No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARK F. HONISH — PETITIONER
(Your Name)

vs.

LORIE DAVIS, DIR. TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARK F. HONISH
(Your Name)

TDCJ Estelle Unit, 264 FM 3478
(Address)

HUNTSVILLE, TX 77320
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. WAS HONISH'S FIRST STATE HABEAS WRIT "APPLICATION" PROPERLY FILED WITHIN THE MEANING OF 28 U.S.C. §2244(d)(2), AND REQUIRED TO BE TOLLED?

2. DID THE FIFTH CIRCUIT ERR, AND ABUSE ITS DISCRETION IN DENYING HONISH A CERTIFICATE OF APPEALABILITY?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[X] For cases from **federal courts**

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was January 5, 2018.

A timely petition for rehearing was filed under the mailbox rule. The clerk of court took no action. A letter of protest sent by petitioner resulted in the Fifth Circuit granting leave for an out of time petition for panel or en banc rehearing. Petition was then denied by the U.S. Court of Appeals on March 6, 2018, and a copy of the order denying panel or en banc rehearing appears at Appendix I.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or prosperity, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2244(d)(2)

The time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2253(c)(2)

A petitioner is entitled to a certificate of appealability if he makes a substantial showing of the denial of a constitutional right.

Article 11.07 Texas Code:

Appendix J

Rule 73.1 Texas Rules Appellate Procedure:

Appendix K

STATEMENT OF THE CASE

Honish was convicted on September 1, 2011 of first degree murder in the death of his brother David, in Denton County, Texas. Honish filed a direct appeal, which was denied. A subsequent petition for discretionary review was filed, and denied. Honish's conviction became final on December 10, 2013, starting the AEDPA limitations period.

Honish filed his first state habeas corpus application 34 days later, on January 13, 2014. Honish simultaneously filed a separate memorandum of law to accompany the application form. Unknown to Honish, or the TDCJ Estelle Unit Law Library Coordinator, the Court of Criminal Appeals of Texas had amended Rule 73.1 of Texas Rules of Appellate Procedure on December 11, 2013, limiting memorandums accompanying a state habeas application form to 50 pages. The amendment went into effect 21 days later on January 1, 2014. The amendment to Rule 73.1 of T.R.A.P. was not reflected in the state habeas application form issued to Honish by the prison law library. (See Ex. A) The prison law library's reference book, "West's 2014 Edition of Texas Statutes and Codes," also did not reflect the recent amendment to Rule 73.1 of T.R.A.P.

The C.C.A. of Texas dismissed Honish's first state habeas writ on March 26, 2014 for non-compliance of his memorandum with the recently imposed 50 page limitation. (See Ex. C) This first state writ was pending 73 days in the state courts, time which Honish believed was tolled as: (1) The clerk of the habeas court accepted and filed Honish's first state habeas application with the proper court; (2) The state, within the required time, filed its Proposed Findings of Fact and Conclusions of Law with the habeas court, recommending Honish's claims be denied; (See Ex. F) (3) The State's Proposed Findings and Conclusions made no objection to, or mention of, the excess pages of Honish's separate

memorandum; (4) The habeas court adopted the State's Findings and Conclusions as its own, (See Ex. G) and sent Honish's application to the C.C.A. for review. (5) Two separate state courts had accorded Honish's application 73 days of judicial review, constituting delivery and acceptance, and being properly filed.

Honish refiled his state habeas application 26 days later on April 21, 2014 after revising his memorandum to under 50 pages. The C.C.A. "**dismissed**" Honish's second writ in error on November 12, 2014 without written order. (See Ex. C) The C.C.A., mistakenly believing Honish's pending §2255 motion to be challenging a **state** conviction, dismissed his state petition in error. Honish had a pending §2255 motion pertaining to a separate federal firearms conviction, however, this fact was explained to the state courts in the habeas application, and Honish's Traverse to the state.

Honish would not have been required to file a third state habeas writ if not for the state C.C.A.'s error. Honish's second writ was in compliance in all respects, and should not have been dismissed. Though the 205 days the second writ was pending were tolled, the state's error in dismissing the writ cost Honish numerous untolled days as he struggled to understand why his writ was rejected, and what he had to change, as the C.C.A. gave no written order.

