

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KURNICUS HAYES

Petitioner

V.

PATRICK ARNOLD

Respondent

APPENDIX

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Appendix A Fifth Circuit Judgment denying panel rehearing and enbac.

Appendix B Fifth Circuit Court Judgment and opinion for COA.

Appendix C District Court order denying Rule 60(b) relief.

Appendix D Magistrate findings of facts and conclusions of law.

Appendix E U.S. Supreme Court's certiorari denied.

Appendix F Fifth Circuit Court rehearing denied.

Appendix G Fifth Circuit Court COA denied.

Appendix H District Court § 2254 application denied.

Appendix I Texas Criminal Court of Appeals petition for discretionary review denied.

Appendix J Fifth Court of Appeals Dallas, Texas rehearing denied.

Appendix K Fifth Court of Appeals Dallas, Texas habeas appeal denied.

Appendix L Trial court habeas denied.

Appendix M constitutional and statutory provisions.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 25-10641

United States Court of Appeals
Fifth Circuit
FILED
December 05, 2025

Lyle W. Cayce
Clerk

KURNICUS HAYES,

Petitioner—Appellant,

versus

ARNOLD PATRICK,

Respondent—Appellee.

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

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before JONES, SMITH, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R.40 I.O.P.), 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.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

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

December 05, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 25-10641 Hayes v. Patrick
USDC No. 3:23-CV-1546

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

Mr. Kurnicus Hayes

APPENDIX B

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 30, 2025

Lyle W. Cayce
Clerk

No. 25-10641

KURNICUS HAYES,

Petitioner—Appellant,

versus

ARNOLD PATRICK,

Respondent—Appellee.

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

ORDER:

After his first trial ended in a deadlocked jury, a second jury convicted Kurnicus Hayes for indecency with a child. Hayes filed an application under 28 U.S.C. § 2254 challenging that conviction. The district court dismissed the claim as untimely and his certificate of appealability (COA) was denied by this court. He now seeks a COA to appeal the district court's denial of his subsequent purported Federal Rule of Civil Procedure 60(b)(6) motion as untimely. While Hayes raised his Rule 60(b)(6) challenge asserting judicial error, the district court found the motion failed to satisfy the requirements of Rule 60(b)(6) and instead construed the motion under Rule 60(b)(1).

No. 25-10641

In his latest COA motion, Hayes purports to challenge the district court's construction of his motion as more appropriate under Rule 60(b)(1). He renews his Rule 60(b) claims, asserting that his double jeopardy claim in his § 2254 application was timely under 28 U.S.C. § 2244(d)(1)(D), that the state courts erred in determining that his state habeas application was procedurally barred, and that the state and federal courts' resulting failure to consider his claims on the merits suspended his constitutional right to "access to the Great Writ"—constituting an extraordinary circumstance warranting relief under Rule 60(b)(6). However, Hayes has not briefed any specific challenge to the district court's determinations that Rule 60(b)(6) is available only if Rules 60(b)(1) through (5) are inapplicable and that his constructive Rule 60(b)(1) motion was untimely under Federal Rule of Civil Procedure 60(c)(1). Accordingly, he has waived any challenge to these determinations. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Hayes has not shown that reasonable jurists could debate whether the district court abused its discretion in denying his Rule 60(b) motion. 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (explaining that demonstrating reasonable jurists could debate whether a petition can be resolved differently is part of how a Habeas petitioner makes a substantial showing of the denial of a constitutional right); *see also Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). As such, his COA motion is DENIED. His motions for leave to proceed in forma pauperis, to stay state court proceedings, and to expedite a ruling on the motion to stay are also DENIED.



STEPHEN A. HIGGINSON
United States Circuit Judge

APPENDIX C

United States District Court
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KURNICUS HAYES

v.

ARNOLD PATRICK

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CIVIL ACTION NO. 3:23-CV-1546-S-BN

**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 Court reviewed the proposed findings, conclusions, and recommendation for plain error. Finding none, the Court **ACCEPTS** the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. Accordingly, Petitioner Kurnicus Hayes's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) ("Motion") [ECF No. 14] is **DENIED**.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing Sections 2254 and 2255 Proceedings in the United States District Court, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability as to its denial of the Motion. 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 (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right"

and “debatable whether [this Court] was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).¹

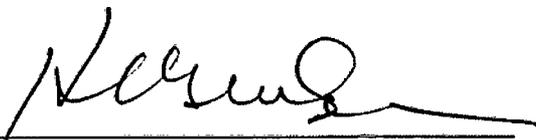
But, insofar as Petitioner does appeal the denial of the Motion, the Court prospectively **DENIES** Petitioner leave to appeal *in forma pauperis* (IFP) and **CERTIFIES**, under 28 U.S.C. § 1915(a)(3), and as fully explained in the applicable Findings, Conclusion, and Recommendation that any appeal would not be taken in good faith.

