21-6026

No. 21A-__

IN THE
SUPREME COURT OF THE UNITED STATES

BARTON R. GAINES,
Petitioner,

vs.

BOBBY LUMPKIN, Dir., TDCJ--CID,
Respondents.

On Petition for a Writ of Certiorari to the
Texas Criminal Court of Appeals

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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I. QUESTION PRESENTED

Like Brady, but with defense counsel (i.e., rather than the prosecutor), does the defendant have a reasonable expectation that his trial counsel will comply with *Strickland*, or does that reasonable expectation evaporate upon conviction or after trial, unlike in *Brady*.

II. DEFINITIONS

1. 1 FCR is Federal Clerk's Record for my first Federal 2254
2. 2 FCR is Federal Clerk's Record for my second Federal 2254
3. 3 FCR is the Federal Clerk's Record in the federal lawsuit Mowla filed against the prison officials.
4. AAG is Assistant Attorney General
5. ACR is appellant's clerk's record.
6. ADA is Assistant District Attorney
7. AEDPA is Anti-Terrorism and Effective Death Penalty Act
8. AG is Attorney General
9. AK47 is Automatic Kalashnikon 1947.
10. aka is also known as
11. APP is Appendix
12. ARR IS Abatement Reporter's Record from my direct appeal.
13. Bart is Barton and vice-versa.
14. CA is Court of Appeals
15. CCA is Criminal Court of Appeals
16. Ch. is Chapter
17. CPD is Crowley Police Department
18. CR is Clerk's Record
19. CSI is Crime Scene Investigator
20. DA is District Attorney
21. DOB is date of birth
22. DOD is date of death
23. DX is defendant's exhibits
24. EX is exhibit
25. F, C, & R is Findings of Fact, Conclusions of Law, and Recommendations
26. FFCL is Finding of Facts and Conclusions of Law
27. FN is footnote
28. FWPDCL is Fort Worth Police Department Crime Lab
29. FWPD is Fort Worth Police Department
30. IATC is ineffective assistance of trial counsel
31. ID is identification
32. LPN is license plate number
33. MDC is Mansfield Detention Center
34. Missy is Melissa and vice-versa.
35. MLEC is Mansfield Law Enforcement Center (Mansfield, TX)
36. MVD is motor vehicle department
37. PDRs is Petition for Discretionary Review
38. RR is Reporter's Record; preceded by the volume number and followed by the page and line number
39. SCFO is State Counsel for Offenders.

40. SCOTUS is Supreme Court of the United States
41. SCR is the Supplemental Clerk's Record.
42. SHCR is State Habeas Clerk's Record
43. SKS is Samozaryadny Karabin sistemy Simonova, 1945 (Russian: Самозарядный карабин системы Симонова, 1945; Self-loading Carbine of (the) Simonov system, 1945).
44. STD is Sexually transmitted disease
45. SubCh. Is subchapter
46. SX is state's exhibits
47. TCDA is Tarrant County District Attorney
48. TCU is Texas Christian University
49. TDCJ is Texas Department of Criminal Justice
50. TS is Texas Syndicate

III. LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cheyenne B. Minick (Tr.Atty.)
Gregory B. Westfall (Tr.Atty.)
Jeff Kearney (App.Atty.)
Kim Minick (ADA)
M. Michael Mowla (Writ Atty.)
Robert F. Foran (ADA)
Shelia Wynn (ADA)
Michele B. Hartmann (ADA)
Mollee B. Westfall
Paul Francis (App.Atty.)
Robert K. Gill (Tr. Judge)
W. Reagan Wynn (App.Atty.)

RELATED CASES

TRIAL

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

DIRECT APPEAL

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

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

1ST STATE WRIT

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

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

§ 2254

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

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

2ND STATE WRIT

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

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

FRCP 60(b)(6)

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

2. *Gaines v. Lumpkin*, No. 21-10301, U.S.C.A., 5th Circuit, New Orleans, Louisiana. Judgment has not been entered yet as of this mailing/filing.

BILL OF REVIEW (1ST STATE WRIT)

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

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

IV. TABLE OF CONTENTS

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V. TABLE OF AUTHORITIES CITED

Cases

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

VI. OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is unpublished.

The opinion of the 213th judicial district court of Tarrant County, Texas, appears at Appendix A & B to the petition and is unpublished.

VII. JURISDICTION

The date on which the highest state court decided Gaines's case was July 14, 2021. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Amendment V to the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a *presentment or indictment of a Grand Jury*,[1] except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of *life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

- Amendment VI to the United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and *to be informed of the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

- Amendment XIV to the United States Constitution, § 1: *All persons born* or naturalized *in the United States* and subject to the jurisdiction thereof, *are citizens of the United States and of the State wherein they reside*. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

[1] *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000)(Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, § 2, cl. 3 ("The Trial of all Crimes ... shall be by Jury"). With the exception of the Grand Jury Clause, see *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884), the Court has held that these protections apply in state prosecutions, *Herring v. New York*, 422 U.S. 853, 857, and n. 7, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)).

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- Texas Code of Criminal Procedure Article 44.29(b), Effect of Reversal (2021). If the court of appeals or the Court of Criminal Appeals awards a new trial to a defendant other than a defendant convicted of an offense under § 19.03, Penal Code, only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under Subsection (b), § 2, Article 37.07, of this code. If the defendant elects, the court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court. At the new trial, the court shall allow both the state and the defendant to introduce evidence to show the circumstances of the offense and other evidence as permitted by § 3 of Article 37.07 of this code.

