

Supreme Court, U.S.  
FILED  
AUG 21 2007  
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07 6984

No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ — PETITIONER  
(Your Name)

VS.

NATHANIEL QUARTERMAN — RESPONDENT(S)  
DIR. TDCJ-CID.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court for the Northern District of Texas  
at San Angelo Division  
United States Court of Appeals for the Fifth Circuit at New Orleans,  
L.A.

Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Carlos Jimenez  
(Signature)

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**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Carlos Jimenez, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0	\$ 0	\$ 0	\$ 0
Self-employment	\$ 0	\$ 0	\$ 0	\$ 0
Income from real property (such as rental income)	\$ 0	\$ 0	\$ 0	\$ 0
Interest and dividends	\$ 0	\$ 0	\$ 0	\$ 0
Gifts	\$ 8.00	\$ 0	\$ 0	\$ 0
Alimony	\$ 0	\$ 0	\$ 0	\$ 0
Child Support	\$	\$	\$	\$
Retirement (such as social security, pensions, annuities, insurance)	\$ 0	\$ 0	\$ 0	\$ 0
Disability (such as social security, insurance payments)	\$ 0	\$ 0	\$ 0	\$ 0
Unemployment payments	\$ 0	\$ 0	\$ 0	\$ 0
Public-assistance (such as welfare)	\$ 0	\$ 0	\$ 0	\$ 0
Other (specify):	\$ 0	\$ 0	\$ 0	\$ 0
<b>Total monthly income:</b>	<b>\$ 8.00</b>	<b>\$ 0</b>	<b>\$ 0</b>	<b>\$ 0</b>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None			\$
			\$
			\$

4. How much cash do you and your spouse have? \$ 0  
 Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
TDCJ-CID	Inmate Trust	\$ 0	\$ None
		\$	\$
		\$	\$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

- Home  
Value None
- Other real estate  
Value None
- Motor Vehicle #1  
Year, make & model \_\_\_\_\_  
Value None
- Motor Vehicle #2  
Year, make & model \_\_\_\_\_  
Value None
- Other assets  
Description \_\_\_\_\_  
Value None

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
None	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ NA	\$ NA
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ NA	\$ NA
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ NA	\$ NA
Clothing	\$ NA	\$ NA
Laundry and dry-cleaning	\$ NA	\$ NA
Medical and dental expenses	\$ NA	\$ NA

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes  No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?  Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated, indigent, and acting in pro se. I have no means of obtaining security or funds to pay the costs of the proceedings in this case.

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

Executed on: August 21, 2007

Carlos Jimenez  
(Signature)

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ 0 _____	\$ 0 _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ 0 _____	\$ 0 _____
Life	\$ 0 _____	\$ 0 _____
Health	\$ 0 _____	\$ 0 _____
Motor Vehicle	\$ 0 _____	\$ 0 _____
Other: 0 _____	\$ 0 _____	\$ 0 _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): 0 _____	\$ 0 _____	\$ 0 _____
Installment payments		
Motor Vehicle	\$ 0 _____	\$ 0 _____
Credit card(s)	\$ 0 _____	\$ 0 _____
Department store(s)	\$ 0 _____	\$ 0 _____
Other: 0 _____	\$ 0 _____	\$ 0 _____
Alimony, maintenance, and support paid to others	\$ 0 _____	\$ 0 _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ 0 _____	\$ 0 _____
Other (specify): 0 _____	\$ 0 _____	\$ 0 _____
<b>Total monthly expenses:</b>	<b>\$ 0 _____</b>	<b>\$ 0 _____</b>

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\_\_\_\_\_  
CARLOS JIMENEZ — PETITIONER  
(Your Name)

vs.

NATHANIEL QUARTERMAN  
DIRECTOR, TDCJ-CID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO  
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT, AT SAN ANGELO  
UNITED STATES COURT OF APPEALS, FIFTH CIR., DENIED C.O.A.

\_\_\_\_\_  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CARLOS JIMENEZ

\_\_\_\_\_  
(Your Name)

P.O. BOX 9200

\_\_\_\_\_  
(Address)

NEW BOSTON, TEXAS 75570-9200

\_\_\_\_\_  
(City, State, Zip Code)

TELFORD UNIT

\_\_\_\_\_  
(Phone Number)

## QUESTION(S) PRESENTED

QUESTION ONE : "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether pursuant to 28 U.S.C. § 2244 (d) (1)(A) When through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1-year limitations period?"

QUESTION TWO : "Whether a Certificate of Appealability should have issued pursuant to Slack v. McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595. 1604 (2000) on the question of Whether the circumstances of petitioner's cause of action present rare and exceptional circumstances warranting equitable tolling of the 1-year limitations period of 28 U.S.C. § 2244 (d)(1)(2)?"

## 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:

Mr. Gregg Abbott

Office of the Attorney General of Texas

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

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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 May 25, 2007.

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 \_\_\_\_\_.

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

QUESTION NUMBER ONE : THE CONSTITUTIONAL PROVISION INVOLVED IS THE DENIAL OF THE 5TH AND 14TH AMENDMENTS CONSTITUTIONAL DUE PROCESS OF LAW AND THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT IN RELATIONSHIP TO 28 U.S.C. § 2244 (d)(1)(A).

QUESTION NUMBER TWO : THE CONSTITUTIONAL PROVISION INVOLVED IS THE DENIAL OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION IN RELATION TO EQUITABLE TOLLING OF 28 U.S.C. § 2244 (d)(1)(2).

## STATEMENT OF THE CASE

Petitioner is in State custody pursuant to a judgment and sentence of the 119th District Court of Tom Green County, Texas, in Cause Number CR91-0528-B, styled The State of Texas V Carlos Jimenez. Tr 35-39 (Judgment)(Tr refers hereafter to State Clerk's REcord and SF refers hereafter to Statement of Facts (State REporters REcord of guilty plea and revocation hearing proceeded by volume number and page number and Lines if necessary) Petitioner was charged by indictment with burglary of a habitation, enhanced by one felony conviction. Tr at 1 (Indictment) Petitioner pleaded guilty to the charge and true to the enhancement paragraph. 2SF 5. On NOVember 12, 1991, pursuant to a plea agreement, Petitioner was placed on deferred adjudication probation for five years. 2 SF 14-15; Tr 15-25.

After serving 3 years and 4 months of his probation the State moved to proceed with adjudication of guilt on March of 1995. Tr 26-28. On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced petitioner to forty-three years confinement. 3 SF 115-18; Tr 35. Petitioner filed a motion for new trial and notice of appeal. Tr 47-49. The Third Court of Appeals dismissed the appeal for want of jurisdiction, Jimenez v State, No. 03-96-00123-CR (Tex. App. - Austin , Delivered Sept. 11, 1996) Appellant counsel abandoned Petitioner with no knowledge of what happened to an appeal if any and petitioner had no opportunity for direct appeal, filing his own brief, Discretionary Review, or Certiorari to this Hon. Court.

