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[SEAL]

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

(Filed Jun. 15, 2022)

No. 04-21-00409-CR

EX PARTE Mark **HOWERTON**

From the 144th Judicial District Court,
Bexar County, Texas
Trial Court No. 2019CR2399
Honorable Michael E. Mery, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Beth Watkins, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: June 15, 2022

AFFIRMED

Appellant Mark Howerton's first murder trial ended in a hung jury. Before his second trial, he filed a pretrial writ of habeas corpus seeking dismissal of the indictment on double jeopardy grounds. The trial court denied relief, and Howerton filed this accelerated appeal.[1] We will affirm.

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[1] The Honorable Raymond C. Angelini presided over the first trial. The Honorable Michael Mery presided over the pretrial habeas proceedings.

BACKGROUND

On the night of October 29, 2017, Howerton drove his girlfriend Cayley Mandadi, a student at Trinity University, from San Antonio towards Houston, where he was from. They never made it. Around 10:30 that night, Howerton drove to a hospital in Luling, Texas, and frantically got the attention of a paramedic. The paramedic found Mandadi slumped back in the passenger seat—not breathing, without a pulse, mostly naked, bruised, and bleeding—and started CPR. Howerton told the paramedic and a responding officer that he and Mandadi had attended a music festival in San Antonio earlier in the day, and that they had consumed alcohol and ecstasy. Mandadi later died. A medical examiner ruled the cause of death homicide and manner of death complications of blunt force trauma.

A 2018 grand jury returned murder, sexual assault, and kidnapping indictments against Howerton. These charges were based in part on the statements and grand jury testimony of Mandadi's former boyfriend, Jett Alexander Birchum.

Birchum had filed a police report when Mandadi did not return to her dorm room after the festival, and he could not reach her on her cell phone. Birchum reported that he had seen Howerton and Mandadi at the festival that day and witnessed Howerton physically pick Mandadi up, put her into his car, and drive away. In later statements and grand jury testimony, Birchum reported that: he saw the couple at the festival, but only from afar; he could tell Howerton was angry and

Mandadi was upset; he saw Howerton grab Mandadi and walk her in the direction of the bars and the exit; he tried to follow them but lost them in the crowd; he immediately called Mandadi's phone and Howerton answered and told him that Mandadi was his and that Birchum needed to leave her alone.

A 2019 grand jury, provided with the transcripts from the 2018 grand jury proceedings, returned a superseding murder indictment.

Before trial, Howerton filed a motion to dismiss the indictment, alleging the State knew or should have known that Birchum's grand jury testimony was false. According to Howerton, cell phone records prove he never entered the music festival on October 29, 2017, so it would have been impossible for Birchum to observe the couple on the festival grounds. Howerton urged a rule, based on the Due Process Clause of the Fifth Amendment and Texas's Due Course of Law provision, requiring dismissal of the indictment whenever the grand jury is provided with perjured testimony.

At a hearing on the motion, David Gallant, a digital forensics consultant, testified he had reviewed the GPS data on the cell phones belonging to Howerton, Mandadi, and Birchum from October 29, 2017. Gallant created exhibits depicting the phones' locations "within ten meters." Gallant testified that Howerton's records showed his phone on a road next to the stadium where the festival was held between 3:43 p.m. and 3:46 p.m. According to Gallant, it did "not appear as though Mr. Howerton entered the festival area. He

drove past it," going "towards the east on Highway 90" and then "north on 10." Gallant further testified that the data from Birchum's phone placed Birchum at the music festival several hours later, at 7:39 p.m. and at 8:51 p.m.—by which time Howerton's phone was near Trinity, almost ten miles away.

Gallant agreed that there was no reason to believe, from the data, that Birchum and Howerton were together or even in line of sight of each other on October 29. On cross-examination, Gallant acknowledged the data showed only that their *phones* were never together, not necessarily that *they* were never together. Gallant also acknowledged he had no location data from Howerton's phone in the late afternoon to early evening hours, which could mean that Howerton had turned off his phone.

Howerton argued the cell phone data proved Birchum lied to the police and the grand jury. He acknowledged "the case law in Texas is sparse on the question of what happens when there is false testimony in the Grand Jury" but argued that going forward on the indictment would violate due process, even if the State did not intentionally sponsor false testimony, because it "should have known that Birchum was lying about something." The trial court denied the motion to dismiss the indictment on November 4, 2019, remarking "I can't find that it's material[]—I can't even find that it's false under what I've heard."