IX. STATEMENT OF THE CASE

A. PRETRIAL 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 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]

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[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).

[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 ¶ 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

Mike agreed to lead Jason to a friend who 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]

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

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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 (¶ 73 of Gaines's affidavit).

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

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

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

[9] See (3 RR 57:25-58:3)(3 RR 95:2-14)(3 APP 63:23-35)(3 APP 65:18-19).

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]

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]

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[10] See (¶ 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 (¶ 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).
[14] See (¶ 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).

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]

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)

[16] See (¶ 81 of Gaines's affidavit)(3 RR 64:6-65:8)(3 APP 86:32-35).
[17] See (¶ 82 of Gaines's affidavit).
[18] See (¶ 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).

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 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]

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[20] See (¶ 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 (¶ 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).

[22] See (¶ 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).

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]

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]

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[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).
[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).

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 (Vickey) showed up over there (Coker's) shortly thereafter.[28]

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

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

[28] See (¶ 96 of Gaines's affidavit)(3 APP 280).
[29] See (¶ 97 of Gaines's affidavit).
[30] See (3 APP 280:245-250) and (¶ 97-101 of Gaines's affidavit).
[31] See (¶ 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).

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 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 (a distraction), but that he (Gaines) also told them (Jerri and Mindy) that he (Gaines) committed another robbery / shooting (an even bigger distraction), Charla B. Smith *padded her file* / 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)

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[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).
[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).

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] (She might as well of been accusing him of being the second shooter behind the grassy knoll in Dallas off Main Street).

After Westfall (Greg) 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 (Greg) pressed on with other, untold plans (untold strategies) in mind (*sandbagging* (*i.e.,* the whole procedural default thing with competent attorneys. *see Dietrich v. Ryan*, 740 F.3d 1237, 1244 (9th Cir 2013))), plans (strategies) for Gaines's direct

[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).

[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).

appeal (all without telling Gaines), which ultimately got scrapped, because of an unexpected grievance from an unexpected inmate (Tony Gregory),[41] then obstructed and sabotaged.[42]

More particularly, right before trial Westfall (Greg) met with, discussed, and mislead Gaines as to the true nature and cause of the extraneous accusations. As detailed further on *page 36* below, at trial, when it came out, Westfall (Greg) lied to Gaines. That there was no evidence to support his story or testimony that he didn't commit the extraneous, and no time to try to dig it up, even if they could undo respondent's previous doings to the contrary.[43] So Gaines bite his tongue. To remain silent. That there would be plenty of time later to scream it from the rooftops, whatever that meant.[44] Consequently, Gaines waived his right to rebut (testify)[45] the extraneous. Notably, without Gaines's involuntary help, silence, acquiesce, or waiver, Westfall (Greg) and the other parties, outlined above, wouldn't have been able to create, design, and execute the charge error.[46]

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[41] See (2 RR 7:11-8:3) (ACR Dkt. 4:2:4)(1 CR 78, 3d ¶) (2 CR 33, 2d ¶)(¶ 176-177 of Gaines's affidavit). *Bluitt v. State*, 70 S.W.3d 901, 902-903 (Tex. App. —Fort Worth 2/14/02). Gregory v. State, 2010 Tex. App. Lexis 618 (CA2 2010). *Gregory v. State*, 2004 Tex. App. LEXIS 10151 (Tex. App.—Fort Worth 2004, pet. denied).

[42] Discussed in detail below.

[43] See generally *In re Young*, 789 F.3d 518, 529 (5th Cir. 2015), citing *Pacheco v. Artuz*, 193 F. Supp.2d 756, 761 (S.D.N.Y. 2002)(This sort of evidence is a unique form of evidence in that it is completely incumbent on the witness to come forward and admit prevaricated testimony).

[44] See (2 RR 84:19-25)

[45] *[U.S.] v. Lore*, 26 F.Supp.2d 729, 738 (D. NJ 1998)(Defense counsel had responsibility to *inform* defendant of *nature* and existence of right to testify, and that the right *was solely defendants to invoke or waive.* U.S.C.A. Const.Amends. 5, 6, 14), *citing* [U.S.] v. Teague, 953 F.2d 1525, 1534 (11th Cir. 1992).

[46] *Huizar v. State*, 12 S.W.3d 479 (Tex.Crim.App. 2000)(484: While § 3(a) says nothing about the submission of a jury instruction to this effect, such instruction is logically required if the jury is to consider the extraneous-offense and-bad act evidence under the statutorily prescribed reasonable-doubt standard. Absent such instruction, the jury might apply a standard of proof less than reasonable doubt in its determination of the defendant's connection to such offenses and bad acts, contrary to § 3(a).[7] § 3(a)'s requirement that the jury be satisfied of the defendant's culpability in the extraneous offenses and bad acts is thus "law applicable to the case" in the non-capital punishment context.[8] *Cf. Arline v. State*, 721 S.W.2d 348, 352 fn. 4 (Tex.Crim. App.1986)(recognizing that "statutorily defined word or phrase must be included in the charge as part of the `law applicable to the case'"). As this was "law

On 12/12/02, the jury, unsurprisingly to everybody but maybe the naive, trusting Gaines, or so it appears, returned with two verdicts of 35 years confinement, and two $10,000 fines, exemplary damages (the extraneous) in civil for the extraneous, which the judge (Gill) ordered to run concurrently, as required by the law.[47]

B. DIRECT APPEAL AND STATE HABEAS

After the jury was dismissed and Gaines was taken behind Gill's court room to his cell to change into his prison garb and shackled, but before he entered the cell, Minick (Cheyenne) leaned up against the door, blocking his way, to sign a piece of paper, then he handed it to him to sign before he entered the cell and the bailiff, Mr. Darusha (2 RR 140:4), closed the door. *See* (¶ 172 of Gaines's affidavit).