Petitioner filed his first State Writ challenging his appellate representation and his denial of his direct appeal on April 11, 2002. Ex parte Jimenez, No. 744,33 (Application No. 53,212-01). The Court of Criminal Appeals granted petitioner relief in the form placing petitioner back to the original position he was in when his guilt was adjudicated and sentence imposed, a new and or out of time appeal. Id. (Tex. Crim. App. opinion delivered September 25, 2002) Petitioner was appointed new appellate counsel who filed timely Notice of Appeal pursuant to Texas Rules of Appellate Procedures 25-26 and filed an Anders Brief in which Petitioner filed his own pro se brief. Subsequently, the Court of Appeals issued an opinion affirming Petitioner's conviction in an unpublished opinion on May 15, 2003. Jimenez v State, No. 03-02-00733-Cr (TEX. App. Austin 2003) ; Ex parte Jimenez, No. 53,212-02, at 87-90 (copy of appellate opinion) Petitioner filed a Petition for Discretionary REview which was subsequently refused on October 8, 2003. Jimenez v State, PDR No. 937-03. Petitioner did not waive his right to file a Writ of Certiorari with this HOnorable Court or the 90 days to file such a writ, pursuant to Supeme Court Rule 13, but did not feel he had a ground developed to the extent that would warrant Certiorari at that time. Instead Petitioner filed his second State Writ and his first challenging his conviction to bring grounds that he felt he could expand and develop the record in Habeas by hearing etc. on December 6, 2004, Ex parte Jimenez, No. 53,212-02, at 17. The Texas Court of Criminal

Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005. Id. at cover.

Petitioner filed his Federal Petition on July 22, 2005. Respondent filed his Answer with Brief in support on October 2, 2005. The U.S. District Court issued an Order on October 23, 2006 Dismissing Petitioner's case with prejudice pursuant to 28 U.S.C. § 2244 (d)(1). (see Appendix B)

Petitioner filed a timely Notice of Appeal with the U.S. District Court with an Application of *informa pauperis* which was granted to proceed with a further proceeding in the Fifth Circuit Court of Appeals.

Petitioner submitted an Application Requesting the Fifth Circuit to grant a Certificate of Appealability which was denied May 25, 2007, thus producing the necessity to file this his instant Petition for Writ of Certiorari in this Honorable Highest Court in the Land: (see Appendix A)

## REASONS FOR GRANTING THE PETITION

### REASON FOR GRANTING PETITION NUMBER ONE:

The United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals, namely the Tenth Circuit in *Orange v Calbone*, 318 F. 3d 1167, 1170-71 (10th Cir. 2003) and the Fourth Circuit in *Frasch v Peguese*, 414 F. 3d 518, 522-23 (4th Cir. 2005); and or The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

QUESTION ONE (Restated) : "Whether a Certificate of Appealability should have issued pursuant to *Slack v McDaniel*, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether pursuant to 28 U.S.C. § 2244 (d) (1)A) When through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1-year limitations period?"

A Certificate of Appealability (COA) will issue only if the requirements of 28 U.S.C. § 2253 have been satisfied. The COA Statute 28 U.S.C. § 2253 (c)(1) establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal. *Slack v McDaniel* 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) The Statute permits the issuance of a COA only where petitioner has made a substantial showing of the denial of a Constitutional right. *Slack, supra*, at 483, 120 S.Ct. 1595. This Court has stated in *Slack*, "[W]here a district court has rejected the constitutional claims on merits, the showing required to satisfy § 2253 (c) is straight forward: The petitioner must demonstrate that reasonable jurists would

find the district court's assessment of the constitutional claims debatable or wrong." , 529 U.S., at 484, 120 S.Ct. 1595. ; Miller E1, 123 S.Ct. 1029, 1039-40 (2003).

"The issue becaomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in it's procedural ruling. " Slack v McDaniel, 120 S.Ct. 1595, Id. at 1604.

In Miller E1, 123 S.Ct. 1029, 1039-40 (2003) this Honorable Court cautioned that "We do not require a petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed a claim can be debatable even though every jurist of reason might might agree, after COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 1040.

In the instant case and the immediate question at issue, the district court's decision and the Fifth Circuits controlling law of their circuit , namely Salinas v Dretke, 354 F. 3d 425 (5th Cir. 2004) cert denied, 541 U.S. 1032 (2004) should be at least debatable by reasonable jurists in that the sister circuits are sharply divided on this issue. see Orange v Calbone, 318 F. 3d 1167, 1170-71 (10th Cir. 2003) & Frasch v Peguese, 414 F. 3d 518, 522-23 (4th Cir. 2005)

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), Pub. L. 104-132, Stat. 1217. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date, which is the date of its enactment. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

Title I of the Act substantially changed the way federal courts handle habeas corpus actions. One of the major changes is a one-year statute of limitations. see 28 U.S.C. § 2244(d) (1)(A) (in relevant part) which provides:

(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 a 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;

There is no dispute that petitioner filed his federal petition after the effective date of act April 24, 1996 as petitioner filed his petition on July 19, 2005. (see Appendix B at 3)

This Court has consistently held that "A conviction becomes final once the defendant exhausts all direct appeals and once either the time for filing a petition for certiorari on direct appeal elapses or the Supreme Court denies a petition for certiorari on direct review." *Teague v Lane*, 489 U.S. 288, 315 (1989)

Due to no fault of petitioner he was denied his first direct appeal including Petition for Discretionary REview, and petition for Certiorari or the time to file Certiorari. see Texas Rules

of Appellate procedure 68 and Rules of the Supreme Court Rule 13. Subsequently petitioner filed a State habeas corpus on April 11, 2002, complaining that he had been denied his right to direct appeal because his attorney had abandoned him without any notice or any further contact. see *Ex parte Jimenez*, App. No. 53,212-01). The Court of Criminal Appeals granted petitioner relief on September 25, 2002 (No. 74,433) in an unpublished Opinion stating Etal, "Relief is granted. Applicant is entitled to an out-of-time appeal in cause number CR-91-0528-B in the 119th Judicial District Court of Tom Green County. Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure , all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is given within thirty days after the mandate issued" (Opinion Del. September 25, 2002 unpublished); Tr. 57-59 (Mandate Issued)

The Fifth Circuit has held "The right to an out of time Petition for Discretionary REview does not require the federal court to restart the running of the 1-year limitations period) *Eskemansv Dretke* 383 F. 3d 336 (5th Cir. 2004); *Salinas v Dretke* 354 F. 3d 425,430 (5th Cir. 2004) Petitioner's case is distinctive in that he was not only was denied his first appeal to the intermediate court, but to petition the highest State Courtlike *Salinas*, and lose his right to Certiorari or the time to file Certiorari to this Honorable Court. Petitioner did not voluntarily

waive his right to file his Certiorari or the time to file his petition for writ of certiorari. see Roberts v Cockrell, 319 F. 3d 690, 693 (5th Cir. 2002) The Fifth Circuit assuming that because Roberts was unable to pursue direct appeal he waived his right to seek certiorari from this Court) see Id. 693 note. 14.

