United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 1, 2022
Lyle W. Cayce
Clerk

No. 21-10301
Summary Calendar

BARTON RAY GAINES,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:08-CV-147

Before STEWART, HAYNES and HO, *Circuit Judges*.

PER CURIAM:*

Barton Ray Gaines, former Texas prisoner # 1139507, has moved for a certificate of appealability (COA) to appeal the district court's disposition of his Federal Rule of Civil Procedure 60(b)(6) motion. He sought relief from

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Appendix B

the judgment dismissing as time barred his 28 U.S.C. § 2254 application in which he challenged his convictions for aggravated robbery with a deadly weapon. The district court found that the motion should be dismissed in part as an unauthorized successive § 2254 application and concluded that the motion otherwise was untimely and did not allege exceptional circumstances. Also, the district court denied Gaines's motion to recuse the district court judge.

Gaines argues that the district court erred in dismissing his Rule 60(b) motion in part as a successive § 2254 application. He asserts that his motion alleged an apparent defect in the integrity of the federal habeas proceedings, specifically, a conflict of interest involving his habeas counsel, and contended that the conflict affected whether his § 2254 application was timely filed. Also, he contends that his Rule 60(b)(6) motion, which was filed more than 12 years after the judgment dismissing his § 2254 application, was filed in a reasonable time after he discovered the conflict and presented exceptional circumstances. He further asserts that the district court erred in denying his motion to recuse.

A prisoner is entitled to a COA if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Gaines must show that reasonable jurists could debate the correctness of the disposition of the Rule 60(b) motion. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Gaines has not made the required showing. Accordingly, his motion for a COA is DENIED. His motion to proceed in forma pauperis on appeal also is DENIED.

A COA is not required to appeal the denial of a motion to recuse. *Trevino v. Johnson*, 168 F.3d 173, 176-78 (5th Cir. 1999). Gaines fails to show that the district court judge was biased against him, and he provides nothing

to suggest that the judge's impartiality might reasonably be questioned. *See* 28 U.S.C. § 455(a), (b)(1); *United States v. Scroggins*, 485 F.3d 824, 830 (5th Cir. 2007). The denial of the motion to recuse is AFFIRMED.

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

BARTON RAY GAINES, Petitioner,	§	
VS.	§	CIVIL ACTION NO.4:08-CV-147-Y
NATHANIEL QUARTERMAN, Director, T.D.C.J., Correctional Institutions Division, Respondent.	§	

ORDER DENYING MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)

On March 12, 2009, petitioner Barton Ray Gaines filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, purportedly claiming that this Court's dismissal of the petition under 28 U.S.C. § 2254 was in error. The Court's final judgment in this matter was entered on the docket on October 14, 2008. Petitioner did not file a notice of appeal, and the Fifth Circuit has "repeatedly and firmly held that Rule 60(b) cannot be used to extend the time for appeal." *Pryor v. U.S.Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985)(citations omitted). Further, the 60(b) motion itself merely reiterates the arguments listed in the written objections to the magistrate judge's report and recommendation, which the Court considered and overruled. Thus, after review and consideration of the motion for relief from judgment under Rule 60(b)(6), the Court concludes that it should be denied.

Therefore, Barton Ray Gaines's March 12, 2009, motion for relief of judgment pursuant to Federal Rule of Civil Procedure 60(b) [docket no. 15] is DENIED.

SIGNED March 23, 2009.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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

BARTON RAY GAINES,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:08-CV-147-Y
	§	
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
	§	
	§	
Respondent.	§	

ORDER DENYING RELIEF

Petitioner, Barton Ray Gaines, has filed in this habeas-corpus proceeding "Petitioner's Motion for Relief from Judgment" (doc. 18); an "Amended Petition for a Writ of Habeas Corpus by a Person in State Custody" accompanied by a supporting affidavit and appendices (docs. 19-21); "Petitioner's Motion to Recuse Means" accompanied by a supporting memorandum and "Petitioner's Request for Hearing on his Motion to Recuse Judge Means" (docs. 22-24); and "Petitioner's Depcsition on Written Questions" for Baxter Morgan, Charles Bleil, Mehdi Michael Mowla, Robert K. Gill, and Terry R. Means (doc. 25).

Petitioner seeks relief from the Court's October 14, 2008 judgment (doc. 14) dismissing his petition under 28 U.S.C. § 2254 as time barred. In the motion, Petitioner asserts that he is entitled to relief from the judgment under Rule 60(b)(6) "because of a newly discovered conflict of interest (dual representation)

Appendix A

existing during the previous habeas proceedings." (Id. at 8.) Specifically, he asserts that his habeas counsel, M. Michael Mowla, "had conflicts of interests because:

> (1) he, of course, was petitioner's 11.07 and 2254 counsel; and
>
> (2) he, according to this newly discovered conflicts(s), was Daniel[] [Aranda's habeas attorney at the same time he was petitioner's habeas attorney, who (Daniel) according to Tiffani Anne Phillips-Brooks-Bearden's misconstrued and misrepresented testimony (via Westfall (Greg)) was petitioner's extraneous codefendant."

