No. 07-6984

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in denying a certificate of appealability on the question of whether the AEDPA statute of limitations contained in 28 U.S.C. § 2244(d)(1)(A) commences after the completion of an out-of-time appeal obtained through post-conviction state habeas proceedings; and

2. Whether the Fifth Circuit erred in denying a certificate of appealability on the question of whether Jimenez is entitled to equitable tolling of the one-year limitations period of 28 U.S.C. § 2244(d)(1)(2).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, ("the Director"), respectfully files this brief in opposition to Carols Jimenez's ("Jimenez") petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 240 (1998).

STATEMENT OF THE CASE

I. State court proceedings.

On November 12, 1991, after pleading "guilty" to the charge of burglary of a habitation, and "true" to the enhancement paragraph alleging one prior felony, the 119th District Court of Tom Green County, Texas, placed Jimenez on deferred adjudication probation for five years, pursuant to a plea agreement, in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez*. Tr 8-20.[1] Jimenez did not appeal from this order.

On November 6, 1995, the trial court held a hearing on the State's motion to proceed with an adjudication of guilt, adjudicated guilt,[2] and sentenced Jimenez to forty-three years confinement. Tr 35. Jimenez 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 on September 11, 1996, finding: the notice of appeal did not preserve for review the district court's rulings on

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[1] "Tr" refers to the Clerk's Record in this case, followed by the relevant page number(s).

[2] Jimenez entered pleas of "not true" to the allegations in paragraphs one and three, and pleas of "true" to the allegations in paragraphs two and four in the State's Motion to Proceed. Tr 35.

any pretrial motions and did not state that the court gave appellant permission to appeal, pursuant to TEX. R. APP. PROC. 40(b)(1), thus the appellate court had jurisdiction only to consider issues concerning the district court's jurisdiction, and no basis for such challenge were raised or found by the court on review of the records. *Jimenez v. State*, No. 03-96-00123-CR (Tex. App.—Austin, 1996). The court noted that appellate counsel had filed an *Anders* Brief,[3] that such brief was delivered to appellant, that appellant was advised of his right to examine the record and file a *pro se* brief, and that no *pro se* brief had been filed. *Id.* at 2. Jimenez did not file a petition for discretionary review.

Almost six years later, on April 11, 2002, Jimenez filed a state application for writ of habeas corpus arguing that he had been denied a meaningful appeal when his counsel failed to comply with the requirements of *Anders* by failing to notify Jimenez of his right to file a *pro se* brief. *Ex parte Jimenez*, Application No. 53,212-01, at 2. The Court of Criminal Appeals granted Jimenez relief in the form of an out-of-time appeal. *Ex parte Jimenez*,No. 74,433, slip op. (Tex. Crim. App. Sept. 25, 2002).

Jimenez's counsel filed an *Anders* brief in his out-of-time appeal also. *Jimenez v. State*, No. 03-02-00733-CR, 2003 WL 21087604 (Tex. App.– Austin 2003); *Ex parte Jimenez*, Application No. 53,212-02, at 87-90 (copy of appellate opinion). Jimenez filed a *pro se* brief challenging the voluntariness of his guilty plea and denial of due process at both his guilty plea hearing and his later sentencing hearing. *Jimenez v. State*, 2003 WL 21087604 at *2. The Court of Appeals subsequently issued an opinion affirming Jimenez's conviction

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[3] Jimenez's attorney on appeal filed an *Anders* brief in which he concluded that the appeal was wholly frivolous and without merit. *Jimenez v. State*, No. 03-96-00123-CR, slip op. at *1; *see Anders v. California*, 386 U.S. 738 (1967).

in an unpublished opinion on May 15, 2003. *Id.* His petition for discretionary review ("PDR") was ultimately refused on October 8, 2003. *Jimenez v. State*, PDR No. 937-03.

Over a year later, on December 6, 2004, Jimenez filed a state writ application for writ of habeas corpus challenging this conviction raising for the first time claims of ineffective assistance of counsel at the revocation and punishment proceedings as well as claims he had raised in his out-of-time appeal including involuntary plea, ineffective assistance of counsel at the plea proceeding, and denial of due process based on judicial bias. *Ex parte Jimenez*, Application 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.

II. Federal court proceedings.

Jimenez filed his federal habeas petition on July 19, 2005, challenging his burglary conviction and claiming that: his plea was involuntary, he was denied effective counsel at the plea proceeding, he was denied due process at revocation because the judge was biased and would not consider a sentencing agreement, and he was denied effective counsel at revocation. *Jimenez v. Quarterman*, No. 6:05-CV-052-C, at 3-4 (N.D. San Angelo, October 23, 2006) (partial opinion located at Cert. Pet. Appendix B); Appendix A (District court order denying federal habeas petition as time-barred). The District Court, relying in part on the Fifth Circuit's holding in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004), found that Jimenez's petition was time-barred. *Id.* at 12, 14. The court also found that equitable tolling was not warranted because Jimenez had neither demonstrated sufficiently rare and exceptional circumstances nor diligence. *Id.* at 8-10, 13-14. The district court dismissed Jimenez's federal writ petition with prejudice as time-barred. *Id.* at 14.

Jimenez applied for a certificate of appealability ("COA") to appeal the dismissal of his petition as untimely filed but a COA was denied by both the federal district court, Cert. Pet. Appendix A, and the United States Court of Appeals for the Fifth Circuit. Cert. Pet. Appendix A (*Jimenez v. Quarterman*, No. 06-11240, order filed May 25, 2007); Appendix B (Petitioner's motion for COA in the Fifth Circuit).

Jimenez now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit erred when it denied him a certificate of appealability ("COA").

