

25-6948  
No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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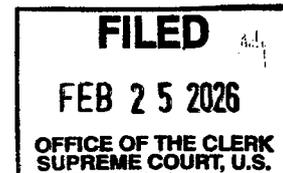
KURNICUS HAYES

*Petitioner*

V.

PATRICK ARNOLD

*Respondent*



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Petition for Writ of Certiorari

To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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KURNICUS HAYES

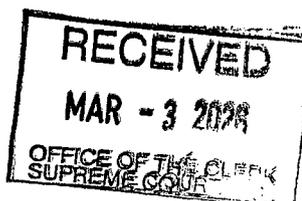
828 LUXOR COURT

GRAND PRAIRIE, TX. 75052

PRO-SE, LITIGANT

(214) 412 - 6793

*Kurnicus Hayes*



## QUESTIONS PRESENTED

In *Gonzalez v. Crosby*, this Court held that in order to obtain Rule 60(b)(6) relief extraordinary circumstances must be present. In determining whether extraordinary circumstances are present a court may consider a wide range of factors. These may include, in an appropriate case, “the risk of injustice to the parties” and “the risk of undermining the public’s confidence in the judicial process.” The questions presented are:

1. Whether injustice outweighs the courts error and constitutes an extraordinary circumstance warranting relief under Rule 60(b)(6) catchall provision?
2. Whether a state’s court procedural bar ruling that is not consistently applied to cases that are procedurally analogous, effectively suspends the petitioner’s right to access the Great Writ?

## **PARTIES**

Kurnicus Hayes, is the petitioner; he was the defendant-appellant below.

Arnold Patrick is the respondent; and was the plaintiff-appellee below.

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## **PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Kurnicus Hayes, proceeding pro-se, respectfully petitions for a *Writ of Certiorari* to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The Fifth Circuit Court of Appeals affirmed the Districts Courts determination of Hayes' Fed. R. Civ. P. Rule 60(b)(6) Motion in Cause no. 25-10641; issuing an order and opinion on the merits of his Certificate of Appealability. The order denying C.O.A. is reprinted in the appendix to this petition at Appendix B *infra*. The order of the Fifth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at Appendix A *infra*.

### **JURISDICTION**

The original order of the Fifth Circuit Court of Appeals was entered on October 30, 2025. A timely motion to that court for rehearing En Banc and Reconsideration was denied on December 5, 2025.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and *Hohn v. United States*, 524 U.S. 236 (1998) (holding that the United States Supreme Court has jurisdiction to review denials of applications for Certificate of Appealabilities.)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves U.S. Const. art. I sec. 9 (Suspension Clause); U.S. Const. amend. V (Due Process Clause); Federal Rule of Civil Procedure 60(b); Rule 11, Rules Governing Section 2254 Cases; the Antiterrorism and Effective Death Penalty Act of 1996, and 28 U.S.C. § 2244. All are set forth in the Joint Appendix, JA- L.

## **STATEMENT OF THE CASE**

On May 8, 2015, Petitioner Kurnicus Hayes' first trial commenced and proceeded to the jury. During jury deliberations the jury made several request of the court. The jury requested to have a portion of the detective in the case testimony read-back to them, in which the trial judge denied the request. The jury requested to have Hayes' testimony regarding his work history read-back to them, and to examine the defense exhibits of Hayes' work history that were admitted into evidence during the trial. The trial judge did not respond to the jury request. The jury then asked the court what would be the course of action if they cannot reach a verdict. The court responded with an Allen Charge for them to keep deliberating. The jury sent out its first and only note stating that they are deadlocked, and the trial judge sue sponte declared a mistrial and discharged the jury while several less drastic alternatives to declaring a mistrial were still available to the court.

Hayes was retried and convicted on June 3, 2016. Hayes 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 curiam. 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, never filed the actual innocence writ of habeas corpus on behalf of Hayes. In September 2020 Hayes found a case in the law library of the Dallas County Detention Center that was similar to his and overturned on a double jeopardy violation because the court failed to explore and rule out less drastic alternatives before declaring a mistrial. Hayes was released from custody on October 3, 2020 and immediately requested from the habeas attorney for all of the case file documents to be turned over to him in October 2020. Upon review of the case file records the double jeopardy violation was discovered, and Hayes filed a pro-se state post conviction writ of habeas corpus in the trial court on November 6, 2020. Hayes contended 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, because several alternatives to declaring a mistrial still 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 Hayes 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 *ExParte 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, and on September 26, 2023 the district court entered an order and judgment expressly adopting the findings and conclusions of the Magistrate Judge that Hayes' petition is time barred.

