No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KURNICUS HAYES

Petitioner

V.

PATRICK ARNOLD

Respondent

APPENDIX

INDEX TO APPENDICES

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 31, 2024
Lyle W. Cayce
Clerk

No. 23-11069

KURNICUS HAYES,

Petitioner—Appellant,

versus

ARNOLD PATRICK,
Director, Dallas County Community Supervision and Corrections,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-1546

ON MOTION FOR RECONSIDERATION
AND PETITION FOR REHEARING EN BANC

Before SMITH, SOUTHWICK, and WILSON, *Circuit Judges.*

PER CURIAM:*

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

* Judge Ramirez is recused and did not participate.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 31, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-11069 Hayes v. Patrick
USDC No. 3:23-CV-1546

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

Mr. Kurnicus Hayes

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 3, 2024
Lyle W. Cayce
Clerk

No. 23-11069

KURNICUS HAYES,

Petitioner—Appellant,

versus

ARNOLD PATRICK, *Director,*
Dallas County Community Supervision and Corrections,

Respondent—Appellee.

Application for Certificate of Appealability
The United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-1546

UNPUBLISHED ORDER

Before SMITH, SOUTHWICK, and WILSON, *Circuit Judges.*

PER CURIAM:

After a mistrial, Kurnicus Hayes was convicted by a jury of indecency with a child. He seeks a certificate of appealability ("COA") to challenge the dismissal, as time-barred, of his 28 U.S.C. § 2254 application, which he filed to attack his conviction and sentence.

Given liberal construction, in his *pro se* COA filing Hayes contends

that his § 2254 application was timely filed because his limitations period should be determined under 28 U.S.C. § 2244(d)(1)(D). Renewing assertions made in his objections to the magistrate judge's report, Hayes contends that, in November 2018, he retained habeas counsel, but counsel did not file a habeas application. Once Hayes received the file from his counsel in October 2020, he reviewed the records and discovered that his rights under the Double Jeopardy Clause had been abridged. In November 2020, he filed a state habeas application raising a double-jeopardy violation and claims that a mistrial had been improperly granted. Hayes contends that his § 2254 application is timely because he exercised due diligence and then filed his § 2254 application within one year of discovering the factual predicate giving rise to the claims.

To obtain a COA, Hayes must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court's denial of federal habeas relief is based on procedural grounds, "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).

Hayes has failed to make the requisite showing. Accordingly, his motion for a COA is DENIED. Because Hayes is not entitled to a COA, we do not reach the question of whether the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534–35 (5th Cir. 2020). Finally, Hayes's motion to proceed *in forma pauperis* is DENIED.

APPENDIX C

NO. 23-11069

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

KURNICUS HAYES	§	**PETITIONER – APPELLANT**
VS.	§	
	§	
ARNOLD PATRICK, DIRECTOR,	§	**RESPONDENT – APPELLEE**
DALLAS COUNTY COMMUNITY	§	
SUPERVISION AND	§	
CORRECTIONS	§	

Appeal from the United States District Court for the

Northern District of Texas

Dallas Division

(U.S.D.C. No. 3:23-CV-1546-S)

APPLICATION FOR CERTIFICATE OF APPEALABILITY AND BRIEF IN SUPPORT

KURNICUS HAYES
828 LUXOR COURT
GRAND PRAIRIE, TX. 75052
PRO-SE, LITIGANT

No. 23-11069

KURNICUS HAYES	§	**PETITIONER – APPELLANT**
VS.	§	
	§	
ARNOLD PATRICK, DIRECTOR,	§	**RESPONDENT – APPELLEE**
DALLAS COUNTY COMMUNITY	§	
SUPERVISION AND	§	
CORRECTIONS	§	

CERTIFICATE OF INTERESTED PARTIES

The Appellant certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1) Kurnicus Hayes, Petitioner – Appellant.

2) Arnold Patrick, Director, Dallas County Community Supervision and Corrections, Respondent – Appellee.

_____

Kurnicus Hayes

Pro-Se

STATEMENT CONCERNING ORAL AURGUMENT

Appellant does not request oral argument, believing that oral argument would not be useful to the Court in resolving the issues raised in this appeal. Appellant's arguments involve application of well settled Supreme Court precedent to fairly unique and complex factual circumstances.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

COMES NOW KURNICUS HAYES, Petitioner – Appellant in the above numbered and styled cause, pursuant to Fed.R.App.Pro. 28 and Local R.28.2, files this application for certificate of appealability and brief in support.

STATEMENT OF JURSIDICTION

This is a direct appeal of a final judgment of the district court entered on September 26, 2023, denying Hayes's petition for writ of habeas corpus, in which he sought relief from a state conviction and sentence. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. Hayes timely filed his notice of appeal on October 18, 2023. The district court denied to issue Hayes a Certificate of Appealability on September 26, 2023. This Court has jurisdiction to determine whether or not to grant Hayes a Certificate of Appealability pursuant to 28 U.S.C. § 2253 (c), and Fed.R.App.Pro. 22(b). Hayes's application and brief in support is due on March 4th, 2024, and is therefore timely filed.

STATEMENT OF THE ISSUES

Hayes would ask this Court to grant him permission to appeal the following issues, which, for the reason that follow, he maintains are at least debatable among reasonable jurists:

Issue One

Whether the district court erred in its determination that Hayes's motion was barred by the one year period of limitation.

Issue Two

Whether the district court erred in not holding an evidentiary hearing to determine if Hayes exercised due diligence in discovering the facts to support his claim of double jeopardy.

STATEMENT OF THE CASE

The Petitioner had a jury trial on May 5, 2015 that ended in a mistrial due to a deadlocked jury in the 283rd Judicial Court in and for Dallas County, Texas. The Petitioner was retried and convicted on June 3, 2016. The Petitioner appealed the conviction to the Fifth Court of Appeals in Dallas, Texas, arguing the court misapplied analysis regarding the admission of a prior consistent statement, and the Court's harmless error analysis applies to erroneous admission of evidence. On November 27, 2017, the court affirmed the conviction per curium. The Petitioner filed a petition for discretionary review on January 26, 2018. The petition was denied without review and the mandate was issued on May 22, 2018.

Hayes retained habeas counsel Mick Mickelson, to file an actual innocence writ on August 17, 2018. Two years after being retained by Hayes the habeas attorney, Mr. Mickelson never filed any writ of habeas corpus on behalf of Hayes. Hayes requested for all of the case file documents to be turned over to him in October of 2020. Upon review of the case file records the double jeopardy

violation was discovered, and Hayes filed a state post conviction writ of habeas corpus in the trial court on November 6, 2020. Hayes contends in his state application for habeas relief that his second trial should have been jeopardy barred, due to there being no manifest necessity in declaring a mistrial in his first trial that took place on May 5, 2015, and because several alternatives to declaring a mistrial existed, and Hayes did not request nor consent to the mistrial. The application for habeas relief based on double jeopardy was denied without an evidentiary hearing on November 29, 2020, and the Petitioner timely appealed to the Fifth Court of Appeals Dallas, Texas on December 29, 2020.

The Fifth Court of Appeals affirmed the trial court's ruling on December 21, 2022, stating that Hayes was procedurally barred from bringing a constitutional claim under *Ex Parte Townsend,* 137 S.W.3d (Tex.Crim.App.2004). Hayes timely filed a Motion for Rehearing on January 5, 2023 that was denied without written opinion on March 2, 2023. Hayes filed a petition for discretionary review on March 29, 2023. The petition was denied without written opinion on April 26, 2023 and the mandate was issued on May 30, 2023. Hayes filed his 28 U.S.C. § 2254 on July 12, 2023. On July 18, 2023, the Federal Magistrate Judge recommended that relief be denied. Hayes filed timely objections to the Magistrate Judge's recommendations, but on September 26, 2023 the district court entered an

order and judgment expressly adopting the findings and conclusions of the Magistrate Judge.

STATEMENT OF FACTS

During the proceedings on May 8, 2015 the trial judge Quay Parker was asked several questions by the jury while they deliberated. The first requests made by the jury, was to have the detectives testimony read back to them, in regards to whether or not he interviewed Hayes, in which the trial judge denied their request. The second request made by the jury was to have the testimony of the Hayes' work history read back to them and to have the specific evidence admitted during the trial in regards to the Hayes' work history in the jury room. The trial judge failed to address the jury's request. The jury then asks the Court what will be the course of action or instruction in the event they could not agree unanimously on a verdict. The trial judge issues an Allen Charge. The jury then sends out its final note stating they are hung, and no Allen Charge was issued. The trial judge declares a mistrial and discharges the jury.

The Petitioner was retried and convicted on June 3, 2016, in which he appealed to the Fifth Court of Appeals, and the Court of Appeals affirmed the conviction. The Petitioner's petition for discretionary review was denied, and conviction was final. The Petitioner filed an application for habeas relief based on double jeopardy

in the trial court on November 6, 2020. The Petitioner contends in his application for habeas relief that his second trial should have been jeopardy barred, due to there being no manifest necessity in declaring a mistrial on May 8, 2015, and because several alternatives to declaring a mistrial existed, and the Petitioner did not request nor consent to the mistrial.

SUMMARY OF ARGUMENT

The trial court erred in declaring a mistrial in Hayes' first trial on May 5, 2015, due to several alternatives to the declaration of a mistrial still being available, and no manifest necessity existing to terminate the trial at the time of the declaration of mistrial. This ruling deprived Hayes of his rights under the Double Jeopardy Clause of the Fifth Amendment. The state court's contrary ruling constituted an unreasonable application of Supreme Court precedent, failing to extend the legal principle of Supreme Court caselaw to a set of facts that, while not materially indistinguishable, nevertheless to which principle ought logically to apply. The state court was unreasonable to conclude Hayes' double jeopardy claim procedurally barred due to the claim not being brought on direct appeal. The state court refused to acknowledge its own established caselaw in regards to a double jeopardy claim. "A double jeopardy claim can be brought on appeal or even for the first time on collateral attack". See, *Gonzalez v. State,* 8 S.W.3d 643 (Tx.Crim.App. 2000). Because both trial and appellate counsel were either

unaware of the existence of, or failed to investigate the applicability of, double jeopardy to Hayes' case, and because of that Hayes was deprived of his Fifth Amendment right to the protections of the double jeopardy clause. Hayes' procedural default should be excused because his state appellate counsel failed to investigate any extra record claims, and state habeas corpus was the first and only forum in which he could have raised the issue of double jeopardy.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

"Under 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right." *United States v. Saro*, 252 F.3d 449, 453(D.C. Cir. 2001)." In *Slack v. McDaniel*, the Supreme Court held that when a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue, if the prisoner shows at least, (1) that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) that a jurist of reason would find it debatable whether the district court was correct in its procedural ruling." A petitioner makes a substantial showing if he demonstrates that his petition involves issues which are debatable among reasonable jurist, that a court could resolve the issues differently, or that the issues are adequate enough to deserve encouragement to proceed

unaware of the existence of, or failed to investigate the applicability of, double jeopardy to Hayes' case, and because of that Hayes was deprived of his Fifth Amendment right to the protections of the double jeopardy clause. Hayes' procedural default should be excused because his state appellate counsel failed to investigate any extra record claims, and state habeas corpus was the first and only forum in which he could have raised the issue of double jeopardy.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

"Under 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right." *United States v. Saro*, 252 F.3d 449, 453(D.C. Cir. 2001)." In *Slack v. McDaniel*, the Supreme Court held that when a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue, if the prisoner shows at least, (1) that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) that a jurist of reason would find it debatable whether the district court was correct in its procedural ruling." A petitioner makes a substantial showing if he demonstrates that his petition involves issues which are debatable among reasonable jurist, that a court could resolve the issues differently, or that the issues are adequate enough to deserve encouragement to proceed

further. The applicant need not show he would necessarily prevail on the merits of his claims. *Barefoot v. Estelle*, 463 U.S. 880 (1983). The dire nature of double jeopardy protections under the Fifth Amendment in this case is a relevant consideration in determining whether to issue a certificate of appealability.