SUMMARY OF ARGUMENT

Jimenez contends that the Fifth Circuit has entered a decision in conflict with the United States Courts of Appeals for the Fourth, and Tenth Circuits on the same important issue: whether an out-of-time appeal obtained through post-conviction habeas proceedings constitutes "direct review" under Section 2244(d)(1)(A), such that the AEDPA limitations period is reset or restarted at the conclusion or expiration of such review. Pet. Cert. at 16. He also argues he is entitled to equitable tolling. Pet. Cert. at 15-24. There is no compelling reason, however, for this Court to exercise its jurisdiction to review the procedural disposition of Jimenez's federal habeas petition.[4]

First, to the extent the Fifth Circuit's opinion in *Salinas*, on which the district court relied in part in dismissing Jimenez's petition, conflicts with decisions from the Fourth and Tenth Circuits, the split between the Circuits is very limited.[5] Moreover, the Fifth Circuit

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[4] This Court denied a petition for certiorari review of the same issue in *Cate v. Quarterman*, No. 07-5914, on January 14, 2008.

[5] Jimenez's argument that the split in the Circuits is broader on this particular issue is not supported by the cases he cites, as further addressed in the argument below. *See* Pet. Cert. at 11-12, citing *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2003) (holding that a sentence review is not direct review under Section 2244(d)(1)(A) looking to state law

provides the better interpretation of Section 2244(d)(1)(A). It promotes the purposes of the AEDPA statute of limitations, is consistent with principles of statutory construction, and enjoys support from several other Circuits. The approach of the Fourth and Tenth Circuits hinders the purposes of the AEDPA, undermining the interest in finality and creating a great potential for delay in the adjudication of federal claims. Because the dismissal of Jimenez's petition was a correct application of Section 2244(d)(1)(A), Jimenez presents no compelling reason for this Court to exercise its jurisdiction to review the issue in the context of this case.

Second, even if it applies to the AEDPA limitations period, equitable tolling is a discretionary and fact-intensive doctrine and the District Court did not err in denying Jimenez equitable tolling on the facts of this case. Jimenez presents no compelling reason for this Court to exercise its jurisdiction to review the issue in the context of this case.

For these reasons, Jimenez's petition for certiorari review should be denied.

ARGUMENT

Rule 10 of this Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefore. As demonstrated below, there is no compelling reason for this Court to exercise its discretion to review this case. Accordingly, certiorari review should be denied.

The federal district court dismissed Jimenez's federal habeas petition finding that it was barred by the AEDPA statute of limitations. Appendix A at 14. The AEDPA provides:

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

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distinguishing between sentence review and direct appeal); *White v. Klitzke*, 281 F.3d 920, 923 (9th Cir. 2003) (holding that petitioner was not entitled to ninety days for filing petition for certiorari from denial of a state habeas application under Section 2244(d)(2)).

> (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;
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> (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).

The district court found that Jimenez's claims relating to the revocation of his deferred-adjudication community supervision and punishment were time-barred. *Jimenez v. Quarterman*, No. 6:05-CV-052-C, at 3-4. Relying on the Fifth Circuit's holding in *Salinas*– that an out-of-time petition for discretionary review ("PDR") tolls the AEDPA statute of limitations but does not require a federal court to restart the limitations period– the district court rejected Jimenez's argument that his AEDPA limitations period was reset when the Court of Criminal Appeals granted his out-of-time appeal and did not begin to run until his out-of-time appeal had concluded. *Id.* 11-13. Recognizing that the Fifth Circuit in *Salinas* addressed the limitations period only in the context of an out-of-time PDR, the

district court concluded that the holding applied equally to an out-of-time appeal because the out-of-time appeal was likewise a product of a state habeas proceeding. *Id.* at 12. Following the Fifth Circuit's holding in *Salinas,* the district court found that Jimenez's claims regarding the revocation of his community supervision and the forty-three-year sentence became final on October 11, 1996, when his time for filing a PDR expired. *Id.* at 11. Thus, to be timely, his federal petition raising these claims should have been filed by October 11, 1997. *Id.* The district court found that Jimenez's limitations period was not statutorily tolled under Section 2244(d)(2) for either his first state habeas application and subsequent out-of-time appeal or the second state habeas application, because they were all filed after the one-year limitations period had expired. *Id.* at 13.

The District court also concluded that Jimenez's arguments– that he was deprived of his first appeal because of ineffective assistance of counsel, and that he was indigent, incarcerated, Hispanic, and proceeding *pro se* –did not entitle him to equitable tolling. *Id.* at 8-10. Additionally, the District court found that Jimenez had not been diligent in pursuing his claims: he waited over six years after his revocation to file his first state habeas application seeking an out-of-time appeal, and over one year after the Court of Criminal Appeals refused his PDR on his out-of-time appeal to file his second state habeas application. *Id.* at 13-14. Jimenez had provided no explanation for the lengthy delays and none were apparent from the record. *Id.* at 14.

The District court also found that Jimenez's claims relating to his guilty plea proceeding[6] were time-barred because he had not appealed from the order placing him on

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[6] Jimenez has conceded that even if not time-barred these claims lack merit. *See* Pet. Cert. at 14; Petitioner's Petition for Certificate of Appealability in the Fifth Circuit, at 4. Out of an abundance of caution, the Director's arguments will address these claims as well.

deferred-adjudication probation such that the order had become final thirty days after it was entered, or on December 12, 1991. *Id.* at 6-7. Thus, in order to be timely, Jimenez had to file his federal petition raising such claims by April 24, 1997, because his conviction was final before the AEDPA was enacted. *Id.* at 7. It was not. It was not filed until July 19, 2005, over eight years after the limitations period had expired. *Id.* Again, the District court found that Jimenez was not entitled to statutory tolling for these claims because his two state habeas applications were filed only after his limitations period had expired. *Id.* at 8. And again the District court found that Jimenez was not entitled to statutory tolling for these claims. *Id.* at 8-10.

