NO. 19-8018

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY HUMPHREY,

Petitioner,

VS.

MARK INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, and ASHLEY MOODY, ATTORNEY GENERAL, STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PROVIDED TO SOUTHBAY CORRECTIONAL FACILITY ON 9/10/18 FOR MAILING

Timothy Humphrey #930490
SOUTH BAY CORRECTIONAL FACILITY
P.O. BOX 7171
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QUESTIONS PRESENTED

SYNOPSIS

On February 27, 2006, Humphrey was found guilty by a jury of first-degree murder. He was sentenced to life in prison on March 3, 2006. His conviction and sentence were affirmed on February 22, 2008. *See Humphrey v. State*, 979 So. 2d 283 (Fla. 2nd DCA 2008). He sought certiorari review to the United States Supreme Court and was denied on October 5, 2009. *See Humphrey v. Florida*, 558 US 838, 130 S Ct 87 (2009). The trial court later issued a new judgment awarding jail credit on March 16, 2010, and Humphrey's one-year AEDPA time limitations period began once the trial court issued this new judgment.

Eventually, Humphrey filed a collateral postconviction motion that was 185 pages in length. The Court granted him leave to file an amended motion that did not exceed fifty pages. He was able to reduce the motion to fifty-five pages in length.

At issue in this case, the federal district court determined that Humphrey's 55-page postconviction motion was not properly filed in the state court. The federal court concluded that this motion did not toll his federal clock. Thus, his § 2254 petition was time-barred. This leads to a compelling question.

QUESTION ONE

Whether an application for state postconviction relief is "properly filed" within the meaning of Antiterrorism and Effective Death Penalty Act provision (28 U.S.C. § 2244(d)(2)) where, through no fault of his own, the motion remained "pending" for longer than the AEDPA limitations period, during which time the state court searched for a reason to render the motion improperly filed, ultimately impeded the claims from being heard?[1]

[1] This Court answered a similar question in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000), but the instant certiorari petition will allow this Court to expound upon the definition of "properly filed."

INTERESTED PARTIES

There are no interested parties to the proceeding other than those named in the caption of the case.

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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 judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

[✓] For cases from state court:

The opinion of the of the highest state court to review the merits appears at Appendix __A__ to the petition and is

[✓] reported at *Humphrey v. Secretary, Department of Corrections*, 2018 U.S. App. LEXIS 12527 (11th Cir. May 11, 2018); or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____. A copy of that decision appears at Appendix ____

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeal on the following date:_____ and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____.

[✓] For cases from state court:

[✓] The date on which the highest state court decided my case decided my case was May 11, 2018. A copy of that decision appears at Appendix A

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was thereafter denied on the following date June 12, 2018 and a copy of the order denying rehearing appears at Appendix C

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

28 U.S.C. § 2244. Finality of determination

(d) (2) The 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.

Fla. R. Crim. P. 3.850. MOTION TO VACATE; SET ASIDE; OR CORRECT SENTENCE

(c) *Contents of Motion* The motion must be under oath stating that the defendant has read the motion or that it has been read to him or her, that the defendant understands its content, and that all of the facts stated therein are true and correct. The motion must include the certifications required by subdivision (n) of this rule and must also include an explanation of:

(1) the judgment or sentence under attack and the court that rendered the same;

(2) whether the judgment resulted from a plea or a trial;

(3) whether there was an appeal from the judgment or sentence and the disposition thereof;

(4) whether a previous postconviction motion has been filed, and if so, how many;

(5) if a previous motion or motions have been filed, the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;

(6) the nature of the relief sought; and

(7) a brief statement of the facts and other conditions relied on in support of the motion.

This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. If the defendant is filing a newly discovered evidence claim based on recanted trial testimony or on a newly discovered witness, the defendant shall include an affidavit from that person as an attachment to his or her motion. For all other newly discovered evidence claims, the defendant shall attach an affidavit from any person whose testimony is necessary to factually support the defendant's claim for relief. If the affidavit is not attached to the motion, the defendant shall provide an explanation why the required affidavit could not be obtained.

(d) *Form of Motion* Motions shall be typewritten or hand-written in legible printed lettering, in blue or black ink, double-spaced, with margins no less than 1 inch on white 8 1/2 by 11 inch paper. No motion, including any memorandum of law, shall exceed 50 pages without leave of the court upon a showing of good cause.

