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April, 26, 2021

Re: Ex parte Barton R. Gaines
CCA Nos: WR-69,338-03 & WR-69,338-04
Tr. Ct. Nos. Case Nos.C-213-W011921-0836979-A & C-213-W011922-0836985-A

Dear Clerk,

Please find enclosed:

1. Applicant-Appellant's Supplemental Brief on Appeal.

Please bring the same to the attention of the court. Please contact me should you have any questions or comments.

Sincerely,

BARTON R. GAINES, Pro Se
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CCA Nos: WR-69,338-03 & WR-69,338-04
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Dear Ms. Jacobs,

Please find enclosed:

1. Applicant-Appellant's Supplemental Brief on Appeal.

Please contact me should you have any questions or comments.

Sincerely,

_____
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Texas Court of Criminal Appeals

Nos: WR-69,338-03 & WR-69,338-04

IN THE
CRIMNINAL COURT OF APPEALS
at Austin

Barton R. Gaines,
Applicant-Appellant,
v.
Sharen Wilson,
Respondent-Appellee.

APPLICANT-APPELLANT'S

SUPPLEMENTAL BRIEF ON APPEAL

By:_____
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APPLICANT-APPELLANT REQUEST ORAL ARGUMENT

Nos: WR-69,338-03 & WR-69,338-04

IN THE
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Barton R. Gaines,
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Sharen Wilson,
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IDENTITIY OF PARTIES & COUNSEL

Parties----------

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DEFINITIONS

1. Ch. is Chapter
2. CPD is Crowley Police Department
3. CR is Clerk's Record
4. CSI is Crime Scene Investigator
5. DA is District Attorney
6. DOB is date of birth
7. DOD is date of death
8. DX is defendant's exhibits
9. EX is exhibit
10. F, C, & R is Findings of Fact, Conclusions of Law, and Recommendations
11. FFCL is Finding of Facts and Conclusions of Law
12. FN is footnote
13. FWPDCL is Fort Worth Police Department Crime Lab
14. FWPD is Fort Worth Police Department
15. IATC is ineffective assistance of trial counsel
16. ID is identification
17. LPN is license plate number
18. MDC is Mansfield Detention Center
19. Missy is Melissa and vice-versa.
20. MLEC is Mansfield Law Enforcement Center (Mansfield, TX)
21. MVD is motor vehicle department
22. PDRs is Petition for Discretionary Review

23. RR is Reporter's Record; preceded by the volume number and followed by the page and line number
24. SCFO is State Counsel for Offenders.
25. SCOTUS is Supreme Court of the United States
26. SCR is the Supplemental Clerk's Record.
27. SHCR is State Habeas Clerk's Record
28. SKS is Samozaryadny Karabin sistemy Simonova, 1945 (Russian: Самозарядный карабин системы Симонова, 1945; Self-loading Carbine of (the) Simonov system, 1945).
29. STD is Sexually transmitted disease
30. SubCh. Is subchapter
31. SX is state's exhibits
32. TCDA is Tarrant County District Attorney
33. TCU is Texas Christian University
34. TDCJ is Texas Department of Criminal Justice
35. TS is Texas Syndicate

STATEMENT OF THE CASE

1. *Nature of the Case*. Applicant-Appellant sued respondent-appellee for unlawful fine and confinement. Respondent-Appellee did not file a response.
2. *Course of proceedings*. On February 21st, 2021, Applicant-Appellant filed 11.07s. On February 27th, 2021, Applicant-Appellant filed Request (motion) To Take The Deposition On Written Questions. On March 17th, 2021 Applicant-Appellant filed *Proposed Findings of Fact And Conclusions of Law*.
3. *Trial court disposition*. On March 24th, 2021, Tarrant County District Magistrate Judge Charles Patrick Reynolds denied Applicant-Appellant's proposed findings of facts and conclusions of law because, according to him, the applications "failed to allege sufficient specific facts establishing one of the exceptions to the subsequent writ bar" of § 4 of Art. 11.07 of the *Texas Code of Criminal Procedures.* The next day (3-25-21) the 213th Tarrant County Judicial District Court Judge, Christopher Robert Wolfe, adopted Patrick's findings of fact and conclusions of law.
4. On March 31, 2021, Applicant filed his initial appeal brief in this matter at hand.

