

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

BARTON RAY GAINES,	§	
TDCJ-CID No. 1139507,	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 4:08-CV-147-Y
	§	ECF Case
NATHANIEL QUARTERMAN,	§	
Director, Texas Department of	§	Previously Referred to U.S.
Criminal Justice,	§	Magistrate Judge Charles Bleil
Correctional Institutions Division,	§	
Respondent.	§	

**RESPONDENT QUARTERMAN'S RESPONSE TO GAINES' MOTION FOR
RELIEF FROM JUDGMENT WITH BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ-CID"), Respondent herein ("the Director"), by and through his attorney, the Attorney General of Texas, and files this **Respondent Quarterman's Response to Gaines' Motion for Relief From Judgment with Brief in Support**. In support thereof, the Director would respectfully show the Court the following:

BACKGROUND

The Director was served with Gaines' "Rule 60(b) Motion Seeking Relief from Final Judgment . . . " on March 12, 2009, and is responding on March 16th; therefore, this response is timely filed. Gaines' motion should be denied as redundant and frivolous.

RESPONSE

This motion for relief from judgment should be dismissed because it is completely redundant of the objections that Gaines filed to the Magistrate's Report to dismiss this writ as time-barred. In fact Gaines has cut and paste his "Objections to the Findings, Conclusions and Recommendations of the United States Magistrate Judge" ("Objections"), into his Rule 60(b) motion. He relied on *Duncan v. Walker*, 533 U.S. 167 (2001), *Walker v. Artuz*, 208 F.3d 357 (2000), *Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001), and *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002) in his Objections, at 3-6, and does the same herein. Motion for Relief from Judgment, at 5-7. This Court having already considered and rejected his arguments when it entered final judgment time-barring this federal writ, need not waste its time considering the same arguments under a post-judgment procedural rubric.

Finally, his weak argument for stay and abatement, which he made in his Objections, and this Court rejected, was frivolous. Gaines was not entitled to statutory tolling for the time that his previous federal writ was pending. *See Grooms v. Johnson*, 208 F.3d 488, 489 (5th Cir. 1999) (a previous federal writ dismissed for failure to exhaust state remedies does not toll the statute of limitations); *see also Duncan v. Walker*, 533 U. S. 167, 181-82 (2001) (same). Gaines's previous federal writ challenged these convictions; it was dismissed for failure to exhaust; Gaines *was denied a stay and abatement* of that writ to exhaust; and, Gaines was warned that the statute of limitations was applicable and not foreclosed by the filing of his first federal writ. *See Gaines v. Quarterman*, Civil Action No. 4:06-CV-409-Y. There was also no basis for

equitable tolling because Gaines waited almost one year after his PDR was refused (5/18/05) to file his first federal writ (5/4/06). Grooms, in comparison, waited over a year after his first federal writ was denied to file his second federal writ; therefore, he was not entitled to equitable tolling. *Grooms*, 208 F.3d at 489.¹

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests that the Court deny Gaines' motion for relief from judgment as frivolous.

Respectfully submitted,

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Attorney General of Texas

ANDREW WEBER
First Assistant Attorney General

ERIC J.R. NICHOLS
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s/ S. Michael Bozarth
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¹ See the Director's Preliminary Response, at p. 6, n.5.

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF INTERESTED PERSONS

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

s/ S. Michael Bozarth
S. MICHAEL BOZARTH
Assistant Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing **Respondent Quartermaster's Response to Gaines' Motion for Relief From Judgment with Brief in Support** has been electronically filed with the Clerk of this Court and served electronically by the CM/ECF system on this the 16th day of March, 2009, addressed to:

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s/ S. Michael Bozarth
S. MICHAEL BOZARTH
Assistant Attorney General