STATEMENT OF THE CASE AND FACTS

On February 27, 2006, Humphrey was found guilty by a jury of first-degree murder. He was sentenced to life in prison on March 3, 2006. His conviction and sentence were affirmed on February 22, 2008. *See Humphrey v. State*, 979 So. 2d 283 (Fla. 2nd DCA 2008). His request for discretionary review in the Florida Supreme Court was denied on December 2, 2008. He sought certiorari review to the United States Supreme Court and was denied on October 5, 2009. *See Humphrey v. Florida*, 558 US 838, 130 S Ct 87 (2009).

On December 23, 2009, Humphrey filed a Motion to Correct Illegal Sentence under Rule 3.800(a), Florida Rules of Criminal Procedure, in which he contended that he was entitled to an additional 119 days of jail credit. The motion was granted in part on March 16, 2010, and Humphrey was awarded an additional 13 days of jail credit.[2] Humphrey appealed, and on September 1, 2010, the appellate court affirmed. Humphrey's motion for rehearing was denied on November 15, 2010, and the appellate Mandate issued on December 2, 2010.

On November 30, 2010, Humphrey filed a petition alleging ineffective assistance of appellate counsel. He filed an amended petition on February 17, 2011. The amended petition was denied on April 12, 2011. His motion for rehearing was denied on August 17, 2011.

On November 30, 2010, Humphrey also filed a post-conviction motion under Rule 3.850, Fla. R. Crim. P., alleging ineffective assistance of trial counsel. Initially,

[2] This constituted a new judgment under *Magwood v. Patterson,* 561 US 320, 130 S Ct 2788 (2010), for purposes of *the one-year time limitations of AEDPA.*

the trial court dismissed the motion as untimely; in so doing, the court ignored all of the ongoing and time-tolling direct appeal entries in the Second District Court of Appeals. The trial court granted Humphrey's motion for rehearing, and the order was rescinded. However, the trial court ultimately struck the motion with leave to amend, determining that the 117 page motion was in violation of a new amendment to Rule 3.850, indicating that any motion under the rule must not exceed a page limit of fifty pages. The court afforded Humphrey leave of only thirty days to file an amended motion that did not exceed fifty pages.

However, during the roughly nine months the original motion sat pending in court, the trial court forestalled reviewing the merits of Humphrey's timely filed[3] 117-page original Rule 3.850 motion. The court had ample time, during the nine months, to review the motion. The court, through no fault of Humphrey, in what appears to be an effort to avoid reviewing the merits of his Rule 3.850's claims, applied the rule amendment *ex post facto*. Humphrey's initial Rule 3.850 motion was a 117-page, a very rough draft, which was completed and typed during the time of the court's forestalling and came to be 185-pages when complete (that version was never able to be submitted to the trial court). Humphrey was compelled to do the editing from the 185 page version. Further, this occurred even though this case

[3] It was timely filed with the Clerk by eleven (11) months and five (5) days before the expiration of the state's two-year time-limitation for defendants seeking postconviction relief for ineffective-assistance-of-trial-counsel.

met all of the criteria, according to substantive law, for an enlargement of the new 50-page count rule amendment to a Rule 3.850 motion.[4]

On December 19, 2011, Humphrey filed a fifty-five (55) page Amended Rule 3.850 motion. The amended motion was denied because it exceeded "the fifty-page benchmark." The trial court also dismissed Humphrey's Motion for Enlargement of Page Count, without ruling on the merits of his claims, which he also filed on December 19, 2011. Humphrey filed a motion for rehearing, which the court denied on February 10, 2012. The denial of the amended motion was affirmed on appeal on April 19, 2013. Rehearing was denied on August 15, 2013, and the appellate Mandate issued on September 11, 2013.

Humphrey relied on Florida's Fourth District Court of Appeal's holding in *McGill v. State*, 157 So.3d 433 (Fla. 4th DCA 2015):

> "The trial court should have reviewed the pages within the fifty-page limit as a motion that was "comprehensive, single, and sworn," and stricken the pages that followed. *See, e.g., Mancino v. State*, 10 So. 3d 1203, 1204 (Fla. 4th DCA2009) (noting that rejection of motion based on form is not the same as a *Spera* rejection). The court's failure to review the sufficiency of the motion amounted to an abuse of discretion. *See* Fla. R. Crim. P. 3.850(f)(2) (providing a court with discretion to deny with prejudice where an amended motion is still insufficient)."