Issue One

Whether the district court erred in its determination that Hayes's motion was barred by the one year period of limitation.

UNREASONABLE APPLICATION

This Court reviews the district court's finding with regards to whether the petitioner exercised due diligence for clear error. "*Mucha v. King*, 792 F.2d 602,605 (7th Cir. 1986), the Seventh Circuit reasoned that "due diligence" is a legal characterization – like negligence, possession, ratification, and principal place of business – and should be reviewed for clear error. *Aron v. U.S.,* 291 F.3d 711 (11th Cir. 2002), " In the context of a motion pursuant to § 2255(4), we will therefore review for clear error a district court's finding with regards to whether the petitioner exercised due diligence." This Court is also governed, however, by the same limitations as those imposed on the district court by 28 U.S.C. § 2254(d)(1), which requires the federal courts to defer to the state habeas court's resolution of federal constitutional issues unless to do so would result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." A state habeas

court's decision is deemed an "unreasonable application of Supreme Court precedent "if the state court identifies the correct legal rule" from that precedent, but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor,* 529 U.S. 362, 407 (2000). In making this latter inquiry, the federal court "should ask whether the state court's application of clearly established federal law was objectively unreasonable.

THE FACTS

In Hayes' first trial on May 5, 2015, during the jury deliberations several requests were made by the jury to the court, signaling some sort of dispute amongst the jurors. The jury asked the court if the detective in the case interviewed Hayes before the indictment, and if they can have that portion of the detectives testimony read back to them. The court essentially denied the jury's request. Yet again the jury made another request. This time asking to have the portion of Hayes' testimony as in regards to his work history read back to them, and to have the evidence of his work history that was admitted into the trial court, in the deliberations room for them to review. The trial court never responded to the jury's request. The jury then asks the court, "what is the instructions in the event we cannot reach a unanimous decision". The court responded with an Allen Charge for them to keep deliberating. The jury sends out its final note stating that they are

deadlock, and the trial judge sua sponte declared a mistrial, and discharged the jury. Hayes, nor his defense counsel objected to the declaration of a mistrial.

Hayes was retried and convicted on June 03, 2016, and he filed a direct appeal challenging the conviction. The conviction was affirmed and the mandate was issued on May 22, 2018. Hayes hired habeas counsel Mick Michelson on August 17, 2018 to review the conviction and appeal for errors, and to file an actual innocence writ of habeas corpus on his behalf. See ROA Exhibit A. Habeas Attorney Retainer. In September of 2020, Hayes was confined in the Dallas County Jail, where he discovered a mistrial case that was very similar to his, that was overturned due to double jeopardy. Hayes' habeas counsel had the case files for 2 years and never filed the actual innocence writ. Hayes was released from the Dallas County Jail on October 3, 2020, and the following week he requested that all of the case documents from the habeas attorney to be turned over to him immediately. Upon Hayes review of the case files he found the double jeopardy violation and filed an 11.072 Writ of Habeas Corpus with the trial court on November 6, 2020.

The writ was denied without a hearing and Hayes timely appealed. The Fifth Court of Appeals in Dallas, Texas affirmed the trial court's ruling, that Hayes was procedurally barred from bring the double jeopardy claim, because he did not bring the claim on direct appeal. Texas Criminal Court of Appeals refused the petition

for discretionary review and issued the mandate on May 30, 2023. Hayes timely filed his 2254 Motion on July 12, 2023. The Magistrate Judge issued his recommendation on July 18, 2023, that the 2254 motion was time barred by the one year limitation, and Hayes timely filed his objections to the report stating, that pursuant 28 U.S.C. § 2255(4) the motion is timely because he exercised due diligence in finding the facts. The district court accepted the Magistrate Judge's recommendations and denied Hayes the certificate of appealalibilty on September 26, 2023. Hayes timely filed his appeal to this Court.

SUPREME COURT PRECEDENT

The AEDPA amended 28 U.S.C. § 2255 to impose a one year limitation period for filing a motion to vacate, set aside or correct a sentence. The limitation period runs from the latest of: (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Due diligence therefore does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts. *Aron v. United States,* 291 F.3d 712 (11th Cir. 2002).

The Double Jeopardy Clause of the Fifth Amendment prohibits a state from twice putting a defendant in jeopardy for the same offense. *Arizona v. Washington,* 434 U.S. 497,503, 98 S. Ct. 824, 829 (1978). The Double Jeopardy Clause thus operates as a limit on the power of the trial court to require a defendant to stand

trial a second time following a mistrial; retrial is permitted only when the original decision to declare a mistrial was compelled by manifest necessity. *United States v. Jorn,* 400 U.S. 470, 480, 91 S. Ct. 547, 555, 27 L. Ed. 2d 543 (1971). "One major factor to consider in assessing the wisdom of the trial court's action is whether a mistrial was necessary. If obvious and adequate alternatives to aborting the trial were disregarded, this suggests the trial judge acted unjustifiably. Therefore we must examine the alternatives to a mistrial." *Harris v. Young, supra,* 607 F.2d at 1085 (4th Cir.1979).

UNREASONABLE APPLICATION REDUX

The district court essentially held that because of AEDPA one year limitation Hayes 2254 motion is untimely. Hayes argues that his motion was timely under 28 U.S.C. § 2255(4) because he exercised due diligence in discovering the facts to supporting his claim, and his motion was filed within one year of the date on which he discovered those facts. Hayes also had to exhaust all state remedies before filing the petition in the district court to be in compliance with AEDPA. AEDPA precludes any federal court, absent exceptional circumstances, from granting relief under habeas corpus unless the petitioner has exhausted all available relief under the state law. See 28 U.S.C § 2254(b)(1); see also *O'Sullovan v Boerckel*, 526 U.S. 838, 842-44 (1999). To exhaust all available state remedies, the petitioner must "fairly present federal claims to the state courts in order to give the state the

opportunity to pass upon and correct alleged violations of its prisoners' federal rights" *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Here, Hayes filed a direct appeal, petition for discretionary review, a state petition for writ of habeas corpus, appeal, motion for rehearing and a final petition for discretionary review. All remedies sought resulted in erroneous and unfavorable decisions. The three grounds raised in Hayes 28 U.S.C § 2254 petition were all addressed by one or more of the exhausted state remedies he sought prior to the petition. It took two and a half years for the state to finalize its ruling on Hayes' state habeas corpus petition, therefore pausing the one year limitation until the Texas Court of Criminal Appeals issued the mandate on May 30, 2023.

The district court failed to address the issue of when the facts of Hayes' claim could have been discovered through due diligence. The government emphasizes that the one year limitation period of § 2255(4) begins to run when the facts could have been discovered through due diligence, not when they were actually discovered. If a court finds that a petitioner exercised due diligence, then the one year limitation period would begin to run on the date the petitioner actually discovered the relevant facts, because the dates of actual and possible discovery would be identical. But if the courts find the petitioner did not exercise due diligence, the statute does not preclude the possibility that the petitioners motion could still be timely under § 2255(4). The court should begin the timeliness inquiry

under § 2255(4) by determining whether Hayes exercised due diligence, because as previously noted, if he did so, the limitation period would not begin to run before the date he actually discovered the facts supporting the claim. § 2255(4) does not require the maximum feasible diligence, but only "due," or reasonable, diligence. *Wims v. U.S.,* 225 F.3d 186, 190 n. 4 (2d Cir. 2000).

Hayes contends that the double jeopardy violation did not become known to him until he found Ex Parte: Little, a case in the digital law library in the Dallas, County Jail in September of 2020. "Despite a trial judge's discretion to declaring a mistrial based on manifest necessity, the trial judge is required to consider and rule out "less drastic alternatives" prior to granting a mistrial. *Little*, 887 S.W.2d at 66; *Harrison*, 788 S.W.2d at 22; *Torres*, 614 S.W.2d at 442. Thus, prior to granting a mistrial based on manifest necessity, the trial judge must review the alternative courses of action and chose the one, which, in light of all the circumstances, best preserves the defendant's " right to have his trial complete before a particular tribunal." *Harrison*, 788 S.W.2d at 23-24. Where a trial judge grants a mistrial despite the available option of less drastic alternatives there is no manifest necessity and we will find an abuse of discretion. *Little*, 887 S.W.2d at 66; and, *Harrison*, 788 S.W.2d at 23-24. We have in fact, held on a number of occasions that no manifest necessity existed where the trial judge failed to consider less

drastic alternatives to the mistrial. See, *Harrison, supra*; *Torres, supra*; *Little, supra*; and *Ex parte Hubbard*, 798 S.W.2d 798 (Tex.Cr.App. 1990).

In Hayes' case there were several alternatives to a mistrial still available before the declaration. The jury sent a note to the trial judge, asking if the defendant was ever interviewed by the detective. The trial judge responded to the note with an Allen Charge, "members of the jury, you have received all of the evidence you are entitled to receive. Please refer to the written instructions I have given you and continue with your deliberations." CLKr1-45-46. The jury then sent two more notes asking for the transcripts of the detective's testimony, and if they could have the transcript or facts regarding Hayes' work history.

The trial judge responded to the jury notes with an Allen Charge, that read;" members of the jury, I have received your note as attached. The court cannot grant your request. The law does not permit a general re-reading of the testimony. So, unless the jury has actually disagreed upon some part of the testimony, the court cannot allow any repeat of it. If you do have an actual disagreement among you about the above issue, then certify to the court that is so. Be sure you are clear about specifically what is in dispute. The reporter will then search her notes. There is no transcript. "Her keystrokes are only readable by her at this point. She will need sufficient time to examine all of the testimony of the witness or witnesses in order to get everything concerning your inquiry. To help her do this, you should

state which witness or witnesses gave testimony concerning the disputed point, and add anything else you can identify when during the trial it occurred. If necessary, include the general nature of what was being discussed at the time. When the information is located, both attorneys will be given an opportunity to hear it first. Once the court is satisfied the answer to your note has been obtained, the jury will be returned to the courtroom. The reporter will re-read the selected testimony and it will take her as long to read it as it did for the attorneys and witnesses to put it on during the trial. If you ask for such testimony, be patient for the notes to be reviewed."

The jury then sends a form to certify that there is a dispute about the detective's testimony, point being whether the detective testified that he talked to the Hayes prior to the indictment. The trial judge responded to the note, "no question or answer satisfy the point dispute. No attorney asked that question." CLKr1-47-50. The trial judge's rationale behind denying the jury's request to have testimony read back to them of the detective, is that no one asked that question. The reporter's record reveals that all though the question was not directly asked to the detective, he still made a statement about his procedure of issuing a warrant without interviewing any suspects. "There are occasions where I'll try to contact somebody that's listed as the defendant and try to obtain their side of the story.

And from there, I will go with an arrest warrant and I'll file a case with the District Attorney's Office after trying to talk with the Defendant." Rr3-p247.

The trial judge failed to address the jury's question about the transcripts or facts about the Hayes' work history that was admitted into evidence. Texas Code of Criminal Procedure Art.36.25 Written Evidence; There shall be furnished to the jury upon its request any exhibits admitted as evidence in the case. The reporter's record reveal that the defense admitted Hayes' tax returns for 2005, and paycheck stubs from both employers covering the time of the alleged offense into evidence marked as defense exhibits 4, 5, and 6. Rr4-p35; Rr6-13-15. The jury requested the transcripts of Hayes' testimony as relating to his work history. The trial judge did not respond to nor address the jury's request. Texas Code Criminal of Procedure Art.36.28 Jury May Have Witness Re-examined or Testimony Read. In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or particular point in dispute, and no other.