STATEMENT ON ORAL ARGUMENT

5. The Court should grant oral argument because oral argument would give the Court a more complete understanding of the facts presented in this appeal. *See Tex. R. App. P. 39.1(c).* This case involves important underlying questions of Sixth and Fourteenth Amendment law.

ISSUES PRESENTED FOR REVIEW

6. Issue: Whether the factual basis of the claims was available or ascertainable on or before the date (11-1-06), the first 11.07s were filed.

STATEMENT OF FACTS

Pre-trial and trial

1. 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.[1]
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 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.[2]

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[1] *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).

[2] 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) (3 APP 1:14-16).

3. Mike agreed to lead Jason to a friend who possibly had marijuana.[3]
4. Jason then asked Gaines if he (Gaines) would take him (Jason) and Daniel to get the marijuana,[4] 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),[5] 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,[6] which Gaines, disinhibited of all social judgments, defected thereto[7]
5. They (Jason, Gaines, and Daniel) followed Mike and Andy to the apartment complex to buy the marijuana.[8]
6. 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,[9] which Gaines, disinhibited of all social judgments, again defected thereto.[10]
7. 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.[11]

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[3] See (3 RR 54:15-21, 55:11-19; 56:17-25, 57:21-24).
[4] See (paragraph 73 of Gaines's affidavit).
[5] See (3 RR 162:20-24).
[6] See (paragraphs 66 & 73 of Gaines's affidavit) (3 APP 36:34-37).
[7] See (4 RR 179:16-181:11).
[8] See (3 RR 57:25-58:3)(3 RR 95:2-14)(3 APP 63:23-35)(3 APP 65:18-19).
[9] 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).
[10] See (4 RR 179:16-181:11).
[11] See (paragraph 76 of Gaines's affidavit)(4 RR 179:16-181:11).

8. 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.[12]
9. 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.[13]
10. 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.[14]
11. 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.[15]
12. 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).[16]

[12] 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).
[13] 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).
[14] See (3 RR 52:2-19, 64:2-16)(3 APP 65:30-33).
[15] See (paragraph 81 of Gaines's affidavit)(3 RR 64:6-65:8)(3 APP 86:32-35).
[16] See (paragraph 82 of Gaines's affidavit).

13. 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.[17]
14. 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,[18] 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.[19]
15. 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.[20]
16. 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 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 &

[17] See (paragraph 83 of Gaines's affidavit)(3 APP 63:37-39, 65:37-38)(3 RR 67:1, 101:8-21)
[18] See (1 CR 70)(2 CR 25)(3 APP 97:25).
[19] 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).
[20] 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).

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.[21]

17. 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.[22]
18. 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.[23]
19. 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.[24]
20. 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.[25]
21. 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

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

and their families if they told, and that they had even seen him (Gaines) outside their (Mindy's, Jason's, and Tarah's) houses.[26]

22. 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.[27]
23. While there Brett asked to borrow Gaines's phone.[28]
24. Tarah, Gaines's mom (Missy), and Mindy then called Gaines's cellphone, but they didn't talk to Gaines.[29]
25. 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.[30]
26. The next day (2-24-02), as promised, Mindy and Tarah went to "the detective's office" and provided "statements."[31]
27. On 2-26-02 Charla B. Smith went and talked to ADA Foran about what to do next,[32] 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,"[33] "a street term for carrying a weapon."[34]

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[26] See (3 APP 108:41-4:21)(3 APP 28:28-30).
[27] See (paragraph 96 of Gaines's affidavit)(3 APP 280).
[28] See (paragraph 97 of Gaines's affidavit).
[29] See (3 APP 280:245-250) and (paragraph 97-101 of Gaines's affidavit).
[30] 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).
[31] *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).
[32] *See* (3 APP 24:34-36, 119:32).
[33] 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).
[34] *See* (3 APP 32:44).

28. 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 and Paul, and some of Mike's other friends who knew Gaines, Mindy, Jason, Jake, Rocky, etc., who was who and who did what.[35]
29. 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.[36]
30. 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.[37]
31. 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.[38]
32. After Westfall pled Gaines out, ADA Hartmann attempted to abort real offense sentencing or essentially taking Gaines straight to sentencing on the extraneous, but despite her (Hartmann's) efforts, Westfall pressed on with other plans in mind

[35] 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).
[36] 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).
[37] See (3 APP 177:4-5 + 13) (3 APP 203:1-2).
[38] 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).