I. The District court's dismissal of Jimenez's federal habeas petition as time-barred and the Fifth Circuit's denial of a certificate of appealability does not warrant review by this Court because any split between the Circuits regarding whether an out-of-time appeal restarts the AEDPA limitations period is extremely narrow and the Fifth Circuit has applied the predominant, and better interpretation of Section 2244(d)(1)(A).

To the extent the Fifth Circuit's opinion in *Salinas*, on which the district court relied in dismissing Jimenez's petition, conflicts with the Fourth Circuit's opinion in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), and the Tenth Circuit's opinion in *Orange v. Calbone*, 318 F.3d 1167 (10th Cir. 2003), as Jimenez argues,[7] the split between the Circuits is very limited and does not merit review by this Court at this time. Moreover, the Fifth Circuit provides the better interpretation of Section 2244(d)(1)(A). Holding that an

[7] Jimenez also attempts to distinguish his case from *Salinas* by pointing out that he was denied not only a petition for discretionary review to the Court of Criminal Appeals, but an appeal to the intermediate appellate court as well. Pet. Cert. at 10. The District court, however, determined that this distinction did not lead to a different result because the same reasoning applied. *Jimenez v. Quarterman*, 6:05-cv-00052, slip op. at 12 (N.D. Tex 2006); Appendix I (the copy in the Petitioner's Appendices that the Director received was not complete).

out-of-time appeal obtained through post-conviction habeas proceedings does not constitute "direct review" under Section 2244(d)(1)(A), triggering the limitations period, but rather collateral review under Section 2244(d)(2), tolling the limitations period, promotes the purposes of the AEDPA statute of limitations. It is consistent with principles of statutory construction and enjoys support from several other Circuits. Because the dismissal of Jimenez's petition was a correct application of Section 2244(d)(1)(A), Jimenez presents no compelling reason for this Court to exercise its jurisdiction to review the issue in the context of this case.

This Court has stated that "[o]rdinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears." *Carey v. Saffold*, 536 U.S. 214, 220, 223 (2002)(determining that California's "reasonableness" time period for filing an appeal in habeas proceeding functioned such that collateral review would be "pending" under Section 2244(d)(2) only if habeas appeal was filed in reasonable amount of time as determined by federal courts). The Fifth, Fourth, and Tenth Circuits, while notably reviewing different states' laws regarding different out-of-time appeal procedures, also focus on different aspects of how those state procedures "function." And they rely, to different degrees, on the state's characterization of the procedures.

In *Salinas v. Dretke*, after his AEDPA limitations period had expired, the Texas Court of Criminal Appeals granted Salinas relief on state habeas in the form of allowing him to file an out-of-time PDR. *Salinas*, 354 F.3d at 428. The Fifth Circuit acknowledged that granting the out-of-time PDR, under Texas law, placed Salinas back in the midst of direct review. *Id.* at 429. But the Fifth Circuit found that under Texas law, the only way to obtain an

out-of-time PDR was through a collateral proceeding,[8] and that "[s]o long as the petitioner is being held pursuant to the same state court judgment, nothing in the AEDPA allows for a properly initiated limitations period to be terminated altogether by collateral state court action." *Id.* at 430. Thus, the Fifth Circuit concluded that an out-of-time petition for discretionary review ("PDR") is part of post-conviction or other collateral review and not part of direct review, thus tolling, but not delaying the start of, the AEDPA limitations period. *Id.* at 429-31.

Because the Fifth Circuit found that an out-of-time appeal in Texas is part of the collateral review process merely tolling the limitations period under Section 2244(d)(2), it determined that the tolling ended when the state process ended, in that case, when the state courts declined to exercise further review by refusing PDR. *Salinas*, 354 F.3d at 430 n.6. Section 2244(d)(2), by its terms, does not provide for additional tolling for time to file a

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[8] After reviewing the relevant state law, the Fifth Circuit determined that the only way to obtain an out-of-time PDR was through a collateral proceeding. *Salinas*, 354 F.3d at 430. The reasoning in *Salinas* applies equally to an out-of-time direct appeal to the intermediate appellate courts of Texas.

The Texas Rules of Appellate Procedure do not provide for filing or obtaining permission to file an out-of-time notice of appeal or PDR. *See Salinas*, 354 F.3d at 431. Those rules set short specific time-limits for filing a notice of appeal and a PDR. *Id.* (citing Tex. R. App. P. 26.2; 68.2). The rules permit a motion for extension of time to file a notice of appeal and a PDR, but such a motion must be filed within fifteen-days after the expiration of the original deadline. *Id.* (citing Tex. R. App. P. 68.2(c); Tex. R. App. P. 26.3). Once the time has passed to file such an extension, the only way to secure an out-of-time appeal in Texas is via a post-conviction application for writ of habeas corpus. *See Salinas*, 354 F.3d at 431 (citing *Ashorn v. State*, 77 S.W.3d 405, 409 (Tex. App. — Houston [1st Dist.] 2002, pet. ref'd)(regarding out-of-time PDR)); *also see Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex.Crim.App.1991) (out-of-time appeal from felony conviction may be sought by filing a writ of habeas corpus pursuant to Texas Code of Criminal Procedure, Article 11.07).

petition for certiorari review in the Supreme Court to review the state court's decision on collateral review.[9]

A. The Fifth Circuit's approach promotes the purposes of the AEDPA.

The Fifth Circuit's analysis promotes the purposes of the AEDPA statute of limitations, to "further the principles of comity, finality and federalism." *See Duncan v. Walker*, 533 U.S. 167, 178 (2001)(addressing statute of limitations) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). Specifically, the Fifth Circuit's holding in *Salinas* promotes the exhaustion of state court remedies, while respecting the interest in the finality of state court judgments, by requiring that the petitioner be diligent in pursuing relief including out-of-time appeals.

