Texas Court of Criminal Appeals
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July 12, 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 Motion to Supplement Brief on the Merits. And,
2. USB thumb-drive of written depositions.[1]

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
244 Siesta Court
Granbury, Texas 76048
Tel.: 682-500-2753
Email bartongaines@gmail.com

[1] As stated on page 1, footnote 1 of the attached document, based off the table of contents of the clerk's record in this matter, it's not clear the Tarrant County District Clerk included these in the record it forwarded to the Criminal Court of Appeals. In the event it did not, for some unknown reason, Applicant-Appellant objects thereto. He also includes the relevant portion thereto on USB thumb drive herewith.

Assist. Crim. Dist. Atty.
Andrea Jacobs
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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 Motion to Supplement Brief on the Merits.

Please contact me should you have any questions or comments.

Sincerely,

_____
BARTON R. GAINES, Pro Se
244 Siesta Court
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Tim Curry Criminal Justice Center
Attn: Tarrant Co Dist Clerk: Tom Wilder
401 W. Belknap, Third Floor
Fort Worth, TX 76196
817-884-1342

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

BARTON R. Gaines,	§	IN THE
Applicant-Appellant,	§	
	§	
v.	§	CRIMINAL COURT
	§	
STATE OF TEXAS,	§	
Respondent.	§	OF APPEALS OF TEXAS

Applicant-Appellant's Motion to Supplement Brief on the Merits

Applicant-Appellant asks the Court to permit him to supplement his Brief on the Merits.

A. INTRODUCTION

Applicant-Appellant is Barton R. Gaines; respondent is State of Texas.

B. ARGUMENT & AUTHORITIES

On March 4, 2021, Applicant-Appellant filed, including a list of questions for each individual person whom Applicant-Appellant wanted to ask at the deposition,[1] *Request (Motion) To Take The Deposition On Written Questions, And Applicant's Preemptive Objection On The Court's Failure to Explicitly Rule Here*[2] of, among other people,

[1] Based off the table of contents of the clerk's record in this matter, it's not clear the Tarrant County District Clerk included these in the record it forwarded to the Criminal Court of Appeals. In the event it did not, for some unknown reason, Applicant-Appellant objects thereto. He also includes the relevant portion thereto on USB thumb drive herewith.

[2] *See* the same.

1. Greg Westfall;
2. Cheyenne Minick
3. Michele Hartmann
4. Robert Foran

See the same.

Twenty-days later on March 24, 2021, the Tarrant County Magistrate Judge, Charles Patrick Reynolds, implicitly denied *Applicant's Request (Motion) To Take The Deposition On Written Questions,* and the same implicitly overruled *Applicant's Preemptive Objection On The Court's Failure to Explicitly Rule [Th]ereto, i.e., when he* denied Applicant-Appellant's 11.07s under § 4 of the article. That the claims were available to Applicant-Appellant on or before his previous filing.[3] Those how or why is unknown and unstated.

The very next day on March 25, 2021, the 213th Judicial District Judge, Christopher Robert Wolfe, but whose signature appears to read, "R. Gonzalez, Jr.,"[4] essentially did the same by adopting the Magistrate's Order as his own.[5]

[3] *See* the same.
[4] Is this Ruben Gonzalez of the 432nd District Court of Tarrant County, Texas? What connection does he have to the 213th Judicial District Court of Tarrant County, Texas? What, is he their signature boy who signs off on their dirty work shenanigans now? As far as Applicant-Appellant can tell, this is procedurally unlawful. Ruben Gonzalez doesn't have jurisdiction over the 213th Judicial Court, does he? In the event he does not, Applicant-Appellant objects hereto and therefor.
[5] *See* the same.

Defendant's argument that state violated pre-trial discovery order by not producing photographs in timely manner was ***preserved*** for appellate review, where defendant's objection at trial was clear enough to convey that defendant was objecting to timeliness of state's production of photographs in alleged violation of pre-trial discovery order. *Kirksey v. State* (App. 9 Dist. 2004) 132 S.W.3d 49. Criminal Law 1035(2)

Objection of tenants in forcible entry and detainer action to landlord's interrogatory on ground that they were not required to state particular knowledge and opinions of identified potential witnesses was adequate to ***preserve*** issue for appeal. *Housing Authority of City of El Paso v. Rodriguez-Yepez* (App. 8 Dist. 1992) 828 S.W.2d 499, writ denied 843 S.W.2d 475. Appeal And Error 232(.5)

Entertainment show journalist seeking mandamus relief against discovery orders in defamation suit ***preserved*** for review arguments that trial court did not follow correct procedure for production of electronic storage devices and that case was not appropriate to compel production of actual hard drives; even though case establishing the procedure was decided after the orders, journalist's attorney brought the case to trial court's attention at hearing on motion to clarify order compelling production and appointing the independent computer forensic examiner

and in motion to reconsider. *In re Harris* (App. 1 Dist. 2010) 315 S.W.3d 685, rehearing denied. Mandamus 172

Objection to interrogatories served in 1989 ***preserved*** objection to identical interrogatory served in 1991. *State Farm Mut. Auto. Ins. Co. v. Engelke* (App. 1 Dist. 1992) 824 S.W.2d 747. Appeal And Error 232(.5)

When discovery is denied and because of the denial the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal. *Ford Motor Co. v. Castillo* (Sup. 2009) 279 S.W.3d 656. Appeal And Error 4264

If the trial court abuses its discretion in a discovery ruling, the complaining party must still show harm on appeal to obtain a reversal; "harmful error" is error that probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the court of appeals. *Ford Motor Co. v. Castillo* (Sup. 2009) 279 S.W.3d 656. Appeal And Error 3311; Appeal And Error 4261

(a) Generally. A court of appeals must not affirm or reverse a judgment or dismiss an appeal if: (1) the trial court's erroneous action or failure or refusal

to act prevents the proper presentation of a case to the court of appeals; and (2) the trial court can correct its action or failure to act.