Honish filed his third state habeas application 282 days later on August 24, 2015, still within the one-year AEDPA limitation as calculated by Honish. The third state writ was denied by the C.C.A. on June 8, 2016 without written order. (See Ex. D) However, the dissenting judges ordered their opinion to be published. (See **Ex Parte Honish**,492 S.W. 3d 305(Tx.Cr.App.2016)(Ex. H) Honish received notification of the denial on June 13, 2016 via the prison mail system. One day later, on June 14, 2016, Honish filed his §2254 petition with the U.S. District Court, Eastern District of Texas.

On July 19, 2016, U.S. Magistrate Judge Don D. Bush issued his Report and Recommendation to deny Honish's §2254 petition as time-barred, and did not order the state to respond. (See Appdx. D) Honish filed his written objections, raising that the magistrate had failed to consider that Honish had "properly filed" two previous state writ applications prior to his third writ being denied, and that the magistrate's AEDPA time limitation calculations were incorrect because of that error.

Subsequently, on February 13, 2017, Magistrate Judge Kimberly Johnson issued an Order To Withdraw the previous magistrate's report and recommendation. (See Appdx. E) Simultaneously, the magistrate issued her own Report and Recommendation to deny Honish's §2254 petition as time-barred. (See Appdx F) Honish filed objections to the magistrate's report, and argued the magistrate's AEDPA time limitation calculations were in error, based on her incorrect factual belief that Honish's second state writ application had been "denied" by the Texas C.C.A., and that Honish's third state writ did not toll AEDPA time limitations because "the C.C.A. had already considered and ruled on Petitioner's second writ." (See Appdx. F-3) Honish also argued the 73 days his first state writ was pending must toll as his separate "application" was properly filed within the meaning of 28 U.S.C. §2244(d)(2). The magistrate did not allow for tolling or equitable tolling of the 73 days. (Appdx. F-3)

Honish argued the 73 days his first state writ was pending must toll for two reasons. (1) Honish's first state writ "application" was "properly filed" within the meaning of §2244(d)(2), as the plain language of the statute states a "properly filed application" will toll for the time it was pending before state courts. The word "application" in §2244(d)(2) does not encompass a separate and distinct memorandum of law accompanying the "application" form

itself. Rule 73.1 of T.R.A.P. states a memorandum is to be separate from the application itself, and that a memorandum is optional, (may be filed) not required. (See Appdx. K) Honish argues his application was properly filed as it was in compliance with all laws and rules for filing.

(2) Alternatively, Honish argued the 73 days the first writ was pending should be equitably tolled under the precedent of **Holland v. Florida**, 560 U.S. 631(2010). As Honish was provided an outdated application form by the prison law library that did not show the amendment to Rule 73.1, and the law library coordinator herself was unaware of the amendment to Rule 73.1, it was an external factor beyond Honish's control, constituting a state created impediment, and an extraordinary circumstance.

The District Court issued an Order of Dismissal on March 9, 2017, concluding that the findings and conclusions of the magistrate judge are correct. (See Appdx. B) Honish filed an application for a COA and for leave to proceed in forma pauperis with the district court. Both motions were denied in a Postjudgement Order issued April 13, 2017. (See Appdx. G)

Honish filed an application for a COA to the U.S. Fifth Circuit Court of Appeals. The Fifth Circuit denied Honish's application for a COA on January 5, 2018. (See Appdx. A) The Fifth Circuit held that "Reasonable jurists would not debate the district court's determination that Honish's §2254 petition was time barred and that he was not entitled to equitable tolling."

Honish filed a timely motion for rehearing with the Fifth Circuit. The Clerk responded in a letter that Honish had not filed his motion within 14 days, and that no further action would be taken. Honish replied in a letter to the court that his motion was timely under the mailbox rule. (See Ex. I) The court subsequently granted Honish leave to file a petition for panel or

en banc rehearing out of time, on February 16, 2018. (Appdx. H) On March 6, 2018, the Fifth Circuit denied Honish en banc reconsideration. (Appdx. I) This petition for certiorari ensues.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND THE U.S. SUPREME COURT ON WHAT CONSTITUTES A PROPERLY FILED APPLICATION UNDER 28 U.S.C. §2244(d)(2), AND WARRANTS THIS COURT'S ATTENTION.

The U.S. Supreme Court in **Artuz v. Bennett**,531 U.S. 4,8(2000), held that an application for state post conviction relief containing procedurally barred claims was "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe for example, the **form** of the document, the **time limits** upon its delivery, the **court** and **office** in which it must be lodged, and the requisite **filing fee**. Id.

