

ORIGINAL

CLERK, U.S. DISTRICT COURT
By _____
Deputy

V.

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

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became final and the one-year limitations period closed on August 16, 2006.

On May 24, 2006, three months before the limitations period closed, Petitioner filed a petition for writ of habeas corpus in the United States District Court, Northern District of Texas. Gaines v. Quarterman, 4-06-CV-0409-Y. On November 16, 2006, this federal court dismissed without prejudice the original petition for writ of habeas corpus filed under 4-06-CV-0409-Y for failure to exhaust claims. On November 1, 2006, prior to the original federal petition being dismissed without prejudice, applications for writ of habeas corpus were filed with the trial court under cause numbers C-213-007907-0836979A and C-213-007908-0836985A. On February 27, 2008, under cause numbers WR-69,338-01 and WR-69,338-02, the Texas Court of Criminal Appeals denied relief for both applications for writ of habeas corpus without written order or hearing based upon the trial court findings.

Five days after the Texas Court of Criminal Appeals denied relief for both applications for writ of habeas corpus, this instant petition for writ of habeas corpus was filed on March 3, 2008.

TIME PERIOD FOR FILING OBJECTIONS

Petitioner respectfully asks the Court to note that Petitioner had 10 days from the date of entry of the findings, conclusions, and recommendations of the United States Magistrate Judge ("Magistrate's Findings") to file these objections. Because the findings were entered on August 28, 2008, the 10-day period expired on September 8, 2008. However, the Magistrate Judge extended the deadline to file these objections until September 18, 2008. See Magistrate's Findings, p. 5. Therefore, the filing of these objections is timely.

OBJECTIONS

Petitioner respectfully makes the following specific objection to the findings, conclusions, and recommendations of the United States Magistrate Judge that were entered by the Court on

August 28, 2008. Petitioner specifically objects to the finding that Petitioner's petition for writ of habeas corpus, as filed on March 3, 2008, should be dismissed with prejudice because the statute of limitations has tolled under 28 USC § 2254(d)(2), and that there are no grounds for equitable tolling.

To support this finding, the Magistrate Judge relies primarily upon Duncan v. Walker, 533 U.S. 167, 181-182 (2001). This case involves an inmate in New York State who filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of New York. Id. at 170. On July 9, 1996, the District Court dismissed the complaint and petition without prejudice because the inmate did not present all of his claims to the state courts. Id. at 170. However, instead of returning to the state courts to litigate his claims, on May 20, 1997, more than one year after AEDPA's effective date, the inmate filed another federal habeas petition in the same District Court. Id. at 170. On May 6, 1998, the District Court dismissed this second petition as time barred because the inmate had not filed the petition within a "reasonable time" from AEDPA's effective date. Id. at 171.

The United States Court of Appeals for the Second Circuit reversed the District Court's judgment, reinstated the habeas petition, and remanded the case for further proceedings. Walker v. Artuz, 208 F.3d 357 (2000); Id. at 171. The Second Circuit's rationale was that the inmate's first federal habeas petition tolled the limitation period because it was an application for "other collateral review" within the meaning of 28 USC § 2244(d)(2). Id. at 171.

The United States Supreme Court reversed the Second Circuit's opinion because the Second Circuit failed to account for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review. Id. at 171.

The inmate in Duncan failed to first exhaust all state remedies and then file his federal habeas petitions as soon as possible. In particular, from the time the District Court dismissed the

inmate's first federal habeas petition without prejudice, the inmate had more than nine months remaining in the limitation period in which present his claims to a state court. Id. at 171. Instead, the inmate failed to return to state court. Id. at 171. Further, the inmate's May 1997 federal habeas petition contained claims different from those presented in his April 1996 petition.

The facts of the case before this Court differ than the facts in Duncan. Unlike the inmate in Duncan, who never returned to state court to litigate his claims, after this Court dismissed his federal claims without prejudice, after this Court dismissed his claims without prejudice for failure to exhaust claims, Petitioner did return to federal court. In fact, Petitioner filed his applications for writ of habeas corpus prior to the date that the original federal petition was dismissed. After the Court of Criminal Appeals denied relief for both applications for writ of habeas corpus on February 27, 2008, five days later, on March 3, 2008, Petitioner filed this instant petition for writ of habeas.