The testimony which the jury requested to have read-back to them was absolutely crucial to their determination of Hayes' guilt or innocence. Reading the transcript of two witnesses would not necessarily emphasize it or preclude consideration by the jury of the other testimony. In these circumstances, it must be

assumed that the jury asked for a reading of testimony because it was in doubt or in disagreement upon its proper evaluation. *U.S. v. Jackson,* 257 F.2d 41(3d Cir. 1958), is directly on point. The issue presented in Jackson was entrapment. The jury asked the court whether or not an informer involved with the defendant was a Government employee. The court told the jury that it was unable to remember whether or not the informer was a Government employee and directed them to return to the jury room for further deliberations without having read any of the testimony to the jury. Attorney for the defendant requested that the pertinent portion of the testimony be read to the jury, but before any action was taken the jury returned a guilty verdict. This court noted that "The point of the jury's question was highly relevant." It held that in this particular situation we think the defendant was entitled to have the jury informed as a matter of right." Id., at 43.

The request by the jury for the reading of testimony in Hayes' case is, in fact, even more compelling than in Jackson. In both cases, the evidence on which the jury wanted guidance was crucial to its verdict. By asking for a reading of the testimony, the jury in Hayes' case merely showed that they were attentive and remembered the case well enough to know which parts of the testimony would be relevant to an implied question. Those questions are whether the detective interviewed Hayes, and can they have Hayes' work history transcripts and exhibits. I have no evidence before me as to the amount of time required to read back

approximately 25 pages of testimony. In normal circumstances, the reading would take considerably less than an hour. This is not such a delay, which could be held, per se, unreasonable.

United States v. Rabb, 453 F.2d 1012, 1014, 1015, 1016 (3cir. 1971); The Standards Relating to Trial by Jury (American Bar Association Project on Minimum Standards of Criminal Justice), Section 5.2 and Commentary at 134-138 (Approved Draft 1968): 5.2 Jury request to review evidence. (a) If the jury, after retiring for deliberations request a review of certain testimony on the evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice, the prosecutor and counsel for the defense, shall have all of the requested parts of testimony read to the jury and shall permit the jury to re-examine the requested materials admitted into evidence. The comment on section 5.2(a) discloses that it was intended to have the judge's discretion in this situation construed narrowly: "The thrust of the second sentence of sec. 5.2(a) is that while the court need not to grant every request received from the jury, is at its discretion, to deny jury review of evidence is strictly limited.

The justification for this approach is well expressed in *State v. Wolf,* 44 N.J. 176, 185, 207 A.2d 670, 675 (1965); "When a jury retires to consider their verdict, their discussion may produce disagreement or doubt or failure of definite recollection as to what a particular witness said in the course of his testimony. If

they request enlightenment on the subject through the reading of his testimony the request should be granted. The true administration of justice calls for such action when there is a doubt in the minds of the jurors as to what a witness said, it cannot be prejudicial to anyone to have that doubt removed by the rehearing of his testimony. There is no need to be chary for fear of giving undue prominence to the testimony of a witness. If a jury is to be considered intelligent enough to be entrusted with the powers of decision, it must be assumed they have sense enough to ask to have their memories stimulated or refreshed only as to the portions of the testimony about which they are in doubt or disagreement." The court held that it was error for the district court to deny the jury's request.

U.S. v. Rabb at 1016, "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring proper conduct." *Herron v. Southern Pacific Co.,* 283 U.S. 91, 51 S. Ct. 383, 384, 75 L.Ed.2d 857 (1931). Although acceding to the jury's request is required "whenever the jury's request is reasonable", the reality is that this affords the trial judge very little veto power over the requests. The court can determine the reasonableness of the request only by asking the jurors what prompted their action. Such an inquiry, however, would be an improper intrusion by the court into the deliberation process of the fact finders. *Domeracki v. Humble Oil Refining Co.,* 443 F.2d 1245, 1247 (3d Cir. 1971). "Thus, the reality is that, except in obviously flagrant situations, the

trial judge, to avoid trial error, would normally accede to the jury's request, without questions, and hence, without any real discretionary power in the matter." The jury request for a re-reading of the testimony of two witnesses could hardly be construed as frivolous. The court had two options: to give a fair synopsis of the critical testimony, or to have the testimony read verbatim. It did neither.

Just as in Hayes' case, the trial judge denied the jury's request to have certain testimony read back to them, and to have the evidence in the jury-room that was admitted into evidence during the trial to aide them in their deliberations, and these request were all less drastic alternatives to a mistrial that were not explored, and still available to the court. In *Harris*, the court determined that there were "less drastic alternatives" available which could have been utilized to prevent ordering a mistrial and a subsequent second proceeding. 607 F.2d at 1085. The import of *Harris, supra,* is not simply that a trial judge make a perfunctory recitation of the alternatives before granting a mistrial, but that he carefully and deliberately consider which of all the alternatives best balances the defendant's interest in having his trial concluded in a single proceeding with society's "interest in fair trials designated to end in just judgments." *Arizona v. Washington*, 434 U.S. at 516, 98 S. Ct. at 836 (quoting *Hunter,* 336 U.S. at 689, 69 S. Ct. at 837). Otherwise, consideration of less drastic alternatives equates to little more than a pro forma exercise to mask the trial judge's preferred course of action.

Accordingly, where the trial judge fails to explicitly or implicitly rule out a less drastic alternative in favor of granting a mistrial, he has abused his discretion.

In *Dunkerley v. Hogan,* 579 F.2d 141 (2d Cir. 1978) The court granted a writ of habeas corpus on the ground that petitioner's state court retrial was barred by the double jeopardy clause as no manifest necessity had existed for the mistrial at his first trial. The trial court had declared a mistrial sua sponte over defendant's objection when he became sick during the trial; seven to ten days hospitalization was necessary. Since the majority found that the record failed to support adequately the trial judge's action including his failure to explore any alternatives, including the simple one of a continuance, it held that no manifest necessity for a mistrial existed.

The jury in Hayes' trial, asked the court "what is or is there any instructions in the event we cannot reach an agreement." The court issued an Allen Charge for them to continue to deliberate. CLKr1-53-54. The jury was simply asking what will be the course of action or instruction in the event they could not unanimously agree on a verdict. The jury did not imply or state that they were deadlocked.

The jury sends its final note to the trial judge stating, " we cannot reach a unanimous verdict. There are deeply held convictions on both sides of the beyond a reasonable doubt standard." CLKr1-p33. The trial judge sua sponte declares a

mistrial due to a deadlocked jury without giving an Allen Charge to the jury. CLKr1-33-41; CLKr1-p6. *United States v. Lara-Ramirez*, 519 F.3d 76 (1st Cir. 2008) Holding that whether a mistrial is justified depends upon the facts of each case, "guided in this determination by consideration of three interrelated factors: whether alternatives to a mistrial were explored and exhausted; whether counsel had an opportunity to be heard; and whether the judge's decision was made after sufficient reflection." As a result, the record is insufficient to give any weight to the jury deadlock in manifest necessity analysis. See *United States v. Razmilovic,* 507 F.3d 130, 140 (2d Cir. 2007) (" Where the record does not indicate that there was a genuine deadlock, and the court has not provided an explanation for its conclusion or pointed to factors that might not be adequately reflected on the cold record, we are unable to satisfy ourselves that the trial judge exercised 'sound discretion' in declaring a mistrial.") Accordingly, the correctness of the court's manifest necessity determination turns on the necessity of the court's mistrial declaration " Id. (quoting *U.S. v. Razmilovic,* 507 F.3d 130, 137 (2d Cir. 2007). Recognizing that "declaring a mistrial when a jury is not hopelessly deadlocked undermines judicial efficiency," this court has stated that "it is essential that deadlocked jurors be allowed to continue deliberating when the deadlock may properly be broken, but not when it is likely that the deadlock will be broken by coercion."

United States v. Razmilovic, 507 F.3d 130, 137 (2d Cir. 2007). Over the objection of defense counsel, the trial court declared a mistrial when the jury announced that they were deadlocked (after three days of deliberations.) There was no manifest necessity for doing so, the jury only sent one note stating that they were deadlocked and no Allen Charge had been given. The various factors that should have been considered before declaring a mistrial (length and complexity of trial; jury notes; length of deliberations; Allen Charge) did not support this step, in light of the parties' request that deliberations continue. Just as in Hayes' case, the jury sent one note stating that they were deadlocked, and the trial judge declared a mistrial. The trial judge did not consider any alternatives to declaring a mistrial, and he did not issue an Allen Charge to the jury when they stated they were deadlocked, as the clerk's record reflects. CLKr1-33-41; CLKr1-p6.

It is a dispute between Hayes and the state, in regards to whether or not Hayes requested the mistrial. In the clerks record is a defense motion for mistrial signed by Judge Rick Magnis, that did not preside over Hayes' trial. The clerk's record contains the trial court's docket sheet, and in examining the trial court's docket sheet section dated 05/08/15 it reveals (1) the presiding judge over the trial was Judge Quay Parker and not Judge Rick Magnis. (2) That the trial judge sua sponte declared a mistrial. (3) No objection to the declaration of the mistrial by the defense counsel or motions for oral argument to grant a mistrial was documented

on the docket sheet. (4) No mention of Judge Magnis being present at the trial or participating in the trial to rule on any defense motions for mistrial. (5) No hearing for the defense motion for mistrial is recorded. (6) The trial court's docket sheet is signed by Judge Quay Parker after he declared a mistrial (deadlocked jury) and discharged the jury. Examining the clerk's record also reveals that the trial court's docket sheet, the court's response to jury notes, and the jury charge are all signed by Judge Quay Parker. See ROA Exhibit B Trial Court Docket Sheet section 05/08/2015. *U.S. v. Holmes,* 863 F.2d 6 (2d Cir. 1988). " The trial judge is most familiar with the testimony and the context in which it was elicited." It is no legal reason why a judge, that has not heard any testimony from the trial; is in a better position than the actual judge who heard all of the testimony, to hear oral arguments to determine a mistrial. Hayes simply, never requested a mistrial.

Issue Two

Whether the district court erred in not holding an evidentiary hearing to determine if Hayes exercised due diligence in discovering the facts to support his claim of double jeopardy.

"If the petitioner alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." *Holmes v. U.S.,* 876 F.2d 1545, 1552 (11th Cir. 1989). See also *U.S. v. Yizar,* 956 F.2d 230, 234 (11th Cir. 1992). "district court must hold an evidentiary

hearing where court cannot state conclusively that the facts alleged by petitioner, taken as true, would present no ground for relief."

The double jeopardy violation that Hayes has alleged, if true, is enough to warrant an evidentiary hearing. The district court failed to determine the actual date that the facts of the claim could have been discovered through due diligence. "The movant need not prove the facts that would entitle him to relief in order to receive an evidentiary hearing. *Aron v. United States,* 291F.3d 708, 715 n.6 (11th Cir. 2002). The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner only needs to allege not prove reasonably specific, nonconclusory facts that, would entitle him to relief.

PRAYER

Wherefore, premises considered, Appellant prays that this Court reverse the judgment of the district court and remand the cause with instructions to enter an order that his conviction be vacated.

Respectfully Submitted,

Kurnicus Hayes

828 Luxor Ct.

Grand Prairie, TX. 75052

Pro Se, Litigant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Application of Appealability and Brief in Support was served on Ken Paxton, Attorney General, at P.O. Box 12548, Capital Station, Austin, Texas, 78711, via certified mail, postage pre-paid, return receipt requested, on this 5th day of February, 2024.

Kurnicus Hayes

Kurnicus Hayes

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Appellant's Brief is in compliance with the limitations imposed by Fed.R.App.Pro. 32(a)(7). The instant brief consists of 7,087 words, exclusive of tables of contents, tables of authorities, statement regarding oral argument, and certificates of interested parties, services, and compliance.

Kurnicus Hayes

Kurnicus Hayes

APPENDIX D

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KURNICUS HAYES	§	
	§	
v.	§	CIVIL ACTION NO. 3:23-CV-1546-S-BN
	§	
ARNOLD PATRICK	§	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. Objections were filed. The District Court reviewed de novo those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court **ACCEPTS** the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[1]

---

[1] Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

> (a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final

But, if Petitioner elects to file a notice of appeal, he must either pay the $505 appellate filing fee or move for leave to appeal in forma pauperis.