Howerton was tried in December 2019. Birchum's trial testimony mirrored his later statements and grand jury testimony. Birchum admitted he lied in the initial report to police about witnessing Howerton forcing Mandadi into his car and driving off. And the trial evidence showed when Birchum placed the phone call to Mandadi—the call he claimed to have made "very shortly" after seeing Howerton and Mandadi at the music festival, and the call he claimed Howerton answered—Mandadi's phone was ten miles away from the music festival near Trinity.

After Birchum's testimony, Howerton renewed his motion to dismiss on the ground that Birchum's testimony before the grand jury, and now before the jury, did not match the cell phone data showing that Howerton and Mandadi never entered the festival. The trial court denied the motion at the close of evidence but expressed exasperation at the State for sponsoring Birchum as a witness and noted that the defense had thoroughly discredited him—"To be quite frank, no one's going to believe Jett Birchum, not about anything."

The jury started deliberations on December 11, 2019. On the afternoon of December 12, it notified the court that it could not reach a unanimous decision. Howerton moved for a mistrial and objected to any kind of *Allen* or dynamite charge. The trial court overruled the motion and gave the jury an *Allen* charge. The jury later sent out another note, again saying it could not reach a unanimous decision. After the trial court read the note to the parties, Howerton renewed

his motion for mistrial. The prosecutor told the court "We do not object" and the trial court granted the motion for mistrial.

After the State demonstrated that it intended to try the case again, Howerton filed a pretrial writ based on double jeopardy. He argued that the State's use of Birchum's false statements constituted egregious prosecutorial misconduct that merited a bar to retrial. The trial court denied the writ, holding that under the "facts and the well-settled law," Howerton's "due process rights under the Double Jeopardy clause of the United States and Texas Constitutions will not be violated by a retrial of this case." In the same order, the trial court denied Howerton's motion to dismiss for prosecutorial misconduct, finding "there has been no evidence presented to support a claim of prosecutorial misconduct."

On appeal, Howerton argues: (1) the trial court erred when it concluded that no prosecutorial misconduct occurred; (2) an exception to the general rule that "a mistrial resulting from a hung jury does not bar a retrial of the accused" should apply when the record establishes egregious prosecutorial misconduct in the original proceedings; and (3) the trial court abused its discretion in denying his request for an evidentiary hearing in support of his writ of habeas corpus.

Analysis

Double Jeopardy

Standard of Review

"It is the burden of the habeas applicant to prove his allegations by a preponderance of the evidence." *Ex parte Martinez*, 560 S.W.3d 681, 695 (Tex. App.—San Antonio 2018, pet. ref'd). An appellate court reviews a habeas court's decision to grant or deny relief on double jeopardy grounds under an abuse of discretion standard. *Id.* In applying this standard, the court reviews the record evidence in the light most favorable to the trial court's ruling. *Id.* We "afford great deference to the habeas court's findings and conclusions, especially" if they involve determinations of credibility and demeanor. *Id.* But if there are no underlying questions of fact, double jeopardy is a question of law we review de novo. *Palacios v. State*, 511 S.W.3d 549, 585 (Tex. App.—Corpus Christi–Edinburg 2014, no pet.); *Vasquez v. State*, 22 S.W.3d 28, 31–32 (Tex. App.—Amarillo 2000, no pet.).

Applicable Law

As a part of the protection against multiple prosecutions, the Double Jeopardy Clause grants "a criminal defendant a valued right to have his trial completed by a particular tribunal." *Oregon v. Kennedy*, 456 U.S. 667, 671–72 (1982) (internal quotation marks omitted). But the clause "does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding."

Id. at 672. This is because "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

"Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the 'manifest necessity' standard first enunciated in Justice Story's opinion in *United States v. Perez*, [22 U.S. 579, 580] (1824)." *Kennedy*, 456 U.S. at 672. "*Perez* dealt with the most common form of 'manifest necessity': a mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict." *Id.* "While other situations have been recognized . . . as meeting the 'manifest necessity' standard, the hung jury remains the prototypical example." *Id.* "The 'manifest necessity' standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining the public's interest in fair trials designed to end in just judgments." *Id.* (internal quotation marks omitted).