The sharp contrast between the Fifth Circuit and her sister courts should be enough to make reasonable jurists agree that this issue is arguable and in distinct conflict. Petitioner would request this Court to consider the sound reasoning in Frasch v Peguese, 414 F. 3d 518-20 (6th Cir. 2005); Orange v Calbone, 318 F. 3d 1167, 1170-71 (10th Cir. 2003) (holding that "if a criminal defendant proves he was denied a part of his statutory direct appeal through no fault of his own, to the highest court of last resort and relief is granted, for the purposes of 28 U.S.C. § 2244 (d)(1))A) his one-year limitations period should begin at the conclusion of his direct review or the time for seeking his next review") see Also Miller v Collins 305 F. 3d 491, 494 (6th Cir. 2002)(revisiting their finding in Bronough v State of Ohio, 235 F. 3d 280, 286 (6th Cir. 2000 in opposition, but because case could be disposed of without overruling Bronough, declined to rule on issue)

Petitioner believe's that the Federal courts should defer to the the highest State court's ruling when the court allows the direct appeal to restart and give a defend ant a meaningful first direct appeal fully including writ of certiorari or time to file Certiorari. More recently the circuit split has grown

pronounced as in *Summers v. Schriro* 486 F. 3d 710 (9th Cir. 2007) the Ninth Circuit in deciding that a "Prisoner's of Right proceeding was a form of Direct REview within the meaning of the habeas limitations Statute." and verified that as of late the Fourth, Tenth and Eleventh Circuits have held that classification of State Direct Review is a question of State Law pursuant to 28 U.S.C. § 2244 (d)(1)(A) and the Fifth, Sixth and now Ninth Circuits have held that although the final State REview is heavily informed by State Law Classification is ultimately a Question of Federal Law. Compare, *Frasch v Peguese* 414 F. 3d 518, 522 (4th Cir. 2005); *Orange v Calbone* 318 F. 3d 1267, 1270, (10th Cir. 2003); *Bridges v Johnson*, 284 F. 3d 1201, 1202 (11th Cir 2003) in direct contrast to, *Foreman v Dretke*, 383 F. 3d 336, 339 (5th Cir. 2004); *Lopez v Wilson*, 426 F. 3d 339, 351 (6th Cir 2005, En Banc); *White v Klitzke*, 281 F. 3d 920, 923 (9th Cir. 2003)

The Fifth, Sixth, and Ninth Circuits do not acknowledge the unfairness of a defendant through no fault of his own not only losing his direct appeal, in the form of intermediate court of appeals, and Petition for Discretionary REviews to the highest State Court, but the presumption of waiver of the right to file Petition for Writ of Certiorari to this Court, see *Roberts v Cockrell*, 319 F. 3d at 693. note 14., supra. In the instant case there is no other remedy to correct an unjust and unfair, and inequitable premature completion of State Direct REview that was time barred before he ever found out about it, except on a post conviction State habeas corpus that allows the Court jurisdiction to remedy such rare cases. see *Ex parter Wilson*, 956 S.W. 2d 25, 27-29 (Tex. Cr. App. 1998)

In the Federal Court process when a defendant is allowed an out of time appeal for ineffective assistance of counsel it triggers the running of a new 10 day appeal period. U.S. v West, 240 F. 3d 456 (5th Cir. 2001)

Allowing the State to regulate the completion and restarting of the direct appeal to a meaningful final conviction and then allowing the 90 days to file Certiorari would not hinder the purpose of the AEDPA "to further the principals of comity, finality and federalism. These instances are rare and very hard to prove to the Texas Courts as this Court can take judicial notice. see Duncan v Walker, 121 S.Ct. 2120, 2190 (2001); Ex parte Wilson 956 S.W. 2d 25, 27 (1998)(noting that Petitioner Wilson while controlling post conviction ineffective assistance of counsel on appeal in Texas Courts, Wilson himself did not get relief because he could not meet the almost impossible standard of proof) Out of time Petitions for Discretionary Review and out of time first direct appeals are very rare in Texas and would not jeopardize either the promotion of consistency and predictability in the application of AEDPA, even as it stays true to Congress purpose, nor upset the principals of comity, finality and federalism. However it would avoid a fundamental miscarriage of justice and denial of Due process and Equal protection in affording a defendant his 1st direct appeal of right, Certiorari to this Court or the time to file Certiorari and an adequate time to file State and Federal habeas challenging his conviction. In Lonchar v Thomas 116 S.Ct. 1293, 1299 (1996) this Honorable Court cautioned the lower courts, "Dismissal of a first federal petition is a particularly serious matter, for that dismissal denies the

petitioner the protection of the "Great Writ" entirely, risking injury to an important interest in human liberty."

Petitioner has conceded that his Claims Regarding his Plea of guilt and placement on deferred adjudication are meritless even if not time barred. (see Appendix B at 6) and *Caldwell v Dretke*, 429 F. 3d 521 (5th Cir. 2005); cert. Denied, *Caldwell v Quarterman*, 127 S.Ct. 432-32 (2006) (holding that deferred adjudication is a final conviction when challenging guilt after first entering plea for purposes of 1-year limitations period.)

However, the instant issue pertains to the underlying Claims involving the revocation or deferred adjudication Community Supervision. (see Appendix B at 11) If this Court agrees with the reasoning of *Salinas v Dretke*, 354 F. 3d 425 (5th Cir. 2004), cert. denied, 541 U.S. 1032 (2004) and the concurring sister circuits, Petitioner was time barred on or before October 11, 1997, before he ever knew he had been abandoned on appeal, his appeal was dismissed, and that he was time barred. (Appendix B at 11) If this Honorable Court rejects *Salinas*, supra, and adopts *Frasch v Peguese*, 414 F. 3d 518 (4th Cir. 2005) and the concurring sister Circuits Petitioner would be as a matter of Due Process and Equal Protection, on time and have at least Nine viable Claims under revocation or deferred adjudication Community Supervision proceedings. (see Appendix B at 11)(counting subpoints)

Petitioner has demonstrated that "reasonable jurists would find the district courts assessment of Petitioner's constitutional claims debatable or wrong and a COA should issue because Petitioner has shown at least, that jurists of reason would find it debatable whether Petitioner states a valid claim or the district court was correct in it's procedural ruling. Slack v McDaniel, 120 S.Ct. 1595, 1604 (2000); Miller El v Cockrell, 123 S.Ct. 1029, 1040 (2003) This Court should issue Certiorari on the Question at issue.

REASON FOR GRANTING PETITION NUMBER TWO:

The United States Court of Appeals has entered a decision on an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court, in the following question:

QUESTION TWO (REstated) : "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether the circumstances of petitioner's cause of action present rare and exceptional circumstances warranting equitable tolling of the 1-year limitations period of 28 U.S.C. § 2244 (d)(1)(2)?"

To obtain a COA under 28 U.S.C. § 2253 (c), a habeas prisoner must make a substabtial showing of a constitutional right, a demonstration that shows jurists of reason could debate whether the issues presented were "adequate to deseve encouragement to proceed further or should have been resolved in a different manner." (emphasis added)  
Slack v McDanies, 120 S.Xt. 1595, 1604 (2000)

"The issue becaomes somewhat more complicated where, as here , the district court dismisses the petition based on

procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v McDaniel* 120 S.Ct. 1595, Id. at 1604.

In *Miller El*, 123 S.Ct. 1029, 1040 (2003) this Honorable Court cautioned that "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed a claim can be debatable even though every jurist of reason might agree, after the COA had been granted and the case has received full consideration, that petitioner will not prevail. " Id. at 1040.

Petitioner requests that if this Honorable Court does find that he is Statutorily barred by the Statute of Limitations, that he be given equitable tolling under the "rare and exceptional circumstances" of his case.