SO ORDERED.

SIGNED September 26, 2023.

UNITED STATES DISTRICT JUDGE

order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KURNICUS HAYES	§	
	§	
v.	§	CIVIL ACTION NO. 3:23-CV-1546-S-BN
	§	
ARNOLD PATRICK	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, it is **ORDERED, ADJUDGED** and **DECREED** that Petitioner Kurnicus Hayes's 28 U.S.C. § 2254 habeas application is **DISMISSED WITH PREJUDICE** as time barred under Rule 4 of the Rules Governing Section 2254 Cases. The Clerk shall serve a copy of the magistrate judge's findings, conclusions, and recommendation (the FCR), the order accepting the FCR, and this judgment on the Texas Attorney General.

SO ORDERED.

SIGNED September 26, 2023.

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KURNICUS HAYES,	:	
v.	:	
ARNOLD PATRICK,	:	**3-23CV1546-S**
DALLAS COUNTY	:	
COMMUNITY SUPERVISION	:	

PLAINTIFF'S OBJECTIONS TO THIS HOURNABLE COURT'S DISMISSAL ORDER

COMES NOW, Petitioner Kurnicus Hayes, and hereby makes the following Objections to the Report and Recommendation of United States Magistrate David L. Horan, signed and entered on July 18, 2023.

FACTS

It is an undisputed fact that the Petitioner's direct appeal and petition for discretionary review finalized on May 22, 2018, and with the 90 days that the Supreme Court allows to file a petition for certiorari following the entry of a judgment; the actual date of finalization is August 23, 2018 for the purpose of equitable tolling. See *Hayes v. State 05-16-00740-CR*.

OBJECTION

THE MAGISTRATE ERRED IN DECLARING THE PETITION UNTIMELY

According to the Magistrate, under section 2244(d)(1)(D) Subsection D, the factual predicate provision of the statute of limitations, runs from "the date a petitioner is on notice of the facts which would support a claim, not the date on which the petitioner has in his possession evidence to support his claim." (Report and Recommendation, page 8). Pursuant to 28 U.S.C § 2255 (f)(4), the limitations period begins to run from "the date on which the facts supporting the claim... could have been discovered through the exercise of due diligence." See *Lanier v. United States,* 769 Fed.Appx. 847,849 (11th Cir. 2019).

The Petitioner in this case retained habeas counsel on August 17, 2018, to file an actual innocence writ dealing with the conviction, and not a collateral attack on the mistrial, due to the fact the double jeopardy violation was not discovered until October, 2020. See *Exhibit A.* Habeas Counsel Retainer Agreement. The Petitioner's appellate counsel and habeas counsel only reviewed the trial records that ended in a conviction. Once the Petitioner received the case files from the habeas attorney and reviewed them; the double jeopardy violation was discovered,

and the Petitioner filed an 11.072 writ of habeas corpus within 30 days of the discovery on November 6, 2020.

The "due diligence" standard "does not require the maximum feasible diligence," nor the undertaking of "repeated exercises in futility." But it does require Movant "to make reasonable efforts in discovering the factual predicate of his claim. See *Aron*, 291 F.3d at 712.

The Petitioner has made reasonable efforts in discovering the facts to support the double jeopardy claim. When the double jeopardy violation was discovered the petitioner immediately filed an 11.072 petition to the trial court to give them a chance to resolve the issue in compliance with AEDPA, and therefore pausing the one year limitation until the Texas Court of Criminal Appeals issues the Mandate on May 30, 2023.

To exhaust all available state remedies, the petitioner must "fairly present federal claims to the state courts in order to give the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights" *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Here, the Petitioner filed a direct appeal, petition for discretionary review, a state petition for writ of habeas corpus, appeal, a motion for rehearing and a final petition for discretionary review. All remedies sought resulted in erroneous and unfavorable decisions. The three grounds raised in the

Petitioners 28 U.S.C § 2254 petition were all addressed by one or more of the exhausted state remedies he sought prior to the petition. Pursuant to 28 U.S.C. § 2254(f)(4) the petition is timely, because it was filed within one year of when the facts to support his claim of double jeopardy was discovered.

The Magistrate Report, referenced the Dallas Court of Appeals ruling in holding that Hayes "forfeited the issue, and may not raise it in habeas proceedings," noted that Hayes "prosecuted a direct appeal to this Court after conviction in the second trial. He raised three issues, none of which were double jeopardy, though that issue was indisputably ripe at the time." Hayes, 2022 WL 17828928, at *1(citing Hayes, 2017 WL 5663612 at *1). (Report and Recommendation, page 8-9).

The Petitioner could not bring the claim in 2016 during the direct appeal, because the double jeopardy violation was not discovered until October, 2020. Pursuant to Texas case law, *Gonzalez v. State*, 8 S.W.3d 643 (Tex.Crim.App. 2000), in which the Court of Criminal Appeals held that because of the fundamental nature of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal or even for the first time on collateral attack when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate states interests.

If the petitioner "alleges facts that, if true would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." Holmes v. United States, 876 F.2d 1545, 1552, (11th Cir. 1989). District Courts must hold an evidentiary hearing where court cannot state conclusively that the facts alleged by petitioner, taken as true, would present no ground for relief. Moreover, the court should construe a habeas petition filed by a pro se litigant more liberally than one filed by an attorney. See *Gunn v. Newsome*, 881 F.2d 949, 961 (11th Cir. 1989).

CONCLUSION

Wherefore, Petitioner kindly and respectfully asks this Honorable Court to take Petitioner's objections into consideration.

Dated this 1st day of August, 2023.

Respectfully submitted,

Kurnicus Hayes

Kurnicus Hayes

828 Luxor Court

Grand Prairie, Texas 75052

Telephone: (214) 412-6793

Pro Se Litigant

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2023, I electronically filed the foregoing with the clerk of the court using ECF system.

Kurnicus Hayes

Kurnicus Hayes

EXHIBIT A

RETAINER AGREEMENT

Kurnicus Hayes ("Client") hereby retains Broden & Mickelsen (the "Firm") to represent Client in relation to:

> review the conviction, sentence and appeal in *State v. Kurnicus Hayes* to determine if any errors exist that would support a habeas corpus motion

In consideration for the Firm's representation, Client agrees to pay Firm in accordance with the "Terms of Payment" provisions set forth below.

A. SCOPE OF REPRESENTATION

1. The Firm will initially review Client's case to determine the viability of a subsequent habeas corpus motion pursuant to Tex. Art. Crim. P. 11.07 and provide the Client a written report.

2. Client understands that this Agreement does not include actually filing a habeas corpus motion pursuant to Tex. Art. Crim. P. 11.07 and does not include entering an appearance in any matter.

3. Client understands that, while the Firm will zealously represent his interests, it is impossible to guarantee the results of any litigation.

4. Client represents that all payments made to the Firm are from proceeds of legitimate enterprises and, conversely, represents that no payments made to the Firm are from proceeds of any type of criminal proceeds whatsoever

CLIENT INITIALS KH

B. OBLIGATIONS OF THE FIRM

1. The Firm agrees to keep Client apprised of all significant developments in his case.

2. The Firm agrees to return all Client phone calls and correspondence in a prompt fashion and, except in unusual circumstances, will return all phone calls the same business day that they are received.

3. The Firm agrees to consult Client on a regular basis and to always consult with Client in regard to significant decisions that need to be made in this matter.

4. The Firm agrees to keep all confidential information private and will not reveal information told by Client to the Firm in confidence.

5. The Firm promises to exert its best efforts at all times and to zealously represent Client using all its knowledge, skills and resources.

6. Client understands in the event of a dispute with the Firm, he/she may contact the State Bar of Texas Grievance Department at (800) 932-1900.

C. OBLIGATIONS OF CLIENT

1. Client agrees to abide by the "Terms of Payment" set forth below.

CLIENT INITIALS KH

2. Client agrees to communicate regularly with his attorneys.

3. Client understands that his failure to abide by Obligations of Client could result in the Firm discontinuing its work.

4. Client and Firm agree that any disputes regarding this Agreement shall be determined pursuant to the law of the State of Texas and any litigation regarding this Agreement shall be brought in the state district court of Dallas County, Texas.

D. TERMS OF PAYMENT

1. The total fee is $7,500 to be paid upon execution of this agreement. If the Firm and the Client agree to file a § 11.07, the cost of preparing, filing and litigating the § 11.07 will be an additional $7500.

2. Client understands that sometimes the time required to handle a legal matter cannot reasonably bee known in advance of the representation. That means that a legal fee paid on an hourly basis could be substantially higher or lower than a fixed fee. Being aware of this fact and desiring certainty as to legal fees, Client has elected to pay a fixed fee for representation rather than an hourly fee and understands that such fixed fee is non-refundable. Client understands that it is difficult for the Firm to know how many hours its representation will take. The fixed fee in this case represents the Firm's best estimate at the total cost of representation and takes into

CLIENT INITIALS KH

account the possibility that the Firm might be required to decline other work in order for it to accommodate its representation of Client. Client also understands that the Client benefits from certain intangibles that cannot be readily quantified such as the Firm's skill and experience and reputation in the legal community.

3. The fee charged represents a retainer fee and not an advance fee. In other words, it is earned in full upon receipt and it is to secure the Firm's services and to remunerate the Firm for the loss of the opportunity to accept other employment either because of a conflict of interest or time constraints. The fee will be deposited in the Firm's operating account

4. These Terms of Payment are all the payments due the Firm and the Firm will not request fees in excess of those set forth herein except in extraordinary and changed circumstances.

5. In addition to the Fees set forth above, Client agrees to pay the following expenses:

Fees for Expert Consultants and/or Expert Witnesses
Fees for Investigators
Polygrapher fees

6. Any expenses billed to Client will be at the rate charged to the Firm and will never be marked up.

AGREED, UNDERSTOOD, ACCEPTED AND SIGNED, this 17th day of August

CLIENT INITIALS KH

August 17, 2018.

Kurnicus Hayes
CLIENT

By:_____
BRODEN & MICKELSEN

CLIENT INITIALS KH

CLIENT INITIALS KH

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KURNICUS HAYES,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:23-cv-1546-S-BN
	§	
ARNOLD PATRICK,	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

A jury in Dallas County convicted Petitioner Kurnicus Hayes of indecency with a child sexual contact, and, on June 3, 2016, he was sentenced to five years of imprisonment, that sentence was suspended, and he was placed on community supervision for ten years. *See* Dkt. No. 3 at 2-3; *State v. Hayes*, No. F13-30966-T (283d Jud. Dist. Ct., Dall. Cnty., Tex.), *aff'd*, No. 05-16-00740-CR, 2017 WL 5663612 (Tex. App. – Dallas Nov. 27, 2017, pet. ref'd).

Years later, on November 6, 2020, Hayes filed a state habeas petition raising the same grounds on which he now collaterally attacks his conviction in federal court under 28 U.S.C. § 2254. *See* Dkt. No. 3 at 3-9; *Ex parte Hayes*, No. WX20-93394-T (283d Jud. Dist. Ct., Dall. Cnty., Tex. Nov. 23, 2020) (denying habeas relief), *aff'd*, No. 05-21-00203-CR, 2022 WL 17828928 (Tex. App – Dallas Dec. 21, 2022, pet. ref'd).

The presiding United States district judge referred the *pro se* Section 2254 application to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

And the undersigned enters these findings of fact, conclusions of law, and recommendation that, under the circumstances here and for the reasons set out below, the Court should dismiss this federal habeas challenge with prejudice as time barred under Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rule 4).

Legal Standards

Habeas Rule 4 allows a district court to summarily dismiss a habeas application "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." *Id.*; *see also Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in "the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." (citation omitted)).

While "the statute of limitations provision of the [Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] is an affirmative defense rather than jurisdictional," a district court may dismiss a time barred Section 2254 application *sua sponte* under Habeas Rule 4. *Kiser*, 163 F.3d at 329.

