U.S. Court of Appeals Fifth Circuit
Clerk of Court: Lyle W. Cayce
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408
(504) 310-7700

Re: Petitioner-Appellant Pro Se Appeal Brief
Civ. Action No. 4:08-CV-147-Y
Appeal No. 21-10301
Date: 6-7-21

Please find enclosed the original and "2 legible copies" (per Deputy Clerk Roeshawn Johnson's 5-12-21 instruction letter) of:

1. Petitioner-Appellant's Motion for Certificate of Appealability and Brief in Support

In the above matter. Please bring it to the attention of the court.

Respectfully submitted,

By:_____
BARTON R. GAINES, Pro Se
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Re: Petitioner-Appellant Pro Se Appeal Brief
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No. 21-10301

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BARTON R. GAINES,
Petitioner-Appellant

v.

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

On Appeal from the United States District Court for the Northern District of Texas,
Ft. Worth Division
Civ. Action No. 4:08-CV-147

MOTION FOR CERTIFICATE OF APPEALABILITY AND BRIEF IN SUPPORT

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Counsel to Barton R. Gaines, Petitioner-Appellant
June 7, 2021

ORAL ARGUMENT REQUESTED
THIS IS A PAROLE CASE

CERTIFICATE OF INTERESTED PERSONS

BARTON R. GAINES,
Petitioner-Appellant,

v. No. 21-10301

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described by Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner-Appellant: Barton R. Gaines, TDCJ-CID (Parole), Granbury, TX

Counsel for Petitioner-Appellant: Barton R. Gaines

Respondent-Appellee: Bobby Lumpkin, Director, Texas Department of Criminal Justice, Criminal Institutional Division, Huntsville, TX

Counsel for Respondent-Appellee: Office of the Texas Attorney General Post-Conviction Litigation Division

_____

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Attorney for Barton R. Gaines, Petitioner-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Petitioner-Appellant Barton R. Gaines respectfully requests oral argument. Oral argument will assist the Court in deciding this case, which involves important questions of Sixth and Fourteenth Amendment law. Specifically, the appeal presents:

1. Whether the motion attacks a defect in the integrity of the prior habeas proceeding.
2. Whether the motion was untimely.
3. Whether the defect (conflict-of-interest) is extraordinary.
4. Whether the judge erred by refusing to recuse himself.
5. And, whether the judge erred by denying depositions regarding the defects.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 2254. This Court has jurisdiction under 28 U.S.C. § 1291. On March 11, 2021, United States District Terry Robert Means denied Gaines relief on his motion filed pursuant to Rule 60 and declined to issue Gaines a certificate of appealability. Doc. 26. Gaines timely filed a notice of appeal on March 23, 2021. Doc. 27.

STATEMENT OF THE LEGAL ISSUES

Gaines is currently confined on parole in Granbury, Texas. Through undersigned Counsel and pursuant to the Constitution of the United States and 28 U.S.C. § 2254, Gaines petitions this Court to find:

a. The district court erred in finding Gaines's Rule 60(b) motion did not attack a defect in the integrity of the prior habeas proceedings.

b. The district court erred in finding Gaines's Rule 60(b) motion was untimely.

c. The district court erred in finding Gaines's Rule 60(b) motion failed to present extraordinary circumstances. And,

d. The district court erred by overruling Gaines's motion to recuse U.S. District Court Judge *Terry Robert Means* with hearing and deposition therefor.[1]

STATEMENT OF THE CASE

Nature of the case. The nature of the case is an appeal from the denial of a rule 60(b)(6) motion for relief from the judgment.

[1] I.e., the district court denied Gaines the opportunity to explore further the evidence and facts tending to support the defect (i.e., the conflict and sabotage), then essentially found Gaines failed to prove there was a defect (i.e., the conflict and sabotage) in the previous habeas proceedings (how miss guided and biased is that?).

The Course of the proceedings. February 21st, 2021 Gaines filed concurrently with his 11.07s a Rule 60(b) (6) Motion for Relief from the Judgment. On March 2nd, 2021 Gaines filed Motion to Recuse.

Trial court disposition. On March 11th, 2021, the U.S. District Court Judge *Terry R. Means* dismissed in part and denied in part Gaines's Rule 60(b) (6) Motion for Relief from the Judgment because:

It was a second and subsequent writ of habeas corpus.

It was untimely. And / or

It did not present extraordinary circumstances.

He (Means) also refused to recuse himself herefrom.

STATEMENT OF FACTS

Pre-trial and trial

Testimony showed that on February 21, 2002, Gaines and two friends, Jason Tucker and Daniel Aranda, went to a location known as the Rice Paddy, which is a housing development where young people hang out.[2]

At the location Michael Williams, or Mike, was later led to believe Gaines was the one who began talking to him (Mike) and Andrew Horvath, or Andy, who (Mike

[2] See (3 RR 48:24, 49:19 + 25, 50:2-11, 52:20-25)(3 RR 91:1, 92:10-93:11) (3 RR 158:9-10, 159:6-7, 187:19-20, 188:1-3)(3 APP 83:12-14) (3 APP 86:12-15).

and Andy) were together, about buying a pound of marijuana, but which later came out at trial when respondent asked Mike to identify Gaines was Jason.[3]

Mike agreed to lead Jason to a friend who possibly had marijuana.[4]

Jason then asked Gaines if he (Gaines) would take him (Jason) and Daniel to get the marijuana,[5] apparently after asking Mindy and Tarah Green, who (Tarah) was also with Mindy, Gaines, Jason, and Daniel before Mike and Andy showed up, to take him (Jason),[6] and if Gaines cared if he (Jason) brought Brett Tucker's and his (Jason's) shotgun, which they (Jason and Brett) had in Tarah's car in the trunk from some previous time,[7] which Gaines, disinhibited of all social judgments, defected thereto[8]

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[3] When Hartmann, one of the State's prosecuting attorneys, asked Mike to identify Gaines in court, Mike identified Minick, Gaines's trial attorney's (Westfall's) co-counsel, who (Minick) had blonde hair, like Jason, the only other kid at the Rice Paddy that night with blonde hair besides Mindy Keisel, who (Mindy) was also there with Gaines, Jason, and Daniel before Mike and Andy got there. That is, when Hartmann asked Mike to identify Gaines, Mike said Gaines was three people to Hartmann's left, or four people counting Hartmann, Foran, Westfall, Minick, Gaines, and the bailiff (Dave Darusha (2 RR 140:4) (see paragraph 180 of Gaines's affidavit))(3 RR 55:3-6). When Foran, Hartmann's co-counsel, asked Andy to identify Gaines, Foran just simply asked Andy if Gaines was the guy next to the officer, Dave Darusha, and Andy replied asking him (Foran), "[t]he guy next to the officer?" (3 RR 99:8-9). See also (3 RR 54:15-21, 55:11-19) where Hartmann essentially told everybody they told their witness where Gaines would be seated and by whom (the officer) and (3 APP 1:14-16).

