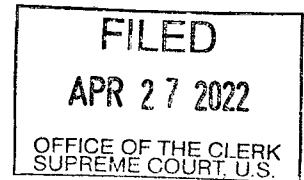


No. 21-7799 ORIGINAL



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

SAM JONES — PETITIONER  
(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

SAM JONES  
(Your Name)

WYNNE UNIT 810 F.M. 2821  
(Address)

Huntsville, Texas 77349  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

QUESTION ONE: DID THE DISTRICT COURT AND FIFTH CIRCUIT ERR WHEN REFUSING TO EQUITABLY TOLL PETITIONER'S UNTIMELY REFILED §2254 HABEAS WHICH WAS ORIGINALLY TIMELY FILED BUT ERRONEOUSLY DISMISSED IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENT IN MARTINEZ v. RYAN, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d. 272 (2012); and TREVINO v. THALER, 569 U.S. \_\_\_, 133 S.Ct. 1911, 185 L.Ed.2d. 1044 (2013).

QUESTION TWO: DID THE DISTRICT COURT AND FIFTH CIRCUIT ERR BY NOT EQUITABLY TOLLING PETITIONER'S REFILED FULLY EXHAUSTED §2254 HABEAS WHICH WAS INITIALLY TIMELY FILED BUT DISMISSED DUE TO PETITIONER'S FILING A DEFECTIVE PLEADING DURING THE STATUTORY TOLLING PERIOD DUE TO PETITIONER'S REASONABLE CONFUSION WITH STATE COURT FILING PROCEDURE, THUS CONFLICTING WITH IRWIN v. Dept. OF VETERENS AFFAIRS, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d. 435 (1090); and PACE v. DiGU-GLIELMO, 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d. 669 (2005).

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

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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 A to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B 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 courts**:

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

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; 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 March 2, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied 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. A.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment Of The United States Constitution

The Antiterrorism Effective Death Penalty Act (AEDPA)

28 U.S.C. §2244(d)(1).

The Sixth Amendment Of The United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to... be informed of the nature and cause of the accusation... and to have the assistance of counsel for defense."

The statute under which Petitioner sought habeas corpus relief was

28 U.S.C. §2244(d)(1) Antiterrorism Effective Death Penalty Act (AEDPA) which states in pertinent part:

"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."



## STATEMENT OF THE CASE

Petitioner (hereafter referred to as "Jones") was charged by indictment with aggravated assault with a deadly weapon against a witness whom reported a crime.<sup>1</sup> A trial by jury was held in Criminal District Court No.1 Dallas County, Texas on April 23, 2012 (cause No. F11-14842-H), the jury found Jones guilty as charge on April 25, 2012. The jury assessed Jones' punishment at "Life" in prison. The Fifth District Court Of Appeals at Dallas affirmed Jones' direct appeal on July 12, 2013. (Jones v. State No. 05-12-0618-CR-2013 WL 371771). The Court Of Criminal Appeals refused Jones' PDR on November 27, 2013. Jones' conviction therefore became final ninety-days thereafter on February 25, 2014 which was the expiration date for him to seek a writ of certiorari in the United States Supreme Court thus the AEDPA time limitation period started to run on said date. Jones filed his (first) state habeas application on May 6, 2014 wherein he raised a "substantial ineffective assistance of trial counsel (IATC) claim(s)" in the state initial-review collateral proceeding. The said state habeas application was dismissed on July 9, 2014 due to Jones' procedural error of non-compliance with Texas Rules Of Appellate Procedure Rule 73.1(d) (Ex parte Samuel Lee Jones, Jr., No. WR-38,160-03). After the state court dismissed Jones' initial-review collateral proceeding he then immediately 12-days later on July 21, 2014 filed a mixed

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1 The alleged reported crime was a "misdemeanor assault" charge which was filed against Jones. Jones and the complainant both were charged with a misdemeanor assault charge against each other stemming from a domestic dispute that they engaged in at their residence.