But, "'before acting on its own initiative' to dismiss an apparently untimely § 2254 petition as time barred, a district court 'must accord the parties fair notice and an opportunity to present their positions.'" *Wyatt v. Thaler*, 395 F. App'x 113, 114 (5th

Cir. 2010) (per curiam) (cleaned up; quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006)).

Under the circumstances here, these findings, conclusions, and recommendation provide Hayes fair notice, and the opportunity to file objections to them (further explained below) affords a chance to present to the Court his position as to the limitations concerns explained below. *See, e.g., Ingram v. Dir., TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at *1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge's report and recommendation gives the parties "fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation" (collecting cases)).

AEDPA "introduced both 'simple logic' to the federal habeas landscape and uniform rules for federal courts to apply." *Wallace v. Mississippi*, 43 F.4th 482, 492 (5th Cir. 2022) (quoting *Smith v. Titus*, 141 S. Ct. 982, 987 (2021) (Sotomayor, J., dissenting from denial of cert.), then citing *Day*, 547 U.S. at 202 n.1).

"Namely, it implemented a host of greatly needed procedural requirements for petitioners seeking habeas relief." *Id.* (citing *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022) ("In many ways, the statute represented a sea change in federal habeas law.")).

One such requirement is "the one-year period for an individual in custody pursuant to a state-court judgment to file a § 2254 petition for habeas relief" that "begins running from the latest of four events." *Id.* at 497 (citing 28 U.S.C. § 2244(d)):

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) 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).

The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – "a discretionary doctrine that turns on the facts and circumstances of a particular case," *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in "rare and exceptional circumstances," *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)).

"[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

"'The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.' What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

But "[a] petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). So this "prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [the litigant's] control." *Menominee Indian Tribe*, 577 U.S. at 257.

A showing of "actual innocence" can also overcome AEDPA's statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

That is, the petitioner's new, reliable evidence must be enough to persuade the Court that "'no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329); *see also Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) ("The Supreme Court has made clear that the term 'actual innocence' means *factual*, as opposed to *legal*, innocence – 'legal'

innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas 'actual' innocence, as the Court stated in *McCleskey[v. Zant*, 499 U.S. 467 (1991)], means that the person did not commit the crime." (footnotes omitted)); *Acker v. Davis*, 693 F. App'x 384, 392-93 (5th Cir 2017) (per curiam) ("Successful gateway claims of actual innocence are 'extremely rare,' and relief is available only in the 'extraordinary case' where there was 'manifest injustice.'" (quoting *Schlup*, 513 U.S. at 324, 327)).

Analysis

To start, although Hayes does not appear to be physically confined, the undersigned finds that, insofar as he remains subject to a ten-year term of community supervision imposed in 2016, Hayes is "in custody" under the state criminal judgment he now challenges under Section 2254.

Under 28 U.S.C. §§ 2241(c)(3) and 2254(a), "[a] habeas petitioner may seek relief from a state court judgment only if he is "'in custody" under the conviction or sentence under attack at the time his petition is filed.'" *Rubio v. Davis*, 907 F.3d 860, 862 (5th Cir. 2018) (quoting *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989)). A petitioner need not be physically confined to be "in custody" for the purpose of habeas relief, *see, e.g.*, *Sinclair v. Blackburn*, 599 F.2d 673, 676 (5th Cir. 1979), and, as another judge of this Court has observed, a petitioner serving a term of community supervision "is in custody for state habeas purposes," *Collins v. Syed*, No. 3:19-cv-2433-G-BK, 2020 WL 690660, at *1 n.3 (N.D. Tex. Jan. 16, 2020) (citing *Maleng*, 490 U.S. at 491; *Ex parte Okere*, 56 S.W.3d 846, 852 (Tex. Crim. App. 2001)), *rec. accepted*, 2020 WL

635978 (N.D. Tex. Feb. 10, 2020).

Although Hayes may be "in custody" to allow him to attack his state criminal judgment, his Section 2254 challenge is untimely.

The timeliness of most Section 2254 applications is determined under Subsection A, based on the date on which the state criminal judgment became final. Such a judgment becomes final under AEDPA "when there is no more 'availability of direct appeal to the state courts.'" *Frosch v. Thaler*, No. 2:12-cv-231, 2013 WL 271423, at *1 (N.D. Tex. Jan. 3, 2013) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)), *rec. adopted*, 2013 WL 271446 (N.D. Tex. Jan. 24, 2013).

A challenge under Subsection A would be years too late here, as the 2016 judgment became final in July 2016, or 90 days after the Texas Court of Criminal Appeals refused Hayes's petition for discretionary review on April 18, 2016, *see Hayes v. State*, PD-1366-17 (Tex. Crim. App.); *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003) (observing that, if a petitioner halts the review process, "the conviction becomes final when the time for seeking further direct review in the state court expires" and noting that the Supreme Court allows 90 days for filing a petition for certiorari following the entry of judgment); SUP. CT. R. 13.

And, "[b]ecause [Hayes's] state habeas petition was not filed within the one-year period" that commenced in July 2016, "it did not statutorily toll the limitation clock." *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (citing, in turn, 28 U.S.C. § 2244(d)(2))).

But Hayes also appears to allege that the federal habeas petition is timely

under Section 2244(d)(1)(D) insofar as he asserts that he

> hired a habeas attorney in August of 2018. The habeas attorney had the case files for 2 years and never filed the writ. The petitioner fired the attorney and requested that all case file[s] and documents be turned over to him. Through due diligence the petitioner found the double jeopardy violation in October of 2020 and filed a state habeas petition within 30 days of the violation being revealed on November 6, 2020. Petitioner received files in October of 2020.

Dkt. No. 3 at 9.

Subsection D, the factual predicate provision of the statute of limitations, runs from "the date a petitioner is on notice of the facts which would support a claim, not the date on which the petitioner has in his possession evidence to support his claim." *In re Young*, 789 F.3d 518, 528 (5th Cir. 2015) (citing *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998)); *see also Vega v. Stephens*, No. 3:14-cv-551-P-BK, 2015 WL 4459262, at *3 (N.D. Tex. July 20, 2015) (defining "the factual predicate" as "the vital or principal facts underlying [a petitioner's] claims" (citing *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007); *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012))); *Blackman v. Stephens*, No. 3:13-cv-2073-P-BN, 2016 WL 777695, at *5 (N.D. Tex. Jan. 19, 2016) ("Under Section 2244(d)(1)(D), the applicable date is the date on which vital facts are first discovered, not when evidence to support those facts is first acquired."), *rec. accepted*, 2016 WL 759564 (N.D. Tex. Feb. 26, 2016).

Hayes's allegation that he "found the double jeopardy violation in October of 2020" does not carry his burden under Subsection D. For example, the timeliness of the state habeas petition raising this claim was not at issue before the Dallas Court of Appeals, but that court, in holding that Hayes "forfeited the issue, and may not raise it in habeas proceedings," noted that Hayes "prosecuted a direct appeal to this

Court after conviction in the second trial. He raised three issues, none of which were double jeopardy, though that issue was indisputably ripe at the time." *Hayes*, 2022 WL 17828928, at *1 (citing *Hayes*, 2017 WL 5663612, at *1).

And, while he does not explicitly raise the argument, Hayes may not rely on any alleged ineffective assistance by his state habeas counsel to assert that the federal habeas challenge should be considered timely.

For example, insofar as he may base a tolling argument on *Martinez v. Ryan*, 566 U.S. 1 (2012), "*Martinez* established a narrow, equitable exception to procedural default; it has no applicability to the statutory limitations period prescribed by AEDPA," *Moody v. Lumpkin*, 70 F.4th 884, 892 (5th Cir. 2023); *see Murphy v. Davis*, 732 F. App'x 249, 256-57 (5th Cir. 2018) (per curiam) ("Under *Martinez* and *Trevino[v. Thaler*, 569 U.S. 413 (2013)], the ineffectiveness of state habeas counsel may excuse a petitioner's procedural default 'of a single claim' – ineffective assistance of trial counsel." (quoting *Davila v. Davis*, 582 U.S. 521, 524 (2017)); *Ayestas v. Davis*, 138 S. Ct. 1080, 1093-94 (2018) ("*Trevino* permits a Texas prisoner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective." (citing *Trevino*, 569 U.S. at 429)); *see also Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) ("[M]ere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified."); *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) ("Ineffective assistance of counsel is irrelevant to the tolling decision.").

The Court should therefore dismiss the Section 2254 petition with prejudice as

time barred.

Recommendation

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss Petitioner Kurnicus Hayes's 28 U.S.C. § 2254 habeas application with prejudice as time barred.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: July 18, 2023

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

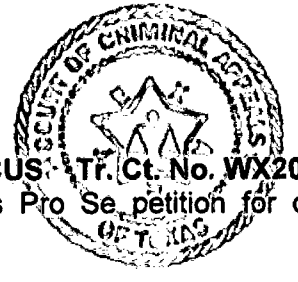
OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/26/2023 **COA No. 05-21-00203-CR**
EX PARTE HAYES, KURNICUS Tr. Ct. No. WX20-93394-T PD-0186-23
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

DISTRICT CLERK DALLAS COUNTY
133 N. RIVERFRONT BLVD., LB 12
DALLAS, TX 75207-4300
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



4/26/2023 **COA No. 05-21-00203-CR**

EX PARTE HAYES, KURNICUS Tr. Ct. No. WX20-93394-T PD-0186-23

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

STATE PROSECUTING ATTORNEY
STACEY SOULE
PO BOX 13046
AUSTIN, TX 78711
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/26/2023 **COA No. 05-21-00203-CR**
EX PARTE HAYES, KURNICUS Tr. Ct. No. WX20-93394-T PD-0186-23

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

KURNICUS HAYES
828 LUXOR COURT
GRAND PRAIRIE, TX 75052
* DELIVERED VIA E-MAIL & POSTAL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/26/2023 **COA No. 05-21-00203-CR**
EX PARTE HAYES, KURNICUS Tr. Ct. No. WX20-93394-T PD-0186-23
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

5TH COURT OF APPEALS CLERK
LISA MATZ
600 COMMERCE, 2ND FLOOR
DALLAS, TX 75202
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/26/2023 **COA No. 05-21-00203-CR**
EX PARTE HAYES, KURNICUS Tr. Ct. No. WX20-93394-T PD-0186-23
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

PRESIDING JUDGE 283RD DISTRICT COURT
133 N INDUSTRIAL, LB 33
DALLAS, TX 75207-4313
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/26/2023 **COA No. 05-21-00203-CR**
EX PARTE HAYES, KURNICUS Tr. Ct. No. WX20-93394-T PD-0186-23
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

DISTRICT ATTORNEY DALLAS COUNTY
APPELLATE SECTION
133 N. RIVERFRONT BLVD, LB 19
DALLAS, TX 75207
* DELIVERED VIA E-MAIL *

APPENDIX H

PD-0186-23
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/29/2023 6:07 PM
Accepted 3/30/2023 8:20 AM
DEANA WILLIAMSON
CLERK

PD-0186-23

No. PD

In The

COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE KURNICUS HAYES

Petitioner,

On appeal in Cause No. WX20-93394-T

From The 283rd Judicial District Court

Dallas County, Texas

And on Petition for Discretionary Review from

The Fifth District of Texas at Dallas

In Cause No. 05-21-00203-CR

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Kurnicus Hayes

828 Luxor Court

Grand Prairie, Texas 75052

Telephone: (214) 412-6793

Pro Se Litigant

IDENTITY OF PARTIES AND COUNSEL

PETITIONER:

KURNICUS HAYES
828 Luxor Court
Grand Prairie, Texas 75052
Telephone: (214) 412-6793

PRESIDING JUDGE:

HON. LELA D. MAYS
283RD Judicial District Court
133 N. Riverfront Blvd.
Dallas, TX. 75207

HABEAS COUNSEL FOR STATE:

JON CREUZOT
Dallas County District Attorney
133 N. Riverfront Blvd. LB 19
Dallas, TX. 75207
Ph: (214) 653-3625

REBECCA OTT LABARDINI
133 N. Riverfront Blvd. LB 19
Dallas, TX. 75207

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATUTES

PD-0186-23

No. PD

In The

COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE KURNICUS HAYES

Petitioner,

On appeal in Cause No. WX20-93394-T

From The 283rd Judicial District Court

Dallas County, Texas

And on Petition for Discretionary Review from

The Fifth District of Texas at Dallas

In Cause No. 05-21-00203-CR

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Kurnicus Hayes, petitions the Court to review the judgment affirming the denial of his Application for Writ of Habeas Corpus Pursuant to Article 11.072 of the Texas Code of Criminal Procedure.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner does not believe that oral argument is necessary in this case, as the Petitioner's arguments are and will be set out fully in this petition and brief, should this Court grant review.

