No. 18-5135

IN THE

Supreme Court of the United States

MARK FRANCIS HONISH,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JOSEPH P. CORCORAN
Supervising Attorney for
Non-Capital Appeals,
Criminal Appeals Division

CRAIG W. COSPER
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
craig.cosper@oag.texas.gov

Counsel for Respondent

QUESTIONS PRESENTED

1. Should the Court grant certiorari to review whether Honish's state habeas application, which included a 150-page memorandum that violated the State's page limit rule, was properly filed under 28 U.S.C. § 2244(d)(2) even though he fails to show any actual conflict with another court's ruling?

2. Should the Court grant certiorari to review whether the Fifth Circuit Court of Appeals violated 28 U.S.C. § 2253(c) by ruling on the merits of his procedural claims when it denied a Certificate of Appealability, even where the Fifth Circuit properly stated the governing law and there is no showing the claims raised were debatable?

3. Should the Court grant certiorari to define what constitutes a properly filed application when the Court has already clarified that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" in *Artuz v. Bennett*, 531 U.S. 4, 8(2000)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF IN OPPOSITION

Respondent, Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division (the "Director") respectfully files this brief in opposition to Mark Francis Honish's petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

As the Director will demonstrate below, Honish wishes this Court to determine that a state habeas application is properly filed and entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) even where the application violated the state's procedural rule governing page limits because it was accompanied by a 150-page memorandum. Specifically, Honish seeks further clarification on what constitutes a properly filed state application under the federal limitations statute for habeas petitions challenging state court convictions, which provides in relevant part that, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

JURISDICTION

The judgment of the court of appeals denying Honish's motion for a certificate of appealability (COA) was entered on January 5, 2018. The court of appeals denied Honish's timely motion for rehearing on March 6, 2018. The petition for a writ of certiorari was filed on May 31, 2018. This Court has

jurisdiction under the provisions of 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 240 (1998).

STATEMENT OF THE CASE

I. Statement of Facts

A Texas jury convicted Honish of murder and sentenced him to fifty years in prison. The intermediate court of appeals for the Second District of Texas summarized the factual background of the case as follows:

> [Honish] and his brother David had been in the process of opening a large indoor gun range. [Honish] is a convicted felon. The brothers began feuding about the business, and David threatened to expose [Honish] for unlawfully possessing a firearm as a convicted felon.
>
> David was found dead in his truck on the side of a road at 11:30 p.m. on June 21, 2007. He had been shot twice in the left side of his head. Texas Ranger Tracy Murphree investigated the scene; he noticed blood spatter inside David's truck and on the outside driver's side. No gun was found at the scene. David's truck was running, the window was down, and he was buckled into his seatbelt. It had been raining that day, and there were fresh tire tracks in the mud alongside the driver's side of David's truck. Ranger Murphree concluded that the shooter was in another vehicle, probably a large SUV or truck based on the size of the tire tracks, and had pulled up alongside the driver's side of David's truck and shot him. Police found a folder with a copy of an email from David to [Honish] inside David's truck. In the email, dated June 6, 2007, fifteen days prior to the shooting, David said [Honish] was late paying "the next $1K installment" and threatened to expose [Honish] as a convicted felon.
>
> Ranger Murphree contacted David's ex-wife from the scene, and she confirmed the feud between [Honish] and David. [Honish] lived ten to twelve miles from the scene, and the tracks in the mud near David's car headed in the direction of [Honish's] home. Flower

Mound Police Sergeant Colin Sullivan went back to the police department to prepare an affidavit for a search warrant to search [Honish's] house and vehicle. Ranger Murphree and Denton County Sheriff's Department Investigator Larry Kish drove to [Honish's] house at around 4:30 a.m. and saw a Ford truck in [Honish's] driveway. The truck was registered to [Honish]. From the street, Ranger Murphree could see mud on the side of the truck. He and Investigator Kish walked into the driveway to get a better look at the truck; they shone a flashlight on the truck and could see fresh mud on the passenger side of the truck and that the tire tread pattern and width matched that of the tire tracks at the scene. The officers returned to their squad car and continued conducting surveillance; Ranger Murphree relayed to Sergeant Sullivan what they had seen on [Honish's] truck.