Shackled and in his prison garb, Gaines was "escorted" back out into the courtroom where he got to hug his family one last time. *See* (¶ 173 of Gaines's affidavit).

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applicable to the case" appellant was not required to make an objection or request under § 3(a) in order for the trial court to instruct the jury thereunder. For this reason, the Court of Appeals was correct to conclude the trial court erroneously failed to instruct the jury under § 3(a)(485: I join the opinion of the majority, reversing the judgment of the court of appeals and remanding this case for analysis under *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App.1985)(opinion on reh'g). I would additionally order the court of appeals to determine *whether the failure of trial counsel* to ask for the instruction as to the State's burden of proof as to extraneous offenses introduced at the punishment phase of appellant's trial amounts to *ineffective assistance of counsel*[1] to the extent that appellant is entitled to a new punishment hearing).

[47] 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).

Next, Westfall (Greg) had Gaines sign a few motions to start his appeal and he was off (1 CR 128-129)(2 CR 67-69); Westfall (Greg) seemed cagey; Minick (Cheyenne) seemed excited, and it was catchy, but Gaines was unsure why. *See* (¶ 174 of Gaines's affidavit).

They told Gaines the appeal lawyer friend (Wynn (William Reagan) of whom they were having Gill appoint him (1 CR 129)(2 CR 69) was very good—like his case would not stand up on appeal. *See* (¶ 175 of Gaines's affidavit).

Unfortunately for Gaines, when he got back to the cell block an older guy from Crowley whose name was Tony L. Gregory,[48] after talking to him, he took it upon himself to write a state bar grievance against Westfall (Greg), and encouraged him to sign and mail it, like it would help his appeal; and he watched him sign and mail it. *See* (¶ 176 of Gaines's affidavit).

Not only that, but after they did that Gaines called his folks and told them and they also filed one on not only Westfall (Greg), but Hartmann too who, according to Gaines mom, made fun of her with her pregnant lawyer friend (D.D. Handy)[49] for crying by saying "Oh! boo-hoo!" Like it was no big deal for her or something. *See* (¶ 177 of Gaines's affidavit).

Gaines wasn't in T.D.C.J. on the Allred Unit two weeks before Wynn (W.R.) had him in a Tarrant County Sheriff Officer's van on his way back to Tarrant County jail. *See* (¶ 178 of Gaines's affidavit *citing* (3 APP 233)).

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[48] *Gregory v. State*, 2004 Tex. App. LEXIS 10151 (Tex.App.—Fort Worth 2004, pet. denied).
[49] *Bottenfield v. State*, 77 S.W.3d 349 (Tex.Crim.App. 2002).

When Gill asked Gaines if he was indigent, Gaines especially remembers saying yes, that "it" (the money out of his trust) "was given to his grandma." And that "[s]he spent the money trying to get him less time". Not, "[i]t was given to [his] grandma". And that "[s]he spent every bit of the money trying to get [him] out during that time" (1 ARR 3:3-13). *See* (¶ 179 of Gaines's affidavit).

They make it sound like she was just like, "Oh well" and went on with her life; Gaines not only remembers this because he was trying to hint around at less time, but also because the same bailiff at his trial, Mr. Darusha told him on his way back to the holding tank behind *Gill's* courtroom, "good answer," his hinting around at less time. *See* (¶ 180 of Gaines's affidavit).

When Gill found Gaines indigent and the court appointed him Francis,[50] Hartmann, who was sitting perched in the middle of the jury box the whole time, interjected, "judge!" like she didn't want Gaines to get a free lawyer, or like she didn't want them to do what they were about to do to him (derail his appeal) through his substitute appeal counsel (Francis) and the ensuing Ander's (No-Merit)(malpractice) brief, which Gill charged Gaines $1,000 for (1 CR 86)(2 CR 41), that followed (a thorough trashing). *See* (¶ 181 of Gaines's affidavit).

[50] Gill, of course, added an extra layer of confusion by first appointing Gaines Whitney Wiedeman (1 CR 140-41)(2 CR 80-81) by mistake; Gaines remember writing his mom the second he got him to call him, etc., but he said he didn't know why he was appointed to represent him. That he only handled civil cases.

But Gill cut her off before she was able to say whatever she was hoping to say in front of Gaines, and he was returned to jail and prison, and the outburst deleted from the record like she was never even there (1 ARR 3:19-21). *See* (¶ 182 of Gaines's affidavit).

When Gaines received notice from Gill's clerk (1&2 SCR 2-3) who (Francis) had been appointed Gaines his direct appeal, he wrote and rehashed the same story above, but much like Wynn (William Reagan), except for this, he told him that he had been appointed much too late to amend his motion for new trial, or to otherwise get his statements into the record by way of an order from the intermediate appellate court (3 APP 235-236)(3 APP 232), and that he could not argue the same because it was outside the record; Wynn just flat out refused to answer him. *See* (¶ 183 of Gaines's affidavit).