(b) Court of appeals direction if error remediable. If the circumstances described in (a) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had not occurred.

See Tex. R. App. Proc. 44.4. A defendant may not be entitled to a reversal if an abatement gives the trial judge a chance to clear up an unclear ruling. *Henery v. State*, 364 S.W.3d 915 (Tex. Crim. App. 2012).

To reiterate, the controverted, previously unresolved **facts** which were material to the **legality** of applicant-appellant 's $20,000 **fine** and 35 year **confinement**, were:

a. :

i. did Westfall and Minick (Cheyenne) abandon their duty to keep Applicant-Appellant informed of important developments throughout the course of the prosecution, and / or did they fail to bring to bear such skill and knowledge to know the difference between what was or was not important, so that they

could render the trial a reliable testing process. *Strickland v. Washington,* 466 U.S. 668, 688 (1984), and

ii. was Applicant-Appellant prejudiced therefrom; or

b. :

i. did Westfall (Greg) and Minick (Cheyenne) actively represent conflicting interest (i.e. setting legal precedent on Applicant-Appellant's potential criminal / culpable responsibility for shooting Rick), and

c. did that actual conflict of interest adversely affect their performance, *Strickland*, 466 U.S. at 692.[6]

[6] "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See* ***United States v. Cronic****, ante* at 466 U. S. 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante* at 466 U. S. 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. ¶ One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In ***Cuyler v. Sullivan****,* 446 U.S. at 446 U. S. 345-350, the Court held that prejudice is presumed when counsel is burdened by an ***actual conflict*** of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, *see, e.g.,* Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel ***"actively represented conflicting interests"*** and that ***"an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan****, supra,* at 446 U. S. 350, 446 U. S. 348 (footnote omitted)." (emphasis added).

See, generally, Applicant-Appellant's affidavit attached to his 11.07 Applications. *Also see* Thomas v. FL, 992 F.3d 1162, 1180 & 1184 (11th Cir. 2021).[7]

It goes without saying respondent presented testimony through Fazio that exceeded the sciences of the ballistics in violation of the 14th Amendment and *Napue*.

The 432nd District Court Ruben Gonzalez, or "R. Gonzalez," refusal to allow Applicant-Appellant the opportunity to question, either orally or written, among others, "his trial attorneys" and the ADAs, and those under the ADAs direct control at the time, probably caused the rendition of an improper judgment or probably prevented Applicant-Appellant from properly presenting the case to the court of appeals.

Ruben Gonzalez, or "R. Gonzalez," prevented Applicant-Appellant from proving the factual basis of the claims were NOT available or ascertainable on or before the date (11-1-06) the first 11.07s were filed, i.e., his trial attorneys failed to

[7] Prisoner had no reason to believe that counsel would deliberately ignore his directions in order to pursue counsel's personal goal of challenging the constitutionality of limitations period.

Appointed counsel's abandonment of her duty of loyalty to state prisoner, so counsel could promote her own interests in challenging the constitutionality of limitations period for filing federal habeas petition, was an extraordinary circumstance that warranted equitable tolling of the limitations period; counsel's deliberate action of delaying the filing of the petition was directly contrary to prisoner's instructions to file a timely petition, and was adverse to his best interests.

keep him informed of important developments throughout the course of the proceedings, and that the ADAs knew, or should have known, that they were suborning perjury through Fazio that the supposed bullet fragment Stephen supposedly found was fired from the rifle.

Then Ruben Gonzalez, or "R. Gonzalez," found Applicant-Appellant failed to prove the factual basis of the claims were NOT available or ascertainable on or before the date (11-1-06) the first 11.07s were filed, i.e., his trial attorneys failed to keep him informed of important developments throughout the course of the proceedings, and that the ADAs knew, or should have known, that they were suborning perjury through Fazio that the supposed bullet fragment Stephen supposedly found was fired from the rifle.

The 432nd district court, or R. Gonzalez, therefore abused his discretion denying Applicant-Appellant the opportunity to show[8] the factual basis of the claims were NOT available or ascertainable on or before the date (11-1-06) the first 11.07s were filed, then finding and concluding Applicant-Appellant failed to show the

[8] I.e., the trial court abused its discretion denying Applicant-Appellant's Request (Motion) To Take The Deposition On Written Questions, then overruling Applicant-Appellant's Preemptive Objection On [t]hereto; i.e., to even broach or delve into the subject matter at hand.

factual basis of the claims were NOT available or ascertainable on or before the date (11-1-06) the first 11.07s were filed.

C. CONCLUSION

Because Applicant-Appellant objected to the trial court's refusal to rule on his motion to depose, Applicant-Appellant preserved for appellate review

The trial court's abuse of discretion probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the court of appeals.

D. PRAYER

For these reasons, Applicant-Appellant asks the Court to abate the proceedings back to the trial court with instructions to hold deposition on his written questions, either orally or written.

Respectfully submitted,

By:_____

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CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word and contains 1,805 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).

_____
BARTON R. GAINES, Pro Se

CERTIFICATE OF SERVICE

I certify that on 7-12-21, I served a copy of Applicant-Appellant's Brief on Appeal on the Tarrant Co. Dist. Atty. Office listed below by U.S. mail:

Assist. Crim. Dist. Atty.
Andrea Jacobs
SBOT: 24037596
401 West Belknap Street
Ft. Worth, Texas 76196-0201

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_____
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