IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10399

GARY DAN BILBO, SR.,

Petitioner–Appellant,

versus

LORIE DAVIS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, HAYNES, and WILLETT, Circuit Judges.

PER CURIAM:

A member of this panel denied appellant's motions for a certificate of appealability and appointment of counsel. The panel has considered appellant's motion for reconsideration, which is DENIED.

Appendix-A 2.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10399

GARY DAN BILBO, SR.,

Petitioner--Appellant,

versus

LORIE DAVIS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Gary Bilbo, Sr., Texas prisoner #1252971, moves for a certificate of appealability ("COA") to appeal the dismissal of his consolidated 28 U.S.C. § 2254 petitions challenging his deferred-adjudication convictions of aggravated assault and his sentence. He maintains that the untimeliness of his federal petition should be excused because he is actually innocent and because he is entitled to equitable tolling. Bilbo also moves for appointment of counsel.

Appendix-B 3.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the denial of federal corpus habeas relief is based on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Bilbo has not made the requisite showing. *See id.* Accordingly, the motion for a COA is DENIED. Likewise, the motion for appointment of counsel is DENIED.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GARY DAN BILBO,	)	
	)	CIVIL ACTION NO.
Petitioner,	)	5:14-CV-152-C
	)	
V.	)	(CONSOLIDATED WITH
	)	CIVIL ACTION NO.
LORIE DAVIS,[1] Director,	)	5:14-CV-157-C)
Texas Department of Criminal Justice,	)	
Correctional Institutions Division,	)	ECF
	)	
Respondent.	)	

ORDER

The Court has considered the Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254 filed by Petitioner, Gary Dan Bilbo. Petitioner's habeas petition is deemed to have been filed on September 5, 2014, the date he declared under penalty of perjury that he placed the petition in the prison mailing system.[2] *See Spotville v. Cain,* 149 F.3d 374, 377 (5th Cir. 1998) ("[A] prisoner's habeas petition is filed for purposes of determining the applicability of the AEDPA, when he delivers the papers to prison authorities for mailing."). His petition is therefore subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was signed into law on April 24, 1996.

Respondent submitted the relevant state court records and filed an Answer with Brief in Support urging that Petitioner's habeas petition be dismissed as barred by the applicable statute

---

[1]Lorie Davis 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).

[2]Petitioner also filed a Petition for Writ of Habeas Corpus in Civil Action No. 5:14-CV-157-C, which was consolidated with the instant Civil Action No. on January 21, 2015. Both petitions were filed on September 5, 2014.

Appendix-C

of limitations in 28 U.S.C. § 2244(d) and alternatively arguing that Petitioner's claims are meritless. Petitioner did not file a response.

The Court has reviewed Petitioner's petition, Respondent's answer, and the state court records submitted by Respondent.

The Court understands Petitioner to challenge his conviction on the following grounds:

(1) he is actually innocent and his convictions are the result of a fundamental miscarriage of justice;

(2) he received ineffective assistance of counsel both before his guilty plea and again before the determination to proceed with the adjudication of his guilt;

(3) the judge erroneously admonished Petitioner as to his range of punishment; and

(4) his religious freedom has been violated and presents extraordinary circumstances.

Respondent has lawful custody of Petitioner pursuant to judgments and sentences out of the 106th District Court of Garza County, Texas, in Cause Nos. 98-1947,[3] 98-1948 and 98-1949, each styled *The State of Texas v. Gary Dan Bilbo*.

In all three cases, Petitioner was charged by indictment with aggravated assault. On September 21, 1998, Petitioner pleaded guilty as charged in each case and received ten years' incarceration probated for ten years in cause no. 98-1947, and ten years' deferred adjudication in each of cause nos. 98-1948 and 98-1949, pursuant to a plea-bargain agreement. On August 20, 2004, Petitioner's community supervision was revoked in cause no. 98-1947, and he was sentenced to ten years' incarceration. On the same date, after the state moved to proceed with adjudication, Petitioner was convicted in cause nos. 98-1948 and 98-1949 and sentenced to twenty years' imprisonment in each. The trial court stacked all three of Petitioner's sentences,

---

[3]Petitioner has fully discharged his sentence in Cause No. 98-1947 and does not seek review of that case in the instant Petition.

ordering that they would run consecutive to one another. Petitioner could not commence either 20-year sentence until he fully discharged his 10-year sentence. Petitioner asserts that he discharged his 10-year sentence and commenced the first of his 20-year sentences (in cause no. 98-1948) on October 22, 2013.

Petitioner did not appeal his convictions.[4] Petitioner filed two relevant applications for state habeas review, one for each of his relevant convictions. Both applications were mailed on April 28, 2014, and contained virtually identical grounds for review, distinguished only by the cause number of the conviction challenged.

Petitioner's petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA establishes a one-year limitation on filing federal habeas corpus petitions. Namely, 28 U.S.C. § 2244(d) 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

---

[4]Petitioner contends that sometime in October 2004 he sent a notice of appeal to the clerk in Dawson County, Texas. He further contends that the clerk responded by notifying him that he had no cases in Dawson County. Petitioner admits that he did not submit a notice of appeal in Garza County, Texas. There is no record of any appeal filed by Petitioner.

