IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BARTON RAY GAINES,	§	
Petitioner,	§	
	§	
V.	§	CIVIL ACTION NO. 4:06-CV-409-Y
	§	ECF
NATHANIEL QUARTERMAN, Director,	§	(Referred to U.S. Magistrate Judge Bleil)
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

RESPONDENT QUARTERMAN'S MOTION TO DISMISS FOR FAILURE TO EXHAUST STATE REMEDIES WITH BRIEF IN SUPPORT

Petitioner, Barton Ray Gaines ("Gaines"), challenges a judgment of conviction by means of a petition for the federal writ of habeas corpus pursuant to 28 U.S.C. § § 2241, 2254. Because this petition was filed after April 24, 1996, it is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996, (the "AEDPA"). *Kiser v. Johnson*, 163 F.3d 326, 327 (5th Cir. 1999). Jurisdiction over the parties and subject matter properly lies with this Court because Gaines's Tarrant County conviction was within the Northern District. *See Wadsworth v. Johnson*, 235 F.3d 959, 960-61 (5th Cir. 2000) (jurisdiction is proper in either the district of custody or conviction)(quoting 28 U.S.C. § 2241(d)). The Director denies all allegations of fact made by Gaines, except those supported by the record and those specifically admitted herein. Because this is a mixed petition, it should be dismissed without prejudice.

STATEMENT OF THE CASE

The Director has lawful custody of Gaines pursuant to a judgment and sentence from the 213th Judicial District Court of Tarrant County, Texas, in cause numbers 0836979A and 0836985A, styled *The State of Texas v. Barton Ray Gaines*. 0836979A Tr. 86, 0836985A Tr. 41.[1] On April 25,

[1]The clerk's record is divided into two volumes distinguished by the cause number. "Tr." refers to transcript of documents filed with the clerk in this case, followed by the page number and preceded by the cause number. Where used, "SF" refers to the statement of facts of the trial,

2002, a Tarrant County grand jury indicted Gaines for the felony offense of aggravated robbery with a deadly weapon, which occurred on or about February 21, 2002. 0836979A Tr. 3, 0836985A Tr. 3. Gaines entered an open plea of guilty to the court. 0836979A Tr. 86, 0836985A Tr. 41, 2 SF 4-6. A trial proceeded before the jury, which was instructed to find Gaines guilty, then assessed punishment at thirty-five years confinement. *Id.*

Gaines appealed, but the Second District of Texas Court of Appeals affirmed the judgment in an unpublished opinion. *Gaines v. State*, No. 02-02-498-CR, No. 02-02-499-CR (Tex. App.–Ft. Worth, Oct. 14, 2004, pet. ref'd). Gaines's petition for discretionary review ("PDR") was refused by the Court of Criminal Appeals ("CCA") on May 18, 2005. *Gaines v. State*, PDR No. 1788-04. Gaines did not seek the writ of certiorari with the United States Supreme Court. Fed. Writ Pet., at 3. Gaines has not filed any state collateral challenges. Fed. Writ Pet., at 3-4, Brief at 5. This proceeding followed Gaines's filing of a petition for the federal writ of habeas corpus, through counsel, on May 4, 2006. Fed. Writ Pet., at 1. The Director previously forwarded Gaines's appellate record to the Court.

STATEMENT OF FACTS

The Director adopts the following portion of the decision of the Second Court of Appeals:

> [O]n February 21, 2002 [Gaines] and two friends, Jason Tucker and Daniel Aranda, went to a location known as the Rice Paddy, which is a housing development where young people hang out. At this location [Gaines] began talking to Michael Williams and Andrew Horvath, who were together, about buying a pound of marijuana. Williams agreed to lead [Gaines] to a friend who possibly had marijuana. [Gaines] and his friends followed Williams and Horvath to an apartment complex to buy the marijuana. On the way, [Gaines] stopped at Wal-Mart to buy some beer, but actually purchased shotgun shells.
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> Once at the apartment complex, Williams attempted to negotiate the marijuana transaction. At one point, [Gaines] checked Williams for weapons and then [Gaines] began to demand Williams's wallet. Williams testified that [Gaines] produced a shotgun and struck him in the head with the barrel. Williams and Horvath emptied their pockets and both were physically assaulted. Williams began to run, at which

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preceded by the volume number and followed by the page number; both causes were tried together.