Applying the **Artuz** standard for a "properly filed" application to Honish's first state writ application shows the "application" was properly filed, and the 73 days it was pending must toll. (1) Honish's application was delivered to, and accepted by the clerk of court, who then filed it with the proper habeas court. (2) Honish used the official state habeas application form issued to him by the prison law library, and filled it out in compliance with the laws and rules governing filings. (3) The first state writ was filed 34 days into the AEDPA limitations period, and Texas imposes no time limitation on the first state habeas writ. (4) There was no filing fee.

Honish's first state writ "application" was filed and accorded 73 days of judicial review. The State issued Findings and Conclusions of Law that were adopted by the habeas court. The state did not mention, or object to the

length of Honish's memorandum in its Findings and Conclusions, (Ex. F) constituting delivery and acceptance, and showing the application was properly filed. The C.C.A. only dismissed the writ for exceeding the 50 page limitation, after Honish filed for leave to exceed the 50 page limitation.

The district court held Honish's §2254 petition to be time barred, (Appdx. B) adopting the second magistrate's report as correct. The court did not toll, or equitably toll, the 73 days Honish's first state writ was pending and accorded judicial review, as it held the application was not "properly filed" because the memorandum exceeded 50 pages.

Honish argued his "application" for state habeas is distinct and separate from the accompanying memorandum, and that under the plain and unambiguous language of §2244(d)(2), the word "application" does not encompass a separate, and discretionary memorandum. Honish argues the district court and the Fifth Circuit have arbitrarily given the word "application" in §2244(d)(2) an overly broad meaning, which includes a separate, discretionary memorandum of law, and asks this Court's review.

Rule 73.1 of T.R.A.P. makes clear that the application form is required to be separate from an accompanying memorandum of law. Texas Art. 11.07 has no requirement that a memorandum of law be filed with the application, nor any language stating the application and memorandum are synonymous. (Appdx. J) Rule 73.1(a) states, "An 'application' filed under Article 11.07 must be on the form prescribed by the Court of Criminal Appeals." Rule 73.1(c) states in relevant part that, "legal citations "may" be made in a separate memorandum." Rule 73.1(d) states in relevant part that, "the applicant or petitioner "may" file a separate memorandum." (See Appdx. K) Rule 73.1 of T.R.A.P plainly states the memorandum is to be separate and distinct from the application itself,

and the word "may" shows a memorandum to be discretionary, not, required.

It is well settled under Texas and federal law that a statute's enacted language is what constitutes the law. In Connecticut National Bank v. Germain, 503 U.S. 249,254(1992), the Court stated, "We begin with the understanding that Congress says in a statute what it means and means in a statute what it says there." See also U.S. v. Ron Pair Enterprises,489 U.S. 235,241-242(1989).

The word "application" in the text of §2244(d)(2) has a plain and unambiguous meaning, as does the word "memorandum" in Rule 73.1(c)(d) of T.R.A.P. Interpreting the word "application" in §2244(d)(2) to encompass a separate memorandum accompanying the application is not compelled by the text of that provision, or the text of Rule 73.1, and would frustrate their purpose.

Honish's first, separate state writ application form was "properly filed" within the meaning of §2244(d)(2) on the basis of the application being in compliance with all procedural rules for the "application" itself, and its being accorded 73 days of judicial review by two state courts, constitutes both delivery and acceptance in accordance with rules and laws for filing.

The majority of appellate courts analyzing the meaning of "properly filed application" have interpreted the phrase to encompass all applications submitted in compliance with basic state filing requirements, such as rules governing the time and place of filing. See Lovasz v. Vaughn,134 F.3d 146,148-149 (CA3 1998). In the context of §2244(d)(2), inquiry into whether a state court motion has been properly filed is limited to whether the motion was filed in accordance with the state's procedural requirements, such as rules governing notice and time and place of filing. Pratt v. Greiner,306 F.3d 1190,1195-1196(CA2 2002). See also Sherwood v. Prelesnik,579 F.3d 581,586-587(CA6 2009); Lloyd v. Vannatta,296 F.3d 630,632(CA7 2002).