So, Gaines asked him about the charge error, but he argued the charge was sufficient and that he was not going to therefore argue it, i.e., that it was not appealable. *See* (¶ 184 of Gaines's affidavit).

Gaines was on the John Middleton Unit when Gaines received Francis' no-merit brief; an inmate there who worked in the law library showed him a book (State Counsel for Offenders; SCFO) with a motion-letter in it to represent himself pro se on his direct appeal, in response to Francis' no-merit brief. *See* (¶ 185 of Gaines's affidavit).

In response, Gaines was bench warranted back to the county jail where he stayed with the same jail house lawyer (Tony Gregory) who talked him into filing the state bar grievance against

Westfall (Greg) for the remainder of the year reviewing his punishment proceeding records (CR & RR) and preparing his pro se appeal brief.[51] *See* (¶ 186 of Gaines's affidavit).

Tony, however, like Francis, told Gaines that the only thing he could complain about on his appeal was the voluntary nature of his guilty pleas, then he told him he was incompetent to enter guilty pleas because, if he was insane on Paxil when the crime occurred, then he was also incompetent on Paxil, which he was still on when he entered his pleas (Tony drafted his brief (in haste Gaines might add; before catching chain to TDCJ)[52] then his grandma typed it). *See* (¶ 187 of Gaines's affidavit).

Tony suggested they gather affidavits to attach to Gaines brief, since it was too late to add them to his motion for new trial (Tony evidently didn't know how to get them into the record otherwise; the 18 year old Gaines surely did not. The old lonely man, Gaines, however….). *See* (¶ 188 of Gaines's affidavit).

One of them they gathered was from Jason; the idea, according to Tony, was incompetence and guilty pleas; so, they got affidavits oriented in that direction. *See* (¶ 189 of Gaines's affidavit).

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[51] While preparing Gaines direct appeal brief he met another one of Francis' clients (some big burly black guy) whom Francis also filed a no-merit brief for who also had an aggravated robbery, and who also filed the same motion to go pro se.

[52] Around September 2003 Gaines remember Tony was yanked into court, convicted, and sentenced to 40 years, for what, he (Gaines) did not know. Then Gaines got yanked into court and made to account for the possession of marijuana under-two ounces case that he was out on bond for when he got picked up for the robbery case (Gaines called his mom after arraignment to call his attorney, Ed. G. Jones, who had been handling the case before he (Gaines) got arrested for the robbery, but she said he told her that he had done all that he was going to do and that he (Gaines) was on his own. So, Gaines had to settle for the court appointed whom they appointed him, Leticia Sanchez-Vigil.

So, Gaines wrote to him, and he wrote to him; they had to send the letters through Gaines's mom because of some new policy T.D.C.J.[53] had implemented regarding inmate to inmate correspondence, so it was few and far between. *See* (¶ 190 of Gaines's affidavit).

Gaines remembers him (Jason) asking him or his mom how the cops or D.A. got the pictures of him, his older brother (Jeremy), and Jake Hardin with the money, marijuana, jewelry, and Latin King gang-signs (3 APP 126-140), and he remembers his mom telling him that she told him that the Fort Worth Police Department must have found them in his stuff that he left at our house from one of the times he lived with us when they ransacked his storage building looking for the shotgun, apparently without a warrant.[54] *See* (¶ 191 of Gaines's affidavit).

He said his lawyer told him that he would have gotten probation if it was not for those pictures. *See* (¶ 192 of Gaines's affidavit).

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[53] See *T.D.C.J. Board Policy* B.P.-3.-91.1.B.1.(Restricted Correspondents 1. Other Offenders may not correspond with other offenders unless: a. The offenders are immediate family members, which means parents, stepparents, grandparents, children, stepchildren, spouses, common law spouses, siblings, aunts and uncles, and nieces and nephews; b. The offenders have a child together, as proven through a birth certificate, and the parental rights have not been terminated; c. The offenders are co-parties in a currently active legal matter; or d. The offender is providing a relevant witness affidavit in a currently active legal matter. Prior to an offender being approved to correspond, relationship issues shall be verified through the records office and legal matters shall be verified through the access to courts department).

[54] Gaines remembers his mom and Corey telling him about it after it happened, and they still had the card Benbrook Officer Zomnir, badge number 215 or 3666, gave them in response thereto (3 APP 239). She and Corey had some of their Christmas stuff in there and Corey said the cops stole his little choo choo train that he had bought the year before to go around the Christmas Tree (*Outstanding* job). Besides Corey and Gaines's mom, Gaines was the only one with a key to the storage, and when the cops gave Gaines's truck back (Gaines's grandma and her husband had Corey and his mom go with them to get his truck; Corey told the officer who was delivering it said it was kind of weird having them pick it up there (a bad part of town), and the officer said, "Sir, this whole thing is weird. We never do this")(3 APP 222-227) that the key was still on his (Gaines's) key ring. Corey and his mom said they even put the lock back on his storage after they demolished the inside looking for the shotgun.

After the Second District of Appeals of Fort Worth upheld Gaines convictions and sentences on 10-14-04,[55] he was transferred from O.L. Luther Unit where he was treated for TB, incidentally, to the James V. Allred Unit in response to his belated grandma's oncologist's (Dr. Mark Redrow, M.D.) (1 CR 57-58)(2 CR 19) request that he be transferred to a prison closer to her. *See* (¶ 193 of Gaines's affidavit).

