No. 22A-____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

BARTON R. GAINES,
Petitioner,
vs.
BOBBY LUMPKIN, Dir., TDCJ--CID,
Respondents.

_____

On Petition for a Writ of Certiorari to the
United States Court of Appeals for The Fifth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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I. QUESTION PRESENTED

Whether GAINES made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). And whether 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).

II. LIST OF PARTIES

All parties appear in the caption of the case on the cover page

III. RELATED CASES

TRIAL

1. *State v. Gaines*, Nos. 0836979-A & 0836985-A, 213th Judicial *District Court*, Tarrant County, Texas. Judgment entered December 12, 2002.[1]

DIRECT APPEAL

1. *Gaines v. State*, Nos. 2-02-498-CR & 2-02-499-CR, Second District *Court of Appeals, Fort Worth*, Texas. Judgment entered December 14, 2004.[2]

2. *Gaines v. State*, Nos. PD-1787-04 & PD-1788-04, *Criminal Court of Appeals, Austin*, Texas. Judgment entered May 18, 2005.[3]

1ST STATE WRIT

1. *Ex parte Gaines*, Nos. C-213-7907-0836979A & C-213-7908-0836985A, 213th Judicial *District Court*, Tarrant County, Texas. Judgment entered January 30, 2008.[4]

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[1] https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2019.%20The%20third%20&%20last%20day%20of%20trial)

[2] https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2024.%20Direct%20appeal%20denied)

[3] https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2024.%20Direct%20appeal%20denied)

[4] https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2030.%20My%20reply%20to%20Westfall%E2%80%99s%20&%20Minick%E2%80%99s%20responses,%20&%20Mowla%E2%80%99s%20malpractice%20response%20to%20me)

2. *Ex parte Gaines v. State*, Nos. WR-69,338-01 & WR-69,338-02, Criminal Court of Appeals, Austin, Texas. Judgment entered February 27, 2008.[5]

§ 2254

1. *Gaines v. State*, No. 4:06-CV-409-Y, U.S.D.C., N.D.T.X., Ft. Worth Div. Judgment entered November 16, 2006.[6]

2. *Gaines v. State*, No. 4:08-CV-147-Y, U.S.D.C., N.D.T.X., Ft. Worth Div. Judgment entered October 14, 2008.[7]

2ND STATE WRIT

1. *Ex parte Gaines*, Nos. C-213-W011921-0836979A & C-213-W011922-0836985A, 213th Judicial *District Court*, Tarrant County, Texas. Judgment entered March 25, 2021.

2. *Ex parte Gaines*, Nos. WR-69,338-03 & WR-69,338-04, Criminal Court of Appeals, Austin, Texas. Judgment entered July 14, 2021.

FRCP 60(b)(6)

1. *Gaines v. Lumpkin*, No. 4:08-CV-147-Y, U.S.D.C., N.D.T.X., Ft. Worth Div. Judgment entered March 11, 2021.

2. *Gaines v. Lumpkin*, No. 21-10301, U.S.C.A., 5th Circuit, New Orleans, Louisiana. Judgment entered April 1, 2022.

BILL OF REVIEW (1ST STATE WRIT)

1. *Ex parte vs. Barton Ray GainesHabeas counsel, M Michael (Atty)*, No. C-213-7907-0836979A, 213th Judicial *District Court*, Tarrant County, Texas. Judgment has yet to be entered.

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5 https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2030.%20My%20reply%20to%20Westfall%E2%80%99s%20&%20Minick%E2%80%99s%20responses,%20&%20Mowla%E2%80%99s%20malpractice%20response%20to%20me)

6 https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2029.%20Sec.%202254(b)%20proceedings)

7 https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2031.%20A%20rtn.%20To%20the%20Fed.%20Ct.)

2. *Ex parte vs. Barton Ray GainesHabeas counsel, M Michael (Atty)*, No. WR-69,338-02, Criminal Court of Appeals, Austin, Texas. Judgment has yet to be entered.

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V. TABLE OF AUTHORITIES CITED

Cases

Statutes

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VI. IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VII. OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix B to the petition and is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is unpublished.

VIII. JURISDICTION

The date on which the United States Court of Appeals decided GAINES'S case was April 1, 2022. No petition for rehearing was filed. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IX. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 28 Federal Rules of Civil Procedure 60
- 28 U.S.C. § 2253.
- 28 U.S.C. § 2254
- 28 U.S.C. § 455
- U.S. Constitution, Amendment. 14
- U.S. Constitution, Amendment. 6

X. STATEMENT OF THE CASE

On May 14, 2006, GAINES requested relief via habeas corpus in the district court:

> 1. he was denied effective assistance of trial counsel, and
> 2. his conviction was obtained by pleas of guilty that were not made voluntarily or made with an understanding of the nature of the charges and the consequences of his pleas, due to the acts and/or omissions of trial counsel.
>
> (Case 4:06-cv-00409-Y Document 1, page 8.).[8]

On July 10, 2006, the federal district court ordered respondent to respond that GAINES'S petition was unexhausted, and potentially time-barred, if respondent requested additional time to respond after the statute of limitation expired (Case 4:06-cv-00409-Y Document 10, page 1).[9]

On August 9, 2006, respondent requested an extra 60-days to respond (Case 4:06-cv-00409-Y Document 12, page 1).[10]

On August 17, 2006, the day after the time for filing said petition expired, the federal district court ordered respondent to respond on October 8, 2006 (Case 4:06-cv-00409-Y Document 13, page 1).[11]

[8] https://gaineshomedesignplus.com/wip/2006%20FCR/8_25-Page%20Brief.pdf#page=2
[9] https://gaineshomedesignplus.com/wip/2006%20FCR/10_2243%20Order.pdf#page=1
[10] https://gaineshomedesignplus.com/wip/2006%20FCR/12_Baxter's%20Extention.pdf#page=1
[11] https://gaineshomedesignplus.com/wip/2006%20FCR/13_Bleil's%20Order.pdf#page=1

On October 9, 2006, respondent requested dismissal on exhaustion grounds under 28 U.S.C. §§ 2254 (b)(1), (c) (2006) (Case 4:06-cv-00409-Y Document 14, page 4).[12]

On November 16, 2006, the federal district court dismissed on exhaustion grounds, without prejudice, GAINES'S petition, except as to any application of the federal statute of limitations (Case 4:06-cv-00409-Y Document 19, page 1).[13]

On March 3, 2008, GAINES, after exhausting state remedies (2254(b) proceedings), as instructed, re- requested relief via habeas corpus in the federal district court:

1. he received ineffective assistance of trial counsel (grounds one and two), and
2. the district attorney intimidated at least two witnesses from speaking to the defense (ground three).