STATEMENT OF THE CASE

During the proceedings on May 8, 2015 the trial judge Quay Parker was asked several questions by the jury[1] while they deliberated. One of the requests made by the jury was to have the detectives testimony read back to them, in which the trial judge denied their request. The next relevant request made by the jury was to have the testimony of the Petitioner's work history read back to them and to have the specific evidence admitted during the trial in regards to the Petitioner's work history in the jury room. The trial judge failed to address the jury's request. The jury then asks the Court what will be the course of action or instruction in the event they could not agree unanimously on a verdict. The trial judge issues an Allen Charge[2]. The jury then sends out its final note[3] stating they are hung, and no Allen Charge was issued. The trial judge declares a mistrial and discharges the jury[4].

---

[1] Clerks Record jury notes pages 45 – 54.
[2] Clerks Record jury note and Allen Charge page 53 -54.
[3] Clerks Record jury final note page 33. No Allen Charge issued.
[4] Clerks Record Docket Sheet page 6.

The Petitioner was retried and convicted on June 3, 2016, in which he appealed to the Fifth Court of Appeals, and the Court of Appeals affirmed the conviction. The Petitioner's petition for discretionary review was denied, and conviction was final. The Petitioner filed an application for habeas relief based on double jeopardy in the trial court on November 6, 2020. The Petitioner contends in his application for habeas relief that his second trial should have been jeopardy barred, due to there being no manifest necessity in declaring a mistrial on May 8, 2015, and because several alternatives to declaring a mistrial existed, and the Petitioner did not request nor consent to the mistrial. The application for habeas relief based on double jeopardy was denied without an evidentiary hearing on November 29, 2020. The Petitioner filed a timely notice of appeal in the trial court on December 29, 2020. The Fifth Court of Appeals affirmed the trial court's judgment on December 21, 2022. The Petitioner filed a Motion for Rehearing on January 5, 2023. The Motion for Rehearing was denied without written opinion on March 2, 2023. The Petitioner now timely files this petition for discretionary review.

STATEMENT OF PROCEDURAL HISTORY

This is an appeal from the Habeas Court's DENIAL OF RELIEF and FINDINGS OF FACTS AND CONCLUSIONS OF LAW in Petitioner's APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO ARTICLE 11.072. Petitioner filed a Notice of Appeal on December 29, 2020.

The court of appeals rendered its decision affirming the trial court's denial of the Petitioner's application for Habeas Relief on December 21, 2022. Petitioner filed a motion for rehearing, and it was denied without written opinion. The court of appeals decision became final on March 2, 2023. This petition was then filed with the clerk of the court of appeals within 30 days after such final ruling.

QUESTION PRESENTED FOR REVIEW

Whether Article 11.072 and Exparte Townsend, 137 S.W.3d 79, 81 (Tex.Crim.App.2004) permanently bars any constitutional double jeopardy claim from being brought for the first time on collateral attack?

REASON FOR REVIEW

The Fifth Court of Appeals erred because it failed to consider Gonzalez v. State, 8 S.W.3d 643 (Tex.Crim.App. 2000), in which the Court of Criminal Appeals held that because of the fundamental nature of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal or even for the first time on collateral attack when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate states interests. The court of appeals erred in stating that due to Exparte Townsend and Art. 11.072, the Appellant has forfeited the right to bring a double jeopardy claim for the first time on collateral attack.

ANALYSIS

In the Fifth Court of Appeals December 21, 2022, opinion affirming the trial court's denial of the Petitioner's double jeopardy writ application, the Court held

that due to Article 11.072 and Exparte Townsend[5] the Petitioner forfeited the double jeopardy claim because the claim could have been raised on direct appeal. However, the Gonzalez[6] Court allowed an exception: because of the "fundamental" nature of double jeopardy, a double jeopardy claim may be raised for the first time on appeal and on collateral attack only when (1) the undisputed facts show the double jeopardy violation is clearly apparent from the face of the record, and (2) enforcement of usual rules of procedural default serves no legitimate states interest. The Court of Criminal Appeals has relied on Gonzalez's holding in granting a habeas applicant relief on a double jeopardy claim that was ostensibly raised for the first time on habeas. See Exparte Denton, 399 S.W.3d 540, 544-45 (Tex.Crim.App.2013).

There is ample case law that a double jeopardy claim can be raised for the first time on collateral attack. In Exparte Knipp,[7] the Court unanimously held the applicant raised a meritorious double jeopardy claim in his 11.07 writ application. Even though such claim was first raised in a subsequent application for a writ of habeas corpus, and thus would have been procedurally barred from review under Article 11.07, Sec.4(a), the Court determined that such a claim was cognizable, and

[5] Ex parte Townsend, 137 S.W.3d (Tex.Crim.App.2004)
[6] Gonzalez v. State, 8 S.W.3d 640, 643 (Tex.Crim.App.2000)
[7] Ex parte Knipp, 236 S.W.3d 214 (Tex.Crim.App.2007)

granted the applicant relief, due to the double jeopardy violation being apparent on the face of the record.

In Exparte Denton,[8] the Court addressed the issue of whether a double jeopardy violation could be remedied in a habeas proceeding or was procedurally defaulted because no objection was raised in the trial court. Following Gonzalez and Knipp, the Court held that an applicant's double jeopardy claim may be reviewed on collateral attack, under an exception to the procedural bar, if two conditions are met: (1) the undisputed facts show that the double jeopardy violation is clearly apparent on the face of the record; and (2) enforcement of the usual rules of procedural default serves no legitimate states interest. The Court concluded that the applicant's claim of a double jeopardy violation could be addressed and remedied in a habeas corpus proceeding even though he failed to raise such claim in the trial court.

In this case, the issue is whether the Petitioner's double jeopardy claim, that could have been raised on direct appeal can survive a Townsend based procedural bar to relief on habeas review. As a general rule, before this Court reviews the merits of a collateral attack, it must first determine cognizability. Once it is determined that a claim is cognizable, the Court can then resolve a claim on the

[8] Ex parte Denton, 399 S.W.3d 540, 544 (Tex,Crim.App.2013)

merits. As noted in Exparte Carmona,[9] "habeas corpus is reserved for those instances in which there is a jurisdictional defect in the trial court which renders the judgment void, or for denials of fundamental or constitutional rights. If the applicant's claim fits within one of these categories, then the claim is cognizable in post conviction habeas proceedings."

Gonzalez recognized that a double jeopardy claim may be cognizable on habeas review even though it is being raised "for the first time on collateral attack" because it is a "fundamental" right. The first prong of Gonzalez, require that "the undisputed facts show the double jeopardy violation is clearly apparent from the face of the record. The clearly apparent from the record factor requires that the Court reach the merits of the claim before determining whether the claim is properly presented. If there is a valid double jeopardy violation, it is sufficiently clear on the face of the record; if there is no double jeopardy violation, it is not.

In Exparte Moss, 446 S.W.3d 786, 790 (Tex.Crim.App.2014) " The resolution of Applicant's claim turns on documents in the record". The record is of great importance if Applicant's double jeopardy claim is to survive a Townsend procedural bar. In this case the only record for review is the documents contained in the clerk's record. The clerk's record contains the trial court's docket sheet[10],

[9] Ex parte Carmona, 185 S.W.3d 492 (Tex.Crim.App.2006)
[10] Clerks Record page 6 Docket Sheet.

and in examining the trial court's docket sheet section dated 05/08/15 it reveals (1) the presiding judge over the trial was Judge Quay Parker and not Judge Rick Magnis. (2) That the trial judge sua sponte declared a mistrial. (3) No objection to the declaration of the mistrial by the defense counsel or motions for oral argument to grant a mistrial was documented on the docket sheet. (4) No mention of Judge Magnis being present at the trial or participating in the trial to rule on any defense motions for mistrial. (5) No hearing for the defense motion for mistrial is recorded. (6) The trial court's docket sheet is signed by Judge Quay Parker after he declared a mistrial (hung jury) and discharged the jury. Examining the clerk's record also reveals that the trial court's docket sheet[11], the court's response to jury notes[12], and the jury charge[13] are all signed by Judge Quay Parker.

In the Court of Appeals December 21, 2022 opinion, the Court made mention of the Appellant's motion for trial transcript[14] in the footnotes on page 3 of the opinion. The importance of this motion being mentioned is that defense counsel requested the trial transcript of the Appellant's first trial in preparation for the second trial, and stated he made that request after "said defendant was granted a mistrial", but that statement is incomplete. The full statement is "Said Defendant was granted a Mistrial on May of 2015 after the jury could not reach a unanimous

[11] Clerks Record Docket Sheet page 6.
[12] Clerks Record Jury Notes and Court Responses pages 45 – 54.
[13] Clerks Record Jury Charge pages 34-40.
[14] Clerks Record Motion for Trial Transcript page 56.

verdict", which matches what Judge Quay Parker wrote on the trial court's docket sheet section dated 05/08/15; that he declared a mistrial due to the hung jury. In Exparte Garrels[15], the trial judge sua sponte declared a mistrial "All right. I am going to declare a mistrial", He later added "I am going to [grant] a mistrial on my own", just as in this case the trial judge declared a mistrial on his own without request from the defense counsel or defendant. Due to the trial judges declaration of a mistrial there is nothing further for the applicant to request, the proceedings are over.

It is a well established rule, in declaring a mistrial that the trial judge has to rule out all less drastic alternatives to declaring a mistrial. Despite a trial judge's discretion to declaring a mistrial based on manifest necessity, the trial judge is required to consider and rule out "less drastic alternatives" prior to granting a mistrial. Little, 887 S.W.2d at 66; Harrison, 788 S.W.2d at 22; Torres, 614 S.W.2d at 442. Thus, prior to granting a mistrial based on manifest necessity, the trial judge must review the alternative courses of action and choose the one, which, in light of all the circumstances, best preserves the defendant's " right to have his trial complete before a particular tribunal." Harrison, 788 S.W.2d at 23-24. **Where a trial judge grants a mistrial despite the [available option of less drastic**

[15] Ex parte Garrels, 559 S.W.3d (Tex.Crim.App.2018)

alternatives] there is no manifest necessity and we will find an abuse of discretion. Little, 887 S.W.2d at 66; and, Harrison, 788 S.W.2d at 23-24.

In this case the clerk's record reveals multiple less drastic alternatives to declaring a mistrial. The jury requested the reading back of the detective's testimony[16] and the request was denied. The reading back of testimony is a less drastic alternative to declaring a mistrial. The jury requested yet again the reading back of the defendant's testimony and to examine the evidence admitted at trial. The Court never responded to the request. The reading back of testimony and allowing the jury to examine evidence admitted into the trial is a less drastic alternative, it is also error. U.S. v. Jackson, 257 F.2d 41(3d Cir. 1958), the court noted that "The point of the jury's question was highly relevant." It held that in this particular situation we think the defendant was entitled to have the jury informed as a [matter of right]." Id., at 43. . Domeracki v. Humble Oil Refining Co., 443 F.2d 1245, 1247 (3d Cir. 1971). Thus, the reality is that, except in obviously flagrant situations, the trial judge, [to avoid trial error], would normally accede to the jury's request, without questions, and hence, without any real discretionary power in the matter.