On October 19, 2023 Hayes appealed to the Fifth Circuit Court of Appeals, bringing two issues, (1) that the district court erred in its application of AEDPA's one year time-bar analysis under 28 U.S.C. § 2244(d)(1)(D); restarting his 1-year period of limitation from September 2020 the date he found the double jeopardy violation, and (2) that the district 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. The Fifth Circuit Court of Appeals denied Hayes COA, and his motion for rehearing on May 31, 2024. He filed for certiorari that was denied by the Supreme Court on October 15, 2024.

Hayes then filed his Rule 60(b) motion in the district court on March 25, 2025, requesting that the District Court reopen and review his habeas application under Rule (60)(b)(6) due to the extraordinary circumstances that were created by the District Courts erroneous misapplication of 28 U.S.C. § 2244(d)(1)(D) that caused Hayes injustice by dismissing his first habeas application effectively suspending his right to access the Great Writ, and that the states procedural bar determination was erroneous because the procedural bar is not consistently applied to double jeopardy cases. The magistrate judge issued his findings and recommendation, that Hayes' Rule 60(b) motion should be construed under section 1 judicial error, and should be time barred by the 1 year limitation period set forth in Rule 60(c)(1). Hayes filed objections to the magistrate report and

recommendations on May 6, 2025. The district court entered its judgment on May 20, 2025, adopting the findings and recommendations of the magistrate's report.

Hayes timely filed his appeal on May 21, 2025 to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals issued its order and opinion affirming the District Courts opinion on October 30, 2025. Hayes timely requested En banc and Reconsideration that was denied on December 5, 2025.

### **REASONS FOR GRANTING THE WRIT**

**CERTIORARI IS APPROPRIATE TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS AND TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.**

This case involves a § 2254 petitioner who's original petition was erroneously dismissed by the district court and denied COA by the Fifth Circuit Court of Appeals as time barred. Both the district court and Fifth Circuit Court failed to determine when Hayes could have found the double jeopardy violation and misapplied 28 U.S.C. § 2244(d)(1)(D); the restart of the 1 year limitation period to the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence. In which he would have 1 year from the date he was made aware of the double jeopardy violation to timely file a § 2254 application. After the district court and Fifth Circuit Court denied review of his 2254 application he sought certiorari from this Court but was denied review.

Hayes filed his Rule 60(b) motion to address the misapplication of § 2244 (d)(1)(D) and the states erroneous procedural bar that is not consistently applied to double jeopardy cases. The district court made a determination that the Rule 60(b) motion should be construed under category (1) judicial error and not (6) the catchall provision, because it failed to consider the extraordinary circumstances the error created. By failing to consider the extraordinary circumstances and reviewing the Rule 60(b) motion under category (1) and not (6); the court stated that Hayes was barred from reopening his petition by the 1 year limitation period set forth in Rule 60(c)(1), effectively suspending Hayes access to the Great Writ.

Rule 60(b)(6) provides the final opportunity to vindicate Hayes' right to have his habeas claims heard on the merits. Without the Rule, his claims can never be addressed or determined, raising grave concerns of whether the statutory scheme, as interpreted in this case, suspends the Great Writ and violates due process of law.

**I. The suspension of the right to access the Great Writ is enough to satisfy the extraordinary circumstances requirement of Rule 60(b)(6), catchall provision which permits a court to reopen a judgment for "any other reason that justifies relief".**

*A. Injustice is a extraordinary circumstance that warrant relief under Rule 60(b)(6) any other reason clause.*

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005) this Court established that, relief under Rule 60(b)(6) requires a showing of "extraordinary circumstances." As a

number of these cases illustrate, Rule 60(b)(6) is commonly used to reopen a habeas corpus case that was terminated without a determination of the petitioner's claims, due to an erroneous interpretation of the procedural requirements of AEDPA, as revealed by a subsequent correction in the interpretation of that statute. This very circumstance is present here.

