IN THE SUPREME COURT OF THE UNITED STATES

MARK F. HONISH,
Petitioner

V.

LORIE DAVIS, DIR. TDCJ,
Respondent

§§§§§§§§§§

No. 18-5135

ON PETITION FOR WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

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Petitioner pro se

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PETITION FOR REHEARING

COMES NOW MARK F. HONISH, Petitioner pro se, and prays this Court grant Rehearing pursuant to Rule 44, and thereafter, grant a Writ of Certiorari to review the Fifth Circuit Court of Appeals denial of a COA. In support of this petition, Honish states the following.

I. STATEMENT OF FACTS

Honish was convicted of Murder on September 1, 2011 by a Texas Jury. A direct appeal was filed, and denied. Honish then filed a subsequent state habeas application, which was eventually denied. Honish filed a §2254 petition with the federal distrct court for the Eastern District of Texas. The district court denied Honish's §2254 petition as time barred, and denied a COA. Honish filed a notice of appeal and application for a COA with the Fifth Circuit Court of Appeals, which was also denied. The distrcit court held that as Honish's first state habeas application was dismissed for exceeding a page limitation on an accompanying document, his memorandum, the application was not "properly filed" under §2244(d)(2), and does not toll the 73 days it was pending, making his §2254 petition time barred. Honish filed a timely petition for certiorari, which was denied on January 14, 2019. Honish respectfully files this petition for rehearing.

II. REASONS MERITING REHEARING

In assessing this petition, Honish asks the Court to construe this petition liberally. Haines v. Kerner,404 U.S. 519(1972). Honish was unable to access the full text of Pratt v. Greiner,306 F.3d 1190,1195-96(CA2 2002) until after he had submitted his original petition for certiorari and response to the state. Upon full review of Pratt, Honish believes that the Second Circuit established a precedent that has a substantial effect on his case, and that it

constitutes a substantial ground not previously presented, per Rule 44.2 of this Court.

In Pratt, the Second Circuit found Pratt's state petition to be "properly filed" even though a supporting document, a fraudulent police report, was forged. The Court held that:

> "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 notice and time and place of filing."

Honish has consistently and continuously argued that his memorandum, required to be separate from his application itself, was not part of the application, but merely a supporting document, as was the case in Pratt. In support of this argument, Honish has shown that the plain language of Texas Rules of Appellate Procedure prove this argument. (1) Rule 73.1(a) states "An application filed under Article 11.07 must be on the form provided by the C.C.A." Thus, the actual form itself, constitutes the "application." (2) Both Rule 73.1(c) and (d) state a memorandum is required to be separate from the application itself. Thus, as in Pratt, it is only a supporting document. (3) As Article 11.07 of Texas Code does not require a memorandum to be filed with a state habeas application, it is only logical that any accompanying, separate memorandum, just as the forged report in Pratt, was merely a supporting document, not the application itself.

The State, in its Brief In Opposition, failed entirely to address the fact that T.R.A.P. 73.1 requires any accompanying memorandum to be separate from the application itself, and that a memorandum is not required in filing a Texas state writ.

Honish has consistently argued that it is well settled under Texas and federal law that a statute's enacted language is what constitutes the law. Beyond the Law itself, dictionary definitions inform the plain meaning of the statute. U.S. v. Radley,632 F.3d 177,182-183(CA5 2011). As such, these definitions from Black's Law Dictionary, 10th Edition, should inform the plain meaning of these words as used in §2244(d)(2) and T.R.A.P. 73.1.

APPLICATION: 1. a request or petition. 2. Motion

MEMORANDUM: A party's written statement of legal arguments presented to the court, usually in the form of a brief.

SEPARATE: Individual; Distinct; Particular; Disconnected

Additionally, West's guide to words and phrases states, "application means a formal application made to a court of competent jurisdiction, containing allegations of material facts."