(Case 4:08-cv-00147-Y Document 1, pages 5-6).[14]

On April 2, 2008, the federal district court ordered respondent to respond; specifically, limited to providing the court with the following information:

- the date the judgment of conviction was entered;
- the date an appeal was perfected or the time for seeking direct review expired;
- the date the judgment of conviction became final;
- the date the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence, if applicable;

[12] https://gaineshomedesignplus.com/wip/2006%20FCR/14_Bozarth'sToDismiss.pdf#page=1
[13] https://gaineshomedesignplus.com/wip/2006%20FCR/19_Mean's%20Final%20Judgment.pdf
[14] https://gaineshomedesignplus.com/wip/2008%20FCR/2%20Supporting%20Brief.pdf#page=2

- the date any relevant application or motion for postconviction relief was filed in the trial court.
- the date any relevant application or motion for postconviction relief was finally determined by the Texas Court of Criminal Appeals and the date Petitioner was notified of that determination; and
- whether respondent believes that this action is barred by limitations under 28 U.S.C. § 2244(d)

(Case 4:08-cv-00147-Y Document 8, page 1).[15]

On April 29, 2008, respondent requested dismissal with prejudice under the AEDPA's statute of limitations (Case 4:08-cv-00147-Y Document 10, page 7).[16]

On October 14, 2008, the district court ordered GAINES'S petition for writ of habeas corpus dismissed with prejudice because it was time-barred (Case 4:08-cv-00147-Y Document 14, page 1).[17]

On February 22, 2021, GAINES requested relief in the federal district court:

1. Title 28 Federal Rules Civil Procedure 60(b):
    a. The motion is not a successive petition because it attacks a defect in the integrity of the 2254 proceedings.
    b. The Court should reopen petitioner's 2254 proceedings under Federal Rules of Civil Procedure 60(b)(6) because of a newly discovered conflict of interest (double conflict, double representation) existing during the previous habeas proceedings.
    c. The motion is timely because it is made within a reasonable time, or good cause exists for its delay.
2. Title 28 U.S.C. § 455:
    a. The judge has exhibited actions from which a reasonable inference of partiality may be drawn.

[15] https://gaineshomedesignplus.com/wip/2008%20FCR/8%20Order%20&%20Cause.pdf#page=1
[16] https://gaineshomedesignplus.com/wip/2008%20FCR/10%20AG's%20Response.pdf
[17] https://gaineshomedesignplus.com/wip/2008%20FCR/14%20Final%20Judgment.pdf

b. If the judge does not recuse himself, the public's confidence in the judiciary will be irreparably harmed.
c. A reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.

(*See* Case 4:08-cv-00147-Y Document 18, page 1).[18]

Respondent did not file a response.

On March 11, 2021, the federal district court decided:

1. 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. Appx. 331, 339 (5th Cir.), *cert. denied*, 138 S. Ct. 35 (2017).
2. 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*, 532 U.S. at 536. In fact, "[s]uch circumstances will rarely occur in the habeas context." *Id*. at 535.[19] And,
3. All other pending motions (i.e., motion to recuse and depose) are DENIED.

Consequently, the federal district court dismissed in part and denied in part the motion. (Case 4:08-cv-00147-Y Document 26, page 3)(*See* Appendix B, page 3, of the same).[20]

GAINES argued in the court of appeals:

[18] https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=1
[19] Note: "not *every* interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *See Gonzalez*, 532 U.S. at 536. But apparently a good number will, if not everyone.
[20] https://gaineshomedesignplus.com/wip/2021%20FCR/usdcorder.pdf#page=3

1. Because the motion for relief from the judgment attacked a defect (i.e., a conflict of interest (Daniel (exhaustion, timeliness, and sabotage))) in the integrity of the previous habeas proceeding, reasonable jurists would find it debatable the district court's holding whether GAINES'S motion asserted new claims based on new evidence, and that the motion was, in substance, a second or successive § 2254 petition.
2. Because the defect couldn't have been discovered any sooner than it was, reasonable jurists would find it debatable the district court's holding that GAINES'S motion was not made in a reasonable time.
3. Because conflicts of interest are defects and because conflicts of interest are, or at least were here, extra ordinary, reasonable jurists would find it debatable the district court's holding whether GAINES'S motion did not present extraordinary circumstances justifying relief from the district court's prior judgment.
4. Because the federal district court denied GAINES'S motion to recuse himself (Means),[21] i.e., because he (Means) exhibited signs of partiality toward respondent in this case, including the state trial counsel and state trial judge, reasonable jurists would find it debatable whether the federal district court, exhibited signs of partiality toward respondent in this case, including the state trial counsel and state trial judge.[22]

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[21] Including motion for deposition (with desired questions therefor) of trial officials:

1. Baxter Morgan (respondent): https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=63
2. Charles Bleil (federal magistrate judges): https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=48
3. Mehdi Michael Mowla (habeas counsel):
4. https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=68
5. Robert K. Gill (state district court judge): https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=53
6. Terry Robert Means (federal district court judge): https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=58

[22] The federal district court denied GAINES ability (request to depose the above) to show and prove there was a defect in the integrity of the habeas proceeding ((i.e., the reason why Habeas counsel chose not to exhaust GAINES'S state remedies and, consequently, got GAINES time barred)), then found and concluded GAINES failed to show and prove there was a defect in the integrity of the habeas proceeding ((i.e., the reason why Habeas counsel chose not to exhaust GAINES'S state remedies and, consequently, got GAINES time barred)). *See* Appendix B, page 3.

See pages 27-28 of the same, plus also pages 28-36 of the argument section of the same.[23]

The State did not file a response.

On April 1, 2022, the court of appeals decided judicial economy (expediency) was better than justice:[24]

1. Gaines must show that reasonable jurists could debate the correctness of the disposition of the Rule 60(b) motion.
2. Gaines has not made the required showing.
3. Accordingly, his motion for a COA is denied.

See (Case: 21-10301 Document 00515859196 Page 2 Date Filed: 04/01/2022) Appendix A, page 2 of 3 of the same.[25]

XI. REASONS FOR GRANTING THE WRIT

Reason One: The United States Fifth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* Court Rule 10 (c)

In *Gonzalez v. Crosby*,[26] this Court's jurist debated the correctness of the jurists' (Stewart's, Haynes's, and Ho's) disposition of GAINES'S rule 60 (b) motion.[27] Specifically, this Court's jurist *debated* whether the motion for relief from judgment, *challenging only district court's prior ruling that habeas petition*

[23] https://gaineshomedesignplus.com/wip/2021%20FCR/appeal/coa.pdf#page=29
[24] If jaded and unsatisfied with their job, get another one.
[25] https://gaineshomedesignplus.com/wip/2021%20FCR/appeal/responses/order.pdf#page=3
[26] *Gonzalez*, 545 U.S. 524, 533 (2005).
[27] "GAINES … contended that the conflict affected whether his § 2254 application was timely filed." Specifically, because of his attempt to shield his other client from any possible litigation. *See https://gaineshomedesignplus.com/wip/2021%20FCR/appeal/responses/order.pdf#page=4*

was time-barred, was not the equivalent of a "second or successive habeas petition".[28]

How, then, was GAINES'S rule 60(b) motion a *second or successive* habeas petition? Gonzalez' and GAINES'S rule 60(b) motions were virtually identical in this regard;[29] *i.e.*, they both argued:

> the district court's prior ruling that their habeas petition was time-barred under the Antiterrorism and Effective Death Penalty Act (AEDPA) limitations period was not the equivalent of a "second or successive habeas petition[.]"

Gonzalez, 545 U.S. at 533.[30]

Both the district court and the circuit court acted outside the boundaries of what they were created to do (they're malfunctioning) and should not be sanctioned by this Court. It's dangerous precedent and threatens Freedom. They cry out for correction.

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[28] *Gonzalez*, 545 U.S. 524, 533 (2005)(If neither a motion for relief from judgment itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, the motion does not qualify as a second or successive habeas petition, under the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2244(b); Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Petitioner's motion for relief from judgment, which challenged only the District Court's prior ruling that his habeas petition was time-barred under the Antiterrorism and Effective Death Penalty Act (AEDPA) limitations period, was not the equivalent of a "second or successive habeas petition," as would require authorization from Court of Appeals before filing; motion did not present a claim for relief from the petitioner's state conviction. 28 U.S.C.A. § 2244(b).)