Article I, section 9 of the U.S. Constitution provides that, "The Privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." This Court has said repeatedly that "the writ of habeas corpus indisputably holds an honored position in our jurisprudence" and remains a bulwark against convictions that violate "fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

A procedural dismissal "of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. Given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the Writ should be both clear and fair." *Ross v. Artuz*, 150 F.3d 97, 100 (2<sup>nd</sup> Cir. 1998)(quoting *Lonchar v. Thomas*, 517 U.S. 314 (1996). To terminate a habeas corpus proceeding arbitrarily and erroneously, without determination of the petitioner's claims, then to deny jurisdiction to reconsider that error based on a clear intervening corrective decision

raises grave constitutional questions of due process of law, prejudice, and an extreme miscarriage of justice.

The Great Writ protections from an extreme miscarriage of justice alone brings the claim within Rule 60(b)(6) extraordinary circumstances requirement. In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, “the risk of injustice to the parties” and “the risk of undermining the public’s confidence in the judicial process”. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 108 S.Ct. 2194, L.E.d.2d 855 (1988). Black’s Law Dictionary defines injustice as the fault or error of the court. “Injustice may be done by the negligence, mistake or omission of the court itself.” *Silvey v. U.S.*, 7 Ct. Cl. 324 (1871).

The Fifth Circuit Court made a determination during the COA process that Hayes had not made any briefing on whether Rule 60(b)(6) is available only if Rules 60(b)(1) through (5) are inapplicable, when in fact he did. Hayes explained to the court that the error the district court made in misconstruing his Rule 60(b) motion under provision (1) error was wrong because it failed to consider the extraordinary circumstances caused by the district courts error in misapplying § 2244(d)(1)(D) to restart the one year limitation period.

In *Klapprott v. U.S.*, 335 U.S. 601 (1949), the court in New Jersey erred in issuing a default judgment against Klapprott causing his citizenship to be cancelled, while he was in jail in New York awaiting trial under the selective services conspiracy case. Klapprott filed his Rule 60 (b) motion and this Court reasoned that the motion should be construed under (1) neglect, but also made the determination that (6) also applies too, because the petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere neglect on his part. This Court further reasoned that, "under such circumstances petitioner's prayer for setting aside the default judgment should not be considered only under the excusable neglect provision, but also under the 'other reasons' clause of 60(b), to which the one year limitation period does not apply."

In *Buck v. Davis*, 137 S. Ct. 759, 777 (2017), Buck's counsel called, a clinical psychologist to testify regarding Buck's future dangerousness. Specifically to determine if an inmate would engage in future acts of violence. The psychologist agreed that being black increases a defendant's future dangerousness, and Buck was sentenced to death. Several years later after Buck exhausted his appeals the Texas Attorney General recognized the erroneous use of the psychologist's race-based testimony. Buck filed for Rule 60(b)(6) relief from judgment in his federal habeas case. The district court denied the motion, holding that Buck's case did not have extraordinary circumstances required under the rule. The Fifth Circuit also

denied Buck's motion for lack of "extraordinary circumstances justifying relief." This Court granted certiorari. Buck argued that the possibility that he may be executed under a death sentence tainted by racial prejudice causes a risk of injustice. Buck also asserted that such an endorsement would lead to a risk of injustice in other cases and in the rule of law, running the risk of undermining public confidence in the justice system. This Court concluded that Buck had demonstrated both ineffective assistance of counsel and an entitlement to relief under Rule 60(b)(6) because his race played a part in him being sentenced to death causing an extraordinary circumstance.

As shown in *Klapprott v. U.S.* and *Buck v. Davis*, a Rule 60(b) motion can be reviewed under both category 1-5 and 6 when extraordinary circumstances are present that causes injustice to the petitioner and undermine the public's faith in the judicial process. Hayes' Rule 60(b) motion does just that.

*B. AEDPA is structured to provide habeas applicants with at least one full and fair opportunity for federal collateral review.*

Under federal habeas law, "a prisoner is entitled to one free-standing collateral attack per judgment." *Magwood v. Patterson*, 561 U.S. 320, 332-333 (2010). Congress through its legislation gave federal courts vested power to review claims of state court constitutional violations through 28 U.S.C. § 2254

habeas corpus. They set in place specific guidelines into which a claimant has a set amount of time to request review of the state claim by the federal court. That time frame to make a claim is governed by 28 U.S.C. § 2244(d)(1)(A)-(D). When the district court and appeals court misconstrues or misapply the start time to properly file a habeas application in the federal court; they have effectively suspended access to the Great Writ leaving the petitioners with no effective remedy of law.