Because the 1-year "AEDPA" statute of limitations is not a jurisdictional bar, the statute of limitations can be equitably tolled, in rare and exceptional circumstances. *Davis v Johnson*, 158 F. 3d 806, 811 (5th Cir. 1998), Cert. Denied, 526 U.S. 1074. (1998)

Equitable tolling of the statute of limitations was raised in *Duncan v Walker*, 121 S.Ct. 2120, 2129 (2001) as Justice Stevens referred to it briefly, but because the issue was not raised properly it was not addressed.

Petitioner was initially deprived of his first appeal of right as an indigent by his appointed attorney Duke Hooten. see *Evitts v Lucy* 469 U.S. 387, 396 (1985)(Sixth Amendment right requires effective assistance of counsel during first appeal of right) Mr. Hooten was not only ineffective on appeal, ut through affirmative misconduct continued to deceive and mislead the appellate court and petitioner with his blatant lies. (see *Ex parte Jimenez* No. 53,212-01 Exhibit 4 pg 2 of Appellate Brief Certificate of Counsel and letter attached dated July, 12, 1996 pgs 28-41 habeas record, Petitioner's time sheet stating Petitioner was received into TDCJ-ID 4-4-96 a little over three months from when Mr. Hooten said he hand delivered the brief and letter of instructions at Tom Geen County jail to Petitioner) see *Irvin v Dept of Veterens Affairs* 498 U.S. 89, 96, 111 S.Ct. 453, 458 112 Led. 2d 435 (1990) (stating that court allowed equitable tolling in situations where complainent has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); see also *Arce v Garcia* 400 F. 3d 1340, 1349 (11 Cir. 2005)(holding that the need for some kind of affirmative misconduct for equitable tolling) There is no question that on the record before this Court and the facts of this case Mr. Hooten misled and tricked the appellate court, the District Clerk, and Petitioner by filing an Anders brief that was ultimately dismissed by the appellate Court and instead of contancting Petitioner in a timely manner and explaining what happened so he could take appropriate action he left Petitioner to wonder what happened until he was forced to submit an affidavit and then claimed amnesia about all of his cases.

(see Ex parte Jimenez, No. 53,212-01 attachment 15 affidavit by Duke Hooten, record on habeas 81-82) dated May 21, 2002) Petitioner wrote a letter to Mr. Hooten, and the Appellate Court. Mr. Hooten never contacted Petitioner after the Appeal was dismissed or answered any of his letterw of inquiry. The Court of Appeals just stated no record of appeal. The District Clerk finally provided a portion of the record and verified that something had been sent to Tom Green Jail after Petitioner had left to go to TDCJ-Id 4-4-96. (see Exhibits 1,2, and 3 in habeas record pages 25-25)

Petitioner pursued diligently every avenue he had available to find out about his appeal before the 1-year limitations ran out in October of 1997, but to no avail, he was time barred before he ever became aware of any information relating to his appeal in 1998. After 9-4-97 Petitioner wrote additional letters and tried to get other inmates to help him because being Hispanic and his first language being Spanish, along with having no or very little former education he was not able to help himself or understand the most basic of legal or factual principals in law. Around the first part of 1998 Petitioner finally received a copy of the brief and the letter etc. (see Exhibit #4 pages of habeas record 28-41) Not knowing Petitioner was already time barred he still pusued vigorously his appeal and post conviction remedies. Because Petitioner can only be housed in a Transfer Facility for Two years Petitioner was transfered to a regular ID Unit, Telford Unit, sometime prior to April 1998.

Petitioner went to the law library after he arrived on the Telford Unit and tried to seek help from knowledgable inmates.

In 1998 the AEDPA Statute of Limitations, 28 U.S.C., 2244 (d) (1)(2) case law was not fully developed and on the Prison Law Libraries. example Davis v Johnson, 158F. 3d 806, 811 (5th Cir. 1998), Cert denied, 526 U.S. 1074 (1999) (holding limitations is not a jurisdictional bar and equitable tolling available in the Fifth Circuit)

Petitioner tried diligently to get someone to help him, but the Supervisor and officers in the law library did not know the law themselves nor would they or State Counsel for Offenders file State or Federal Writs for you, even if they could. Petitioner being indigent and incarcerated for over 13 years at that time could not pay inmates to help him and finally after a long period of trying and hearing you are already time barred and we can not help you for free, an inmate, who was Hispanic and very knowledgeable about the law agreed to help me with my case. The called him Wheto, because he was light skinned. He explained to me that Texas Law was unsettled on whether you could file a first state writ not challenging your conviction and then file a second writ to challenge your conviction without it being a successive writ under Texas Code of Criminal Procedure 11.07 Section 4. For instance the Texas Court of Criminal Appeals on December 18th of 1997 in Ex parte Rawlinson 958 S.W. 2d 198, 200-01 (TEX. Cr. App 1997) (held that prisoner Rawlinson's challenge to ineffective assistance of counsel on appeal was barred by the successive writ doctrine) Just four months later the same TEXas Court of Criminal Appeals held in Ex parte Evans, 964 S.W. 2d 643, 647 (TEX Cr. App 1998) ((a claim that does not address the validity of the underlying

conviction under Art. 11.07 Sect. 1 and is not a challenge to the conviction under 11.07 Section 4 because it does not call into question the validity of the prosecution or the judgment of guilt) Evans having been decided in September of 1998 was followed by Ex parte Whiteside, 12 S.W. 3d 819, 823 (Tex Cr. App. 2000) in March of 2000 and finally Ex parte Rieck , 44 S.W. 3d 510 (Tex. Cr. App 2004)

Petitioner was convinced that he could challenge his denial of direct appeal by ineffective assistance of appellate counsel on appeal and still have a challenge of his conviction cognizant on a second petition. Petitioner although, believed that he could not go to Federal Court because he was time barred. Salinas v Dretke was not decided as of yet, 354 F. 3d 425 (5th Cir. 2004) Even if Petitioner obtained a new direct appeal he was not sure he could ever go to federal court, so he was being very sure that he got his full bite of the apple in State Court, which he did. (see Ex parte, Jimenez, No 53,212-01 and Ex parte Jimenez, No 53,212-02) Petitioner is still unsure if a new appeal or Petition for Discretionary REview resets the 1-year limitations period, as this Court has not visited this Question to Petitioner's knowledge. Keeping in mind Petitioner is not privileged to the Rulings for 2 to 4 month after they come out on the unit and the Shephardization Process is faulty at times in prison unit library's.

About the time Wheto was going to help Petitioner file his first State Petition, he was transferred off the Unit. Petitioner had to go through the whole process of getting someone else to assist him in continuing in the process. Petitioner finally filed

his first state habeas on April 11, 2002, (see Exparte Jimenez, No. 53,212-01) and obtained a Christian helper that is committed to Petitioner presenting his case to this Honorable Highest Court in the Land, if he is not transferred before the deadline to file this Petition. (TDCJ- Rules of Correspondance chaned in May of 2003 and inmates can no longer write each other even to help with their legal cases, unless they are a co-defendant in the case) The Texas Court of Criminal Appeals in an opinion delivered on September 25, 2002, granted permission to file an out of time appeal (APP. No 53,212-01)

On October Petitioner filed a notice of appeal on the 25th day, 2002. In an unpublished Memorandum Opinion filed May 15, 2003 the Third Court of Appeals affirmed Petitioner's conviction and sentence (No. 03-02-00733-CR) considering not only the new appointed Counsel's Anders Brief, but Petitioner's pro se brief on merits. Petitioner filed a pro se Petition for Discretionary REview, which the Texas Court of Criminal Appeals refused on October 8, 2003.

