No._____

In The

Supreme Court of the United States

OCTOBER TERM 2020

JUSTIN MERTIS BARBER,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

WILLIAM MALLORY KENT
Florida Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com Email
Counsel for Petitioner Barber

QUESTION PRESENTED

I. **WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DENYING BARBER'S MOTION FOR LEAVE TO FILE A MOTION FOR A CERTIFICATE OF APPEALABILITY FINDING THAT BARBER'S UNDERLYING PETITION FOR HABEAS CORPUS WAS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d)?**

LIST OF PARTIES

Justin Mertis Barber, Petitioner

Attorney General of the State of Florida, Respondent

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The Petitioner, Justin Mertis Barber, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The decision and order of the Eleventh Circuit as well as the underlying district court order are included in the Appendix, *infra*.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law.

FEDERAL STATUTE INVOLVED

28 U.S.C. § 2244 - Finality of Determination

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A)the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B)the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C)the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to

cases on collateral review; or

(D)the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(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.

PROCEDURAL HISTORY AND FACTS PERTINENT TO THIS PETITION

Barber filed his initial 3.850 in October 2010 based on claims of ineffective assistance of counsel on October 2, 2010. The state circuit court entered an order denying the initial 3.850 motion April 18, 2013 and an order denying Barber's motion for rehearing on May 10, 2013. At the time of the filing and circuit court litigation of the initial 3.850 motion, Barber had no knowledge of any juror misconduct.

Barber's undersigned counsel, William Kent, was contacted by Timothy Faircloth December 14, 2012 and in a telephone conversation initiated by Faircloth that day, counsel Kent for the first time was informed in general terms about the juror misconduct of juror Steder, Juror 161. The exact date of counsel learning about the juror misconduct was memorialized in an email sent by counsel for Barber, Kent, to Barber's trial counsel, Robert Willis and Lee Hutton, the very same day that

Faircloth contacted Kent. At that point in time the appeal of the initial 3.850 motion was pending, the notice of appeal in that matter having been filed within thirty days of the order denying rehearing.

Therefore at that point the state lower tribunal lacked jurisdiction to consider any newly discovered evidence claim - Barber could not file a second 3.850 motion while the appeal of his first 3.850 motion was pending.

After investigating the claim, Barber filed with the Florida Fifth District Court of Appeal October 1, 2013 a motion to stay the appeal and relinquish jurisdiction to pursue a juror interview and litigate the juror claim at the lower tribunal. The Florida Fifth District Court of Appeal denied Barber's motion to stay and relinquish jurisdiction by order entered October 15, 2013. The first 3.850 appeal then proceeded to conclusion (Fifth DCA Appeal Number 5D13-2093) by entry of the mandate September 23, 2014.

To preserve his federal habeas time limit, Barber promptly filed on August 13, 2014 the second 3.850 motion (the juror misconduct motion) after entry of the *per curiam affirmed* decision of the Fifth District Court of Appeal affirming the denial of the first 3.850 motion, but prior to entry of the mandate on that appeal. Thus, Barber had a post-conviction motion pending, or an appeal of a post-conviction motion pending, non-stop from the date of the timely filing of his first

3.850 motion. The trial court entered a written order denying the second 3.850 motion and Barber timely appealed the denial to the Fifth District Court of Appeal. The District Court of Appeal per curiam affirmed the trial court's denial on February 16, 2016. The mandate was issued April 6, 2016. Meanwhile Barber filed his federal habeas petition on March 1, 2016.

The district court held that Barber's petition was untimely unless Barber could establish that his August 13, 2014 second Rule 3.850 motion tolled the limitations period until Barber filed his federal petition. [Order Denying 2254 petition, pgs. 13-14]. The district court held that Barber's second 3.850 motion did not toll the AEDPA's tolling provision based on the federal district court's own interpretation of Florida law as it pertains to the exercise of due diligence with regard to the new evidence. [*Id.* at 19]. The district court held that, because of his determination that Barber's second 3.850 was untimely under Florida law, "his motion was not properly filed pursuant to AEDPA's tolling provision, and, therefore, his Petition is time-barred." [*Id.*].

Barber timely filed a motion for leave to file a motion requesting a certificate of appealability at the Eleventh Circuit Court of Appeals and received an order denying his motion on June 16, 2020 which stated only:

To merit a COA, Barber must show that reasonable jurists would find

> debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Barber's petition is barred by the one-year statute of limitations, 28 U.S.C. § 2244(d), and he has not shown that he is entitled to equitable tolling, he has failed to satisfy the second prong of Slack's test. The motion for a COA is DENIED.