Petitioner thus asserts that the holding in Duncan applies only to those who do not return to State court, as instructed by the federal court, to litigate unexhausted claims. Further, Petitioner believes that the Court in Duncan made clear that the purpose of the AEDPA was not to bar petitioners from seeking meritorious claims on a technicality, but to encourage litigants to pursue claims in state court prior to seeking federal collateral review. Id. at 171. Petitioner did just that, and did so in a highly expeditious manner.

Petitioner's assertion is supported by the concurring opinions in Duncan. For instance, Justice Souter provided that "nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies, and that a claim for equitable tolling could present a serious issue on facts different from those before us." Id. at 182.

Justice Stevens wrote an even more precise and lengthy concurring opinion on this topic. Stevens wrote "in our post-AEDPA, world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion

of state remedies.” Id. at 181-182. Stevens made it clear that the AEDPA gives a district court the alternative of denying a petition containing unexhausted but nonmeritorious claims, but does not bar a district court from retaining jurisdiction over a meritorious claim because of the lapse of AEDPA's 1-year limitations period. Id. at 182.

Stevens bases his opinion on the fact that nothing in caselaw or the legislative history of the AEDPA precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity. Id. at 182. Therefore, Petitioner pleads with the court to agree with Stevens that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA.

Petitioner will further show that an alternative to the practice of this District Court, which is the dismissal without prejudice any petition that has unexhausted claims, 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 ruled 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.

Finally, Petitioner Gaines respectfully points to the fact that the very reason the AEDPA was created was to, as a court provided, "to spur defendants to file their federal habeas petitions more quickly." Duncan v. Walker, 533 U.S. at 181. Petitioner Gaines shows that he did the very thing that Congress would have wanted him to do under the AEDPA.

It is true that Petitioner Gaines waited nine months after the date the statute of limitations began to run (or three months before the limitations period closed) before he filed his first postconviction petition, which was the first petition for writ of habeas corpus in this District Court. However, Petitioner Gaines pleads for this Court to understand that it takes time to gather information and evidence in order to file any writ of habeas corpus. It is not as though Petitioner Gaines waited several years before he filed his first postconviction writ. In fact, he filed the State writ before this federal court dismissed without prejudice the original petition for writ of habeas corpus. Five days after the Court of Criminal Appeals denied relief for his state writs of habeas corpus, he filed the instant petition for writ of habeas corpus.

Therefore, Petitioner Gaines's petition for writ of habeas corpus should not be dismissed with prejudice. Instead, this Court should reinstate his petition and allow him to litigate it on its merits.

Respectfully submitted,

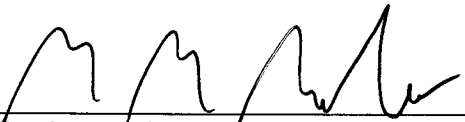
M. Michael Mowla, PLLC
1414 W. Wheatland Road Suite 250
Duncanville, Texas 75116
Phone: 972-283-2600
Fax: 972-283-2601

By: 

M. MICHAEL MOWLA
State Bar No. 24048680
Attorney for Petitioner

CERTIFICATE OF FILING

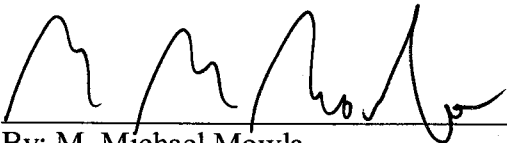
I, the undersigned, hereby certify that a true and correct copy of the foregoing OBJECTIONS TO THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE was filed by USPS CERTIFIED MAIL, RRR 7008-1140-0004-6738-8319, and sent to the United States District Clerk, Fort Worth Division, 501 W. 10th Street Room 310, Fort Worth, Texas 76102, on this the 15th day of September, 2008.



By: M. Michael Mowla
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing OBJECTIONS TO THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE was delivered on this the 15th day of September, 2008, by Fax to Michael Bozarth, Assistant Attorney General of the State of Texas, Postconviction Litigation, P. O. Box 12548, Austin, TX 78711, Fax (512) 936-1280



By: M. Michael Mowla
Attorney for Petitioner