> point he heard a "boom" and felt his left shoulder go numb. Williams made it to a convenience store and realized he was bleeding. Once at the convenience store, the police were called. Horvath testified that one of [Gaines]'s friends punched him and knocked him down. [Gaines] then pointed the shotgun at Horvath and demanded his wallet. Horvath testified that as [Gaines] and his friends were driving off, he was shot from the driver's side of [Gaines]'s vehicle.
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> At trial, [Gaines] introduced evidence that he began taking Paxil beginning in February 2002. [Gaines] called Dr. Edwin Johnstone to testify regarding the possible role Paxil played in [Gaines]'s behavior on the day of the offense. Dr. Johnstone testified that someone with attention deficit hyperactivity disorder, with which [Gaines] had been diagnosed, who also takes Paxil, may develop hypomania. Dr. Johnstone described hypomania as "sort of the opposite of depression. It is where the person's mood is high instead of low. The person is in an overenergized state. The elevated mood might be very happy and cheery and euphoric, but most of the time actually the mood is sort of a driven, irritable state." Evidence was also introduced showing [Gaines]'s prior use of alcohol, marijuana, Xanax, cocaine, and methamphetamine.
>
> Additionally, it was shown that [Gaines] continued taking Paxil while in jail with no adverse effects. Dr. Johnstone believed that the isolation and lack of stimulation, as well as [Gaines]'s lack of access to marijuana, contributed to the effects Paxil had on [Gaines]'s behavior while in jail. While [Gaines] introduced evidence of his use of Paxil in an attempt to explain his behavior, he did not use this as a basis for an insanity claim. Dr. Johnstone specifically testified that he was not offering an opinion as to [Gaines]'s sanity, but rather [Gaines]'s "disinhibition of social judgment."

Gaines v. State, Slip Op. at 1-2.

PETITIONER'S ALLEGATIONS

The Director understands Gaines to allege the following grounds of error:

1. He was denied the effective assistance of counsel because counsel:
   a. conducted almost no discovery,
   b. spent very little time with any of the witnesses and did not prepare the witnesses for trial,
   c. spent only a total of ten minutes with Gaines in the nine months before trial,
   d. induced Gaines to plead guilty, and;

2. His plea of guilty was not made voluntarily or with an understanding of the nature of the charge and the consequences of the plea,

Fed. Writ Pet. at 8-9.

MOTION TO DISMISS FOR FAILURE TO EXHAUST STATE REMEDIES WITH BRIEF IN SUPPORT

As it relates to this petition, the AEDPA provides:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (I) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. §§ 2254(b)(1), (c) (2006).

The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Anderson v. Harless,* 459 U.S. 4, 6 (1982). In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985); *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982). For purposes of exhaustion, the Texas Court of Criminal Appeals is the highest court in the state of Texas. *Richardson*, 762 F.2d at 431. To proceed before that court, a petitioner must either file a petition for discretionary review, TEX. R. APP. P. 68.1, or an application for a post-conviction writ of habeas corpus. TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 and Vernon Supp. 1998).

All of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Picard v. Conner*, 404 U.S. 270, 275 (1971). In other words, in order for a claim to be exhausted, the state court system

must have been presented with the same facts and legal theory upon which the petitioner bases his assertions. *Id*. at 275-77. In addition, if one or more of the petitioner's claims is exhausted and one or more of the claims is unexhausted, it is a "mixed" petition and the entire petition must be dismissed for failure to exhaust state court remedies. *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *see also Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) ("*Lundy* made plain that assertion of the unexhausted claims necessitates dismissal of the mixed petition") (italics added). Finally, in order to satisfy the exhaustion requirement, the petitioner must have not only presented his claims to the highest state court, but he must have presented them in a procedurally correct manner. *Castille,* 489 U.S. at 351. In other words, a habeas applicant must give the state courts a fair opportunity to review his claims, that is, in a procedural context in which the state courts will be certain to review his claims solely on their merits. *Id*.; *Depuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988).