(Id. at 7 (footnotes omitted).) According to Petitioner,

> Mowla, unbeknownst to petitioner hitherto, represented both petitioner and Daniel Aranda on their habeas corpses [sic] at the same time, and, as such, he (Mowla) could not have reasonably been expected to argue:
>
> a. Westfall (Greg) [Petitioner's trial attorney] was ineffective because petitioner didn't **commit** the extraneous, and/or
>
> b. Westfall (Greg) was ineffective because petitioner was not criminally responsible for the extraneous;
>
> less he (Mowla) risked exposing Daniel to another round of litigation (this time for the extraneous) with evidence he (Mowla) no doubt feared would be gleaned therefrom (the habeas litigation).

(Id. at 10 (footnotes omitted) (emphasis in original).) Petitioner asserts that he did not become aware of Mowla's dual representation earlier because

> Respondent refused his (petitioner's) *Freedom of Information Act* ("FOIA") requests under *Texas Government Code* § 552.028 (i.e., because he was in prison), until he made parole and respondent was no longer able to deny him access thereunder (which ultimately led to his extraordinary discovery; i.e., Mowla's dual representation).

(Id. at 13 (footnotes omitted) (emphasis in original).)

To the extent Petitioner moves to reopen his initial federal habeas proceeding to assert new claims based on new evidence, the motion is, in substance, a second or successive § 2254 petition and must be dismissed. 28 U.S.C. § 2244(b)(1); *Gonzalez v. Crosby*, 532 U.S. 524, 532 (2005); *Preyor v. Davis*, 704 Fed. App'x 331, 339 (5th Cir.), *cert. denied*, 138 S. Ct. 35 (2017).

To the extent Petitioner moves to reopen his initial federal habeas proceeding based on Rule 60(b)(6), having been filed more than 12 years after entry of the Court's judgment, the motion was not filed within a reasonable time and is untimely. FED. R. CIV. P. 60(c)(1). Nor does he present "extraordinary circumstances" justifying the reopening of the proceeding. *See Crosby*, 545 U.S. at 536. In fact, "[s]uch circumstances will rarely occur in the habeas context." *Id.* at 535.

Based on the foregoing, Petitioner's motion is DISMISSED, in part, and DENIED, in part. All other pending motions are DENIED.

A movant may not appeal a final order in a habeas-corpus proceeding, including an order on a motion for relief from a judgment, "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In cases where a district court rejects a petitioner's claim(s) on the merits, "[t]he petitioner must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To warrant a grant of the certificate as to claims that the district court rejects solely on procedural grounds, the movant must show both that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Here, reasonable jurists would not debate the Court's procedural rulings and/or its conclusion that Petitioner's motion does not meet the criteria for obtaining relief under Rule 60(b)(4) or (6). Accordingly, Petitioner is not entitled to a certificate of appealability.

SIGNED March 11, 2021.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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

BARTON RAY GAINES, Petitioner,	§ §	
VS.	§	CIVIL ACTION NO.4:08-CV-147-Y
NATHANIEL QUARTERMAN, Director, T.D.C.J.,Correctional Institutions DIV., Respondent.	§ § § §	

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS

In this action brought by petitioner Barton Ray Gaines under 28 U.S.C. § 2254, the Court has made an independent review of the following matters in the above-styled and numbered cause:

1. The pleadings and record;

2. The proposed findings, conclusions, and recommendation of the United States magistrate judge filed on August 28, 2008; and

3. The petitioner's written objections to the proposed findings, conclusions, and recommendation of the United States magistrate judge filed on September 16, 2008.

The Court, after **de novo** review, concludes that Petitioner's objections must be overruled, and that the petition for writ of habeas corpus should be dismissed with prejudice as time-barred under 28 U.S.C. § 2244, for the reasons stated in the magistrate judge's findings and conclusions, and for the reasons stated in Quarterman's prelimnary response at pages 6-7.

Therefore, the findings, conclusions, and recommendation of the magistrate judge are ADOPTED.

Petitioner Barton Ray Gaines's petition for writ of habeas corpus is DISMISSED WITH PREJUDICE.

SIGNED October 14, 2008.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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

BARTON RAY GAINES, Petitioner,	§ §	
VS.	§	CIVIL ACTION NO.4:08-CV-147-Y
NATHANIEL QUARTERMAN, Director, T.D.C.J.,Correctional Institutions DIV., Respondent.	§ § § §	

FINAL JUDGMENT

In accordance with the order issued this same day and Federal Rule of Civil Procedure 58, petitioner Barton Ray Gaines's petition for writ of habeas corpus is DISMISSED WITH PREJUDICE. All costs of court are taxed against the party that incurred them.

