press charges on Petitioner, and testified she told Petitioner's brother she wanted Petitioner's new house having $161,000.00 of home equity in exchange for not pressing charges after she filed chapter 7 bankruptcy in 2003. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, at Pg. 31; (6) Antionette Brittenum testified that she was Henderson's friend, knew Henderson longer than Petitioner, provided special counseling services for black women and Henderson said she was "upset because through it all" Petitioner wasn't going to take "the polygamist' position" in marriage. Henderson said she knew Petitioner didn't want to be with her any more, but here he was now "with some other woman and unwilling to accept her as another wife with his new girlfriend" in a polygamist marriage. Id ECF No. 71, Pg. 34-35 (Henderson's Obsession)

With those facts before the jury in this case, "in the light most favorable to the prosecution" (*Jackson V. Virginia*, 443 U.S. 307, 319 (1979)), no rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt". (Ibid) Simply put, the child witness' testimony does not meet the definition of sexual penetration defined by Tenn. law. T.C.A. § 39-13-501(7)-(8) The child smelling Petitioner's hands is impossible without her simultaneously smelling his fingers. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, at Pg. 29-31 She also testified that she told her mother Petitioner committed the acts because he "said that he was going to make both" her and her "mother happy, but he" only made her mother "happy", clearly telling investigators she was an angry jealous little girl. Id ECF No. 71, Pg. 29-31 Evidence was legally insufficient to sustain a conviction of T.C.A. § 39-13-522 (Id; ECF No. 26-1, Pg. 2-3, PageID#461-62), and evidence of her jealous reason for accusing Petitioner involves "factual innocence", not "mere legal insufficiency." *Bousley V. United States*, 523 U.S. 614, 623 (1998)

Wallace faced with these facts was well aware, it was "more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt" *(Schulp V. Delo*, 513 U.S. 298, 327 (1995)) and she strategically made inflammatory comments precalculated to mislead the jury from rendering a verdict of acquittal, to deciding guilt in fear of him killing Henderson if acquitted. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 71, at Pg. 35-36 "The broad discretion of the habeas court in fashioning a

proper remedy allows a district court to bar the State from reprosecuting the habeas Petitioner in 'extraordinary circumstances.'" *D'Ambrosio V. Bagley*, 656 F. 3d 379, 383 (6th Cir. 2011) (citation omitted) There are cases arising within American Criminal Justice System, where evidence of innocence preponderates the sexual accusations of minors. *State V. Mixon*, 983 S.W. 2d 661, 665 (Tenn. 1999) (Recanting childhood testimony) There are cases demonstrating arteria motives of complaining witnesses behind the sexual allegation of minors. *State V. Farris*, 221 W. Va. 676, 681-821|656 S.E. 2d 121, 126-27 (W. Va. 2007) In the spirit of impartiality, the jury would have more likely than not, acquitted Petitioner.

GROUND III

III.) PETITIONER DID NOT WAIVE HIS RIGHT TO ASSITANCE OF COUNSEL. PETITIONER WAS IRREPARABLY TRAUMATIZED BY OPPRESSIVE DEFICIENT PERFORMANCES OF HIS PREVIOUS COUNSEL TO PROCEED TO TRIAL PRO SE.

Petitioner previously mentioned in this argument herein. Ante Pg. 3-12 Petitioner was forced to proceed Pro Se and was given choice between counsel who had conflict of interest and appearing Pro Se. Pleasant-Bey, 2: 19-cv-02136, ECF No. 71, Pg. 13-28 (Pre-Trial and Trial Issues with Counsel) Choice between counsel who has a conflict of interest and appearing Pro Se is also no choice at

all. *United States V. Cronic*, 466 U.S. 648, 658-60 (1984) "The court must decide" if "the defendant was bowing to the inevitable" having no choice. *Pazden*, 424 F. 3d at 313-14 (Citation omitted) There must be an evaluation of "the motives behind the defendant's dismissal of counsel and decision to proceed pro se." Id 424 F. 3d at 314; *Argersinger V. Hamlin*, 407 U.S. 25, 36 (1972) ("...absent a knowing and intelligent waiver, no person may be imprisoned for any offense... unless he was represented by counsel at his trial...applicable to all criminal prosecutions...")

GROUND IV

IV.) THE STATE VIOLATED PETITIONER'S EQUAL PROTECTION RIGHTS UNDER THE XIVTH AMEND. TO THE U.S. CONST. BY DEPRIVING HIM OF HIS TENN. CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT, FAILING TO PROPERLY ELECT AN OFFENSE UNDER STATE LAW.

"[T]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne V. Cleburne Living Center*, 473 U.S. 432, at 439; U.S. Const. amend. XIV, § 1 "Article 1, section 6 of the Tennessee Constitution provides 'that the right of a trial by jury shall remain inviolate...'" *State V.*

Qualls, 482 S.W. 3d 1, 8-9 (Tenn. 2016) (citing Tenn. Const. art. 1, § 6)) "This constitutional provision also guarantees every accused the right to a unanimous jury verdict before a criminal conviction for a criminal offense may be imposed." *Qualls*, 482 S.W. 3d at 9 The SCT has held, "...there should be no question that the unanimity of twelve jurors is required in criminal cases under our State Constitution." *State V. Shelton*, 851 S.W. 2d 134, 137 (Tenn. 1993) (quoting *State V. Brown*, 823 S.W. 2d 576, 583 (Tenn. Crim. App. 1991)) The combined provisions of Tenn. Const. art. 1, § 6, and the Equal Protection Clause of the XIVth Amend. to the U.S. Const. both require the Tenn. constitutional right to a unanimous jury verdict be equally provided similarly situated persons charged with a crime within the jurisdiction of that State. Id "[A[lthough the defense apparently did not request an election of offenses, we have stressed that the election requirement is a responsibility of the trial court and the prosecution and...does not depend on a specific request by a defendant." *State V. Kendrick*, 38 S.W. 3d 566, 569 (Tenn. 2001) (Denial of Election of Offenses requirement "...amounted to plain error" as held by the Supreme Court of Tennessee.); *State V. Walton*, 958 S.W. 2d 724, 727 (Tenn. 1997) ("Plain error is an appropriate consideration")

The State must elect a specific act, and the direct-examination of the child witness testified to two separate acts of alleged anal penetration, by finger, and by tongue without considering her cross-examination. *Pleasant-Bey V. Clendenion*, 2:19-cv-02136, ECF No. 26-1, Pg. 2, PageID#461-62; Id

ECF No. 71, at Pg. 29 The State must elect a single specific act wherewith the Jury would unanimously agree or disagree that such an act occurred or did not occur. *State V. Shelton*, 851 S.W. 2d 134 at 137 (The Election Requirement prevents the jury from "...some jurors convicting on one offense and others, another.") (quoting *Burlison V. State*, 501 S.W. 3d 801, 803 (Tenn. 1973)) The State's choosing two acts of penetration was not specific enough to meet the Election of Offenses' requirement. The State must "...elect the specific offense upon which a verdict of guilty would be demanded.'" Id at 137 (citation omitted) Despite impugning the credibility of the child witness on cross-examination [*Pleasant-Bey*, 2:19-cv-02136, ECF No. 71, at Pg. 29-31] and re-direct examination [Id at Pg. 31], the State's failure to properly elect an offense between either: a.) digital; or b.) oral penetration to her anus violated the Petitioner's State Constitutional right "to a unanimous jury verdict before a criminal conviction is imposed" (851 S.W. 2d at 137) under *Shelton* (Id; Tenn. Const. Art. 1 § 6) and his XIV Amend. Equal Protection Clause rights. The Warden's argument that Petitioner did not object at trial to this is without merit. Pleasant-Bey, 2:19-cv-02136, ECF No. 67, Pg. 37, PageID#1858

CONCLUSION

WHEREFORE, THE PREMISES IS CONSIDERED, considering the nature of the case sub judice despised with bias by most, the degree of unfairness of the pre-trial, trial, and appellate proceedings Petitioner has faced, "...neutrally

No. 23-5347

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOAZ PLEASANT-BEY,

Petitioner-Appellant,

v.

JASON CLENDENION, Warden,

Respondent-Appellee.

ORDER

Before: MATHIS, Circuit Judge.

Boaz Pleasant-Bey, a Tennessee prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Pleasant-Bey moves this court for a certificate of appealability. *See* Fed. R. App. P. 22(b).

This case concerns Pleasant-Bey's protracted efforts to file a direct appeal from his criminal conviction. In 2010, following a jury trial in the Shelby County Criminal Court during which Pleasant-Bey represented himself with the assistance of advisory counsel, he was convicted of raping a child and sentenced to 23 years and 6 months of imprisonment. Pleasant-Bey filed a motion for a new trial. At the hearing on the new-trial motion, the trial court noted that Pleasant-Bey had submitted a motion to file a premature notice of appeal. Declining to file the notice of appeal at that time, the trial court advised Pleasant-Bey that, if the court denied his motion for a new trial and he wished to appeal, he could then change the date on the notice and file it in the record. The trial court denied Pleasant-Bey's motion for a new trial in December 2011. Pleasant-Bey purportedly mailed a notice of appeal on January 12, 2012, and an "ad informandum judiciem" on May 15, 2012, which reminded the trial court "to promptly file his Notice of Appeal," but the trial court apparently did not receive these documents.

Pleasant-Bey filed a § 2254 habeas petition in June 2013. *Pleasant-Bey v. McAllister*, No. 2:13-cv-2389 (W.D. Tenn.). In his amended habeas petition, Pleasant-Bey asserted in relevant part that he was denied his right to appeal his conviction. The district court dismissed Pleasant-Bey's habeas petition as time-barred and procedurally defaulted and declined to issue a certificate of appealability. Pleasant-Bey appealed, and this court denied him a certificate of appealability. *Pleasant-Bey v. McAllister*, No. 14-6032 (6th Cir. Feb. 12, 2015).