At around 6:00 a.m., the officers saw [Honish] get in his truck. Ranger Murphree stopped [Honish] a few houses down from his house, and when [Honish] opened the door to get out, Ranger Murphree saw a wipe mark in an S-pattern on the driver's side door; the truck was covered in road dust except the wipe-marked area. Ranger Murphree also saw a line of mud on the right passenger tire, indicating that it had been in "deep mud," and saw wet mud "sitting pretty loosely" on the running board, indicating that the truck had recently been in mud. Ranger Murphree told [Honish] that his brother had been shot and asked if [Honish] would move his truck back to his driveway because they were in the middle of the street. [Honish] complied. Once in front of the driveway, Ranger Murphree told [Honish] that he understood the brothers had been feuding. In response, [Honish] said that he and David were trying to open a gun range and that David was trying to blackmail [Honish] because he was a convicted felon; he then commented, "I guess you probably know that because of the paperwork in his vehicle."

[Honish], who was a pilot for Dean Foods, asked the officers if he should cancel a flight he was scheduled to make that day. Ranger Murphree said that would be a good idea. [Honish] then began making numerous phone calls for about thirty minutes. As the sun began to rise, Ranger Murphree noticed six drops of blood on the running board and fender well of [Honish's] truck, just below the wipe mark that he had noticed earlier. Ranger Murphree

relayed what he found on [Honish's] truck to Sergeant Sullivan for inclusion in the search warrant affidavit. Police arrived with a cast of the tire tracks from the murder scene; they compared the cast to the tires on [Honish's] truck and determined that the two matched. At one point, [Honish] licked his thumb and rubbed something on the truck near the driver's door handle. Ranger Murphree instructed him not to touch the truck.

While they were waiting on the search warrant, a sprinkling rain began so Investigator Kish collected samples of blood and dirt from [Honish's] truck in order to preserve evidence. Police then covered the door with plastic and a tarp and called for a wrecker. A search warrant issued shortly thereafter, around 8:15 a.m., and officers took guns and clothing from [Honish's] house.

At trial, evidence showed that [Honish] was on a flight the day of David's murder and arrived back in Dallas at 9:18 that night. Evidence also showed that the alarm at Advanced Gunworks, for which [Honish] had security codes to enter, had been disabled at 10:37 that night and that a Bushmaster AR–15 was missing from the business. The drive from the airport to Advanced Gunworks takes about thirty minutes and from the gun business to the murder scene takes about eight minutes. Evidence at trial also showed that [Honish] was giving David money and that he would meet David somewhere between Denton—where David lived—and Trophy Club—where [Honish] lived—to give David money.

Police found the AR–15 that had been taken from Advanced Gunworks in [Honish's] house. Police also found a .357 magnum handgun containing six rounds of .38 special ammunition in [Honish's] house. A .38–caliber handgun was found in a creek between the crime scene and [Honish's] home; the gun belonged to [Honish's] wife. The gun contained four live rounds and two spent rounds of .38 Special P Plus ammunition. A senior firearm and tool mark examiner testified to her opinion that the two bullets recovered from David's body were fired from the .38–caliber handgun found in the creek.

DNA swabs taken from [Honish's] truck tested positive for blood and matched David's DNA. Soil samples taken from

> [Honish's] truck matched the soil at the crime scene but did not match the soil around [Honish's] house.

Honish v. State, No. 02-11-00407-CR, 2013 WL 1759903, at **1–2 (Tex. App.—Fort Worth April 25, 2013, pet. ref'd) (mem. op., not designated for publication) (footnotes omitted).

As a result of the investigation, Honish also pleaded guilty in a separate federal criminal proceeding to being a felon in possession of a firearm and ammunition. *Honish v. United States*, No. 4:12CV521, 2015 WL 5837661, at **1, 3–4. (E.D. Tex. Sept. 30, 2015). The federal court sentenced him to twenty-four months' imprisonment and three years' supervised release. *Id.* at *1.

II. Course of Proceedings and Disposition Below

A jury found Honish guilty of murder in cause number F-2007-2063-E. SHCR-05 at 145–46.[1] On September 1, 2011, the trial court sentenced Honish to fifty years' imprisonment. SHCR-05 at 145–46.

The intermediate appellate court affirmed the trial court's judgment and denied motions for rehearing and rehearing en banc. *Honish*, 2013 WL 1759903. The Texas Court of Criminal Appeals (TCCA) refused Honish's

[1] "SHCR" refers to the state habeas clerk's records from case numbers WR-79,976-03 through WR-79,976-05, which were already obtained by the Court directly from the Texas Court of Criminal Appeals. *See* docket entry from Sep. 24, 2018. The number following "SHCR" refers to the corresponding application number. Unless otherwise noted, page numbers are from the main files marked "Writ Received," for each application cited.

petition for discretionary review on September 11, 2013. *See Honish v. State*, No. PD-642-13 (Tex. Crim. App. 2013).