"But in the case of a mistrial declared at the behest of the defendant, quite different principles come into play." *Id.* "A defendant's motion for a mistrial constitutes a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Id.* at 676 (internal quotation marks omitted). Nevertheless, "even where the defendant moves for a mistrial, there is a narrow exception to the rule that the Double Jeopardy Clause is

no bar to retrial." *Id.* at 673. "[T]he circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.* at 679.

Application

This case deals with the most common form of manifest necessity—a mistrial declared following the jury's declaration that it was unable to reach a verdict. *Id.* at 672. As in *Perez*, Howerton "has not been convicted or acquitted, and may again be put upon his defence." *Perez*, 22 U.S. at 580. Under these circumstances, the law invests trial courts "with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.* "[S]uch a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." *Id.*

Howerton nevertheless argues that retrial is barred by double jeopardy because the prosecution engaged in misconduct designed to prejudice his prospects for an acquittal, and it would be "manifestly absurd to preclude a jeopardy remedy simply because the prosecution's objectives were more broadly to avoid acquittal by dishonest means rather than simply to abort the proceedings before the matter can be

submitted to the trier of fact." Either way, argues Howerton, he has lost his right to a fair trial before his chosen jury.

Howerton thus argues for a broader standard than *Kennedy*.[2] For ten years, Texas offered greater double jeopardy protections than does the Due Process Clause of the Fifth Amendment. *Bauder v. State*, 921 S.W.2d 696 (Tex. Crim. App. 1996), *overruled by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). In 1996, in *Bauder*, the Texas Court of Criminal Appeals interpreted the Texas constitutional double jeopardy standard more broadly than the corresponding federal provision, protecting against "reckless" misconduct, and held that retrial would be barred "when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id.* at 699. But in 2007, that court overruled *Bauder* and held that the proper rule under the Texas Constitution is the rule articulated by the United States Supreme Court in *Oregon v. Kennedy:* double jeopardy bars a retrial *only* if the prosecutor commits manifestly improper conduct with the intent to goad the defendant into moving for a mistrial. *Ex parte Lewis*, 219 S.W.3d at 359–60, 371.

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[2] Howerton relies on Judge Clinton's dissenting opinion in *Buffington v. State* for support. 652 S.W.2d 394, 397 (Tex. Crim. App. 1983) (Clinton, J., dissenting) ("as Justice Brennan pointed out in his concurring opinion in *Oregon v. Kennedy* . . . a state is not required to construe its own constitutional provision in lockstep with the federal counterpart").

The *Bauder* court had held, much as Howerton argues here, that the right to a trial before the jury first selected is the right to a fair trial before that jury. *Bauder*, 921 S.W.2d at 698. But that holding "conflates the double jeopardy protection with more generalized notions of due process and due course of law." *Lewis*, 219 S.W.3d at 358. "The question, for double jeopardy purposes, is not whether the defendant's trial was 'fair' but whether requesting a mistrial was ultimately his decision." *Id.* "To say that the decision was not the defendant's own is to say that the decision was in reality made by someone else, *e.g.* the prosecutor." *Id.* "But when a prosecutor is merely reckless, one cannot say the prosecutor has made the decision to seek a mistrial." *Id.* "Only when the prosecutor intends to provoke the defendant's mistrial motion can it be said that the prosecutor, rather than the defendant, has exercised primary control over the decision to seek the trial termination." *Id.* at 358–59.

This case involves a prosecution team that, it is asserted, intended to "win at any price" before a first jury, rather than one trying to get its case before a second jury. The team's intent is different and, under *Kennedy*, that distinction is crucial for double jeopardy purposes. Here, Howerton does not allege that the prosecution was the true actor behind his request for a mistrial. These circumstances do not show that Howerton's consent to a mistrial was a sham. *Id.* at 358. Howerton moved for a mistrial because the jury was hung, not because the State forced him to do so.

The habeas court, in denying relief on double jeopardy grounds, followed the letter of *Kennedy*, as it was obligated to do. Manifest necessity was present to justify the declaration of a mistrial because of jury deadlock, Howerton consented to that mistrial, and Howerton's consent was not a sham. His retrial is, therefore, not barred.

Because Howerton's double jeopardy claim fails as a matter of law, we need not weigh in on his contention that the trial court erred when it reached the legal conclusion that no prosecutorial misconduct occurred or abused its discretion in denying his request for an evidentiary hearing in support of his writ of habeas corpus. TEX. R. APP. P. 47.1.