The second prong of the Gonzalez exception, when enforcement of the usual rules of procedural default serves no legitimate states interest, was clarified in

[16] Clerks Record jury notes pages 45-50.

Exparte Denton, the Court held, "While the state may have an interest in maintaining the finality of a conviction, we perceive no legitimate interest in maintaining a conviction when it is clear on the face of the record that the conviction was obtained in contravention of constitutional double jeopardy protections."

Violation of the right to not be subjected to double jeopardy is a constitutional error, which may be raised for the first time on an application for a writ of habeas corpus. Exparte Banks, 769 S.W.2d 539, 541 (Tex.Crim.App. 1989) "because this error was of constitutional magnitude, we consider it on application for writ of habeas corpus even though the error was not raised on direct appeal.") Exparte Milner, 394 S.W.3d 502, 506 (Tex.Crim.App. 2013) "When a double jeopardy violation has occurred, a writ of habeas corpus is a proper venue through which to challenge the error.") Exparte Parrott, 396 S.W.3d 531, 534 n. 6(Tex.Crim.App. 2013) (observing that habeas corpus relief is "an extraordinary remedy premised on equity and not error correction as is the focus of direct appeal"). By applying the same strict procedural default rules that apply to claims raised on direct appeal in deciding to deny habeas relief to an applicant claiming a double jeopardy violation, this Court fails to fairly and equitably resolve applications for writs of habeas corpus in conformity with common law principles.

For all these reasons, this Court should Grant the petition for discretionary review, properly defer to the Court of Criminal Appeal's holding in Gonzalez, reverse the Fifth Court of Appeals order denying relief of the Petitioner's writ of habeas corpus, and issue an order barring prosecution of the case.

PRAYER

WHEREFORE, the Petitioner prays that this Court Grants the Petitioner's Petition For Discretionary Review, reverses the Fifth Court of Appeals order denying relief of the Petitioner's writ of habeas corpus, and issue an order barring prosecution of the case.

Respectfully submitted,

Kurnicus Hayes

Kurnicus Hayes

828 Luxor Court

Grand Prairie, Texas 75052

Telephone: (214) 412-6793

Pro Se Litigant

CERTIFICATE OF COMPLIANCE.

This brief contains 3,077 (exclusive of Appendix) printed in a proportionally spaced typeface, Times New Roman, 14.

CERTIFICATE OF SERVICE

Pursuant to TEX.R.APP.P.9.5, I certify that on March 31, 2023 , a copy of this petition was mailed via Certified First Class U.S. mail, postage prepaid, to the following:

Jon Creuzot

Dallas County District Attorney

133 N. Riverfront Blvd. LB 19

Dallas, Texas 75207

Telephone: (214) 653-3625

Fax: (214) 653-3643

State Prosecuting Attorney of Texas

P.O. Box 13046

Austin, TX. 78711-3046

Ph: (512) 463-1660

Kurnicus Hayes

Kurnicus Hayes

APPENDIX

COURT OF APPEALS OPINION

AFFIRMED and Opinion Filed December 21, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00203-CR

EX PARTE KURNICUS HAYES

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. WX20-93394-T

MEMORANDUM OPINION

Before Justices Myers, Carlyle, and Goldstein
Opinion by Justice Goldstein

Appellant challenges the trial court's denial of his writ of habeas corpus without a hearing.[1] *See* TEX. CODE CRIM. PROC. art. 11.072 § 3(a). We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

After the trial court granted a mistrial due to a deadlocked jury in the first trial, a second jury found appellant guilty but recommended suspending his sentence in favor of community supervision. The trial court followed that recommendation, suspended the five-year sentence, and placed appellant on ten years' community supervision on June 13, 2016. Appellant prosecuted a direct appeal to this Court, and

[1] In determining no hearing was required the trial court found that "Applicant is manifestly entitled to no relief and that his application is frivolous."

this Court affirmed the conviction. *See Hayes v. State*, No. 05-16-00740-CR, 2017 WL 5663612 (Tex. App.—Dallas Nov. 27, 2017, pet. ref'd) (mem. op., not designated for publication).[2] In the November 6, 2020, article 11.072 habeas proceeding that is the subject of this appeal, appellant raises three issues: double jeopardy, error to grant mistrial without first taking less drastic action, and error to grant mistrial because he never requested or consented to the mistrial.

A court may not grant relief pursuant to article 11.072 "if the applicant could obtain the requested relief by means of an appeal under Article 44.02 and Rule 25.2, Texas Rules of Appellate Procedure." TEX. CODE CRIM. PROC. art. 11.072, § 3(a). Habeas corpus is an extraordinary remedy, available only when there is no other adequate remedy at law, and even constitutional claims are forfeited if the applicant had the opportunity to raise the issue on appeal. *See Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004); *Ex parte Anwuzia*, No. 05-21-01083, 2022 WL 3273724, at *2 (Tex. App.—Dallas Aug. 11, 2022, no pet. h.) (mem. op., not designated for publication).

As noted, appellant prosecuted a direct appeal to this Court after conviction in the second trial. He raised three issues, none of which were double jeopardy, though that issue was indisputably ripe at the time. *See Hayes*, 2017 WL 5663612, at *1. Therefore, he forfeited the issue, and may not raise it in habeas proceedings.

[2] The facts and record on direct appeal are well known and therefore used herein only where necessary for analysis and determination of this extraordinary writ.

See Townsend, 137 S.W.3d at 81; *Anwuzia*, 2022 WL 3273724, at *2. We overrule appellant's first issue.

Similarly, we overrule appellant's second and third issues, both of which pertain to the trial court's decision to grant a mistrial, and both of which could have been—but were not—raised on direct appeal.[3] *See id.*

Having overruled appellant's three issues, we affirm the order of the trial court.

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

210203F.U05

[3] In any event, appellant's current mistrial complaints would have found no success even had he raised them on direct appeal. The trial court did take less drastic action before granting mistrial by giving the deadlocked jurors an *Allen* charge. *See Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006) (citing *Allen v. United States*, 164 U.S. 492, 501 (1896)); *Ex parte McMillian*, No. 05-11-00642-CR, 2011 WL 3795727, at *3 (Tex. App.—Dallas Aug. 29, 2011, pet. ref'd) (not designated for publication). And the record indicates appellant requested the mistrial: it contains the trial court's May 8, 2015 order stating it is granting appellant's oral motion for mistrial. Moreover, appellant's motion for a transcript of the first trial in preparation for a second trial stated he made that request after "[s]aid Defendant was granted a Mistrial." *See Ex parte Garrels*, 559 S.W.3d 517, 522 (Tex. Crim. App. 2018); *Ex parte Little*, 887 S.W.2d 62, 65 (Tex. Crim. App. 1994). Even had appellant raised these issues on direct appeal, the record directly contradicts appellant's assertions, and they are without merit.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE KURNICUS HAYES No. 05-21-00203-CR	On Appeal from the 283rd Judicial District Court, Dallas County, Texas Trial Court Cause No. WX20-93394-T. Opinion delivered by Justice Goldstein. Justices Myers and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 21st day of December 2022.

APPENDIX I

Order entered 03/02/2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00203-CR

EX PARTE: KURNICUS HAYES

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. WX20-93394-T

ORDER

Before the Court is appellant Kurnicus Hayes's January 25, 2023 motion for rehearing. We **DENY** the motion.[1]

/s/ BONNIE LEE GOLDSTEIN
JUSTICE

[1] Justice Lana Myers was a member of the panel that decided this case. Due to Justice Myers's retirement from the Court on December 31, 2023, she did not participate in the ruling on this motion for rehearing.

APPENDIX J

AFFIRMED and Opinion Filed December 21, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00203-CR

EX PARTE KURNICUS HAYES

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. WX20-93394-T

MEMORANDUM OPINION

Before Justices Myers, Carlyle, and Goldstein
Opinion by Justice Goldstein

Appellant challenges the trial court's denial of his writ of habeas corpus without a hearing.[1] *See* TEX. CODE CRIM. PROC. art. 11.072 § 3(a). We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

After the trial court granted a mistrial due to a deadlocked jury in the first trial, a second jury found appellant guilty but recommended suspending his sentence in favor of community supervision. The trial court followed that recommendation, suspended the five-year sentence, and placed appellant on ten years' community supervision on June 13, 2016. Appellant prosecuted a direct appeal to this Court, and

[1] In determining no hearing was required the trial court found that "Applicant is manifestly entitled to no relief and that his application is frivolous."

this Court affirmed the conviction. *See Hayes v. State*, No. 05-16-00740-CR, 2017 WL 5663612 (Tex. App.—Dallas Nov. 27, 2017, pet. ref'd) (mem. op., not designated for publication).[2] In the November 6, 2020, article 11.072 habeas proceeding that is the subject of this appeal, appellant raises three issues: double jeopardy, error to grant mistrial without first taking less drastic action, and error to grant mistrial because he never requested or consented to the mistrial.

A court may not grant relief pursuant to article 11.072 "if the applicant could obtain the requested relief by means of an appeal under Article 44.02 and Rule 25.2, Texas Rules of Appellate Procedure." TEX. CODE CRIM. PROC. art. 11.072, § 3(a). Habeas corpus is an extraordinary remedy, available only when there is no other adequate remedy at law, and even constitutional claims are forfeited if the applicant had the opportunity to raise the issue on appeal. *See Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004); *Ex parte Anwuzia*, No. 05-21-01083, 2022 WL 3273724, at *2 (Tex. App.—Dallas Aug. 11, 2022, no pet. h.) (mem. op., not designated for publication).

As noted, appellant prosecuted a direct appeal to this Court after conviction in the second trial. He raised three issues, none of which were double jeopardy, though that issue was indisputably ripe at the time. *See Hayes*, 2017 WL 5663612, at *1. Therefore, he forfeited the issue, and may not raise it in habeas proceedings.

[2] The facts and record on direct appeal are well known and therefore used herein only where necessary for analysis and determination of this extraordinary writ.

See Townsend, 137 S.W.3d at 81; *Anwuzia*, 2022 WL 3273724, at *2. We overrule appellant's first issue.

Similarly, we overrule appellant's second and third issues, both of which pertain to the trial court's decision to grant a mistrial, and both of which could have been—but were not—raised on direct appeal.[3] *See id.*

Having overruled appellant's three issues, we affirm the order of the trial court.

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

210203F.U05

[3] In any event, appellant's current mistrial complaints would have found no success even had he raised them on direct appeal. The trial court did take less drastic action before granting mistrial by giving the deadlocked jurors an *Allen* charge. *See Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006) (citing *Allen v. United States*, 164 U.S. 492, 501 (1896)); *Ex parte McMillian*, No. 05-11-00642-CR, 2011 WL 3795727, at *3 (Tex. App.—Dallas Aug. 29, 2011, pet. ref'd) (not designated for publication). And the record indicates appellant requested the mistrial: it contains the trial court's May 8, 2015 order stating it is granting appellant's oral motion for mistrial. Moreover, appellant's motion for a transcript of the first trial in preparation for a second trial stated he made that request after "[s]aid Defendant was granted a Mistrial." *See Ex parte Garrels*, 559 S.W.3d 517, 522 (Tex. Crim. App. 2018); *Ex parte Little*, 887 S.W.2d 62, 65 (Tex. Crim. App. 1994). Even had appellant raised these issues on direct appeal, the record directly contradicts appellant's assertions, and they are without merit.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE KURNICUS HAYES	On Appeal from the 283rd Judicial District Court, Dallas County, Texas
No. 05-21-00203-CR	Trial Court Cause No. WX20-93394-T.
	Opinion delivered by Justice Goldstein. Justices Myers and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 21st day of December 2022.

APPENDIX K

WX20-93394-T

EX PARTE	§	**IN THE 283RD JUDICIAL**
KURNICUS HAYES	§	**DISTRICT COURT**
APPPLICANT	§	**DALLAS COUNTY, TEXAS**

ORDER FINDING NO ISSUES REQUIRING A HEARING

ON THIS 23RD day of November 2020, came to be considered Applicant's Application for Writ of Habeas Corpus pursuant to Article 11.072, and the Court having considered the same finds that the issues raised in the instant Application do not require a hearing. The Court finds that Applicant is manifestly entitled to no relief and that his application is frivolous. The Application is hereby DENIED.

