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

BARTON RAY GAINES,	§	
Petitioner,	§	
	§	
	§	
	§	**CIVIL ACTION 4:08-CV-147-Y**
	§	
V.	§	
	§	
	§	
NATHANIEL QUARTERMAN,	§	
Director, Texas Department of	§	
Criminal Justice, Corrections	§	
Institutions Division,	§	
Respondent.	§	

RULE 60(b) MOTION SEEKING RELIEF FROM FINAL JUDGMENT OF FEDERAL DISTRICT COURT WITH BRIEF IN SUPPORT

Barton Ray Gaines, Petitioner, through counsel and pursuant to Federal Rule of Civil Procedure Rule 60(b) and Local Rules 7.1 and 7.2, respectfully submits this Rule 60(b) Motion Seeking Relief From Final Judgment With Brief in Support:

I. FACTS AND PROCEDURAL HISTORY

After trial and appeal to the Court of Appeals, the Texas Court of Criminal Appeals denied Petitioner's Application for discretionary review on May 18, 2005. 2005 Tex. Crim. App. LEXIS 773. Therefore, Petitioner's convictions 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. On October 14, 2008, this Court dismissed Petitioner's case with prejudice, adopting the magistrate judge's recommendation that the petition was not timely filed. See ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS.

II. RELIEF REQUESTED

Petitioner requests that this Court grant him relief from the final judgment dated October 14, 2008 on the grounds that the judgment is manifestly unjust because the judgment misinterprets the tolling statute in that it was not the intent of Congress for federal courts to dismiss with prejudice petitions such as those of Petitioner.

III. LAW AND ARGUMENT

A. General Standard of Rule 60(b)(6)

Rule 60(b) of the Federal Rules of Appellant Procedure provides as follows:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. App. Proc. 60(b).

A claim for relief from judgment on basis of "any other reason justifying relief from operation of the judgment" is cognizable where there is evidence of extraordinary circumstances or where there is evidence of extreme hardship or injustice, and, once extraordinary circumstances or hardship is found, this rule is to be liberally applied to accomplish justice. U.S. v. McDonald, N.D.Ill.1980, 86 F.R.D. 204. Rule 60(b)(6) gives courts authority to vacate judgments whenever such action is appropriate to accomplish justice. Hawaii County Green Party v. Clinton, D. Hawaii 2000, 124 F. Supp. 2d 1173; International Controls Corp. v. Vesco, C.A.N.Y.1977, 556 F.2d 665, certiorari denied, 98 S.Ct. 730, 434 U.S. 1014, 54 L. Ed. 2d 758.

The only subsection of Rule 60(b) that can be applied to the facts of this case is subsection (b)(6). For instance, subsection (b)(1), providing for setting aside final judgment for "mistake, inadvertence, surprise, or excusable neglect," and subsection (b)(6), authorizing setting aside of judgment "for any other reason justifying relief from the operation of the judgment," are mutually exclusive, and reasons justifying relief under one cannot be basis for relief under other. Murray v. Ford Motor Co., 770 F.2d 461 C.A.5 (Tex.) 1985; See also Transit Cas. Co. v. Security Trust Co., C.A.Fla.1971, 441 F.2d 788, certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164; U.S. v. Erdoss, C.A.N.Y.1971, 440 F.2d 1221, certiorari denied, 92 S.Ct. 83, 404 U.S. 849, 30 L.Ed.2d 88; Rinieri v. News Syndicate Co., C.A.N.Y.1967, 385 F.2d 818; Sears, Sucsy & Co. v. Insurance Co. of North America, D.C.Ill.1975, 392 F.Supp. 398; Frank v. New Amsterdam Cas. Co., D.C.Pa.1961, 27 F.R.D. 258. In fact, a Rule 60 Motion brought under subsection (b)(6) allowing relief for "any other reason" must be for some reason other than subsections (b)(1) through (b)(5). William Skillings & Associates v. Cunard Transp., Ltd., 594 F.2d 1078 (5th Cir. 1979); Corex Corp. v. U. S., 638 F.2d 119 (9th Cir. 1981); See also De Filippis v. U.S., C.A. Ill. 1977, 567 F.2d 341; Carr v. District of Columbia, 1976, 543 F.2d 917, 177 U.S. App. D.C. 432; In re Four Seasons Securities Laws Litigation, C.A. 10 (Okla.) 1974, 502 F.2d 834, certiorari denied 95 S.Ct. 516, 419 U.S. 1034, 42 L. Ed. 2d. 309; U. S. v. Failla, D.C.N.J.1957, 164 F. Supp. 307; Lopez Ithier v. Cadillac Industries Inc., D.Puerto Rico 2001, 199 F.R.D. 39 (Subsection (b)(6) may not be invoked

when movant has also sought protection of subsections (b)(1) through (b)(5)); Matter of Emergency Beacon Corp., C.A.2 (N.Y.) 1981, 666 F.2d 754 (Relief from judgment under subdivision (b)(6) is not available unless the asserted grounds for relief were not encompassed within subdivisions (b)(1) through (b)(5)).