Unfortunately, the district court and Fifth Circuit underestimates the significance of the fact that Hayes was effectively shut out of federal court without any adjudication of the merits of his claim because of a procedural ruling that was later shown to be flatly prejudicial. As this Court has stressed, “dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner of the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996); see also *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (“The writ of habeas corpus plays a vital role in protecting constitutional rights”). When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed the State has experienced a windfall, while the state prisoner has been deprived contrary to congressional intent of his valued right to one full round of federal habeas review.

Significant questions arise about whether Mr. Hayes' right to the Great Writ has been suspended. Certainly he has been deprived of any ruling on the merits of his habeas petition. Mr. Hayes has never had a hearing in state or federal court; has never had an evidentiary hearing, in state or federal court; had his state habeas petition erroneously dismissed without consideration of the merits of his claims; and was denied appeal of that error by the state court and restrictions of AEDPA.

Rule 60(b)(6) is that remedy to correct those instances and moments of injustice when the courts make such a fatal error; that causes a petitioner to lose the ability to correct or challenge those errors. Habeas corpus is the most valued right in the justice system, and losing that right through erroneous procedural bars only leaves the Great Writ's image a figment of imagination, that holds no power.

**II. A state's procedural bar ruling that is not consistently applied to cases that are procedurally analogous effectively suspends the petitioner's right to access the Great Writ.**

*C. The states procedural bar is not consistently applied to double jeopardy cases.*

The Fifth Court of Appeals in Texas, procedural default ruling deprived Hayes of his Constitutional right of habeas corpus, because it failed to consider *Ex parte Milner*, "when a double jeopardy violation has occurred, a writ of habeas corpus is the proper venue through which to challenge the error, and *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 interest.”

The procedural default doctrine bars federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement. For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well-established at the time of the petitioner’s default. *Hanson v. Mahoney*, 433 F.3d 1107, 1113 (9<sup>th</sup> Cir. 2006). “Procedural default is excused if the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” See *Coleman v. Thompson*, 501 U.S. 722, S.Ct. 2546, 115 L.E.d2d 640 (1991).

In its December 21, 2022, opinion affirming the trial court’s denial of Hayes’ double jeopardy writ application, the Texas Fifth Court of Appeals held that due to Article 11.072 and *Ex parte Townsend*, that Hayes forfeited the double jeopardy claim because the claim could have been raised on direct appeal. However, Hayes argued that the double jeopardy violation was not known until September, 2020,

two years after his direct appeal ended. The *Gonzalez* 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 Texas 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. *Ex parte Denton*, 399 S.W.3d 540, 544-45 (Tex.Crim.App.2013).

*D.Habeas is the proper venue to remedy a double jeopardy violation in Texas.*

There is ample Texas case law that a double jeopardy claim can be raised for the first time on collateral attack. *In Ex parte Knipp*, 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 granted the applicant relief, due to the double jeopardy violation being apparent on the face of the record.

In *Ex parte Denton*, 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 the state court, the issue is whether Hayes' double jeopardy claim, that was not raised on direct appeal can survive a *Townsend* based procedural bar to relief on habeas review. As a general rule, before the Texas Court of Criminal Appeal 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 merits. As noted in *Ex parte Carmona*, "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.

The second prong of the *Gonzalez* exception, when enforcement of the usual rules of procedural default serves no legitimate states interest, was clarified in *Ex parte 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. *Ex parte 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.”) *Ex parte 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.”) *Ex parte 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.

Nevertheless, double jeopardy relief is still granted without controversy. *Ex parte Cook*, 630 S.W.3d 65(Tex. Crim. App. 2021). And a recent opinion reflects that eight judges agree that “as it stands, precedent supports the continued cognizability of free-standing double-jeopardy claims, and the State has not argued that we should re-evaluate that position.” *Ex parte Woods*, 664 S.W.3d 260, \*7, n.33 (Tex. Crim. App. 2022).