Following the state court's rulings on Humphrey's post-conviction efforts, the United States District Court decided that the fifty-five page post-conviction motion was not "properly filed" in state court; thus, his AEDPA time was not tolled by the

[4] Humphrey's trial record consisted of 4,000+ pages, with some 100,000+ pages of discovery, for a seventeen (17) day death penalty trial, wherein ____ witnesses testified, after over 50 depositions were taken, and it involved and evolved from ten (10) additional cases prior to this case, all in part, established the standard *for cause* for enlargement.

motion. The federal district court ruled that substantive law in Florida, at the time of the trial court's dismissal of Humphrey's motion *for violation of the rule*, also allowed for dismissal of *excessively* long motions. Seemingly, this would be a separate issue then the ground for which the trial court dismissed the motion. Additionally, it appears that all of the cases used by the Assistant Attorney General, adopted by the Federal District Court in the order dismissing Humphrey's § 2254 petition, were factually distinguishable from Humphrey's case.

In reviewing Humphrey's § 2254 petition, the federal district court, adopting the Assistant Attorney General's position, failed to address the nine month delay that was caused by the state trial court, and not by Humphrey. The wasted time allowed the Florida Supreme Court to add the amendment to Rule 3.850, pertaining to the 50-page limit. However, the trial court had plenty of time to rule on his post-conviction motion, and instead delayed ruling on the motion. A proper review of the case docket, prior to the dismissal for un-timeliness, would have revealed that such a dismissal was unmerited as the motion was timely and "properly filed." The rule amendment did not occur until over seven months after Humphrey filed the motion and the state trial court therefore had enough time to rule on his motion had it more carefully reviewed the timeliness of the filing of his motion. Thereby, his post-conviction motion would have effectively tolled AEDPA's time-limitations period. The state trial court erred in the improper dismissal for un-timeliness, delaying the review so thoroughly that the fifty page amendment became an issue.

This certiorari petition follows.

REASONS FOR GRANTING THE PETITION

This case presents an issue that will clarify and re-address the definition of "properly filed" post-conviction motions for purposes of tolling the AEDPA one-year time limit. This case presents an opportunity for this Court to elucidate the issue that was delineated in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000).

Section 2244(d)(2) of Title 28 USC provides that "[t]he time during which a properly filed application for State postconviction 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." This case presents the question of whether an application for state postconviction relief containing 5 extra pages is "properly filed" within the meaning of this provision.

A

QUESTION ONE

Whether an application for state postconviction relief is "properly filed" within the meaning of Antiterrorism and Effective Death Penalty Act provision (28 U.S.C. § 2244(d)(2)) where, through no fault of his own, the motion remained "pending" for longer than the AEDPA limitations period, during which time the state court searched for a reason to render the motion improperly filed, which ultimately impeded the claims from being heard?

An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. *See, e.g., United States v Lombardo*, 241 US 73, 76, 60 L Ed 897, 36 S Ct 508 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed"); *Black's Law Dictionary* 642 (7th ed. 1999) (defining "file"

as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). And an application is "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,[5] the court and office in which it must be lodged, and the requisite filing fee. *See, e.g., Habteselassie v. Novak*, 209 F.3d 1208, 1210-1211 (10th Cir. 2000); 199 F.3d, at 121 (case below); *Villegas v. Johnson*, 184 F.3d 467, 469-470 (5th Cir. 1999); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3rd Cir. 1998). In some jurisdictions the filing requirements also include, for example, preconditions imposed on particular abusive filers, *Martin v District of Columbia Court of Appeals*, 506 US 1, 121 L Ed 2d 305, 113 S Ct 397 (1992) (per curiam), or on all filers generally, cf. 28 USC § 2253(c) (conditioning the taking of an appeal on the issuance of a "certificate of appealability").

If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee, it will be pending, but not properly filed. Or, in Humphrey's case, the state court disingenuously delayed the post-conviction proceedings to find a reason to dismiss the motion on the format, ultimately rendering the post-conviction motion pending for many months, but not properly filed for purposes of AEDPA. However, existing case law suggests that the court was incorrect in the procedural stance taken.

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[5] This Court expressed no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. *See, e.g., Smith v Ward*, 209 F.3d 383, 385 (5th Cir. 2000).

The alleged failure of Humphrey's application to comply with Rule 3.850(c)(6), Fla. R. Crim. P, does not render it "[im]properly filed" for purposes of § 2244(d)(2). Humphrey's filing in the state court was accepted by the Clerk and filed in the Court, only to be *dismissed* later due to *five extra pages* past the 50-page threshold. A state appellate court determined in *McGill, supra,* that the trial court should have ruled *only* on the first 50 pages of the state application for collateral review. Humphrey contends that this motion still tolls section 2244(d)(2), regardless of the page limit. Thus, his § 2254 federal habeas petition was timely.