[4] See (3 RR 54:15-21, 55:11-19; 56:17-25, 57:21-24).

[5] See (paragraph 73 of Gaines's affidavit).

[6] See (3 RR 162:20-24).

[7] See (paragraphs 66 & 73 of Gaines's affidavit) (3 APP 36:34-37).

[8] See (4 RR 179:16-181:11).

They (Jason, Gaines, and Daniel) followed Mike and Andy to the apartment complex to buy the marijuana.[9]

On the way, Jason suggest they (Jason Gaines, and Daniel) stop by Walmart real quick to get some bullets for Jason's and Brett's shotgun, i.e., since they (Jason Gaines, Daniel, Mindy, and Tarah) shot up all theirs (Jason's and Brett's) at the Rice Paddy before Mike and Andy got there, and that they (Jason, Gaines, and Daniel) pull up alongside Mike and Andy and tell them to follow them to Walmart real quick to get some beer,[10] which Gaines, disinhibited of all social judgments, again defected thereto.[11]

Then at Walmart because neither Jason nor Daniel had identification, Jason asked Gaines if he would go in and buy the bullets, which Gaines, disinhibited of all social judgments, defected thereto.[12]

While inside Walmart Security made Jason, Daniel, Mike, and Andy move from in front of the double doors, and Jason took Mike and Andy to the back of the parking lot and told them to wait there while he (Jason) and Daniel circled around till Gaines came out.[13]

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[9] See (3 RR 57:25-58:3)(3 RR 95:2-14)(3 APP 63:23-35)(3 APP 65:18-19).
[10] See (paragraph 75 of Gaines's affidavit)(3 APP 34:7-10)(3 RR 57:25-58:14) (3 RR 95:18-96:1)(3 APP 83:24)(3 APP 86:20-23).
[11] See (4 RR 179:16-181:11).
[12] See (paragraph 76 of Gaines's affidavit)(4 RR 179:16-181:11).
[13] See (3 RR 59:8-60:15)(3 RR 100:4-15)(3 APP 33:54)(3 APP 83:26-28)(3 APP 86:24-28).

Then when Gaines did, he (Jason) circled around, got out, let Gaines in, got in behind him (Gaines) and handed him (Gaines) his (Jason's) beer, i.e., so that it looked like Gaines bought beer, then they (Jason driving) proceeded to the back of the parking lot where they (Jason and Daniel) had Mike and Andy waiting, then they (Jason, Gaines, Daniel, Mike, and Andy) then proceeded on to the apartment complex.[14]

Once at the apartment complex, Mike attempted to get the money first before serving up the product, which, as a matter of fact, is a red flag in the dope world.[15]

Because Jason, Gaines, and Daniel thought Mike and Andy were trying to "jack them," because he kept trying to get the money first by lowering the amount and, thereby, the price, and because it appeared to Gaines like Mike was fiddling around with something in his waistband, which Gaines thought was a gun, Gaines accused Mike of being an undercover cop and began to check him (Mike) for a wire, which caused Jason to jump into action and search him, i.e., because he was closer.[16]

Then Andy apparently decided to see what the matter was and walked up on them, which only served to reinforce their (Jason's, Gaines's, and Daniel's) suspicion, or which only served to "spook" them (Jason, Gaines, and Daniel).[17]

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[14] See (paragraph 77 of Gaines's affidavit)(3 RR 60:16-52:2)(3 RR 100:16)(3 APP 65:22-28)(3 APP 63:24-30).
[15] See (3 RR 52:2-19, 64:2-16)(3 APP 65:30-33).
[16] See (paragraph 81 of Gaines's affidavit)(3 RR 64:6-65:8)(3 APP 86:32-35).
[17] See (paragraph 82 of Gaines's affidavit).

Jason threw open the driver's side door, then Daniel the passenger side door,, and they all got out to take them (Mike & Andy) head on or to neutralize their perceived threat, real or not.[18]

After Gaines got out behind him (Jason), Jason reached back in the truck and armed himself with the shotgun that he loaded while Mike and Andy laid in wait,[19] and used it to pin Mike up against the neighboring car with the barrel pointed to the sky, all the while screaming and yelling for Mike to give him (Jason) his (Mike's) wallet, after which when he (Jason) got it, or something similar to it, he (Jason) turned the shotgun on Andy and demanded his (Andy's) wallet too, whom (Andy) Daniel, who (Daniel) had already gotten out of the truck from the passenger side and circled around to the front of the truck, had already knocked down.[20]

Only when he (Jason) did that, Mike took it as his cue to vacate the premises, or possibly, if not probably, take cover to return fire or whatever, which only caused Jason to turn, chase and fire at Mike, just like all the cops now-a-days seen on TV, but Mike, unfazed, kept going.[21]

After the shot that rang out across the parking lot, Jason pushed Gaines to get in the truck, and Daniel followed suit, to leave and, in doing so, Jason, who took back

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[18] See (paragraph 83 of Gaines's affidavit)(3 APP 63:37-39, 65:37-38)(3 RR 67:1, 101:8-21)
[19] See (1 CR 70)(2 CR 25)(3 APP 97:25).
[20] See (paragraph 82 & 84-85 of Gaines's affidavit)(3 APP 83:39-84:7)(3 APP 86:39-43)(3 RR 67:1-24, 68:3-10, 70:1-71:7) (3 RR 101:24-102:8, 102:19-103:5, 103:11-104:4).
[21] See (paragraph 83-85 of Gaines's affidavit)(3 RR 70:22-71:1, 72:16-73:8)(3 RR 104:5-6)(3 APP 84:7 & 10)(3 APP 86:43-46).

up his position at the helm, or who took back up his position at the driver's wheel, before pulling off to leave the apartments, stopped, aimed, and fired a shot out the window at Andy, leaned back in the truck, and continued on back to the pond where Tarah and Mindy were supposed to be still waiting, then Crowley, when they discovered they (Mindy & Tarah) weren't there, where (Crowley) they found them (Mindy & Tarah) on their way to Kodi's to drop off her backpack the next day for school.[22]