(exhausted & unexhausted) §2254 habeas in the district court. (cause No. 3:14-cv-3134-D(BH)). When Jones filed his federal habeas only 146-days of the AEDPA limitation period had elapsed. The state contended to the district court that his habeas be dismissed for failure to exhaust. In addition to Jones arguing that the reason for his failure to exhaust was a state-created default error, Jones also motioned the court requesting the court to issue a stay and abeyance of his mixed habeas pending complete state exhaustion but the district court denied Jones' request.<sup>2</sup> (See Appendix G and H). The Fifth Circuit affirmed the district court's denial to issue a stay and abeyance. (See Appendix F). The district court then agreed with the state's position and dismissed Jones' habeas for failure to exhaust. (See Appendix I and J). The Fifth Circuit affirmed such dismissal. (See Appendix F). The district court dismissed Jones' habeas after it had been pending 403-days thus the AEDPA limitation period had long expired while the petition was pending in the district court. ~~The Fifth Circuit~~ affirmed the district court's dismissal for failure to exhaust.<sup>3</sup> (See Appendix F).

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2 See Duncan v. Walker, 121 S.Ct. 2120 wherein Justices Stevens and Souter in their concurring opinion stated: "... in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and further proceeding pending complete exhaustion of state remedies... when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitation period.

3 Jones respectfully request that this Honorable Court take judicial notice that he didn't seek certiorari in this Court of the Fifth

After such dismissal Jones then promptly 5-days later on September 1, 2015 refiled his petition back in state court to exhaust (cause W11-14842-H(b)) but unfortunately that state habeas was dismissed on November 25, 2015 for the exact same procedural error that his initial (first) habeas was dismissed for, non-compliance with Tex. R.App.P. Rule 73.1(d). Then 10-days later on December 4, 2015 Jones refiled his state habeas (which was his third) to exhaust. (cause No. W11-14842-H(c)). The said state habeas stayed pending three-hundred and ninety-four days thus statutorily tolled 394-days until it was denied without written order on March 29, 2017. Jones then promptly 7-days later on April 5, 2017 refiled his fully exhausted habeas back in the district court. (cause No. 3:17-cv-1028-D(BH)). But the district court then dismissed Jones' fully exhausted refiled habeas as "time-barred" by the AEDPA statute of limitation on January 3, 2019. The court also denied equitable tolling. (See Appendix B and C). The Fifth Circuit affirmed the district court's dismissal and denial of equitable tolling. (See Appendix A). Jones filed a motion for rehearing which the Fifth Circuit also denied. (See Appendix D).

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FOOTNOTE #3 CONTINUES: Circuit's Order affirming the district court's dismissal of his original timely filed mixed habeas for failure to exhaust because he didn't receive the Fifth Circuit's Order (by mail) affirming such dismissal. Jones didn't discover that the Fifth Circuit had affirmed the district court's dismissal until he read such in the respondent's answer to his fully exhausted refiled habeas which was over 1-year after the Fifth Circuit had affirmed such dismissal.

## REASONS FOR GRANTING THE PETITION

THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS  
HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH

AN APPLICABLE DECISION OF THIS COURT

The Fifth Circuit Panel affirming the district court's dismissal of Jones' untimely fully exhausted refiled §2254 habeas which was related to his original timely filed mixed (exhausted & unexhausted) habeas which was erroneously dismissed directly conflicts with this Court's decisions in Martinez v. Ryan, 566 U.S. 1,132 S.Ct. 1309 (2012); and Trevino v. Thaler, 569 U.S. \_\_\_, 133 S.Ct. 1911 (2013). In Jones' §2254 habeas he presented a "substantial IATC claim(s)," Texas law required that Jones raise his substantial IATC claim(s) in the initial-review collateral proceeding whereat during such proceeding Jones was "unrepresented by counsel" thus he presented his IATC claim(s) pro-se. During the state initial-review collateral proceeding Jones committed a procedural error of non-compliance with state Rule 73.1(d) Tex.R.App.P. which caused the trial/habeas court to dismiss Jones' habeas without rendering a ruling on the merits of his IATC claim(s) thus not fully exhausting his habeas, as a result his original timely filed mixed federal habeas was erroneously dismissed for failure to exhaust which ultimately resulted in Jones' fully exhausted refiled §2254 habeas being dismissed as "time-barred" by the AEDPA.