Honish filed his first state habeas application challenging his conviction on January 13, 2014. SCHR-03 at 1. He attached a 150-page memorandum, plus over 200 pages of exhibits. SHCR-03 at 23–399. The TCCA dismissed the application for noncompliance with Rule 73.1 of the Texas Rules of Appellate Procedure on March 26, 2014. SHCR-03 at "Action Taken" page. Specifically, the court noted that his memorandum exceeded the 50-page limit without leave of the court. SHCR-05 at 56.

Honish filed a second state habeas application on April 21, 2014. SHCR-04 at 1. On November 12, 2014, the TCCA dismissed the application without written order. SHCR-04 at "Action Taken" page. Based on the trial court's reliance on *Ex parte Soffar*, 143 S.W.3d 804, 805 (Tex. Crim. App. 2004), in recommending dismissal, the TCCA apparently dismissed Honish's second habeas application because Honish also had a federal case pending in which he challenged the same search that led to both his state conviction for murder and his federal conviction for possession of a firearm by a felon. SHCR-04 at 4, 332, 335–36, 343; *Honish v. United States*, 2015 WL 5837661. Under the abstention doctrine—or two forums rule—the TCCA dismisses state habeas applications when the applicant also has a writ pending in federal court that relates to the same conviction or matter. *Ex parte Soffar*, 143 S.W.3d at 805.

On August 24, 2015, Honish filed his third state habeas application. SHCR-05 at 1. The TCCA denied the application without written order on June 8, 2016. SHCR-05 at "Action Taken" page.

Honish then filed a federal habeas petition on June 14, 2016. ROA.17, 145;[2] *Honish v. Director*, No. 4:16CV425, 2017 WL 939023, at *1 (E.D. Tex. Feb. 13, 2017) (Magistrate's Report). Without ordering the Director to respond, the magistrate judge recommended Honish's petition be dismissed as untimely under 28 U.S.C. § 2244(d). ROA.145–48; *Honish v. Director*, 2017 WL 939023, at **1–2. The magistrate determined that Honish was only entitled to statutory tolling for his second state habeas application because his first state application was improperly filed for failing to comply with the page limitation rule, while his third state application was filed after the deadline had already expired.[3] ROA.146; *Honish v. Director*, 2017 WL 939023, at *2. The district overruled Honish's objections, adopted the magistrate's recommendation, and denied the petition as untimely, finding that Honish's first state application

[2] "ROA" refers to the record on appeal from the Fifth Circuit, followed by the page numbers from the lower right-hand corner of the record that follow the period.

[3] The magistrate also found that Honish's third state habeas application did not statutorily toll the limitations period because the TCCA "had already considered and ruled on" his second application. ROA.146; *Honish v. Director*, 2017 WL 939023, at *2. The Director believes this alternative holding was incorrect because the second application was dismissed, and even if it had been considered and denied on the merits, a successive third application would still be entitled to statutory tolling according to Fifth Circuit precedent. *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999).

was improperly filed and that Honish failed to show any valid basis for equitable tolling. ROA.169–72; *Honish v. Director*, No. 4:16CV425, 2017 WL 931652 (E.D. Tex. March 9, 2017) (order adopting the Magistrate's Report).

The Fifth Circuit denied a COA, and denied a motion for reconsideration and rehearing en banc. *Honish v. Davis*, No. 17-40289 (5th Cir. Jan. 5, 2018); Pet. App. A1–2, I1–2. Until the Court requested a response to Honish's petition for certiorari, the Director was not involved with this case.

REASONS FOR DENYING THE WRIT

Honish's first state habeas application was improperly filed because it included a 150-page memorandum in violation of the State's procedural rule which clearly indicates that a habeas application accompanied by a memorandum that exceeds 50 pages may be dismissed without prior approval from the court. Honish fails to show that the lower courts' determination that he improperly filed his first state habeas application conflicts with any ruling from another circuit, or with any of the Court's prior decisions. To the contrary, the Tenth Circuit, in a factually indistinguishable case, reached the same result as this case, and other circuits have found that a petitioner's failure to comply with state page limitations means the state pleadings are improperly filed and not entitled to statutory tolling. Honish also fails to show the Fifth Circuit abused its discretion or misapplied the standard of review by denying a COA for the issues he raised, and any erroneous factual findings or

misapplication of a properly stated rule of law would not make this case worthy of further review. *See* Sup. Ct. R. 10. Consequently, there is simply no good reason for this Court to expend limited certiorari resources to review Honish's claims.