There are no countervailing considerations involved in the instant case, the statute's plain language constitutes the law. However, the fact remains that neither AEDPA, nor its legislative history explains which state filings qualify as "properly filed" applications. See S. Rep. No. 104-179(1995), reprinted in 1996 U.S.C.C.A.N. 924; H.R. Conf. Rep. No. 104-518(1996), reprinted in 1996 U.S.C.C.A. n.944.

An estimated 20% of petitions filed by state prisoners in 2003 and 2004 were dismissed as time barred, and 4% of petitions filed by death row petitioners between 2000 and 2002. (Nancy J. King, et. al., 2007 Habeas Study) The numbers have most likely increased in the intervening years, making this issue crucial to thousands of applicants dealing with AEDPA's vague language in this matter, not just Honish. Was the intent of Congress for the word "application" in §2244(d)(2) to encompass all submissions to the habeas court,

including supporting documents not required by state rules and laws governing filings? Was the intent of Congress to leave this question to the discretion of 50 individual states and their district courts?

This Court must clarify the intent of Congress in order to fill in the gaps of its ruling in Artuz v. Bennett,531 U.S. 4,8(2000), which fails to address which state filings qualify as "properly filed" applications under AEDPA's §2244(d)(2).

Honish argues that he has shown a conflict among the Circuits as to what state filings constitute a "properly filed" application. Pratt shows supporting documents are not considered part of an application, essentially the same argument Honish has been making. The Third Circuit in Lovasz v. Vaughn,134 F.3d 146,148-149(CA3 1998) held procedural filing requirements mean the prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review. Under Lovasz, Honish's separate application was properly filed, after being filed and accorded 73 days of judicial review.

The Fourth Circuit in Jackson v. Kelly,650 F.3d 477,491-492(CA4 2011) held that "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 filings." The only difference between Jackson and Honish, is that Honish's motion to permit the extra pages in the memorandum was not filed simultaneously with his application, as TDCJ failed to timely notify inmates of a newly implemented page limitation. Once aware of the page limitation, Honish immediately filed a motion to exceed the page limitation, which was denied.

The fact that Honish filed a motion to exceed the page limitation as soon as he learned of the new limitation, must be considered as complying with the laws and rules governing filings. Just because the State denied his motion to exceed page limitations, does not render his application improperly filed.

III. CONCLUSION

Honish respectfully asks this Court to rehear his petition in light of the substantial effect on his case of the precedent by the Second Circuit in Pratt v. Greiner, 306 F.3d 1190(CA2 2002), which was not previously presented to this Court. Honish asks this Court to determine if under the plain language of T.R.A.P. 73.1(a)(c)(d), Honish's accompanying memorandum was a supporting document to the application itself as in Pratt, or part of the application itself for the purposes of §2244(d)(2). Vagueness in the laws allows the Courts and the Prosecutors to make up the laws as they go, violating the Fifth Amendment's due process rights, requiring this Court's intervention and guidance.

IV. PRAYER

For the foregoing reasons stated in this petition and previously, Honish prays this Court grant a rehearing of his petition for certiorari, and upon further review, grant certiorari.

Respectfully submitted,

Mark F. Honish

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CERTIFICATE OF GOOD FAITH

COMES NOW MARK F. HONISH, Petitioner pro se, and makes certification that his petition for rehearing is presented to this Court in good faith pursuant to Rule 44. Honish further states the following:

1. This Court entered its Order denying Honish a writ of certiorari on January 14, 2009. Honish believes that he presents this Court with adequate grounds to justify the granting of a rehearing in this case, and his petition is brought in good faith and not for delay.

2. Honish asks review of a substantial case precedent not previously presented, that has a substantial effect on his case. Pratt v. Greiner, 306 F.3d 1190,1195-1196(CA2 2002) established a precedent of a supporting document to not be cause, for a state habeas application to not be "properly filed" under AEDPA §2244(d)(2).

3. Honish believes that based upon the law of this Court and the facts of his case, he is entitled to relief which has been unjustly denied by the Fifth Circuit Court of Appeals.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of February, 2019.

Mark F. Honish
Mark F. Honish