*E. The state court’s procedural bar contravenes this Court’s precedent in determining whether a procedural bar is consistently applied to cases.*

Texas courts do not apply *Ex parte Townsend* consistently to double jeopardy claims brought on post-conviction habeas petitions for relief. The Court held in *Ex parte Townsend*, that Townsend had forfeited his claim by failing to raise the issue on direct appeal. *Id.* at 81. In light of *Townsend*, the Court has repeatedly stated that, in general, constitutional claims may be procedurally forfeited by a lack of objection at trial or a failure to present the complaint on appeal. But, as the extensive number of cases cited above demonstrates, in the decades since *Townsend* was, decided, the Court has not applied strict procedural default rules to double jeopardy claims presented on habeas and has instead evaluated such claims on a case-by-case basis to determine whether they should be subject to procedural forfeiture or evaluated on their merits.

The 4<sup>th</sup> Circuit Court's discussion in deciding *Jones v. Sussex I State Prison*, 591 F.3d 707 (4<sup>th</sup> Cir. 2010), is directly on par with explaining when a states procedural bar is not regularly and consistently applied to cases that are procedurally analogous. "If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim." *Breard*, 134 F.3d at 619 (citing *Coleman v. Thompson*, 501 U.S. 722 111 S.Ct. 2546, 115 L.E.d. 2d 640 (1991)). "A state rule is adequate if it is firmly established and regularly or

consistently applied by the state court.” *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). In making this adequacy determination, we ask “whether the particular procedural bar is applied consistently to cases that are procedurally analogous—here, cases in which the particular claim raised could have been raised previously but was not.” *McCarver v. Lee*, 221 F.3d 583, 589 (4<sup>th</sup> Cir. 2000).

Because procedural default constitutes an affirmative defense in habeas cases, the burden rests with the state to prove the adequacy of the relied on procedural bar. *See Yates v. Angelone*, 166 F.3d 255, 261 (4<sup>th</sup> Cir. 1999) (“The issue of procedural default generally is an affirmative defense that the state must plead in order to press the defense thereafter.”) *see also Scott v. Schriro*, 567 F.3d 573, 580 (9<sup>th</sup> Cir. 2009) (placing the burden on the state to show adequacy); The habeas respondent bears the burden not only asserting that a default occurred, but also of persuading the court that the factual and legal prerequisites of a default are present. However, “the fact that a state procedural rule is adequate in general does not answer the question of whether the rule is adequate as applied in a particular case.” *Reid v. True*, 349 F.3d 788, 805 (4<sup>th</sup> Cir. 2003). The Fourth Circuit Court went on to explain, here the Commonwealth does not cite any case in which Virginia courts have applied *Slayton* to bar a double jeopardy claim on collateral review because



the Double Jeopardy Clause was not specifically mentioned as a ground for reversal on direct appeal.

In fact, as the district court correctly observed, the Supreme Court of Virginia “has indulged a more lenient pleading standard where the alleged error pertains to the incidental detention doctrine. “In at least two cases, the state Supreme Court on direct appeal despite the defendant’s failure to explicitly mention double jeopardy, federal law, or even *Brown* in his assignments of error ruled on the merits of the defendant’s *Brown* claim. These cases provide strong evidence that Virginia courts do not regularly or consistently require defendants, in order to receive on the merits review of *Brown* claims, to refer to the Constitution of the United States or other federal law. In the absence of any showing of consistency by the Commonwealth, these cases demonstrate *Slayton’s* inadequacy in this context. Because the Commonwealth has not met its burden, we cannot find Jones’s double jeopardy claim procedurally defaulted.”

Just as in Hayes’ case, the Texas courts do not apply *Ex parte Townsend* consistently to double jeopardy claims brought on post-conviction habeas petitions for relief. *Ex parte Townsend*, 137 S.W. 3d 79 (Tex.Crim.App. 2004) does not apply here because *Townsend* is a case that is only about statutory interpretation of Article 42.08 of the Texas Code of Criminal Procedures, which governs

cumulation sentences. The Townsend opinion contains neither the word “double” nor the word “jeopardy.”

These two erroneous procedural rulings in both the state court and federal courts suspended Hayes’ right to access the Great Writ creating an extraordinary circumstance that warrant relief under Fed. R. Civ. P. 60(b)(6), any other reason clause. This case also provides a perfect vehicle to define extraordinary circumstances warranting relief under Rule 60(b)(6) catchall provision.

This Court should grant Mr. Hayes’ Petition for Writ of Certiorari.

### CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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