In a case similar to Honish's, Jackson v. Kelly,650 F.3d 477,491-492(CA4 2011), the government argued Jackson's oversized brief did not constitute a "properly filed application." Citing Artuz v. Bennett, the Fourth Circuit stated, "Jackson's submission of an oversized habeas brief and motion to permit the extra pages to the Supreme Court of Virginia constituted "delivery and acceptance...in compliance with the applicable laws and rules governing filing." The Fourth Circuit also stated that even if the government were correct that Jackson's oversized brief was not properly filed under these circumstances, equitable tolling would apply due to circumstances external to the party's own conduct, and that it would be unconscionable to enforce the limitation period as gross injustice would result. Id. at 491-492.

The Tenth Circuit in Habteselassie v. Novak,209 F.3d 1208,1212(CA10 2000), held that a state petition may have constituted a "properly filed application" for tolling purposes even if the superior court has dismissed it solely on the grounds of procedural default, and that it is error to dismiss a federal habeas petition on that ground. See also Cross v. Sisto,676 F.3d 1172,1176(CA9 2012).

The Fifth Circuit in Villegas v. Johnson,184 F.3d 467,470(CA5 1999), had to decide if a second successive state writ found to be an abuse of the writ by the Texas C.C.A. should be tolled under §2244(d)(2). The court held that even though the second petition was dismissed as successive, it was "properly filed" and thus tolled the limitation period. "We similarly refuse to find that a successive state application or one containing procedurally barred claims is per se improperly filed. Section 2244(d)(2) explicitly requires only that a state application be "properly filed." Id. at 470.

It is ironic that the Fifth Circuit tolled Villegas' application as "properly filed" when it was not in compliance with Art. 11.07(4)(a)(1) of Texas

Code on successive writs. Yet, the Fifth Circuit found Honish's claims for tolling or equitable tolling of his first writ to not be debatable among jurists of reason, when Honish has clearly shown his application was separate from the memorandum, and was properly filed in accordance with the rules for filing.

The Fifth Circuit in Larry v. Dretke,361 F.3d 890,893-894(CA5 2004), articulated the standard the court would use to determine if an application is not properly filed because of a procedural rule issue.

> "If the applicable procedural rule is an "absolute bar to filing" such that it provides "no exceptions" and the court need not examine "issues related to substance" to apply the procedural rule, then the habeas corpus application is not "properly filed." Therefore, an application is not "properly filed" if the state court blindly applies the proceduaral bar in all cases without ever having to consider any potential exception to its prohibition or examine any issues related to the substance of the application."

Applying this standard to the instant case, Honish exceeding the 50 page limitation in his memorandum was not an "absolute bar to filing" as Rule 73.1 (d) of T.R.A.P. allows for exceptions to exceed the 50 page limitation. See (Appdx. K) Under the Fifth Circuit's standard in Larry, Honish's application was "properly filed," and the 73 days must toll.

Honish's first "application" for state habeas was separate and distinct from his accompanying memorandum, and was properly filed in accordance with all of the basic state filing requirements cited in Artuz. The district court and the Fifth Circuit's interpretation that the separate memorandum is part of the "application" itself, and that its excess pages renders the application to not be "properly filed," is an arbitrary and overly broad interpretation of the term "application" in §2244(d)(2). This interpretation is not supported by the language of either T.R.A.P. Rule 73.1, or §2244(d)(2). The respective court's decision to not toll the 73 days Honish's first writ was pending

conflicts with the rulings of the other circuits, and this Court in Artuz.

The Fifth Circuit's arbitrary and overly broad interpretation of the term "application" in §2244(d)(2) will prejudice all future petitioner's, as the meaning of "properly filed application" is now whatever the Fifth Circuit wants it to be, or not to be, warranting this Court's intervention.

II. THE FIFTH CIRCUIT HAS MISAPPLIED THE STANDARD OF REVIEW FOR ISSUANCE OF A COA, AND HELD HONISH TO A HIGHER STANDARD THAN REQUIRED BY THIS COURT, WARRANTING THIS COURT'S ATTENTION.

When a district court denies a §2254 petition on procedural grounds without reaching the underlying constitutional claims, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid constitutional claim...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. 473,483-484(2000). This required only that Honish state a valid constitutional claim and show the correctness of the district court's procedural ruling to be debatable among jurists of reason, which he did. Honish was not required to overcome the procedural bar AND win the claim on the merits.

The Fifth Circuit, in ruling to deny Honish a COA, has misapplied this standard enunciated in Slack, and has disregarded the holdings of this Court in Barefoot v. Estelle,463 U.S. 880,893(1983) and Miller-El v. Cockrell,537 U.S. 322,338(2003).