On direct appeal, Gaines's appointed counsel filed an *Anders* brief and motion to withdraw, finding no valid grounds for appeal. [Brief in Support of Motion to Withdraw]. Gaines filed a pro se brief on appeal challenging the lack of a competency hearing, the validity of his plea of guilty and the effectiveness of his trial counsel. [Appellant Barton Ray Gaines Brief on Appeal]. Attached to that pro se appellate brief were affidavits from Dr. Edwin Johnstone, the doctor that testified at Gaines's trial; James Adams, Gaines's stepfather; Jason Tucker, a friend of Gaines; Jason Childs, a deputy sheriff; Tony Gregory, a fellow inmate; Justin Adams, Gaines's brother; Gail Inman, Gaines's grandmother; and Melissa Adams, Gaines's mother. *Id.* at attachments. In affirming Gaines's conviction, the Court of Appeals specifically held there was no evidence in the record to support his allegations of ineffective assistance of counsel, and his affidavits "were not admitted into evidence and are not properly before this court for consideration." *Gaines v. State*, Slip Op. at 15. Overruling the claims of ineffective assistance of counsel, mainly because of the lack of any evidence to support his claims, the Court of Appeals concluded that Gaines "has a more appropriate remedy in seeking a writ of habeas corpus to allow him the opportunity to develop evidence to support his complaints." *Id.* at 16-17.

Gaines filed a PDR alleging the Court of Appeals erred "in holding that petitioner's plea of guilty was not voluntary because the trial court failed to sua sponte hold a competency hearing at the time petitioner entered his plea of guilty." *Gaines v. State*, PDR No. 1878-04 at 4. Gaines also challenged the effectiveness of his trial counsel, but this time without reference to any of the previously rejected affidavits, only based on record citations. *Id.* at 7-10. Now Gaines challenges the effectiveness of trial counsel, based almost exclusively on the affidavits attached to his petition. Fed. Writ Pet., at 7, Brief at 6-21. Those affidavits are from Gaines, Paula Adams, Tiffani Brooks, Melissa Adams, Gail Inman, and Rosie Horvath. [Docket Entry 8, at 28-47]. None of these affidavits have been presented to the Texas Court of Criminal Appeals in any fashion. In general substance, only the statements of Melissa Adams and Gail Inman were part of Gaines's attempt to submit evidence to the intermediate appellate court. No Texas state court has ever seen these affidavits nor has their substance been considered at any level. Where a petitioner makes the same legal claim to a federal court which he presented to the state courts but supports that claim with factual allegations which he did not make to the state courts, he has failed to exhaust his state remedies. *Brown v. Estelle,* 701 F.2d 494 (5th Cir. 1983); *Thomas v. Collins,* 919 F.2d 333 (5th Cir. 1990). As such, the entire basis of all of Gaines's allegations of ineffective assistance of counsel remains unexhausted. Further, Gaines only challenged the lack of a competency hearing in his PDR, not the voluntariness of his plea. PDR No. 1787-04, at 4-7. As such, Gaines's instant claim regarding the voluntariness of his plea also remains unexhausted.

This failure to properly present his claims to the state court does not result from either an "absence of State corrective procedures" or state procedures that are "ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b). Gaines has simply bypassed the opportunity to collaterally challenge his conviction in state court through an application for state writ of habeas corpus. Ultimately, Gaines has prevented the state courts from ruling on, and if necessary correcting, any constitutional errors that might have occurred in this case. *Castille*, 489 U.S. at 349; *Picard*, 404 U.S. at 275. Consequently, because Gaines still has a legal remedy available to him in state court,

he must be required to exhaust his claims prior to bringing them for federal review. Accordingly, the Director respectfully requests that Gaines's federal petition be dismissed without prejudice because he has failed to exhaust all of the claims now before this Court in his federal habeas corpus petition. *Rose,* 455 U.S. at 522; *Jones*, 722 F.2d at 168.

CONCLUSION

For all of the foregoing reasons, the Director respectfully requests the Court dismiss Gaines's petition without prejudice.

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

I, Baxter R. Morgan, do hereby certify, pursuant to Local Rule 3.1(f) of the Northern District of Texas that other than the Director and Petitioner, counsel for Respondent is unaware of any person with a financial interest in the outcome of this case.

/s/ Baxter R. Morgan
BAXTER R. MORGAN
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Baxter R. Morgan, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent Quarterman's Motion to Dismiss for Failure to Exhaust State Remedies with Brief in Support has been served by placing same in the United States Mail, postage prepaid, on this the 9th day of October, 2006, addressed to counsel for the petitioner:

M. Michael Mowla
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/s/ Baxter R. Morgan
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