The next day (2-22-02) at school Mindy learned that Mike was going to identify her (Mindy) in a high school yearbook so that the police could talk to her to find out who the three guys were who robbed and shot him (Mike) and Andy.[23]

After school Mindy and Tarah went to Jason's to tell him (Jason), then they (Jason, Mindy, and Tarah) decided to call and tell their parents, the parents and kids, the police that Gaines setup, robbed, and shot Mike and Andy with little to no help from them (Jason, Mindy, and Tarah) whatsoever.[24]

They (Jason, Mindy, and Tarah) agreed not to tell Gaines that they (Jason, Mindy, and Tarah) were going to the cops and were going to turn him (Gaines) in.[25]

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[22] See (paragraph 87 of Gaines's affidavit)(3 RR 104:5-6, 104:22-105:6)(3 APP 84:7-10).
[23] See (3 RR 173:3-7)(3 APP 107:16-19).
[24] See (3 RR 173:8-10) (3 APP 107:33-3:35) (3 APP 113:22-36) (3 RR 195.17-22).
[25] See (3 APP 108:27-28) (3 APP 113:40:41).

The next day (2-23-02) Detective Charla B. Smith with the Ft. Worth PD looked Mindy up and went to her (Mindy's) house, then Mindy gave Charla B. Smith the three names (Gaines, Jason, and Daniel) of the guys whom she (Mindy) was with who robbed and shot Mike and Andy.[26]

After Charla B. Smith left Mindy's and apparently after Mindy, Jerri, and Kodi went to Jerri's work to get something, or after they went back over to Jason's to tell them Charla B. Smith came by their house about what happened, Mindy's mom (Jerri) decided to call Charla B. Smith back that Gaines confessed to Mindy and Tarah single-handedly robbing and shooting Mike and Andy, but that the only reason why Mindy lied she didn't know anything about the robbery / shooting was because Gaines threatened to kill them and their families if they told, and that they had even seen him (Gaines) outside their (Mindy's, Jason's, and Tarah's) houses.[27]

At their or some unknown person's direction, Brett then called Gaines and asked him (Gaines) where he was at, then he (Brett) and his (Brett's) girlfriend (Vicky) showed up over there (Coker's) shortly thereafter.[28]

While there Brett asked to borrow Gaines's phone.[29]

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[26] See (3 RR 145.23-150:5) (3 RR 174:16-175:4) (3 RR 197:14-16) (3 APP 108:37-39) (3 APP 114:1-3).
[27] See (3 APP 108:41-4:21)(3 APP 28:28-30).
[28] See (paragraph 96 of Gaines's affidavit)(3 APP 280).
[29] See (paragraph 97 of Gaines's affidavit).

Tarah, Gaines's mom (Missy), and Mindy then called Gaines's cellphone, but they didn't talk to Gaines.[30]

Brett then called 911 on Gaines's cellphone and apparently turned him into the police, or told them where Gaines was, then Jason Mindy, and Tarah, among others, called him (Brett) and Gaines was arrested shortly thereafter.[31]

The next day (2-24-02), as promised, Mindy and Tarah went to "the detective's office" and provided "statements."[32]

On 2-26-02 Charla B. Smith went and talked to ADA Foran about what to do next,[33] who (Foran), no doubt, directed Charla, to go back and show Mindy and Tarah the Walmart video, and to *ask* them if they called Gaines while he, Jason and Daniel were at Walmart, and whether he (Gaines) *told* them he was there buying bullets, in "case they were strapped,"[34] "a street term for carrying a weapon."[35]

While Gaines was in jail, Mindy became friends with Paul Griffin, whereby Mike and Andy were able to learn and fill in the pieces, no doubt with the help of Mindy

[30] See (3 APP 280:245-250) and (paragraph 97-101 of Gaines's affidavit).
[31] See (paragraph 97-102 of Gaines's affidavit)(3 APP 280:251-2:313)(3 APP 18:64-19:53)(3 APP 26:15-27).
[32] See (3 APP 22:40-41, 23:24-32, 78:33-34, 79:37-39, 80:7-9, 80:14-23, 83:15, 84:1-3).
[33] See (3 APP 24:34-36, 119:32).
[34] Although they acquiesced or conceded in exchange therefor, the Walmart video doesn't show Gaines receiving any cell phone calls while there (6 RR SX 34).
[35] See (3 APP 32:44).

and Paul, and some of Mike's other friends who knew Gaines, Mindy, Jason, Jake, Rocky, etc., who was who and who did what.[36]

Meanwhile, because Mindy and Jerri told Charla B. Smith that Gaines not only threatened to kill them, but that he (Gaines) also told them (Jerri and Mindy) that he (Gaines) committed another robbery / shooting, Charla B. Smith uncovered an unsolved shooting and investigated Gaines for it (shooting Rick), who (Rick) was admitted to the same hospital (Harris) on the same day Mike was discharged.[37]

Charla B. Smith then encouraged Detective Goin whose jurisdiction the shooting occurred, to investigate Gaines for the other shooting (shooting Rick), in addition to any others he (Gaines) may have been good for, but Goin closed the file in spite of Charla B. Smith's efforts.[38]

Undeterred, Charla B. Smith went to ADA Hartmann, who (Hartmann) was prosecuting Gaines for her (Charla B. Smith's) robbery / shooting with Mike and Andy, who (Hartmann) then filed (i.e., *padded* her file) to accuse Gaines of the extraneous (shooting Rick) at his (Gaines's) *guilt-innocent,* not *punishment,* hearing.[39]

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[36] See (3 RR 53:7-3, 66:6-11) (3 RR 110:16-21, 111:19-21)(3 RR 159:6-7)(3 RR 182:1-4) (3 RR 51:16-25) (3 RR 93:7-9)(3 APP 83:14-15) (3 APP 86:13-15).
[37] See (3 APP 109:23)(3 APP 27:28-32) (3 APP 100:24)(3 APP 170:41-42)(3 APP 14:12, 20:61-121:60)(3 APP 202:30).
[38] See (3 APP 177:4-5 + 13) (3 APP 203:1-2).
[39] See (3 APP 224:6-1 + 224:4-16) (1 CR 68:2-3)(2 CR 23:2-3)(2 RR 7:11-8:3).