In September 2014, after the district court dismissed his habeas petition, Pleasant-Bey filed a motion to waive timely filing of a notice of appeal in the Tennessee Court of Criminal Appeals (TCCA). The TCCA denied Pleasant-Bey's motion because the court was unable to "conclude that allowing [him] to late-file a notice of appeal of a judgment that was entered more than two years ago would be in the interest of justice." Pleasant-Bey filed a rehearing petition, which the TCCA denied. Pleasant-Bey then filed a motion to appeal as of right before the TCCA, asserting that denying him an appeal as of right would deny him due process and equal protection under the Fourteenth Amendment. The TCCA denied Pleasant-Bey's motion, and the Tennessee Supreme Court denied his application for permission to appeal.

Two years later, Pleasant-Bey petitioned the Tennessee Supreme Court to assume jurisdiction over his case, asserting a denial of his right to appeal and his right to a speedy appeal. The Tennessee Supreme Court denied Pleasant-Bey's petition on the grounds that its jurisdiction was "appellate only" and that he had "no case currently pending in the appellate courts." Pleasant-Bey's subsequent petition for rehearing and his petition for a writ of certiorari were denied. *Pleasant-Bey v. Tennessee*, 138 S. Ct. 1554 (2018). In the meantime, Pleasant-Bey filed another motion to appeal as of right; the TCCA denied his motion. In his subsequent rehearing petition, Pleasant-Bey asserted that the "inordinate appellate delay" and denial of his right to appeal violated his constitutional rights; the TCCA denied his rehearing petition.

A year later, Pleasant-Bey filed another § 2254 habeas petition, this time challenging the denial of his various motions and petitions by the Tennessee appellate courts. The district court dismissed Pleasant-Bey's claims to the extent that he failed to raise a federal claim in the

underlying motion or petition. The district court also dismissed Pleasant-Bey's claims to the extent that the underlying motion or petition asserted the denial of his right to appeal his conviction because he raised that same claim in his first habeas petition. *See* 28 U.S.C. § 2244(b)(1). The district court allowed Pleasant-Bey's claims to proceed to the extent that the underlying motion or petition asserted that the delay in affording him a direct appeal violated his constitutional rights, but the court ultimately dismissed those claims as procedurally defaulted. The district court denied a certificate of appealability. This timely appeal followed.

Pleasant-Bey now moves this court for a certificate of appealability. *See* Fed. R. App. P. 22(b). Pleasant-Bey apparently seeks a certificate of appealability only as to the district court's procedural-default ruling with respect to his constitutional claims raised in his petition to assume jurisdiction before the Tennessee Supreme Court. By failing to address the district court's other rulings in his motion for a certificate of appealability, Pleasant-Bey has forfeited review of those rulings by this court. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a certificate of appealability, Pleasant-Bey must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court dismisses a habeas petition on procedural grounds, as here, a certificate of appealability should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added).

The Tennessee Supreme Court denied Pleasant-Bey's petition to assume jurisdiction based on Tenn. Code Ann. § 16-3-201(a), which provides that "[t]he jurisdiction of the court is appellate only." Pointing out that Pleasant-Bey did not have a case currently pending in the appellate courts, the Tennessee Supreme Court concluded that he had failed to demonstrate that his petition was properly before the court. The district court determined that the Tennessee Supreme Court's denial

of Pleasant-Bey's petition therefore rested on an adequate and independent state ground foreclosing federal habeas review. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

In his motion for a certificate of appealability, Pleasant-Bey argues that another subsection of Tenn. Code Ann. § 16-3-201 provided the Tennessee Supreme Court with jurisdiction to hear his petition to assume jurisdiction. Pleasant-Bey cites Tenn. Code Ann. § 16-3-201(d), which provides that "[t]he supreme court may, upon the motion of any party, assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed before any intermediate state appellate court." But Pleasant-Bey did not have an appeal filed before an intermediate state appellate court when he filed his petition. Pleasant-Bey argues that his "timely filed" premature notice of appeal was sufficient to confer appellate jurisdiction under Tenn. Code Ann. § 16-3-201(d). But the trial court specifically declined to file Pleasant-Bey's premature notice of appeal when he submitted it.

Federal habeas review of defaulted claims "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[.]" *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Pleasant-Bey argues that the district court failed to consider whether the trial court's failure to appoint appellate counsel for his direct appeal constituted cause for his default. Pleasant-Bey also argues that he was prejudiced by the inordinate appellate delay, asserting that, if his appeal had been decided within a reasonable timeframe, he would have been granted an acquittal, a dismissal of the indictment, or a new trial. The district court did not address Pleasant-Bey's cause-and-prejudice arguments. Regardless, Pleasant-Bey's arguments about the unfiled direct appeal following the denial of his new-trial motion in 2011 do not establish cause for the absence of a pending appeal in an intermediate state appellate court in 2017, which was the basis for the procedural default at issue here.

Pleasant-Bey has failed to show that reasonable jurists could debate the district court's procedural-default ruling with respect to his constitutional claims raised in his petition to assume jurisdiction before the Tennessee Supreme Court. Accordingly, this court **DENIES** Pleasant-Bey's motion for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT B

DISTRICT COURT ORDER 2:19-CV-02136

DENYING HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BOAZ PLEASANT-BEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:19-cv-02136-JTF-atc
	)	
JASON CLENDENION,	)	
	)	
Respondent.	)	
	)	

ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254, DENYING A CERTIFICATE OF APPEALABILITY, CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH, AND DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court are the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Second § 2254 Petition"), filed by Petitioner, Boaz Pleasant-Bey (ECF No. 1); the Second Amended Answer to Petition for Writ of Habeas Corpus ("Second Amended Answer"), filed by Respondent, Jason Clendenion (ECF No. 67); Petitioner's Reply to Respondent's Second Amended Answer to His Petition for Writ of Habeas Corpus ("Reply to Second Amended Answer") (ECF No. 71); and Respondent's Sur-Reply (ECF No. 74). For the reasons stated below, the Court **DISMISSES** the remaining claims in the Second § 2254 Petition.

I. PROCEDURAL HISTORY[1]

On February 19, 2019, Pleasant-Bey filed his *pro se* Second § 2254 Petition, in which he asserted the following claims:

[1] The procedural history of Pleasant-Bey's state and federal challenges to his conviction are set forth at ECF No. 61, pp. 2-9, and will not be repeated here.

1. "The Tennessee Court of Criminal Appeals And The Supreme Court of Tennessee denied Motions to Appeal As of Right" (ECF No. 1 at PageID 5);

2. "The Tenn. Court of Criminal Appeals denied Petitioner's Motion To Appeal As of Right in 2016" (*id.* at PageID 6);

3. "The Petitioner's Petition To Assume Jurisdiction and Petition To Rehear As Motion To Appeal As of Right was denied by Sup. Ct. Tenn." (*id.* at PageID 8); and

4. "Petitioner's Final Motion To Appeal As of Right And Petition To Rehear were denied by the Tenn. Ct. Crim. App." (*id.* at PageID 10).

The Court issued an order on May 10, 2019 that directed Warden Rusty Washburn, the Respondent at that time, to file the state-court record and a response to the Second § 2254 Petition. (ECF No. 10.) Eventually, on January 2, 2020, Washburn filed most of the state-court record. (ECF No. 28.) On January 3, 2020, Washburn filed his Amended Answer to Petition for Writ of Habeas Corpus ("Amended Answer"). (ECF No. 29.) On January 13, 2020, Pleasant-Bey filed Petitioner's Response to Respondent's Filing of State Court Record, which, despite the title, appears to be a reply to the Amended Answer. (ECF No. 30.) On January 16, 2020, Pleasant-Bey filed his Reply to Amended Answer. (ECF No. 33.)

The Court issued an order on September 14, 2021, directing the subsequent respondent, Martin Frink, to supplement the state-court record with Petitioner's Petition to Assume Jurisdiction and his Petition to Rehear with respect to that petition. (ECF No. 47.) Frink complied on October 6, 2021. (ECF No. 49.)[2]

In an order issued on June 28, 2022, the Court (i) dismissed Claim 1 as not cognizable in a federal habeas petition (ECF No. 61 at 14-15); (ii) dismissed Claim 2 pursuant to 28 U.S.C. §

[2] On March 31, 2022, Jason Clendenion was substituted as respondent. (ECF No. 57.)

2244(b)(1) except for a claim that Pleasant-Bey was harmed by the delay in affording him a direct appeal, as presented in his February 16, 2018 Petition to Rehear (*id.* at 15-16); (iii) dismissed Claim 3, based on the Tennessee Supreme Court's denial of the Petition to Assume Jurisdiction and Petition to Rehear, pursuant to 28 U.S.C. § 2244(b)(1), except to the extent that Pleasant-Bey claims that he was harmed by the delay in affording him a direct appeal (*id.* at 16-17); and (iv) dismissed Claim 4, based on the denial of Pleasant-Bey's Final Motion to Appeal as of Right and Petition to Rehear, except to the extent Pleasant-Bey claims that he was harmed by the delay in affording him a direct appeal (*id.* at 17). In summary, the Court dismissed "every claim in the Second § 2254 Petition as either not arising under federal law or pursuant to 28 U.S.C. § 2244(b)(1) **except for** the following filings in which Pleasant-Bey has alleged that he was harmed by the delay: (i) the February 6, 2018 Petition to Rehear; and (ii) the November 3, 2017 Petition to Assume Jurisdiction. (*Id.*) The Warden was ordered to file a second amended answer, and Pleasant-Bey was given the opportunity to reply. (*Id.* at 20.)

The Warden filed his Second Amended Answer on August 25, 2022. (ECF No. 67.) Pleasant-Bey filed his Reply to Second Amended Answer on October 3, 2022. (ECF No. 71.) After obtaining leave of Court, the Warden filed a sur-reply on October 13, 2022. (ECF No. 74.) The Court denied Pleasant-Bey leave to file a rebuttal to Respondent's Sur-Reply. (ECF No. 76.)

