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, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§	(Referred to U.S. Magistrate Judge Bleil)

RESPONDENT QUARTERMAN'S REPLY TO PETITIONER'S RESPONSE TO THE MOTION TO DISMISS 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. On October 9, 2006, the Director filed a motion to dismiss this petition without prejudice because some of Gaines's allegations are unexhausted and he still has a remedy in state court. [Docket Entry 14]. On October 19, 2006, Gaines filed an "Answer to Respondent's Motion to Dismiss," requesting the Court stay his federal petition pending the outcome of the state habeas proceeding. [Docket Entry 15]. However, Gaines fails to demonstrate good cause as to why he failed to exhaust these claims first in state court and his unexhausted claims are plainly meritless. As such, the Director requests the Court disregard this request and dismiss this petition without prejudice.

RESPONDENT'S REPLY WITH BRIEF IN SUPPORT

Where a petitioner fails to exhaust claims in state court, a federal court has the discretion to either stay and abate or dismiss the action. *Brewer v. Johnson*, 139 F.3d 491, 493 (5th Cir. 1998). Stay and abeyance should be granted only in limited circumstances when there is good cause for the failure to exhaust, the unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Gaines has not demonstrated circumstances warranting a stay.

"Because granting a stay effectively excuses a habeas petitioner's failure to present his claims first to state courts, stay and abeyance is only appropriate when the district court determines there is good cause for the petitioner's failure to exhaust his claims first in state court." *Rhines*, 544 U.S. at 277; *Neville v. Dretke*, 432 F.3d 474, 479 (5th Cir. 2005). Gaines has offered no cause as to why these claims were not first exhausted in state court before filing this federal petition. *See generally* [Docket Entry 15]. The concurring opinions in *Rhines* sounded concern that an unwary *pro se* petitioner might be victimized or attempt to manipulate the stay on the issue of good cause. 544 U.S. at 279 (Stevens, J., concurring; Souter, J., concurring). However, Gaines was represented before the

Court of Criminal Appeals by counsel and is currently represented by a different attorney in this Court. In his response, Gaines offers no reason as to why these claims were not first exhausted in state court; he has simply bypassed the opportunity for the state courts to examine and potentially correct any alleged violation of his constitutional rights, without cause or explanation. *Castille v. Peoples*, 489 U.S. 346, 349 (1989). While Gaines refers to the stay as a "sensible alternative . . . without the hassle of dismissal and refiling," his reply does not give any reason why these claims could not first have been presented to the state courts. [Docket Entry 15, at 5]. As such, *Rhines* indicates a stay is inappropriate and this petition should be dismissed without prejudice.

While a showing of good cause was articulated as the primary concern, the Supreme Court also permits the district court to look to the potential merits of the petitioner's unexhausted claims in deciding if a stay is warranted. *Rhines*, 544 U.S. at 277. Gaines's unexhausted allegation essentially boils down to the claim that he was denied the effective assistance of counsel because his attorney did not spend enough time investigating his case. Fed. Writ Pet., at 8, Brief at 16. A defendant must affirmatively prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the guilty plea context, the requirement of prejudice was interpreted to mean "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The record gives no indication that with

any amount of investigation, Gaines would have chosen to, or been better served by, going to trial, in light of the substantial evidence of his guilt of the two aggravated robbery charges. 3 SF 68-74, 100-105. Further, nothing in the record indicates Gaines's plea of guilty was involuntary or that he was unaware of its consequences. 0836979A Tr. 86, 0836985A Tr. 41, 2 SF 4-6. As such, the potential merits of Gaines's allegations do not overcome his failure to show good cause as to why his claims were not properly exhausted.

CONCLUSION

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

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for
Criminal Justice

GENA BUNN
Assistant Attorney General
Chief, Postconviction Litigation Division

/s/ Baxter R. Morgan
BAXTER R. MORGAN*
Assistant Attorney General
State Bar No. 24051083

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
(512) 936-1280 (FAX)
Baxter.Morgan@oag.state.tx.us
ATTORNEYS FOR RESPONDENT

*Attorney in Charge

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 Reply to Petitioner's Response with Brief in Support has been served automatically by electronic filing and by placing same in the United States Mail, postage prepaid, on the 20th day of October, 2006, addressed to counsel for the petitioner:

M. Michael Mowla
1318 South Main Street, Suite 103B
Duncanville, TX 75137

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