When Jones timely filed his original mixed §2254 habeas on July 21, 2014 only 146-days of the AEDPA limitation period had elapsed thus 219-days remained on the AEDPA time limitation period. Jones' federal habeas stayed pending before the district court for

408-days thus the remaining 219-days expired while the petition was pending in the district court. When the district court dismissed Jones' habeas for failure to exhaust, the AEDPA limitation period had been expired 189-days.

"It is reasonable to believe that Congress could not have intended to bar federal habeas review for petitioner who invokes the court's jurisdiction within the 1-year interval prescribed by AEDPA." Duncan v. Walker, 533 U.S. 182, 121 S.Ct. 2120 (2001) (Justices Stevens and Souter's concurring opinion)

ARGUMENTS AMPLIFYING REASON FOR WRIT:

PETITIONER PRESENTED A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (IATC) CLAIM(S) PRO-SE IN THE STATE INITIAL-REVIEW COLLATERAL PROCEEDING WHICH WAS ERRONEOUSLY DISMISSED BY THE DISTRICT COURT IN DIRECT CONFLICT WITH MARTINEZ v. RYAN, 566 U.S. 1, 132 S.Ct. 1309 (2012); and TREVINO v. THALER, 569 U.S. \_\_\_, 133 S.Ct. 1911 (2013).

To overcome a procedural default a prisoner must demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has merit. Martinez. Jones respectfully request that this Honorable Court take judicial notice that Judge, Alcalá, J., of the Texas Court Of Criminal Appeals, in that court's September 21, 2016 Order remanding Jones' state habeas back to the trial/habeas court, Judge Alcalá, J., acknowledged in the court's order that Jones' state habeas presented a substantial IATC claim(s) thus in Judge Alcalá, J., concurring opinion she encouraged the trial/habeas court on remand to appoint Jones counsel citing (Ex

parte Pointer, 492 S.W.3d. 319,320-21 (Tex.Crim.App.2016) (per curiam) (Alcala, J., concurring) (stating that Code Of Criminal Procedure Article 1.051 permits a habeas court to appoint counsel to an indigent habeas applicant "if the court concludes that the interest of justice requires representation" and encouraging habeas courts to utilize this statutory authority "in order to liberally appoint counsel for pro-se applicant who... appear to have a colorable ineffective-assistance-of-trial-counsel claim"). (See Appendix K). Needless to say that the trial/habeas court did not heed Judge Alcala, J., encouragement on remand to appoint Jones counsel but instead the trial/habeas court dismissed Jones' substantial IATC claim(s) due to a procedural error of Jones' non-compliance with rule 73.1. Jones also, request that this Court take judicial notice that in granting Jones a COA the Fifth Circuit also acknowledged that Jones' IATC claim(s) have merit wherein the Fifth Circuit stated in its Order granting a COA that Jones' "§2254 application includes at least some claims that appear to facially assert a valid claim of the denial of a constitutional right." (See Appendix E).

THE DISTRICT COURT AND FIFTH CIRCUIT ERRED BY NOT  
EQUITABLY TOLLING PETITIONER'S FULLY EXHAUSTION RE-  
FILED HABEAS WHICH WAS ORIGINALLY TIMELY FILED BUT  
ERRONEOUSLY DISMISSED IN DIRECT CONFLICT WITH MARTINEZ  
v. RYAN, 132 S.Ct. 1309; and TREVINO v. THALER, 133  
S.Ct. 1911.