[29] "Except," of course, GAINES'S argued a double defect (two conflicts). Gonzalez' argued change in law. *See* https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=11

[30] https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=8

In *Christeson v. Roper*,[31] this Court jurists again debated the correctness of the jurists' (Stewart's, Haynes's, and Ho's) disposition of GAINES'S rule 60 (b) motion. Specifically, they *debated* "relief pursuant to Rule 60(b)" was "proper[]" to "raise" conflict-of-counsel claim, even though it was more than seven years afterward. *Christeson*, 574 U.S. at 378.[32]

Seven years isn't that much less than 12. And as this Court stated, *Christeson's* first substitution motion, *while undoubtedly delayed*, was not abusive. *Christeson*, 574 U.S. at 380.[33] How then was GAINES'S motion delayed (untimely) and abusive? Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct."[34] GAINES'S and Christeson's motions were virtually identical in this regard, *i.e.*, both GAINES'S and Christeson's habeas counsels faced:

> significant conflict of interest [which] prevented [them] from filing motion to *reopen* final judgment on ground that Antiterrorism and Effective Death

[31] *Christeson*, 574 U.S. 373 (Jan. 20, 2015)

[32] The court's principal error was its failure to acknowledge Horwitz and Butts' conflict of interest. Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct." *Holland v. Florida*, 560 U.S. 631, 651–652, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).

Advancing such a claim would have required Horwitz and Butts to denigrate their own performance. Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood. *See* Restatement (Third) of Law Governing Lawyers § 125 (1998). Thus, as we observed in a similar context in *Maples v. Thomas*, 565 U.S. 266, 285-286, n. 8, 132 S.Ct. 912, 925, n. 8, 181 L.Ed.2d 807 (2012), a "significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with his client's "strongest argument—i.e., that his attorneys had abandoned him."").

[33] https://gaineshomedesignplus.com/wip/affidavit.html#Return%20to%20paragraph%20287,%20footnote%20368

[34] *Holland v. Florida*, 560 U.S. at 651–652.

> Penalty Act (AEDPA)'s one-year statute of limitations should have been equitably tolled [because of their malfeasance].

(emphasis added).[35] Both the district court and the circuit court acted outside the boundaries of what they were created to do (they're malfunctioning) and should not be sanctioned by this Court. It's dangerous precedent and threatens Freedom. They cry out for correction.

Reason Two: The United States Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Sixth Circuit Court of Appeals on the same important matter. *See* Court Rule 10 (a).

In *Thompson v. Bell*, [36] the United States Sixth Circuit Court of Appeal's jurist debated the correctness of the jurists' (Stewart's, Haynes's, and Ho's) disposition of GAINES'S rule 60 (b) motion. Specifically, they *debated* whether change in law was extraordinary and whether the motion was timely.

> We recently found in *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (*en banc*) ("*Abdur'Rahman I*") that the promulgation of TSCR 39 was an extraordinary circumstance. … In *Abdur'Rahman I*, this Court reversed the district court and held that the promulgation of TSCR 39 was an extraordinary circumstance warranting relief under Rule 60(b)(6), because the new rule indicated that the district court had failed to recognize a state's own procedural rule—thereby undermining the principle of comity on which AEDPA is based.
>
> The *Gonzalez* Court noted that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." … The Supreme Court then vacated this Court's holding in *Abdur'Rahman I* so this Court could reconsider the case in light of *Gonzalez*. … This Court remanded the case to the district court,

[35] *Christeson*, 574 U.S. at 378 *citing Martel v. Clair*, 565 U.S. 648, at 658, 663 (2012)
[36] 580 F.3d 423 (6th Cir. 2008)

> which found that the promulgation of TSCR 39 was still an extraordinary circumstance after *Gonzalez*.
>
> We agree that the enactment of TSCR 39 is an extraordinary circumstance, and that nothing in the Supreme Court's opinion in *Gonzalez* undermined this Court's reasoning in *Abdur'Rahman I*. … Because this Court's reasoning in *Abdur'Rahman I* is still valid after *Gonzalez*, today we reaffirm our previous holding that a motion based upon the promulgation of TSCR 39 is an extraordinary circumstance warranting relief under Rule 60(b)(6).

Thompson, 580 F.3d at 442-443

> [T]he finality of the judgment against *Thompson* must be balanced against the more irreversible finality of his execution, as well as the serious concerns about ineffective assistance that caused this Court so much angst upon its *prior consideration* of *Thompson's* petition.
>
> Because *Thompson* should be heard on the merits of his *four remaining ineffective assistance claims*, we reverse the district court's denial of *Thompson's* Rule 60(b) motion.

(emphasis added) *Thompson*, 580 F.3d at 444.

How then, if the promulgation of TSCR 39 was an extraordinary circumstance warranting relief under Rule 60(b)(6), was this Court's promulgation in *Martinez* and *Trevino* not an extraordinary circumstance warranting relief under Rule 60(b)(6)?[37] How then, if nothing in the Supreme Court's opinion in *Gonzalez* undermined *Abdur'Rahman I*, or *Thompson*, did, or does, *Gonzalez* undermine *Martinez* / *Trevino*? *Gonzalez*, *Abdur'Rahman I*, and *Thompson* were procedural in nature. GAINES'S, *Martinez*, and *Trevino* were both procedural in nature, and substantive (IATC).

[37] https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=11

How then, if *Thompson* waited more than four years after change to state supreme court's procedure was reasonable, was GAINES'S unreasonable. Twelve years isn't that much more than five years. Moreover, GAINES is not secure in his person, nor his property; liberty deprivation is just as final and un-do-able as death (can the hands of time be rewound, except for death? Can GAINES'S 20s and 30s be restored? What about Parole? When GAINES turns 54, freed from the ball and chain (both physically and monetarily), does he revert to the age when he paroled or, better yet, 3-months into his 19th year? Is the passage of time less final than death? Is the one less painful than the other? (Land of the free, home of the brave)?). How is the one more undoable than the other? Sounds like a cop-out. Nobody is ever going to come back and make it right just because he is alive. Pass the buck, right? Somebody will fix it, right? Problem is, nobody ever will. What is unrealized, the person is you (but you don't want to rock the boat). Nobody else is in the position. GAINES is a living example of that. It's a fantasy that somehow makes human beings feel better. Somehow this country lost sight of its rallying cry (Freedom). Freedom no longer matters, inasmuch as death is concerned.[38]

Both the district court and the circuit court acted outside the boundaries of what they were created to do (they're malfunctioning) and should not be

[38] Great care is taken to protect the public from charlatan-doctors and the like, but the same often times come on board to deprive the same of life-and-limb or liberty.

sanctioned by this Court. It's dangerous precedent and threatens Freedom. They cry out for correction.

Reason Three: The United States Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals (itself; different panel) on the same important matter. *See* Court Rule 10 (a).

In *Clark v. Stephens*, [39] the United States court of appeals, jurist *Stewart*, no less (he is an inconsistent, wavering jurist), jurist Higginbotham, and jurist Owen *debated* the correctness of the jurists' (Stewart's, Haynes's, and Ho's), disposition of GAINES'S rule 60 (b) motion. Specifically, they *debated:*

- We conclude that reasonable jurists could debate whether Clark's federal habeas proceeding was defective, either because the *counsel* the federal district court appointed to represent Clark *labored* under a *conflict of interest*, or because Henry's failure to *argue his own ineffectiveness as state habeas counsel* is sufficient to satisfy Rule 60(b) *even though* it is an *"omission."* We further conclude that *reasonable jurists* could debate whether Clark is likely to succeed in introducing *new evidence* if his Rule 60(b) motion is granted.
- We conclude that in light of these arguments, and because this court has not established a bright-line rule for when a Rule 60(b)(6) motion is filed within a reasonable time, jurists of reason could debate whether Clark's delay could be discounted to a period of sufficiently short duration such that it was not untimely.
- In light of the foregoing, Clark's application for a *certificate of appealability* is granted on all issues, *namely* whether the district court *abused its discretion* when denying Clark's Rule 60(b) motion for (1) being untimely and (2) failing to present extraordinary circumstances.