After Westfall pled Gaines out, ADA Hartmann attempted to abort real offense sentencing or essentially taking Gaines straight to sentencing on the extraneous,[40] but despite her (Hartmann's) efforts, Westfall pressed on with other plans in mind (*sandbagging (i.e.*, the whole procedural default thing with competent attorneys*)* the charge error), plans for Gaines's appeal, which ultimately got scrapped because of an unexpected grievance from an unexpected inmate (Tony Gregory).[41]

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[40] American Bar Association, Standards for Criminal Justice 18-3.6, 3d Ed., 1994, Commentary: The rejection of real-offense sentencing in Standard 18-3.6 stems from a policy decision that infliction of punishment for a given crime ought to be preceded by conviction for that crime…. real-offense sentencing adds appreciably to the government's power to influence sentence outcomes…. Real-offense sentencing gives the government "two bites at the apple" for proof of criminal conduct…. prosecutor to view the sentencing hearing as the most propitious forum for establishing the defendant's "true" culpability—not the trial or plea negotiation…. Citing Elizabeth T. Lear, Is Conviction Irrelevant? 40 UCLA L.REV. 1179 (1993) (arguing that real-offense sentencing is a violation of the jury trial guarantee)(cases applying the Court's approach have been forced to adopt absurd positions to support their results: an acquittal is no protection against punishment; a convicted defendant has no liberty interest in his liberty; a citizen whose punishment is increased on the basis of specific conduct is not being punished for that conduct. Such obvious inanities could not fail to astound the general public. Nor should we allow our legal training to dull our intellects to such nonsense. @ 1220)(By statutorily classifying specific conduct as criminal, the legislature forfeits its right to punish that behavior in any manner other than by recourse to the criminal justice system established by the Constitution. @ 1221)(A citizen, however, does not need to prove his innocence to protect himself from criminal punishment; the government needs authorization through conviction to legitimize his incarceration. In the absence of a conviction, the government lacks constitutional authority to exact punishment for allegedly criminal conduct. Id @ 1222)(Not only does the possibility exist that a grand jury might not have been willing to indict the defendant for criminal conduct introduced at sentencing, but more disturbing, it might have already so declined. The current system does not technically prevent a federal prosecutor from presenting evidence of a "crime" at sentencing that has already been offered to, and rejected by, the indicting grand jury. Severing punishment from conviction not only frees the federal prosecutor from the task of marshalling credible evidence to obtain an indictment for additional criminal conduct, but potentially authorizes her to ignore grand jury findings that such evidence was insufficient, or even politically motivated. Id. @ 1229)

[41] See (2 RR 7:11-8:3) (ACR Dkt. 4:2:4)(paragraph 176-177 of Gaines's affidavit).

On December 12, 2002, the jury returned with two verdicts of 35 years confinement, and two $10,000 fines, which the judge (Gill) ordered to run concurrently, as required by the law.[42]

Direct appeal and state habeas

Gaines appealed his convictions and sentences,[43] but on October 14, 2004, the Second District Court of Appeals of Texas (CA2) affirmed the trial court's judgments, and on May 18, 2005, the Texas Court of Criminal Appeals (CCA) refused to hear Gaines's petition for discretionary review (PDR).[44] Gaines did not seek a writ of certiorari.[45]

November 1, 2006, Gaines, through Mowla, filed two state habeas applications challenging his convictions and sentences,[46] which were denied by the CCA on February 27, 2008, without written order based upon the trial court's January 30, 2008, findings.[47]

Federal habeas proceedings

[42] See (1 CR 82, 85-87)(2 CR 37, 40-42). See also Art. 42.08 of The Texas Code of Criminal Procedure and Texas Penal Code § 3.03(a).
[43] See (1 CR 127) (2 CR 57).
[44] To make matters worse, Gill reappointed Gaines Francis to represent Gaines on his direct appeal, who (Francis) completely ignored Gill's failure to charge the jury on the law applicable to the case (paragraph 183-184 of Gaines's affidavit)(SCR 1-6)(1 CR 78) (2 CR 33) (3 APP 232:13). Then to add insult to injury, the same unexpected inmate, Tony, who filed the unexpected grievance on Westfall, conned Gaines's grandma (Gail Inman) into hiring himself (Tony) and Gaines a friend (Allen Norrid) of his (Tony's) writ lawyer named M. Michael Mowla, who (Mowla) refused to touch the extraneous shooting allegations with a ten-foot pole (paragraph 194-195 of Gaines's affidavit).
[45] See (SHCR 14).
[46] See (SHCR 2, 10).
[47] See (SHCR 243) (2 FCR 13).

On May 4, 2006, Gaines filed, through Mowla, a federal habeas petition challenging his convictions and sentences, which was dismissed on November 16, 2006, without prejudice on exhaustion grounds.[48]

Mowla lied to Gaines that he was filing his § 2254 concurrently with his 11.07s[49] like he did in Norrid's case,[50] but of course, he (Mowla) only filed his (Gaines's) 2254, at least until after he (Mowla) let Gaines's year elapse under the A.E.D.P.A.[51]

Gaines's grandmother hired Mowla right after the CCA refused to hear Gaines's PDR on 5-18-05,[52] which was well before Gaines's year elapsed under the A.E.D.P.A. on 8-16-06. Even so, Mowla waited nearly 351 days until there was a hundred-and-four days remaining on Gaines's year before filing Gaines's 2254, which respondent's attorney (Baxter Morgan) characterized as evidence more than "discoverable at the time of … trial",[53] and even then Mowla filed it in the wrong division,[54] which ate up an extra sixty-seven days off Gaines's year before it was transferred to the proper division and U.S. Magistrate Judge Charles Bleil ordered respondent, Morgan, 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

[48] See (1 FCR 205-207).
[49] See (paragraph 249 of Gaines's affidavit).
[50] Norrid v. Quarterman, 2006 U.S. Dist. LEXIS 83380 (N.D.T.X. 10-16-06).
[51] See (1 FCR 144).
[52] See (1 FCR 127).
[53] See (2 FCR 97).
[54] See (1 FCR 200 + n.2).

would have given Gaines seven days to return to state court to correct the 2254(b, c) deficiencies, had Baxter filed within the given 31-days,[55] but for reason more than apparent to Gaines, and hopefully to everybody weighing the probability of the situation, he (Morgan) did not.

Unknown to Gaines, Mowla entered into an agreement with Morgan to respond after Gaines's year elapsed under the AEDPA (8-16-06), which Bleil, no doubt aware of the matter, waited to sign until the day after Gaines's year expired on 8-17-06.[56]

On the very last day of the extension on 10-9-06 Baxter filed (unsurprisingly) a motion to dismiss under 2254(b, c).[57] And, for good measure, no doubt, because *Lawrence v. Florida*[58] 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, U.S. District Judge Terry R. Means, no doubt, waited until the 91st day (11-16-06) to adopt Bleil's Finding, Conclusions, & Recommendation

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[55] See (1 FCR 174).