Relief from a final judgment or order for "any other reasons justifying relief" was available under the former rule only when a movant acted in a timely fashion and asserted a ground justifying relief that was not a ground encompassed within any of the first five clauses. U. S. v. Cirami, C.A.2 (N.Y.) 1977, 563 F.2d 26, on remand, 92 F.R.D. 483. To obtain relief from judgment under the catchall provision of Rule 60(b), a movant cannot offer reasons for relief that could otherwise be considered under one of the more specific provisions of Rule of Federal Civil Procedure. Lender v. Unum Life Ins. Co. of America, Inc., M. D. Fla. 2007, 519 F. Supp. 2d 1217. A party may seek relief from judgment under Rule 60(b) if the party's motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated elsewhere in the rule. Hawaii County Green Party v. Clinton, D. Hawaii 2000, 124 F. Supp. 2d 1173; Fustok v. Conticommodity Services, Inc., S.D.N.Y.1988, 122 F.R.D. 151, affirmed, 873 F.2d 38. See also Price v. United Mine Workers of America, D. C. Ky. 1963, 35 F.R.D. 27, affirmed, 335 F.2d 958, certiorari denied, 85 S.Ct. 701, 379 U.S. 990, 13 L. Ed. 2d 610.

Rule 60(b) allows a court to relieve a party from a final judgment for any "other reason" justifying relief from operation of the judgment vests the court with power adequate to enable it to vacate judgment whenever such action is appropriate to accomplish justice. Klapprott v. U. S., U.S. N.J. 1949, 69 S.Ct. 384, 335 U.S. 601, 336 U.S. 942, 93 L.Ed. 266, 93 L.Ed. 1099, motion denied, 69 S.Ct. 877, 336 U.S. 949, 93 L.Ed. 1105. See also Menier v. U.S., C.A. Tex. 1968, 405 F.2d 245; Yanow v. Weyerhaeuser S.S. Co., C.A. Or. 1959, 274 F.2d 274, certiorari denied, 80 S.Ct. 671, 362 U.S. 919, 4 L. Ed. 2d 739; Patapoff v. Vollstedt's Inc., C.A. Or. 1959, 267 F.2d 863; L. M. Leathers' Sons v. Goldman, C.A. Mich. 1958, 252 F.2d 188. Rule 60(b)(6) allows a district court to vacate a prior dismissal order and restore the case to its docket. Van Leeuwen v. Farm Credit Admin., D.C. Or. 1984, 600 F.Supp. 1161. When considering a motion under Rule 60(b), a court should weigh all

of the attendant circumstances and balance the equities on a case-by-case basis. Brooks v. Walker, D.C. Mass. 1979, 82 F.R.D. 95.

In this case, Petitioner may request relief only under Rule 60(b)(6). This motion does not fall under any of the other subsections of Rule 60(b). Therefore, this motion is appropriately filed.

B. Rule 60(b)(6) Applied in This Case

Petitioner seeks relief from the judgment that dismissed his federal habeas petition with prejudice. This Court has the power to set aside this judgment and should do so because justice will be served if such judgment is set aside.

The reason given by this Court of why Petitioner's habeas petition was dismissed with prejudice is that the petition was not timely filed due to the tolling of the statute of limitations under 28 USC § 2254(d)(2). Further, this Court ruled that there are no grounds for equitable tolling.

To support its ruling, this Court relies primarily upon Duncan v. Walker, 533 U.S. 167, 181-182 (2001). In Duncan, an inmate in New York 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 significantly 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, Petitioner almost immediately returned to federal court after this Court dismissed his claims without prejudice for failure to exhaust claims. 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.

Therefore, a thorough reading of Duncan suggest that the tolling statute applies only to those who do not return to State court, as instructed by the federal court, to litigate unexhausted claims. Further, the Supreme 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 reading of Duncan 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 asks the Court to take note of Stevens's argument 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 argues 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 behaved in the exact manner that Congress would have wanted him to do under the AEDPA.