[39] 627 Fed.Appx. 305 (5th Cir. 2015).

See 627 Fed.Appx. at 309 & 310 (5th Cir. 2015) (emphasis added). How then was GAINES'S federal habeas proceeding not defective? And how then was GAINES'S Rule 60(b)(6) motion untimely? Clark's and GAINES'S motions were virtually identical in this regard (*except* where Clark's ultimately got denied on the timeliness issue, discussed in more detail below, GAINES'S far surpassed Clark's, especially in this regard)?[40]

In *Clark v. Davis*,[41] the same trio (*Stewart*, Higginbotham, and Priscilla) again debated the correctness of jurists' (*Stewart's*, Haynes's, and Ho's), disposition of GAINES'S rule 60 (b) motion. Specifically, they *debated*:

> To the extent that Clark's Rule 60(b)(6) motion attacks *not the substance* of the federal court's resolution of the claim of the merits, but asserts that [habeas counsel] had a *conflict* of interest that resulted in a *defect in the integrity* of the proceedings, the motion is *not* an *impermissible successive petition*.

See 850 F.3d at 780 (emphasis added).

How, then, was GAINES'S "an *impermissible successive* petition[?]" Clark's and GAINES'S motions were virtually identical (conflicted habeas counsel)?

[40] https://gaineshomedesignplus.com/wip/affidavit.html#(SubCh.%2035.B.%20Daniel%20&%20Mowla) https://gaineshomedesignplus.com/wip/2021%20FCR/60(b)_recuse_depo.pdf#page=11

[41] *Clark*, 850 F.3d 770 (5th Cir. 2017), *cert. denied*

Both the district court and the circuit court acted outside the boundaries of what they were created to do (they're malfunctioning) and should not be sanctioned by this Court. It's dangerous precedent and threatens Freedom. They cry out for correction.

Reason Four: The United States Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Sixth Circuit Court of Appeals on the same important matter. *See* Court Rule 10 (a).

In *Associated Builders & Contractors v. Michigan Department of Labor and Economic Growth, et al.*,[42] the United States Sixth Circuit Court of Appeals *debated* the correctness of the jurists' (Stewart's, Haynes's, and Ho's) disposition of GAINES'S rule 60 (b) motion. Specifically, they *debated* whether the motion was timely. In *Associated Builders*, the State filed rule 60(b) 14-years after the judgment, but the same was timely because of an intervening change in law,[43] no less:

> The district court did not abuse its discretion in determining that the State filed its motion *within a reasonable time*. One, there has been a *change in law*. … Ignoring for a moment the potential significance of when ERISA -preemption law changed … the fact remains that the law "has changed so that the enjoined behavior, which once might have been [preempted by] federal law, [may] no longer [be preempted] at all" [citations omitted].
>
> Two, this case plainly implicates a matter of public concern … not simply a dispute between two private citizens.

[42] *Associated Builders*, 543 F.3d 275 (6th Cir 2008).
[43] *Associated Builders*, 543 F.3d at 278-279.

> Three, while one could imagine a State responding more quickly to these changes in the law than Michigan did, *there are practical reasons for excusing the delay*. … Far from announcing a brave new line for ascertaining ERISA preemption, the post–1997 cases show only a willingness to place more emphasis on the presumption against preemption and on the underlying purposes of the ERISA statute…. The last thing, indeed, that a *purpose-driven* approach to statutory construction guarantees is clarity. The key effect of permitting judges to *generalize* from the purposes of a statute, as opposed to just its *text*, is to give them more rather than less discretion in construing a law's scope.
>
> Four, *Associated Builders* has not pointed to any prejudice that the alleged delay caused it to suffer. … All things considered, the district court did not abuse its discretion in accepting this Rule 60(b)(5) motion and in reaching the merits of the State's ERISA arguments.

See Associated Builders, 543 F.3d at 278-279 (emphasis added).

Twelve years is less than 14-years, to be sure. And similar to this case, there has been a significant change in law in GAINES'S case cutting to the bone of this country's founding, the "bedrock"[44] of the Constitution, *i.e., effective assistance of trial counsel*.[45] This is a matter of grave public concern (liberty, which seemed to have been lost somewhere along the way in this country, the home of the "free"), "not simply a dispute between two private citizens."

[44] *Martinez v. Ryan*, 566 U.S. 1, 12 (2012)(a recognition / realization many of this countries state's effectively legislated its citizens out of the right to effective trial counsel by pushing off review beyond where it is constitutionally guaranteed through effective review counsel).
[45] *Strickland v. Washington*, 466 U.S. 668 (1984)

Also, “there are practical reasons for excusing the delay**.**” GAINES asked honorable trial[46] and habeas counsel[47] about the existence of the evidence, was told there was none, and (GAINES) had no reason to otherwise doubt honorable trial and habeas counsel 's representations. GAINES was not expected to suspect honorable trial[48] and habeas counsel was lying; that they were sitting on evidence he (GAINES) did not and could not have shot Rick (*i.e.*, innocence).[49] But even if he (GAINES) was, why and how was GAINES to prove it? Write Gass, Smith, Fazio, and Jheen letters from prison? This sort of evidence is a unique form of evidence in that it is completely incumbent on the witness to come forward and admit prevaricated testimony.[50] Or was GAINES expected to file *Texas Freedom of Information Act* (FIA) Request? Far from its intended purpose,[51] Texas FIA excepts prisoners, period.[52] What's more, “due diligence” doesn't “require a defendant to file a public information act request to double-check … compli(ance)

[46] https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2018.%20The%20second%20day%20of%20trial)
[47] https://gaineshomedesignplus.com/wip/affidavit.html#[FN%20349]
[48] https://gaineshomedesignplus.com/wip/2008%20SHCR/andreasproposedffcl.pdf#page=2
[49] As the Supreme Court recently recognized, evidence that a defendant ‘committed another murder [is] the most powerful imaginable aggravating evidence.’” *Clark*, 850 F.3D at 776 fn.18, *citing Wong v. Belmontes*, 558 U.S. 15, 28, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam). How much more so is evidence the defendant didn’t commit another murder is the most powerful imaginable mitigating evidence?
[50] *See* generally *In re Young*, 789 F.3d 518, 529 (5th Cir. 2015), citing *Pacheco v. Artuz*, 193 F. Supp.2d 756, 761 (S.D.N.Y. 2002).
[51] Keeping Texas prisoners from harassing prison guards and prison nurses, not protecting the DA’s office from disclosing *Brady* material.
https://gaineshomedesignplus.com/wip/misc/HB949.PDF.pdf
[52] *See* Texas Government Code § 552.028 (2021).

with … disclosure obligations."[53] (*Strickland* has a similar disclosure obligation like *Brady*).[54] Or was GAINES expected to file a writ of habeas corpus and get a court order for the documents, which he did not know existed?[55] If so, such speculative and conclusionary allegations as honorable trial and habeas counsel may or may not have been lying about evidence GAINES was innocent[56] was an insufficient basis upon which to seek a court order to produce the DA's, among others, files.[57]

Respondent could argue (or, in this case, in the name of judicial economy, the courts could *decide* supervisory expediency), of course, honorable trial and habeas counsel did tell GAINES about the evidence, and this scum of a human being (the *un-honorable*-nobody-untitled-GAINES) is now lying they (honorable trial and habeas counsel) didn't tell him there was evidence corroborating his innocence he didn't attempt murder of Rick? Surely the Court is of the mind GAINES would have opted for it (establishing innocence) over accepting responsibility for another shooting. Surely the Court is of the mind GAINES didn't think trial counsel's "novel defense" of accepting responsibility for another