[56] See (1 FCR 180). If Mowla wasn't conspiring with Baxter and Bleil to drive Gaines's appeal into the ground, then why did he (Mowla) enter into an agreement without okaying it with Gaines to run the rest of his year out so that Morgan could respond, not on the merits, but some simply-easy-to-do tech., and why did Bleil wait to sign it until the day after Gaines's year ran out? Surely the Court doesn't believe Mowla's flimsy scheduling-conflict argument? And surely Gaines wouldn't have agreed to it. And was it just sheer coincidence that Bleil waited to sign the order granting Morgan an extra 30-days to respond on the very day after Gaines's year elapsed under the A.E.D.P.A.?

[57] See (1 FCR 181-88).

[58] Lawerance, 127 S.Ct. 1079, 1083 (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).

(F, C, & R),[59] but, instead of going back and both exhausting Gaines's procedurally defaulted claims, and appealing Bleil's F. C. & R (Means 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, Mowla, again without Gaines's consent or knowledge, went rogue and abandoned (sabotaged) Gaines's § 2253 proceedings,[60] much like he did Gaines's 11.07s & 2254 filings and proceedings,[61] and only went back and exhausted his state court remedies, all the while taking more and more of Gaines's trust until he completely exhausted the funds therein.[62]

The same day (11-16-06) Means dismissed Gaines's first 2254 without prejudice, but for any tolling provisions,[63] Gill, no doubt aware of the whole federal fiasco, *and apparently in contact with Means*, or Means Gill, or both, ordered Westfall and Minick to respond to what Mowla himself (Mowla's self) termed was a prima facie[64] ineffective-assistance-of-trial-counsel (IATC) arguments,[65] which Morgan described boiled "down to the claim that [Gaines] was denied effective assistance of

[59] See (1 FCR 205-06). Or was this just another coincidence? Not likely in this line of business, sadly.
[60] See (chapter 28 of Gaines's affidavit).
[61] See (chapter 28 of Gaines's affidavit).
[62] See (chapter 28 of Gaines's affidavit)(2 FCR 144, 151, 153, 205). Of course, Gaines wrote Mowla 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 249 of Gaines's affidavit). 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)).
[63] See (1 FCR 205-06),
[64] Strickland v. Washington, 466 U.S. 668, 678 (1984).
[65] See (1 FCR 91).

counsel because [Westfall and Minick] didn't spend enough time investigating his case[,]" completely ignoring the "prejudice" prong of "*Strickland*".[66]

After Gill 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, i.e., for getting to cozy with defense attorneys, Gill demoted back down to the DA's office to assist there,[67] and Sturns stepped in to deny Mowla's flimsy prima facie[68] IATC claim that Westfall and Minick were ineffective because Westfall and Minick didn't investigate enough, with no showing himself what Westfall and Minick failed to discover and what to do with it had they (Westfall and Minick) and how the deficient performance prejudiced Gaines's defense.[69] Then on 2-27-08 the CCA summarily denied Mowla's flimsy 11.07 arguments based upon Sturns' 1-31-08 denial, i.e., Sturns rubber-stamped Andrea Jacobs proposals.[70]

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[66] (1 FCR 196). Note: if Gill wasn't in contact with Bleil, Means, and Mowla, then why did he wait to order Westfall and Minick to respond to Mowla's 11.07s on the same day Means adopted Bleil's F, C, & R (1 FCR 205-06) (SHCR 91)?).

[67] Note: if Gill wasn't denoted out of office, then why did he not only leave the bench, but wait to do so only after Gaines's 11.07s were filed? Was it another one of those convenient coincidences? It cost Gaines all his inheritance. God have mercy on their souls. 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.

[68] Strickland v. Washington, 466 U.S. 668, 678 (1984).

[69] See (SHCR 46, 243).

[70] See (2 FCR 144).

On 3-3-08 when Mowla returned to Federal Court, Bleil ordered respondent, through S. Michael Bozarth, to argue Gaines was time-barred,[71] which Bozarth did,[72] and Bleil, unsurprisingly agreed**,**[**73**] but Mowla[74] didn't tell Gaines that Means adopted Bleil's F, C, & R[75] until Gaines overheard two inmates at a table in the day-room at the Allred Unit talking about this new case, *Lawrence,* and how it didn't include an extra 90-days and he (Gaines) wrote his grandmother and she sent it (the case) to him and he read it and wrote Mowla about the extra 90-days, or lack thereof.[76]

All Mowla wrote back was he (Mowla) thought Gaines's grandmother and mother told him (Gaines) that Means denied his 2254,[77] and that he didn't appeal it because

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[71] See (2 FCR 89-90). Also, unknown to Gaines was Mowla agreed with respondent to run the statute of limitation out on his federal writ (See paragraph 253 of Gaines's affidavit)(1 FCR 179).
[72] See (2 FCR 92-100).
[73] See (2 FCR 146). So much for trying to be discrete about what they were doing, right?
[74] Who just simply argued that equitable tolling should toll between 8-16-06, when Gaines's year elapsed, and 11-1-06, when Mowla 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. (2 FCR 150-53)).
[75] Means denied Gaines's second federal habeas with prejudice on October 14, 2008, on technical grounds because the first federal writ didn't act to toll the statute of limitations for the state and federal habeas applications (2 FCR 155).
[76] See (paragraph 264 of Gaines's affidavit)(2 FCR 155; 172).
[77] Note: indeed, Gaines's mother and grandmother did tell Gaines about Bleil's F, C, & R, but neither they (See chapter 31 of Gaines's affidavit) nor Gaines (See chapter 31 of Gaines's affidavit) knew Means adopted Bleil's F, C, & R (2 FCR 155) until Gaines wrote them late 2009 about Lawrence and found out for himself (See chapter 31 of Gaines's affidavit). That Mowla didn't send them Morgan's and Bozarth's responses, their objections to Bleil's F, C, & R's. Or Means' orders adopting the same. Or that the motion Mowla did send them, which Mowla led them, or at least Gaines, to believe were their objections to Bleil'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 (2 FCR 157) (See chapter 31 of Gaines's affidavit). But by then, of course, it was too late. It was even too late to try to advance their (respondent's (Det. Charla B. Smith's) lovely agents) witness intimidation argument (2 FCR 9, 61, 68), which were timely as of 6-22-07 when it was

he was going to charge them $5,000 to appeal it,[78] 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 (Mowla) could therefore do for them. That his (Mowla's) services to them had long since elapsed.[79] 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 Mowla didn't respond to that or any other questions Gaines had, but for any matter dealing with the attorney client privilege, or so he threatened (after over $30K).[80]

Subsequent state habeas proceeding

On 8-19-20 Gaines made parole, and on 10-12-20 filed a freedom of information act request, and on 12-21-20 the DA's office finally responded thereto, then on 12-30-20 Gaines serendipitously discovered the Westfalls threats, Mowla's ensuing conflict and sabotage.[81]

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discovered and the 3-9-08 filings, i.e., under 2241(d)(1)(D). See In re Young, 789 F.3d 518, 529 (CA5 2015). This no doubt encompassed more than just the witness intimidation of Tarah and Horvath, who Charla B. Smith, not Hubbard, interviewed (SHCR 220-21).