When the Criminal Court of Appeals (CCA) denied review of his Petition for Discretionary Review (PDR), which Gaines mom's[56] boss's (Mark Hoak) appeal lawyer friend (John Gregory Tatum) filed for him for approximately $1,200, Tony, the same jail-house lawyer[57] mentioned above wrote Gaines's grandma to hire him his friend's, Allen Norrid's[58] writ attorney whom his family somehow knew named Mehdi Michael Mowla, a New York lawyer.[59] *See* (¶ 194 of Gaines's affidavit).

Next thing Gaines knew Mowla put not only him on his visitation list when he came to visit Norrid, but he also put Tony on there too;[60] he brought us legal tablets, a few case laws (see e.g., *Ex parte Tuley*, 109 S.W.3d 388 (Tex.Crim.App. 2002)) plus some stuff on filing an out of time motion for new trial. *See* (¶ 195 of Gaines's affidavit).

Mowla did not seek a writ of certiorari with the U.S. Supreme Court for Gaines.[61]

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[55] *Gaines v. State*, 2004 Tex. App. LEXIS 9147 (Tex.App.—Fort Worth 2004); *Gaines v. State,* 2005 Tex. Crim. App. LEXIS 773 (Tex. Crim. App. 2005).
[56] She took a nine month paralegal course to help Gaines with his appeal.
[57] Who was now on the Allred Unit serving his forty year sentence; he was on the William P. Clements Unit, but he too got hard shipped to the Allred Unit like Gaines because it was closer to Fort Worth.
[58] *Norrid v. State*, 925 S.W.2d 342 (Tex.App.—Fort Worth 1996).
[59] Mowla was a staff attorney there on the Supreme Court of that State who boasted a 90% success rate at keeping New York prisoner's writs from getting through him (so much for a neutral court; surely Texas isn't like that), and who apparently learned while there (straight out of law school and bar certified) that the approximate 10% of the writs that got through him were the actual innocence writs.
[60] So, it appears Tony conned Gaines's grandma (Gail Inman) into hiring himself (Tony) and Gaines Mowla.
[61] See (SHCR 14).

November 1, 2006, Gaines, through Mowla, filed two state habeas applications challenging his convictions and sentences,[62] which were denied by the CCA on February 27, 2008, without written order based upon the trial court's January 30, 2008, findings.[63]

C. FEDERAL HABEAS PROCEEDINGS

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.[64]

Mowla lied to Gaines that he was filing his § 2254 concurrently with his 11.07s[65] like he did in Norrid's case,[66] 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.[67]

Gaines's grandmother hired Mowla right after the CCA refused to hear Gaines's PDR on 5-18-05,[68] 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

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[62] See (SHCR 2, 10).
[63] See (SHCR 243) (2 FCR 13).
[64] See (1 FCR 205-207).
[65] See (¶ 249 of Gaines's affidavit).
[66] *Norrid v. Quarterman*, 2006 U.S. Dist. LEXIS 83380 (N.D.T.X. 10-16-06).
[67] See (1 FCR 144).
[68] See (1 FCR 127).

evidence more than "discoverable at the time of ... trial",[69] and even then Mowla filed it in the wrong division,[70] 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,[71] 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.[72]

On the very last day of the extension on 10-9-06 Baxter filed (unsurprisingly) a motion to dismiss under 2254(b, c).[73] And, for good measure, no doubt, because *Lawrence v. Florida,* 127

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[69] See (2 FCR 97).
[70] See (1 FCR 200 + n.2).
[71] See (1 FCR 174).
[72] 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.?
[73] See (1 FCR 181-88).

S.Ct. 1079 (2007)[74] 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 aware of the matter, waited until the 91st day (11-16-06) to adopt Bleil's Finding, Conclusions, & Recommendation (F, C, & R),[75] 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,[76] much like he did Gaines's 11.07s & 2254 filings and proceedings,[77] 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.[78]

On the same day (11-16-06) Means dismissed Gaines's first 2254 without prejudice, but for any tolling provisions,[79] Gill, no doubt aware of the whole federal fiasco, *and apparently in contact with Means*, or Means Gill, or both, he (Gill) ordered Westfall (Greg) and Minick

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[74] *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).

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

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

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

[78] 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 ¶ 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 ¶ 250 of Gaines's affidavit)).

[79] See (1 FCR 205-06),

(Cheyenne) to respond to what Mowla himself (Mowla's self) termed was a prima facie[80] ineffective-assistance-of-trial-counsel (IATC) arguments,[81] which Morgan described boiled "down to the claim that [Gaines] was denied effective assistance of counsel because [Westfall (Greg) and Minick (Cheyenne)] didn't spend enough time investigating his case[,]" completely ignoring the "prejudice" prong of *Strickland*.[82]

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,[83] and Sturns stepped in to deny on 1-31-08 Mowla's flimsy prima facie[84] IATC claim that Westfall (Greg) and Minick (Cheyenne) were ineffective because Westfall (Greg) and Minick (Cheyenne) didn't investigate enough, with no showing himself what Westfall (Greg) and Minick (Cheyenne) failed to discover and what to do with it had they (Westfall (Greg) and Minick (Cheyenne)) and how the deficient performance prejudiced Gaines's defense.[85] Then on 2-27-08 the CCA summarily