[53] *See Smith v. State*, 165 A.3d 561, 590 (Maryland App. 2017), commenting on *Ex parte Miles*, 359 S.W.3d 647, 664 (Tex. Crim. App. 2012).
[54] *See* Id., 466 U.S. at 688 (counsel owes the client a duty to keep him informed of important developments throughout the course of the prosecution).
[55] *See*, e.g., *Nabelek v. Bradford*, 228 S.W.3d 715, 718 (Tex. App.-Houston [14th Dist.] 2006).
[56] *Haley v. Cockrell*, 306 F.3d 257, 264 (5th Cir. 2002), *cert granted*, 541 U.S. 386 (2004), *rev'd*.
[57] *See* generally *Murphy v. Johnson*, 205 F.3d 809, 813-14 (5th Cir. 2009).

shooting, then *floating the Paxil defense*, was better.[58] Surely trial counsel didn't think it was better, unless, of course, it was to argue on appeal state trial judge failed to charge the jury on the law applicable to the case (*i.e.*, set legal precedent), then cover up and conceal the same when it threatened their livelihoods. Perhaps that was why counsel got so cagey every time somebody appeared to threaten it.[59]

Both the district court and the circuit court acted outside the boundaries of what they were created to do (they're malfunctioning) and should not be sanctioned by this Court. It's dangerous precedent and threatens Freedom. They cry out for correction.

Reason Five: The United States Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of another Court of Appeals on the same important matter. *See* Court Rule 10 (a).

A motion to recuse asks a judge to remove herself from the case so another judge can hear it. The Due Process Clause of the U.S. Constitution entitles a person to an impartial and disinterested tribunal in both civil and criminal cases, and it may serve as the basis for recusal.[60]

[58] *See* gaineshomedesignplus.com (SHCR 95).
[59] *See* (paragraph 163-165 of Applicant's affidavit); *see* https://gaineshomedesignplus.com/wip/affidavit.html (4 RR 220:8-11)(5 RR 2:11-15).
[60] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

If the judge's impartiality might reasonably be questioned, the judge must recuse herself.[61] Because the goal of § 455(a) is to "exact the appearance of impartiality," recusal may be required even when there is no actual partiality.[62] In determining whether the judge must recuse herself under § 455(a), the question is whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits; this is an objective standard viewed from the perspective of a *well-informed, thoughtful observer* rather than an unduly sensitive person.[63] Section 455(a) requires judicial recusal only if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge of her interest or bias in the case.[64] *Doubts must be resolved in favor of recusal*.[65] There is no requirement that the judge have knowledge of the disqualifying circumstance.[66] Each § 455(a) case must be decided on its unique

[61] 28 U.S.C. § 455(a); *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98,107 (2d Cir. 2012); *In re Kensington Int'l*, 368 F.3d 289, 301 (3d Cir. 2004); Andrade v. Chojnacki, 338F.3d 448, 454 (5th Cir. 2003); *U.S. v. MicrosoftCorp*., 253 F.3d 34, 114 (D.C. Cir. 2001).
[62] See *In re Basciano*, 542 F.3d 950, 956 (2d Cir. 2008); *In re Kensington Int'I*, 368 F.3d at 303; *Moran v. Clarke*, 296 F.3d 638, 648(8th Cir. 2002); *U.S.v.Bremers,*195 F.3d 221, 226 (5thCir.1999), .
[63] *Lilieberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 865 (1988); *see ISC Holding AG*, 688 F.3d at 107; *U.S. v. Ruff*, 472 F.3d 1044, 1046 (8th Cir. 2007); *In re Kensington Int'l*, 368 F.3d at 303; *U.S. v. DeTemple*, 162 F.3d 279, 287 (4th Cir.1998).
[64] *Sao Paulo State v. American Tobacco Co.*, 535 U.S. 229, 232-33 (2002).
[65] *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir. 2001); *see* also *Bryce v. Episcopal Ch. in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) (if issue is close, judge must recuse herself).
[66] *Liljeberg*, 486 U.S. at 860.

facts and circumstances rather than by comparison to similar situations considered in prior cases.[67]

If a party moves to recuse a judge on the ground that the judge's impartiality might reasonably be questioned, the party should allege the following:

1. There is a reasonable factual basis for calling the judge's impartiality into question.[68]
2. The judge has outwardly exhibited partiality.[69]
3. The question about the judge's impartiality stems from an extrajudicial source and not from conduct or rulings made during the proceedings.[70] But the fact that a judge's opinion derives from an extrajudicial source is not alone a sufficient basis to show impartiality.[71]
4. The public's confidence in the judiciary will be irreparably harmed if the case is allowed to proceed before a judge who appears to be tainted.[72]
5. A reasonable person knowing all the relevant facts would harbor doubts about the judge's, impartiality.[73] For example, a, reasonable

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[67] *Bremers*, 195 F.3d at 226.

[68] *See*, e.g., *In re Kensington Int'l*, 368 F.3d at 303 (recusal warranted when advisers appointed by judge simultaneously served as advocates in another' asbestos-related bankruptcy);

U.S. v. Avilez-Reyes, 160 F.3d 258, 259 (5th Cir. 1998)(judge erred by not recusing himself after defendant's attorney had recently testified against judge in judicial disciplinary proceeding);

U.S. v. Anderson, 160 F.3d 231, 233 (5th Cir. 1998)(public defender successfully challenged judge against whom he had testified in judicial disciplinary proceedings);

Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995)(criminal defendant success fully challenged judge whose chambers were damaged by defendant's alleged bombing of federal courthouse);

Hamid v. Price Waterhouse, 51 F.3d 1411, 1416-17 (9thCir.1995)(relationship between judge's law clerk and attorney could have compromised impartiality of judge's decisions in which law clerk participated).

[69] *U.S. v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993).

[70] *Selkridge v. United of Omaha Life Ins.*, 360 F.3d 155, 167 (3d Cir. 2004); *Thomas v. Tenneco Packaging Co*., 293 F.3d 1306, 1329 (11th Cir. 2002).

[71] *See Liteky v. U.S.*, 510 U.S. 540, 554 (1994); *ISC Holding AG*, 688 F.3d at 107-08.

[72] *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993).

[73] *Cooley*, 1 F.3d at 993; *Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992).

> person could harbor doubts about a judge's impartiality when the judge recuses herself, without explanation, from presiding over one group of cases, yet refuses to recuse herself from presiding over a separate but nearly identical group of cases.[74]

If the judge served as the attorney in the matter in controversy or was a material witness in the matter in controversy, the judge must recuse herself.[75] If an attorney with whom the judge previously practiced law served as an attorney in the matter in controversy during their association or was a material witness in the matter in controversy, the judge must recuse herself.[76]

If the judge participated as an attorney, *adviser*, or material witness in the proceeding in her capacity during governmental employment, the judge must recuse herself.[77] The judge must have personally participated in the proceeding to require recusal.[78] A proceeding includes pretrial, trial, appellate review, and other stages of litigation.[79] If the judge expressed an opinion on the merits of the particular case in her judicial capacity during governmental employment, the judge must recuse herself.[80]

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[74] *See Selkridge*, 360 F.3d at 170.
[75] 28 U.S.C. § 455(b)(2); *see* also *Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 471 F.3d 1355, 1357-58 (D.C. Cir. 2006) ("associational" rule for recusal based on prior law-firm employment).
[76] 28 U.S.C. § 455(b)(2).
[77] 28 U.S.C. § 455(b)(3); *Murray*, 253 F.3d at 1312; *see* also *Baker & Hostetler*, 471 F.3d at 1357-58 ("personal—participation" rule for recusal based on previous governmental employment is narrower than "associational" rule based on previous employment in private practice).
[78] *Baker & Hostetler*, 471 F.3d at 1357-58.
[79] 28 U.S.C. § 455(d)(1); *Baker & Hostetler*, 471 F.3d at 1357.
[80] 28 U.S.C. § 455(b)(3); *U.S. v. Ruzzano*, 247 F.3d 688, 695 (7th Cir.2001).