(*sandbagging* the charge error), plans for Gaines's appeal, which ultimately got scrapped because of an unexpected grievance from an unexpected inmate (Tony Gregory).[39]

33. 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.[40]

Direct appeal and state habeas

34. Gaines appealed his convictions and sentences,[41] 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).[42] Gaines did not seek a writ of certiorari.[43]

35. November 1, 2006, Gaines, through Mowla, filed two state habeas applications challenging his convictions and sentences,[44] which were denied by the CCA on February 27, 2008, without written order based upon the trial court's January 30, 2008, findings.[45]

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[39] See (2 RR 7:11-8:3) (ACR Dkt. 4:2:4)(paragraph 176-177 of Gaines's affidavit).
[40] 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).
[41] See (1 CR 127) (2 CR 57).
[42] 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).
[43] See (SHCR 14).
[44] See (SHCR 2, 10).
[45] See (SHCR 243) (2 FCR 13).

Federal habeas proceedings

36. 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.[46]

37. Mowla lied to Gaines that he was filing his 2254 concurrently with his 11.07s[47] like he did in Norrid's case,[48] 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.[49]

38. Gaines's grandmother hired Mowla right after the CCA refused to hear Gaines's PDR on 5-18-05,[50] 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",[51] and even then Mowla filed it in the wrong division,[52] 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 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,[53] but for reason more than apparent to Gaines, and hopefully to everybody weighing the probability of the situation, he (Morgan) did not.

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[46] See (1 FCR 205-207).
[47] *See* (paragraph 249 of Gaines's affidavit).
[48] *Norrid v. Quarterman,* 2006 U.S. Dist. LEXIS 83380 (N.D.T.X. 10-16-06).
[49] *See* (1 FCR 144).
[50] *See* (1 FCR 127).
[51] *See* (2 FCR 97).
[52] *See* (1 FCR 200 + n.2).
[53] *See* (1 FCR 174).

39. 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.[54]

40. On the very last day of the extension on 10-9-06 Baxter filed (unsurprisingly) a motion to dismiss under § 2254(b, c).[55] And, for good measure, no doubt, because *Lawrence v. Florida*[56] 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 (F, C, & R),[57] 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,[58] much like he did Gaines's 11.07s & 2254 filings and proceedings,[59] and only went back and exhausted his state court

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[54] *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.?

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

[56] *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).

[57] *See* (1 FCR 205-06). Or was this just another coincidence? Not likely in this line of business, sadly.

[58] *See* (chapter 28 of Gaines's affidavit).

[59] *See* (chapter 28 of Gaines's affidavit).

remedies, all the while taking more and more of Gaines's trust until he completely exhausted the funds thereto.[60]

41. The same day (11-16-06) Means dismissed Gaines's first 2254 without prejudice, but for any tolling provisions,[61] Gill, no doubt aware of the whole federal fiasco, *and apparently in contact with Means*, ordered Westfall and Minick to respond to what Mowla himself (Mowla's self) termed was a prima facie[62] ineffective-assistance-of-trial-counsel (IATC) arguments,[63] which Morgan described boiled "down to the claim that [Gaines] was denied effective assistance of counsel because [Westfall and Minick] didn't spend enough time investigating his case[,]" completely ignoring the "prejudice" prong of "*Strickland*".[64]

42. 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, Gill demoted back down to the DA's office to assist there,[65] and Sturns stepped in to deny Mowla's flimsy prima facie[66] 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

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[60] *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)).

[61] *See* (1 FCR 205-06),

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

[63] *See* (1 FCR 91).

[64] (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)?).

[65] 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 was 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.

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

Minick) and how the deficient performance prejudiced Gaines's defense.[67] 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.[68]

43. On 3-3-08 when Mowla returned to Federal Court, Bleil ordered respondent, through S. Michael Bozarth, to argue Gaines was time-barred,[69] which Bozarth did,[70] and Bleil, unsurprisingly agreed**,**[71] but Mowla,[72] didn't tell Gaines that Means adopted Bleil's F, C, & R[73] 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.[74]

44. All Mowla wrote back was he (Mowla) thought Gaines's grandmother and mother told him (Gaines) that Means denied his 2254,[75] and that he didn't appeal it because he was