I. The Court should not grant certiorari to review whether Honish's first state habeas application was properly filed because he fails to prove any circuit split or conflict with this Court's prior decisions.

Honish asserts the lower courts' determination that his first state habeas application was improperly filed, and therefore not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2), conflicts with the Court's prior decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), as well as decisions from the other circuits.[4] *See* Cert. Pet. at 9–14. Because Honish's perceived conflicts are illusory and the lower courts' rulings for this appeal were in accordance with the general consensus that failure to comply with rules on page limitations renders a state

[4] If Honish were entitled to tolling for the pendency of his first state habeas application as he claims, then his third state habeas application would also be entitled to tolling because it would have been filed before the federal limitations period expired. *E.g.*, *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (state application filed after federal limitations period expired does not toll limitations period); Cert. Pet. at 21. Indeed, the 73 days his first application was pending, when combined with the 205 days of tolling for his second application that the district court already took into account, would have extended his deadline from July 3, 2015, to September 14, 2015. *See* ROA.146; *Honish v. Director*, 2017 WL 939023, at **1–2. Thus, Honish's third state application, which Honish agrees was filed on August 24, 2015, would have been timely and provided Honish an additional 290 days of statutory tolling, making his deadline June 30, 2016. Honish's federal petition, filed on June 14, 2016, would be timely as a result of this chain reaction.

pleading improperly filed, Honish fails to show any actual conflict worthy of the Court's attention.

First, Honish contends that his application was properly filed in compliance with *Artuz* for various reasons. In *Artuz*, the Court held that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8. Laws governing delivery time limits, filing locations, filing fees, and document form are such examples. *Id.* "[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Id.* at 9.

Despite Honish's distinction between an application and memorandum, Rule 73.1(d) of the Texas Rules of Appellate Procedure clearly provides that "[i]f the total number of pages, including those in the original and any additional memoranda, exceed the word or page limits, an *application* may be dismissed unless the convicting court for good cause shown grants leave to exceed the prescribed limits." Tex. R. App. P. 73.1(d) (emphasis added). Thus, state law recognizes this distinction, but will dismiss the applications that are accompanied by excessively long memorandums because of the burden such pleadings place on the court. *Ex parte Walton*, 422 S.W.3d 720, 721 (Tex. Crim. App. 2014) ("We have no wish to prevent any habeas applicant from presenting

claims to this Court, but given this volume of cases, it is clear that concise writing benefits both the applicant and the Court. We have therefore amended the Texas Rules of Appellate Procedure to set reasonable limits on the length of post-conviction habeas pleadings."). This is a condition to filing that does not involve consideration of the merits. Although Honish may have been unaware of the rule because it had changed days before he filed his first state habeas application, that application was still improperly filed under state law due to the noncompliant memorandum.

Further, the fact that the district clerk accepted the application and memorandum is not determinative. *See Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (indicating that clerk's failure to reject improperly filed application is not determinative); *Artuz*, 531 U.S. at 8–9 (noting that acceptance by the court means the pleading is deemed filed, but to be properly filed the acceptance must be in compliance with the applicable laws and rules). Additionally, in Texas, the TCCA retains the discretion to dismiss noncompliant habeas applications that were accepted by the clerk of the trial court. *Walton*, 422 S.W.3d at 721.

Honish's narrow focus on the application itself overlooks the fact that other typical filing rules expressly recognized in *Artuz* concern things beyond the four corners of the application, such as whether the filing fee is included or whether the application is timely. Indeed, in accordance with *Artuz*, enforcing

reasonable page limitations does not require looking to the merits of any given claim.