Petitioner filed a second state application for writ of habeas, as a first challenge to his conviction on habeas on December 5, 2004. The TEXas Court of Criminal Appeals denied the application without wrritten order on the findings of the trial court without a hearing, on the merits on June 29, 2005 (App No. 53-212-02)

The instant federal Petition was filed on July 19, 2005, persuant to Houston v Lack, 108 S.Ct. 237) (1988); see also Spotville v Cain, 149 F. 3d 374, 378 (5th Cir.1998)(holding

that for the purposes of determining the applicability of the AEDPA, a federal petition is considered filed on the date it is delivered to prison officials for mailing to the district court.) Petitioner from April 11, 2002, to this present date August 21, 2007, has not missed one State or Federal filing or one procedure as untimely or frivolous in over 5 years of litigation and will place this instant petition in the indigent law library mailbox for filing tomorrow August 22, 2007 as the deadline for filing is August 25, 2007. (see Appendix A 5th Cir. Decision on May 225, 2007, Rule of Supreme Court 13 90 days to file writ of Certiorari)

Although there may be several defendants that deserve equitable tolling on similar circumstances as Petitioner throughout the United States of America, this Honorable Court can take Judicial Notice that Petitioner's set of facts are rare and exceptional in Texas, where it is rare that a Petitioner would have the proof that a licenced, trained, skilled, attorney would lie about taking a copy of a Anders Brief to an indigent, incarcerated inmate and then abandon him completely and then get amnesia about the case and only through fate actually get caught. (see Jimenez Ex parte, 53,212-01 the entire record on state habeas and Exhibits.) It is interesting to note that Ex parte Wilson, 956 S.W. 2d 25, 27 (Tex. Cr. App. 1998) the controlling case of ineffective assistance of Counsel on Direct Appeal, did not get relief because it came down to Petitioner Wilson's word against his Attorney and because of the credibility of the attorney he was forever denied a first appeal of right, which obviously effected his whole State and Federal post conviction process.

One such rare and exceptional circumstance was recognized in *Alexander v Cockrell*, 294 F. 3d 626 (5th Cir. 2002) in which the Fifth Circuit Court held that the district court did not abuse its discretion when it applied equitable tolling based on *United States v Patterson*, 211 F. 3d at 931, because the court had merely used language that could have misled the Petitioner into believing that he could file a subsequent Section 2255 petition. 294 F. 3d at 629.

Petitioner has alleged acts and omissions of his appellate counsel, his inability to obtain the whole transcript or retrieve his file from appellate counsel in time to correct his direct appeal prior to October 1997, and Petitioner's numerous good faith efforts to have his case reviewed at the state level, seeing he is Hispanic, uneducated, and relying almost completely on other inmates, prior to filing this instant application, under Section 2254, these circumstances should act to toll the limitations period, even though Petitioner believes he may be Statutorily timely under 28 U.S.C. § 2244 (d)(1)(A), which should have reset his 1-year limitations at the conclusion of his out of time appeal. see *Orange v Calbone* 318 F. 3d 1167, 1170-71 (10th Cir. 2003) *Frash v Peguese*, 414 F. 3d 518, 522-23 (4th Cir. 2005) However in the alternative, Petitioner concedes that if Statutorily barred he should get equitable relief.

Since the AEDPA one-year limitations is not a bar to federal jurisdiction it can be equitably tolled, albeit only in "rare and exceptional circumstances." *Felder v Johnson*, 204 F. 3d 168, 171 (5th Cir. 2000) (citations omitted)

In *Fisher v Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) the Fifth Circuit held that courts must examine each case on its facts to determine whether it presents sufficiently rare and exceptional circumstances to justify equitable tolling." (citations omitted). "Equitable tolling is a discretionary doctrine that turns on the facts and circumstances of (each) particular case and does not lend itself to bright line rules.:Id. at 713. The doctrine of equitable tolling preserves a plaintiff's claims when the strict application of the statute of limitations would be inequitable. *United States v Patterson*, 211 F. 3d 927, 930 (5th Cir. 2000); see also *Davis v Johnson*, 158 F. 3d 806, 810 (5th Cir. 1998)

In order for equitable tolling to be applicable, it is necessary that the petitioner have been prevented, through no fault of his own, from asserting his claim. see *Coleman v Johnson*, 184 F. 3d 398, 403 (5th Cir. 1999); *Cousin v Lensing*, 310 F. 3d 843, 848 (5th Cir. 2002)

Appellate Counsel's inexplicable neglect of Petitioner's rights as well as counsel's own ethical obligations to Petitioner, presents a "rare and extra ordinary circumstance" beyond Petitioner's control that warrants equitable tolling of the statute of limitations. This Honorable Court of last chance should find that the case before it presents "rare and exceptional circumstances" and should grant Certiorari to grant COA and either look at the merits in the case or remand to the Fifth Circuit on the merits. In light of actions and inactions of appellate counsel and Petitioner's genuine attempts to litigate his issues to finality, it would be inequitable to bar Petitioner from presenting his application.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carlos Jimenez

Date: August 21, 2007

Pursuant to Supreme Court Rule 29 in the foregoing petition for Writ of Certiorari proceeding, the Writ and all accompanying documents have been deposited in the Telford Unit indigent Mailbox in the Law Library on or before August 22, 2007 and is timely filed with this Court. "I declare under penalty of perjury under the laws applicable that the foregoing is true and correct." Executed this 21st day of August, 2007.

Carlos Jimenez  
Carlos Jimenez #745196

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ — PETITIONER  
(Your Name)

VS.

NATHANIEL QUARTERMAN — RESPONDENT(S)  
DIR. TDCJ-CID.

**PROOF OF SERVICE**

I, CARLOS JIMENEZ, do swear or declare that on this date, August 22, \_\_\_\_\_, 20 07, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

\_\_\_\_\_  
Mr. Gregg Abbott, Office of the Attorney General of Texas  
\_\_\_\_\_  
P.O. Box 12548, Capitol Station  
\_\_\_\_\_  
Austin, Texas 78711-2548

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

Executed on August 21, \_\_\_\_\_, 20 07

Carlos Jimenez  
(Signature)

**APPENDIX A**

**United States Court of Appeals**

FIFTH CIRCUIT  
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

May 25, 2007

Ms Karen S Mitchell, Clerk  
Northern District of Texas, San Angelo  
United States District Court  
33 E Twohig  
Room 202, Federal Building  
San Angelo, TX 76903

No. 06-11240 Jimenez v. Quarterman  
USDC No. 6:05-CV-52

Enclosed is a certified copy of the judgment issued as the  
mandate.