II. ANALYSIS[3]

The Court agrees with the Warden that Pleasant-Bey has not properly exhausted his claims that he was deprived of a direct appeal and that he was harmed by the delay. A federal court may

[3] Although the Second Amended Answer sets forth several grounds for denying relief, the Court will address only the issue of exhaustion, which is dispositive.

not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas petition to the state courts pursuant to 28 U.S.C. §§ 2254(b) and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The petitioner must "fairly present" each claim to each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). If a claim has never been presented to the state courts but a state court remedy is no longer available (*e.g.*, when an applicable statute of limitations bars a claim), the claim is technically exhausted, but procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). To avoid procedural default, a habeas petitioner in Tennessee ordinarily must present his federal claims to the trial court and, on appeal, to the TCCA. *Covington v. Mills*, 110 F. App'x 663, 665 (6th Cir. 2004). This is not the ordinary case because Pleasant-Bey's claims arise from the denial of a direct appeal. As discussed below, however, Tennessee has procedural rules applicable to Pleasant-Bey's claims. A claim has not been fairly presented where it "has been presented for the first and only time in a procedural context in which its merits will not [ordinarily] be considered." *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

If a state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977); *see Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment.") (internal

quotation marks omitted). The state-law ground may be a substantive rule dispositive of the case or a procedural barrier to adjudication of the claim on the merits. *Martin*, 562 U.S. at 315.

The Sixth Circuit applies "a four-part test to determine whether [a federal court is] precluded from reviewing a federal habeas claim because the petitioner failed to observe a state procedural rule." *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 464 (6th Cir. 2015) (citing, *e.g.*, *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986)).

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule....
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction....
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim....
>
> [Fourth, o]nce the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate ... that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. . . .

Maupin, 785 F.2d at 138 (citations omitted).

The Rule 4(a) Motions.[4]

Tennessee has a procedural rule that contains a deadline for filing a notice of appeal and a procedure for waiving that deadline. The 2011 version of Rule 4(a) of the Tennessee Rules of Appellate Procedure provided, in pertinent part, that,

> [i]n an appeal as of right to the . . . Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court

[4] Although the previous order dismissed all claims arising from Pleasant-Bey's Rule 4(a) motions except for the February 6, 2018 petition to rehear, the Court has, in the interest of completeness, addressed why the additional filings do not serve properly to exhaust his claims.

> within 30 days after the date of entry of the judgment appealed from; however, in all criminal cases the "notice of appeal" document is not jurisdictional and the filing of such document may be waived in the interest of justice. The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice. . . .[5]

Here, the judgment was entered on or about July 19, 2010. However, Rule 4(c) provides that, "[i]n a criminal action, if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant: . . . (4) under Rule 33(a) for a new trial . . . , the time for appeal for all parties shall run from entry of the order denying a new trial . . . ." The motion for a new trial was denied on December 21, 2011, at which time the thirty-day period for filing a notice of appeal commenced.

Pleasant-Bey submitted a premature notice of appeal to the trial judge, which was not docketed because the motion for a new trial was pending. (*See* ECF No. 61 at 2.) The trial judge advised Pleasant-Bey that his notice of appeal would be filed if the motion for a new trial was unsuccessful. That did not happen. The record contains no explanation for that lapse.[6] The

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[5] Rule 4(a) was amended in 2017 to provide that the notice of appeal be filed with the appellate court clerk.

[6] It is not clear why the notice of appeal could not have been docketed in the criminal file. Rule 4(d) provides that "[a] prematurely filed notice of appeal shall be treated after the entry of the judgment from which the appeal is taken and on the day thereof." Pleasant-Bey's notice of appeal would not have precluded the trial judge from ruling on his new trial motion. Rule 4(e) provides, in pertinent part, that

> [t]he trial court retains jurisdiction over the case pending the court's ruling on any timely filed motion specified in subdivision (b) or (c) of this rule. If a motion specified in either subdivision (b) or (c) is filed within the time permitted by the applicable rule referred to in that subdivision, the filing of a notice of appeal prior to the filing of the motion, or the filing of a notice of appeal prior to the trial court's ruling on an earlier filed motion, does not deprive the trial court of jurisdiction to rule upon the motion. A notice of appeal filed prior to the trial court's ruling on a timely specified motion shall be deemed to be premature and shall be treated as filed after the entry of the order disposing of the motion and on the day thereof. . . .

time for filing a notice of appeal expired on January 20, 2012.[7] Clearly, something went wrong in the trial court, resulting in the failure to file the premature notice of appeal and to forward it to the TCCA. However, because Pleasant-Bey knew that his notice of appeal had not been forwarded to the TCCA, the question for exhaustion purposes is whether Pleasant-Bey followed Tennessee's procedures for correcting this error. As discussed below, he did not.

Rule 4(a) of the Tennessee Rules of Appellate Procedure provides that a party can file in the Tennessee Court of Criminal Appeals ("TCCA") a motion to waive timely filing of the notice of appeal. Tennessee also allows parties a limited right to seek rehearing of an adverse decision by a state appellate court. The grounds on which a Tennessee appellate court will grant relief on a petition to rehear are narrow. Rule 39(a) provides as follows:

> Rehearing may be granted by the Supreme Court, Court of Appeals, or Court of Criminal Appeals on its own motion or on petition of a party. In determining whether to grant a rehearing, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the court's opinion incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's opinion is in conflict with a statute, prior decision, or other principle of law; (3) the court's opinion overlooks or misapprehends a material fact or proposition of law; and (4) the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute. **A rehearing will not be granted to permit reargument of matters fully argued.** (Emphasis added.)

"[T]he office of the petition to rehear cannot be used to file supplemental briefs and present issues that should or could have been presented in the orderly issues of the proceedings. In other words, the petition to rehear cannot be used as a secondary method of appeal." *State v. Pearson*, C.C.A. No. 87-157-III, 1988 WL 105728, at *2 (Tenn. Crim. App. Dec. 28, 1988), *appeal denied*

[7] Pleasant-Bey claims that he mailed a notice of appeal to the Criminal Court Clerk on January 12, 2012, but that document apparently was not received. (ECF No. 61 at 3.)

(Tenn. Apr. 3, 1989); *see also Reed v. State*, No. M2017-00480-CCA-R3-PC, 2018 WL 3621083, at *13 (Tenn. Crim. App. July 30, 2018) ("[A] petition to rehear is not an appropriate vehicle to introduce new issues on appeal."). "Raising an issue in a petition for rehearing does not constitute exhaustion of state court remedies." *Thomas v. Carpenter*, No. 12-2333-SHM-tmp, 2015 WL 13091647, at *45 (W.D. Tenn. Mar. 30, 2015) (collecting cases), *rev'd on other grounds sub nom. Thomas v. Westbrooks*, 849 F.3d 659 (6th Cir. 2017).

Pleasant-Bey filed multiple Rule 4(a) motions with the TCCA and multiple petitions to rehear the denial of those motions. How many bites at the apple did he take? Six. There was (1) the September 2014 Petition to Waive Timely Filing of NOA and the supplement; (2) the November 12, 2014 motion to rehear; (3) the November 21, 2014 Motion for Speedy Appeal; (4) the December 29, 2014 Motion to Appeal as of Right; (5) the December 18, 2017 Motion to Appeal as of Right under Rule 3(b); and (6) the Petition to Rehear. Some of these filings presented federal claims and some did not, but none serve to properly present Pleasant-Bey's constitutional claims to the state courts.

Attempts (1) through (3), the 2014 filings, included no federal claims and, therefore, did not serve to exhaust Pleasant-Bey's federal habeas claims. The TCCA first denied the Rule 4(a) motion on October 28, 2014, reasoning as follows:

> This matter is before the Court on the Petitioner Boaz Pleasant-Bey's motion to waive the timely filing of his notice of appeal. . . . According to the Petitioner, he . . . filed both a motion for new trial and a notice of appeal on February 4, 2011. The motion for new trial was denied on December 12, 2011, and the Petitioner filed a notice of appeal on January 12, 2012. The Petitioner states that neither notice of appeal is included in the file with the trial court clerk.
>
> The Petitioner filed a motion in this Court requesting that we waive the timely filing of his motion for new trial and his notice of appeal. On September 23, 2014, this Court denied the Petitioner's motion to the extent that the motion for

new trial was untimely. With regard to the untimely notice of appeal, we noted that the Petitioner failed to include information regarding his conviction and sentence and the issues that he intends to present on appeal. The Petitioner also failed to include an explanation as to why he waited more than two years after the trial court denied his motion for new trial to file a motion in this Court. As a result, this Court ordered that the Petitioner file a supplemental motion within fifteen days setting out this additional information.

In his supplemental motion, the Petitioner failed to include the offenses for which he was convicted but stated that he was sentenced to twenty-two and one-half years. The Petitioner explained that he believed that he had filed a notice of appeal on January 12, 2012. When he did not receive any communication regarding the appeal, he filed a writ of habeas corpus in the federal district court in an effort to expedite the appeal. The Petitioner states that after the State filed a copy of the state court record in the federal court on August 7, 2014, he discovered that his notice of appeal was not included in the record.

Pursuant to Rule 4(a), Rules of Appellate Procedure, a notice of appeal must be filed no later than thirty days after final judgment of the trial court. Furthermore, in order to initiate an appeal as of right, an appellant must file the notice of appeal with the clerk of the trial court, not the clerk of the appellate court. Tenn. R. App. P. 3(d). Rule 4(a) provides that a notice of appeal document in criminal cases is not jurisdictional and the timely filing of such may be waived in the interest of justice. However, the waiver is not automatic, and this Court has discretion to determine whether it shall be allowed. *Id.* In making that determination, the Court shall consider the nature of the issues presented for review, the reasons for the delay in seeking relief, as well as other factors presented in the case. *See, e.g., Moore v. State*, No. 02C01-9511-CC-00337 (Tenn. Crim. App., Mar. 19, 1999), *perm. to app. denied*, (Tenn. Oct. 4, 1999).

While the Petitioner mistakenly believed that he had filed a notice of appeal in the trial court, he did not file any motions regarding the appeal in this Court until more than two years after he believed that the notice of appeal had been filed. The fact that the Petitioner filed a petition in federal court does not excuse him of his obligation in this Court. We cannot conclude that allowing the Petitioner to late-file a notice of appeal of a judgment that was entered more than two years ago would be in the interest of justice.