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[80] *Strickland v. Washington*, 466 U.S. 668, 678 (1984).
[81] See (1 FCR 91).
[82] (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)?).
[83] 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.
[84] *Strickland v. Washington*, 466 U.S. 668, 678 (1984).
[85] See (SHCR 46, 243).

denied Mowla's flimsy 11.07 arguments based upon Sturns' 1-31-08 denial, i.e., Sturns rubber-stamped Andréa Jacobs proposals.[86]

On 3-3-08 when Mowla returned to Federal Court, Bleil *ordered* respondent, through S. Michael Bozarth, to argue Gaines was time-barred,[87] which Bozarth did,[88] and Bleil, unsurprisingly agreed,[89] but Mowla[90] didn't tell Gaines that Means adopted Bleil's F, C, & R[91] 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.[92]

All Mowla wrote back was he (Mowla) thought Gaines's grandmother and mother told him (Gaines) that Means denied his 2254,[93] and that he didn't appeal it because he was going to

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[86] See (2 FCR 144).

[87] 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 ¶ 253 of Gaines's affidavit)(1 FCR 179).

[88] See (2 FCR 92-100).

[89] See (2 FCR 146). So much for trying to be discrete about what they were doing, right?

[90] 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)).

[91] 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).

[92] See (¶ 264 of Gaines's affidavit)(2 FCR 155; 172).

[93] 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 2241(d)(1)(D). See *In re Young*, 789 F.3d 518, 529 (CA5

charge them $5,000 to appeal it,[94] 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.[95] 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 to him alone, $80K+ including the others).[96]

D. SUBSEQUENT STATE HABEAS PROCEEDING

On 8-19-20, after 18.5 years to the day, minus 3-days, Gaines made parole, and on 10-12-20 filed a freedom of information act request with the Tarrant County Criminal District Attorney's Office for him and his two codefendants, and on 12-21-20 the DA's office finally responded thereto, then on 12-30-20 Gaines inadvertently discovered the Westfalls threats, Mowla's ensuing conflict and possible eventual sabotage.[97]

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).

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

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

[96] See (¶ 282 of Gaines's affidavit).

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

Then on 2/21/21, 19-years to the date of the crime, Gaines filed 11.07s, unsure whether Mowla was in on it (sabotage adjudication) with Greg and Mollee Westfall and trial court judge *Robert Keith Gill* to sabotage adjudication of their timeline and charge errors.

On 2/27/21, Gaines filed Request (motion) To Take The Deposition On Written Questions of several state actors, complete with notice(s), subpoena(s), and a list of questions he wanted to ask deponent(s) at deposition.

On 3/17/21, Gaines filed *Proposed Findings of Fact And Conclusions of Law* with accompanying *order*.

On 3/24/21, Tarrant County District Magistrate Judge *Charles Patrick Reynolds* found and concluded:

- Greg was not required to inform Gaines of important developments throughout the course of the prosecution, *or*, if he was required to inform Gaines of important developments throughout the course of the prosecution,
- Gaines had a burden to investigate whether evidence existed that Greg had a constitutional obligation to inform Gaines about but did not.
- That Gaines was required to *shed* his reasonable reliance on Greg's compliance with *Strickland* after he went to trial, was convicted, and was sentenced to serve a term of imprisonment.
- That *Strickland* did not impose obligation on Greg to inform Gaines of, one in which Gaines was entitled to place his faith, at least not without facts giving him reasonable basis to suspect Greg did not.
- That Gaines (as a habeas applicant) is obligated to investigate the factual basis for a potential claim even if he had no reasonable expectation that an investigation would produce relevant information.
- That even if there are no facts to tip him off otherwise, Gaines (as a habeas applicant) may not reasonably trust that his trial counsel acted according to his constitutional obligations.
- That, a reasonable expectation that defense counsel will comply with *his duty to consult and inform evaporates* upon conviction or after trial (just another way to gut the imputation of opposing parties' counsels' deficiencies); that is, unless and until

there are reasons to think otherwise, that reasonable expectation did not continues past trial into *postconviction proceedings* and beyond.

- That Greg could (may) unlawfully obstruct, alter, destroy, or conceal from Gaines access to documents or other material,[98] i.e., evidence corroborating Gaines's story he was *innocent* of shooting Rick, in anticipation of the impending dispute (i.e., 11.07s & 2254).

In other words, res judicata prevented further consideration thereof, and that the State essentially figured out another way, in addition to pushing effective-assistance-of-trial-counsel claims outside the direct appeal process where defendants, and Gaines, have and had the right to effective-assistance-of-appeal-counsel,[99] to weasel out of the U.S. Amendment VI's (*Strickland's*) imputation of defective counsel. *See* Appendix B hereto.

On the very next day on 3/25/21 the 213th Tarrant County Judicial District Court Judge, Christopher Robert Wolfe, sifted through a mountain of documents to the contrary and adopted (rubber stamped) Tarrant County District Magistrate Judge Charles Patrick Reynolds's *findings of fact and conclusions of law*. *See* Appendix B hereto.

On 3/31/21, 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.

On 4/6/21, 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 had not received the appeal brief.

On 4/7/21, Gaines remailed his brief on appeal to the CCA and the Tarrant County District Criminal Clerk, when he (Gaines) was advised he could do both.