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[67] *See* (SHCR 46, 243).
[68] *See* (2 FCR 144).
[69] *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).
[70] *See* (2 FCR 92-100).
[71] *See* (2 FCR 146). So much for trying to be discrete about what they were doing, right?
[72] 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)).
[73] 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). **Lastly** unknown to Gaines was Means rulings.
[74] *See* (paragraph 264 of Gaines's affidavit)(2 FCR 155; 172).
[75] 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 discovered and the 3-9-08 filings, i.e., under 22441(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).

going to charge them $5,000 to appeal it,[76] 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 (See chapter 31 of Gaines's affidavit). 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).[77]

Subsequent state habeas proceeding

45. 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 Mowla's conflict of interest.[78]
46. 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
47. On February 27th, 2021, Gaines filed Request (motion) To Take The Deposition On Written Questions.
48. On March 17th, 2021 Gaines filed *Proposed Findings of Fact And Conclusions of Law*.
49. 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*, which the 213th Tarrant County Judicial District

[76] 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).
[77] *See* (paragraph 282 of Gaines's affidavit).
[78] See ¶s 286-287 of Gaines's affidavit.

Court Judge, Christopher Robert Wolfe, adopted on the next day on March 25th, 2021, because § 4 essentially required to "scavenge for hints of undisclosed *Brady* [i.e., *Strickland*] material."[79]

50. 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).
51. 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.
52. 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

53. On February 21st, 2021 Gaines filed concurrently with his 11.07s Rule 60(b)(6) Motion for Relief from the Judgment.
54. On March 2nd, 2021 Gaines filed Motion to Recuse *Terry Robert Means*.
55. 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 because:
    a. it was a second and subsequent writ of habeas corpus;
    b. It was untimely; and / or
    c. It did not present extraordinary circumstances.
56. On March 19th, 2021 Gaines filed notice of appeal or certificate of appealability.

[79] *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).

Proceedings pursuant to a Bill of Review

57. 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.
58. 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.
59. On April 11, 2021, Gaines filed:
    a. Request for Submission & Hearing.
    b. Proposed Order on Plaintiff's Bill of Review. And,
    c. Notice of Hearing on Gaines's Bill of Review.
60. On April 15, 2021, the District Clerk filed the same, and as of yet, Gaines has heard nothing back.

SUMMARY OF THE ARGUMENT

7. The Magistrate judge, and hence the Trial Judge, erred that "the current claims and issues [could] have … been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was []available on or before the date the applicant filed the previous application[,]" and hence, the same was *procedurally defaulted*, i.e., that **Applicant-Appellant** *and* **Mowla**, his original Habeas counsel, should have suspected Westfall and the DA's office were sitting on exonerating or exculpating evidence showing Applicant-Appellant didn't shoot Rick (the extraneous victim). That they were essentially expected to suspect foul play.

ARGUMENT

Issue: Whether the factual basis of the claims was available or ascertainable on or before the date (11-1-06), the first 11.07s were filed.

ARGUMENT & AUTHORITIES

8. Because this is a "subsequent application" under *Texas Code of Criminal Procedure, Art. 11.07 (2021)*, it is subject to the provisions of *§ 4. Section 4* provides in relevant part:

    a. (a) if a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing:

        i. (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on or before the date the applicant filed the previous application;

    b. (c) for purpose of subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by subsection (a) (1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

    See Tex. Code of Crim. Proc., Art. 11.07, § 4 (2021).

9. Thus, this Court is barred from considering the merits of the instant application unless the facts giving rise to the claims made in the instant application could not have been presented in the initial application because it was "not ascertainable through the exercise of reasonable diligence on or before" the date of the initial application.

No findings / conclusions

10. The trial court erred by refusing to file findings of **fact** and conclusions of **law** because Applicant-Appellant cannot ascertain the **facts** and **grounds** for recovery on which the court based its judgment. When a party timely requests findings of **fact** and conclusions of **law** and the court does not file them, the failure is presumed harmful on appeal unless

the record affirmatively shows that the party suffered no injury.[80] In this case, Applicant-Appellant can show injury because it prevents Applicant-Appellant from properly presenting his case to the appellate court.[81] *Specifically, all the Magistrate judge Charles Patrick Reynolds said was that the 11.07s did not meet the requirements of § 4 with no explanation how (form; no substance). The trial court's adoption certainly fares no better. Consequently, Applicant-Appellant has no idea*:

> whether Wolfe and Reynolds concluded Applicant-Appellant was supposed to have for some unknown reason suspected Stephen found, kept, and handled the alleged bullet fragment with friends and family for nearly a year before it was tested against an exemplar from Applicant-Appellant's rifle, i.e., respondent knowingly suborned perjury through Fazio, or that there was a *Napue* violation.