Under the Fifth Circuit's analysis, if the out-of-time appeal were sought before the expiration of the AEDPA limitations period, the limitations period would be tolled during the pendency of the out-of-time appeal, allowing the petitioner to exhaust his state court remedies. If the limitations period had expired before the petitioner filed the state writ application seeking an out-of-time appeal, then the question would be whether the situation called for the application of a different triggering event, such as the petitioner's ability to discover the factual predicate through the exercise of due diligence under Section 2244(d)(1)(D). The requirement of due diligence fosters finality and keeps the petitioner from sitting on a claim for a lengthy period of time. Furthermore, where relief from the state

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[9] Jimenez contends that he was denied his right to file a petition for certiorari to the Supreme Court from the state court's denial of PDR. Pet. Cert. at 10. Although under Section 2244(d)(2) his AEDPA limitations would not be tolled during the time he had to file such petition, he was not denied the opportunity to do so.

court conviction is obtained through an out-of-time appeal, there would be a new judgment and a new AEDPA limitations period in which to challenge it.

B. The Fifth Circuit's approach is consistent with principles of statutory interpretation.

Under principles of statutory construction, the Fifth Circuit is correct that nothing in the AEDPA suggests that finality under Section 2244(d)(1)(A) is an event that can occur more than once. First, Congress used the definite article, "the" in Section 2244(d)(1)(A), indicating that it was an event that would only occur once, whereas it used the indefinite article "a" in Section 2244(d)(2) acknowledging that there may be more than one state habeas application or other collateral proceeding attacking a conviction.

Further, Congress used the term "direct review," not "direct appeal," emphasizing the direct and linear nature of the review rather than the standards under which the case is reviewed. *See Summers v. Schriro*, 481 F.3d 710, 715 (9th Cir. 2007) (Arizona of-right habeas proceeding for criminal defendants who pleaded guilty was form of direct review for limitations purposes under the AEDPA because it helped ensure that state courts had full opportunity to consider state prisoners' claims before they were presented to federal courts and was governed by short, definite deadlines). Although an out-of-time appeal is reviewed under the standards used in a direct appeal, at least in Texas, it is not direct, because it can only be obtained through collateral proceedings. Black's Law Dictionary defines "direct" as "[i]mmediate, proximate, by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through a medium; . . . In the usual or natural course or line; immediately upwards or downwards; . . . without any intervening medium, agency or influence. . . ." Black's Law Dictionary, Sixth Ed. Thus, where out-of-

time appeals can only be obtained through an intervening collateral proceeding, as in Texas, the resulting appeal is not "direct."

Finally, Section 2244(d)(1)(A) does not contain any qualifying words requiring that the direct review process conclude or expire without error or constitutional infirmity. If such a requirement were inferred, claims raised in federal habeas petitions claiming constitutional infirmity on appeal would have to be addressed on their merits in order for the court to determine whether the statute of limitations had even begun to run.

C. The Fifth Circuit's approach finds support in other Circuits.

The Fifth Circuit's focus on the origin of the out-of-time appeal and its premise that the AEDPA limitations period is linear and, once begun, cannot be extended by state court action, except to toll the period under Section 2244(d)(2), finds support in other Circuits as well. The Sixth Circuit began by focusing on the linear nature of the limitations period and the principle of diligence the limitations statute promoted, then finally determined that the process for reopening or obtaining a delayed appeal in Ohio was in fact a collateral proceeding, not part of the direct appeal. *See Lopez v. Wilson*, 426 F.3d 339, 341, 342-349 (6th Cir. 2005)(en banc, per curiam)(determining that there was no clearly established right to counsel for filing a Rule 26(B) motion because it was a collateral proceeding, providing historical summary).[10] Before the Sixth Circuit determined, in *Lopez*, that motions for delayed appeals, under Ohio Supreme Court Rules of Practice (4)(a), or a motion to reopen,

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[10] The Sixth Circuit case cited by Jimenez, *Miller v. Collins*, 305 F.3d 491 (6th Cir. 2002), was discussed in *Lopez* as reflecting concerns that the initial determination that the out-of-time appeal procedure was part of the direct appeal was incorrectly decided because it was at odds with the structure and function of the AEDPA. *See* Pet. Cert. at 11; *Lopez*, 426 F.3d at 349. This does not support Jimenez's contention that there is a sharp contrast beteen the Fifth Circuit and her sister courts. *See* Pet. Cert. at 11.

under Rule 26(B) of the Ohio Rules of Appellate Procedure, were collateral proceedings, it had characterized such proceedings as being part of direct review, except that for purposes of the AEDPA limitations period, it was treated as a collateral proceeding merely tolling the period instead of restarting it. *See Id.* at 343-46; *Searcy v. Carter*, 246 F.3d 515, 516-19 (6th Cir. 2001), *cert. denied*, 534 U.S. 905 (2001). In *Searcy*, the Sixth Circuit quoted *Bronaugh v. Ohio*, 235 F.3d 280, 286 (6th Cir. 2000), holding that it is important to ensure that the petitioner would not benefit from his delay in filing his Rule 26(B) motion. *Searcy*, 246 F.3d at 519. Further, it found that retriggering the limitations period at the conclusion of a motion for delayed appeal proceeding, which could be filed years after conviction, would effectively eviscerate the AEDPA's statute of limitations. *Id.* More recently, in *DiCenzi v. Rose*, 452 F.3d 465, 469 (6th Cir. 2006), the Sixth Circuit stated, albeit in *dicta*, as it had implied in *Lopez*, that a motion for an out-of-time appeal based on ineffective assistance of appellate counsel, under Ohio law, does not restart the AEDPA limitations period, even if the motion is granted.