The appellate court can reassign the case.[81] The appellate court has supervisory authority over district courts, and that authority allows the appellate court to reassign case.[82] To reassign case under § 2106, the appellate court does not need to find actual bias or prejudice, but only that the facts "might reasonably cause an objective observer to question" the judge's impartiality.[83] In determining whether to reassign case, the appellate court should consider the following:

1. Whether the original judge would reasonably be expected to have substantial difficulty putting her previous views and findings aside.[84]

2. Whether reassignment is appropriate to preserve the appearance of justice.[85]

3. Whether reassignment would entail waste and duplication out of proportion to any gains realized from reassignment.[86]

[81] *See U.S. v. Feldman, 983 F.2d 144, 145 (9th Cir. 1992).*
[82] See 28 U.S.C. §2106; *Liteky v. U.S.*, 510 US. 540, 554 (1994); *see* also *Wyler Summit I'rtshp. v. Thmer Broad. Sys.*, 235 F.3d 1184, 1196 (9th Cir.2000) (appellate court has statutory authorization and inherent authority to reassign case to different judge on remand when there are unusual circumstances).
[83] *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C.Cir.1995); *see Lilieberg v. Health Servs. Acquisition Corp.*, 486 US. 847, 865 (1988); *In re International Bus. Machs. Corp.*, 45 F.3d 641, 64345 (2d Cir.1995).
[84] *Armco, Inc. v. United Steelworkers*, 280 F.3d 669, 683 (6th Cir.2002).
[85] Id.
[86] Id.

In an apparent attempt to help respondent[87] finish off GAINES's appeal, habeas counsel lied to GAINES that he was filing his 2254 concurrently with his 11.07s,[88] like he did in *Norrid*'s case;[89] *i.e.*, he (habeas counsel) only filed his (GAINES'S) 2254, at least until after he (habeas counsel) let GAINES'S year under the A.E.D.P.A elapse (Case 4:08-cv-00147-Y Document 11 Filed 08/28/08 Page 2 of 5 PageID 144).[90]

GAINES'S grandmother hired Habeas counsel right after the Criminal Court of Appeals (CCA) refused to hear GAINES'S petition for discretionary review (PDR) on 5-18-05 (Case 4:06-cv-00409-Y Document 8 Filed 07/05/06 Page 5 of 47 PageID 127),[91] which was well before GAINES'S year and 90-days elapsed on 8-16-06 under the A.E.D.P.A.

Even so, Habeas counsel waited nearly 351 days until there was a hundred-and-four days remaining on GAINES'S year before filing GAINES'S 2254, which respondent characterized as evidence more than "discoverable at the time of … trial" (Case 4:08-cv-00147-Y Document 10 Filed 04/29/08 Page 6 of 9 PageID

[87] That is, the state district judge, state trial attorneys.
[88] *See* generally chapter 28 of petitioner's affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2028.%20Deliberate%20bypass;%20constructive%20denials)
[89] *Norrid v. Quarterman*, 2006 U.S. Dist. LEXIS 83380 (N.D.T.X. 10-16-06)
[90] https://gaineshomedesignplus.com/wip/2008%20FCR/11%20F,%20C,%20&%20R.pdf
[91] https://gaineshomedesignplus.com/wip/2006%20FCR/8_25-Page%20Brief.pdf#page=5

97),[92] and even then habeas counsel filed it in the wrong division (Case 4:06-cv-00409-Y Document 17 Filed 10/20/06 Page 2 of 6 PageID 200)(*See* footnote 2),[93] which ate up an extra sixty-seven days off GAINES'S year[94] before it was transferred to the proper division and the federal district court ordered respondent to respond and show cause within 30-days (but see § 2243), leaving GAINES thirty-seven days on his year, on the day of the 2243 order, which would have given GAINES seven days to return to state court to correct habeas counsel's 2254(b, c) deficiencies, had respondent filed within the given 31-days (Case 4:06-cv-00409-Y Document 10 Filed 07/10/06 Page 1 of 2 PageID 174),[95] but for reason more than apparent to GAINES, and hopefully to everybody weighing the probability of the situation, he (respondent) did not.

Unknown to GAINES, habeas counsel entered into an agreement with respondent to respond after GAINES'S year elapsed under the AEDPA (8-16-06), which the federal district court, no doubt aware of the matter (the federal district court directed respondent how to proceed (affirmative defense strategy; extension, exhaustion, timeliness)),[96] waited to sign until the very day after GAINES'S year

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[92] https://gaineshomedesignplus.com/wip/2008%20FCR/10%20AG's%20Response.pdf#page=6
[93] https://gaineshomedesignplus.com/wip/2006%20FCR/17_Bleil's%20F,%20C,%20&%20R.pdf#page=2
[94] That is, because the mailbox rule doesn't apply to prisoner's represented by counsel. *See* https://gaineshomedesignplus.com/wip/2006%20FCR/17_Bleil's%20F,%20C,%20&%20R.pdf#page=2 , fn2.
[95] *See* https://gaineshomedesignplus.com/wip/2006%20FCR/10_2243%20Order.pdf#page=1
[96] *See* https://gaineshomedesignplus.com/wip/2006%20FCR/10_2243%20Order.pdf#page=1

elapsed under the AEDPA on 8-17-06 (Case 4:06-cv-00409-Y Document 13 Filed 08/17/06 Page 1 of 1 PageID 180).[97]

On the very last day of the extension on 10-9-06 respondent filed (unsurprisingly; as directed) a motion to dismiss under 2254(b, c). *See* (Case 4:06-cv-00409-Y Document 14 Filed 10/09/06 Page 1 of 8 PageID 181).[98]

And, for good measure, no doubt, because *Lawrence v. Florida*[99] hadn't yet been decided and made it clear whether GAINES got an extra 90-days added to his year to seek a writ of certiorari with the Supreme Court of the U.S. (S.C.O.T.U.S.) after the C.C.A. denied his 11.07s like he did after the CCA denied his PDR, the federal district court, no doubt, aware of the whole situation (again, it was directing this whole thing), waited until the 91st day (11-16-06) to adopt the magistrate's

[97] https://gaineshomedesignplus.com/wip/2006%20FCR/13_Bleil's%20Order.pdf#page=1
If habeas counsel wasn't in cahoots with respondent, the federal district court, and state district court to drive GAINES'S appeal into the ground, then why did he (habeas counsel) enter into an agreement without okaying it with GAINES to run the rest of his year out so that respondent could respond, not on the merits, but some simply-easy-to-do tech., and why did the federal district court wait to sign it until the day after GAINES'S year ran out? Surely the Court doesn't believe habeas counsel's and respondent's flimsy scheduling-conflict argument? And surely GAINES wouldn't have agreed to it. And was it just sheer coincidence that the federal district court waited to sign the order granting respondent an extra 30-days to respond on the very day after GAINES'S year elapsed under the A.E.D.P.A.?

[98] https://gaineshomedesignplus.com/wip/2006%20FCR/14_Bozarth'sToDismiss.pdf#page=1

[99] *Lawrence*, 549 U.S. 327, 332 (2007) (1-yr. Statute of limitations for seeking federal habeas relief for state court Judgment was not tolled during the pendency of petition for certiorari to S.C.O.T.U.S. for review of state post-conviction denial).