28 U.S.C. §2253(c)(2) holds a petitioner is entitled to a COA if he makes a "substantial showing of the denial of a constitutional right." In Barefoot, the Court held this to mean an appellant need not show he would prevail on the merits, but must "demonstrate that the issues are debatable among jurists

of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.'"

The Barefoot standard does not require the petitioner to show that he is entitled to relief. Miller-El v. Cockrell,537 U.S. 322,338(2003). Therefore, doubts as to whether to issue a COA should be resolved in favor of the appellant. Fuller v. Johnson,114 F.3d 491,495(CA5 1997). Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of a case. Miller-El at 336. Recently, in Buck v. Davis,137 S.Ct. 759(2017), the Court reversed the Fifth Circuit for failing to issue a COA. Buck cites Miller-El at 327:

> "The COA inquiry we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown the jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."

This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Id. at 336. A Court of Appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merits of the claims, and ask "only if the District Court's decision was debatable." Id. at 327,348.

In addition to the time bar argument, Honish raised constitutional claims under the Fourth Amendment on search and seizure issues; Due Process violations under the Fifth and Fourteenth Amendments for prosecutorial misconduct, including the knowing use of perjured testimony, witness tampering, and failure to preserve material, exculpatory evidence; and Sixth Amendment claims of ineffective assistance of trial and appellate counsel.

As the district court did not rule on the merits of Honish's claims, the only questions before the Fifth Circuit was the debatability of Honish's claim his §2254 petition was not time barred, and the correctness of the district court's procedural ruling, not, the resolution of the time bar debate. In denying Honish a COA, the Fifth Circuit's Order stated only, "Reasonable jurists would not debate the district court's determination that Honish's §2254 petition was time barred and that he was not entitled to equitable tolling." (Appdx. A)

The Fifth Circuit's ruling is a subjective and arbitrary assessment that is not supported by the objective evidence and arguments provided by Honish. It is apparent the court has ruled not, on the debatability of Honish's claims as is required, but on a merits based analysis, without stating such, in conflict with **Buck** and **Miller-El**.

Honish has shown the correctness of the district court's procedural ruling to be debatable, by showing the court erred, and relied on factually incorrect information, in holding that Honish's second state habeas writ was "**denied**" by the Texas C.C.A., when in fact, the record conclusively shows this writ was "dismissed," not, "denied." (See Ex. C) Debatability as to the correctness of the district court's holding was again shown by Honish showing the district court's AEDPA time limitation calculations to be in error, based on the court's errant belief that, as the second writ was denied, the third state writ did not toll.

The difference between a writ being denied or dismissed is not just an issue of semantics. As Honish's second state writ was "dismissed," Honish was allowed to file a third state writ, without it being successive, or an abuse of the writ, as would be the case if the second writ had actaully been "denied."

The district court's confusion, and why it led to the court's incorrect AEDPA time calculations is apparent at Appendix F-3, where the magistrate incorrectly states, "Honish's third state writ does not toll the limitations deadline as the Texas C.C.A. had already considered and ruled on Honish's second writ."

The magistrate not only incorrectly held Honish's second state writ was already considered and ruled on, but also fails to toll the 288 days that the properly filed third state writ was pending. Honish raised this error to the district court in his Objections, and COA application. The error was again raised in the COA application to the Fifth Circuit, but was found not to show the correctness of the district court's procedural ruling to be debatable... Surely, this is debatable among jurists of reason.

By comparison, consider how the Third Court of Appeals ruled in **U.S. v. Thomas**,713 F.3d 165,175,fn.1(CA3 2013). The Third Circuit granted a COA to Thomas to appeal from the district court's order denying Thomas' motion for an extension of time. The Third Circuit cited **Miller-El** at 337, "granting a COA does not require the appeal will succeed." The court held that the controlling standard under **Miller-El** at 336 applied, and that Thomas had presented issues adequate to deserve encouragement to proceed further. The Third Circuit affirmed the district court's order denying the motion for an extension of time, yet, granted Thomas a COA to argue if equitable tolling should apply.

Contrast the Third Circuit's actions in **Thomas** to the Fifth Circuit's in the instant case. Honish has conclusively shown the district court denied his §2254 petition as time barred on the basis of its errors of fact, that the court knew to be in error, and when the court's AEDPA time calculations were also in error. Honish has provided properly supported, objective arguments for tolling, or equitable tolling of the 73 days his first state writ was

pending. Yet, the Fifth Circuit held Honish failed to show the correctness of the district court's ruling to be debatable, and denied a COA. It is readily apparent that the Fifth Circuit held Honish to a higher standard than required by this Court for issuance of a COA, and the Fifth Circuit will continue to deny COA's to other applicants meeting this Court's standard for a COA to issue, unless corrected by this Court.