Generally, an appellant is **harmed** if the circumstances of the particular case require the appellant to guess at the reasons for the trial court's decision.[82] In a complicated case with disputed **facts** or two or more grounds for recovery or defense, the inference of harm cannot be overcome.[83] If the error is **curable**, the appellate court may abate the appeal and remand the case to the trial court to make findings of facts.[84] If the error is **not curable**, the appellate court will reverse and remand the case for a new trial.[85]

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[80] *Tenery v. Tenery,* 932 S.W.2d 29, 30 (Tex. 1996).
[81] *Tex. R. App. Proc.* 44.1(a)(2). *Tenery,* 932 S.W.2d at 30.
[82] *Liberty Mut. Fire Inv. v. Lac*a, 243 S.W.3d, 791, 794 (Tex. App.--El Paso 2007, no pet.); *Goggins v. Leo*, 849 S.W.2d 373, 379 (Tex. App.--Houston [14th Dist.] 1993, no writ); *see Larry F. Smith, Inc. v. Weber Co.*, 110 S.W.3d 611, 614 (Tex. App.--Dallas 2003, pet. denied)(when there is one ground of recovery or no defense, appellant usually does not have to guess reasons for judgment; when there is more than one, appellant must guess reasons for judgment unless findings are provided).
[83] *Randall v. Jennings, 788 S.W.2d 931, 932* (Tex. App.--Houston [14th Dist.] 1990, no writ); *Liberty Mut. Fire Inv. v. Laca*, 243 S.W.3d, at 794.
[84] *See Tex. R. App. Proc*. 44.4(a)(2)(no reversal if trial court can correct failure to act); *see*, e.g., *Tex. R. Civ. Proc.* 18 (successor judge can make findings of fact if judge who handled case dies, resigns, or is disabled during her term); *Cherne Indus. v. Magallanes*, 763 S.W.2d 768, 773 (Tex 1989)(trial judge was still on bench and could correct error); *Brooks v. Housing Auth*., 926 S.W.2d 316, 319 (Tex. App.--El Paso 1996, no writ)(appeal was abated and trial judge was given 30 days to file findings)
[85] *See*, e.g., *Liberty Mut.*, 243 S.W.3d at 796 (reversed and remanded because judge who handled case was replaced as of election); *Larry F. Smith, Inc.* v. Weber Co., 110 S.W.3d 611, 616 Tex. App.--Dallas 2003, pet. denied)(same).

Implicit Findings / Conclusions

11. Alternatively, even though the court did not make an express **finding**, the trial court erred by implicitly **finding** that:[86]

> Applicant-Appellant was supposed to have for some unknown reason suspected Stephen found, kept, and handled the alleged bullet fragment with friends and family for nearly a year before it was tested against an exemplar from Applicant-Appellant's rifle, i.e., respondent knowingly suborned perjury through Fazio, or that there was a *Napue* violation.[87]

Explicit Findings / Conclusions

12. *In the event this Court **finds** the trial court made explicit findings hereto*:

a. the trial court erred by finding *that the **facts** giving rise to this instant application, or applications, could … have been presented in the initial application because it was … ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed* because the evidence proves conclusively, **as a matter of law**, Applicant-Appellant was not supposed to have suspected Stephen found, kept, and handled the alleged bullet fragment with friends and family for nearly a year before it was tested against an exemplar from Applicant-Appellant's rifle, i.e., Applicant-Appellant was not supposed to have suspected respondent knowingly suborned perjury through Fazio, or that there was a *Napue* violation*, or*

b. the trial court erred by **finding** *the facts giving rise to this instant application, or applications, could … have been presented in the initial application because it was … ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed, i.e., that* Applicant-Appellant was not

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[86] *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 759 (Tex. 2002); *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex. 1990)(When no findings of fact are requested or filed, the trial court's judgment implies all findings of fact necessary to support it).