This Court hereby ORDERS the Clerk of the Court to send a copy of this ORDER to Applicant and counsel for the State.

SIGNED this the 23rd day of November 2020.

Lela Mays Digitally signed by Lela Mays Date: 2020.11.29 22:19:20 -06'00'

JUDGE LELA LAWRENCE MAYS
283RD JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

EXHIBIT A

RETAINER AGREEMENT

Kurnicus Hayes ("Client") hereby retains Broden & Mickelsen (the "Firm") to represent Client in relation to:

> review the conviction, sentence and appeal in *State v. Kurnicus Hayes* to determine if any errors exist that would support a habeas corpus motion

In consideration for the Firm's representation, Client agrees to pay Firm in accordance with the "Terms of Payment" provisions set forth below.

A. SCOPE OF REPRESENTATION

1. The Firm will initially review Client's case to determine the viability of a subsequent habeas corpus motion pursuant to Tex. Art. Crim. P. 11.07 and provide the Client a written report.

2. Client understands that this Agreement does not include actually filing a habeas corpus motion pursuant to Tex. Art. Crim. P. 11.07 and does not include entering an appearance in any matter.

3. Client understands that, while the Firm will zealously represent his interests, it is impossible to guarantee the results of any litigation.

4. Client represents that all payments made to the Firm are from proceeds of legitimate enterprises and, conversely, represents that no payments made to the Firm are from proceeds of any type of criminal proceeds whatsoever

CLIENT INITIALS KH

B. OBLIGATIONS OF THE FIRM

1. The Firm agrees to keep Client apprised of all significant developments in his case.

2. The Firm agrees to return all Client phone calls and correspondence in a prompt fashion and, except in unusual circumstances, will return all phone calls the same business day that they are received.

3. The Firm agrees to consult Client on a regular basis and to always consult with Client in regard to significant decisions that need to be made in this matter.

4. The Firm agrees to keep all confidential information private and will not reveal information told by Client to the Firm in confidence.

5. The Firm promises to exert its best efforts at all times and to zealously represent Client using all its knowledge, skills and resources.

6. Client understands in the event of a dispute with the Firm, he/she may contact the State Bar of Texas Grievance Department at (800) 932-1900.

C. OBLIGATIONS OF CLIENT

1. Client agrees to abide by the "Terms of Payment" set forth below.

CLIENT INITIALS KH

2. Client agrees to communicate regularly with his attorneys.

3. Client understands that his failure to abide by Obligations of Client could result in the Firm discontinuing its work.

4. Client and Firm agree that any disputes regarding this Agreement shall be determined pursuant to the law of the State of Texas and any litigation regarding this Agreement shall be brought in the state district court of Dallas County, Texas.

D. TERMS OF PAYMENT

1. The total fee is $7,500 to be paid upon execution of this agreement. If the Firm and the Client agree to file a § 11.07, the cost of preparing, filing and litigating the § 11.07 will be an additional $7500.

2. Client understands that sometimes the time required to handle a legal matter cannot reasonably bee known in advance of the representation. That means that a legal fee paid on an hourly basis could be substantially higher or lower than a fixed fee. Being aware of this fact and desiring certainty as to legal fees, Client has elected to pay a fixed fee for representation rather than an hourly fee and understands that such fixed fee is non-refundable. Client understands that it is difficult for the Firm to know how many hours its representation will take. The fixed fee in this case represents the Firm's best estimate at the total cost of representation and takes into

CLIENT INITIALS KH

account the possibility that the Firm might be required to decline other work in order for it to accommodate its representation of Client. Client also understands that the Client benefits from certain intangibles that cannot be readily quantified such as the Firm's skill and experience and reputation in the legal community.

3. The fee charged represents a retainer fee and not an advance fee. In other words, it is earned in full upon receipt and it is to secure the Firm's services and to remunerate the Firm for the loss of the opportunity to accept other employment either because of a conflict of interest or time constraints. The fee will be deposited in the Firm's operating account

4. These Terms of Payment are all the payments due the Firm and the Firm will not request fees in excess of those set forth herein except in extraordinary and changed circumstances.

5. In addition to the Fees set forth above, Client agrees to pay the following expenses:

Fees for Expert Consultants and/or Expert Witnesses
Fees for Investigators
Polygrapher fees

6. Any expenses billed to Client will be at the rate charged to the Firm and will never be marked up.

AGREED, UNDERSTOOD, ACCEPTED AND SIGNED, this 17th day of August

CLIENT INITIALS KH

August 17, 2018.

Kurnicus Hayes
CLIENT

By:_____
BRODEN & MICKELSEN

CLIENT INITIALS KH

CLIENT INITIALS KH

EXHIBIT B

TRIAL DOCKET – CRIMINAL DISTRICT COURT – DALLAS COUNTY, TEXAS

NO. F 13-30966-PT

ATTY FOR STATE: FINE

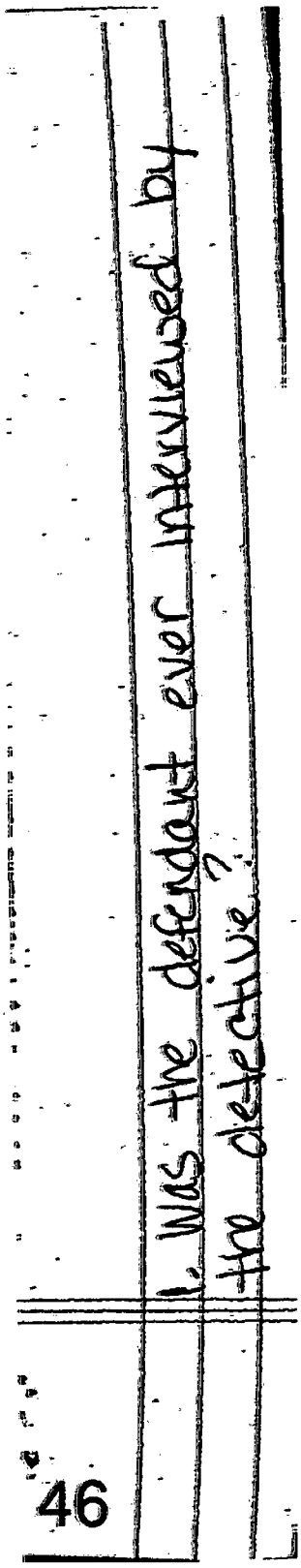
283

BAIL STATUS: JAIL 6

STATE OF TEXAS	ATTORNEY	OFFENSE	DATE OF FILING
KURNICUS HAYES SID# TRN:		IND CHILD CONT OFF Date: Degree / Statute:	10/21/2013 Declined

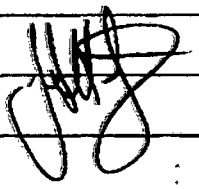
DATE OF ORDER	13057953 ORDER OF COURT
	Offer W-8873
5/5/15	Hearing on State's Motion in Limine. Def. Arraigned on Indictment & Jury.
5/5/15	Jury Trial: Panel of 71 seated and Voir Dire Conducted.
	Jury Selected, Impaneled and Instructed.
5/6/15	Jury Trial Cont'd. Jury Sworn & Instructed. Case Called for Trial before the Court. Def. arraigned before the Jury. Def. pleads "Not Guilty". Opening Statements by State & Defense. State's case in Chief: Witnesses: ① Elbyah Bowers ② Diane Eptan; ③ Alexia Stanley; ④ Patricia Fajardo ⑤ Det. Brad Mahoney. #1 Def. Sworn, First Admonished as to Right to Testify and 5th Amendment Right. State Rested @ 2:14pm. Defense case in Chief: Witnesses ① Gazelle Hayes ② Kurnicus Hayes. Def. Rests @ 11:25 am. State and Def Closed at 11:25am
	Charge Prepared & Read. Objections to Charge were Conducted. Charge Read to Jury. Closing Arguments. Jury retired to deliberate @ 2:35pm
5/8/15	Jury Continued to Deliberate on Guilt/Innocence. Jury Sent out Several Questions. Jury advised the Court they were Deadlocked. Sent in a Jury Charge. Jury Reported Still Deadlocked. Declared Mistrial. Jury Discharged.
	Clerk's Trial

EXHIBIT C


46
1. Was the defendant ever interviewed by the detective?

2. May we have the transcript of the detectives testimony?

3 TRANCRIPT OR FACTS OF DEFENDANT'S WORK HISTORY.



JONATHAN SWITZER

NO. F13-30966

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VS.	§	283rd JUDICIAL DISTRICT
Kurnicus Hayes	§	Dallas COUNTY, TEXAS

MEMBERS OF THE JURY:

I have received your note as attached.

The Court cannot grant your request. The law does not permit a general re-reading of the testimony. So, unless the jury has actually disagreed upon some part of the testimony, the Court cannot allow any repeat of it.

If you do have an actual disagreement among you about the above issue, then certify to the Court that is so. Be sure you are clear about specifically what is in dispute.

The reporter will then search her notes. There is no "transcript." Her keystrokes are only readable by her at this point. She will need sufficient time to examine all of the testimony of the witness or witnesses in order to get everything concerning your inquiry. To help her do this, you should state which witness or witnesses gave testimony concerning the disputed point, and add anything else you can to identify when during the trial it occurred. If necessary, include the general nature of what was being discussed at the time.

When the information is located, both attorneys will be given an opportunity to hear it first. Once the court is satisfied the answer to your note has been obtained, the jury will be returned to the courtroom. The reporter will re-read the selected testimony and it will take her as long to read it as it did for the attorneys and witnesses to put it on during the trial.

If you ask for such testimony, be patient for the notes to be reviewed.

Signed this 8th day of May, 2015.

JUDGE PRESIDING

NO. F. 13-30966

THE STATE OF TEXAS

VS.

KORNICUS HALES

IN THE DISTRICT COURT

283rd JUDICIAL DISTRICT

[redacted] COUNTY, TEXAS

DALLAS

You have requested that certain testimony of witnesses be read back from the court reporter's notes.

You must state that the jurors are in dispute over a point in the testimony of a particular witness and who the attorney was that was examining the witness.

Point in Dispute: There is a disagreement about whether the Detective testified that he talked to the Defendant prior to the indictment.

Witness whose testimony is in dispute: Detective

Attorney questioning witness: Defense

Jonathan Switzer

NO. F13-30966

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VS.	§	283rd JUDICIAL DISTRICT
Kurnicus Hayes	§	Dallas COUNTY, TEXAS

MEMBERS OF THE JURY:

I have received your note as attached.

ANSWER: No Question or Answer satisfies the point in dispute. No Attorney asked that question.

Signed this 8th day of May, 2015.

JUDGE PRESIDING

EXHIBIT D

(1) What is or is there any instruction for the event that we can not reach an agreement.

JONATHAN SWITZER

F13309100
NO.

THE STATE OF TEXAS	§	IN THE 283rd JUDICIAL
VS.	§	DISTRICT COURT OF
Kinnicus Hayes	§	Dallas COUNTY, TEXAS

CHARGE OF THE COURT

MEMBERS OF THE JURY:

If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the court to declare a mistrial and discharge the jury. The indictment will still be pending, and it is reasonable to assume that the case will be tried again before another jury at some future time. Any such future jury will be impaneled in the same way this jury has been impaneled and will likely hear the same evidence which has been presented to this jury. The questions to be determined by the jury will be the same questions confronting you, and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.

With this additional instruction, you are requested to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury if you can do so without doing violence to your conscience.

SIGNED this 8th day of May, 2006

Judge Presiding

JUDGE PRESIDING

EXHIBIT E

We cannot reach a unanimous verdict. There are deeply held convictions on both sides of the "beyond a reasonable doubt" standard.

JONATHAN SWITZER