Record/original papers/exhibits are returned:

( ) Volumes ( ) Envelopes ( 1 ) Box (SCP)

The electronic copy of the record has been recycled.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

*Gina Randazzo Martin*

By: \_\_\_\_\_  
Gina Randazzo Martin, Deputy Clerk  
504-310-7687

cc: w/encl:  
Mr Carlos Jimenez  
Ms Gretchen Berumen Merenda

MDT-1

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 06-11240  
USDC No. 6:05-CV-52

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United States Court of Appeals  
Fifth Circuit

**FILED**

May 25, 2007

CARLOS JIMENEZ,

Charles R. Fulbruge III  
Clerk  
Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN,  
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
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O R D E R:

Carlos Jimenez, a Texas prisoner, pleaded guilty of felony burglary of a habitation and admitted an enhancement charge based on a prior felony conviction. The initial judgment of deferred adjudication was revoked, Jimenez was adjudicated guilty, and he was sentenced to 43 years in prison. The district court dismissed Jimenez's 28 U.S.C. § 2254 petition with prejudice as barred by the one-year statute of limitations. Jimenez now seeks a certificate

O R D E R  
No. 06-11240

-2-

of appealability ("COA"), arguing (1) that the granting of an out-of-time appeal by the Texas Court of Criminal Appeals started the limitations period running anew and (2) that he is entitled to equitable tolling.

Jimenez has failed to demonstrate that reasonable jurists would debate the correctness of the district court's conclusion that the § 2254 petition is time-barred. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, the request for a COA is DENIED.

/s/ Jerry E. Smith  
JERRY E. SMITH  
United States Circuit Judge

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
SAN ANGELO DIVISION

CARLOS JIMENEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	6:05-CV-052-C
NATHANIEL QUARTERMAN, <sup>1</sup> Director,	)	
Texas Department of Criminal Justice,	)	
Correctional Institutions Division,	)	
	)	ECF
Respondent.	)	

**ORDER**

Petitioner Carlos Jimenez, acting *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on July 22, 2005. Respondent filed an Answer with Brief in Support on October 3, 2005, and provided copies of Petitioner's relevant state court records. Petitioner subsequently filed his objections and response on December 5, 2005.

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 119th Judicial District Court of Tom Green County, Texas, in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez*. In that cause number, Petitioner was charged with the felony offense of burglary of a habitation, and one prior felony conviction for aggravated assault with a deadly weapon was alleged to enhance the sentence. Pursuant to a plea agreement, Petitioner pleaded guilty to the charge and true to the enhancement paragraph; and on November 12, 1991, the trial court deferred adjudication and placed him on probation for five years. On December 3, 1991, the trial court entered an Amended Judgment to add the monthly probation fee that had been announced in open court at the sentencing. Petitioner did not appeal.

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<sup>1</sup>Nathaniel Quarterman has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

On March 3, 1995, the prosecution filed a Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged that he had violated three terms and conditions of his deferred adjudication probation. A State's First Amended Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged four violations of the terms and conditions of probation, was filed on October 3, 1995. Following a hearing on the motion to revoke on November 6, 1995, the trial court found that Petitioner had violated all four terms and conditions of his probation as alleged in the First Amended Motion to Revoke, adjudicated guilt, and sentenced him to forty-three (43) years' incarceration in the Texas Department of Criminal Justice. A Motion for New Trial was filed on December 4, 1995, and the trial court appointed counsel to represent Petitioner on appeal on December 8, 1995. The appointed counsel filed a Notice of Appeal on January 24, 1996. On July 15, 1996, appellate counsel filed an *Anders*<sup>2</sup> brief in the Third Court of Appeals and alleged that, in his professional opinion and after a diligent review of the record, Petitioner had no grounds for an appeal. In a *per curiam* unpublished opinion filed on September 11, 1996, the Third Court of Appeals held that Petitioner's appellate brief was frivolous because the notice did not raise the question of jurisdiction and dismissed the appeal (No. 03-96-00123-CR). Petitioner did not file a petition for discretionary review.

On April 11, 2002, Petitioner filed a state habeas application and argued that he had been denied the right to file an appeal because his attorney had not properly notified him that he was filing

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<sup>2</sup>In *Anders v. California*, 386 U.S. 738 (1967), the Supreme Court of the United States determined that "when [appellate] counsel finds a case to be wholly frivolous, after conscientious examination of it, he should so advise the court and request permission to withdraw." *Id.* at 744. The Court further noted that such request must be accompanied by a brief that refers to anything that might arguably support an appeal and a copy of the brief should be provided to the indigent defendant "and time allowed him to raise any points that he chooses . . ." *Id.* Thus, an "*Anders* brief" refers to the request to withdraw and accompanying brief that sets out anything that might arguably support an appeal.

an *Anders* brief. In an opinion delivered on September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal (App. No. 53, 212-01).

On October 25, 2002, Petitioner filed a notice of appeal pursuant to the order granting him permission to file an out-of-time appeal.<sup>3</sup> In an unpublished Memorandum Opinion filed May 15, 1993, the Third Court of Appeals affirmed Petitioner's conviction and sentence (No. 03-02-00733-CR). Although Petitioner filed a *pro se* petition for discretionary review, the Texas Court of Criminal Appeals refused the petition on October 8, 2003.

Petitioner filed a second state application for writ of habeas corpus on December 6, 2004. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005 (App. No. 53-212-02).

Because Petitioner declared under penalty of perjury that he delivered the instant petition to prison officials for mailing to the court on July 19, 2005, the petition is deemed to be filed as of July 19, 2005. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (holding that for purposes of determining the applicability of the AEDPA, a federal petition is considered filed on the date it is delivered to prison officials for mailing to the district court).

The Court understands Petitioner to raise the following grounds for review in the instant petition:

- (1) He was denied due process at the hearing on the motion to adjudicate and revoke his probation because the judge was biased and had pre-determined his sentence.
- (2) He was denied due process because the sentencing judge threatened him with perjury, called him a liar, interrupted Petitioner, denied Petitioner the right to explain why he did not

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<sup>3</sup>Petitioner's appointed attorney also filed an *Anders* brief in the out-of-time appeal and alleged that he could find no grounds for an appeal and any appeal was frivolous and meritless.

A

understand his previous plea of guilty, and refused to consider the fifteen-year sentencing agreement between Petitioner and the prosecutor.

(3) His conviction was unlawfully obtained because his plea of guilty was coerced, involuntary, and unintelligent.

(4) He was denied effective assistance of counsel at the plea proceeding because counsel failed to adequately explain deferred adjudication or the use of a prior conviction as a sentencing enhancement.

(5) He was denied effective assistance of counsel at the revocation proceeding because counsel did not advise the court that Petitioner had agreed to a fifteen-year sentence, counsel failed to object to the sentencing judge's bias, prejudice, and vindictiveness, counsel was intimidated by the sentencing judge, and he failed to explain to Petitioner that he had to plead true to all allegations in the motion to adjudicate to be eligible to receive a fifteen-year sentence.

Respondent argues that Petitioner has failed to timely file his § 2254 petition.

#### STATUTE OF LIMITATIONS

Petitioner filed his federal petition after April 24, 1996; therefore, his petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, signed into law on April 24, 1996, enacted the present 28 U.S.C. § 2244(d), which establishes a one-year limitation on filing federal habeas corpus petitions. Sub-section (d) now provides as follows:

(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 a 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.

28 U.S.C. § 2244(d). Under the statute, the habeas clock begins to run when one of the circumstances included in § 2244(d)(1)(A)-(D) triggers the Act's application.