The Seventh Circuit, in *Teas v. Endicott*, 494 F.3d 580, 582-83 (7th Cir. 2007), recently held that a belated appeal granted through collateral habeas proceedings in Wisconsin did not restart the AEDPA limitations period. The Seventh Circuit focused on the linear nature of the limitations period and found that nothing in the AEDPA implied that the "conclusion of direct review" in state court could happen more than once or that the limitations period is "reopened" if the state court engages in multiple rounds of review that it calls "direct." *Teas*, 494 F.3d at 581. The court further rejected the notion that the way the state court characterizes the review determines whether it is direct or collateral for the purposes of the AEDPA limitations. *Id.* at 582. Thus, it rejected the approaches taken by the Fourth Circuit in *Frasch* and the Tenth Circuit in *Orange*. *Id.* However, the Seventh Circuit

also noted that it was not necessary in *Teas* to reject a state's classification of the process as direct appeal because Wisconsin itself recognized the procedure as a form of collateral review. *Id.*

Also, the Eighth Circuit in *O'Neal v. Kenny*, 501 F.3d 969 (8th Cir. 2007), recently found that Nebraska's grant of a new direct appeal did not constitute direct review for purposes of the AEDPA. In that case, *O'Neal* failed to file for direct appeal, but two weeks after the AEDPA limitations period had expired, sought state post-conviction relief, which was still pending four years later when he filed for federal habeas relief. His federal petition was dismissed as untimely. *Id.* at 970. *O'Neal* then obtained post-conviction relief in the form of "a new direct appeal" from the state courts, based on ineffective assistance of counsel in failing to submit an adequate poverty affidavit prior to his original appeal. *Id.* The Eighth Circuit held that, under Nebraska law, a new direct appeal does not constitute direct review for AEDPA purposes. *Id.* The Eighth Circuit found that the Nebraska Supreme Court had explicitly held that a granting of a new direct appeal constitutes a new appellate process and does not reinstate the original appellate process, does not disturb the original criminal judgment, and does not reverse the clock, but places the inmate on a new appellate path. *Id.* at 971.

Though the Eighth Circuit's determination purports to rest on state law, the new direct appeal under Nebraska law appears to be the functional equivalent of the out-of-time appeals addressed by the Fifth Circuit, absent the legal fiction of turning back the clock. Thus, this decision implicitly supports the Fifth Circuit's premise that the conclusion or expiration of "direct review" is an event the AEDPA contemplated occurring only once, such that further rounds of review equivalent to "direct appeal" would not constitute "direct review" under Section 2244(d)(1)(A).

D. The holdings of the Fourth and Tenth Circuits do not promote the purposes of the AEDPA, nor do they have much support.

The holdings of the Fourth and Tenth Circuits, that an out-of-time appeal obtained through post-conviction habeas proceedings constitutes "direct review" under Section 2244(d)(1)(A), triggering the limitations period, does not promote the purposes of the AEDPA statute of limitations. Nor do they find much support.

In *Orange*, the petitioner failed to file a notice of appeal, but was granted an appeal out of time when he filed an application for post-conviction relief seeking an appeal out of time, under Oklahoma Rule of Appellate Procedure 2.1(E)(1), over eighteen months after his time for seeking direct review had expired. *Orange*, 318 F.3d at 1169. The Tenth Circuit, deferring to the underlying state court characterization of the procedure, found that the out-of-time appeal *Orange* obtained was considered part of the direct appeal process under Oklahoma law. *Id.* at 1171. The procedure was provided in the Rules of the Court of Criminal Appeals. *Id.* And, if granted in the direct appeal context under Rule 2.1(E)(1), the defendant would be essentially placed in the same procedural posture as if he had timely pursued a direct appeal from his convictions. *Id.* He would be bound by the same procedural rules, be able to raise the same substantive claims to be reviewed under the same standards, be addressed as appellate, and face the same prospect of having the conviction affirmed or reversed. *Id.* Because the petitioner would essentially be placed in the same procedural and substantive posture as if his time for seeking direct appeal had not expired, the Tenth Circuit found that an appeal out of time was therefore part of the "direct review" process within the meaning of Section 2244(d)(1)(A).[11] *Id.* at 1170-73.

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[11] Although the Tenth Circuit addressed both the nature of the review on out-of-time appeal and the origin of the right to file the appeal, the Fifth Circuit noted that any

In *Frasch*, the petitioner failed to file an application for leave to appeal his guilty-plea conviction before the thirty-day deadline expired, which would have been the proper route for seeking direct review of his conviction and sentence under Maryland law. *See Frasch*, 414 F.3d at 520-21. Frasch was granted thirty days to file a belated application for leave to appeal when, almost ten years later, he filed a petition for postconviction review claiming ineffective assistance of counsel for failure to file an application for leave to appeal. *Id.* The application was timely filed, read, considered, and denied. *Id.*

The Fourth Circuit's analysis began with the premise that a federal court must look to state (Maryland) law to determine what constitutes "direct review" for purposes of 2244(d)(1)(A), and that the nature of the review conducted determined whether it was collateral or direct. *Frasch*, 414 F.3d at 522. That court found that Maryland considered a defendant's timely application for leave to appeal to be direct review, and that the Maryland Circuit Court granted *Frasch* a new thirty-day deadline within which he timely filed an application for leave to appeal which was read, considered, and denied by the Court of Special Appeals. *Id.* Thus, the Fourth Circuit found that the application constituted direct review and that the AEDPA limitations did not begin until the time for seeking further direct review expired. *Id.*

The Fourth Circuit did not consider it important that the original deadline prescribed by state rule for direct appeal had expired ten years earlier or that the origin of the new

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inconsistency between the conclusion in *Salinas* and *Orange* was due to the underlying differences in state laws. *See Salinas*, 354 F.3d at 431 n.9. The distinction is that an out-of-time appeal is not provided for in the Texas Rules of Appellate Procedure but is provided for in the Oklahoma Rules of Appellate Procedure and, consequently, can be part of Oklahoma's direct review process. *Id.*

deadline to file an out-of-time motion for leave to appeal was a collateral proceeding. *Id.* at 522. The court acknowledged that the belated application was obtained through a collateral proceeding.[12] *Id.* at 522-23. However, it was not this *in*direct nature of review with which the Fourth Circuit was concerned. Because the state courts treated *Frasch*'s application for leave to appeal in every respect as a timely one, the Fourth Circuit concluded the state court had engaged in direct review, the conclusion of which would trigger the start of the AEDPA statute of limitations. *Id.* at 523.