(ECF No. 28-3 at PageID 777-78.) The TCCA offered the following explanation for its December 15, 2014 denial of the Petition to Rehear:

The Appellant has filed a Petition to Rehear, pursuant to Rule 39, Tennessee Rules of Appellate Procedure, to have this Court reconsider its order entered on

> October 28, 2014, denying the Appellant's motion to waive the timely filing of his notice of appeal. The Appellant contends this Court's order overlooks or misapprehends material facts or propositions of law. *See generally* Tenn. R. App. P. 39(a)(3).
>
> It appears from the substance of the petition that the Appellant merely wants this Court to reach an alternate conclusion from that reached in the order. This Court has, again, reviewed the pleadings [and] concludes that the Appellant's motion to waive the timely filing of his notice of appeal should be denied.

(*Id.* at PageID 784.) These orders are important because they form the basis for the TCCA's denials of Pleasant-Bey's subsequent attempts to obtain relief under Rule 4(a).

Attempt (4), Pleasant-Bey's Motion to Appeal as of Right, raised federal claims. The TCCA denied relief on January 30, 2015 for the following reasons:

> This matter is before the Court on the Petitioner Boaz Pleasant-Bey's "Motion to Appeal as of Right." On October 28, this Court entered an order denying the Petitioner's motion to waive the timely filing of the notice of appeal. On December 15, 2014, this Court entered an order denying the Petitioner's petition to rehear. In his "Motion to Appeal as of Right," the Petitioner essentially requests that this Court revisit its previous orders and allow him to proceed with an appeal of his conviction and sentence. We conclude that the Petitioner has failed to establish that the timely filing of his notice of appeal should be waived.

(*Id.* at PageID 795.) In other words, the TCCA denied relief for the reasons stated in its two previous orders on Pleasant-Bey's Rule 4(a) motion and his petition to rehear.

The January 30, 2015 order was based on an independent and adequate state ground, namely, Rule 4(a). Rule 4(a) provides a deadline for filing a notice of appeal and a process to seek a waiver of that deadline in the TCCA, thereby satisfying the first *Maupin* factor. The second factor is also satisfied: in its October 28, 2014, December 15, 2014, and January 30, 2015 orders, the TCCA explicitly ruled that Pleasant-Bey was not entitled to relief under Rule 4(a), satisfying the second *Maupin* factor.

The third *Maupin* factor asks whether Rule 4(a) is an adequate and independent state ground sufficient to foreclose review of a federal constitutional claim. "The question of whether a state procedural ruling is adequate is itself a question of federal law." *Beard v. Kindler*, 558 U.S. 53, 60 (2009). A state rule is an "adequate" procedural ground if it is "firmly established and regularly followed." *Walker*, 562 U.S. at 316 (internal quotation marks omitted). "A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Id.* (alteration, internal citations and quotation marks omitted). "There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted). A state court's application of its procedural rule may be found to be "exorbitant" when a state court "exercised its discretion in a surprising or unfair manner." *Walker*, 562 U.S. at 320.

The Warden says that the TCCA routinely invokes Rule 4(a) to deny criminal defendants' requests to late-file notices of appeal. (ECF No. 67 at 23.) The Court's search has revealed numerous such cases. *See, e.g., State v. James*, No. E2021-00559-CCA-R3-CD, 2022 WL 633540, at *1-2 (Tenn. Crim. App. Mar. 4, 2022); *Cage v. State*, No. M2019-01888-CCA-R3-HC, 2020 WL 3639932, at *2 (Tenn. Crim. App. July 6, 2020) (denying Rule 4(a) motion where notice of appeal was eight days late, stating that, "[g]iven the Petitioner's multitudinous history of filings in this Court, the Petitioner knows better than most, the importance of timely filings"); *State v. Broyld*, No. M2005-00299-CCA-R3-CD, 2005 WL 3543415, at *1 (Tenn. Crim. App. Dec. 27, 2005) (denying Rule 4(a) motion where notice of appeal was five days late, stating that "*pro se*

litigants are expected to comply with the time requirements of Rule 4(a)"). Also, as the Warden notes, federal courts in Tennessee have held claims that were not presented to the state courts to be procedurally defaulted where the thirty-day period specified in Rule 4(a) has expired. (ECF No. 67 at 7-8.) The Court's own research has confirmed this statement. *See Carson v. Genovese*, No. 3:15-cv-01121, 2021 WL 1564764, at *8 (M.D. Tenn. Apr. 21, 2021); *Whitmore v. Tenn.*, No. 2:19-cv-00089, 2021 WL 848688, at *4 (M.D. Tenn. Mar. 4, 2021); *Meriweather v. Hall*, No. 3:19-cv-00462, 2020 WL 5203566, at *3 (M.D. Tenn. Sept. 1, 2020); *Love v. Boyd*, No. 3:19-cv-446-RLJ-DCP, 2020 WL 2814125, at *11 (E.D. Tenn. May 29, 2020); *Armstrong v. State*, No. 1:15-cv-001-3, 2016 WL 465458, at *8 (M.D. Tenn. Feb. 8, 2016). Given that almost three years had elapsed between the date when Pleasant-Bey's conviction became final and his filing of his Motion to Appeal as of Right in December 2014, Pleasant-Bey can make no showing that the TCCA exercised its discretion in a surprising or unfair manner. Therefore, Rule 4(a) constitutes an independent and adequate state procedural ground.

Finally, the fourth *Maupin* factor asks whether the inmate can show "cause" for his failure to follow the procedural rule and actual prejudice. Pleasant-Bey has failed to do so. His argument focuses on the trial court's failure properly to docket the notice of appeal. (ECF No. 71 at 52-53.) That is largely beside the point. The focus here is on why Pleasant-Bey could not have filed a timely Rule 4(a) motion with the TCCA. He states that the Tennessee Rules of Appellate Procedure "do not place any burden upon the Petitioner to file a motion in the TCCA regarding the delay in the trial court clerk in filing these [premature] notices of appeal with the clerk of the appellate court." (*Id.* at 53.) But the question is not whether Pleasant-Bey should have complained to the TCCA about the purported delay by the Criminal Court Clerk. Instead,

the issue is whether he should have filed his Rule 4(a) motion in a timely manner. He has offered no satisfactory explanation. At best, it seems that Pleasant-Bey assumed that a Rule 4(a) motion to waive timely filing was not an available remedy because the Criminal Court Clerk had not docketed his notice of appeal. However, the TCCA did not deny any of Pleasant-Bey's Rule 4(a) motions on the ground that no notice of appeal had been docketed and forwarded by the Criminal Court Clerk. Moreover, the TCCA has made clear that legal errors and mistaken assumptions of law ordinarily are insufficient to warrant relief under Rule 4(a). *See, e.g., State v. Bullock*, No. E2021-00661-CCA-R3-CD, 2022 WL 3012460, at *3 (Tenn. Crim. App. July 29, 2022) (denying Rule 4(a) motion where notice of appeal was filed more than a year after the deadline even though trial judge had entered summary order and promised to set forth the reasoning later and the notice of appeal was filed within 30 days of the later order, reasoning that the trial court lacked jurisdiction to enter further orders and, "[w]hile the Defendant, the prosecutor, and the trial court appeared to believe that the trial court had such authority, this court previously has recognized that a misunderstanding of the law as a reason for delay weights against a finding of waiver."); *Sales v. State*, No. E2020-01471-CCA-R3-HC, 2021 WL 1994072, at *2 (Tenn. Crim. App. May 19, 2021) (denying Rule 4(a) motion where notice of appeal was filed two months after entry of judgment, explaining that multiple motions to reconsider filed after dismissal of habeas petition did not toll time to file notice of appeal). Therefore, Pleasant-Bey has not shown cause or prejudice to overcome his procedural default. Attempt (4) is insufficient to fairly present Pleasant-Bey's federal claims to the state courts.

Attempt (5), Pleasant-Bey's December 18, 2017 Motion to Appeal as of Right under Rule 3(b), does not include any federal claims and, therefore, does not suffice to exhaust any claim. The TCCA denied relief on January 25, 2018, reasoning as follows:

> This matter is before the Court on the Petitioner Boaz Pleasant-Bey's "Motion to Appeal as of Right Under Rule 3(b)." On January 30, 2015, this Court entered and [sic] order denying the Petitioner's motion to appeal as of right. Prior to that order, on October 28, 2014, this Court entered an order denying the Petitioner's motion to waive the timely filing of his notice of appeal. On December 15, 2014, this Court entered an order denying the Petitioner's petition to rehear. In his "Motion to Appeal as of Right Under Rule 3(b)," the Petitioner essentially requests that this Court revisit its prior orders and allow him to proceed with an appeal of his convictions and sentence. We conclude that the Petitioner has failed to establish that the untimely filing of his notice of appeal should be waived.

(ECF No. 28-3 at PageID 799.)

Attempt (6), the February 6, 2018 Petition to Rehear with respect to the TCCA's February 25, 2018 order, presented federal claims. The TCCA denied relief on February 13, 2018 for the following reasons:

> The Appellant has filed a Petition to Rehear, pursuant to Rule 39, Tennessee Rules of Appellate Procedure, to have this Court reconsider its order entered on January 25, 2018, denying the Appellant's motion to appeal as of right under Rule 3(b). The Appellant contends this Court's order overlooks or misapprehends material facts or propositions of law. *See generally* Tenn. R. App. P. 39(a)(3).
>
> It appears from the substance of the petition that the Appellant merely wants this Court to reach an alternative conclusion from that reached in the order. This Court has, again, reviewed the pleadings and concludes that the Appellant's motion to appeal as of right under Rule 3(b) should be denied.

(*Id.* at PageID 804.)

The TCCA denied Attempt (6) on the basis of Rule 39(a) of the Tennessee Rules of Appellate Procedure, an independent and adequate state ground. Rule 39(a) sets forth the circumstances under which a rehearing can be granted. The TCCA explicitly cited that rule and

denied relief on the ground that the issues presented had been previously determined. Rule 39(a), by its terms, provides that "[a] rehearing will not be granted to permit reargument of matters fully argued." Thus, the first two *Maupin* factors have been satisfied.