Appendix - C

> 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.

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.

In cases where guilt is adjudicated after a failed term of deferred adjudication, "[t]wo distinct limitations periods . . . apply for the filing of habeas petitions. One limitations period applies to claims relating to the deferred adjudication order, and another limitations period applies to claims relating to the adjudication of guilt." *Frey v. Stephens*, 616 F. App'x 704, 707 (5th Cir. 2015) (citing *Tharpe v. Thaler*, 628 F.3d 719, 722 (5th Cir. 2010); *Caldwell v. Dretke*, 429 F.3d 521, 526–30 (5th Cir. 2005)); *see also Caldwell*, 429 F.3d at 530 ("Because an order of deferred adjudication community supervision is a final judgment within the plain meaning of AEDPA section 2244, the one-year statute of limitations, for challenging substantive issues of [an order] of deferred adjudication, [begins] to run when the order deferring adjudication [becomes] final."); *Tharpe*, 628 F.3d at 724 (holding that "a habeas claim that challenges a deferred-adjudication order and another habeas claim that challenges a conviction and sentence involve two different 'judgments' for AEDPA purposes" and "in dealing with two entirely separate and distinct judgments – one a deferred-adjudication order and the other a judgment of conviction and sentence – [federal courts] are dealing with two separate and distinct limitation

periods under the AEDPA" (distinguishing *Burton v. Stewart*, 549 U.S. 147 (2007); emphasis in original)).

However, at the time Petitioner's guilt was adjudicated, the Texas Code of Criminal Procedure did not permit an appeal from the adjudication of guilt following a failed term of deferred-adjudication-probation. Prior to its amendment in 2007, article 42.12 § 5(b) contained a prohibition against appealing the determination to adjudicate guilt, which was routinely enforced by the Texas Court of Criminal Appeals. *See Davis v. State*, 195 S.W.3d 708, 710 (Tex. Crim. App. 2006). Petitioner could not have appealed the trial court's determination to proceed with adjudication of his guilt in 2004; therefore, his judgements became final on October 21, 1998, thirty days after the trial court entered the order of deferred adjudication. *See Caldwell*, 429 F.3d at 530. The statute of limitations for federal habeas review under AEDPA expired one year later, on October 21, 1999.[5] Petitioner's petition, then, filed on September 5, 2014, was nearly fifteen years too late.

In "rare and exceptional circumstances," the doctrine of equitable tolling may preserve a Petitioner's claims when the strict application of the statute of limitations would be inequitable. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Larry v. Dretke*, 361 F.3d 890, 896-97 (5th Cir. 2004). Equitable tolling does not apply when an applicant has "failed to diligently pursue his rights." *Larry*, 361 F.3d at 897. "Ignorance of the law, even for an incarcerated *pro*

---

[5]The Court notes that Petitioner asserts that there was error in the proceedings in 1998 before his guilty plea, and also in 2004 before the determination to proceed with adjudication of his guilt. Even in the event that Petitioner's limitations period on some of his claims commenced after the adjudication of his guilt in 2004, the Court finds that the instant Petition was still filed nearly a decade too late.

se petitioner, generally does not excuse prompt filing." *Id.* (quoting *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999)).

Petitioner appears to make three excuses for his late filing. First, he alleges that he did not think he was required to file his federal petition until he commenced his current sentence. However, on Petitioner's petition that was filed originally in Civil Action No. 5:14-CV-157-C, which challenges his conviction in cause no. 98-1949, he asserts that although his sentence on that case has not yet commenced, he does not think that he needed to wait to file his federal petition. Petitioner seems to acknowledge, then, that the consecutive nature of his sentences does not toll the statute of limitations. Petitioner also relies on his ignorance of the law to explain the lengthy delay in filing his federal petition. Ignorance of the law, however, even in the case of a *pro se* prisoner, does not excuse a petitioner's failure to diligently pursue his rights. Finally, Petitioner claims that his status as the founder of his own religious denomination presents an extraordinary circumstance and that he must be released based on the separation of church and state. This argument, while creative, fails to justify the fifteen-year delay in filing. The Court finds that Petitioner has failed to show that the strict application of the statute of limitations would be inequitable.

The Court has conducted a thorough examination of Petitioner's pleadings, Respondent's answer, the relevant state court records, and the applicable law. For the reasons set forth above, and based on the facts and law clearly set forth in Respondent's answer, the Court finds:

(1) The instant Petition for Writ of Habeas Corpus should be DENIED and dismissed with prejudice as barred by the statute of limitations.

(2) All relief not expressly granted is denied and any pending motions are denied.

Appendix-C

(3) Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. For the reasons set forth herein and in Respondent's Original Answer, Petitioner has failed to show that reasonable jurists would find (1) this Court's "assessment of the constitutional claims debatable or wrong" or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

SO ORDERED.

Dated March 22, 2017.

SAM R. CUMMINGS
Senior United States District Judge

Appendix-C

Additional material from this filing is available in the Clerk's Office.