

U.S. DISTRICT COURT  
NORTHERN DIST. OF TX.  
MEMPHIS DIVISION

CLERK OF COURT



**CIVIL ACTION NO.**  
**4:06-CV-409-Y**

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§ 87(2)(b)

**Submitted by:**

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**TO THE HONORABLE JUDGE OF SAID COURT:**

**NOW COMES** the Petitioner, BARTON RAY GAINES, and submits this Answer to Respondent's Motion to Dismiss With Brief in Support:

**I. PROCEDURAL HISTORY**

Petitioner was charged with two counts of attempted capital murder by indictment that alleged that during the course of or attempting to commit robbery, Petitioner intentionally shot one Michael Williams with a deadly weapon, to wit: a firearm. This offense was alleged to have occurred on or about February 21, 2002.

Petitioner entered a plea of guilty to lesser charges of two counts of aggravated robbery with a deadly weapon. A jury was empanelled, and on December 10, 2002, a trial by jury on punishment commenced. After presentation of evidence, the jury set Petitioner's punishment at thirty five years in the Institutional Division of the Texas Department of Criminal Justice.

Notice of appeal was given and the case was appealed to the Court of Appeals of Texas, Second District (Fort Worth). On October 14, 2004, the Court of Appeals affirmed the conviction. 2004 Tex. App. LEXIS 9147. A petition for discretionary review was filed. On May 18, 2005, the Texas Court of Criminal Appeals denied Petitioner's petition for discretionary review. PDR No. 1788-04; 2005 Tex. Crim. App. LEXIS 773. Petitioner filed the instant Petition on May 4, 2006. On October 9, 2006, Respondent filed a motion to dismiss without prejudice, asking that Petitioner exhaust his claims in state court.

**II. ANSWER AND BRIEF IN SUPPORT OF ANSWER**

**1. Facts**

Following Petitioner's conviction and sentence, notice of appeal was given and the case was appealed to the Court of Appeals of Texas, Second District (Fort Worth). On October 14, 2004, the Court of Appeals affirmed the conviction. 2004 Tex. App. LEXIS 9147. A petition for discretionary review was filed. On May 18, 2005, the Texas Court of Criminal Appeals denied Petitioner's petition for discretionary review. PDR No. 1788-04; 2005 Tex. Crim. App. LEXIS 773. Petitioner filed the instant Petition on May 4, 2006. In order not to prejudice his

constitutional rights, Petitioner was required to file a petition for writ of habeas corpus in federal court within one year of the final state proceeding in his case. In the petition for writ of habeas corpus, Petitioner alleges ineffective assistance of counsel and that the conviction was obtained by a plea was not made voluntary, and was made without an understanding of the nature of the charge and the consequences of the plea. (FIRST AMENDED MEMORANDUM IN SUPPORT).

## **2. Applicable Law**

Federal habeas corpus relief is not available until after the applicant has exhausted the remedies available in state courts. 28 U.S.C. § 2254(b). A petition including both exhausted and unexhausted claims will be dismissed *without* prejudice, leaving the petitioner the choice of eliminating the unexhausted claims from the petition or returning to the state courts to exhaust state remedies before refiling the federal habeas petition. Rose v. Lundy, 455 U.S. 509, 520, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

The “exhaustion doctrine” does not require one to seek collateral review in the state courts on an issue already raised on direct appeal. Brown v. Allen, 344 U.S. 443, 447-448, 73 S. Ct. 397, 97 L. Ed. 469 (1953); Resendez v. McKaskle, 722 F.2d 227, 231 (5th Cir. [Tex.] 1984). However, if a claim that a petitioner seeks to present on federal habeas corpus has not been presented on direct appeal, the petitioner must use a state habeas corpus proceeding, if it is available, in order to satisfy the exhaustion requirement. Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380, 386 (1989); Galtieri v. Wainwright, 582 F.2d 348, 354 n.12 (5th Cir. [Fla.] 1978).

An alternative to dismissal without prejudice is to stay the proceedings pending the outcome of the state habeas corpus proceeding. This position has been adopted by several other federal circuits, including the Second and Sixth Circuit Courts of Appeal. Zarvela v. Artuz, 254 F.3d 374, 376 (2d Cir. 2001); Palmer v. Carlton, 276 F.3d 777 (6th Cir. 2002) (calling the Second Circuit's approach in Zarvela “eminently reasonable”) In Zarvela, the petitioner sought permission to withdraw his timely petition, without prejudice to renew at a later date, so that he could present a new claim to the state courts. Zarvela, 254 F.3d at 377. The petitioner pursued his state court remedies and returned to federal court fourteen days after he was denied leave to appeal. Id. The district court dismissed the petitioner’s subsequent petition as untimely. Id. The Second Circuit decided that the district court should have stayed the petitioner’s first petition, subject to appropriate conditions. The Court ruled that when a district court elects to stay a petition, “it should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally

30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed.” *Id.* at 381. Because the petitioner would have satisfied these conditions had the district court imposed them, the Second Circuit directed the district court to consider the petition on its merits. *Id.* at 383

### **3. Application**

The standard procedure in this case is for the Court to dismiss Petitioner’s writ of habeas corpus without prejudice. Petitioner would then file an application for writ of habeas corpus in state court. If the application is denied by the Court of Criminal Appeals, then Petitioner would have a certain number of days remaining to refile his Petition in this Federal Court.

However, a sensible alternative to dismissal without prejudice is to stay these proceedings pending the outcome of the state habeas corpus proceeding. In the event that the Court of Criminal Appeals denies Petitioner’s state writ of habeas corpus, Petitioner will continue in this Federal Court in a timely manner. Staying this proceeding will achieve the same result without the hassle of dismissal and refiling within calculated deadlines. This Court can order Petitioner to file a state habeas corpus proceeding within a time limit, and upon denial by the Court of Criminal Appeals, Petitioner will continue his federal habeas petition within another time limit.

### **4. Conclusion**

This Court should adopt the sensible alternative to dismissal without prejudice that has been adopted by other federal circuits by staying this proceeding pending the outcome of the state habeas corpus proceeding. In the event that the Court of Criminal Appeals denies Petitioner’s state writ of habeas corpus, Petitioner will continue in this Federal Court according to a timetable set by this Court. Doing so will achieve the same result of dismissal without prejudice without the hassle of dismissal and refiling within calculated deadlines. This Court can order Petitioner to file a state habeas corpus proceeding within a time limit, and upon denial by the Court of Criminal Appeals, Petitioner will continue his federal habeas petition within another time limit. As a result, Petitioner respectfully asks that the Court stay this proceeding pending the outcome of the state habeas proceeding.

### **III. CONCLUSION**

Based upon the foregoing arguments, Petitioner respectfully asks that the Court stay this proceeding pending the outcome of the state habeas proceeding.

Respectfully Submitted,

M. Michael Mowla, PLLC



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### **IV. CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the foregoing Answer to Respondent's Motion to Dismiss With Brief in Support was delivered by fax to the Office of the Texas Attorney General, at fax number 512-936-1280 on this the 18<sup>th</sup> Day of October, 2006.



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By: M. Michael Mowla