The Fifth Circuit erred in affirming the district court's denial to equitably toll Jones' fully exhaust refiled habeas which was originally timely filed but erroneously dismissed for failure to

exhaust which directly conflicts with Martinez and Trevino. Jones' conviction was affirmed by the Fifth District Court Of Appeals at Dallas on July 12, 2013. The Court Of Criminal Appeals refused Jones' petition for discretion review on November 27, 2013. His conviction became final ninety-days thereafter on February 25, 2014 which was the expiration date for him to seek a writ of certiorari in the United States Supreme Court thus the AEDPA limitation period started to run on said date. Jones filed his first state habeas on May 6, 2014, when Jones filed that habeas only 70-days of the AEDPA limitation period had elapsed. Due to Jones' (allegedly) procedural error of non-compliance with state Rule 73.1(d) exceeding the fifty-page limit memorandum of law, as a result the said habeas was deemed improperly filed thus dismissed on July 9, 2014 64-days after it was filed.<sup>4</sup> After the state court dismissed Jones' habeas he immediately 12-days later on July 21, 2014 filed his §2254 habeas in the district court. When Jones filed his §2254 habeas only 146-days of the AEDPA limitation period had elapsed thus 219-days remained. When Jones' §2254 was pending the AEDPA limitation period was NOT statutory tolled, the said habeas stayed pending in the district court for 408-days thus the remaining 219-days which Jones had left on the AEDPA limitation period expired while his §2254 remained

4 Since the petition was deemed improperly filed due to the (alleged) procedural error by Jones the 64-days which the habeas was pending from May 6th until it was dismissed on July 9th those 64-days were not statutorily tolled. Note that all "untolled" statutory days are calculated herein.

pending in the district court. So, when the district court dismissed the habeas on August 27, 2015 for failure to exhaust the AEDPA limitation period had been expired 189-days therefore the the court's dismissal without prejudice after Jones' habeas had been expired 189-days the without prejudice provision was an illusion Jones could never succeed in timely refiling his petition after state exhaustion because he would already be time-barred. But after the district court's August 27, 2015 dismissal Jones immediately 5-days later on September 1, 2014 refiled his state habeas to exhaust, but unfortunately that state habeas was also dismissed for the exact same (alleged) procedural error as was Jones' first habeas for non-compliance with Rule 73.1(d), thus his second habeas was dismissed on November 4, 2015 54-days after it was filed.<sup>5</sup> Then 10-days later on December 4, 2015 Jones refiled his state habeas to exhaust which stayed pending three-hundred and ninety-four days thus statutorily tolled 394-days, until it was denied without written order on March 29, 2017. Jones then immediately 7-days later on April 5, 2017 refiled his fully exhaust §2254 back in the district court. In short, there were a grand total of 188-days of the AEDPA limitation period out of the 365-days that were not

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5 Jones' second state habeas was dismissed for allegedly non-compliance with rule 73.1(d) which was due to the trial/habeas judge knowingly counting pages in the memorandum which were exempt from the page-limit. Jones will show herein that his "so-called" non-compliance with rule 73.1(d) which resulted in his first habeas being dismissed was due to a state-created default impediment of the trial/habeas judge ignoring Jones' timely/properly filed motion to exceed the fifty-page limit memorandum. Thus both dismissal were due to the actions of the judge.



statutorily tolled during the state court habeas proceedings; the 70-days which had elapsed prior to Jones filing his first habeas, the 64-days which his first state habeas was pending but dismissed deemed improperly filed and the 54-days his second state habeas was pending but dismissed deemed improperly filed. Clearly Jones has not slept on his rights, he has truly exercised due diligence to move his case forward through the state and federal courts to avoid having his substantial IATC claim(s) getting time-barred by the AEDPA statute of limitation. In Martinez, this Court stated:

"Federal habeas courts can find "cause" thereby excusing a defendant's procedural default, when (1) the claim of "ineffective assistance of trial counsel" was a substantial claim; (2) the cause consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the ineffective-assistance-of-trial-counsel claim; and (4) state law requires that an "ineffective assistance of trial counsel [claim]... be raised in an initial-review collateral proceeding." Id. Martinez, 132 S.Ct. 1309.