It is true that 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 petitioner, which was the first petition for writ of habeas corpus in this District Court. However, Petitioner 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 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 his federal petition for writ of habeas corpus.

Other cases that involved a motion filed under Rule 60(b)(6) show that unlike Petitioner, those movants did not act in an expeditious manner in order to bring their claims. For instance, in one case, an individual who was subject to a deportation order filed a motion seeking to vacate his prior conviction for importation of heroin on basis of newly discovered evidence. Hanan v. U.S., E.D. Va. 2005, 402 F.Supp.2d 679, reconsideration denied, 2006 WL 1303127, affirmed, 213 Fed. Appx. 197, 2007 WL 142557. The court ruled that his motion was untimely because he gave no explanation for not filing motion until approximately 19 months after receiving evidence. Id. Unlike Petitioner, this movant waited almost two years to file his motion after he attained the evidence or arguments to do so.

In another case more on point with Petitioner's case, a state prisoner filed a motion to vacate a district court's order dismissing his habeas petition for failure to exhaust state remedies. Gaskins v. Duval, D. Mass. 2004, 336 F. Supp. 2d 66. The Court ruled that his motion was untimely even under the reasonable time standard of civil procedure rule governing motions for relief from

judgment because the legal predicate for the motion existed for at least the nearly two and a half years between the Duncan v. Walker decision, holding that the one-year habeas limitation period is not tolled during federal habeas proceedings, and petitioner's filing of the motion to vacate.

C. This Rule 60(b)(6) Motion is Timely

Petitioner finally contends that this Rule 60(b)(6) motion is timely. Although there is no specific filing deadline, other federal courts have ruled that a motion filed more than one year after entry of final judgment was not made within a reasonable amount of time. See Esposito v. Ashcroft, 288 F.Supp.2d 292 (E.D.N.Y. 2003), affirmed 392 F.3d 549; see also In re Kravitz, 471 F.Supp. 665 (M.D.Pa. 1979) (Delay of 4 1/2 years between filing of formal legal action after decision of state court on state prisoner's postconviction action was reasonable and did not operate to preclude prisoner from seeking relief in federal court in a habeas corpus context in that prisoner lacked financial resources to hire private counsel and, mindful of her prior experiences, seeking other counsel while appointed counsel was working on case would have been unwise); U. S. ex rel. Bonner v. Warden, Stateville Correctional Center, 78 F.R.D. 344 (N.D.Ill. 1978) (Petitioner that filed a petition for writ of habeas corpus later filed motion to vacate and set aside order denying his motion to vacate prior order dismissing habeas petition. Court found that he filed it untimely under Rule 60(b)(6) because the judgment that the petitioner sought to set aside was entered on Oct. 13, 1976, and where motion was filed on Nov. 28, 1977); Pitchess v. Davis, 95 S.Ct. 1748, 421 U.S. 482 (1975), 44 L. Ed. 2d 317 (habeas petitioner had not exhausted state remedies as regards unavailability of physical evidence for use at retrial, which was undertaken pursuant to conditional federal writ of habeas corpus, the federal district court, which apparently would have granted an absolute writ if it had been presented with the unavailability claim at time of issue of conditional writ was not justified in amending prior judgment, so as to make writ absolute, under authority of this rule providing for relief from a final judgment for "any other reason justifying relief"; exhaustion requirement was not inapplicable on ground that motion to make absolute was authorized under the rule as one for relief from a final order).

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.

IV. PRAYER

Petitioner prays that this Court grant him relief from the final judgment dated October 14, 2008 on the grounds that the judgment is manifestly unjust because the judgment misinterprets the tolling statute in that it was not the intent of Congress for federal courts to dismiss with prejudice petitions such as those of Petitioner.

Respectfully submitted,

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/S/ M. MICHAEL MOWLA
By:_____
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CERTIFICATE OF FILING AND NOTICE OF ELECTRONIC FILING

I, the undersigned, hereby certify that a true and correct copy of the foregoing was filed by the Electronic Case Files System of the Northern District of Texas, on March 12, 2009.

/S/ M. MICHAEL MOWLA
_____
By: M. Michael Mowla
Attorney for BARTON RAY GAINES

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Rule 60(b) Motion Seeking Relief From Final Judgment With Brief in Support was delivered on this the 12th day of March, 2009, 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

/S/ M. MICHAEL MOWLA

_____

By: M. Michael Mowla
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