The third *Maupin* factor has also been satisfied. The Tennessee appellate courts routinely deny Rule 39(a) applications that do not satisfy the criteria for granting rehearing or that repeat arguments that have previously been considered and rejected. *See, e.g., Earnest v. State*, No. W2006-00714-CCA-R3-PC, 2005 WL 2453951 (Tenn. Crim. App. Oct. 4, 2005), *reh'g denied* (Oct. 27, 2005) (per curiam); *Hall v. Bookout*, 87 S.W.3d 80, 88 (Tenn. Ct. App. 2002); *State v. Wright*, No. 01C01-9510-CC-00326, 1997 WL 115816 (Tenn. Crim. App. Feb. 28, 1997) (per curiam); *State v. Davidson*, No. 13, Meigs Criminal, 1987 WL 17074 (Tenn. Crim. App. Sept. 10, 1989), *appeal dismissed* (Tenn. Oct. 2, 1989).

Finally, the fourth *Maupin* factor has been satisfied, as Pleasant-Bey has failed to show cause for his default or that he has been prejudiced.

In sum, Claim 2, to the extent it is based on the February 6, 2018 Petition to Rehear, is **DISMISSED** because Rules 4(a) and 39(a) of the Tennessee Rules of Appellate Procedure are adequate and independent state law grounds precluding review of Pleasant-Bey's constitutional claims. Claim 4, to the extent it is based on the Final Motion to Appeal as of Right And Petition to Rehear, is **DISMISSED** for the same reason.

The Petition to Assume Jurisdiction.

That leaves the Petition to Assume Jurisdiction that Pleasant-Bey filed with the Tennessee Supreme Court on November 3, 2011 and the Petition to Rehear the denial of that petition. Those filings form the basis for Claim 3. The Petition to Assume Jurisdiction raised federal

constitutional claims and asserted that Pleasant-Bey was harmed by the delay. On November 8, 2017, the Tennessee Supreme Court denied relief, reasoning as follows:

> On November 3, 2017, the petitioner, Boaz Pleasant-Bey, proceeding *pro se*, filed a "petition to assume jurisdiction and for release from confinement without right to appeal pending review." The jurisdiction of this Court is appellate only. *See* Tenn. Code Ann. § 16-3-201. The petitioner has no case currently pending in the appellate courts. Therefore, the petitioner has failed to demonstrate that his petition is properly before this Court. Accordingly, it is ORDERED that the petition is denied. . . .

(ECF No. 49-2.) Pleasant-Bey's Petition to Rehear does not explicitly assert any federal claims but, instead, reiterates that he timely filed a notice of appeal. (ECF No. 49-3.) The Tennessee Supreme Court summarily denied relief. (ECF No. 49-4.)

Tennessee Code Annotated § 16-3-201(a) provides that "[t]he jurisdiction of the [Tennessee Supreme Court] is appellate only, under restrictions and regulations that from time to time are prescribed by law; but it may possess other jurisdiction that is now conferred by law upon the present supreme court." However, "[t]he court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals, within each division, to the supreme court as provided by this code." Tenn. Code Ann. § 16-3-201(b). This statute makes clear that the Tennessee Supreme Court lacked jurisdiction to address the Petition to Assume Jurisdiction or the Petition to Rehear. The Tennessee Supreme Court explicitly relied on that provision. Section 16-3-201 is an independent and adequate state ground. While there are few decisions addressing the matter, doubtless due to the fact that the statute itself is clear, the Sixth Circuit has held that a habeas petitioner did not properly exhaust his claims by presenting them directly to the Tennessee Supreme Court in a "petition for a writ of mandamus or in the alternative a petition for writ of habeas corpus." *Gillard*

v. Barksdale, No. 84-5690, 1985 WL 12995 (6th Cir. Feb. 14, 1985). Again, a habeas petitioner does not properly exhaust his claims by presenting them in a procedural context in which their merits will not be considered. *See supra* p. 4. Pleasant-Bey does not get to make up his own procedures. Claim 3 is **DISMISSED**.

* * * *

Because every claim presented is without merit, the Court **DENIES** the Second § 2254 Petition. The Second § 2254 Petition is **DISMISSED WITH PREJUDICE**. Judgment shall be entered for Respondent.

III. APPEAL ISSUES

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2254 petition and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). The COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). No § 2254 petitioner may appeal without this certificate. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks omitted).

> Where a district court has rejected a constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that

> jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. . . .

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "In short, a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). "To put it simply, a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Id.*; *see also id.* ("Again, a certificate is improper if *any* outcome-determinative issue is not reasonably debatable.").

In this case, there can be no question that the Second § 2254 Petition is meritless for the reasons previously stated. Because any appeal by Petitioner on the issues raised in his Second § 2254 Petition does not deserve attention, the Court **DENIES** a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith. Leave to appeal *in forma pauperis* is **DENIED**.[8]

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[8] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within 30 days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

IT IS SO ORDERED, this 3rd day of April, 2023.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

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U.S. District Court

Western District of Tennessee

Notice of Electronic Filing
The following transaction was entered on 4/3/2023 at 3:56 PM CDT and filed on 4/3/2023

Case Name:	Pleasant-Bey v. Washburn
Case Number:	2:19-cv-02136-JTF-atc
Filer:	
Document Number:	78

Docket Text:
ORDER denying [1] 2254 Petition, denying a certificate of appealability, certifying that an appeal would not be taken in good faith, and denying leave to proceed in forma pauperis on appeal. Signed by Judge John Thomas Fowlkes, Jr. on 04/03/2023. (Fowlkes, J.)

2:19-cv-02136-JTF-atc Notice has been electronically mailed to:
John H. Bledsoe John.Bledsoe@ag.tn.gov, jenny.winfree@ag.tn.gov
Michael Matthew Stahl Michael.Stahl@ag.tn.gov, Sheron.Johnson@ag.tn.gov
Meredith W. Bowen (Terminated) Meredith.Bowen@ag.tn.gov
Sarah J. Stone Sarah.Stone@ag.tn.gov, Sheron.Johnson@ag.tn.gov
2:19-cv-02136-JTF-atc Notice will not be electronically mailed to:
Boaz Pleasant-Bey
473110
Turney Center Industrial Complex
1499 R.W. Moore Memorial Highway
Only, TN 37140-4050

The following document(s) are associated with this transaction:

EXHIBIT C

DISTRICT COURT ORDER 2:19-CV-02136

June 22, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BOAZ PLEASANT-BEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:19-cv-02136-JTF-atc
	)	
JASON CLENDENION,	)	
	)	
Respondent.	)	
	)	

ORDER OF PARTIAL DISMISSAL AND
DIRECTING RESPONDENT TO FILE A SECOND AMENDED ANSWER

Before the Court are the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Second § 2254 Petition"), filed by Petitioner, Boaz Pleasant-Bey, Tennessee Department of Correction ("TDOC") prisoner number 473110, who is currently incarcerated at the Turney Center Industrial Complex ("TCIX") in Only, Tennessee (ECF No. 1); the Amended Answer to Petition for Writ of Habeas Corpus ("Amended Answer"), filed by Rusty Washburn, who was, at the time, the warden of the prison where Pleasant-Bey was incarcerated at the time (ECF No. 29); and Pleasant-Bey's Reply to Respondent's Amended Answer to Petition for Writ of Habeas Corpus ("Reply to Amended Answer") (ECF No. 33.) For the reasons stated below, the Court **DISMISSES** virtually every claim in the Second § 2254 Petition and directs Respondent to file an amended answer addressing the remaining claims.

I. BACKGROUND

A. Procedural History

1. The Trial and Its Aftermath

On January 30, 2007, a grand jury in Shelby County, Tennessee returned a single-count indictment charging Pleasant-Bey with raping a person less than thirteen (13) years of age. (ECF No. 28-1 at PageID 474-75.) A jury trial commenced in the Shelby County Criminal Court on May 25, 2010, at which Pleasant-Bey represented himself with the assistance of elbow counsel. (*See id.* at PageID 479.) On May 29, 2010, the jury convicted Pleasant-Bey of rape of a child. (*Id.*) At a sentencing hearing on July 19, 2010, the trial court sentenced Pleasant-Bey to a term of imprisonment of twenty-three (23) years, six months. (*Id.* at PageID 477.)

On July 22, 2010, Pleasant-Bey filed a *pro se* motion for a new trial. (*See id.* at PageID 479-80.) Subsequently, on February 4, 2011, Pleasant-Bey filed another *pro se* Motion For A New Trial. (*Id.* at PageID 510-45.) A hearing on the new trial motions was held on February 4, 2011. (ECF No. 28-4.) At that hearing, the trial judge noted that Pleasant-Bey had submitted a premature notice of appeal (ECF No. 28-7 at PageID 903-04) but declined to file it until after a ruling on the new trial motion. The trial judge told Pleasant-Bey that he would be brought to court to hear the decision on the motion for a new trial and, if the ruling was adverse to him, the notice of appeal would be filed at that time. (ECF No. 28-4 at PageID 815-17, 885.)

On December 21, 2011, the trial judge denied the motion for a new trial. (ECF No. 14-1 at PageID 479-91, 493.) It is unclear whether Pleasant-Bey was present to receive a copy of the decision.[1] The trial judge explained that

> [t]he Motion for New Trial in this case in its final form was finally filed and heard on February 4, 2011, and was set March 9th for a written ruling . . . . This court during that month then discovered that not only did all of the transcripts need to be read, but also an extremely large box of handwritten pro se filings by the defendant over the years in the various courts, consisting of well over 1,000 handwritten pages. These included many pages of motions and memoranda concerning habeas corpus writs he had filed and appealed, which were intermixed with those related to the indictment . . . .

(ECF No. 14-1 at PageID 480.)

Pleasant-Bey claims that he mailed a notice of appeal on January 12, 2012, but it was never received. Thereafter, on or about May 15, 2012, Pleasant-Bey claims that he filed a document, titled Ad Informandum Judiciem, in which he (1) argued that his February 4, 2011 notice of appeal was timely; and (2) noted that he had submitted a second notice of appeal on January 12, 2012. (ECF No. 28-8 at PageID 912-13.) This document also was apparently not received by the Criminal Court.