Second, contrary to his assertion, Honish does not establish any actual circuit split or conflict on this issue. His citation to *Jackson v. Kelly*, 650 F.3d 477, 491 (4th Cir. 2011), proves no conflict with the Fifth Circuit's ruling here because in *Jackson* the state court did not dismiss or reject the habeas application due to an oversized brief; instead the court directed the petitioner to file a corrected petition that the circuit court believed was an amendment to the initial filing. Therefore, the application remained pending. Furthermore, the Fourth Circuit found the § 2254 petition was also timely because the petitioner relied on an extension of time to file that was granted by the federal district court. *Id.*

The other cases Honish relies on to suggest a conflict are all distinguishable because they involve state courts looking at the merits of individual claims, contrary to guidance provided in *Artuz*. Indeed, his citation to *Habteselassie v. Novak*, involves procedural default of a claim used as an affirmative defense. 209 F.3d 1208, 1212–13 (10th Cir. 2000). Likewise, the citation to *Cross v. Sisto*, does not establish any conflict because that case involved the dismissal of a state habeas petition based on the fact the claims were not adequately pleaded and therefore without merit. 676 F.3d 1172, 1176–77 (9th Cir. 2012). *Villegas v. Johnson*, also finds successive state habeas

applications properly filed because review involves examining claims to some degree. *See Villegas*, 184 F.3d 467, 469–73 (5th Cir. 1999).

In contrast, several circuits that have specifically examined whether failure to comply with state-page-limit requirements renders a state pleading improperly filed have indicated such pleadings do not statutorily toll the limitations period. Indeed, the Tenth Circuit denied COA in a case just like Honish's, finding the petitioner was not entitled to statutory tolling because he filed a supporting brief with his application that exceeded the page limit set by the state. *Fitzpatrick v. Monday*, 549 F. App'x 734, 735, 737–38 (10th Cir. 2013). Courts that have considered page limitations in the context of statutory tolling generally have determined noncompliance equates to improper filing. *See Perkins v. Turner*, No. 17-3140, 2018 WL 3812811, at *2 (6th Cir. May 15, 2018) (declining to grant COA in a time bar case where motion that exceeded page limits did not toll limitations period); *Levering v. Dowling*, 721 F. App'x 783, 785, 787 (10th Cir. 2018) (finding that state application struck for failure to comply with page limits was not properly filed); *Price v. Sec'y Dep't of Corr.*, 489 F. App'x 354, 355–56 (11th Cir. 2012) (finding state motion that was dismissed for violating rule requiring "a brief statement of facts" because it was 250 pages was not properly filed). Honish fails to identify any case where a state application for postconviction relief that was actually dismissed for failure to comply with a page limit rule was considered properly filed.

Finally, Honish's claim, based on the Fifth Circuit's decision in *Larry v. Dretke*, 361 F.3d 890, 893–94 (5th Cir. 2004), that the existence of an exception to the page limit renders his application properly filed is not valid given this Court's later ruling in *Pace*, which found that the existence of exceptions to a limitations bar did not prevent a late application from being improperly filed. *Pace*, 544 U.S. at 413. The State's creation of limited exception to the page limit for supporting memorandums, in the form of prior trial court approval, does not alter his noncompliance with rule.

Ultimately, Honish has failed to show any compelling reason why the Court should expend its resources to decide whether his first state habeas application was properly filed when he failed to comply with state procedural rules on page limits. And even if Honish could establish some factual error or misapplication of a properly stated rule of law, nothing here warrants further review. *See* Sup. Ct. R. 10.

II. The Court should not grant certiorari on whether the Fifth Circuit properly applied § 2253(c) because it properly stated the applicable law and Honish failed to show any debatable issue.

Honish also argues the Fifth Circuit violated 28 U.S.C. § 2253(c) by ruling on the merits of his procedural claims without having granted a COA to obtain jurisdiction. Cert. Pet. at 14–21. Specifically, he asserts the court did not apply the proper standard of review because he believes the claims he raised were debatable. The Court should not grant certiorari on this claim to

correct the alleged misapplication of a properly stated rule of law, especially where Honish fails to prove the issue was debatable.

Here, the Fifth Circuit issued its ruling denying COA on Honish's claims pursuant to the appropriate standard of review. In its COA order the Fifth Circuit stated:

> Mark Francis Honish, Texas prisoner # 1745461, seeks a certificate of appealability (COA) to appeal the district court's dismissal, as time barred, of his 28 U.S.C. § 2254 petition challenging his conviction for murder. He contends that he was entitled to tolling of the limitations period during the time that his first and second state habeas applications were pending and that equitable tolling was warranted as he pursued habeas relief diligently and extraordinary circumstances were present.
>
> 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. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Honish has failed to show that reasonable jurists would debate the district court's procedural ruling, this court need not reach his substantive claims. *See id.* at 484–85. Accordingly, Honish's COA motion is DENIED. His motion for leave to proceed in forma pauperis on appeal also is DENIED.