The Fourth Circuit explicitly rejected the *Salinas* approach stating that *Salinas* ignored the fact that two separate proceedings were involved. *See Frasch*, 414 F.3d at 522. In doing so, however, the Fourth Circuit implicitly rejected the premise on which the Fifth Circuit's decision in *Salinas* was based, that nothing in the AEDPA allows for a properly initiated limitations period to be restarted by collateral state court action. The dissent in *Frasch*, however, argued that the origin of the right to file an out-of-time appeal was precisely the issue on which the court should have focused, rather than the nature of the review. *See Frasch*, 414 F.3d at 525-528 (Niemeyer, J., dissenting). Thus, the dissent in *Frasch* implicitly supported the Fifth Circuit's reasoning and decision in *Salinas*.

1. These holdings do not promote the purposes of the AEDPA.

The holdings of the Fourth and Tenth Circuits, that an out-of-time appeal, obtained through a collateral proceeding subject to no filing deadlines, is "direct review" for purposes of triggering the limitations period under Section 2244(d)(1)(A), and their deference to state

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[12] Maryland's rules of appellate procedure provide no mechanism for extending the period for filing a direct appeal and absent specific authority, the Maryland courts found that the appeals period may not be extended on direct review. *See Frasch*, 414 F.3d at 526 (Niemeyer, J., dissenting) (citing *Michael v. State*, 584 A.2d 1317, 1318 (Md. App. 1991)).

court characterizations of the proceedings, do not promote the purposes of the AEDPA statute of limitations: to "further the principles of comity, finality and federalism." *See Duncan*, 533 U.S. at 178. They do not promote the exhaustion of state remedies while respecting the interest in the finality of state court judgments. They do not encourage diligence in seeking out-of-time appeals in the state courts. And they present much greater potential for finality to be hindered.

Under the Fourth Circuit's interpretation of Section 2244(d)(1)(A), a person who had a valid basis for seeking an out-of-time appeal in Texas, even one that lacked any arguable claim to address on appeal, would not face any AEDPA time limitation for filing a federal writ petition pursing his substantive trial claims. There is no statute of limitations in Texas for filing a state habeas application. *See* Tex. Code Crim. Proc. art. 11.07. Under that construction, such a person could file the state writ application years after his conviction was final, and even years after discovering the facts supporting the entitlement to an out-of-time appeal, and not be time-barred when he subsequently filed a federal habeas application. The AEDPA clock would simply restart whenever the out-of-time appeal concluded or the time for seeking further review within the out-of-time appeal expired. The interest in finality would be undermined by creating a great potential for delay in the adjudication of federal claims. *See Duncan*, 533 U.S. at 180. This consequence is aptly demonstrated by the result in *Frasch*, where the petitioner delayed seeking an out-of-time appeal for almost ten years. *See Frasch*, 414 F.3d at 520-21.

It is also aptly demonstrated in this case, where Jimenez took over four years to file a state habeas application seeking an out-of-time appeal due to ineffective assistance of appellate counsel, even after the date he concedes he discovered the factual predicates of that claim in 1998. Jimenez also took no action to otherwise pursue the claims he eventually

raised in his federal petition for six years after his conviction was final. This, despite his allegation in the district court that he believed he had never gotten an appeal – although his trial attorney had told him that he might get another attorney appointed to him for that purpose. Petitioner's Response to Respondent's Answer, at 9.

Nor do the holdings of the Fourth and Tenth Circuits, focusing on the state's characterization of the out-of-time appeal proceeding and the nature of review, promote uniformity in the application of the AEDPA statute of limitations, which is what Jimenez purports to seek. For example, there appears to be no functional difference between the out-of-time appeal provided in Texas and that provided in Nebraska, except that Texas employs the legal fiction of turning back the clock and Nebraska does not. The nature of the review provided remains the same. Were state characterization paramount, the AEDPA's limitations statute would apply much more harshly to inmates in Nebraska who are able to demonstrate ineffective assistance to obtain an out-of-time appeal than to those in Texas. This disparity would not be based on any functional distinction in the states' laws. Nor would the leniency in Texas be based on promoting the goals of the AEDPA.

2. These holdings have not found support; therefore the split in the Circuits is both narrow and shallow.

Not only did the decision by the Fourth Circuit in *Frasch* not have the full support of the panel deciding it– nor have any of the cases citing to *Frasch* applied its holding– Jimenez has cited no decision from any other Circuit which follows the reasoning of the Fourth or Tenth Circuits. Jimenez did cite to *Bridges v. Johnson*, from the Eleventh Circuit, arguing that it follows the reasoning of the Fourth and Tenth Circuits, that the question of whether a procedure is "direct review" or a collateral proceeding is a question of State law. Pet. Cert. at 12. A reading of the case, however, demonstrates that it does not support Jimenez's

contention. In *Bridges* the Eleventh Circuit addresses not an out-of-time appeal, but a state procedure called "sentence review." *Bridges*, 284 F.3d at 1202. The court did look to state law, which distinguished "sentence review" from an appeal of right, to determine that the sentence-review process was not "direct review." However, it determined that the process was also not a collateral proceeding under Section 2244(d)(2) by reading Georgia Code provisions together with Supreme Court precedent regarding the goals of the AEDPA, focusing on exhaustion and finality. *Bridges*, 284 F.3d at 1203. *Bridges*, therefore, appears rather to support the Fifth Circuit's focus on how the procedure functions not only within the state law context, but within the context of promoting the goals of the AEDPA limitations provisions.