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[1] The record includes a copy of a letter from the trial judge to Pleasant-Bey, dated December 12, 2011, advising that a decision would be issued on December 21, 2011 and stating that

> I promised you when I heard your motion that I would bring you back to court when I ruled on it so that you could file a notice of appeal if needed, and you could tell me whether or not you wished an attorney appointed to represent you on appeal, or whether you still wished to represent yourself. If for some reason the TDOC cannot bring you back to court on that date, I will not rule, but will pick another date in January to bring you back.

(ECF No. 28-8 at PageID 911.)

2. The First § 2254 Petition, Case No. 13-2389

On June 4, 2013, Pleasant-Bey filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("First § 2254 Petition") in this district. (*Pleasant-Bey v. McAllister*, No. 2:13-cv-02389-STA (W.D. Tenn.), ECF No. 1.) Among the issues presented was a claim that the State's unnecessary delay in affording Pleasant-Bey a direct appeal violated his rights to due process and the equal protection of the law. (*Id.* at PageID 8.) On June 8, 2013, the judge assigned to the case directed Pleasant-Bey to file an amended petition on the official form. (ECF No. 11.) On September 4, 2013, Pleasant-Bey filed an amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Amended First § 2254 Petition"), in which he alleged, *inter alia*, that he had been deprived of a direct appeal. (ECF No. 17-1 at PageID 1634.) On March 5, 2014, the Warden filed a motion to dismiss the Amended First § 2254 Petition on the grounds that it was time barred and that every claim presented was procedurally defaulted. (ECF No. 26.) Pleasant-Bey responded on March 17, 2014 and March 21, 2014. (ECF Nos. 29, 30.)

In an order issued on August 7, 2014, the Court denied the Amended First § 2254 Petition and denied a certificate of appealability. (ECF No. 34.) Specifically, the Court found that the First § 2254 Petition was time barred and that Pleasant-Bey was not entitled to equitable tolling. In discussing Pleasant-Bey's claim that he filed a premature notice of appeal, a timely notice of appeal on January 12, 2012, and a Notice Ad Informandum Judiceum on May 12, 2012, the Court wrote:

> Petitioner's argument demonstrates that he knew a notice of appeal had not been docketed by the trial court. Petitioner had knowledge of the procedure for filing a *pro se* motion to waive the timely filing of the notice of appeal. He had previously, successfully filed such a motion while seeking state habeas relief in *Boaz Pleasant*

> *Bey v. State of Tennessee*, No. W2010-00997-MR3-HC.[2] Because Petitioner had the option of filing a motion to waive timely filing, he cannot demonstrate any circumstances beyond his control. Petitioner's knowledge that his direct appeal was not proceeding and the delay in filing this habeas petition demonstrates a marked lack of diligence on his part. Petitioner does not allege any fact or circumstance that prevented him from filing a habeas petition under 28 U.S.C. § 2254 within one year of the denial of his motion for a new trial.

(*Id.* at 5-6 (citation omitted).)

The Court also held that every claim was barred by procedural default and that "Pleasant-Bey has not established cause and prejudice for his procedural default and presents no tenable claim of actual innocence. Thus, he cannot avoid the procedural bar erected by the state post-conviction statute of limitations and cannot seek federal habeas relief." (*Id.* at 9.) The order did not address the possibility of filing a motion to waive timely filing and, instead, assumed that no means existed for Pleasant-Bey to exhaust his claims. (*See id.*) Judgment was entered on August 7, 2014. (ECF No. 35.)

On February 12, 2015, the Sixth Circuit Court of Appeals denied a certificate of appealability, holding that "[r]easonable jurists could not disagree with the district court's conclusion that Pleasant-Bey's habeas petition was time barred" and that "[j]urists of reason could not debate the district court's conclusion that Pleasant-Bey's claims were procedurally defaulted." (ECF No. 43 at PageID 2096.)

3. Pleasant-Bey Returns to State Court

Although both the district court and the Court of Appeals in Case Number 13-2389 assumed that Pleasant-Bey no longer had a path to a direct appeal, Tennessee law did not, in fact,

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[2] A copy of this order, which was dated May 27, 2010, is found at ECF No. 28-2 at PageID 764.

foreclose that remedy. Rule 4(a) of the Tennessee Rules of Appellate Procedure provides that, "in all criminal cases the 'notice of appeal' document is not jurisdictional and the timely filing of such document may be waived in the interest of justice. The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice." That rule, on its face, provides no deadline for the making of such a motion.

On September 18, 2014, shortly after the district court denied the First § 2254 Petition, Pleasant-Bey filed a Motion To Waive Timely Filing of NOA and supporting memorandum in the Tennessee Court of Criminal Appeals ("TCCA"). (ECF No. 28-3 at PageID 768-69, 770-71.) On September 23, 2014, the TCCA issued an order directing Pleasant-Bey to supplement his motion with "information regarding his conviction and sentence and the issues that he intends to present on appeal" and "an explanation as to why he waited more than two years after the trial court denied his motion for new trial to file a motion in this Court." (*Id.* at PageID 772-73.) Pleasant-Bey filed his supplement on October 6, 2014. (*Id.* at PageID 774-76.) On October 28, 2014, the TCCA denied the motion to waive timely filing of the notice of appeal. (*Id.* at PageID 777-78.) The TCCA explained that,

> [w]hile the Petitioner mistakenly believed that he had filed a notice of appeal in the trial court, he did not file any motions regarding the appeal in this Court until more than two years after he believed that the notice of appeal had been filed. The fact that the Petitioner filed a petition in federal court does not excuse him of his obligations in this Court. We cannot conclude that allowing the Petitioner to late-file a notice of appeal of a judgment that was entered more than two years ago would be in the interest of justice.

(*Id.* at PageID 778.) On November 12, 2014, Pleasant-Bey filed a Petition to Rehear. (*Id.* at PageID 779-81.) On November 21, 2014, Pleasant-Bey filed a Motion For Speedy Appeal. (*Id.* at PageID 783.) The TCCA denied the petition to rehear on December 15, 2014, reasoning that

"[i]t appears from the substance of the petition that the Appellant merely wants this Court to reach an alternate conclusion from that reached in the order." (*Id.* at PageID 784.)

On December 29, 2014, Pleasant-Bey filed a Motion to Appeal as of right with the TCCA. (*Id.* at PageID 789.) Unlike his previous motion, which was based on Tennessee law, this filing argued that denial of a direct appeal violated Pleasant-Bey's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution. (*Id.* at PageID 789-92.) Pleasant-Bey filed a legal memorandum in support of his motion on January 13, 2015. (*Id.* at PageID 793-94.) The TCCA denied the motion on January 30, 2015. (*Id.* at PageID 795.) Pleasant-Bey apparently filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on May 15, 2015. (*Id.* at PageID 796.)[3]

4. The Sixth Circuit Application

On February 26, 2015, Pleasant-Bey filed a Motion To File A Second Or Successive Writ of Habeas Corpus with the Sixth Circuit Court of Appeals. (6th Circuit Case No. 15-5194, ECF No. 1.) In that filing, Pleasant-Bey alleged that he should be granted habeas relief "due to undue appellate delay and current proof of the State of Tenn. Depriving the Petitioner of the right to appeal." (ECF No. 1-1 at 1.) Pleasant-Bey noted that his First § 2254 Petition was dismissed for failure to exhaust and he has since cured that deficiency. (*Id.* at 2.) He also complained that the Criminal Court Clerk had denied his constitutional rights by removing his notices of appeal from the files. (*Id.* at 4.) On March 9, 2015, Pleasant-Bey filed a corrected Motion Under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for

[3] The record does not include the application for permission to appeal.

Relief Under 28 U.S.C. § 2254 or § 2255. (ECF No. 4.) That filing complained about the TCCA's January 30, 2015 order. (ECF No. 4-1 at 6.)

On August 7, 2015, the Sixth Circuit issued an order holding that, "[t]o the extent that Pleasant-Bey challenges the denial of his motions by the state appellate courts, his claim arose after the filing of his initial habeas petition and therefore does not require this court's authorization to proceed in the district court." (ECF No. 7-1 at 2.)[4] The Court of Appeals did not, however, transfer the application to this district.[5]

Pleasant-Bey did not timely receive the Sixth Circuit's order because it was mailed to him at the Shelby County Jail, where he was not housed at the time. (ECF No. 7-2.) More than two years later, on December 7, 2017, the Sixth Circuit Clerk docketed a letter from Pleasant-Bey stating that he had not received a decision on his application. (ECF No. 8.) The docket reflects that a copy of the order was mailed to Pleasant-Bey on December 7, 2017. Four months later, on April 5, 2018, the Sixth Circuit Clerk docketed another letter from Pleasant-Bey noting that he was transferred to a new prison and still had not received a copy of the order. (ECF No. 9.) The docket reflects that another copy of the order was mailed to Pleasant-Bey that day. (*Id.*) Pleasant-Bey admits that he received a copy of the order in April 2018. (ECF No. 10 at 2.)

5. Once Again, Pleasant-Bey Returns to State Court

For some reason, Pleasant-Bey returned to the state appellate courts after the Sixth Circuit's decision had issued but before it had been received. On November 3, 2017, Pleasant-Bey filed

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[4] The Court of Appeals denied authorization to file any claim pertaining to the Criminal Court Clerk's purported removal of documents from the file, including Pleasant-Bey's notices of appeal. (*Id.*)

[5] This approach was followed in, *e.g.*, *In re Frazier*, No. 16-6645 (6th Cir. Apr. 28, 2017).

with the Tennessee Supreme Court a Petition to Assume Jurisdiction and for Release from Confinement Without Right to Appeal Pending Review. (ECF No. 49-1.) The Tennessee Supreme Court denied the petition on November 8, 2017 because "[t]he jurisdiction of this Court is appellate only." (ECF No. 49-1.) Pleasant-Bey filed a Petition to Rehear on November 17, 2017 (ECF No. 49-3), which was denied on November 21, 2017 (ECF No. 49-4). Pleasant-Bey filed a petition for a writ of certiorari with the United States Supreme Court, which was denied on April 16, 2018. *Pleasant-Bey v. Tennessee*, 138 S. Ct. 1554 (2018).