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[98] See Texas Disciplinary Rules of Professional Conduct – Advocate, Rule 3.04 Fairness in Adjudicatory Proceedings, and *ABA* Model Rules of Professional Conduct – Advocate, Rule 3.4 Fairness to Opposing Party and Counsel (2019).

[99] *Martinez v. Ryan*, 566 US 1, 13 (2012)(by deliberately choosing to move effective trial counsel claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminished, and indeed did diminish / contracted, [Gaines's] ability to file and vindicate such claims).

On 4/26/21, 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 Supplemental Brief on Appeal.

On 5/10/21, apparently in response to his Bill of Review in State Court, Andréa Jacobs filed State's disclosure in the trial court. That the State (respondent) *did not* withhold anything from the defense.

On 7/12/21, 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 Motion to Supplement Brief on the Merits.

On 7/14/21, the Criminal Court of Appeals of Texas summarily denied Gaines's 11.07s based upon the trial court's findings of fact and conclusions of law. *See* Appendix A hereto.

E. PROCEEDINGS PURSUANT TO RULE 60

On 2/21/21, Gaines filed in the U.S. District Court, Fort Worth Division, concurrently with his 11.07s Rule 60(b) (6) Motion for Relief from the Judgment.

On 3/2/21, Gaines filed Motion to Recuse U.S. District Court Terry R. Means.

On 3/11/21, Means dismissed in part and denied in part Gaines's Rule 60(b)(6) Motion, and all other motions thereto, because, according to him:

- They are always second and subsequent writ of habeas corpus;[100]
- It was untimely; and / or
- It did not present extraordinary circumstances.

On 3/19/21, Gaines filed notice of appeal.

[100] *Preyor v. Davis*, 704 Fed. App'x 331, 339 (5th Cir.), cert. denied, 138 S.Ct. 35 (2017).

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.[101]

On 5/3/21, Gaines filed Relator's Motion for an Order or other relief (i.e., to proceed in forma pauperis on appeal).

On 6/7/21, Gaines filed Motion for Certificate of Appealability and Brief in Support, and as of the date of this filing, or at least mailing, the same has yet to be decided.

F. PROCEEDINGS PURSUANT TO STATE BILL OF REVIEW

On 9/3/21, Gaines filed in the 213Th Judicial District Court, Tarrant County, Texas, Bill of Review.

On 9-8-21, the high State Court docketed the same and is pending review.

[101] 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."

X. REASONS FOR GRANTING THE WRIT

A. A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.[102]

Like *Brady*,[103] but with defense counsel (i.e., rather than the prosecutor), does the defendant have a "reasonabl[e] expect[ation]" that his trial counsel will comply with *Strickland*,[104] or does that reasonable expectation "evaporate upon conviction or after trial," *un*like in *Brady*.[105]

As detailed above on *page 18*, Westfall (Greg) tricked Gaines into waiving his opportunity to rebut (testifying against) the unadjudicated extraneous offense. That is, Gaines did not voluntarily and knowingly waive his right to rebut the same because Westfall (Greg) lied to Gaines there was no evidence to support his allegations he did not commit the extraneous. But there in fact was. Only Westfall (Greg) concealed that evidence for his own selfish purpose, which was to create the *jury charge*[106] error for Gaines's appeal,[107] which was to

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[102] *Supreme Court Rule 10*, Considerations Governing Review on Writ of Certiorari, i.e., 10(c).

[103] In *Brady v. Maryland*, this Court held that, "[s]uppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution." *Brady*, 373 U.S. @ 87.

[104] That is, *Strickland's*, "... duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution." *Strickland*, 466 U.S. @ 688. That is, whether to testify, or knowingly and voluntarily waive said testimony.

[105] *See Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 286-294 (3rd Cir. 2021)("the defendant's "reasonabl[e] expect[ation]" that the government will comply with *Brady*, *see Wilson*, 426 F.3d at 661, does not evaporate upon conviction or after trial), citing *Banks v. Dretke*, 540 U.S. 668, 693 (2004), and *Strickler v. Greene*, 527 U.S. 263, at 286–87 (1999).

[106] *Huizar v. State*, 12 S.W.3d 479 (Tex.Crim.App. 2000)(484: While § 3(a) says nothing about the submission of a jury instruction to this effect, such instruction is logically required if the jury is to consider the extraneous-offense and-bad act evidence under the statutorily prescribed reasonable-doubt standard. Absent such instruction, the jury might apply a standard of proof less than reasonable doubt in its determination of the defendant's connection to such offenses and bad acts, contrary to § 3(a).[7] § 3(a)'s requirement that the jury be satisfied of the defendant's culpability in the extraneous offenses and bad acts is thus "law applicable to the case" in the non-capital punishment context.[8] *Cf. Arline v. State*, 721 S.W.2d 348, 352 fn. 4 (Tex.Crim. App.1986)(recognizing that "statutorily defined word or phrase must be included in the charge as part of the `law applicable to the case'"). As this was "law applicable to the case" appellant was not required to make an objection or request under § 3(a) in order for the trial court to instruct the jury thereunder. For this reason, the Court of Appeals was correct to conclude the trial court erroneously failed to instruct the jury under § 3(a))(485: I join the opinion of the majority, reversing the judgment of the court of appeals and remanding this case for analysis under *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App.1985)(opinion on reh'g). I would additionally order the court of appeals to determine *whether the failure of trial counsel* to ask for the instruction as to the State's burden of proof as to extraneous offenses introduced