CONCLUSION

Based on the foregoing, we affirm the trial court's order denying Howerton's application for a pretrial writ of habeas corpus.

Beth Watkins, Justice

DO NOT PUBLISH

NO. 2019CR2399

THE STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT
v.	§	
	§	144TH JUDICIAL
MARK HOWERTON	§	DISTRICT
	§	
	§	BEXAR COUNTY,
	§	TEXAS

ORDER

The Court having considered ~~evidence presented and legal authority~~ [the motion presented and Defendant's response] hereby GRANTS this State's motion to lift the stay of proceedings. IT IS ORDERED this case be placed on the trial docket.

The motion is GRANTED on November 30, 2022.

/s/ Michael E. Mery
JUDGE PRESIDING

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

[SEAL]

10/26/2022 **COA No. 04-21-00409-CR**
HOWERTON, EX PARTE MARK
Tr. Ct. No. 2019CR2399 **PD-0437-22**

On this day, this Court has denied the State's "MOTION TO LIFT STAY OF PROCEEDINGS OR ORDER TRIAL COURT TO LIFT THE STAY".

Deana Williamson, Clerk

[Service Addresses Omitted]

NO. 2019-CR-2399

STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT
vs.	§	
MARK HOWERTON	§	144TH JUDICIAL
	§	DISTRICT
	§	
	§	BEXAR COUNTY,
	§	TEXAS

ORDER

ON THE ___ DAY OF SEP 24 2021, 2021, came on to be heard Defendant's Motion to Stay Trial Proceedings pending his appeal of the denial of his pretrial writ of habeas corpus seeking relief from double jeopardy. Having considered the merits of same, the Defendant's Motion is hereby:

[GRANTED]/~~DENIED~~

It is so ORDERED.

/s/ Michael E. Mery
PRESIDING JUDGE

NO. 2019-CR-2399

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
vs.	§	
MARK HOWERTON	§	**144th JUDICIAL DISTRICT**
	§	**BEXAR COUNTY, TEXAS**
	§	

ORDER

(Filed Sep. 1, 2021)

I. Motion to Dismiss for Prosecutorial Misconduct

On August 26, 2021, Defendant Howerton filed a Motion to Dismiss for Prosecutorial Misconduct. After examining the entire record of the proceedings that have taken place in this case thus far, this court finds that there has been no prosecutorial misconduct.

On November 4, 2019, a month before the first trial of this case, the trial court (presided over by a visiting district court judge) conducted an evidentiary hearing on the defendant's previously filed motion to dismiss. At that hearing, the defense presented essentially the same argument that it does here – that the prosecution intentionally presented to the grand jury the false testimony of Jett Birchum. After hearing the evidence and arguments, the judge expressly stated that he "[could not] find that there is perjury," and that he "[could not] find that [Jett Birchum's testimony

before the grand jury is false under what [he] heard." The judge denied the motion to dismiss.

At the December 2019 trial (presided over by the same visiting district court judge), the defense cross-examined Jett Birchum regarding purported inconsistencies in what he first reported to the police, in what he later testified to before the grand jury, and in what he testified to in his direct testimony at trial. Moreover, the defense cross-examined Birchum regarding whether he had an immunity deal with the State, and regarding his alleged drug use, in an attempt to impeach Birchum's credibility in front of the jury. The defense also presented GPS and cell data evidence at trial and argued to the jury that such evidence refuted Birchum's version of the events that day. This court finds that these purported inconsistencies and the GAS and cell data evidence do not support Defendant's claim that the attorneys for the State committed prosecutorial misconduct.

Defendant's Motion to Dismiss For Prosecutorial Misconduct is DENIED.

II. Motion to Compel Production of Grand Jury Transcripts and Motion to Disqualify Assistant District Attorneys From Representing the State of Texas

On August 17, 2021, Defendant Howerton filed a Motion to Compel Production of Grand Jury Transcripts. Defendant Howerton has had access to the transcript from the first grand jury proceeding in 2018.

In this motion he asks for the transcript from the second grand jury proceeding in 2019. The State has represented to this court that there was no witness testimony heard by the second grand jury, only a summation of the facts. The State has represented to defense counsel that there is not a transcript from the second grand jury proceeding because there was no witness testimony.

Because defense counsel believes that he is entitled to know what the prosecutors said to the second grand jury, and he claims that he can only know what they said if the prosecutors are called as witnesses in the case, defense counsel filed a Motion to Disqualify Assistant District Attorneys From Representing the State of Texas.