[78] Gaines didn't know Mowla stopped prosecuting Gaines's federal writ when he filed his 11.07 (See paragraph 254 of Gaines's affidavit)(1 FCR 205-206).

[79] See chapter 31 of Gaines's affidavit.

[80] See (paragraph 282 of Gaines's affidavit).

[81] See ¶s 286-287 of Gaines's affidavit.

Then on February 21st, 2021, Gaines filed 11.07s, in the event Mowla wasn't in on it with Greg and Mollee Westfall and trial court judge *Robert Keith Gill* to sabotage adjudication of their timeline and charge errors

On February 27th, 2021, Gaines filed Request (motion) To Take The Deposition On Written Questions of several state actors.

On March 17th, 2021 Gaines filed *Proposed Findings of Fact And Conclusions of Law* with accompany *order*.

On March 24th, 2021, Tarrant County District Magistrate Judge *Charles Patrick Reynolds* found and concluded the applications were procedurally defaulted via § 4 of the *Texas Code of Criminal Procedures*, with no explanation therefor but for the statutory language, which the 213th Tarrant County Judicial District Court Judge, Christopher Robert Wolfe, adopted on the next day on March 25th, 2021, because apparently § 4 essentially required to "scavenge for hints of undisclosed *Brady* [i.e., *Strickland*] material."[82]

On March 31, 2021, Gaines mailed, via U.S. Postal Service first class mail, to the Criminal court of Appeals and the Tarrant County District Attorney Applicant-Appellant's Brief on Appeal herein (subsequent 11.07s).

[82] Bracey v. Superintendent Rockview SCI, 986 F.3d 274 (3rd Cir. 2021), citing Dennis v. Sec'y, 834 F.3d 263 (3d Cir. 2016), Norris v. Brooks, 794 F.3d 401 (3d Cir. 2015), Wilson v. Beard, 426 F.3d 653 (3d Cir. 2004), United States v. Starusko, 729 F.2d 256 (3d Cir. 1984).

On April 6, 2021, Gaines called the CCA's clerk whether they got his brief on appeal, which, she said they did not, and again on the following day, which he said they still hadn't gotten it.

On April 7, 2021, Gaines remailed his brief on appeal to the CCA and the Tarrant Co. Dist. Crim. Clerk, since he was advised he could do both.

Proceedings pursuant to Rule 60 in the court below

On February 21st, 2021 Gaines filed concurrently with his 11.07s Rule 60(b) (6) Motion for Relief from the Judgment.

On March 2nd, 2021 Gaines filed Motion to Recuse *Terry Robert Means*.

On March 11th, 2021, the U.S. District Court Terry R. Means dismissed in part and denied in part Gaines's Rule 60(b) (6) Motion for Relief from the Judgment, and all other motions thereto, because, according to him:

1. It was a second and subsequent writ of habeas corpus;
2. It was untimely; and / or
3. It did not present extraordinary circumstances.

On March 19th, 2021 Gaines filed notice of appeal.

On 3-25-21 Gaines filed Form 4 Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis accompanied by an earnings statement from his current employer.

On 4-15-21 Means filed order and notice of deficiency; Gaines overlooked the signature block included in nondescript heading's small print, and Gaines miscalculated his weekly pay for his monthly pay. Means ordered Gaines to sign and recalculate his weekly pay to reflect his monthly pay.

On 4-16-21 Gaines corrected the above-mentioned deficiencies.

On 4-27-21 Means denied Gaines corrected Form 4 Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis because, according to Means, although Gaines signed the affidavit, Gaines, did not adjust his weekly pay to reflect his monthly pay. However, this is inaccurate. Gaines did correct his weekly pay to reflect his monthly pay.[83]

On May 3, 2021, Gaines filed Relator's Motion for an Order or other relief (i.e., to proceed in forma pauperis on appeal).

On 5-12-21 the 5th Circuit's Deputy Clerk, Roeshawn Johnson, directed Gaines to file "(2) a motion requesting permission to appeal in forma pauperis, [a]ttaching to the motion the affidavit required by FED. R. APP. P. 24 [and to] file his request to appeal in forma pauperis by the date set for filing [his] brief[,]" which Gaines did on 6-7-21 (*See* the same).

[83] The relevant portion of Gaines's motion for leave to proceed in forma pauperis is as follows: "Although I make roughly $400*4.35=1,700 a month, I just spent over $2000 to repair a car a family member is letting me drive to work. I completely drained my bank account, but for a $1 and some change. I've been in prison for almost 20 years. I've been single all my life."

Proceedings pursuant to a Bill of Review

On March 25, 2021, upon talking to the Tarrant County Criminal District Clerk's Office and finding out Reynolds and Wolfe § 4 barred Gaines's 11.07s, Gaines filed Bill of Review to reopen the initial, first round of writs, in the event Mowla was in on sabotaging adjudication of Greg Westfall's and Gill's timeline and charge errors.

On April 6, 2021, Gaines called and, after talking to several people at the Tarrant County Criminal District Clerk's Office, discovered Wolfe had his clerk boxed up and mailed, or emailed, the Bill of Review as supplemental records in his second round of habeas (11.07) filings.

SUMMARY OF THE ARGUMENT

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.

Because the defect couldn't have been discovered any sooner than it was,[84] reasonable jurists would find it debatable the district court's holding that Gaines's motion was not made in a reasonable time.

[84] Like Gaines just wanted to do 18.5 years in prison.

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.