Alternatively, Honish presented arguments for equitable tolling of the 73 days his first state writ was pending, under Holland v. Florida,130 S.Ct. 2549, 2560(2010).

The AEDPA statute of limitations is subject to equitable tolling in rare and exceptional circumstances. Holland at 2560. AEDPA seeks to eliminate delays in the federal habeas review process; AEDPA does not seek to end every possible delay at all costs. Id. at 2562. Rather, "the exercise of a court's equity powers must be made on a case by case basis," mindful "that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." Id. at 2563.

A litigant seeking equitable tolling bears the burden of establishing two elements. (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. Pace v. Diguglielmo,544 U.S. 408,418(2005). While equitable tolling is warranted in "rare and exceptional circumstances," courts do not apply its requirements mechanistically. Equity eschews mechanical rules. Holmberg v. Ambrecht,327 U.S. 392,396(1946).

Honish argued for equitable tolling as he was issued an out of date state habeas application form by the prison law library, that did not reflect the change to Rule 73.1 of T.R.A.P. limiting memorandums to 50 pages. The Estelle Unit Law Library Coordinator was unaware of the amendment to Rule 73.1 until

January 14, 2014, when the state habeas application form issued by the prison law library was revised to reflect the 50 page limitation. (See Ex. B) However, the revision did not occur until one day after Honish's first state habeas application had been received and filed by the habeas court. Honish, having already filed his application, did not use the law library for approximately 45 days, and was unaware of the amendment to Rule 73.1. Upon learning of the amendment to Rule 73.1, Honish immediately filed a motion for leave to exceed the 50 page limitation for memorandums, this motion was denied.

Honish argued he was prejudiced by a state created impediment when TDCJ issued an outdated application form to Honish, that failed to reflect the amendment to Rule 73.1. (Ex. A) This was an external factor, completely beyond Honish's control, and thus, suceptible to equitable intervention under **Holland** and **Phillips v. Donnelly**,216 F.3d 508,511(CA5 2000)(a delay of several months in receiving information concerning a change in law might qualify for equitable tolling.)

Honish provided the district court and the Fifth Circuit a signed affidavit from an Estelle Unit Law Library Clerk, Shawn Koester, attesting that the law library staff was unaware of the change to Rule 73.1 until January 14, 2014 when, the application form was revised. Koester also stated law library reference books did not show amended Rule 73.1 until the following year. (Ex. E)

As an inmate, Honish's only access to legal updates was through the prison law library. No amount of diligence could have discovered the amendment to Rule 73.1, especially when the law library coordinator, whose job was to make notification of these rule changes, was herself unaware of the amendment until January 14, 2014. Nonetheless, Honish has shown he acted as diligently as reasonably could have been expected under those circumstances.

Honish filed his first state writ 34 days into the 1-year AEDPA limitation period. Once Honish became aware of the amendment to Rule 73.1, he immediately filed a motion for leave to exceed the 50 page limitation with the C.C.A., where his writ was being reviewed. Upon dismissal of his first state writ, Honish filed his second writ 26 days later, well within the AEDPA limitation period, showing reasonable diligence.

A petitioner seeking equitable tolling of AEDPA's limitation period must demonstrate that he acted with reasonable diligence throughout the period he seeks to toll. If a party carries this burden, the statute of limitations is suspended for the duration of the extraordinary circumstances supporting tolling, and filing is timely if made before the total untolled time exceeds the limitations period without need for further inquiry into diligence. See Harper v. Ercole,648 F.3d 132,136-139(CA2 2011). Equitably tolling the 73 days Honish's first writ was pending results in 342 days of untolled time.

It is a miscarriage of justice that Honish and other Texas inmates are held to be at fault for failing to discover amended rules of procedure, when little or no effort was made by the state to provide inmates or prison law library staff adequate notice. Surely, these factors at the very least, show Honish's argument for equitable tolling to be debatable among jurists of reason.

Honish has shown the correctness of the district court's procedural ruling to be debatable among jurists of reason by presenting his AEDPA time limitation calculations to the district and Fifth Circuit courts. These calculations show his §2254 petition was timely filed if the disputed 73 days are tolled, or equitably tolled, and the 288 days the third writ was pending are tolled, as is required. The following AEDPA calculations were provided to the courts.