This court finds that these two motions are without merit. "Grand jury proceedings are secret." TEX. CODE CRIM. PROC. Art. 20A.202. "The attorney representing the state may not disclose anything transpiring before the grand jury" except as permitted by Art. 20A.204 or Art. 20A.205. TEX. CODE CRIM. PROC. Art. 20A.204. Under Art. 20A.204(b), the prosecutors were permitted to present to the second grand jury the witness testimony that was presented to the first grand jury in order "to assist the attorney in the performance of the attorney's duties." *Id.*

A defendant "may petition a court to order the disclosure" of what transpired before a grand jury. TEX. CODE CRIM. PROC. Art. 20A.205. "The court may order disclosure of the information if the defendant shows a

particularized need." TEX. CODE CRIM. PROC. Art. 20A.205. Defense counsel seeks to expose what he believes was prosecutorial misconduct by delving into what the prosecutors said to the second grand jury to support the second grand jury's indictment of Howerton. This court finds, however, that this does not demonstrate the type of "particularized need" that would support either of these motions filed by defense counsel.

The trial court has considerable discretion concerning disclosure of what transpires before a grand jury. *See McManus v. State*, 591 S.W.2d 505, 523 (Tex. Crim. App. 1979), *overruled on other grounds, Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988). A particularized need is not shown simply because the requested testimony pertains to a key prosecution witness, or that there is a "need" to locate inconsistencies in the witness's testimony. *Legate v. Slate*, 52 S.W.3d 797, 803-04 (Tex. App. – San Antonio 2001, pet. ref d) (citing *Bynum v. State*, 767 S.W.2d 769, 782 (Tex. Crim. App. 1989)). Prosecutors have no duty to present exculpatory evidence to the grand jury. *In re Grand Jury Proceedings 198.GJ.20*, 129 S.W.3d 140, 144 (Tex. App. – San Antonio 2003, pet. dism'd). Because prosecutors have no duty to present exculpatory evidence to the grand jury, an accused can show no particularized need to access grand jury information to obtain such information. *In re State ex rel. Rodriguez*, No. 13-19-00200-CR, 2019 WL 2426597 (Tex. App. – Corpus Christi-Edinburg, June 10, 2019, no pet) (citing *In re State*, 516 S.W.3d 526, 528 (Tex. App. – San Antonio

2016, no pet.)); *Gallegos v. State*, No. 08-05-00081-CR, 2006 WL 3317964 (Tex. App. – El Paso, May 2, 2007, pet. ref d) ("To the extent that Appellant's complaint is based on alleged prosecutorial misconduct in the presentation of evidence to the grand jury, we note that the State has no duty to present exculpatory evidence to a grand jury. . . . [It] would be improper for this court to evaluate the adequacy of the evidence presented to the grand jury. Moreover, there is simply no evidence in the record to support appellant's claim that prosecutors misled the grand jury in its decision to return Count I in the indictment.").

Because this court has found no evidence to support Defendant Howerton's claim of prosecutorial misconduct, this court finds that there has been no showing of a "particularized need" sufficient to support ordering disclosure of what transpired before the second grand jury.

Howerton's Motion to Compel is DENIED.

With regard to the motion to disqualify the attorneys for the State, a trial court has limited authority to disqualify an elected district attorney and his staff from the prosecution of a criminal case. *Buntion v. State*, 482 S.W.3d 58, 76 (Tex. Crim. App. 2016). A trial court's authority to disqualify an assistant district attorney in a particular case requires proof that the assistant district attorney has a conflict of interest that rises to the level of a due process violation. *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994). This court finds that there has been no showing

that the attorneys for the State in this case have a conflict of interest that rises to the level of a due process violation.

Defendant's Motion to Disqualify Assistant District Attorneys From Representing the State of Texas is DENIED.

III. Application for Pretrial Writ of Habeas Corpus

Prior to filing the previously discussed motions, on July 30, 2021, defense counsel filed on behalf of Defendant Howerton an Application for Writ of Habeas Corpus Seeking Relief From Double Jeopardy. Howerton's counsel again argues in his writ application that the State's witness, Jett Birchum, lied to the police, lied to the grand jury, and lied during the December 2019 trial. To support his claim in this pretrial writ application, Howerton asserts that it was Birchum's false testimony that caused a hung jury, which caused a mistrial, and because the prosecution knowingly presented such false testimony, the prosecution knowingly triggered a mistrial, all of which, says the defense, would support a pretrial grant of relief in the form of a dismissal based on double jeopardy.