misrepresent Gaines committed the extraneous then later challenge his culpable responsibility (strict liability holding) therefor,[108] and Gill's failure to *charge the jury* they could not consider the same in punishing Gaines for *(only)* the case in chief (legal fiction in and of itself) unless they found and believed beyond a reasonable doubt Gaines could be held criminally or culpably responsible for the same. But, as described above on *page 18*, because of the State Bar Grievances (backlash), this matter was ignored on direct appeal (damage control). And to ensure it (further backlash) was also ignored on habeas review, Westfall (Greg) omitted the same (evidence & documents) in the file he gave to Gaines's mom and habeas attorney (Mowla).[109] Consequently, because of Westfall's (Greg's) additional concealment at the habeas stage of discovery, the same was omitted on habeas review. Once discovered, because of Westfall's (Greg's) previous actions (deception), *the high state court of last resort* decided Westfall's (Greg's) previous concealment and trial action were immune from review because, upon conviction, or after trial, Gaines was *expected* to *suspect* Westfall (Greg) *lied* to Gaines there was no evidence. That he did possess documents and material corroborating or supporting his story or testimony that he did not commit the extraneous. And that if he didn't or couldn't figure out a way to prove it, then it was on him. The high state court of last resort fails to say why Gaines was supposed to suspect the DA possessed said documents, however.

In sum, Gaines enjoyed the constitutional right to effective counsel at trial. But, upon conviction or after trial, it was a free for all. Gaines had to suspect and know all possibilities or

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at the punishment phase of appellant's trial amounts to *ineffective assistance of counsel*[1] to the extent that appellant is entitled to a new punishment hearing).

[107] *Bluitt v. State*, 70 S.W.3d 901, 902-903 (Tex. App. —Fort Worth 2/14/02). *Moore v. State*, 165 S.W.3d 118 (CA2 2005).

[108] *Ranger v. State*, 2005 Tex. App. LEXIS 10430 (Tex. App.—Fort Worth 2005). *Lindsay v. State*,102 S.W.3d 223 (Tex.App.—Houston [*14th Dist.*] 2003).

[109] *See* (SHCR 92).

infeasibilities, or risk losing them to time forever. Put simply, Gaines's reasonable expectation that his trial counsel complied with *Strickland* evaporated upon conviction or after trial.

B. ALSO, OR IN THE ALTERNATIVE, A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

To the extent *this* Court has decided that criminal defense counsel is required to *inform the defendant of important developments throughout the course of the prosecution*, and, by construct, the same not "evaporate[ing] upon conviction or after trial,"[110] the high state court of Texas *decided* a defendant's (Gaines's) "reasonabl[e] expect[ation]" that his trial counsel (Greg Westfall) *complied* with *Strickland* "evaporate[s] upon conviction or after trial."

XI. CONCLUSION

This issue is not only important to Gaines. It is also important to other similarly situated persons. Without Supreme Court intervention, Texas, in matters criminal and through its court of last resort, will continue to weasel out of liability for opposing parties' counsel,[111] so long as, as done here, counsels can conceal the matter until after the initial habeas proceedings. That is, by holding that "expectation" that criminal defense counsel will consult with him on important developments (i.e., evidence and testimony), throughout the course of the prosecution,[112] "evaporate[s] upon conviction or after

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[110] *See Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 286-294 (3rd Cir. 2021)("the defendant's "reasonabl[e] expect[ation]" that the government will comply with *Brady*, *see Wilson*, 426 F.3d at 661, does not evaporate upon conviction or after trial), *citing Banks v. Dretke*, 540 U.S. 668, 693 (2004), and *Strickler v. Greene*, 527 U.S. 263, at 286–87 (1999).

[111] Another way was reminiscent to this Court in *Trevino v. Thaler*, 569 U.S. 413 (2013), *citing Martinez v. Ryan*, 566 US 1, 13 (2012)(by deliberately choosing to move effective trial counsel claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminished, and indeed did diminish / contracted, [Gaines's] ability to file and vindicate such claims).

[112] That is, whether to testify and, if not, why not.

trial,"[113] Texas's court of last resort essentially legislated Gaines out of his constitutional right to effective trial counsel.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Barton R. Gaines

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Date:10/10/2021

VIII. PROOF OF SERVICE

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

Executed on 10/11/2021

Barton R. Gaines

Barton R. Gaines

[113] *Dietrich v. Ryan*, 740 F.3d 1237, 1244 (9th Cir 2013)(The Court in *Wainwright* justified the strictness of the new rule [cause & prejudice] as necessary to prevent competent defense counsel from "sandbagging" the prosecution at trial. (citation omitted). The Court explained that the rule discouraged " 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." (citation omitted). Sandbagging might consist, for example, of competent defense counsel deliberately failing to make a constitutional objection to testimony of a key prosecution witness, with the result that neither the court nor the prosecutor takes corrective action during the trial. Then, in the event that the defendant is convicted, defense counsel could raise for the first time on federal habeas the constitutional objection he deliberately failed to make during trial, with the result that the conviction would be set aside.) *Thomas v. Fl.*, 992 F.3d 1162 (2021)(Thomas had no reason to believe that Bonner would deliberately ignore his directions to file his completed petition following her appointment as his counsel in order to pursue her personal goal of challenging AEDPA's limitations period, and Bonner's letters left Thomas with the impression that Bonner was still competently representing him and that time issues were "technical" and could be resolved later).