1. Honish's state conviction final, and AEDPA limitations period begins December 10, 2013.

2. Honish's first state writ "application" properly filed January 13, 2014. 34 of 365 day limitation period used. 331 days remain in AEDPA period.

3. First state writ dismissed March 26, 2014 for non-compliance of separate memorandum. Honish argues "application" was properly filed under §2244(d)(2) and that 73 days writ was pending and accorded judicial review must toll. 331 days still remain in AEDPA limitation period.

4. Honish files his second state writ application April 21, 2014. 26 of the 331 days in limitation period used. 305 days remain in limitation period.

5. Second state writ is "dismissed" in error, not, "denied," on November 12, 2014. The 205 days it was pending are tolled. 305 days still remain in AEDPA limitation period.

6. Third state writ filed August 24, 2015. 282 days of remaining 305 days in limitation period used. 23 days remain in limitation period.

7. Third state writ denied June 8, 2016. Honish notified June 13, 2016 via prison mail system.

8. Honish filed his §2254 petition June 14, 2016, one day after notification of state writ denial. 22 days remain in AEDPA limitation period, 17 days if June 8 decision date starts AEDPA clock. 342 days of untolled time.

Black's Law Dictionary, 10th Edition, defines "debatable" as:"of, relating to, or involving points that admit of contention or dispute; open to question or controversey; not settled." To receive a COA, Honish was only required to make a substantial showing of the denial of a constitutional right, and to show the correctness of the district court's procedural ruling to be debatable among jurists of reason.

Honish has met the controlling standard to be issued a COA by the Fifth Circuit, that this Court enunciated in **Slack**, **Miller-El**, **Buck**, and **Barefoot**. In denying a COA to Honish, the Fifth Circuit has abused its discretion and held Honish to a higher, arbitrary, and unknown standard of "debatability" than required by this Court, warranting its intervention and correction.

III. NEITHER AEDPA NOR ITS LEGISLATIVE HISTORY EXPLAINS OR DEFINES WHICH STATE FILINGS QUALIFY AS "PROPERLY FILED APPLICATIONS" UNDER §2244(d)(2), REQUIRING CLARIFICATION BY THIS COURT.

Neither AEDPA nor its legislative history explains which state filings qualify as "properly filed applications." The federal appellate courts generally hold that a "properly filed application" is one submitted according to the state's procedural requirements, in line with this Court's holding in Artuz. However, Honish has been unable to find a case in any of the circuits where an applicant was held to be time barred where his "application" was filed in accordance with state procedural requirements per Artuz, but not tolled because a separate, accompanying memorandum exceeded a page limitation.

In Lonchar v. Thomas,517 U.S. 314,324,330(1996), this Court stated:

> "Dismissal of a first federal 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," Id. at 324. "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." Id. at 330.

In this Court's recent ruling in Sessions v. Dimaya,(citation unknown) Justice Gorsuch stated that, "Vague laws invite arbitrary power, leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." Justice Gorsuch also stated that vague laws also threaten the Constitution's ordered liberty because they "risk allowing judges to assume legislative power."

These two cases show the importance this Court places on the clarity and fairness of rules and laws, especially when, as in the instant case, a petitioner with valid and substantial constitutional claims is being denied access to

the Great Writ for a procedural error, he had no way to know about, until after he had filed his writ. Honish is being denied access to the great Writ based on the district court and Fifth Circuit's arbitrary and erroneous interpretation of the terms "application" and "properly filed" in 28 U.S.C. §2244(d)(2).

Honish's first state writ "application" complied in all respects with the standards of this Court in Artuz, and its delivery and acceptance was in compliance with the applicable laws and rules governing filings. The other circuits hold "properly filed" to be the Artuz standard: the form of the document; time limits upon its delivery; the court and office in which it must be lodged.

Honish respectfully asks for certiorari to be granted to further clarify the terms "application" and "properly filed" in §2244(d)(2), and to determine specifically what state filings qualify as "properly filed application" under §2244(d)(2). Specifically, is a memorandum of law, required by state procedural rules to be separate from the habeas application itself, and discretionary in nature, to be considered synonymous with "application" under §2244(d)(2), or as separate and distinct from an application?

Respectfully submitted,

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CONCLUSION

For the above and foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Executed this 29th day of May, 2018.

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