Petitioner may challenge this finding under *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a motion to proceed IFP on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order. *See, e.g., Dobbins v. Davis*, 764 F. App’x 433, 434 (5th Cir. 2019) (per curiam) (applying *Baugh* to state prisoner’s appeal in federal habeas action).

The Court further **DIRECTS** the Clerk of Court to, solely for statistical purposes, **REOPEN** and then **CLOSE** this case based on this order.

SO ORDERED.

SIGNED May 20, 2025.



UNITED STATES DISTRICT JUDGE

¹ Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings 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 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.

ARNOLD PATRICK

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CIVIL ACTION NO. 3:23-CV-1546-S-BN

ORDER

The Court entered judgment dismissing Petitioner Kurnicus Hayes's application for a writ of habeas corpus under 28 U.S.C. § 2254 with prejudice as time barred on September 26, 2023. *See* ECF Nos. 4, 7, 8. Hayes noticed an appeal. *See* ECF No. 9. His motion for a certificate of appealability was denied. *See* ECF No. 12. And his petition for writ of certiorari to the Supreme Court was also denied. *See* ECF No. 13. Hayes then filed a motion for relief under Federal Rule of Civil Procedure 60(b). *See* ECF No. 14.

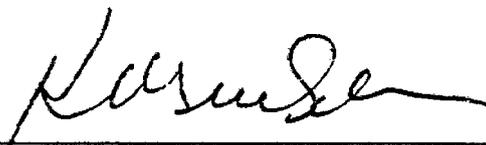
The Court denied the motion, denied a certificate of appealability, prospectively denied Hayes leave to appeal *in forma pauperis* ("IFP"), and certified, under 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith. *See* ECF Nos. 15, 17. Petitioner nevertheless noticed an appeal, *see* ECF No. 19, and filed a Motion to Proceed IFP ("Motion") [ECF No. 20].

The Motion is treated as seeking reconsideration of the previous order certifying that any appeal is not taken in good faith and prospectively denying leave to proceed IFP on appeal and is **DENIED**. The Court again **CERTIFIES**, under 28 U.S.C. § 1915(a)(3), and as explained in the Magistrate Judge's Findings, Conclusions, and Recommendation [ECF No. 15], that the appeal is not taken in good faith.

Petitioner may challenge this finding under *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a motion to proceed IFP on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order.

SO ORDERED.

SIGNED June 9, 2025.



UNITED STATES DISTRICT JUDGE

APPENDIX D

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

KURNICUS HAYES,

Petitioner,

V.

ARNOLD PATRICK,

Respondent.

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No. 3:23-cv-1546-S-BN

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

The Court entered judgment dismissing Petitioner Kurnicus Hayes's application for a writ of habeas corpus under 28 U.S.C. § 2254 with prejudice as time barred on September 26, 2023. *See* Dkt. Nos. 4, 7, 8. Hayes noticed an appeal. *See* Dkt. No. 9. His motion for a certificate of appealability was denied. *See* Dkt. No. 12. And his petition for writ of certiorari to the Supreme Court was also denied. *See* Dkt. No. 13. Hayes then filed a motion for relief under Federal Rule of Civil Procedure 60(b). *See* Dkt. No. 14.

The Rule 60(b) motion remains referred to the undersigned United States magistrate judge under 28 U.S.C. § 636(b) and a standing order of reference from presiding United States district judge. And the undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should deny the motion.

While Rule 60(b) provides for relief from a final judgment or order, "a Rule 60(b) motion for relief from a final judgment denying habeas relief counts as a second or successive habeas application ... so long as the motion 'attacks the federal court's

previous resolution of a claim on the merits.” *Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020) (cleaned up; quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)).

But “there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a ‘defect in the integrity of the federal habeas proceeding,’ or (2) the motion attacks a procedural ruling which precluded a merits determination” by, for example, arguing that a district court’s ruling as to exhaustion, procedural default, or limitations was in error. *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez*, 545 U.S. at 532).

Hayes’s motion attacks the Court’s limitations analysis and may therefore be properly considered under Rule 60(b). Hayes specifically raised Rule 60(b)(6) as the basis of his motion, and he asserts that the basis for the motion is judicial error. See Dkt. No. 14. But in *Kemp v. United States*, 596 U.S. 528 (2022), the Supreme Court held that “[t]he ordinary meaning of the term ‘mistake’ in Rule 60(b)(1) includes a judge’s legal errors.” *Id.* at 534.

Rule 60(b)(6) is an option that “is available only when Rules 60(b)(1) through (b)(5) are inapplicable,” *id.* at 533, so it does not apply to Hayes’s motion alleging legal error. Instead, Hayes’s motion should properly have been brought under Rule 60(b)(1).