Thus, any conflict or split between the Circuits on this issue is very narrow and shallow, and does not warrant review by this Court at this time. There are only one or two Circuits that appear out of line with the rest. At most, the issue needs time to percolate as it has in the Sixth Circuit.

The Fifth Circuit's interpretation of Section 2244(d)(1)(A), applied by the district court in dismissing Jimenez's federal habeas petition as untimely, is the better interpretation and the predominant one. It is consistent with principles of statutory construction, it promotes the interest of finality of state court judgments, requires due diligence in seeking relief, and prevents state courts or petitioners from lengthening the federal limitations period.

Jimenez's petition was appropriately dismissed as barred by the AEDPA statute of limitations. There is no compelling reason for this Court to exercise its discretion to review this case.

II. The Supreme Court need not grant certiorari review on the issue of equitable tolling because Jimenez's case presented neither rare and exceptional circumstances nor diligence and therefore the Fifth Circuit's denial of COA is not in conflict with any other Circuit or this Court.

Jimenez has not demonstrated a need for this Court to exercise certiorari review to determine whether the Fifth Circuit should have issued a certificate of appealability regarding the district court's denial of equitable tolling. The Fifth Circuit's decision does not conflict with decisions from this Court or other Circuit Courts. And Jimenez has not presented any authority to demonstrate that reasonable minds could differ on the issue. Nor do the circumstances of Jimenez's case present the issue of equitable tolling in a context such that it should be settled by this Court in this case. Therefore, this Court should deny certiorari review.

Even assuming *arguendo* that equitable tolling is available for prisoners who file Section 2254 petitions,[13] the Fifth Circuit did not err in finding that reasonable jurists would not find it debateable whether the district court was correct in its procedural ruling denying Jimenez equitable tolling because no rare and exceptional circumstances exist to warrant such tolling in this case. Nor was Jimenez diligent in pursuing his claims. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he

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[13] This Court has not decided whether equitable tolling applies to federal habeas petitions. *See Lawrence v. Florida*, __U.S.__, 127 S. Ct. 1079, 1087 (2007). However, a post-*Lawrence* decision indicates that equitable tolling would likely not apply. In *Bowles v. Russell*, this Court recently found that statutory time limits created by Congress are not subject to equitable exceptions. __ U.S. __, 127 S. Ct. 2360, 2366 (June 14, 2007). The time limits created in 28 U.S.C. § 2244(d) are statutory and were created by Congress. Consequently, although the Director did not argue this in the courts below, based on this new precedent, the Director contends that equitable tolling is not applicable to time-barred federal habeas petitions.

has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

In applying the general principle of equitable tolling to habeas petitioners under Section 2254, the Fifth Circuit has explained, "[t]he doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir.1998). It 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). "Equitable tolling applies principally when the plaintiff is actively misled by the defendant 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). Specifically, the Fifth Circuit has held that indigence, incarceration, *pro se* status, limited education, lack of legal training or ignorance of the law or filing deadlines, lack of access to federal statutes and case law, illiteracy, and deafness, are insufficient to justify equitably tolling the limitations period. *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000); *Turner v. Johnson*, 177 F.3d 390, 391 (5th Cir. 1999); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999).

Jimenez alleges that he is entitled to equitable tolling because he was deprived of his first appeal due to ineffective assistance of appellate counsel. But he has not demonstrated that reasonable jurists would find it debateable whether he were entitled to equitable tolling for his counsel's failure to inform him of the status of his appeal. The Fifth Circuit has found that although the defendant is entitled to effective assistance of counsel on direct appeal, violation of that right is not relevant to and does not toll the AEDPA limitations period. *See Molo v. Johnson*, 207 F.3d 773, 776 (5th Cir. 2000). Nor does the fact that a state court

granted an out-of-time appeal on a claim of ineffective appellate counsel entitle a petitioner to equitable tolling. *See Salinas*, 354 F.3d at 431-32.

Jimenez also alleged he is entitled to equitable tolling because he is indigent, incarcerated, Hispanic, and proceeding *pro se*. *Jimenez v. Quarterman*, slip op. at 8; Pet. Cert. at 18-21. Given the Fifth Circuit precedent outlined above, Jimenez has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling denying Jimenez the discretionary equitable tolling he requested.

Additionally, Jimenez's argument that he is entitled to equitable tolling regarding his appellate counsel's ineffective assistance would not relate to his claims regarding his guilty plea or the court's order placing him on deferred-adjudication probation. His appeal after the revocation of such probation, and any delay in discovering that such appeal had been dismissed, is irrelevant to his pursuit of relief regarding his claims pertaining to his plea and the order, because such claims could not properly be raised in the appeal from his revocation. *See* 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 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). Again, Jimenez's ignorance of this legal fact would not justify equitable tolling. *See Turner*, 177 F.3d at 391. Therefore, with respect to these claims, his limitations period expired at the end of the grace period on April, 24, 1997. *See Felder*, 204 F.3d at 169. Additionally,

Jimenez has conceded that these claims are meritless even if not time-barred. *See* Pet. Cert. at 14; Petitioner's Petition for Certificate of Appealability in the Fifth Circuit, at 4.

Regarding the remainder of his claims, although Jimenez contends that he was misled not only by counsel, but by the court of appeals's response to his inquiry regarding the status of his appeal, he has not established that the miscommunication prevented him in some extraordinary way from timely asserting his rights. *See Coleman v. Johnson*, 184 F.3d at 402. But even assuming, a*rguendo*, that Jimenez were entitled to equitable tolling until 1998, when it appears he claims he was first able to discover, through the exercise of due diligence, that his appeal had been dismissed,[14] his petition would still be untimely. Jimenez would not be entitled to equitable tolling for the approximately four years that passed after he concedes he was able to discover the ineffectiveness of his initial appellate counsel and that his appeal had been dismissed. During those four years Jimenez filed neither state habeas nor federal habeas applications, much less applications pursuing relief for the claims he now raises in federal habeas.