Petitioner first argues that his petition is not time-barred because the statute of limitations did not begin to run in his case under 28 U.S.C. § 2244(d)(1)(A) until January 8, 2004, because the out-of-time appeal "reset" the one-year period; the conclusion of his "direct appeal" included the periods for filing a petition for discretionary review and a petition for writ of certiorari; and his state habeas applications tolled the limitations period. He does not argue that the one-year limitations period was triggered by the circumstances listed in Sections 2244(d)(1)(B), (C), or (D). Respondent agrees that the applicable section is § 2244(d)(1)(A) but disagrees with Petitioner's tolling arguments and contends that the instant petition is time-barred.

Petitioner raises claims relating both to (1) his initial plea of guilty and deferred adjudication community supervision sentence and (2) the revocation of his deferred adjudication community supervision. Even though Petitioner does not distinguish between the two groups of claims in his limitations argument, this Court will analyze each group separately because each group of claims

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became “final” for purposes of the AEDPA’s limitations period on different dates. *See Dones v. Dretke*, No. 3:05-CV-2237-M, 2006 WL 1294077, at \*2 (N.D. Tex. May 11, 2006) (separating claims challenging an order deferring adjudication and imposing community supervision from a claim challenging an order revoking community supervision and imposing a prison sentence for purposes of calculating the one-year limitations period).

***1. Claims Regarding Petitioner’s Plea of Guilty and Placement on Deferred Adjudication Community Supervision***

On November 12, 1991, Petitioner pleaded guilty and the trial court deferred adjudication and entered an order for five years of community supervision. The trial court entered an Amended Judgment on December 3, 1991. Petitioner did not file an appeal.

Under Section 2244(d)(1)(A), the AEDPA’s one-year limitation period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003). The one-year period begins to run under § 2244(d)(1)(A) when the judgment of conviction becomes final, “not when the petitioner becomes aware that the judgment is final.” *Crutcher v. Cockrell*, 301 F.3d 656, 657 (5th Cir. 2002). Furthermore, the “AEDPA, not state law, determines when a judgment is final for federal habeas purposes.” *Foreman v. Dretke*, 383 F.3d 336, 339 (5th Cir. 2004) (citing *Roberts v. Cockrell*, 319 F.3d at 694).

“Although an order of deferred adjudication is not a judgment under Texas law, it is a judgment under the relevant federal law.” *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005), *cert. denied*, *Caldwell v. Quarterman*, (No. 05-10671) 549 U.S. \_\_\_\_ (October 10, 2006). “Because an order of deferred adjudication community supervision is a final judgment within the plain meaning of AEDPA section 2254, the one-year statute of limitations, for challenging substantive issues of the

orders of deferred adjudication, beg[ins] to run when the order deferring adjudication bec[omes] final.” *Id.* Petitioner did not file an appeal following his plea of guilty; therefore, his conviction became final by expiration of the time for filing a direct appeal from the order deferring adjudication on December 12, 1991. Tex. R. App. P. 41(b)(1) (1990), now Tex. R. App. P. 26.2(a)(1) (stating that a defendant convicted in Texas must file his notice of appeal within 30 days after the trial court imposes or suspends the sentence in open court). *See Scott v. Johnson*, 227 F.3d 260, 262 (5th Cir. 2000) (holding that when a Texas petitioner does not appeal his conviction, it becomes final thirty days after his plea of guilty); *Roberts v. Cockrell*, 319 F.3d at 694 (“If the defendant stops the appeal process before [filing a petition for writ of certiorari], the conviction becomes final when the time for seeking further direct review in the state court expires.”). *See also Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) (holding that a defendant placed on deferred adjudication community supervision must raise issues relating to the original plea proceeding in an appeal taken when the community supervision is first imposed and not after subsequent revocation proceedings). Hence, Petitioner’s plea of guilty and five-year sentence to deferred adjudication community supervision became final for purposes of the AEDPA’s limitations period on December 12, 1992, and the one- year limitations period literally expired on December 12, 1993.

Nevertheless, for federal petitions filed after the enactment of the AEDPA on April 24, 1996, which attack convictions that became final thereto, the United States Court of Appeals for the Fifth Circuit has determined that an inmate must be accorded a one-year “grace period” within which to file his federal petition; that is, the petitioner must file his federal petition on or before April 24, 1997. *Felder v. Johnson*, 204 F.3d 168, 169 (5th Cir. 2000). Petitioner, however, did not file his petition until July 19, 2005, over eight years after the applicable limitations period had expired. Therefore,

unless Petitioner demonstrates that he is entitled to statutory or equitable tolling of the limitations period, his claims regarding the original guilty plea and order for deferred adjudication community supervision are time-barred.

Section 2244(d)(2) provides for tolling of the limitation period during the time when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. “Congress meant to include within the scope of § 2244(d)(2) those ‘properly filed’ applications, without respect to state nomenclature or the nature of the petitioner’s state confinement, that, pursuant to the wording of § 2244(d)(2), seek ‘review’ of the ‘pertinent judgment or claim.’” *Moore v. Cain*, 298 F.3d 361, 366-67 (5th Cir. 2002). “[A]n application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original).

Although Petitioner properly filed two state habeas applications, on April 11, 2002, and December 6, 2004, he is not entitled to tolling under 28 U.S.C. § 2244(d)(2) because neither application was filed before the limitations period expired on April 24, 1997. *See Scott v. Johnson*, 227 F.3d at 263 (holding that a state application filed after the one-year limitation period had expired did not toll the limitation period under § 2244(d)(2)).

Petitioner also argues that he is entitled to equitable tolling of the limitations period because the limitations period is not a jurisdictional bar, he was deprived of his first appeal because of ineffective assistance of counsel, and he is indigent, incarcerated, Hispanic, and proceeding *pro se*. Equitable tolling is a discretionary doctrine “that turns on the facts and circumstances of [each] particular case, . . . and does not lend itself to bright-line rules.” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). “The doctrine . . . is applied restrictively and . . . is entertained only in cases

presenting ‘rare and exceptional circumstances where it is necessary to preserve a plaintiff’s claims when strict application of the statute of limitations would be inequitable.’” *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (quoting *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002) (internal quotation and alteration omitted)). The doctrine applies principally “where the [petitioner] is actively misled by the [respondent] about the cause of action or is prevented in some extraordinary way from asserting his rights.” *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (internal quotation marks omitted) (emphasis added). See *In re Wilson*, 442 F.3d at 875 (“A petitioner’s failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner’s own making do not qualify.”). The doctrine does not apply “where a petitioner has failed to pursue habeas relief diligently.” *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002). Therefore, a court must examine each case on its individual facts and, guided by precedent, “determine whether it presents sufficiently ‘rare and exceptional circumstances’ to justify equitable tolling.” *Fisher v. Johnson*, 174 F.3d at 713 (footnote omitted).

Attorney error or neglect is insufficient to warrant equitable tolling. *Cousin v. Lensing*, 310 F.3d at 849. See *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (“Ineffective assistance of counsel does not constitute a basis for equitable tolling.”); *Moore v. Cockrell*, 313 F.3d 880 (5th Cir. 2002) (holding that counsel’s delay in notifying petitioner of the result of a direct appeal does not constitute a basis for equitable tolling); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) (holding that “counsel’s erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [petitioner’s] habeas petition in the district court within the one-year limitations period”); and *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (holding that “ineffective assistance

on direct appeal in state court is not relevant to the question of tolling the AEDPA's statute of limitations").