And under Rule 60(c)(1), motions made under Rule 60(b)(1) must be made “no more than a year after the entry of the judgment or the date of the proceeding.” FED. R. CIV. P. 60(c)(1). The motion must be made “within one year from the date of the

judgment of the district court” and “is not tolled by appeal.” *Gulf Coast Bldg. & Supply Co. v. Int’l Bhd. of Elec. Workers, Local 480, AFL-CIO*, 460 F.2d 105, 108 (5th Cir. 1972). But Hayes did not file the present motion until more than six months after the expiration of the one-year limit for filing motions under Rule 60(b)(1), so his motion is untimely. *See Kemp*, 596 U.S. at 539.

Recommendation

The Court should deny Petitioner Kurnicus Hayes’s motion for relief based on judicial error under Federal Rule of Civil Procedure 60(b)(1) [Dkt. No. 14] as untimely, but should, solely for statistical purposes, reopen and then close this case based on any order accepting or adopting these findings, conclusions, and recommendation.

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: April 25, 2025

A handwritten signature in black ink, appearing to be 'D. Horan', written over a horizontal line.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

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

October 15, 2024

Ms. Karen S. Mitchell
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Earle Cabell Federal Building
Room 1452
Dallas, TX 75242

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

Dear Ms. Mitchell,

We have received the Supreme Court order denying certiorari. We previously sent you the judgment issued as mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Sean Hannan, Deputy Clerk

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

October 15, 2024

Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Kurnicus Hayes
v. Arnold Patrick
No. 24-5311
(Your No. 23-11069)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk



APPENDIX F

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 G

United States Court of Appeals
for the Fifth Circuit

No. 23-11069

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2024

Lyle W. Cayce
Clerk

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

No. 23-11069

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 H

United States District Court
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KURNICUS HAYES

v.

ARNOLD PATRICK

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CIVIL ACTION NO. 3:23-CV-1546-S-BN

**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

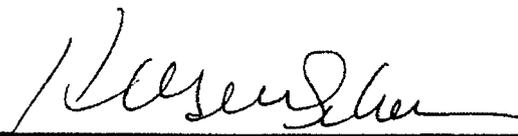
¹ Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(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.

APPENDIX I

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



4/26/2023

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

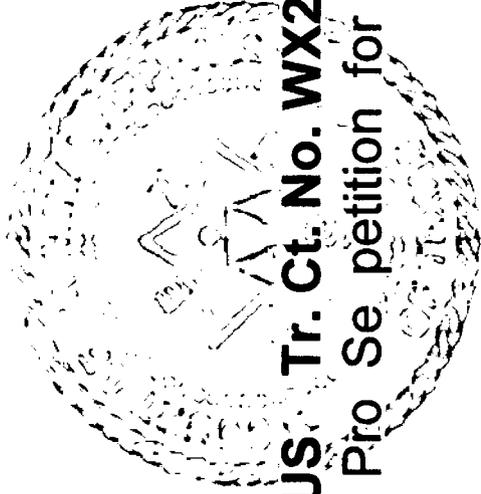
On this day, the Appellant's Pro Se petition for discretionary review has been refused

Deana Williamson, Clerk

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

FILE COPY

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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

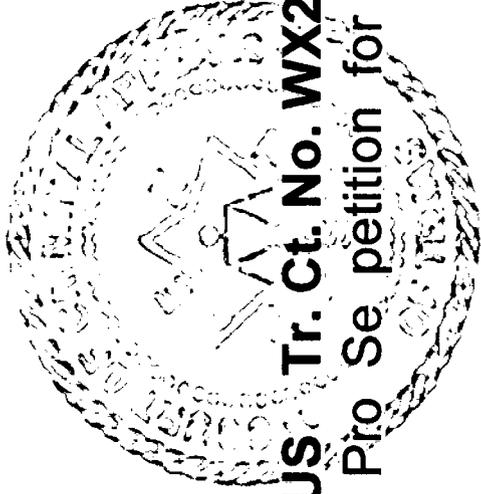
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

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

FILE COPY

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



4/26/2023

EX PARTE HAYES, KURNICUS Tr. Ct. No. **WX20-93394-T** COA No. **05-21-00203-CR**
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 ***

FILE COPY

**OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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 ***

FILE COPY

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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 *

FILE COPY

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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 J

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 K

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

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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 L

APPENDIX M

CONSTITUTIONAL AND STATUTORY PROVISIONS

Suspension Clause and Writ of Habeas Corpus

Article I, Section 9, Clause 2:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

Federal Rules of Civil Procedure 60(b) Grounds for relief from a final judgment, order or proceeding. On motion and just terms, the court may relieve a party or its legal representative from final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (6) any other reason that justifies relief.

28 U.S.C. § 2244(d)(1)(D): A 1 year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.