This Court held in Trevino v. Thaler, 133 S.Ct. 1911 that the standard articulated in Martinez applies to Texas because Texas law by a matter of procedural design requires prisoners to raise their IATC claim in the initial-review collateral proceeding. It is within the context of Texas procedural framework that the state lack of appointment of counsel in that initial-review collateral proceeding "qualified as cause" for the district court to have excused

Jones' state procedural default error of non-compliance with rule 73.1(d) which resulted in the state trial/habeas court dismissing his petition which caused his failure to exhaust and his timely filed mixed federal habeas to be dismissed for failure to exhaust, which ultimately resulted in Jones' fully exhausted refiled habeas being dismissed as time-barred by the AEDPA. In accordance with Martinez and Trevino by the state electing not to appoint Jones counsel during that initial-review collateral proceeding to comply with the state's rules and filing procedures to adequately present his substantial IATC claim(s), by the state electing not to appoint counsel the state thereby forfeited their right to have even raised the procedural default error in the district court. Had the district court applied the standard articulated in Martinez and Trevino to Jones' timely filed habeas then the district court would have "excused" Jones' procedural error which caused his failure to exhaust therefore, would not have erroneously dismissed his original timely filed mixed habeas for failure to exhaust thus Jones would not have been placed in the predicament that he find himself in now of having to argue that his fully exhausted refiled habeas is entitled to equitable tolling. Likewise, had the Fifth Circuit followed this Court's precedent in Martinez and Trevino then the Fifth Circuit would have equitably tolled Jones' fully exhausted refiled habeas.

THE DISTRICT COURT AND FIFTH CIRCUIT ERRED BY NOT  
EQUITABLY TOLLING PETITIONER'S §2254 HABEAS WHERE  
PETITIONER'S REASONABLE CONFUSION WITH STATE COURT  
FILING PROCEDURE RESULTED IN HIM NOT CORRECTING HIS  
DEFECTIVE PLEADING FILED DURING THE STATUTORY TOLLING

PERIOD.

Jones state habeas was dismissed due to his procedural error of

non-compliance with Tex.R.App.P. Rule 73.1(d), for submitting a memorandum of law that exceeded the fifty-page limit. From the outset of this argument Jones must bring to the court's attention that his (allegedly) non-compliance with rule 73.1(d) was a state-created procedural default, caused by the actions (or inactions) of the trial/habeas judge ignoring Jones' timely/properly filed motion to exceed the fifty-page limit memorandum which he submitted along with his habeas application and "100-page" memorandum. It was Jones' reasonable understanding that proper court protocol required that he submit for the court to view, his 100-page memorandum which he was seeking leave of the court to file, along with his motion and habeas application. So, when Jones submitted his habeas application he submitted along with it his motion to exceed the fifty-page memorandum, and the 100-page memorandum which he was seeking leave to file. But the trial/habeas court judge intentionally ignored Jones' motion and filed the 100-page memorandum as through the motion didn't exist and wasn't Jones' intent to obtain leave to file the 100-page memorandum thus it was the trial/habeas court judge inactions to rule on Jones' motion which cause his non-compliance with rule 73.1 (d). The trial/habeas court judge knew very well that Jones was simply submitting the memorandum along with the motion for the court to review the memorandum which he was seeking leave to file but the judge file it in order to put his substantial IACT claim(s) in procedural default.

When the state court dismissed Jones' habeas at that time he did not know that there was a difference between a habeas being "dismissed" opposed to being "denied" so he did not know that the dismissal of his state habeas meant that the habeas was not exhausted.

