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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RUDOLPH YOUNG,

Petitioner,

-vs-

JAMES CONWAY,

Respondent.

**RESPONSE TO PETITIONER'S
REQUEST FOR A STAY**

Case No.: 07-CV-6074L

TO THE HONORABLE DAVID G. LARIMER, United States District Court Judge
for the Western District of New York:

1. WENDY EVANS LEHMANN, Assistant District Attorney for Monroe County, on behalf of Respondent James Conway, opposes petitioner's request for a stay. Petitioner has failed to establish good cause for not previously exhausting the claim he now is attempting to exhaust and his claim is entirely meritless.

2. This response is based upon personal knowledge and information and belief, the source of which is my conversations with members of my office and review of the contents of our file.

3. On or about October 18, 2007, this Court issued an Order directing respondent to file a response to petitioner's motion to amend the petition and his request for a stay filed on or about August 13, 2007. Petitioner, in his August 13, 2007, filing requested a stay to exhaust a claim of ineffective assistance of appellate counsel for counsel's failure to raise a claim on direct appeal that petitioner was denied his right to present a defense by the exclusion of his proffered identification expert. Because petitioner did not raise this issue in his original petition, this Court interpreted his August

13, 2007, filing as also requesting permission to amend his original petition to include this claim.

4. Petitioner's request for a stay should be denied as he has failed to establish good cause as to why this claim was not previously exhausted. Additionally, petitioner's new claim is entirely without merit. See Rhines v. Weber, 544 US 269, 277 (2005). Permission to file an amended petition should also be denied, as respondent has previously filed an answer to the original petition, petitioner's claim is now time barred and the new claim would not relate back. See 28 USC § 2244(d)(1); Mayle v. Felix, 545 US 644, 656 (2005).

5. The Supreme Court recently explained in Rhines v. Weber, supra, that a stay of a habeas proceeding is only available in limited circumstances. 544 US at 277. Petitioner must establish good cause for his failure to previously exhaust his claim in state court; must establish that the claim is not "plainly meritless;" and also must establish that the delay was not the result of dilatory tactics. Rhines, 544 US at 277. Petitioner here has failed to meet this heavy burden.

6. Petitioner has failed to set forth any facts to support a finding of good cause for his failure to previously exhaust his ineffective assistance of appellate counsel claim. Petitioner's direct appeal was decided by the Appellate Division, Fourth Department in July, 2005. The facts supporting petitioner's claim that he was denied effective assistance of appellate counsel would have been clear at that point. Petitioner offers no excuse for not filing the coram nobis motion until September, 2007, some two years after the claim would have arisen. Good cause simply does not exist for the delay, therefore the request for a stay should be denied.

7. Additionally, petitioner's new claim is "plainly meritless." Petitioner clearly received effective assistance of appellate counsel. Counsel provided exceptional representation. He succeeded in convincing two of the five justices of the Fourth Department that petitioner deserved a new trial on the issue of his identification as the perpetrator. Counsel further obtained leave to appeal the Fourth Department's decision, and although ultimately unsuccessful at the Court of Appeals, presented a well reasoned brief which resulted in one judge dissenting. Counsel's decision not to pursue the right to present a defense claim now urged by petitioner was reasonable appellate strategy under the circumstances of this case. Counsel did raise an issue which the Court of Appeals described as "extremely close." He likely chose not to raise the meritless claim suggested by petitioner because it would have detracted from his far more meritorious claim. Counsel's decision should not be second-guessed.

8. Respondent further refers this Court to the response to petitioner's original petition for discussion of the merits of the underlying claim that the exclusion of Dr. Brigham's testimony denied petitioner his right to present a defense. As argued in the response, this claim is meritless.

9. Petitioner should not be permitted to amend his original petition to include the claim that he was denied effective assistance of appellate counsel. A petitioner may not file an amended petition once the respondent has answered unless he first receives leave of court or the opposing party consents. Fed. R. Civ. P. 12(a)(1). Petitioner's claim is now time barred under 29 USC § 2244(d)(1), as more than a year has expired since his case became final and his claim does not "relate back" to his original petition.

10. Federal Rule of Civil Procedure 15(c)(2) provides that an amendment “relates back” to the original petition if it “arose out of the conduct, transaction, or occurrence set forth” in the original petition. However, the Supreme Court in Mayle v. Felix, 545 US 644, 656 (2005), further explained that “[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.”

11. Petitioner’s new claims are not tied to a common core of operative facts as were presented in the original claim. Petitioner’s new claim of ineffective assistance of appellate counsel requires proof of additional facts which were not encompassed in his original petition. Petitioner did not set forth any claim in his original petition which dealt with the failure of appellate counsel to allege that petitioner was denied his right to present a defense by the exclusion of Dr. Brigham’s testimony. Although petitioner did claim that the exclusion of this testimony denied him his right to present a defense, he did not claim that the failure to raise this issue on appeal rendered appellate counsel ineffective. This new allegation requires additional operative facts not presented in the original petition and therefore does not relate back to the original petition under Mayle. Petitioner’s motion to amend his petition should be denied.

CONCLUSION

Petitioner's motion for a stay should be denied and his motion for leave to amend his petition should be denied.

Dated: November 26, 2007

Respectfully submitted,
MICHAEL C. GREEN
District Attorney of Monroe County
Ebenezer Watts Building/Suite 832
Rochester, New York 14614

A handwritten signature in cursive script, reading "Wendy Evans Lehmann".

WENDY EVANS LEHMANN
Assistant District Attorney

To: Rudolph Young, 92-B-1096

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RUDOLPH YOUNG,

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-vs-

JAMES CONWAY,

Respondent.

CERTIFICATE OF SERVICE
BY MAIL

CYNTHIA A. BELLUCCO, is not a party to this action, is over the age of eighteen (18) years and resides at Rochester, New York.

That on the 26TH day of November, 2007, deponent served one copy of the Response To Petitioner's Request For A Stay upon, Rudolph Young, Inmate No. 92-B-1096, petitioner in this action at, Attica Correctional Facility, P.O. Box 149, Attica, New York 14011, by depositing a true copy of the same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: November 26, 2007

Cynthia A. Bellucco

CYNTHIA A. BELLUCCO

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