On December 18, 2017, Pleasant-Bey filed with the TCCA a Motion To Appeal As of Right Under Rule 3(b) of the Tennessee Rules of Appellate Procedure. (ECF No. 28-3 at PageID 797-98.) The TCCA denied the motion on January 25, 2018, explaining that it had repeatedly considered and rejected similar applications. (*Id.* at PageID 799.) Pleasant-Bey filed a Petition to Rehear on February 6, 2018 (*id.* at PageID 800-03), which the TCCA denied on February 13, 2018 (*id.* at PageID 804).

B. Pleasant-Bey's Second § 2254 Petition

On February 19, 2019, Pleasant-Bey filed his *pro se* Second § 2254 Petition, in which he asserted the following claims:

1. "The Tennessee Court of Criminal Appeals And The Supreme Court of Tennessee denied Motions to Appeal As of Right" (ECF No. 1 at PageID 5);

2. "The Tenn. Court of Criminal Appeals denied Petitioner's Motion To Appeal As of Right in 2016" (*id.* at PageID 6);

3. "The Petitioner's Petition To Assume Jurisdiction and Petition To Rehear As Motion To Appeal As of Right was denied by Sup. Ct. Tenn." (*id.* at PageID 8); and

4. "Petitioner's Final Motion To Appeal As of Right And Petition To Rehear were denied by the Tenn. Ct. Crim. App." (*id.* at PageID 10).

The § 2254 Petition was accompanied by a Motion To File Writ of Habeas Corpus As Timely Filed Due To Clerical Error. (ECF No. 2.) On March 5, 2019, Pleasant-Bey filed a Motion for Summary Judgment. (ECF No. 5.) On May 9, 2019, Pleasant-Bey filed a Motion For Emergency/Preliminary Injunction [Seeking] Order for Immediate Release. (ECF No. 9.)

The Court issued an order on May 10, 2019 that denied the pending motions and directed Warden Washburn to file the state-court record and a response to the Second § 2254 Petition. (ECF No. 10.) On July 15, 2019, the Warden filed excerpts from the state-court record. (ECF No. 17.) On July 24, 2019, Washburn filed his Answer to Petition for Writ of Habeas Corpus ("Answer"), accompanied by a Motion to Excuse Filing of Complete State-Court Record. (ECF Nos. 21, 22.) On July 29, 2019, Pleasant-Bey filed Petitioner's Reply To Respondent's Filing of State Court Record and a Motion To Order The Respondent Or To Direct The Clerk To Subpoena Or Produce Petitioner's Petition To Assume Jurisdiction Filed In The Supreme Court of Tennessee. (ECF Nos. 23, 24.) On August 7, 2019, Pleasant-Bey filed Petitioner's Reply To Respondent's Answer To Petitioner's Writ of Habeas Corpus ("Reply"). (ECF No. 25.)[6]

In an order issued on December 6, 2019, the Court denied the Warden's Motion to Excuse Filing of Complete State-Court Record, granted Pleasant-Bey's Motion to Produce Petition to Assume Jurisdiction, and directed the Warden to file every document cited in its Answer and to

[6] On October 31, 2019, Pleasant-Bey filed a Memorandum of Transcript Evidence to Correct Discrepancies in the State Court Record, which refers to his complaint against a court reporter and his challenge to the victim's testimony. (ECF No. 26.) On January 29, 2020, Pleasant-Bey filed his Copy of State Court Record Correspondence from Tennessee Court Reporter and Judge Christopher Craft. (ECF No. 35.) These filings will be disregarded because they are not relevant to the issues presented.

file a corrected Answer containing citations to the newly filed record. Pleasant-Bey was also directed to identify any further documents that he contends are necessary to decide his § 2254 Petition. (ECF No. 27.)

On January 2, 2020, Washburn filed a more complete version of the state-court record. (ECF No. 28.)[7] Washburn filed his Amended Answer on January 3, 2020. (ECF No. 29.) On January 13, 2020, Pleasant-Bey filed Petitioner's Response to Respondent's Filing of State Court Record, which, despite the title, appears to be a reply to the Amended Answer. (ECF No. 30.) On January 16, 2020, Pleasant-Bey filed his Reply to Amended Answer. (ECF No. 33.) On January 21, 2020, Pleasant-Bey filed a document titled Memorandum of Evidence in Support of Petitioner's Response to Respondent's Amended Answer to Petitioner's Writ of Habeas Corpus ("Memorandum of Evidence"). (ECF No. 34.)[8] On March 2, 2020, Pleasant-Bey filed a Supplement To Material Facts And to Plaintiff's Actual Innocence Claim. (ECF No. 37.)

The Court issued an order on September 14, 2021, directing the subsequent respondent, Martin Frink, to supplement the state-court record with Petitioner's Petition to Assume Jurisdiction and his Petition to Rehear with respect to that petition. (ECF No. 47.) The Court had previously ordered that these documents be filed. (ECF No. 27.) Frink complied on October 6, 2021. (ECF No. 49.)[9]

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[7] However, the Warden did not file the Petition to Assume Jurisdiction and Pleasant-Bey did not bring that failure to the Court's attention.

[8] Ordinarily, habeas petitioners file **one** reply to an answer. Pleasant-Bey has submitted three. The Court construes ECF No. 33 as his Reply to Amended Answer. Nonetheless, the Court will consider the arguments advanced in ECF Nos. 30 and 34 **in this instance only**.

[9] On March 31, 2022, Jason Clendenion was substituted as respondent. (ECF No. 57.)

II. ANALYSIS

The procedural posture of this case is exceedingly odd, arising from the fact that Pleasant-Bey has chosen to make up his own procedures. In his First § 2254 Petition, Pleasant-Bey complained that he had been prevented from taking a direct appeal. As previously noted, that claim was dismissed as untimely and because it had not been exhausted in state court. *See supra* pp. 4-5. In particular, Pleasant-Bey's claim was held to be barred by procedural default without discussing the possibility that a state-law remedy might still exist to provide him a direct appeal.

However, following the dismissal of the First § 2254 Petition, Pleasant-Bey returned to state court to exhaust his claim that he had been deprived of a direct appeal. And, although the Tennessee appellate courts did not grant Pleasant-Bey any relief, they also did not hold that he was foreclosed from bringing his applications. This might ordinarily raise the question whether Pleasant-Bey's claim was, in fact, procedurally defaulted rather than unexhausted. (It would not, however, affect the timeliness of the First § 2254 Petition.)

In *Patterson v. Magwood*, 561 U.S. 320 (2010), the Supreme Court addressed whether the phrase "second or successive" in 28 U.S.C. § 2244(b), applies to claims or state-court judgments. The Supreme Court held that "both § 2254(b)'s text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Id.* at 332-33. On a related note, the Sixth Circuit has consistently held that a new § 2254 limitations period does not commence to run whenever a state-court collateral challenge has concluded. *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) ("The tolling provision does not . . . 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to

habeas court to reexamine state-court determinations on state-law questions."); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law.").

Each of Pleasant-Bey's claims, on its face, challenges a decision by the TCCA or the Tennessee Supreme Court. It is correct, as the Warden has pointed out, that the Second § 2254 Petition does not allege a violation of Pleasant-Bey's rights under the United States Constitution or federal law. (ECF No. 29 at 12-13.) However, given Pleasant-Bey's *pro se* status, the Court will not deny relief solely because he has not alleged that each of his claims arises under federal law. Instead, the Court will consider whether the underlying state filings, which prompted the state decisions that are challenged here, raised a federal claim. The Warden has not cited any authority that disavows that approach.

In addition, habeas petitioners ordinarily are entitled to file only one § 2254 petition. 28 U.S.C. § 2244(a). "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1). Therefore, Pleasant-Bey cannot litigate any claim in his Second § 2254 Petition that was presented in his First § 2254 Petition, which was dismissed as untimely and barred by procedural default.

Claim 1 challenges the TCCA's denial of Pleasant-Bey's Motion to Waive Timely Filing of NOA and supporting memorandum. (ECF No. 1 at PageID 5.) The Motion to Waive Timely Filing of NOA, on its face, raises no federal claim. (*See* ECF No. 28-3 at PageID 768-71.) Neither does Pleasant-Bey's Motion To Supplement Prior Filings Therein, which was filed in response to the TCCA's order to file a supplement containing the issues he intended to present on appeal and the reason for the delay. (*See id.* at PageID 774-76.) Likewise, no federal claim was

raised in Pleasant-Bey's Petition to Rehear (*id.* at PageID 779-81) or his Motion For Speedy Appeal (*id.* at PageID 783). Therefore, because Claim 1 does not present a federal claim, it is **DISMISSED** as not cognizable in a federal habeas petition.[10]

Claim 2 challenges the fact that the TCCA "denied Petitioner's Motion To Appeal As of Right in 2016." (ECF No. 1 at PageID 6.) It is not clear which of his filings Pleasant-Bey is referencing here. As previously noted, *see supra* p. 7, Pleasant-Bey filed a Motion to Appeal as of right with the TCCA on December 29, 2014, which raised a federal claim. (ECF No. 28-3 at PageID 789-92.) Specifically, Pleasant-Bey argued that he "has a federal Due Process and Equal Protection right to have an appeal as of right." (*Id.* at PageID 790; *see also id.* at PageID 791 ("The Petitioner deserves an appeal as of right and to deny such right would be to deny him both Due Process and Equal Protection under the XIVth Amend. To the U.S. Const.").) The TCCA denied relief on January 30, 2015. (*Id.* at PageID 795.) If this is the TCCA decision referred to in Claim 2, despite its issuance in 2015 rather than 2016, Pleasant-Bey has asserted a federal claim.

However, the federal claim presented in the December 29, 2014 Motion to Appeal as of right was included in the Amended First § 2254 Petition, where Pleasant-Bey argued that "I was deprived of my right to appeal my conviction under State Law . . . ." (Case No. 13-2389, ECF No. 17-1 at PageID 1634.) Despite the title given this claim by Pleasant-Bey, the Amended First § 2254 Petition makes clear that he claimed a violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution. (*Id.* at PageID 1635.) Pleasant-Bey also claimed to have been injured by the delay in affording him a direct

[10] The Court further notes that the documents in Claim 1 argue that the state court clerk removed Pleasant-Bey's notice of appeal from the record. However, the Sixth Circuit has not authorized Pleasant-Bey to raise any such claim here.

appeal. (*Id.* at PageID 1636.) Therefore, the Court **DISMISSES** Claim 2, to the extent it is based on the December 29, 2014 Motion to Appeal as of right, pursuant to 28 U.S.C. § 2244(b)(1), because it was presented in the Amended First § 2254 Petition.