Between 1998 and 2002, Jimenez claims his delay was not due to lack of diligence, but to his indigency, lack of education, difficulty in finding someone to help him, transfers of inmates and institutional policies regarding inmate communication, the fact that English is his second language, and thinking his federal limitations period had already expired. Pet.

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[14] Such tolling would not be statutory under Section 2244(d)(1)(D) because the factual predicate he claims he discovered at that time relates only to his claim of ineffective assistance of appellate counsel, for which he obtained state habeas relief in the form of an out-of-time appeal. It is not the factual predicate for any of the claims he raised in his federal habeas petition. Fed. Writ Pet. at 7-8. To the extent he presents different or additional factual allegations to this Court, they are not properly before the Court. *Vernado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (factual allegations may not be raised for the first time on appeal).

Cert. at 18-21.[15] His explanations for the delay, however, present nothing more than circumstances common to the inmate experience which Congress is presumed to have taken into consideration when passing the one-year limitation statute. Moreover, Jimenez concedes that he decided to take his time in preparing his state habeas application at least in part because he believed his federal limitations period had expired and he was not certain he would be able to file a federal habeas petition. Pet. Cert. at 20. Once again, to the extent, if any, that Jimenez was incorrect in this belief, his ignorance of the law would not justify equitable tolling. *See Turner*, 177 F.3d at 391. His alleged circumstances were neither rare nor exceptional circumstances for incarcerated inmates.

However, even assuming, *arguendo*, that Jimenez were entitled to equitable tolling up to the date he filed his first state habeas application on April 11, 2002, his federal petition would still be untimely. Four-hundred and twenty-five days elapsed between the refusal of his PDR in his out-of-time appeal and the filing of his second state habeas application. Jimenez provides no argument for equitable tolling during the year and approximately two months that he waited after his PDR was refused in his out-of-time appeal before he filed his second state habeas application. To the extent he argues that this period should be equitably tolled because he believed it would be statutorily tolled for ninety days after the PDR was

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[15] Jimenez's allegations presented in support of his argument for equitable tolling in his petition for certiorari review differ somewhat from the allegations he presented in support of his argument in the district court. One example of these discrepancies is that in the district court he argued that the inmate helping him with his state writ application was transferred off the unit *after* Jimenez was granted the out-of-time appeal. Petitioner's Response to Respondent's Answer at 10. In his petition for certiorari, he contends that same inmate was transferred to a different unit some time during the four years he claims he was diligently preparing his first state habeas application. Cert. Pet. at 20-21. In the district court, he also claimed that he believed that he did not have an appeal pending. Petitioner's Response to Respondent's Answer at 9-10.

refused, once again, his ignorance of the law does not invoke equity. *See Turner*, 177 F.3d at 391. Nor does the fact that those ninety days are not counted towards his one-year limitations period under Section 2244(d)(1)(A), but are under Section 2244(d)(2), entitle him to equitable tolling of that time. This too is a circumstance of which Congress is presumed to have been aware when it passed the AEDPA limitations provisions. Because the limitations period expired one year from the Court of Criminal Appeal's denial of his PDR, his second state habeas application, filed over two months after that expiration, would not statutorily toll his limitations period under Section 2244(d)(2) and his federal petition would have been filed 285 days past the latest possible equitable expiration of his limitations period, or 650 days after his PDR on out-of-time appeal had been refused.

The district court, in addition to finding no extraordinary circumstances, also found that Jimenez, despite his conclusory allegations to the contrary, had not been diligent in pursuing his claims. *Jimenez v. Quarterman*, slip op. at 10-11. Because his equitable tolling claim is without any arguable merit, Jimenez has failed to show not only that the Fifth Circuit should have found the issue debateable, but that the circumstances of his case provide any compelling reason for this Court to grant certiorari on this issue. Therefore, certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Jimenez's petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX

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,[1] 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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[1]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*[2] 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

[2]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.[3] 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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[3]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.

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

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).[4]

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[4]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.[5] 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).

[5]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),[6] 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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[6]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

out-of-time appeal, he did not file another state habeas application until December 6, 2004, over one year later. *See Coleman v. Johnson,* 184 F.3d at 403 (holding that a petitioner was not entitled to equitable tolling where he did not explain the six-month delay between receiving notice of the denial of his state appeal and filing his federal petition). Petitioner has provided no explanation for these lengthy delays and none is apparent from the record. "Equity is not intended for those who sleep on their rights." quoting *Fisher v. Johnson,* 174 F.3d 710, 715 (5th Cir. 1999).

CONCLUSION

Accordingly, the Court finds that the above-styled and -numbered case should be DISMISSED with prejudice pursuant to 28 U.S.C. § 2244(d)(1). All relief not expressly granted is denied and any pending motions are hereby denied.

SO ORDERED.

Dated October 23, 2006.

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

No. 07-6984

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 6th day of February, 2008, one copy of **Respondent's Brief in Opposition** was mailed to Carlos Jimenez, TDCJ-CID# 745196, Telford Unit, P.O. Box 9200, New Boston, Texas 75570-9200. All parties required to be served have been served. I am a member of the Bar of this Court.

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February 6, 2008

Honorable William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

SENT VIA OVERNIGHT MAIL

Re: *Carlos Jimenez v. Nathaniel Quarterman,* No. 07-6984

Dear Mr. Suter:

Enclosed please the original and nine copies of Respondent's Brief in Opposition to be filed among the papers in the above-referenced cause. Also enclosed is the Proof of Service form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid envelope.

By copy of this letter, I am forwarding one copy to the petitioner. Thank you for your kind assistance in this matter.

Sincerely,

Marta McLaughlin

MARTA McLAUGHLIN
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MM/br
Encls.
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