Pet. App. A1–2. No additional analysis was pursued beyond the threshold for reviewing whether a COA should issue, and the Fifth Circuit correctly stated the law. Because the Fifth Circuit goes no further, the order denying COA is in compliance with this Court's decisions in *Buck v. Davis*, 137 S. Ct. 759, 773–75 (2017), and *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). Honish's proposed rule would discourage a circuit court from providing even a basic legal

rationale in support of a decision to deny COA on a procedural issue, which would, in turn, make it difficult for this Court to exercise its discretion to grant certiorari. Therefore, this Court should not grant certiorari because the Court does not generally grant a petition to correct the misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10.

To argue the issue was debatable, Honish focuses on the district court's view that his second state habeas application was denied on the merits, when it was actually dismissed. Cert Pet. at 16. But this distinction relates to the issue of exhaustion under 28 U.S.C. § 2254(b)–(c), not the statute of limitations; and, in any event, the district court *did* toll the limitations period for the second application. ROA.146; *Honish v. Director*, 2017 WL 939023, at *2. And to be sure, the district court's legal rationale regarding the non-availability of statutory tolling for Honish's third state habeas application was founded on a mistake of historic fact. Specifically, the district court did not statutorily toll the limitations deadline for the pendency of Hosnish's third state application because the court concluded, erroneously, the second application had been "denied" instead of "dismissed." However, this factual error does not change the district court's legal conclusion because Honish's third state habeas application could not toll because it was filed after the limitations period expired (absent tolling for the first application). ROA.146; *Honish v. Director*,

2017 WL 939023, at *2; *See Scott*, 227 F.3d at 263. Honish does not address this alternative explanation provided by the district court.

Honish also contends that he presented a debatable claim for equitable tolling due to dismissal of his first state habeas application when there was no way he could have learned about the recent rule change regarding page limits prior to filing. Cert. Pet. at 18–20. Equitable tolling is available when a petitioner shows "(1) that he diligently pursued his rights, and (2) an extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Here, Honish does not establish that the issue with his first state habeas application *prevented* him from timely filing because it occurred at the beginning to the limitations period and he was aware of it in plenty of time to file his federal petition within the limitations period. *See, e.g., King v. Hobbs*, 666 F.3d 1132, 1137 (8th Cir. 2012); *San Martin v. McNeil*, 633 F.3d 1257, 1270 (11th Cir. 2011) ("Most importantly, San Martin has not begun to explain how the two-week delay in receiving notice of the Supreme Court's denial of his certiorari petition ultimately caused the late filing of his federal habeas petition; or why he did not have ample time, even after the two-week delay, in which he could have presented a timely federal petition.); *Flores v. Quarterman*, 467 F.3d 484, 487 (5th Cir. 2006) (holding that even though petitioner was unable to file state habeas application for first two months due to a delay in the issuance of mandate, equitable tolling was not

warranted where he still had ten months to complete his petition.); *Valverde v. Stinson*, 224 F.3d 129, 134 (2nd Cir. 2000) ("The word 'prevent' requires the petitioner to demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances."); *Fisher v. Johnson*, 174 F.3d 710, 715–716 (5th Cir. 1999) (holding that although petitioner was unable to purse his claims for seventeen days because he was held in the psychiatric ward, he was not entitled to equitable tolling given that he still had six months remaining after being discharged).

Consequently, Honish failed to identify any debatable claim for equitable tolling here or in the Fifth Circuit. To the extent any additional basis for equitable tolling could be shown, this case would be a poor vehicle to address it because he failed to press any other argument in the district court or Fifth Circuit. Thus, any additional argument would now be forfeited. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017); *United States v. Jones*, 565 U.S. 400, 413 (2012).

III. The Court should not grant certiorari to define what constitutes a properly filed application when it has previously clarified the issue in a way that resolves the case.

Again, the Supreme Court has held that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8. Honish's first state habeas application was not properly filed because its delivery and acceptance was not in compliance with the rules governing filings. Rule 73.1(d) of Texas Rules of Appellate Procedure clearly indicates that an application may be dismissed if accompanied by a brief that exceeds the page limit absent approval by the trial court on a showing of good cause. Honish does not show any need for further clarification based on the circumstances of this case.

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JOSEPH P. CORCORAN
Supervising Attorney for

Non-Capital Appeals,
Criminal Appeals Division

s/ Craig W. Cosper
CRAIG W. COSPER
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
craig.cosper@oag.texas.gov

COUNSEL FOR RESPONDENT