It is undisputed that after both sides presented their case at the December 2019 trial, and after closing arguments, the jury deliberated for two days, after which the jury announced that they were deadlocked and could not come to a unanimous verdict. The trial court declared a mistrial. There is no claim being

made, nor evidence to support any such claim, that either side objected to the trial court's decision to declare a mistrial based on a hung jury.

Under Article 36.31 of the Texas Code of Criminal Procedure, when a jury is unable to agree on a verdict, "the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree." The Texas Code of Criminal Procedure specifically provides that a defendant may be retried if his first trial ends in a mistrial because the jury was unable to agree on a unanimous verdict. TEX. CODE CRIM. PROC. Art. 36.33 ("when a jury has been discharged . . . without having rendered a verdict, the cause may be again tried at the same or another term.").

Moreover, according to *United States v. Perez*, 22 U.S. 579 (1824), and cases (both state and federal) decided since 1824, a person is not put in jeopardy by a trial resulting in a discharge of the jury for failure to agree. A deadlocked jury is the "classic example" of when the State may try the same defendant twice. *Renico v. Lett*, 559 U.S. 766, 774, 130 S. Ct. 1855. 1863, 176 L. Ed. 2d 678 (2010). In *Renico* the Supreme Court noted that "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court," and a "mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been) long considered the classic basis for a proper mistrial." *Id. See also Richardson v. United States*, 468 U.S. 317, 323-24, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) ("We have

constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause . . . Without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."); *United States v. Williams*, 449 F.3d 635, 644 n. 14 (5th Cir. 2006)("The Double Jeopardy Clause does not bar a second trial when the first trial ended with a hung jury."); *Sullivan v. State*, 874 S.W.2d 699, 701 (Tex. App.-Houston [1st Dist.] 1994, pet. red); *Molina v. State*, No. 13-19-00460-CR, 2020 WL 7757367 (Tex. App. – Corpus Christi – Edinburg, December 30, 2020, pet. ref d) (citing to *Arizona v. Washington*, 434 U.S. 497, 509-10 (1978), and noting that "great deference" is given to a manifest necessity finding when based on the trial court's belief that the jury is unable to reach a verdict, and also noting that a deadlocked jury has "long [been] considered the classic basis for a proper mistrial").

Despite the applicable Texas statutes and this well-settled case law, Howerton's counsel advocates for a double jeopardy bar to a retrial of this case because he claims that the State engaged in misconduct designed to prejudice the defendant's prospects for an acquittal. *See Buffington v. State*, 652 S.W.2d 394, 396 (Tex. Crim. App. 1983) (Clinton, J., dissent). However, because this court finds, as discussed above, that the State did not commit prosecutorial misconduct, this argument is not persuasive.

Under these facts and the well-settled law, this court finds that Applicant's due process rights under

the Double Jeopardy clause of the United States and Texas Constitutions will not be violated by a retrial of this case.

The Application for Writ of Habeas Corpus Seeking Relief From Double Jeopardy is DENIED.

SIGNED and ENTERED on September 1, 2021.

/s/ Michael E. Mery
JUDGE MICHAEL MERY
144th Judicial District Court
Bexar County, Texas

cc: Joe Gonzales
Bexar County District Attorney
Attn: David Lunan
101 W. Nueva
San Antonio, Texas 78205
dlunan@bexar.org

John T. Hunter
Attorney for Defendant
Hunter, Lane & Jampala
310 S. St. Mary's Street
San Antonio, Texas 78205
John@hljdefense.com

[SEAL]

Fourth Court of Appeals
San Antonio, Texas

July 29, 2022

No. 04-21-00409-CR

EX PARTE Mark **HOWERTON**,
Appellant

From the 144th Judicial District Court,
Bexar County, Texas
Trial Court No. 2019CR2399
Honorable Michael E. Mery, Judge Presiding

ORDER

Sitting: Rebeca C. Martinez, Chief Justice
Beth Watkins, Justice
Lori I. Valenzuela, Justice

Appellant's motion for rehearing is DENIED. See TEX. R. APP. P. 49.3.

/s/ Beth Watkins
Beth Watkins, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 29th day of July, 2022.