There is a second candidate for the ruling at issue in Claim 2. As previously noted, *see supra* p. 7, on December 18, 2017, Pleasant-Bey filed with the TCCA a Motion To Appeal As of Right Under Rule 3(b) of the Tennessee Rules of Appellate Procedure. (*Id.* at PageID 797-98.) That filing, on its face, raised no federal claim. The TCCA denied relief on January 25, 2018. (*Id.* at PageID 799.) Pleasant-Bey did, however, raise federal issues in his Petition to Rehear, which was filed on February 6, 2018. (*Id.* at PageID 800-03.) Specifically, Pleasant-Bey argued that he "hath the right to appeal," citing, *inter alia*, the Fourteenth Amendment. (*Id.* at PageID 800.) Pleasant-Bey also argued that he was harmed by the length of the delay and that the denial of an appeal violates his rights to due process and equal protection. (*Id.* at PageID 801-03.) The TCCA denied relief on February 13, 2018. (*Id.* at PageID 804.) If the February 6, 2018 Petition to Rehear is the filing at issue in Claim 2, even though the TCCA's decision issued in 2018 rather than 2016, the Court **DISMISSES** Claim 2 to the extent it alleges a denial of Pleasant-Bey's right to take a direct appeal, pursuant to 28 U.S.C. § 2244(b)(1). Claim 2 can, however, proceed on a claim that Pleasant-Bey was harmed by the delay, as presented in his Petition to Rehear.

Claim 3 complains that Pleasant-Bey's Petition To Assume Jurisdiction and Petition To Rehear ("Petition to Assume Jurisdiction") was denied by the Tennessee Supreme Court. (ECF No. 1 at PageID 8.) In that filing, Pleasant-Bey argued that the deprivation of a direct appeal violated his rights under the Fourteenth Amendment to due process and equal protection. (*Id.* at PageID 1564, 1565, 1568.) Pleasant-Bey also complained that the delay violated his rights. (*Id.*

at PageID 1565-66, 1569-71.) Therefore, the Court will not dismiss Claim 3 as not cognizable in habeas. However, Claim 3 is **DISMISSED**, pursuant to 28 U.S.C. § 2244(b)(1), to the extent that Pleasant-Bey argued that he was deprived of a direct appeal. Pleasant-Bey's claim that he was harmed by the delay can proceed.

Claim 4 argues that Pleasant-Bey's "Final Motion To Appeal As of Right And Petition To Rehear were denied by the Tenn. Ct. Crim. App." on January 25, 2018. (ECF No. 1 at PageID 10.) Here, Pleasant-Bey references his Exhibit C, which is the TCCA's February 13, 2018 order, addressed in connection with Claim 2. (*See* ECF No. 1-3.) Therefore, as previously noted, the Court **DISMISSES** Claim 4 insofar as Pleasant-Bey claims that he was denied a direct appeal. Claim 4 can proceed insofar as Pleasant-Bey claims that he was harmed by the delay.

To summarize, then, the Court **DISMISSES** every claim in the Second § 2254 Petition as either not arising under federal law or pursuant to 28 U.S.C. § 2244(b)(1) **except for** the following filings in which Pleasant-Bey has alleged that he was harmed by the delay: (i) the February 6, 2018 Petition to Rehear; and (ii) the November 3, 2017 Petition to Assume Jurisdiction.

B. Timeliness

The Warden further argues that the Second § 2254 Petition is untimely. (ECF No. 29 at 14-16.) However, in light of the unorthodox procedural posture of the case, the Court is unable to assess that argument at this time.

There is a one-year statute of limitations for the filing of a petition for a writ of habeas corpus "by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). In most cases, the running of the limitations period commences on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such

review." *Id.* § 2244(d)(1)(A). In Case Number 13-2389, the Court held that the First § 2254 Petition was untimely because it was filed more than one year and one month after the denial of Pleasant-Bey's motion for a new trial. (Case No. 13-2389-STA, ECF No. 34 at 4.)

Nonetheless, the Court of Appeals held that the Second § 2254 Petition is not second or successive because "his claim arose after the filing of his initial habeas petition." (6th Cir Case No. 15-5194, ECF No. 7-1 at 2.) The Court of Appeals cited *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010), which stands for the proposition that a petition is not second or successive if it raises a claim "whose predicates arose after the filing of the initial petition." In *Jones*, the *ex post facto* claim at issue arose from statutory amendments to a state parole system that took effect after the filing of the inmate's initial petition. *Id.*

Because Pleasant-Bey is not challenging his criminal judgment but, rather, the subsequent decisions of the Tennessee appellate courts, it appears that the timeliness of the Second Amended § 2254 Petition must be assessed based on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). And the factual predicate must be the state-court decisions at issue here.

The Amended Answer does not adequately assess the timeliness of Pleasant-Bey's claims. It lists the dates of issuance of four orders at issue here, but it fails to analyze whether the timeliness should be assessed according to the date of issuance of each order, the date of the filing of the application to file a second or successive § 2254 petition, or the date of the Sixth Circuit's order. Although Pleasant-Bey did not present federal claims in his earliest motions to waive timely filing of a notice of appeal, it is arguable that the factual and legal bases of his claims should have been presented in his earliest such application, given that the claims were presented in a substantially

similar form in his First § 2254 Petition. It would seem unreasonable to permit Pleasant-Bey to extend the federal statute of limitations by filing largely redundant applications with the state courts after relief has been denied. However, Pleasant-Bey did not raise the surviving claims at issue here until November 3, 2017 and February 6, 2018.

Pleasant-Bey might be entitled to some period of equitable tolling if the Sixth Circuit mailed its decision on his application to file a second or successive petition to the wrong address. The Warden's discussion of this issue is also inadequate. The Warden says that, shortly before the issuance of that decision, Pleasant-Bey notified the Sixth Circuit of a change of address to the Shelby County Jail. (ECF No. 29 at 15 n.10.) However, the document cited at ECF No. 28-18 does not support that proposition.

For the foregoing reasons, the Court declines to dismiss the Second § 2254 Petition as time barred at this time.

III. INSTRUCTIONS TO THE PARTIES

As discussed, the only surviving claims arise from the November 3, 2017 Petition to Assume Jurisdiction and the February 6, 2018 Petition to Rehear, both of which present the federal claim that the Court of Appeals has held that Pleasant-Bey is entitled to litigate in a second § 2254 petition. The Court cannot conclude, on the present record, that every claim in the Second § 2254 Petition is time barred and that Pleasant-Bey is not entitled to equitable tolling. The Warden also has not addressed whether Pleasant-Bey properly exhausted his federal claims in state court or whether the decisions of the state courts were based on an independent and adequate state ground. A claim has not been fairly presented where it "has been presented for the first and only time in a procedural context in which its merits will not [ordinarily] be considered." *Castille v. Peoples*,

489 U.S. 346, 351 (1989). Pleasant-Bey's claims about the delay in adjudicating his efforts to obtain a direct appeal were presented in an application directly to the Tennessee Supreme Court and in a petition to rehear a successive application for leave to waive the timely filing of a notice of appeal.

Therefore, the Warden is **ORDERED** to file a second amended answer to the Second § 2254 Petition within twenty-eight (28) days of the date of entry of this order. Petitioner may, if he chooses, submit **one** reply to Respondent's second amended answer within twenty-eight (28) days of service. Petitioner may request an extension of time to reply if his motion is filed on or before the due date of his response. The Court will address the merits of the remaining claims in the Second § 2254 Petition after the expiration of Petitioner's time to reply, as extended.

IT IS SO ORDERED, this 28th day of June, 2022.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

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Western District of Tennessee

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Case Name:	Pleasant-Bey v. Washburn
Case Number:	2:19-cv-02136-JTF-atc
Filer:	
Document Number:	61

Docket Text:
ORDER partially dismissing [1] Second 2254 Petition and directing Respondent to file a second amended answer. Signed by Judge John T. Fowlkes, Jr. on 06/28/2022. (Fowlkes, J.)

2:19-cv-02136-JTF-atc Notice has been electronically mailed to:
John H. Bledsoe John.Bledsoe@ag.tn.gov, jenny.winfree@ag.tn.gov, maria.sweatman@ag.tn.gov
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EXHIBIT D

STATE V. PLEASANT-BEY

W2017-02170-SC-UNK-CO PER CURIAM ORDER

DENYING PETITION

TO ASSUME JURISDICTION

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. BOAZ PLEASANT-BEY

Criminal Court for Shelby County
No. 07-00471

No. W2017-02170-SC-UNK-CO

ORDER

On November 3, 2017, the petitioner, Boaz Pleasant-Bey, proceeding *pro se*, filed a "petition to assume jurisdiction and for release from confinement without right to appeal pending review." The jurisdiction of this Court is appellate only. *See* Tenn. Code Ann. § 16-3-201. The petitioner has no case currently pending in the appellate courts. Therefore, the petitioner has failed to demonstrate that his petition is properly before this Court. Accordingly, it is ORDERED that the petition is denied. Costs are taxed to the petitioner, Boaz Pleasant-Bey, for which execution may issue, if necessary.

PER CURIAM

Page, Roger A., J., Not Participating

EXHIBIT E

STATE V. PLEASANT-BEY

W2017-02170-SC-UNK-CO PER CURIAM ORDER

DENYING PETITION TO REHEAR

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. BOAZ PLEASANT-BEY

Criminal Court for Shelby County
No. 07-00471

No. W2017-02170-SC-UNK-CO

ORDER

On November 17, 2017, Boaz Pleasant-Bey filed a petition seeking rehearing of this Court's November 8, 2017 order denying his "petition to assume jurisdiction and for release from confinement without right to appeal pending review." The petition to rehear is DENIED.

PER CURIAM

Page, Roger A., J., Not Participating