SIGNED October 14, 2008.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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

BARTON RAY GAINES,	§	
Petitioner,	§	
	§	
VS.	§	
	§	**CIVIL ACTION NO. 4:08-CV-147-Y**
NATHANIEL QUARTERMAN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

Appendix A

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The findings, conclusions and recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus brought by a state prisoner under 28 U.S.C. § 2254.

B. PARTIES

Petitioner Barton Ray Gaines, TDCJ #1139507, is a state prisoner currently in custody of the Texas Department of Criminal Justice, Correctional Institutions Division. He is represented by M. Michael Mowla, attorney at law.

Respondent Nathaniel Quarterman is the Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

C. FACTUAL AND PROCEDURAL HISTORY

By this action, Gaines challenges his December 12, 2002, convictions for aggravated robbery, to which he pleaded guilty, in Case Nos. 0836979A and 0836985A in the 213th District Court Number of Tarrant County, Texas. *Ex parte Gaines*, State Habeas Application Nos. WR-69,338-01 & WR-69,338-02, at 245. He is serving two concurrent 35-year sentences. Gaines appealed his convictions, but the Second District Court of Appeals of Texas affirmed the trial court's judgments, and, on May 18, 2005, the Texas Court of Criminal Appeals refused Gaines's petition for discretionary review. *Gaines v. Texas*, Nos. 2-02-498-CR & 2-02-499-CR, slip op. (Tex. App.–Fort Worth Oct. 14, 2004) (not designated for publication); *Gaines v. Texas*, PDR Nos. 1787-04 & 1788-04. Gaines did not seek writ of certiorari. (Petition at 2)

On May 24, 2006, Gaines filed a prior federal habeas petition in this court challenging his convictions, which was dismissed on November 16, 2006, without prejudice on exhaustion grounds. *Gaines v. Dretke*, Civil Action No. 4:06-CV-409-Y. On November 1, 2006, Gaines filed two state habeas applications challenging his convictions, which were denied by the Texas Court of Criminal Appeals on February 27, 2005, without written order on the findings of the trial court. *Ex parte Gaines*, State Habeas Application Nos. WR-69,338-01 & WR-69,338-02, at cover. This petition was filed on March 3, 2008. As ordered, Quarterman has filed a preliminary response addressing only the issue of limitations.

D. GROUNDS

In three grounds, Gaines claims that (1) he received ineffective assistance of trial counsel (grounds one and two), and (2) the district attorney intimidated at lease two witnesses from speaking to the defense (ground three). (Petition at 6)

E. STATUTE OF LIMITATIONS

28 U.S.C. § 2244(d) imposes a one-year statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners. Section 2244(d) provides:

> (1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

Under subsection (A), applicable to this case, the limitations period began to run on the date on which the judgments of conviction became final by the expiration of the time for seeking direct review.[1] For purposes of this provision, Gaines's convictions became final and the one-year

[1]There are no allegations that the state imposed an unconstitutional impediment to the filing of Gaines's petition for federal relief, that the Supreme Court has announced a new rule(s) applicable to Gaines's claims, or that the factual predicate of his claims could not have been discovered sooner through the exercise of due diligence. Therefore, the statutory exceptions embodied in § 2244(d)(1)(B)-(D) do not apply.

limitations period began to run upon expiration of the time that Gaines had for filing a petition for writ of certiorari in the United States Supreme Court on August 16, 2005, and closed one year later on August 16, 2006, absent any tolling. *See id.* § 2244(d)(1)(A); *Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998); SUP. CT. R. 13. Gaines's state habeas applications, filed on November 1, 2006, after limitations had already expired, did not operate to toll the federal limitations period under § 2244(d)(2). *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Nor did Gaines's prior federal petition operate to toll the limitations period under § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). Gaines has not alleged or demonstrated rare and exceptional circumstances that would justify equitable tolling. *See United States v. Petty*, 530 F.3d 361, *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Gaines waited nearly a year before seeking post-conviction habeas relief and has not demonstrated that he was actively misled by the state or prevented in some extraordinary way from asserting his rights in state or federal court. Thus, Gaines's federal petition filed on March 3, 2008, was filed beyond the limitations period and is, therefore, untimely.

II. RECOMMENDATION

Gaines's petition for writ of habeas corpus should be DISMISSED with prejudice as time barred.

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions, and recommendation within ten (10) days after the party has been

served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation until September 18, 2008. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(B)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc op. on reh'g); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990).

IV. ORDER

Under 28 U.S.C. § 636, it is ORDERED that each party is granted until September 18, 2008, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED August 28, 2008.

Charles Bleil

CHARLES BLEIL
UNITED STATES MAGISTRATE JUDGE