Petitioner's allegations of indigence, incarceration, *pro se* status, and limited education are likewise insufficient to justify equitably tolling the limitations period. See *Turner v. Johnson*, 177 F.3d at 391 (providing that unfamiliarity with legal process, ignorance of the law, or lack of legal training does not merit equitable tolling); *Felder v. Johnson*, 204 F.3d at 171-72 (finding that ignorance of the law, lack of knowledge of filing deadlines, a prisoner's *pro se* status, lack of access to federal statutes and case law, incarceration prior to enactment of the AEDPA, illiteracy, deafness, a lack of legal training, and actual innocence claims will not support equitable tolling of the AEDPA's statute of limitations).

Moreover, the doctrine of equitable tolling "will not be applied where the [petitioner] failed to diligently pursue habeas corpus relief under § 2254." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). Petitioner has provided no evidence that he was prevented by the State of Texas from timely raising his claims or that any "rare and exceptional" circumstances warrant equitable tolling of his claims from April 24, 1997, when the one-year period expired, until July 19, 2005, when he is deemed to have filed his petition. See *Phillips v. Donnelly*, 216 F.3d at 511 (holding that the burden of proving facts to support a claim of equitable tolling lies with the party seeking equitable tolling).

Accordingly, Petitioner's claims regarding his plea of guilty and the imposition of five years' deferred adjudication community supervision are time-barred under 28 U.S.C. § 2254(d)(1)(A).<sup>4</sup>

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<sup>4</sup>To the extent that Petitioner argues that he could not appeal from his plea of guilty and the imposition of five years' deferred adjudication community supervision in 1991 until after his community supervision was revoked and sentence imposed in 1995, his claims are still time-barred as discussed in the following section. See *Manuel v. State*, 994 S.W.2d at 661-62 (noting in 1999 that prior to 1987, when Texas Code of Criminal Procedure Art. 44.01(j) was enacted, a defendant placed on deferred adjudication community supervision could challenge the decision to defer adjudication or its terms and conditions only

2. *Claims Regarding the Revocation of Deferred Adjudication Community Supervision*

On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced Petitioner to 43 years' incarceration. Counsel for Petitioner filed a motion for new trial and notice of appeal. The Third Court of Appeals dismissed the appeal for want of jurisdiction on September 11, 1996, and Petitioner did not file a petition for discretionary review. Petitioner's claims regarding the revocation of his community supervision and 43-year sentence therefore became final on October 11, 1996, when his time for filing a petition for discretionary review expired, and he had to file his federal petition on or before October 11, 1997.

Petitioner, however, argues that because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process, that is, on January 6, 2004, when his time expired for filing a petition for writ of certiorari.<sup>5</sup> Although he argues that the decision by the Fourth Circuit Court of Appeals in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), supports his argument, he has

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by moving for final adjudication and then appealing the adjudication, but the 1987 change in the law required a defendant placed on deferred adjudication community supervision to raise issues relating to the original plea proceeding only in an appeal taken when the deferred adjudication community supervision was first imposed).

<sup>5</sup>Following the revocation of his deferred adjudication community supervision and sentencing to 43 years' incarceration, Petitioner's appointed counsel filed a notice of appeal and subsequently an *Anders* brief. The Third Court of Appeals dismissed the appeal on September 11, 1996, and Petitioner did not file a petition for discretionary review. Five years later, on April 11, 2002, Petitioner filed a state application for writ of habeas corpus and alleged that he had been denied the right to appeal because his counsel had not properly notified him that he was filing an *Anders* brief so Petitioner could file his own *pro se* brief. On September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal. Petitioner contends that this granting of an out-of-time appeal "restored" him to the position he was originally in immediately after the revocation of his deferred adjudication community supervision on November 6, 1995. He then argues that his revocation actually became final for purposes of the AEDPA's limitations period on January 6, 2004, when his time expired for filing a petition for writ of certiorari following the out-of-time appeal. Petitioner also argues that because he filed his second state application on December 6, 2004, the limitations period was tolled until it was denied on June 29, 2005, and his federal petition was therefore timely filed on July 19, 2005.

overlooked the decision by the Fifth Circuit Court of Appeals in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004),<sup>6</sup> which is binding on this Court.

In *Salinas*, the Fifth Circuit determined that “[o]n its face, AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between.” *Id.* at 429. “As a result, when a petitioner convicted in the Texas system acquires the right to file an ‘out-of-time’ PDR, the relief tolls the AEDPA’s statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA’s limitations period altogether.” *Id.* at 430 (footnote omitted). Thus, “if . . . an ‘out-of-time’ PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief.” *Id.* at 430. Although the decision in *Salinas* involved an out-of-time petition for discretionary review, its holding is equally applicable to an out-of-time appeal that “is necessarily the product of state habeas review . . . .” *Id.* at 431. *See Roach v. Quarterman*, No. 3:05-CV-2539-P, 2006 WL 2586087 at \*2 n.5 (N.D. Tex. Sept. 8, 2006) (noting that the decision in *Salinas* is equally applicable to cases involving out-of-time PDRs or direct appeals obtained by state collateral review). Thus, for purposes of the AEDPA’s statute of limitations, the revocation of Petitioner’s deferred adjudication community supervision became final on October 11, 1996, when his time for seeking direct review expired, and the granting of permission to file an out-of-time appeal did not “restart” the limitations period. The

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<sup>6</sup>In *Frasch v. Peguese*, 414 F.3d 518, 522-23 (4th Cir. 2005), the Fourth Circuit Court of Appeals rejected the Fifth Circuit’s approach in *Salinas* because “it ignore[d] that two separate proceedings [were] involved”; that is, even though Frasch obtained the right to file an out-of-time appeal in a collateral proceeding, that proceeding ended with the order granting him leave to file the out-of-time appeal, which placed him in the same procedural posture as if he had timely filed his direct appeal.

one-year limitations period expired on October 11, 1997, and the instant petition is clearly time-barred unless Petitioner demonstrates that he is entitled to statutory or equitable tolling.

Petitioner is not entitled to statutory tolling under § 2244(d)(2) because he filed both of his state habeas applications after the one-year limitations period expired. *Scott v. Johnson*, 227 F.3d at 263.

Petitioner is not entitled to tolling for the time period during which his first state habeas application and the resulting out-of-time appeal were pending because neither was filed before the one-year limitations period expired. *See Miles v. Dretke*, No. 3:03-CV-2725-K, 2004 WL 1041635 (N.D. Tex. May 5, 2004) (adopting the findings and conclusions of the magistrate judge, 2004 WL 827941 at \*3 (N.D. Tex. April 15, 2004)) (finding that when the state habeas application that seeks permission to file an out-of-time PDR is filed after the one-year limitation period has expired, neither the state habeas application nor the out-of-time PDR will toll the limitation period). *See also Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (“A state court’s subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application.”).

As previously discussed, Petitioner’s claims of indigency, incarceration, *pro se* status, limited education, and limited ability to speak English are insufficient to warrant equitable tolling. Moreover, he has not demonstrated that he diligently pursued relief in either state or federal court. *Melancon v. Kaylo*, 259 F.3d at 408. Petitioner was originally placed on deferred adjudication community supervision on November 12, 1991, and his community supervision was revoked on November 6, 1995, but he did not file his first state habeas application until April 11, 2002, over six years later. Furthermore, after Petitioner’s discretionary review was refused on October 8, 2003, following his