At such time Jones reasonably thought that a dismissal and a denial were "one in the same" therefore, after the state court dismissed his habeas Jones reasonably thought that such dismissal meant that that was "his one bite of the apple" his one and only shot at filing a state writ thus he reasonably thought that the next step was for him to seek federal review of his IATC claim(s) so he immediately filed his §2254 in the district court. Jones did not know at that time that the state dismissal of his habeas meant that his IATC claim(s) would be unexhausted thereby prohibiting federal review of his habeas. So, when the respondent filed their November 20, 2014 response contending that Jones' habeas be dismissed for failure to exhaust, Jones countered by arguing the cause for his procedural default error with resulted in his failure to exhaust because Jones reasonably thought that if the respondent prevailed on their argument to dismiss his habeas he would be prohibited to file a second state habeas, because Jones reasonably thought that a second habeas would be rejected as a "successive 11.07 habeas."

"A petitioner's reasonable confusion about whether a state filing would be timely ordinarily constitute "good cause" for him to file in federal court." Pace v. DiGuglielmo, 125 S.Ct. 1807.

Had Jones known at that time or had he been instructed by the court of what steps he could have taken to rectify his situation informing him that he could have "simply" filed a motion to withdraw his federal habeas to refile his state habeas and that such state habeas would not be rejected as "successive," to exhaust then return back to federal court before the 219-days expired which Jones had remaining on the AEDPA limitation period when he timely filed his mixed

habeas. Jones would have surely refiled his habeas back in state court to completely exhaust. He did not discover that he could have refiled his habeas back in state court and that such filing would not have been dismissed as a "successive writ" until he read it in the Magistrate's finding and conclusion of law but even then he did not know what steps to take to withdraw his pending federal habeas in order to refile it back in state court. Furthermore, Jones did not discover that the state's dismissal of his habeas meant that he did not exhaust his claim until he read that in the respondent's November 20, 2014 response.

"We have allowed equitable tolling in situation where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period."

Irwin v. Dept. Of Veterans Affairs, 489 U.S. 89,96,111 S.Ct. 453 (1990).

Jones' situation is distinguishable from the petitioner's situation in Baldwin County Welcome Crt. v. Brown, 466 U.S. 147,151 (1984) wherein this Court found a lack of diligence where petitioner was told "three time what she must do to preserve her claim, and she did not do it." In the district court's erroneous fact analysis the court concluded that Jones was "first made aware that he had failed to properly exhaust his claim during the state trial court's review of his 11.07 application in May 2014 and again in July 2014 when the Texas Court Of Criminal Appeals dismissed his application. Then again when the respondent raised lack of proper exhaustion in the November 20, 2014 proceeding." The district court stated in its flawed analysis that Jones was put on notice that his habeas was unexhausted therefore denied Jones' motion requesting

the court to issue a stay and abeyance pending complete state exhaustion. Jones contends that the district court's analysis was erroneous because nowhere in the record did the state trial court, or the Texas Court Of Criminal Appeals even mention the word "exhausted or unexhausted" at no time did either court put Jones on proper notice using layman's language that his dismissed state habeas meant that his claims would be unexhausted thus prohibiting federal habeas court review. Nor did the Magistrate or the respondent inform Jones at any point what steps he needed to take to rectify his situation informing him that he could have simply withdrew his federal habeas and refiled his habeas back in state court to exhaust and then refiled his habeas back in federal court. Had the Magistrate judge informed Jones of what steps he needed to take to rectify his situation, he surely would have rectified it. But the Magistrate simply restated the respondent's position verbatim that "Jones simply abandoned his state habeas and defiantly filed his court §2254 in federal court without exhausting because he was dissatisfied with the Texas Court Of Criminal Appeals' failure to address his motion to exceed the fifty-page limit memorandum." Stating that Jones "was unwilling to follow state court rules and filing procedures." The Magistrate simply disregarded Jones' position and ignored the fact that he is an uneducated pro-se litigant who has done his best to read, interpret, understand and comply with all of the state and federal courts' rules and filing procedures.

"It is reasonable to believe that Congress could not have intended to bar federal habeas review for petitioner who invokes the court's jurisdiction within the 1-year interval prescribed by AEDPA." Duncan.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SAM JONES

Date: April 26, 2022