/s/ Michael A. Cruz
[SEAL] MICHAEL A. CRUZ,
Clerk of Court

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

[SEAL]

10/26/2022 **COA No. 04-21-00409-CR**
HOWERTON, EX PARTE MARK
Tr. Ct. No. 2019CR2399 **PD-0437-22**

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

Deana Williamson, Clerk

[Service Addresses Omitted]

NO. 2019-CR-2399

STATE OF TEXAS	§	**IN THE DISTRICT**
	§	**COURT**
vs.	§	
MARK HOWERTON	§	**144TH JUDICIAL**
	§	**DISTRICT**
	§	
	§	**BEXAR COUNTY,**
	§	**TEXAS**

MOTION TO STAY TRIAL PROCEEDINGS PENDING APPEAL OF THE COURT'S DENIAL OF DEFENDANT'S PRETRIAL WRIT OF HABEAS CORPUS

(Filed Sep. 23, 2021)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MARK P. HOWERTON, Defendant in the above-entitled and numbered cause, by and through undersigned counsel, and submits respectfully this Motion to Stay Trial Proceedings during the pendency of his appeal from the denial of his pretrial writ of habeas corpus seeking relief from double jeopardy. In support of same, Defendant would show as follows:

1. Defendant Mark P. Howerton filed a pretrial writ of habeas corpus asserting that his continued prosecution for the charged offense is barred by the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, Article I, § 14 of the Texas Constitution, and Article 1.10 of

the Texas Code of Criminal Procedure. In his prayer for relief, the Defendant prayed this Court to issue his writ of habeas corpus, to conduct an evidentiary hearing, and to grant relief barring retrial on Jeopardy principles pursuant to the Texas and United States constitutions. This Court has denied an evidentiary hearing and has denied relief. Mr. Howerton has timely filed his notice of appeal. Because the protections of the Double Jeopardy Clause would be rendered meaningless without substantive review by the trial court and the court of appeals, Mr. Howerton now seeks to stay further trial proceedings during the pendency of his appeal:

> Obviously, **these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken**; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy, and thereby enjoy the full protections of the Clause, **his double jeopardy challenge to the indictment must be reviewable before the subsequent prosecution occurs.**

United States v. Abney, 431 U.S. 651 (1977) (emphasis supplied); *See also Ex parte Robinson*, 641 S.W.2d 552, 553-555 (Tex. Crim. App. 1982) ("We are compelled to hold that there is a Fifth Amendment right not to be

exposed to double jeopardy, and that it ***must be reviewable before that exposure occurs.***") (emphasis supplied).

Because the Court has denied *habeas* relief on the merits, and made factual determinations as to the contested issues of fact asserted therein, Mr. Howerton is lawfully entitled to appeal. *In re Martinez*, 2015 Tex. App. LEXIS 8944 at *6 (Tex. App.—San Antonio, no pet.) (mem. op.) (Pulliam, J.) (citing *Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005) (original proceeding)). He similarly has the right to a stay of further proceedings in this Court while that appeal is pending. *Williams v. White*, 856 S.W.2d 847, 848 (Tex. App.—Fort Worth 1993, no pet.) ("When a movant has appealed the trial court's denial of his double jeopardy claim, the movant is entitled to a stay of further proceedings unless his double jeopardy claim is frivolous."); *see also United States v. Dunbar*, 611 F.2d 985, 989 (5th Cir. 1980).

Because this Court has issued a final, appealable order on Mr. Howerton's writ of habeas corpus seeking relief from double jeopardy, ruling substantively on the merits of same, the proceedings in this cause should be stayed pending the appeal.

WHEREFORE, PREMISES CONSIDERED, Defendant Mark Howerton prays this Honorable Court to issue a stay of further trial proceedings until such time as his appeal from the denial of his pretrial writ of habeas corpus is resolved.

Respectfully Submitted,

Respectfully submitted,

HUNTER, LANE & JAMPALA
310 S. St. Mary's Street
Suite 1740-Tower Life Bldg.
San Antonio, Texas 78205
(210) 202-1076
(210) 880-6162 (*telecopier*)

By:*/s/ John T. Hunter*
John T. Hunter
State Bar No. 24077532
Attorney for Mark Howerton

CERTIFICATE OF SERVICE

This is to certify that on September 21, 2021, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Bexar County, Texas, by the eFile Texas electronic filing platform, which will transmit service to all attorneys of record in the cause.

By:*/s/ John T. Hunter*
John T. Hunter