Finding, Conclusions, & Recommendation (F, C, & R)(Case 4:06-cv-00409-Y Document 18 Filed 11/16/06 Page 1 of 2 PageID 205). [100]

But habeas counsel instead of going back and both exhausting GAINES'S *procedurally defaulted claims*, and appealing the federal district court's F. C. & R (the federal district court adoption) not to stay the proceedings, then proceeding with the exhausted claims from the direct appeal, i.e., if the Fifth Circuit wouldn't stay the proceedings, again without GAINES'S consent or knowledge, went rogue and abandoned (sabotaged) GAINES'S 2253 proceedings,[101] much like he did GAINES'S 2254(b, c) proceedings,[102] and only went back and exhausted his state court remedies,[103] all the while taking more and more of GAINES'S money[104]

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[100] Or was this just another coincidence? Not likely in this line of business, sadly. https://gaineshomedesignplus.com/wip/2006%20FCR/18_Mean's%20Order%20Adopting.pdf#page=1

[101] *See* paragraph 254 of GAINES'S Affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2028.%20Deliberate%20bypass;%20constructive%20denials) https://gaineshomedesignplus.com/wip/2006%20FCR/18_Mean's%20Order%20Adopting.pdf#page=1

[102] *See* paragraph 249 of GAINES'S Affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2028.%20Deliberate%20bypass;%20constructive%20denials)

[103] Of course, GAINES wrote habeas counsel and asked him what was up with filing his 2254 concurrently with his 11.07s, i.e., once that finally came out in the wash (See paragraph 250 of GAINES'S affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2028.%20Deliberate%20bypass;%20constructive%20denials)). But by then it was all too late, even though he said the first 2254 acted to toll the second 2254 (See paragraph 250 of GAINES'S affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2028.%20Deliberate%20bypass;%20constructive%20denials)).

[104] *See* *https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2027.%20Mowla%E2%80%99s%20malpractice%20response)*

(Case 4:06-cv-00409-Y Document 18 Filed 11/16/06 Page 2 of 2 PageID 206)[105] (Case 4:08-cv-00147-Y Document 11 Filed 08/28/08 Page 2 of 5 PageID 144, 151, 153)[106](Case 4:08-cv-00147-Y Document 12 Filed 09/16/08 Page 4 of 7 PageID 151)[107] (Case 4:08-cv-00147-Y Document 12 Filed 09/16/08 Page 6 of 7 PageID 153)[108]

The same day (11-16-06) the federal district court dismissed GAINES'S first 2254 without prejudice, but for any tolling provisions under 2244(d)(2) (*See* (Case 4:06-cv-00409-Y Document 18 Filed 11/16/06 Page 1 of 2 PageID 205)),[109] the state trial court, no doubt aware of the whole federal fiasco, ordered state trial counsel to respond to habeas counsel's flimsy IATC arguments (SHCR 91),[110] which respondent described boiled "down to the claim that [GAINES] was denied effective assistance of counsel because [state trial attorneys] didn't spend enough time investigating his case[,]" completely ignoring the "prejudice" prong of

[105] https://gaineshomedesignplus.com/wip/2006%20FCR/18_Mean's%20Order%20Adopting.pdf#page=1

[106]

[107] https://gaineshomedesignplus.com/wip/2008%20FCR/12%20Mowla's%20Obj.%20F,%20C,%20&%20R.pdf#page=4

[108] https://gaineshomedesignplus.com/wip/2008%20FCR/12%20Mowla's%20Obj.%20F,%20C,%20&%20R.pdf#page=6

[109] https://gaineshomedesignplus.com/wip/2006%20FCR/18_Mean's%20Order%20Adopting.pdf#page=1

[110] https://gaineshomedesignplus.com/wip/2008%20SHCR/gillsordertorespond.jpg

"*Strickland*" (Case 4:06-cv-00409-Y Document 16 Filed 10/19/06 Page 2 of 4 PageID 196);[111] *i.e.*, what didn't he fail to discover / present.[112]

After the state trial judge put that matter to rest, or after he had the chance to review GAINES'S 11.07s, which was apparently the only reason why he was still sticking around, or the only reason why the ADAs weren't seeking his removal with the judicial commission,[113] the state trial judge demoted back down to the DA's office to assist there,[114] and Sturns stepped in to deny what habeas counsel himself termed was a prima facie[115] ineffective-assistance-of-trial-counsel (IATC) claim that state trial attorneys were ineffective because state trial attorneys didn't investigate enough, with no showing himself what state trial attorneys failed to discover and what to do with it had state trial attorneys and how the deficient performance prejudiced GAINES'S defense (SHCR 46,[116] 243).[117] Then on 2-27-

[111] https://gaineshomedesignplus.com/wip/2006%20FCR/16_Baxter's%20Response.pdf#page=2
[112] If State district court wasn't in contact with federal district court and habeas counsel, then why did he wait to order Westfall and Minick to respond to habeas counsel's 11.07s on the same day federal district court adopted the federal magistrate's F, C, & R (*See* above citations)?
[113] That is, for "budding" up too much with the defense.
[114] If State district court wasn't demoted out of office, then why did he not only leave the bench, but wait to do so only after GAINES'S 11.07s was filed? Was it another one of those convenient coincidences? It cost GAINES all his inheritance. GAINES practically grew up without a family, shuttled from house to house until he was old enough to receive the money, give it to the attorneys, and go to prison.
[115] *Strickland*, 466 U.S. at 678 (respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice").
[116] https://gaineshomedesignplus.com/wip/2008%20SHCR/mowlas11.07.pdf#page=13
[117] https://gaineshomedesignplus.com/wip/2008%20SHCR/sturnsiorder.pdf

08 the CCA summarily denied habeas counsel's flimsy 11.07 arguments based upon Sturns' 1-31-08 denial (rubber-stamp).[118]

When habeas counsel returned to the federal district court, the same ordered respondent to argue GAINES was time-barred (Case 4:08-cv-00147-Y Document 8 Filed 04/02/08 Page 1 of 2 PageID 89),[119] which respondent did (Case 4:08-cv-00147-Y Document 10 Filed 04/29/08 Page 1 of 9 PageID 92),[120] and the federal district court, unsurprisingly agreed (Case 4:08-cv-00147-Y Document 11 Filed 08/28/08 Page 4 of 5 PageID 146), [121] but habeas counsel,[122] didn't tell GAINES that the federal district court adopted the federal magistrate's F, C, & R until GAINES overheard two inmates at a table in the dayroom at the Allred Unit talking about *Lawrence* and how it didn't include an extra 90-days and he

[118] https://gaineshomedesignplus.com/wip/2008%20SHCR/mowlas11.07.pdf#page=1

[119] https://gaineshomedesignplus.com/wip/2008%20FCR/8%20Order%20&%20Cause.pdf#page=1

[120] https://gaineshomedesignplus.com/wip/2008%20FCR/10%20AG's%20Response.pdf#page=1

[121] So much for trying to be discrete about what they were doing, right? https://gaineshomedesignplus.com/wip/2008%20FCR/11%20F,%20C,%20&%20R.pdf#page=4

[122] Who just simply argued that equitable tolling should toll between 8-16-06, when GAINES'S year elapsed, and 11-1-06, when habeas counsel went back and filed in state court, i.e., the time between when there was no properly filed writ tolling the A.E.D.P.A. (Case 4:08-cv-00147-Y Document 12 Filed 09/16/08 Page 3 of 7 PageID 150). https://gaineshomedesignplus.com/wip/2008%20FCR/12%20Mowla's%20Obj.%20F,%20C,%20&%20R.pdf#page=3

(GAINES) wrote his grandmother and she sent it (the case) to him and he read it and wrote habeas counsel about the extra 90-days, or lack thereof.[123]

All habeas counsel wrote back was he (habeas counsel) thought GAINES'S grandmother and mother told him (GAINES) that the federal district court denied his 2254, and that he didn't appeal it because he was going to charge them $5,000 to appeal it, but that they (GAINES'S grandmother and mother) didn't want to pay it, so he didn't appeal it and that there was nothing more that he (habeas counsel) could do for them. That his (habeas counsel's) services to them had long since elapsed.[124] He wrote him back why his exhausted claims on his PDR, plus also his witness intimidation claims, were time-barred, plus then what happened to filing his 11.07s concurrently with his 2254, as mentioned above, but habeas counsel didn't respond to that or any other questions GAINES had, but for any matter dealing as to the attorney-client-privilege (after over $40K) (See paragraph 282 of GAINES'S affidavit;

[123] *See* paragraph 267 of GAINES'S affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2031.%20A%20rtn.%20To%20the%20Fed.%20Ct.)