[87] The same should have revealed this information long ago under the *Michael Morton Act* codified at *Texas Code of Criminal Procedure*, Art. 39.14(h, k).

supposed to have suspected Stephen found, kept, and handled the alleged bullet fragment with friends and family for nearly a year before it was tested against an exemplar from Applicant-Appellant's rifle, i.e., Applicant-Appellant was not supposed to have suspected respondent knowingly suborned perjury through Fazio, or that there was a *Napue* violation, because that finding is against the **great weight and preponderance of the evidence and is manifestly unjust**.

Conclusion

13. This Court can and should reverse the entire judgment or a part of the judgment and render the judgment that the trial court should have rendered.[88] This Court must render judgment unless remand is necessary.[89]
14. In the alternative, this Court can and should reverse the trial court's judgment and remand the case to the trial court for further proceedings consistent with the opinion of

[88] *Texas Rules of Appellate Procedure* 43.2(c), 43.3; *Long v. Castle Tex. Prod.*, 426 S.W.3d 73 (Tex.2014); see, e.g., *Sierra Club v. Andrews Cty.*, 418 S.W.3d 711, ___ (Tex. App.--El Paso 2013, n.p.h.)(Court of Appeals reversed and rendered part of judgment when question was one of law based on evidence that trial court had before it when disposing of anti-SLAPP motion); *Public Util. Comm'n v. City of Harlingen*, 311 S.W.3d 610, 631 (Tex. App.--Austin 2010, no pet.)(Court of Appeals reversed all but one part of trial-court judgment and rendered judgment affirming remainder of Commissin's final order); *Tate v. Hernandez*, 280 S.W.3d 543, 541 (Tex. App.--Amarillo 2009, no pet)(Court of Appeals reversed and rendered a take-nothing judgment).

[89] *Texas Rules of Appellate Procedure* 43.3; *Long,* 426 S.W.3d 73; *see e.g., Branch v. Monumental Life Ins.*, 422 S.W.3d 919 (Tex. App.--Houston *[14th Dist.]* 2014, n.p.h.)(Court of Appeals generally first addresses issues that would require court to reverse and render if sustained).

the court of appeals.[90] When a case is to be retried on remand this Court may address issues raised on appeal to assist the trial court on retrial.[91]

15. In the alternative, this Court can and should reverse the trial court's judgment and remand the case to the trial court for a new trial because justice requires it.[92]

Prayer

16. For these reasons, and in the interest of justice and fairness, Applicant-Appellant asks the Court to:
    a. Reverse the entire judgment and render the judgment that the Trial Court should have rendered.
    b. Reverse the trial court's judgment and remand the case to the Trial Court for further proceedings consistent with the opinion of the Court of Criminal Appeals. Or,
    c. Reverse the Magistrate Court's judgment and remand the case to the Trial Court for a new trial in the name of justice.

Respectfully submitted,

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[90] *Texas Rules of Appellate Procedure* 43.2(d), 43.3(a); *see Central Appr. Dist. v. Western AH 406, Ltd.*, 372 S.W.3d 672, 696 (Tex. App.--Eastland 2012, pet. denied); see, e.g., *Long* ,426 S.W.3d 73 (Court of Appeals remanded for recalculation of prejudgment interest); *Sierra Claub*, 418 S.W.3d at__ (Court of Appeals remanded sanctions issues because appellant did not show it was entitled to sanctions as a matter of law); *O'Carolan v. Hopper*, 414 S.W.3d 288, 304 (Tex. App.--Austin 2013, no pet.)(Court of Appeals could not render judgment because trial court improperly dismissed claim denying appellant opportunity to present evidence supporting her claim; Court of Appeals remanded for further proceedings); *S&P Consulting Eng'rs, PLLC v. Baker*, 334 S.W.3d 390, 404 (Tex. App.--Austin 2011, no pet.)(Court of Appeals remanded for further proceedings to allow appellees to file "certificate of merit" to satisfy requirements of amended statute).

[91] *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997).

[92] *Texas Rules of Appellate Procedure* 43.3(b); e.g., *Knapp v. Wilson N. Jones Mem't Hosp.*, 281 S.W.3d 163, 176 (Tex. App.--Dallas 2009, no pet.)(Court of appeals remanded for new trial because trial court refused to allow discovery of witness statement and deposition testimony in arbitration).

CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word 2013 and contains 8,291 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

_____
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CERTIFICATE OF SERVICE

I certify that on 4-26-21, I served a copy of Applicant-Appellant's Brief on Appeal on the Tarrant Co. Dist. Atty. Office listed below by U.S. mail:

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