Because U.S. Dist. Ct. Judge *Terry Robert Means* denied Gaines's motion to recuse himself (Means),[85] i.e., because he (Means) exhibited signs of partiality toward respondent in this case, including the Westfalls and Gill, reasonable jurists would find it debatable whether district court, Terry Robert Means, exhibited signs of partiality toward respondent in this case, including the Westfalls and Gill.[86]

ARGUMENT

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a certificate of appealability (COA) is necessary to appeal a claim to this Court. *See* 28 U.S.C. § 2253 (c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA should issue when the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336. To

[85] Including a hearing and proposed questions for the previous trial officials, namely, Baxter Morgan, Charles Bleil, Mehdi Michael Mowla, Robert K. Gill, and Terry Robert Means.
[86] Means essentially denied Gaines's ability ((request to depose Baxter Morgan, Charles Bleil, Mehdi Michael Mowla, Robert K. Gill, and Terry Robert Means)) to show and prove there was a defect in the integrity of the habeas proceeding ((i.e., the reason why Mowla 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 Mowla chose not to exhaust Gaines's state remedies and, consequently, got Gaines time barred)). See page 3 of Mean's order denying relief.

determine whether a COA should issue, this Court conducts only a "threshold inquiry," and it must issue a COA if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Skinner v. Quarterman*, 528 F.3d 336, 340-41 (5th Cir. 2008) (quoting *Miller-El*, 537 U.S. at 336, 338). A claim is "debatable" even if every reasonable jurist might agree, after fully considering the claim, that the "petitioner will not prevail." *Id.* at 341 (quoting *Miller-El*, 537 U.S. at 338). In other words, a COA should be denied when a claim is frivolous but not as a means of short-circuiting appellate review.

In the district court's March 11, 2021 order denying relief, the court held:

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. App'x 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, 545 U.S. at 536. In fact, "[s]uch circumstances will rarely occur in the habeas context." Gonzalez at 535.[87]

[87] Unless, of course, Means means attorneys in his court regularly act to sabotage citizen's pleas for justice by conspiring with them to procedurally bar them therefrom. How miss guided and corrupt is this.

And, consequently, the district court DISMISSED, in part, and DENIED, in part, Petitioner's motion, plus then DENIED all other pending motions.[88]

This Court addressed a Rule 60(b) (6) motion in the case of *Miguel Paredes*. (Like Gaines), *Paredes* was represented by the same attorney in both state and federal habeas proceedings. In state habeas proceedings, *Paredes's* attorney failed to bring to the trial court's attention evidence that would have raised a bona fide doubt as to *Paredes's* competency to waive his *Wiggins* claim. Because raising the claim in federal court would have required counsel to argue that *Paredes's* failure to exhaust the claim was due to counsel's ineffectiveness, counsel had a conflict of interest.

While this Court did not decide whether the attorney was, in fact, conflicted, it recognized, consistent with Supreme Court precedent, that "[t]he assertion that *Paredes's* federal habeas counsel had a conflict of interest and that *Paredes* is entitled to reopen the final judgment and proceed in the federal habeas proceedings with conflict-free counsel is a claim that there was a defect in the integrity of the proceedings."[89] According to this Court, this issue could not "be considered a successive motion for habeas relief."[90]

[88] The all other motions denial ruling cut at the heart of Mean's extraordinary ruling.
[89] In re Paredes, 587 F. App'x 805, 823 (5th Cir. 2014).
[90] Paredes, 587 F. App'x at 822.

In *Gonzalez v. Crosby*,[91] the Supreme Court noted that a Rule 60(b) motion is not a successive petition within the meaning of 28 U.S.C. §§ 2254 and 2244 when it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings."[92]

One who argues that there was a defect in the integrity of the proceedings is saying that the movant "did not get a fair shot in the original … proceeding because its integrity was marred by a flaw that must be repaired in further proceedings."[93]

Such an argument is properly raised under Rule 60(b); for example, this Court has found discovery violations can constitute a defect in the integrity of the proceedings.[94]

Further, this Court found that a defect in the integrity of the federal habeas proceedings exists when a lawyer who is afflicted by a conflict of interest represents an inmate in federal proceedings.[95]

Christeson makes it clear that this Court's holding in *Paredes* was correct, and that where a petitioner argues that his previous federal habeas lawyer was laboring under a conflict of interest, that petitioner is in fact arguing that there was a defect

[91] See Gonzalez, 545 U.S. 524 (2005).
[92] Gonzalez, 545 U.S. at 532.
[93] In re Packard, 681 F.3d 1201, 1206 (10th Cir. 2012); see also United States v. Buenrostro, 638 F.3d 720, 722 (9th Cir. 2011), cert. denied, 132 S. Ct. 3422 (2011).
[94] See Williams v. Thaler, 602 F.3d 291, 311-12 (5th Cir. 2010).
[95] See Paredes, 587 F. App'x at 823. See also Clark, 850 F.3d at 779-80 (5th Cir. 2017).

in the integrity of the federal habeas proceedings, and that argument is properly raised in a Rule 60(b) motion.[96]

In noting that *Christeson* could return to the federal district court with a Rule 60(b) motion some seven years after the district court had dismissed his petition, the Court observed that *Christeson's* original federally appointed counsel "could not be expected to file a [Rule 60(b)(6) motion seeking equitable tolling] on *Christeson's* behalf" because "any argument for equitable tolling would be premised on their own malfeasance in failing to" timely file his petition.[97]

Consequently, without even looking to the nature of the specific claims *Christeson* sought to raise, the Court held that *Christeson* was entitled to pursue relief pursuant to Rule 60(b) with substitute counsel.[98]

Here, Gaines's defect is like *Christeson's* and *Paredes's*. Gaines was represented by M. Michael Mowla in both state and federal habeas proceedings.[99] Gaines's defect differs, however, from *Christeson's* and *Parade's* defect in that Mowla had an additional conflict; Mowla's other conflict was he took on Gaines co-defendant's (Daniel Aranda's) case on appeal (collateral and otherwise), without telling Gaines,

[96] See Christeson, 135 S. Ct. at 895.
[97] Id. at 892-93; Order at 3, Christeson v. Roper, No. 4:04-cv-08004 (W.D. Mo. Jan. 31, 2007) (dismissing petition).
[98] Id. at 895.
[99]

at the same time he (Mowla) was representing Gaines.[100] This additional defect wasn't discovered until Gaines got out of prison here recently and inadvertently found out through an unrelated public of information act request.[101] This defect (Daniel; the reason why he (Mowla) sabotaged Gaines's appeal and got him procedurally barred) becomes particularly troubling when considered in conjunction with the fact that Daniel was alleged to be Gaines's alleged co-defendant in the extraneous shooting accused only Gaines.[102]

It is more than apparent to at least Gaines, and hopefully anybody else who is reading this, that Mowla conspired with respondent to get Gaines procedurally barred under 2244(d)(2) and drive anything therewith into the ground.[103] Greg and his wife, Mollee Westfall, who (Mollee) worked for the DA's office, were apparently going to try and threaten to use Daniel against Gaines in the extraneous if Gaines, through Mowla, moved to adjudicate Greg's and Gill's timeline and charge errors on collateral attack in state court; that is, right after Gaines's PDR was denied Mollee moved to revoke, and did revoke, Daniel's deferred adjudication in an apparent attempt to try to scare him (Daniel) into turning state's evidence against Gaines in the extraneous, less he (Daniel) was sentenced to additional time.[104]

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[100] See (paragraph 287 of Gaines's affidavit)(1 APP 32).
[101]
[102] (4 RR 106:12, 115:25-117:25, 119:12-25)(SHCR 115)(4 RR 100:25, 101:5-7).
[103] See (paragraph 240 of Gaines's affidavit).
[104] See (generally, ch. 27 of Gaines's affidavit)(1 APP 31).