[Order Denying Motion for Leave to File a Motion for a Certificate of Appealability, pg. 2]. Barber timely moved for reconsideration of the order which was denied on July 20, 2020.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DENYING BARBER'S MOTION FOR LEAVE TO FILE A MOTION FOR A CERTIFICATE OF APPEALABILITY FINDING THAT BARBER'S UNDERLYING PETITION FOR HABEAS CORPUS WAS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d)?

The district court denied Barber's 2254 petition as untimely based on its finding that under Florida law, Barber's second 3.850 motion alleging newly discovered evidence did not toll Barber's time for filing his habeas petition under 28 U.S.C. § 2244 because, according to the federal district court judge, Barber did not use due diligence in presenting the claim to the state court and therefore Barber's second 3.850 motion was not properly filed for purposes of § 2244 tolling. The Eleventh Circuit Court of Appeals affirmed this result when it denied Barber's

motion for leave to request certificate of appealability.

This holding directly conflicts with this Court's decision in *Artuz v Bennett*, 531 U.S. 4 (2000). In *Artuz* this Court addressed the question "whether an application for state postconviction relief containing claims that are procedurally barred is 'properly filed' within the meaning of [28 U.S.C. § 2244]." *Artuz* at 5. This Court held as follows:

> Petitioner contends here, as he did below, that an application for state postconviction or other collateral review is not "properly filed" for purposes of § 2244(d)(2) unless it complies with all mandatory state-law procedural requirements that would bar review of the merits of the application. We disagree.
>
> 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 U.S. 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 "to 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, 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 (CA10 2000); 199 F.3d at 121(case below); *Villegas v. Johnson*, 184 F.3d 467, 469-470 (CA5 1999); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (CA3 1998). In some jurisdictions the filing requirements also include, for example, preconditions imposed on particular abusive filers, *cf. Martin v. District of Columbia Court of Appeals*, 506 U.S. 1, 121 L. Ed.

2d 305, 113 S. Ct. 397 (1992) (per curiam), or on all filers generally, cf. 28 U.S.C. § 2253(c) (1994 ed., Supp. IV) (conditioning the taking of an appeal on the issuance of a "certificate of appealability"). But in common usage, the 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.

Petitioner contends that such an interpretation of the statutory phrase renders the word "properly," and possibly both words ("properly filed"), surplusage, since if the provision omitted those words, and tolled simply for "the time during which an . . . application for State post-conviction [relief] is pending," it would necessarily condition tolling on compliance with filing requirements of the sort described above. That is not so. 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.

Petitioner's interpretation is flawed for a more fundamental reason. By construing "properly filed application" to mean "application raising claims that are not mandatorily procedurally barred," petitioner elides the difference between an "application" and a "claim." Only individual claims, and not the application containing those claims, can be procedurally defaulted under state law pursuant to our holdings in *Coleman v. Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), and *Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), which establish the sort of procedural bar on which petitioner relies. *Compare* HN6 § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed") with HN7 § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the

> applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application" (emphases added)). *See also O'Sullivan v. Boerckel*, 526 U.S. 838, 839-840, 144 L. Ed. 2d 1, 119 S. Ct. 1728 (1999) ("In this case, we are asked to decide whether a state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement" (emphases added)). Ignoring this distinction would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is "properly filed" as to the nonbarred claims, and not "properly filed" as to the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can be both "properly filed" and not "properly filed." Ordinary English would refer to certain claims as having been properly presented or raised, irrespective of whether the application containing those claims was properly filed.

Artuz v Bennett, 531 U.S. 4, 5 (2000). The district court did not find that Barber's second 3.850 motion was not properly filed with the appropriate state court, but rather it made an independent determination that the claim raised in that 3.850 motion was procedurally barred. Based on the holding of *Artuz*, the district court and court of appeals decisions holding that Barber's second 3.850, despite being properly filed, did not toll the federal time period for filing his habeas petition must be reversed as they are contrary to binding Supreme Court Precedent and have denied Barber due process of law.

CONCLUSION

WHEREFORE, the Petitioner, Justin Mertis Barber, respectfully requests this Honorable Court grant this petition for certiorari.

Respectfully submitted,

KENT & McFARLAND,
ATTORNEYS AT LAW

WILLIAM MALLORY KENT
Florida Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
(904) 398-8000
(904) 348-3124 Fax
kent@williamkent.com