B

Importance of the Question Presented

This case presents a fundamental question of the interpretation of this Court's decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). The question presented is of great public importance because it affects the review of § 2254 petitions in federal courts in all 50 states. In view of the large amount of litigation over prisoner's § 2254 federal habeas proceedings, guidance on the question is also of great public importance to prisoners, because the failure for a 55-page state post-conviction motion to toll state prisoners' federal clock affects their abilities to receive fair decisions in federal habeas proceedings that ultimately will deprive § 2254 petitioners from having the merits of their constitutional claims heard in any federal court.

The issue's importance is enhanced by the fact that the lower courts have seriously misinterpreted *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). Guidance from this Court is needed to reiterate the point made in *Artuz*

to clarify whether the length of the state collateral application affects whether the motion is "properly filed" for purposes of tolling.

The limitations period is tolled, however, for the time a properly filed application for post-conviction relief is pending in the state court. *See* 28 U.S.C. § 2244(d)(2). To be "properly filed," the application must be authorized by, and in compliance with, state law. *See Artuz*; *see also Allen v. Siebert*, 552 U.S. 3, 128 S. Ct. 2, 169 L. Ed. 2d 329 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) (holding that, regardless of whether there are exceptions to a state's timeliness bar, time limits for filing a state post-conviction petition are filing conditions and the failure to comply with those time limits precludes a finding that the state petition is properly filed). A state court application for post-conviction relief is "pending" during all the time the petitioner is attempting, through proper use of state court procedures, to present his claims. *See Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).

Further, "[a]n application that is untimely under state law is not 'properly filed' for purposes of tolling AEDPAs limitations period." *Gorby v. McNeil*, 530 F.3d 1363, 1366 (11th Cir. 2008)(citation omitted), *cert. den'd*, 556 U.S. 1109, 129 S. Ct. 1592, 173 L. Ed. 2d 684 (2009). A motion filed past the deadline for filing a federal habeas petition cannot toll the limitations period. *See Hutchinson v. Florida*, 677 F.3d 1097, 1098 (11th Cir. 2012)("In order for...§ 2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral petition before the one-year period

for filing his federal habeas petition has run."); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000).

Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed. For example, no statutory tolling is allowed for the period of time between finality of an appeal and the filing of an application for post-conviction or other collateral review in state court, because no state court application is "pending" during that time. *Nino*, 183 F.3d at 1006-1007. Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of a federal petition. *Id.* at 1007

A federal habeas petitioner can file a § 2254 petition once he completes a full round of state collateral review. However, in Humphrey's case, he would have been forced, along with many other state prisoners in a similar position, to file a protective § 2254 to ensure that his habeas petition is timely filed and then he may request to hold the § 2254 in abeyance while he is seeking state collateral relief. The problem this presents is that state prisoners, who cannot distinguish between a "properly filed" and an "[im]properly filed" collateral application, may not file a protective § 2254. This would flood the federal courts with protective § 2254 filings, overloading federal court dockets with many unnecessary, often mooted federal petitions.

Thus, the state trial court misinterpreted *Artuz* failing to distinguish between "properly filed" and "[im]properly filed" state post-conviction motions, for purposes of statutory tolling under § 2244 (d)(2). Humphrey asserts that this

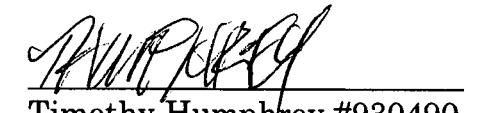
confusion led him to believe that his 55-page state court filing was proper, because the clerk accepted it, and filed it on the docket. Then, after many, many months, the state court dismissed it and he appealed the dismissal. Humphrey honestly believed that the federal habeas time-limitation was tolled during that period. The state courts dilatory tactics, in reviewing his state collateral motion, caused his § 2244(d)(2) time-limitation to expire.

Ultimately, the federal court prevented him from ever having the merits of his constitutional claims considered due to the perplexity of his state filing.

CONCLUSION

This Court should grant this petition for writ of certiorari. Humphrey hopes that this Honorable Court could understand the impact that the federal district court's misconstruction of the definition of "properly filed" has caused him, and may very well, cause many other state prisoners under similar circumstances to be deprived of one full round of federal review of collateral claims. The predicament that he is in is crucial. This may very well be Humphrey's final cry for justice.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15351-F

TIMOTHY HUMPHREY,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE COURT:

Timothy Humphrey has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 11, 2018, order denying his motion for a certificate of appealability and leave to proceed *in forma pauperis*. Upon review, Humphrey's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.