Rather than advance Greg's timeline and charge errors in state court, Mowla, scared away therefrom, filed only in federal court, until Gaines and his family, or at least Gaines, asked him why he didn't file in state court too, then he filed in state court, skating a razor thin line (hence, Daniel's representation; to keep them from being able talk to him but through him).[105]

Mowla's interest here conflicted with Gaines's interest when Mowla failed to tell Gaines he (Mowla) was representing Daniel, and that he was bypassing Gaines's state habeas proceedings to appease the Westfalls and Gill regarding their timeline and charge errors. There was apparently some kind of truce between the attorneys in exchange for Mowla's cooperation; if Mowla didn't try to adjudicate Westfall's (Greg's) and Gill's timeline and charge errors in state court, Mollee wasn't going to try to pinch Daniel to squeal on Gaines for an offense he (Gaines) didn't commit.

This Court should therefore hold that, to the extent that Gaines *Rule* 60(b) (6) motion attacks not the substance of the federal court's resolution of the claim of the merits but asserts that Mowla had a conflict of interest that resulted in a defect (procedural bar) in the integrity of the proceedings, the motion is not an **impermissible successive petition**,[106] and, consequently, reasonable jurists would

[105] See (generally, ch. 28 of Gaines's affidavit)(1 FCR 200-203).
[106] See Clark, 850 F.3d at 780-81.

find the district court's holding that Gaines's motion was an impermissible successive petition to be debatable.

This Court should also therefore hold that, to the extent that Gaines couldn't have learned of the defect, i.e., conflict, any sooner than he did because Gaines had no reasonable basis upon which to suspect the defect any sooner than he did; i.e., that it came about rather serendipitously, the motion *was* filed within a reasonable time and *was* **timely** under *Federal Rules of Civil Procedure 60(c)(1)* and, consequently, reasonable jurists would find the district court's holding that Gaines's motion was not timely filed to be debatable.

This Court should also therefore hold that, to the extent that Gaines moved to reopen his initial federal habeas proceeding based on Rule 60(b) (6), that it *did* present "**extraordinary circumstances**" (*extra*ordinary omissions, i.e., 2244(d)(2))[107] justifying the reopening of the proceeding under *Gonzalez*, 545 U.S. at 536, and, consequently, reasonable jurists would find the district court's holding that Gaines's motion was not extraordinary to be debatable.

On the issue of recusal reasonable jurists would find the district court's refusal to recuse itself to be debatable. A judge should recuse himself or herself if the

[107] Exhaustion & time bar fiasco.

judge's impartiality might reasonably be questioned.[108] Recusal is proper if a court determines that a *reasonable person* would *perceive* a significant risk that the judge will resolve the case on a basis other than the merits.[109]

Terry Robert Means should have recused himself because:

1. he exhibited actions from which a reasonable inference of partiality may be drawn.[110] Means purposely waited until the day after Gaines 91st day elapsed on his year under the AEDPA to rule on Gaines's federal writ just to evidently be absolutely certain it was time barred because *Lawerance* hadn't yet been decided yet, then he evidently told Gaines's state trial judge (Gill) who then ordered Greg Westfall and his co-counsel (Cheyenne Minick) to respond to Mowla's 11.07s (never mind what Means Magistrate (Charles Bleil) mentioned above did).

2. the public's confidence in the judiciary will be irreparably harmed.[111]

3. A reasonable person, knowing all the relevant facts, would harbor doubts about Means' impartiality.[112]

This Court should therefore hold that reasonable jurists would find the district court's holding that a reasonable inference of partiality may not have been drawn to be debatable.

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[108] 28 U.S.C. § 455(a); In re Kensington Int'l, 368 F.3d 289, 301 (3rd Cir. 2004); United States v. Microsoft Corp., 253 F.3d 34, 114-15 (DC Cir. 2001).
[109] See Sao Paulo State of Federative Republic of Braz. v. Am. Tobacco Co., 535 U.S. 229, 232-33 (2002); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865-67 (1988).
[110] See United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993).
[111] Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3rd Cir. 1993). Don't know about anybody else's confidence in the judiciary (if the year's last rioting isn't any indication), but Gaines's and his is a ripple effect on the public's confidence in the judiciary. Right now, it's not looking very good.
[112] Alexander, 10 F.3d at 164; Cooley, 1 F.3d at 993.

CONCLUSION

Reasonable jurists would debate the holding of the court below. This Court should issue a COA, find Gaines is entitled to relief pursuant to Rule 60, address the merits of his proposed *Strickland* claim, and grant Gaines relief from his unconstitutional sentence of 35-years.

Respectfully submitted,

_____

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Counsel for Barton R. Gaines
June 7, 2021

CERTIFICATE OF SERVICE

I, the undersigned, certify that on June 7, 2021, a copy of petitioner's motion for relief from the judgment was served by U.S. mail on the following attorney in charge for respondent:

Edward L. Marshall
Chief, Criminal Appeals Division
Texas Attorney General's Office
P.O. BOX 12548
Austin, Texas 78711
Tel.: 512-936-1400
Fax: 512-320-8132

I further certify that required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13.

_____
Barton R. Gaines

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This application with brief in support complies with the type-volume limitation of Fed. R. App. P. 32 (a) (7)(B) because this brief contains **7,986** words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (f); specifically:

· cover page;

disclosure statement;

· table of contents;

· table of citations;

· statement regarding oral argument;

· addendum containing statutes, rules, or regulations;

· certificate of counsel;

· signature block;

· proof of service; and

· any item specifically excluded by these rules or by local rule.

(I.e., the first seven pages and the last two (i.e., 39-7-2=30)).

This motion with brief in support complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point times new roman and 12-point times new roman for footnotes.

_____

Barton R. Gaines