[124] *See* paragraph 282 of GAINES'S affidavit; https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2034.%20Investigation%20while%20incarcerated)

https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2034.%20Investigation%20while%20incarcerated).[125]

The federal district court served as *adviser* during governmental employment. Specifically, the federal district court advised respondent to:

1. request extension of time beyond the statute of limitation to respond GAINES failed to exhaust available state remedies pursuant to 28 U.S.C. § 2254(b, c) (Case 4:06-cv-00409-Y, Document 10, page 1), then
2. request GAINES'S petition was time-barred under 28 U.S.C. § 2244(d) because it took respondent and the federal district court too long to act on GAINES'S petition (Case 4:08-cv-00147-Y, Document 8, pages 1-2).

[125] Indeed, GAINES'S mother and grandmother did tell GAINES about the magistrate judge's F, C, & R, but neither they nor GAINES knew the federal district court adopted the magistrate judge's F, C, & R (https://gaineshomedesignplus.com/wip/2008%20FCR/11%20F,%20C,%20&%20R.pdf) until GAINES wrote them late 2009 about *Lawrence* and found out for himself. That habeas counsel didn't send them respondent 's and respondent's responses, their objections to the magistrate judge's F, C, & R's. Or the federal district court's orders adopting the same. Or that the motion habeas counsel did send them, which habeas counsel lead them, or at least GAINES, to believe were their objections to the federal district court's F, C, & R was in fact a motion for relief from the judgment, which in and of itself was nothing more than objections to the F, C, R (*See* https://gaineshomedesignplus.com/wip/2008%20FCR/15%2060(b)(6).pdf) (*See* https://gaineshomedesignplus.com/wip/affidavit.html#(Ch.%2031.%20A%20rtn.%20To%20the%20Fed.%20Ct.)). But by then, of course, it was too late. It was even too late to try to advance their (respondent's (Det. Smith's) lovely agents) witness intimidation argument (https://gaineshomedesignplus.com/wip/2008%20FCR/2%20Supporting%20Brief.pdf#page=1 at pages 61 & 68), which were timely as of 6-22-07 when it was discovered and the 3-9-08 filings, i.e., under 2244(d)(1)(D). See *In re Young*, 789 F.3d at 529. This no doubt encompassed more than just the witness intimidation of Tarah and Horvath, who Smith, not Hubbard, interviewed (https://gaineshomedesignplus.com/wip/2008%20SHCR/andreasproposedffcl.pdf#page=6 at 220-21).

See: https://gaineshomedesignplus.com/wip/2006%20FCR/10_2243%20Order.pdf#page=1

In other words, the federal district court saw an easy way out of having to rule on another petition, plus, while at the same time, saving their esteemed state colleagues shame and embarrassment.

The federal district court then, of course, ruled accordingly. *See* (Case 4:06-cv-00409-Y, Document 17, page 4),[126] essentially shutting GAINES out of federal court once and for all (Case 4:08-cv-00147-Y Document 13 Filed 10/14/08 Page 1 of 1 PageID 15).[127] And this was all in a day's work, according to the Fifth Circuit panel; i.e., it's okay because there was, ipso facto, no evidence the federal district court was biased. Of course, there wasn't, wink-wink-nudge-nudge. There never is. The federal district court wouldn't even permit GAINES indigency on appeal, despite the facts to the contrary.[128] GAINES is just loaded with money. Yeah right. For twenty years he wasn't allowed to earn or handle money, and his only job thereafter was terminated because he is a felon.

Both the district court and the circuit court acted outside the boundaries of what they were created to do (they're malfunctioning) and should not be

[126] *See* https://gaineshomedesignplus.com/wip/2006%20FCR/17_Bleil's%20F,%20C,%20&%20R.pdf#page=1
[127] *See* https://gaineshomedesignplus.com/wip/2008%20FCR/13%20OrderAdopting%20F,%20C,%20&%20R.pdf
[128] *See* https://gaineshomedesignplus.com/wip/2021%20FCR/appeal/indigencyappealusca.pdf#page=5

sanctioned by this Court. It's dangerous precedent and threatens Freedom. They cry out for correction.

Reason Six: The circuits are split on the standard of review for an order on motion to recuse when the party raised the issue of recusal in the district court.

The circuits are split on the standard of review for an order on motion to recuse when the party raised the issue of recusal in the district court. *COMPARE* *LoCascio v. U.S.*, 473 F.3d 493, 495 (2d Cir.2007) (ABUSE OF DISCRETION), *U.S. v. Ruff*, 472 F.3d 1044, 1046 (8th Cir.2007) (same), *In re Kensington Int'l*, 368 F.3d 289, 301 (3d Cir.2004) (same), ***Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir.2003)** (same), *U.S. v. Ayala*, 289 F.3d 16, 27 (1st Cir.2002) (same), *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir.2001) (same), and *Baldwin Hardware Corp. v. Franksu Enter*, 78 F.3d 550, 556 (Fed.Cir.1996) (same), *WITH Hook v. McDade*, 89 F.3d 350, 353-54 n.3 (7th Cir.1996) (DE NOVO), and *People Helpers Found, v. City of Richmond*, 12 F.3d 1321, 1325 (4th Cir.1993) (same).

Gaines calls upon this Court to resolve which standard is to be applied.

XII. CONCLUSION

This case may not be what the Court or the higher-ups of your organizations costume party is looking for in a case. But GAINES promise the Court this. The Court will never encounter as messed up a case as this one. At every turn, another cog of complexity and error is / was added. It is a complicated, lengthy, and arduous case, to say the least. The Court has nothing to gain ruling in GAINES'S

favor. The most GAINES can hope to appeal to is the Court's character and emotion. Logic doesn't seem to work with the lower courts. They're more concerned with expediency and five-second sound bites.

A fair shake is all GAINES ask. To date, GAINES has not had one. And nobody in a position to do anything about it cares to notice. GAINES at no point got one. This case isn't going away if GAINES ever has anything to do with it. Your knight in shining armor, Savoy,[129] should've finished the job with a bullet to the head.

Social media appears a lucrative venue. Just another rank and file. But it's taking its toll. The Court knows what GAINES wants. Reversal, reopening, and instructions to rule accordingly, i.e., with a different district judge. This Court may be able to sweep it under the court's rug. Maybe GAINES can garner public support and interest elsewhere. It's where GAINES is going.

[129] *See* https://gaineshomedesignplus.com/wip/2021%20habeas/appendixtoaffidavit/Appendix%203A.pdf#page=15

Respectfully submitted,

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Date: Tuesday, June 21, 2022

VIII. PROOF OF SERVICE

I, Mr. Barton R. Gaines, Jr., do swear or declare that on this October 11, 2021, 2021, as required by Supreme Court Rule 29. I have served the enclosed *Motion For Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari* on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows: Attorney General, Criminal Appeals Division, Office of the Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548. I declare under penalty of perjury that the foregoing is true and correct.

Executed on Tuesday, June 21, 2022.

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Barton R. Gaines